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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: DS

Date of Birth: xx/xx/xx

Dates of Hearing:
July 16, 2008, September 4, 2008, September 5, 2008
CLOSED HEARING
ODR #8856.07-08 KE

Parties to the Hearing:

Ms. and Mr.

Colonial IU/EI Program
6 Danforth Drive
Easton, PA 18045-7820

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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September 24, 2008

October 9, 2008

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INTRODUCTION AND PROCEDURAL HISTORY

Student is a [young] resident of the Colonial Intermediate Unit 20 (IU), and is not currently identified as a child with a disability for special education purposes. (NT 16-18.) Until Student's reevaluation in April 2008, the Student was identified as eligible for and was receiving special education and related services including occupational therapy and speech and language therapy as part of the Early Intervention program of the IU. (S-37 p. 1.) In April 2008, the IU reevaluated the Student and recommended that Student be exited from special education. (S-37, 40, 42.) Ms. (Parent) and Mr. (together, Parents) requested an independent educational evaluation (IEE), and the IU requested due process for an order that its reevaluation was appropriate.

The hearing was conducted on three dates, July 16, 2008, September 3, 2008 and September 4, 2008. The record closed on September 24 upon receipt of written summations from the parties.

ISSUES

1. Was the District's evaluation, as reported in the Evaluation Report dated April 10, 2008, appropriate?
2. Should the hearing officer order an independent educational evaluation at public expense?

FINDINGS OF FACT

STUDENT'S EDUCATIONAL HISTORY

1. The Student received Infant and Toddler Early Intervention services through the [redacted] County MH/MR birth to three program. (S-37.)
2. The Student entered the IU's Early Intervention Program on May 9, 2006, and received services under the pendent IFSP. (S-37.)
3. In June and July 2006, the Student was evaluated by the [redacted] Institute, which concluded that [the] profile of developmental

delays did not fit the profile of an autism spectrum disorder. Student was found to be developmentally delayed in social skills. Some rigidity and difficult behavior was noted. (S-46.)

4. The IU offered an IEP on April 26, 2007, after a mediation in January 2007. Services included classroom based service ten hours per week, an early intervention itinerant teacher one hour per week, speech and language support, occupational therapy, physical therapy and transportation. The IEP contained goals in self help and social skills. (S-2, S-14, S-37.)
5. The Parent disapproved the IEP but signed it and accepted the services on the basis that she had no alternative placement for the Student. (NT 100-101; S-3.)
6. In July 2007, the IEP was revised to change the goals in the IEP, including self help and social goals. (NT 93-94; S-7, S-8.)
7. After the July IEP revision, the Student was admitted to Head Start and began attending a Head Start program four days per week. (NT 94-95.)
8. On September 25, 2007, the IEP team met and revised the IEP to provide different levels of services in light of the Student's attendance at Head Start. (NT 96; S-12.)
9. From September 2007 until May 2, 2008, the Student attended a Head Start class four days per week and the early intervention program one partial day per week. Student also received speech and language therapy, occupational therapy, transportation and sixty minutes per month of direct instruction from an itinerant teacher. Behavior specialist services were provided on a consult basis to staff. (NT 95-96, 2NT 101-102; S-2, 6-8, 12-14, 37, S-13, S-42, S-44.)
10. In December 2007, the IU informed the Parent that it would conduct a reevaluation of the Student in part because the Student had mastered all special education goals and was in its opinion functioning on age level in all areas. (NT 101-102; S-23, S-28.)

11. The Parent disagreed with the proposed reevaluation and requested mediation. (NT 101-102; S-29.)
12. At a mediation session on March 7, 2008, the parties agreed that the IU would conduct the reevaluation and would consider sources of information and evaluation instruments agreed upon by both parties. The Parent provided the names of the persons that she wanted to fill out behavior inventory reports, but the IU insisted that she provide those names in writing pursuant to a specific term in the agreement. (2NT 103-108, 144-145; S-32.)
13. The Parent signed a release permitting Head Start and the Youth Advocate Program to provide information to the IU for purposes of the reevaluation. (S-34.)
14. The agreement required the Parent to provide a list of names and addresses, along with releases, for persons who the Parent wanted to fill out Achenbach inventory questionnaires. The Parent did not provide those names or releases to the IU pursuant to the agreement. (NT 108-109, 2NT 107-108.)
15. At a meeting on May 2, 2008, the IU offered an exit IEP to the Parent, to which the Parent did not consent. The IU offered to monitor the Student's maintenance of age appropriate self help and social skills for four months. (NT 110-111; S-40.)
16. The Parent disapproved the IEP, so the exit status with monitoring was not provided. (NT 111; S-42.)

