

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS SPECIAL
EDUCATION DUE PROCESS HEARING



N.S.

v.

: DUE PROCESS
COMPLAINT # LL15-13

BURRILLVILLE SCHOOL DEPARTMENT

DECISION

TRAVEL

The petitioner, parents on behalf of N.S. (Parents, hereinafter) filed this complaint with the Rhode Island Department of Education (hereinafter RIDE) on June 10, 2015 and the respondent, Burrillville School Department (District, hereinafter) filed a motion challenging the sufficiency of the complaint on June 16, 2015.

The sufficiency challenge was taken up and after review of the documents an Order was rendered by your Hearing Officer on June 22, 2015¹ and found Parent's complaint to be sufficient in part.

On or around June 30, 2015, Parents filed a motion for an interim order for stay put for summer and math services. This motion for stay put was denied after oral argument.

On or around October 5, 2015, District filed a complaint with RIDE. District filed said complaint as a response to parent's request for an "independent educational evaluation" (IEE hereinafter) disputing the need for the IEE and asserting that the "child has been fully evaluated by LEA and LEA's evaluation affords FAPE".

Parents filed an answer to the complaint and a counterclaim thereon, on or around February, 2016 contending that parents have a right to the IEE at public expense because the prior psychoeducational evaluation performed by Dr. Osowiecki "was not appropriate and comprehensive as it did not include classroom observations of N.S. as well as the additional neuropsychological testes regarding memory, executive functioning, social

¹ See Order appended hereto and incorporated herewith as Exhibit A.

functioning and adaptive functioning performed by parent's evaluator Dr. Allison Evans, Ph.D." Parents counterclaim asserts that they are entitled to reimbursement for the expenses of obtaining the IEE.

District filed an answer to the counterclaim and a Motion for Summary Judgment stating that they are not required to pay for a parent's "supplementary" testing in a new area and they are only required to pay for a second opinion that rebuts a first opinion done by the school department. District's general position is that Dr. Osowiecki produced what the parents asked for and the neuropsychological evaluation the parents obtained is not the same and adds nothing to the prior report of Dr. Osowiecki.

During the course of the hearing, N.S.'s IEP from June 2014 remained the operative and governing document although the parties, by agreement made some modifications.

Parents filed an amended request for due process hearing on February 1, 2016.

From this posture, the parties embarked on eight (8) days of hearing including the testimony of witnesses which included both parents, educators, experts and N.S. The sum of each person's testimony will be briefly outlined below in context to its importance related to the remaining issues at hand.

At the conclusion of the hearing, both parties submitted Memorandum of Law in support of their respective positions and asked for further leave to submit supplemental papers to further bolster their positions. This request was premised on the Parent's contention that that there was additional/new guidance on the issues at hand.

It should be noted that through the course of the hearing the parties engaged in ancillary discussions targeted towards a resolution of the outstanding issues. Fruitfully this led to a consent agreement between the parties leaving three issues as the subject matter of this decision.

BACKGROUND

1. N.S., at the time of the hearing in this matter, was a [REDACTED] who lived in [REDACTED] with her parents, [REDACTED]. Also living with her was her younger brother and younger sister. N.S. was a tenth (10th) grader at [REDACTED] during the 2015- 2016 school year.

2. N.S. was diagnosed on her second birthday with cerebral palsy and was later, at the age of 14 diagnosed with autism. *Tr. Vol II at p. 5*
3. N.S.'s cerebral palsy manifests with some difficulty in walking and some interference with the use and function of her right hand. *Tr. Vol II at p. 6*
4. It is expected that N.S. will graduate on time when she completes 12th grade and it was said that she wants to go to art school to study animation after she graduates. *Tr. Vol II at p. 7*
5. She received early intervention services through the town of Narragansett when she was approximately three years old. At age five, in 2003, the family moved to Burrillville and N.S. began school in Burrillville. In October or November of that school year the Burrillville IEP team agreed to implement the services N.S. was receiving in Narragansett. *Tr. Vol II at p. 10*
6. Parents decided to home school N.S. and did so "halfway" through her 5th grade year and returned N.S. to the District in her 8th grade year *Tr. Vol II at p. 11*
7. During the homeschooling period, wherein N.S.'s mother was her teacher, it was asserted that she did pretty well in math when it was "slowed down" for her and that "she got B's" when the material was in smaller portions and not tested on until she learned it. *Tr. Vol II at p. 24*
8. Upon N.S. return to school at the beginning of the 8th grade she initially did well in math over time her grades started dropping and by the third quarter parents received a progress report that she was in "threat" of failing. *Tr. Vol II at p. 27*
9. Also, upon N.S. return to the District the District suggested that Dr. Dana Osowiecki, a clinical neuropsychologist, evaluate her and Parents agreed. This evaluation by Dr. Osowiecki took place in January 2013 and, as a result of the evaluation, diagnosed N.S. with Autism Spectrum Disability, Pervasive Developmental Disorder, NOS. *See both Tr. Vol II at p. 14 and 15 and District Exhibit #6 p. 14.*
10. Parents asked if there was any extra help that could be offered for math and a tutor was suggested which Parents agreed to. After a waiting period (the suggested tutor was apparently away on a trip) Barbara Menard (Menard, hereinafter) began tutoring N.S. in math. *Tr. Vol II at p. 31*
11. Menard tutored N.S. from May 6, 2014 through June 17, 2015 including through

