

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: A.M.

Date of Birth: [redacted]

ODR No. 00625-0910 KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Dates of Hearing:

March 18, 2010, April 13, 2010, April 26, 2010

Date of Decision:

May 16, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an elementary-school aged eligible resident of the Abington School District (District); Student is classified with Specific Learning Disability. (NT 11-22 to 13-14.) During Student's kindergarten, first and second grades, the Student attended the [Redacted] Elementary School in the District. (NT 18-2 to 4.) Student currently attends the Private School in [redacted], Pennsylvania. (NT 17-23.)

The District conducted an initial evaluation in March 2008. In November 2009, through a letter of counsel, Parents requested an independent educational evaluation by a psychologist of their choosing. (NT 401-14 to 17; P-36 p. 2.) In December 2009, they obtained an independent educational evaluation. (S-46.)

In January 2010, the District filed the Complaint Notice in this matter. (NT 18-4 to 8.) The District requested that this hearing officer find and order that the November 2008 IEP is appropriate, and that the Parents are not entitled to reimbursement for the cost of the independent educational evaluation that they obtained in December 2009. (NT 21-3 to 9.)

This matter is being considered with ODR No. 00758-0910 LS, filed by the Parents, which raises additional issues pertaining to the education of the Student. (NT 5-3 to 22.) I determined to hear and decide the District's request, limited to the appropriateness of its evaluation, before addressing the Parents' request. The document books in the matters are consolidated, and documents excluded at the first hearing are not necessarily excluded from the second hearing; however, I have determined which of the documents will be considered for purposes of this matter. (NT 506-6 to 520-19.)

ISSUES

1. Was the District's March 2008 Evaluation Report appropriate under the standards set forth in the IDEA?
2. Should the hearing officer order the District to pay the cost of the Independent Educational Evaluation obtained by the Parents in December 2009?

FINDINGS OF FACT

1. The evaluation was performed by the District's highly experienced, certified school psychologist. The School psychologist demonstrated familiarity with the Student's learning strengths and needs, including the characteristics Student exhibited as a kindergarten student. (NT 28-14 to 34-8, 35-15 to 37-13.)
2. The evaluation was conducted in the Student's native language. (S-9 p. 2)
3. The evaluation was based on multiple assessments and multiple kinds of assessments. No single fact or factor was the sole determinant of the report's conclusions. (S-9 pp. 1 to 8.)
4. The District's school psychologist utilized a variety of testing instruments, all of which were valid and reliable for the purposes for which they were used, and she utilized them pursuant to the publishers' instructions. (NT 52-23 to 55-11, 60-1 to 62-17, 90-1 to 105-15, 114-24 to 115-1; S-9.)
5. The evaluation was based upon multiple sources, including classroom observation by the school psychologist, observation during testing, medical and developmental history, parent reports, teacher reports and school records, including records of educational history prior to kindergarten. A psychiatric evaluation was obtained. (NT 41-1 to 12, 42-1 to 8, 47-17 to 49-21, 62-18 to 68-4, 124-18 to 126-7; S-1, S-9.)
6. The evaluation noted the report of a pediatric neurologist. (S-9 p. 1.)
7. The psychologist explored all reasonably suspected and suggested areas of weakness, including problems with focus and attending, reading, mathematics and behavior. (NT 46-1 to 47-2, 49-12 to 21, 54-4 to 59-25, 68-5 to 71-2; S-9.)
8. The District's school psychologist did not recommend neuropsychological testing because it was deemed unnecessary for

the purpose of the evaluation – to obtain a comprehensive understanding of the educational needs of the Student. (NT 126-18 to 127-6, 148-9 to 23.)

9. Assessments included a variety of mathematics and reading assessments administered by District reading and curriculum specialists. (NT 141-10 to 146-5, 162-13 to 165-3, 174-20 to 175-2; S-9 pp. 3 to 4.)
10. The evaluation included cognitive testing, achievement testing and curriculum based assessments. The evaluators utilized multiple instruments that included measures of verbal comprehension, perceptual reasoning, auditory memory, visual memory, visual-motor integration, processing speed, short term memory, phonemic awareness, decoding, reading fluency, familiarity with print, book orientation, letter, word and sentence concept, voice/print match, directionality, word recognition, word reading, reading comprehension, mathematics reading, numerical operations, word writing, spelling, and written expression. (NT 49-24 to 51-10, 56-13 to 24, 71-3 to 73-20; S-9 pp. 3 to 9.)
11. Vision and hearing screenings were negative. A speech and language assessment was average with some non-disability-based articulation needs. (NT 70-9 to 71-2; S-9 pp. 11 to 12.)
12. The evaluation included a psychiatric examination specifically responding to Parents' concern from the Student's developmental history that Student might be suffering from post traumatic stress disorder. (NT 69-7 to 70-9; S-4.)
13. The District school psychologist received information about indications of post-trauma symptoms brought to light in the Student's private play therapy, and discussed it with the Student's Mother. The psychologist did not talk to the therapist directly. (NT 127-22 to 130-4, 149-19 to 150-19; S-9.)
14. In addition, a behavior inventory was administered to a teacher and to a parent, to further assess behavioral issues. The results were consistent with the Student's medical diagnosis of ADHD. (NT 68-5 to 69-6; S-9 p. 11.)