DISTRICT'S METHOD AND INFORMATION RELIED UPON

17. The IU's IEP team reviewed the existing data and determined that further data were needed, including standardized tests, observations and classroom based assessment. (S-37 p. 2.)
18. The IEP team sought information from the Parents through a parent questionnaire, family needs survey and interview with the Mother. (NT 108; S-37 p. 2, 5.)

19. The Parent did not return a family survey form requested on March 7, 2008; however, the IU considered a family survey form provided in December 2007, providing data on present programming, including the provision of Provider 50 TSS and BSC services at home. (S-37 p.2.)
20. On the December family survey form, the Parent raised issues of developmental and social behavioral needs, including emotional self expression, ability and willingness to learn to ride a bicycle, withdrawal from other children at school and negative emotions toward school. (S-37 p. 3.)
21. The IEP team inquired about and considered cultural concerns. (S-37 p. 3.)
22. The IU declined to consider two non-educational psychological reports, which reached contradictory conclusions regarding diagnosis, because material in those reports was redacted. The IU insisted on non-redacted reports, but the Parent insisted on redacting material from the reports that related to one of the Student's siblings. The IU declined to speak to one of the psychologists by telephone. (2NT 154-155.)
23. The IEP team obtained the report of the Head Start teacher, her responses on the Achenbach Child Development Inventory, and work sampling sheets addressing social and emotional development, learning, language development, literacy, mathematics, science, creative arts, physical health and development. (S-37 p. 4.)
24. The IEP team reviewed the Student's mastery of the goals in [the] IEP. These goals addressed social skills, requesting help or information, speech and language skills and fine motor skills. (S-37 p. 4.)
25. The IEP team received the report of an observation by a certified special education teacher in April 2008, while the Student was attending [the] early intervention program. (S-37 p. 5.)

26. The IEP team received the report of an observation while Student was attending [the] Head Start program on March 5, 2008, conducted by its itinerant early intervention teacher, who is a certified special education teacher. (NT 34; S-37 p. 6.)
27. The IEP team received the report form the Achenbach Caregiver-Teacher Report of three teachers. This addresses behaviors and emotional states. (S-37 p. 8.)
28. The IEP team received the report of the Vineland-II Adaptive Behavior Scales, Teacher Rating Form. Two teachers filled out this form, which addresses communication, daily living, socialization and motor skills. (S-37 p. 9.)
29. A certified special education teacher and speech therapist administered a standardized instrument known as the Batelle Developmental Inventory. This addresses functioning in the home and community regarding adaptive, social, communication, motor and cognitive skills. (S-37 p. 10-12.)
30. The IU also conducted testing in the areas of visual motor functioning, early literacy, pronunciation, phonological development, speech fluency, auditory comprehension and expressive communication, receptive and expressive language, fine motor skills, sensorimotor functioning, and achievement in the general education curriculum, as well as an Occupational Therapy evaluation. (S-37 p. 16.)
31. The IU found no delays in self help skills or social functioning. (S-37 p. 16.)
32. The IU reviewed progress reports on the Student's IEP goals which showed mastery of four social behavior and self-help goals. (S-37.)
33. The IU was willing to consider reports of home care providers and or private providers, but as of April 10, 2008, had not received releases from the Parent to obtain such reports. (S-37.)