the summer months of 2014. *Parents Exhibit #9*

12. N.S. while in ninth grade attended BELLA, a after school program at Burrillville, on Mondays where she would receive assistance in math. *Tr. Vol III at p. 110*

13. N.S. ninth grade IEP called for a math teacher and a special educator in the math class. There was no special educator assigned to the class. *Tr. Vol VII at p. 23*

14. N.S. parents were not aware that a special educator was not in the math class until February of 2015. *Tr. Vol II at p. 38*

15. N.S. received passing grades in all of her classes for ninth grade including Algebra I. *See Tr. Vol I at 100; Parents Exhibit #3; ad Parents Exhibit 12*, and N.S. was scheduled to take Geometry in the tenth grade. *Tr. Vol 145 at p. 812*

16. N.S. was on the Honor Roll when these hearings concluded. *Tr. Vol VIII at p. 88 and 89*

16. On May 27, 2015 N.S.'s requested that Burrillville complete a psychoeducational assessment in the summer of 2015. The District agreed and all parties agreed that Dr. Osowiecki would conduct the assessment. *Tr. Vol III at p. 127, 128*

17. In Dr. Osowiecki's 2015 report she noted "Executive functioning challenges can impact day-to day performance with math activities." *District Exhibit #6 p. 18*

18. Among other things, Dr. Osowiecki's 2015 assessment made recommendations about math and the need to provide additional instruction and make efforts to simplify "challenging" subjects for N.S. in order to reduce anxiety, and/or frustration." *Tr. Vol VI at P. 15*

19. An IEP meeting was convened on August 25, 2016 at which time Dr. Osowiecki's report and recommendations were reviewed. The results were the basis for the District to eliminate the math goal that existed in the May 2015 IEP. *Tr. Vol VII at p. 179*

20. Parents disagreed with the Dr. Osowiecki's assessment and requested a neuropsychological IEE to be performed by Dr. Evans, the District disagreed that is should be responsible to fund Dr. Evans evaluation and on October 5, 2016 filed a due process request challenging the neuropsychological report by Dr. Evans. *Parents Exhibit 30.*

21. Dr. Evans conducted her evaluation on October 20, 2016 which included a classroom observation on November 2, 2016. *Parents Exhibit #3*

22. Dr. Evans report was shared with District. There was no IEP meeting convened to discuss the Evans report. *Tr. Vol VIII at p. 6-7*

23. In tenth grade N.S.'s mother's main concern was that the pace of instruction was too fast for N.S. and that she thought N.S. needed extra instruction outside of the classroom. *Tr. Vol II at p. 62*

24. In tenth grade N.S. did not have a math tutor or other math support. She attended BELLA and occasionally met with her math teacher. She was a diligent student who did her homework. *Tr. Vol IV at p.175*

ISSUES PRESENTED

As a result of the above complaint, counterclaim, testimony and argument ensuing thereafter the following issues are presented:

1. Did N.S. IEP dated September 16, 2015 which did not include a math goal and did not provide dedicated 1:1 instruction in math, provide a free appropriate public education (FAPE) for N.S.
2. Did N.S. IEP dated June 2015 which did not include extended school year (ESY) services provide FAPE for N.S.; and
3. Must Respondent reimburse N.S. the cost for the neuropsychological evaluation conducted by Dr. Allison Evans as an Independent Educational Evaluation (IEE).

BURDEN OF PROOF

The U.S. Supreme Court has held that in cases involving the IDEA, "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer v. Weast*. 126 S.Ct 528, 537 (2005).

It is the Petitioner, in this case, the Parents who carry the burden to prove that the District has not provided an education adequate for the child. This position is clearly supported by the law.

The person who seeks court action should justify the request, which means that the plaintiff bears the burden on the elements in their claims. *Weast Id.* at 534.

The court has further held that the *Weast* holding applies not only to issue of FAPE, but to any challenge to the IEP ... *L.E. v. Ramsey Board of Education*, 435 F.3d 384.

Parents must in turn carry their burden by producing evidence at hearing that proves, by a preponderance that N.S. was deprived of FAPE which includes all of the applicable state and federal statutory and regulatory provisions which can be properly supported by case law.