15. Classroom observation and psychiatric evaluation did not disclose any evidence of post traumatic stress disorder. (NT 70-1 to 9; S-9.)
16. Cognitive testing revealed a specific learning disability, based upon a significant discrepancy between the Student's achievement in mathematics, writing and reading, as contrasted with high intellectual potential. The evaluation found a need for specially designed instruction. The evaluation also found significant difficulties sustaining attention and concentration. No symptoms of post traumatic stress disorder were detected. (NT 11 to 52-22, 57-4 to 58-21; S-9 p. 9 to 11.)
17. The District's school psychologist conducted additional testing to obtain further detail on weaknesses revealed by the original cognitive and achievement tests. (NT 51-24 to 53-25; S-9.)
18. The evaluation identified educational needs requiring specially designed instruction in reading (including decoding, encoding, sight word reading, and comprehension), mathematics (including numerical operations, reasoning, and problem solving), written language (including spelling, written expression, sentence writing) and attention to task. The evaluation assigned a classification of Specific Learning Disability. (NT 74-1 to 75-13, 117-5 to 120-1; S-9 p. 13.)
19. The Evaluation Report included recommendations for specially designed instruction and accommodations to address all of the identified educational needs. (NT 81-18 to 82-24, 192-1 to 195-25, 214-5 to 17, 234-10 to 235-12; S-9 p. 13, S-12.)
20. The Evaluation Report was delivered sixty-seven school days after receipt of the Permission to Evaluate; thus it was seven days late. (NT 78-5 to 22.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.¹ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipose” – that is, where neither party has introduced a preponderance of evidence² to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon the District, which initiated the due process proceeding. If the evidence is in “equipose”, the District will not prevail.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The hearing officer must determine whether or not the District’s evaluation was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party – *i.e.* more convincing evidence. See, Dispute Resolution Manual §810.

regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311. If the District’s evaluation was inappropriate, the Parent is entitled to an independent educational evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

The IDEA obligates a local educational agency to conduct a “full and individual initial evaluation” 20 U.S.C §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to “determine the educational needs of such child” 20 U.S.C. §1414(a)(1)(C)(i). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii).

The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need” 34 C.F.R. §300.304(c)(2).

The IDEA requires the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information” 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors” 20 U.S.C. §1414(b)(2)(C). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii).

Further, the regulations require that the evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs” 34 C.F.R. §300.304(c)(6). At least one federal court has interpreted the IDEA to require that the evaluation be “sufficient to develop an appropriate

IEP” Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002). The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2). The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The agency must utilize information provided by the parent that may assist in the evaluation. Ibid. This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.533(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

APPROPRIATENESS OF THE MARCH 2008 EVALUATION

Here, the District substantially³ complied with the procedures required under the IDEA. There was no issue as to qualifications of the District's school psychologist to administer the psychological testing instruments utilized in the evaluation, or to compile the report and make recommendations. 20 U.S.C. §1412(b)(3)(A). (FF 1.) The Student was assessed in all areas of suspected disability. 20 U.S.C. §1412(b)(3)(B). (FF 7, 8, 17.) The parents were consulted adequately and offered an opportunity to provide input to the evaluation, 20 U.S.C. §1412(b)(4)(A). (FF 5, 6, 12, 13, 14.) The report included review of existing evaluation data provided by the parents and teachers, as well as classroom observations. 20 U.S.C. §1412(c)(2)(A). (FF 5.) The District utilized a variety of tools and strategies to gather relevant information, 20 U.S.C. §1412(b)(2)(A). (FF 3, 4, 5, 6, 9, 10, 11, 12, 14, 17.) These strategies derived information relevant to "functional, developmental, and academic" functioning. (*Ibid.*, FF 18.) The determination of ineligibility was not based upon any single measure or assessment. 20 U.S.C. §1412(b)(2)(B). (FF 3, 4, 5, 6, 9, 10, 11, 12, 14, 17.) The instruments used were technically sound, 20 U.S.C. §1412(b)(2)(C), properly administered, 20 U.S.C. §1412(b)(3)(A), non-discriminatory, and utilized according to the publishers' instructions. (FF 2, 4.)

I find that the District's school psychologist was credible and reliable. Her experience is substantial, (FF 1), and her demeanor was professional, objective and dispassionate for the most part. I found that her answers to questions revealed a straightforward approach without an excessive effort to convince me. She also demonstrated a command of the facts and an effort to be as accurate as possible with regard to the inferences to be drawn from the available data. I find it particularly convincing that the District's psychologist followed up with additional testing and review of data after her initial testing. (FF 17.)