34. The IU was willing to consider and solicited the Parent's report from the Achenbach Caregiver-Teacher Report, but the Parent did not return it. (S-37 p. 8.)
35. On May 5, 2008, the Parent provided a psychological evaluation from a private evaluator, which the IU added to the April 10, 2008 reevaluation report by amendment. This report diagnosed the Student with Asperger's Disorder. (NT 357-358; S-45 p. 4-5.)
36. The purpose of the evaluation was to determine eligibility for continued Therapeutic Support Staff services, and the psychologist is a contractor for Behavioral Health Rehabilitation Services to provide evaluations to determine such eligibility. (2NT 10-14, 19, 20; P-2.)¹
37. The report focused on the question of medical necessity for such services. The evaluator is a clinical psychologist with no training, experience or certification in school psychology. (2NT 10-14, 19, 20; P-2.)
38. The evaluator reviewed the [Institute] report of June and July 2006 in formulating his opinion, as well as two medical reports of another professional who diagnosed and then withdrew the diagnosis of pervasive developmental disorder. Informants were limited to the Parent and Case Coordinator at [agency redacted], a service agency providing home based services. The evaluator did not obtain any information from IU personnel or directly from the school settings at the time he wrote the report dated May 5, 2008. (2NT 10-24; P-2.)
39. The report contained some history that was not reported in the reevaluation report and was not in the 2006 report of the [Institute] evaluation, though both reports indicate that an extensive history was sought and obtained from the Parent. (2NT 148-149, 154-55; S-45, S-46, P-2.)

¹ The third transcript of the proceedings is not numbered consecutively, although the first two volumes are numbered consecutively. Therefore, the transcript of the third session on September 4, 2008 is referred to herein as "2NT", so that duplicative page numbers can be distinguished from the session of July 16, 2008, which is labeled "NT" herein.

40. The evaluator conducted no psychological testing, and observed the Student on one occasion for about one and one half hours. (2NT 21.)
41. The Parent provided Achenbach Child Behavior Checklist results to the IU from both Parents, the Student's behavior specialist, a therapeutic support specialist and another person familiar with the Student's behavior in the home, which the IU added to the April 10, 2008 reevaluation report by amendment. The scores from these checklists were substantially different from those provided by IU and Head Start personnel, and showed clinical and borderline clinical significance for the Student's behaviors at home. (NT 358-364, 453-4, 463, 468-9, 2NT 106-108, 144-145, 154-155; S-45 p. 9-10.)
42. The Student's Parents were separated at the time in which they filled out the Achenbach forms; the Student's father saw the Student only on weekends. (2NT 107; P-2 p. 2.)
43. The Student's home behavior consultant took data and reported that the Student had met [the] IEP goals. (NT 99-100; S-30.)
44. The Head Start teacher reported that the Student's behavior was appropriate for age, based upon her observations of Student during four days per week at Head Start. (NT 118-119; S-37 p. 4.)
45. The Head Start teacher reported that the Student was able to take care of bathroom needs with no supervision and was able to use writing tools. (S-37 p. 4.)
46. The Head Start teacher's report on the Child Development Inventory in December 2007 indicated that the Student's self help and communication skills were age appropriate, but that social/behavioral skills were within the developmental delay or borderline range. In March 2008, the teacher's report indicated that social and self help skills were age appropriate. (S-37 p. 4.)
47. The Head Start teacher provided work sampling sheets to the IU, showing social and self skills to be "in process." (S-37 p. 4.)

48. The certified special education teacher reported in April 2008 that the student was able to perform needed self help tasks such as removing and putting on winter clothes, hand washing, eating lunch, using the bathroom, and was able to interact with peers without difficulty. (S-37 p. 5-6.)
49. The itinerant special education teacher reported in March 2008 that during sessions in Head Start, the Student was able to interact with peers without difficulty. (S-37 p. 6.)
50. Head Start reported that from July 2007 to March 2008 the Student was exhibited independent performance of eight self help skills and nineteen social skills independently. (S-37 p. 7.)
51. The IU's school psychologist scored the Achenbach Caregiver-Teacher Reports from three teachers, which indicated that the Student's behaviors are in the average range. (S-37 p. 8-9.)
52. The Vineland-II Adaptive Behavior Scales, as reported by two teachers and scored by the IU's school psychologist, scored the Student's daily living and social skills as moderately high and adequate. (S-37 p. 9.)
53. The Battelle Developmental Inventory showed that the Student was functioning at or above age level in the adaptive and personal social domains of the instrument. (S-37 p. 11.)
54. The behavior specialist who filled out an Achenbach form based her report primarily upon observations of the Student in the Head Start setting. She confirmed that that the Student was able to perform the social skills set forth in the IU's re-evaluation report, but stated that the Student did not consistently perform these skills and needed redirection regarding social skills at least once every class day. The behavior specialist did not keep data on these observations. (2NT 45, 48-54, 55-56, 68, 73, 75.)
55. On the Achenbach checklist, the BSC reported behaviors that were scored in the externalizing and aggression domains as borderline clinically significant. (NT 368; S-45 p. 10.)