For their part, the District argues that the burden of proof at hearing regarding reimbursement for the IEE, so called, provided to them by Dr. Evans is of no consequence if the school District's evaluation in the first instance (Dr. Osowiecki's psychoeducational evaluation) is appropriate. From this frame work the District should be required to have produced, evidence at hearing that by a preponderance demonstrate that the Dr. Osowiecki evaluation was appropriate.

Parents opine that the District having filed the complaint regarding the IEE in the first instance is responsible for carrying the burden of proof.

WITNESSES

Petitioner's Witness:

1. Dr. Allison Evans:

Dr. Evans is a licensed clinical psychologist who holds licenses in both the State of RI and State of Massachusetts. *Tr. Vol I at p. 50*. As stated above, Dr. Evans conducted a neuropsychological evaluation of N.S. For the purposes of this hearing she was qualified to testify as an expert in her field of clinical neuropsychology. *Tr. Vol I at p. 59*

2. Parent (H.S.):

H.S. testified generally regarding N.S.' travel through special education services both prior to District and within district, including testimony regarding home schooling, math tutoring and general testimony about N.S.

3. Barbara Menard:

Testified as generally about her work as a math tutor for N. S. She was qualified at the time of cross examination as an expert in teaching math

4. N.S.:

N.S. testified generally about her educational progress, her strengths, her areas of need as she identified them, her preferences, friends, and her high school experience.

5. Dr. Bennett Hirsch:

Dr. Hirsch testified in his role as a treating professional for N.S. He testified generally as to the nature of his treatment with her including the therapeutic strategy and some of the areas of need that he identified N.S. had which included issues related to her self-esteem as related to difficulties she was having in school.

6. Ashley Pleau:

Ms. Pleau testified in her role as a high school math teacher in the District who had N.S. as a student in her Algebra I Class for the 2014/15 academic year. She testified generally as to the content of the class, the expectations of the class and N.S.'s work in the class. She was qualified during cross-examination as an expert in the area of math education.

7. Molly Gouveia:

Ms. Gouveia testified in her role as a high school math teacher in the District who had N.S. as a student in her Geometry class during the 2015/16 academic year. She testified generally as to the content of the class, the expectations of the class and N.S.'s work in the class. She was qualified during cross-examination as an expert in the area of math education.

8. Tara Staples:

Ms. Staples testified in her role as a Special Educator in the District who was the case manager and Special Educator for N.S. in the TTAP program. She testified generally as to her role as case manager, her work with N.S. in the area of math, her work as a Special Educator in the BELLA program and her; and her role with respect to N.S. IEP.

9. Kathryn Johnston: (She was to be called by District as well)

Ms. Johnston testified in her role as a high school assistant principal in the District. She testified generally about her participation in N.S IEP; the structure of the team classes versus inclusion class, N.S. math tutoring and her role in the continuation/termination of math tutoring.

10. John Jalette:

Mr. Jalette testified in his role as a Special Educator and department leader within the District. He testified generally about his role with N.S. including that of her case manager during her ninth-grade year, supporting N.S. in English classroom, his work supporting her in math, his interactions with Dr. Evans, and his role in the development of N.S.'s IEP. Mr. Jalette was qualified as an expert in the area of special education during cross examination.

11. Kimberly Pristawa: (called under the adverse witness statute)

Ms. Pristawa testified in her role as Director of Pupil Personnel services in the District. She testified generally as to her role in that position, her involvement in the IEE request by Parents, her knowledge of the regulations related to IEE, her knowledge and role in N.S. IEP including involvement in math tutoring decisions.

12. Michelle Stanley:

Ms. Stanley testified in her role as a speech and language pathologist in the District. She testified generally about her work with N.S., her participation in N.S. IEP particularly as related to her communication goal, her knowledge of Dr. Evans report as related to social skills and role play and N.S. progress in speech and language, and N.S.'s social/pragmatic communication.

13. Albert Spencer, Jr.

Mr. Spencer testified as parent of N.S. He testified generally as to her school progress, math tutoring, the IEE request, and his opinion as to N.S. social skills progress.

District Witnesses:

1. Dana Osowiecki, Ph. D:

Dr. Osowiecki testified in her role as a neuropsychologist and licensed psychologist who evaluated N.S. on two occasions (2013 and 2015) completing psychoeducational evaluations. She testified generally about her role as a clinician, her work with students who have IEP's, the differences between psychoeducational evaluations and neuropsychological evaluations, and more specifically about her evaluations of N.S. and the recommendations coming from the evaluations. She also testified about her review of Dr. Alison Evan's neuropsychological report. She was qualified as an expert witness in the field of psychology on direct exam.

ARGUMENT

The widely accepted standard of review for FAPE can be found in the U.S. Supreme Court case of *Board of Education of the Hendrick Hudson School District v. Rowley*, 553 IDELR 656(1982). The Rowley decision established a two-part test to determine the appropriateness of a student's education: 1. Has the state complied with the procedures set forth in the IDEA, and 2. Is the IEP developed to reasonably calculated to enable the child to receive educational benefits.