The Parents presented the testimony of Dr. K, a certified school psychologist with extensive experience in performing evaluations for IDEA purposes. (NT 277-21 to 279-22.) Dr. K performed a searching evaluation that far exceeded that of the District in both number of instruments used and

³ The District complied in all respects but one. It issued the evaluation report seven days late. (FF 20.) I find that this procedural lapse did not render the evaluation inappropriate, since in all other respects it was performed in accordance with law. See, *D.S. v. Bayonne Bd. Of Educ.*, ____ F.3d ____, 2010 WL 1610591 (3d Cir. 2010)(finding no violation due to late notice because no significant substantive deprivation was proved).

length of the report itself. (P-37.) I found her testimony to be credible, but unpersuasive on the ultimate issue in this matter.

Dr. K's testimony was credible because of the way in which she answered the questions. Her criticisms of the District evaluation were restrained. She declined to criticize the District's selection of strategies and instruments for evaluating emotional needs. (NT 323-5 to 14.) She declined to criticize the report as not comprehensive; rather, she contended that the evaluation failed to be searching enough in certain delimited areas. (NT 323-18 to 24.) Despite the obvious desire of the Parents to have her criticize the District's direct observation reports, Dr. K pointedly declined to do so. (NT 312-3 to 320-8.) She conceded a point on cross examination by admitting that the District's failure to identify the Student with ADHD was not a significant flaw because the District's report accounted for the Student's ADHD. (NT 299-1 to 11, 375-23 to 376-2.) Thus, Dr. K openly gave much credence to the report's overall quality. (NT 281-17 to 282-9, 305-11 to 306-10, 323-18 to 24.) On the whole, I found her testimony to be quite frank.

Nevertheless, Dr. K failed to uncover a fatal flaw in the District's report. Her critique was essentially that she could identify significant additional tests that would obtain more detail about educational needs that the report had already identified. (FF 16, 18; NT 282-9 to 284-8, 305-11 to 306-10, 309-5 to 19, 321-19 to 322-5, 323-18 to 24, 351-11 to 25, 381-18 to 383-2.) I find that these additional steps, while they could have been helpful in the broadest sense, were not necessary for IDEA compliance.

Indeed, I find it hard to conceive of an evaluation report that could not be improved upon by additional testing such as that which Dr. K recommended. I conclude that the IDEA does not require local educational agencies to perform every possibly relevant or useful test; rather, it requires sufficient testing to permit identification of the student's educational needs. The District complied with this requirement. (FF 18, 19.)

The decision in Warren G. v. Cumberland County School District, 190 F.3d 80, 87-88 (3d Cir. 1999), cited by Parents, demands no more. There, the evaluation was found to be deficient because the district had failed to identify the child's educational needs in broad subject-matter categories, such as "punctuation, spelling and writing comprehension" and "dyslexia". There is no suggestion in the court's one paragraph treatment of this issue that failure to uncover the nuanced neurological causes of such

needs would fail to meet the IDEA standard. In the present matter, the District did identify and deal with the subject matter categories in which the Student demonstrated educational needs. (FF 18, 19.)

I find significant that Dr. K's evaluation contains tests and observations that are more pertinent to medical diagnosis than to educational evaluation. (NT 352-12 to 353-1, 374-4 to 17, 383-3 to 14.) This indicates an approach that assumes the prudence of a searching analysis of functioning, one that in my view exceeds what IDEA demands in educational evaluations.

Dr. K opined that the Student's background (fetal alcohol exposure, abuse and neglect at an early age) indicated that a neuropsychological evaluation should have been provided in the District's evaluation. While this may have been appropriate, I cannot say that IDEA required it on the strength of this testimony. This seems to be more a difference of judgment between two qualified psychologists than a fundamental flaw in the District's effort to address all areas of suspected disability as required by law. (FF 8.) It is not the function of due process to arbitrate between the professional opinions of local educational agencies and private practitioners as to how best to select testing instruments. See, Leighty v. Laurel School Dist., 457 F.Supp.2d 546, (W.D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgment).

Dr. K also criticized the District's ER for failing to recommend supports in the areas of basic mathematics facts and operations, and language mechanics such as spelling, sentence structure and punctuation. (NT 287-1 to 290-10, 300-5 to 302-8, 306-2 to 308-11.) I find from examination of the record that the District's evaluation accounted for the needs in these areas, and made recommendations to address them educationally. (FF 16, 18, 19.) Thus, I cannot accept Dr. K's criticism of the evaluation on these bases.

CONCLUSION

For the reasons set forth above, I find that the District's March 2008 evaluation was appropriate.

ORDER

1. The evaluation provided by the District in March, 2008 was appropriate.
2. The Parents are not entitled to reimbursement for the costs of the Independent Educational Evaluation that they obtained in December 2009.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

May 16, 2010