56. The Student's behaviors at home became more problematic after the TSS service was removed from the Student for Head Start class time. The behavior specialist observed more problematic behavior at home than in school. (2NT 73-75, 82, 111-112.)
57. Overall, the Student made progress with social skills and anxiety concerns while at Head Start in the 2007-2008 school year. Student was able to and usually did perform age appropriate social skills. (2NT 52-54, 75-76, 87, 89-92.)
58. Data taken at the Head Start classes confirmed that the Student made progress in social skills. (2NT 137-138.)
59. The Student did not perform social skills as well at home and in the community as in the school setting. (2NT 114-119.)
60. The IU staff did not at first recognize the behavioral signs of the Student's anxiety, but did address them when the Parent pointed them out to the staff. (2NT 135.)

FINDINGS REGARDING DEVELOPMENTAL, SOCIAL AND BEHAVIORAL NEEDS

61. In processing the discrepancy between the reports of behavior from school settings and those from home settings, the IU's school psychologist concluded that whatever behavioral issues were occurring at home did not occur in the school setting, and therefore did not require special education or related services. (NT 361-364; S-45 p. 10.)
62. The IU's school psychologist was unaware that one of the informants who filled out an Achenbach scale was basing her responses primarily upon observations of the Student in the Head Start setting. (NT 369-370, 379.)
63. The IU's school psychologist might have sought more information if she had known that one of the informants was reporting behavioral difficulties in the Head Start setting. (NT 370-372, 380-382.)

64. The school psychologist would not have changed her opinion if she had known that some of the negative behavior reports were from the Head Start setting. (NT 370-371, 380, 391-392, 396.)

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.² 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 “equipoise” – that is, where neither party has introduced a preponderance of evidence³ 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.

² 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).

³ 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. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

In the present matter, the hearing officer assigned the burden of persuasion to the District. (NT 20.) Ordinarily, the local education agency bears the burden of proving the adequacy of its evaluation. See e.g., Warren G. v. Cumberland County School District, 190 F.3d 80 (3rd Cir. 1999); 34 C.F.R. §300.502(b)(2)(i). Thus, if the evidence is in “equipoise”, the District will not prevail.

MEDIATION

The IU argues that the mediation agreement entered into prior to the Parents’ request for due process, (FF 11-14), precludes a decision on the appropriateness of the District’s evaluation in this due process proceeding. The hearing officer disagrees. The governing regulation under the IDEA provides that mediation agreements must be “legally binding” and that such agreements are enforceable in state or federal courts. 34 C.F. R. §300.506(b)(6)(7). Nothing in the regulations speaks to preclusive effect. Indeed, the regulation, in providing for enforcement in the courts and not in the administrative due process procedure, precludes an administrative hearing officer from considering whether or not the parties have performed their obligations under the agreement.

Moreover, the regulation makes it clear that mediation is not to be used in any way to “deny or delay the parent’s right to a hearing on the parent’s due process complaint.” 34 C.F. R. §300.506(b)(1)(ii). The mediation agreement, not enforceable in administrative proceedings, does not preclude administrative jurisdiction over claims brought according to statutory due process procedures.

EVALUATION

The hearing officer must determine whether or not the District’s evaluation as reported in April 2008 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 regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311. These requirements apply to re-evaluations as well as initial evaluations. 34 C.F.R. §300.303(a). 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 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 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). It 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 extensive 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).

The evaluation required in the IDEA is an educational evaluation, not a medical one. The IDEA repeatedly characterizes the evaluation as educational. The parental right that triggered the District’s instant request for due process is set forth in 20 U.S.C. §1415(b)(1). The Act entitles a parent to an independent “educational” evaluation at public expense, id., not to an independent medical evaluation. At §1414(a)(1)(C)(i)(I), 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” 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). See also, 20 U.S.C.