The First Circuit in *D.B.* held that "to comply with the IDEA an IEP must be reasonably calculated to confer meaningful educational benefit." *D.B. v. Esposito*, 675 F.3d 26, 34

Parents notably quote the *Rowley* court which concluded that "the basic floor of opportunity provided by the Act consists of specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley at 201*. They further instruct that the court stated "the IEP, and therefore the personalized instruction, should be formulated in accordance with the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id. at 204*

They find further support for their contention in 34 C.F.R. § 300.101(c)(1) which Parents accurately cite for their proposition that even though N.S. did not fail math and was advancing from grade to grade that this should not lead to an assurance that N.S. was receiving FAPE.

The IDEA further provides that a proper IEP is one that is reasonably calculated to provide benefit in all of the disabled child's areas of needs and that FAPE through the IEP includes addressing all of the child's special needs including academic, physical, emotional, social, and behavioral. See *Rowley*, pages 176, 2017. Broad support for this

proposition can be found in two First Circuit case cited, *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 12, 127, 19 (1st Cir. 2007) and *Timothy W. v. Rochester, N.H. Sch. Dist.*, 875 F.2d 954, 970 (1st Cir. 1989). Respectively these cases stand for the proposition that educational performance is broadly defined to include non-academic deficits.

The District finds the Court of Appeals for the Sixth Circuit's opinion in *Doe V. Board of Education* to be instructive in summarizing its argument related to the requirements of FAPE and as it pertains to the receipt of educational benefit. District quotes that court as follows:

"The [IDEA] requires that [the public school] provide the educational benefit equivalent of a serviceable Chevrolet to every handicapped student. [Parent], however, demands that [the school] provide a Cadillac solely for [the child's] use. We suspect that the Chevrolet offered . . . is in fact a much nicer model than that offered to the average [public school] student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to [the child], and is therefore in compliance with the requirements of the IDEA."

Doe ex rel. Doe v. Board of Education, 9 F.3d 455, 459-60 (6th Cir. 1993).

The District contends that this case fits squarely into the *Rowley* framework wherein Parent want what is best for N.S. but the law provides that The District only provide a free appropriate public education which it contends it has and Parents attempts to "minimize" N.S.'s passing grades is contradictory to the *Rowley* court's instruction.

PARENTS

Parent's advanced the following arguments:

First, that N.S. disability adversely affects her ability to learn math.

Second, that the IDEA requires the School District Provide N.S. with a math goal.

Third, N.S. is entitled to specialized instruction in math.

These three arguments will be taken up and summarized together below.

Parents generally contend that N.S. did not receive FAPE because the District

failed to provide math goals within the IEP and did not provide any instruction designed to meet N.S.'s needs for additional instruction in math. They believe that the IEP should have included math goals and specially designed instruction in the area of math. In addition to this, Parents believe that N.S. should have had appropriate math intervention included in her 2015-2016 IEP that provided said interventions in her extended school year program.

Parents point to the testimony of Ms. Pristawa who acknowledged that N.S. performance in the area of math is affected by her disabilities *Tr. Vol VII at p. 15*. Additionally, other professionals within district opined that N.S. needed both accommodations and modifications in math to be successful. In sum, Parents say, as a result of the adverse effects of her disability, N.S. needs a math goal as well as specialized instruction in math.

Parents rely on IDEA's requirement which states that IEP include "a statement of measurable annual goal, including academic and functional goals, designed to (aa) meet the child's needs that result from the child's disability to be involved in and make progress in the general educational curriculum; and (bb) meet the child's other educational needs that result from the child's disability." *20 U.S.C. § 1414 (d)(A)(i)(II)*.

Further parents say that the regulations do not indicate that accommodations and modifications can never be considered specially designed instruction and rely on the U.S. Dept. of Education in *Letter to Teague, 20 IDELR 1462, 20 LRP 2398 (Feb. 15, 1994)* for the proposition that modifications can be considered specially designed instruction if "they constitute individualized instruction planned for a particular student."

Parents point to Tara Staples testimony as the special educator for N.S. who prepared a May 2015 IEP with a math goal in the area of geometry. They point to *Parent Exhibit 5 at p. 2* for their contention that the math goal for geometry was included and was agreed to by the IEP team. Further they assert that the team agreed that N.S. would have inclusion math with a special educator. *Parent Exhibit 6 at p. 2*.

In addition, parents state that N.S. is a student with a disability which significantly affects her ability to learn and is considered a person with a disability under both Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, both of which require different obligations than the IDEA. They assert that Section 504 requires N.S. to have her needs met as adequately as the needs of other nonhandicapped students. *34 C.F.R. § 1104.33(b)(1)*. As such N.S. would need reasonable accommodations in math instruction.

