

STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

IDPH-FY-07-03-056 / Kensington School District

**ORDER ON MOTION FOR SUMMARY JUDGMENT**

I. **INTRODUCTION.**

A Prehearing Conference was held on May 1, 2007 and a Prehearing Order issued that day. A copy of that Prehearing Order is affixed hereto. The issue involves the District's request for evaluate the Student. The parties agreed that the matter could be resolved through a Motion for Summary Judgment in that the Exhibits used in the related case (IDPH-FY-07-02-049) would be submitted in this matter. The District filed a Motion for Summary Judgment and the Parents filed a Response identified as Parent's Motion for Summary Judgment.

II. **DISCUSSION.**

The District argues that it has an absolute right to evaluate the Student with examiners of its choice, and points to the re-evaluation provisions of the IDEA at 20 U.S.C. § 1414(a)(II)(B)(ii). The Student was last provided a three year evaluation in the fall of 2004 so that the three year re-evaluation is due in the fall of 2007. The Parents in their Motion for Summary Judgment request that the three year re-evaluation if ordered be done in the fall of 2007 and not prior thereto. (See Paragraph 3 of the Parent's Motion). The Parents argue that the District failed to evaluate the Student back in the fall of 2006 and for that reason have forfeited their right to conduct the three year evaluation with examiners of its choice. However, there is no basis for that position in law. (See Andress v. Cleveland Independent School District, 64 F.3d. 176, 178-79 (5th Cir. 1995).

The District also correctly argues that the District did not forfeit its right to evaluate the Student. The District has an absolute obligation to evaluate the Student every three years or more frequently if warranted and agreed to. Given that the last such evaluation was in the fall of 2004 (See School District's Memorandum of Law at Page 2), this evaluation should occur in the fall of 2007.

The District then argues that the Parents waived any objection to the proposed re-evaluation. The Hearing Officer finds it unnecessary to rule on the waiver argument for reasons set forth herein.

The District has the right to conduct the comprehensive three year re-evaluation of the Student. There is no basis for the Parents to argue that they are entitled to an independent evaluation at public expense where there has been no three year re-evaluation conducted by the District. Under the circumstances and for the reasons set forth herein, the School District's Motion for Summary Judgment is granted. The Parents' Motion for Summary Judgment if taken as a Motion as opposed to an Objection to the District's Motion is denied, except that the evaluation shall take place in the fall of 2007, unless the parties agree to an earlier date.

IV. **APPEAL RIGHTS.**

If either party is aggrieved by the Decision of the Hearing Officer set forth above, either party may appeal this Decision to a Court of appropriate jurisdiction. The Parent has the right to obtain a transcription of the proceedings from the Department of Education. The District shall notify the Commission of Education when either the District or the Parent seeks judicial review of the Decision.

V. **STAEMENT OF COMPLIANCE WITH ED-1128.22(B).**

If neither party appeals this Decision to a Court then the District shall within ninety (90) day provide to the Office of Legislation and Hearing (Department of Education) and the Hearing Officer a written report describing the implementation of this Decision and provide a copy to the Parents. If the Parents do not concur with the District's report, the Parents shall submit their own report through the Commission of Education.

**SO ORDERED.**

Dated: 6/8/07

John P. LeBrun, Hearing Officer