§1414(b)(3)(C) (“educational needs”); 20 U.S.C. §1414(b)(4)(A) (same); 20 U.S.C. §1414(c)(1)(B)(i)(same).

The regulations define “evaluation” to be:

Procedures ... to determine whether a child has a Disability and the nature and extent of the special education and related services that the child needs [.]

APPROPRIATENESS OF APRIL 10, 2008 RE-EVALUATION

Here, the IU fully complied with the procedures required under the IDEA. The District utilized a variety of tools and strategies to gather relevant information, 20 U.S.C. §1412(b)(2)(A). (FF 10, 14, 15, 17, 18-21, 23-35, 41, 43-45, 52-53, 58.) These strategies derived information relevant to “functional, developmental, and academic” functioning, *ibid.* *Ibid.* The District utilized information provided by the parent. (FF 18-21, 33-41.) The determination of eligibility and the identification of program needs were not based upon any single measure or assessment, 20 U.S.C. §1412(b)(2)(B). (FF 23-30.) The Student was assessed in all areas of suspected disability. 20 U.S.C. §1412(b)(3)(B). (FF 20, 23-24, 28-30, 52-53.) The parents were consulted adequately and offered an opportunity to provide input to the ER itself, 20 U.S.C. §1412(b)(4)(A). (FF 18-21, 33-41.) The report included review of existing evaluation data provided by the parents, observations by teachers and service providers, and identification of additional data needed. 20 U.S.C. §1412(c)(2)(A). (FF 17, 18-21, 23-27, 33-41, 43-51.)

There was no issue in the hearing regarding the instruments used – whether or not they were technically sound, 20 U.S.C. §1412(b)(2)(C), properly administered, 20 U.S.C. §1412(b)(3)(A), or discriminatory, *ibid.* There was no issue as to qualifications of the District’s school psychologist to administer the psychological testing instruments utilized in the evaluation, 20 U.S.C. §1412(b)(3)(A).

EFFECT OF MAY 5, 2008 EVALUATION REPORT ON THE APPROPRIATENESS OF THE RE-EVALUATION

Indeed, the Parent does not challenge the reevaluation report on grounds of procedural non-compliance. (2NT 150-152.) Rather, she

challenges the re-evaluation on grounds that it failed to take into consideration important data about the Student's functioning in school. She argues, first, that the IU's school psychologist made a material mistake by assuming that all reports of substantial autistic-like behavior and disruptive behavior were based upon observations made in the home setting, whereas reports of such behavior were based also on observations in the school setting. She further argues that the Student was diagnosed recently with Asperger's Disorder, and that diagnosis is not changeable – in other words, this recent diagnosis raises an inference that the Student suffered from Asperger's throughout Student's life. Finally, she argues that the data collected by the IU failed to take into account behavior that the Student exhibited in the Head Start classes – data that the Parent argues is proof that the Student's disability is impeding progress in school, such that Student needs specially designed instruction and related services.

The hearing officer does not find that the recent report, with a diagnosis of Asperger's, casts doubt upon the appropriateness of the the IU's findings to the contrary. Having considered this report belatedly, the IU's school psychologist was within her professional judgment to discount its contrary findings and not deem it a reason for changing the re-evaluation conclusions that she had reached.

The circumstances of the evaluation diminish its reliability for the purpose of educational evaluation. It was a medical evaluation, conducted by a clinical psychologist without training or certification in school psychology, and made for medical necessity purposes. (FF 35-36.) The examiner did not even advert to the need to assess according to the two prong test of eligibility, which includes whether the disability results in an educational need. (FF 37.)

The examiner's data were limited. He did not test the Student or receive any information from the school setting. (FF 38.) His sole source of information was the Parent, who obviously had an interest – albeit legitimate - in the outcome. Ibid. Although he read the Institute report and two medical reports which contradicted each other, he did not read the IU's re-evaluation report in formulating his opinion - the only report that contained a wealth of educational information about the Student's functioning and behavior in the school setting. (FF 38.) His observation was on one occasion, for about one and one-half hours, and was not in the context of school, or in the context of testing, in which data can be observed from

watching the child respond to testing demands. (FF 40.) Given this relative paucity of information, it is not surprising that the history the examiner related contained factual assertions that previous, more thorough evaluators either did not receive, or did not deem worthy of note. (FF 39.) For example, the history of rocking, tactile issues, and “smelling everything” are not mentioned in the Institute report. Ibid.