The District would argue that N.S. had made progress in the current year in an inclusive math classroom without goals, objectives or tutoring which is exactly what the IEP draft of 2016-2017 school year called for. Support for its position comes in the form of testimony from two witnesses in particular, Jack Jalette and Ms. Pristaw both of whom were qualified as experts at the time of their testimony. *See Jalette, Tr. Vol VII at p. 58-59 and Pristawa, Tr. Vol VII at p. 179.*

In so doing, the District states that the testimony of these experts should control and the draft IEP which was attached to the consent agreement would afford N.S. FAPE. Consistent with this argument the District discounts the testimony of parent's expert, Dr. Evans, pointing specifically to her testimony minimizing the importance of N.S.'s grades which it says is contradictory to Rowley.

After the parties submitted memoranda, parents brought to the attention of this hearing officer a *First Circuit* decision that they opined was relevant to the issue at hand. Specifically, parents that in *Doe*, the First Circuit held that a student who had a strong academic record, including straight A grades and good performance on state standardized tests, may still have a need for special education and be entitled to special education and related services. *Doe v. Cape Elizabeth Sch. Dist., 15-1155 (1st Cir. Aug 5, 2015).*

Parents cite this in response to the District's insistence throughout the case that N.S.'s passing grades meant she was not entitled to special education services in math.

Fourth, N.S needs ESY math services to benefit from education.

There are two arguments here the first relates to ESY services in the area of math which parents contend should have been provided to N.S. during her 2015 ESY programming. They rely on the minutes from a June 2014 IEP meeting which make reference to summer math tutoring. *See District's Exhibit C attached to District's Objection to Parent's Stay-put motion.*

Parents posit that summer math services are indicated as services that N.S. requires so as to not regress in math during the summer months and would say that given the nature of her special needs and the testimony of Dr. Evans these services are necessary for N.S. to receive FAPE.

Parents state that regression is not the only concern and that the *Rhode Island Department of Education* has provided some guidance in this area by saying that a factor to be considered is whether not having ESY services would "jeopardize the student's attainment of his/her IEP goals and/or provision of transition services in the area [] of

education.” See *R.I.D.E. Extended School Year (ESY) Frequently Asked Questions (2/9/2010)*, at p. 10.

In support of this Parents state that Menard, (math tutor) recommended additional instruction in fractions and decimals over the summer thus showing that N.S. needed math services through ESY to benefit from education.

The District disagrees with this position and with the interpretation of the June 2014 meeting minutes which the District points out clearly state that summer math tutoring was not an ESY service. Further the District argues that once a due process hearing initiates a stay-put control sets in place the status quo that must be maintained during the pendency of the proceeding – absent any agreement by both parties to alter the status quo. In this instance, the status quo is the last agreed upon IEP which was the summer 2014 IEP which contained no provision for summer math services – even though N.S. was provided these services, the District would say this was an extra service not a required service.

Quoting the court in *Verhoeven* the District states that the purpose of the stay-put rule in the IDEA is “to preserve the status quo pending resolution of challenge proceedings under the IDEA ...” *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1,3 (1st Cir. 1999).

Fifth, that they are entitled to reimbursement for the IEE conducted by Dr. Alison Evans.

Dr. Evans testified as to the content of her neuropsychological testing of N.S. including: what a neuropsychological test consisted of; the specifics of her testing of N.S. and the results and recommendations therein; the differences between a neuropsychological test and a psychoeducational evaluation; her review of Dr. Osowiecki’s psychoeducational assessment, including her conclusions about omissions in Dr. Osowiecki’s assessment; her opinion as to why the “additional” testing if a neuropsychological evaluation would be appropriate for N.S.; a summary of her classroom observations; and additional diagnostic indicators she saw present including ADHD and depressive disorder. *Tr. Vol I at P 61 through 69*

Dr. Evans stated a psychoeducational evaluation is “typically looking at intellectual achievement and a educational testing or educational functioning”. *Tr. Vol I at p. 62-63*. A neuropsychological exam, on the other hand, includes evaluation of intellectual development, language based skill, visual processing, visual motor integration, fine motor skills, memory, and executive functioning. *Id at p.61*

The stated purpose of Dr. Evans' report was identified directly in her report, introduced as *Parents Exhibit #3*: "This report was conducted to add to areas assessed by Dr. Osowiecki and to expand on areas traditionally covered in a comprehensive neuropsychological evaluation, including memory, executive functioning, social functions, and adaptive functioning."