In sum, the private examiner’s report is not sufficient to render the IU’s reevaluation conclusions inappropriate. It was based upon too little information to credibly contradict the far more extensive investigations that underlay the Institute and IU findings and conclusions.

As to the permanence of the diagnosis, this argument loses force because it is based entirely upon the private examiner’s finding of an autistic spectrum disorder.⁴ The Institute report in 2006 specifically rejected such a diagnosis. (FF 3.) This report found that the more appropriate diagnosis would be more directly related to the Student’s problematic behaviors, and the report suggested that a disorder grounded in oppositional behavior would be more useful. Ibid. The IU’s reevaluation report found that there is no educational disability – that is, regardless of the medical diagnosis, it does not presently interfere with the Student’s functioning in school. The Parents did not introduce another similar report diagnosing an autistic spectrum disorder, presumably because that report was contradicted shortly by a subsequent evaluation – both of these evaluations were for the purpose of determining medical necessity for TSS and BSC services from the non-educational service system. (FF 38.)

⁴ The hearing officer gives no weight on the issue of diagnosis to the home program witnesses’ testimony that the Student’s behaviors appeared to them to be similar to those exhibited by children with autistic spectrum disorders. It is plain that none of these witnesses purported to be qualified to render a diagnosis and that the Student’s behaviors also can be similar to those exhibited in children with other disorders. There was evidence that these behaviors could have been associated with anxiety related to family issues. (FF 41, 42, 59, 60.) Thus, the similarity of the Student’s behavior to that of other children on the autistic spectrum does not raise a weighty inference against the IU’s evidence of the appropriateness of their re-evaluation.

EFFECT OF OBSERVATIONS AT HEAD START BY THE BEHAVIOR SPECIALIST

The argument as to failure to take into account evidence of behaviors in school is a more weighty concern. It is plain that the IU's school psychologist (through no professional fault of her own) relied upon somewhat misleading data, thus introducing an element of error. The Student's behavior specialist (BSC) and Therapeutic Support Staff (TSS)⁵ both credibly testified that they observed the Student exhibiting inappropriate social behaviors in the Head Start class. (FF 61-63.) Clearly, this was not disclosed to the IU's school psychologist until weeks after she issued the re-evaluation report.⁶ Does this error rise to the magnitude that would justify a hearing officer's finding that the re-evaluation report was inappropriate?

The BSC testified that she observed the Student in Head Start classes about three times per month from September 2007 to August 2008. (FF 54.) At least once per classroom session, she observed the Student exhibiting inappropriate social behaviors. *Ibid.* However, she also witnessed the Student engaging in appropriate social behaviors, and agreed that the Student was able to engage in the positive social behaviors that were set forth in the Re-evaluation report. (FF 57.)

Thus, the BSC did not contradict the finding of the Re-evaluation report that the Student had attained the goals and was able to function at an age-appropriate level, nor did she offer an opinion that the Student was experiencing disabilities that interfered with progress in school. (Indeed, she

⁵ The TSS testified only that she had seen problematic social behaviors, similar to those reported by the BSC, at the Head Start program. (2NT 89.) She also testified that she had seen evidence of improvement of these behaviors over the 2007-2008 school year. (2NT 90-92.) Her observations were limited to a few days in September and a few days on two more occasions near the end of the year. (2NT 87.) Thus, her testimony bolstered the credibility of the BSC's testimony, but it did not contradict the conclusions of the re-evaluation report. This testimony does not implicate any error in that report.

⁶ The parties contended at length as to whose fault that was. (FF 33-35, 41.) The evidence for finding fault with the IU is weak, since the Parent claimed that she had emailed the needed information to the IU in time, but failed to produce the email. *Ibid.* Such miscommunications are rarely the exclusive fault of one party, and the hearing officer finds that the weight of evidence to that effect is not preponderant that the IU erected artificial roadblocks to receipt of the information. Thus, the lateness of the information does not make the IU's re-evaluation inappropriate.

depicted some progress over the course of the year in which she observed the Student.) Rather, she did express the opinion that the Student needed a TSS in [the] Head Start classes. (FF 54, 55, 56, 60.)

In addition to the above error, the IU's school psychologist did not know that the BSC's report on the Achenbach inventory was based upon extensive observations in the school setting. (FF 61-63.) This was clearly an error. It bears upon her conclusions, because they were based in part upon the belief that the Student's behavior in school was not clinically significant according to the Achenbach inventories. This error was important enough that the psychologist would have sought more information if she had known this while formulating her report. (FF 63.)

However, this error did not go to the heart of the psychologist's conclusions. The BSC's actual scores did not disclose a substantial behavioral deficit in the classroom; rather, her externalities scoring was only in the borderline significant range. (FF 55.) In addition, the Achenbach inventory does not score for social skills deficits specifically, so that the scores would not have disclosed a problem in that realm, even if the psychologist had known that they were from an observer in the Head Start classroom. Moreover, the Psychologist had reliable information from other sources indicating that the Student was not experiencing a disability that prevented Student from improving social skills. (FF 44-53.) The school psychologist did not conclude, upon review of the Achenbachs in light of their origin in the Head Start classroom, that the new information invalidated her conclusions; on the contrary, she confirmed her conclusions in the face of the new information. (FF 64.) Thus, by compliance with the IDEA mandate to use multiple sources, 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b), the IU preserved the reliability of its conclusions, in spite of the error in its underlying data in this respect.

The Parent notes that the BSC disagreed that the Student had mastered the behaviors listed in the re-evaluation report. (2NT 55-56; S-45 p. 8.) However, the BSC's disagreement was with the assumption that the Student's mastery required the complete absence of redirection for these skills. *Ibid.* Such perfection was not the criterion for reporting mastery, and some need for redirection is not necessarily age-inappropriate. Thus, the weight of this evidence does not overcome the weight of the evidence produced by the IU that the re-evaluation was appropriate.

The Parent raises a purported error in data keeping by the IU's itinerant teacher, claiming that the teacher did not keep the data correctly by her own admission. (NT 50, 52, 60-62; S-8.) However, this testimony did not establish that the witness did not keep the data correctly. It did establish some confusion on the witness' part while testifying as to how she scored days where there was no opportunity for the counted behavior to occur.

This was due to failures of her memory; the witness repeatedly indicated that she could not answer the questions from memory, and needed to reference her records. (NT 47-52, 64-65.) On redirect, the witness recited the correct methodology, and indicated that the document she had been testifying about was not a complete record of the Student's performance. (NT 68-72, 76.) Thus, the hearing officer does not give such weight to this testimony that it detracts from the preponderance of evidence that the Student was correctly observed to have accomplished [the] goals.

The Parent also challenges the credibility of the Head Start teacher, who testified that when the TSS worker was removed from the Head Start class, the Student's interactions with other children improved and were more age appropriate. (NT 122.) The Parents argues that this statement was contrary to a letter the teacher wrote on behalf of the Parent advocating for the TSS service and saying that it was needed. (NT 130.) The hearing officer found that the Head Start teacher was credible, based upon her demeanor and the way in which she answered questions. Upon review of the two passages in the transcript, the hearing officer is not persuaded that these two statements are contradictory. Negative behaviors can be other than social behaviors; nothing in the transcript indicates that the teacher when writing the letter was describing inappropriate social behaviors. Moreover, the teacher indicated that she had written the letter as a favor to the Parent, and did not consider the reemergence of negative behaviors to be anything serious. (NT 130.)

CONCLUSION

Weighing the evidence as stated above, the hearing officer finds that the re-evaluation of April 10, 2008, as revised in May 2008, was not inappropriate. Consequently, the Parent is not entitled to an order for an independent educational evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

ORDER

1. The IU's evaluation, as reported in the Evaluation Report dated April 10, 2008, was appropriate.
2. The hearing officer will not order an independent educational evaluation at public expense.

William F. Culleton, Jr. Esq.

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

October 9, 2008