Dr. Evans testified that parents asked her to conduct the evaluation because they wanted Dr. Osowiecki's report of 2015 "updated". *Tr. Vol 1 at p.114 -115*. Further, she testified that she "concur[red] with all of the recommendations provided" by Dr. Osowiecki. *Tr. Vol 1 at p. 169*

Dr. Evans testified that N.S. needed extensive support for social emotional, executive adaptive functioning and graphomotor challenges and that she was overwhelmed, had increasing depression and anxiety, and was not engaging with others. *Tr. Vol I at p. 85*.

Dr Evans specifically said of N.S. "Her challenges are not because she doesn't have the fundamental reading, writing and math skills, but her challenges are because the stamina, perseverance, the higher order social language demands. All of these things I already talked about are seriously interfering with her ability to make consistent effective progress in all areas." *Tr. Vol I at p. 85-86* She further stated that N.S. had "nice fundamental math skills but her ability to apply them day to day is clearly problematic." *Tr. Vol I at p. 87*. This observation is what led Dr. Evans to make her recommendations for math. *Id.*

The District countered this argument and states that it is not liable to pay for the Dr. Evans IEE as its Dr. Osowiecki report was appropriate. In support thereof, the District presented Dr. Osowiecki as a witness.

Dr. Osowiecki testified that she had completed two psychoeducational evaluation on in 2013 *Tr. Vol VI at p. 10-11* and then another in 2015. *Id at p.23*. For purposes of argument as it relates to this due process hearing the 2015 evaluation is the operative report.

During her testimony Dr. Osowiecki spoke of N.S. difficulties with processing speed, executive functioning and attentional issues. She also testified to the academic achievement testing she did during the 2015 evaluation including the academic area of math. *Tr. Vol VI at p. 26* Dr. Osowiecki answered no to counsel's question, "Do you believe sitting here right now that [N.S.] has a learning disability in the area of math?" *Tr. Vol VI at p. 26*

Dr. Osowiecki also testified as to her review of Dr. Evans report and Dr Evans testimony in this matter. *Tr. Vol IV at p. 35-37*. In her testimony, she indicated that she did not agree with Dr. Evans with respect to the importance of grades as an aid in understanding performance. Dr. Osowiecki indicated that it was her opinion that grades were one tool that helped to measure performance and grades should not be discounted. Dr. Osowiecki's opinion was that Dr. Evans did not feel grades were important in understanding performance. *Tr. Vol VI at p. 37*.

Dr. Osowiecki also extensively testified as to her opinion about the process Dr. Evans used in during her neuropsychological evaluation and in some instances how she did not agree with Dr. Evans rationale for how she completed her report. For example, Dr. Osowiecki testified that she did not agree with Dr. Evans rationale for giving the Behavior Assessment System for Children (BASC) to the parents only and not to teachers. *Tr. Vol VI p. 59*.

Significantly, Dr. Osowiecki testified that it was her opinion that even though the 2015 IEP for N.S. did not contain a written expression or math goal it still afforded her FAPE. *Tr. Vol VI at p. 69*.

The District contends that it is not required to pay for what it describes as supplemental testing in an area which has not been identified by the IEP team as requiring testing. It appropriately cites *S. Kingstown School Comm. V. Joanna S.* which stands for the proposition that the IDEA requires an LEA to pay for a second opinion to rebut a first opinion done by the LEA when the LEA's evaluation in the first instance was not appropriate. Therefore, the IDEA does not require the District to pay for parent's supplemental testing in a new area. *S. Kingstown School Comm. V. Joanna S, 773 F.3d 344, 350 (1st Cir. 2014)*

In this instance District contends that Dr. Evans neuropsychological evaluation was indeed supplemental testing in a new or different area from that of their "expert" Dr. Osowiecki who conducted a psychoeducational evaluation at the request of parents prior to them engaging Dr. Evans, and that Dr. Evans testing added nothing material to the development of N.S.'s IEP

The testimony is clear that a neuropsychological evaluation and a psychoeducational evaluation are two different processes and it would also appear that one could certainly say that one, or the other for that matter, of the evaluations could be used to supplement the other.

Parents, in part, rely on the IDEA's regulation *Section 1415(b)(1)* which affords

parents the right to obtain an independent evaluation of their child. 20 U.S.C. § 1415(b)(1). District contends citing *Schaffer*, that the purpose of this right is to “ensure parents access to an expert who can evaluation all the material that the school must make available, and who can give and independent opinion.” *Schaffer*, 546 U.S. at 60-61.

The crux of the argument boils down then to whether any credible evidence exists to show that Dr. Osowiecki’s evaluation was not appropriate. The District contends, and I think correctly so, that if there is no disagreement with the existing educational evaluation then parents have no right to an IEE at the District’s expense. See *R.L. v. Plainville Bd. of Educ.* 363 F. Supp. 2d 222, 234-35 (D. Conn. 2005). In further reliance on the court in R.L., the District states that the court declined to require that the LEA pay for an IEE because there was no disagreement between the parent and the LEA as required by 34 C.F.R. § 300.502(b)

The District opines that a neuropsychological evaluation and psychoeducational are two different things and that the District provided what the parents requested, and in fact agreed was necessary, by signing consent to have Dr. Osowiecki conduct the psychoeducational evaluation. Therefore, District states in sum, the parents never asked for a neuropsychological evaluation in the first instance so to ask the District to pay for a neuropsychological as a second opinion as an IEE is without support.

Parents find *Schaffer* instructive argue that they are entitled to be reimbursed for the IEE unless the District can establish that its evaluation was both appropriate and sufficiently comprehensive. citing *Schaffer*, 546 U.S. at p. 62. Their contention is that if Dr. Evans testing was appropriate for determining N.S. IEP then the IEE should be paid for by the District.

Parents also make some attempt to forward a proposition that parents undertook a neuropsychological as an IEE in part because the District had claimed to have already done a neuropsychological evaluation in a document provided to parents, see *Parents Exhibit 30*, but later, during examination of Ms. Pristawa claimed that the word neuropsychological was mistakenly used on the document. *Tr. Vol VII at p. 96-97*. This argument appears to be a reach at best as there was no question parents requested a psychoeducational evaluation, one was provided and subsequently reviewed by parents and additionally clearly “labeled” psychoeducational.

Last, parents argue that Districts psychoeducational evaluation was incomplete particularly in light of what information Dr. Evans evaluation added to the Dr. Osowiecki’s evaluation, and that when courts have found the school district’s evaluations incomplete, courts have required school districts to fund IEEs. *MZ v. Bethlehem Area*

Parents rely on Dr. Evans testimony wherein she generally concurred with many of Dr. Osowiecki's recommendations but stated that important aspects of N.S.'s presentation was omitted which led her to make further recommendations.

Finding and Conclusions

Based on the foregoing arguments of both parties; a review of the testimony of witnesses with due consideration given to those qualified as expert witnesses throughout the travel of the hearing and examining the operative statutory and requirements of the regulations, the following findings of fact are made.

That, by a preponderance of the evidence:

1. N.S. is a student with a disability that adversely affects her ability to learn;
2. N.S. does not have a learning disability in the area of math;
3. N.S. continued to make academic progress in the area of math as demonstrated by her meeting the educational standards within the District;
4. N.S. benefits from reasonable accommodations in math instruction;
5. The last agreed upon IEP for N.S. is the one dated June of 2014;
6. Parents requested the District perform a psychoeducational evaluation and agreed to Dr. Osowiecki based upon their prior experience with Dr. Osowiecki;
7. Dr. Osowiecki's evaluation was appropriate to use in the development of N.S.'s IEP;
8. Parents also requested that, during the pendency of the evaluation, the District continue to provide special education services in accordance with the last agreed upon IEP;
9. The District relied upon Dr. Osowiecki's evaluation to determine that the math goal could be eliminated going forward with the new IEP;
10. N.S. did not need math goals to access a free appropriate public education from District;
11. Dr. Evans neuropsychological testing she conducted at the request of Parents added nothing material to Dr. Osowiecki's prior psychoeducational evaluation, also conducted at the request of Parents;
12. Dr. Evans substantially concurred with all of the recommendations provided by Dr. Osowiecki in her report and did not controvert Dr. Osowiecki's findings;
13. Dr. Evans additional testing in the areas of adaptive functioning and executive

- functioning did not add new information to Dr. Osowiecki's;
14. N.S. was not entitled to math tutoring as an extended school year services as the 2014-2015 IEP did not provide for math tutoring;
 15. N.S. was not entitled to continued math tutoring over the 2015 summer ESY as part of "Stay Put".

As such and in conclusion:

1. N. S.'s IEP which does not include math goal, math objectives or specialized instruction in math, does afford her access to a Free Appropriate Public Education;
2. N.S. was not entitled to any ESY services or math tutoring as an ESY service and as such the same is appropriately excluded from her 2015-2016 IEP;
3. N.S. is not entitled to compensatory services; and
4. N.S.'s parents are not entitled to reimbursement from the District for the IEE conducted by Dr. Evans.

RESPECTFULLY ORDERED:

/s/ S. Colantuono
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CERTIFICATION

I, Steven A. Colantuono, hereby certify that on the 18TH day of **August 2017** I sent via regular mail, postage pre-paid, a true and accurate copy of the within **ORDER** to the following:

J. David Sienko, Director
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 /s/ S. Colantuono

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS SPECIAL
EDUCATION DUE PROCESS HEARING



N.S. :
v. : DUE PROCESS
COMPLAINT # LL15-13
BURRILLVILLE SCHOOL DEPARTMENT :

SUFFICIENCY CHALLENGE ORDER

Summary of Findings

The petitioner filed this complaint with the Rhode Island Department of Education (hereinafter RIDE) on June 10, 2015 and the respondent, Burrillville School Department filed BURRILLVILLE’S MOTION TO CHALLENGE THE SUFFICIENCY OF N.S.’S COMPLAINT with RIDE on June 16, 2015.

The complaint and sufficiency challenge were received by your Hearing Officer on June 17, 2015 and after having reviewed the documents, and in accordance with facts and reasoning set forth below, I find the complaint to be SUFFICIENT, in part, as further identified/specified below.

Analysis

The RIDE regulations (hereinafter regulations) set forth the requirements for a valid or sufficient due process complaint. **Regulation at 300.508**. In addition to other requirements the complaint must contain “A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem...” *Id. at 300.508(b)(5)*; and “proposed resolution of the problem to the extent known and available to the party at the time.” *Id. At 300.508(b)(6)*.

In this case, petitioner has filed a due process hearing request inclusive of 54 allegations including: demographic information; a timeline of events, including IEP meeting for 2014/15 and 2015/16; allegations regarding “Adaptive Physical Education” (APE); allegations regarding “Assistive Technology”; allegations regarding “Evacuation Plan”; allegations regarding “Extended School Year Services”; allegations training for staff in transition services; and “Stay Put”. Also included therewith are 12 points of Relief Requested (Proposed Resolution) and a request for attorney fees.

For its part, respondent’s sufficiency challenge addresses each paragraph of the due process request concluding that “N.S.’s complaint is woefully deficient as a matter of law, and most, if not all of it should be struck.

Generally the regulations provide that the due process complaint allege facts related to the problem identified and further, based upon the facts and identified problem, propose a resolution to the problem. As a prerequisite, the subject matter of the complaint must be under the auspice of the IDEA in order for a hearing officer to have jurisdiction and, in essence, in order for the complaint to be sufficient.

In this case, there are allegations made by the petitioner that so not appear to arise under the IDEA. Specifically they include: the allegations related to APE; the allegations related to an Evacuation Plan and the allegations related to training, both transition services and those areas identified in petitioner's proposed resolution #10. The APE allegations appear to be outside of the scope of the IDEA and relate more to scheduling. Both petitioner and respondent admit the services are being provided or proposed and the complaint appears focused on the schedule. The evacuation plan also appears to fall outside of the IDEA and is not proper for a due process hearing. Likewise, there appears to be no jurisdiction, in this arena, for the training issues complained of or for the award of attorney fees.

The remaining allegations, therefore are examined under the standard identified above meaning the problem must be identified, facts related thereto stated, and then a proposed resolution offered. The proposed resolution must minimally state that the proposed resolutions are necessary for N.S. to make some educational progress.

In reviewing the allegations related to the above standard it is evident that they do not efficiently outline the petitioner's position specifically as related to the defining a resolution that states how the proposed resolution is necessary for N.S. to make educational progress. However, this alone should not be enough to render the allegation insufficient. The U.S. Supreme court in the Weast decision generally concludes that due process hearing requirement pleading standards are "minimal" and not meant to require the petitioner to spell out all facts or identify all legal theories in "painstaking detail".

CONCLUSION

Examining the remaining allegations based upon jurisdictional and sufficiency requirements, the following conclusions are offered relative to each of petitioner's 12 proposed resolutions:

1. The allegation regarding a writing goal is INSUFFICIENT;
2. The allegation regarding social skills training is INSUFFICIENT;
3. The allegation related to math tutoring is SUFFICIENT except as related to the identification of a specific instructor;
4. The allegation related to math tutoring as an ESY service is SUFFICIENT;
5. The allegation related to physical therapy is INSUFFICIENT;

6. The allegation related to APE is outside the scope of a due process hearing and therefore INSUFFICIENT;

7. The allegation regarding adaptive/assistive technology is INSUFFICIENT;

8. The allegation related to an evacuation plan is outside the scope of a due process hearing and is therefore INSUFFICIENT;

9. The allegations related to training for the special education director is outside the scope of a due process hearing and is therefore INSUFFICIENT;

10. The allegations related to training in this paragraph are INSUFFICIENT;

11. The allegations related to prevailing party and the award of attorney fees is beyond the scope of a due process hearing and is INSUFFICIENT;

12. The general pray for relief is INSUFFICIENT.

For those allegations deemed INSUFFICIENT, not inclusive of those noted to be beyond the scope of a due process hearing, it is unclear how they relate to the provision or denial of a free appropriate education as defined and contemplated by the regulation.

Thus the complaint is SUFFICIENT, in part.

ORDERED:

/s/ S. Colantuono
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CERTIFICATION

I, Steven A. Colantuono, hereby certify that on the 22nd day of **JUNE 2015** I sent via email and regular mail, first class postage pre-paid, a true and accurate copy of the within SUFFICIENCY CHALLENGE ORDER to the following:

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 /s/ S. Colantuono