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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING
ODR File Number 7131 06-07 KE

Name of Child: J.N.

Date of Birth: xx/xx/xx

Date of Hearing:
December 14, 2006
January 5, 2007

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Representative:
Pro Se

Dan Crum
Special Education Director/School
Psychologist
Upper Dauphin Area School District
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Date Transcript Received: January 9, 2007
Date Record Closed: January 9, 2007
Date of Decision: January 17, 2007
Hearing Officer: Lynda A. Cook, Ed. D.

BACKGROUND

Student is a xx year-old second grader residing with his parents in the Upper Dauphin Area School District (District). He completed first grade in the South Western School District, following which Parents enrolled him in the Connewago School District for the 2006-2007 school year. Before the 2006-2007 school year began, however, Parents moved into the service area of the Upper Dauphin Area School District and enrolled Student there in August, 2006. Parties disagree over whether or not at the time of enrollment Parents informed the District of the extent of Student's disabilities. The District did not receive Student's school records until October 2006. In response to Parents' refusal to provide consent for an evaluation at enrollment, the District developed a Chapter 15 Service Plan in August 2006 and then filed for due process in November 2006 to determine whether it has the right to conduct an evaluation.

ISSUE

Whether the District has the right to evaluate Student to determine if he is need of special education and related services? (N.T. 5-6)

FINDINGS OF FACT

1. This case was filed with the Office for Dispute Resolution (ODR) by the District on 11/13/06 after Parents did not participate in a scheduled mediation session. The District requested this hearing because Parents will not provide permission for an evaluation of Student's needs. The District's proposed resolution was to enroll Student in an intermediate unit diagnostic program. (SD 1)
2. The record of the hearing provides several statements of Student's disabilities.
 - a. The 11/13/06 Due Process Complaint Notice filed with ODR by the District identified Student's exceptionalities as cerebral palsy, orthopedic impairment, speech and language impairment, visual impairment, and varying opinions on his intellectual delays. (SD 1)
 - b. The 06/25/03 Evaluation Report (ER) produced by the South Western School District states that a 5/14/03 Early Intervention IEP "identifies Student as Visually Impaired, to have communication needs, and to require assistive technology devices or services." The report also notes delays in gross and fine motor skills, receptive and expressive language, oral/motor speech production, cognitive skills, social skills and feeding skills. (SD 5)
 - c. A 6/21/06 hearing decision on behalf of the Student states that Student is eligible for special education and related services as a child with a disability who has been diagnosed with cerebral palsy, developmental dysplasia of the hips, and a visual impairment, and a history of speech and language delays. (SD 6)

3. The hearing was held in two sessions. The first session was held on 12/14/06, the date set by this Hearing Officer on 11/22/06 upon assignment by ODR to the case. This date was maintained because both parties could not agree to another date more convenient to the Parents. Because parents opted to represent themselves, and because Father was presenting their case and unavailable on 12/14/06, a second session was held on January 5, 2007. The January 5 session convened at 4:00 p.m. to accommodate Father's work schedule. (HO 1, 2,3, 4)
4. This Hearing Officer required the parties to meet for a resolution session immediately before going on the record on 12/14/06. (HO 4, 5)
5. Student, who is xx years old and in the second grade, resides with his parents in the Upper Dauphin Area School District.
6. Student enrolled in the Upper Dauphin Area School District at the beginning of the 2006-2007 school year. (N.T.21, 24)
7. District personnel and Parents disagree over whether or not the District was informed when Student and Parents visited the District prior to the beginning of the 2006-2007 school year or enrolled that he had had an IEP in his former placement in the South Western School District. District personnel state that Parents informed the Special Education Director and second grade teacher that Student had cerebral palsy, but no learning disabilities. (SD 2; N.T. 105, 107, 144-45, 150, 206-207)
8. When student enrolled in the District, complete education records from his former school district had not yet arrived. Student's report card from first grade (2005-2006 school year) in the South Western School District was available, and indicated that Student was to be placed in second grade learning support for the 2006-2007 school year. (SD 2, 7; N.T 22, 24, 176)
9. On 8/24/06 District issued a Notice of Recommended Educational Placement (NOREP) when Student enrolled, proposing a diagnostic program through the Capital Area Intermediate Unit (CAIU). Father signed disapproval on 8/24/06, stating, "We want (Student) to have the opportunity to try to be successful in regular ed setting and review progress in 30 days." Father also requested a meeting with the principal to discuss the district's recommendation. Parent added to NOREP, "Parents would want review by regular education team within 30 calendar days." (SD 9)
10. The 8/24/06 NOREP had typed and crossed out as student's name, "T H". Student's correct name was handwritten and initialed by district personnel and Father. (SD 9)

11. On 8/24/06 The Upper Dauphin Area School District developed a Chapter 15 Service Agreement (Section 504) for Student after parents rejected learning support placement and did not want to pursue a comprehensive evaluation. Father signed the Service Agreement indicating permission. (N.T. 27-29, 92-95; SD 10)
12. Components of the 8/24/06 Service Agreement include: (1) help with toileting (i.e., transfer); (2) lunch assistance (i.e., help with tray); (3) recess assistance (i.e., transitioning to equipment); (4) transfer assistance to carpet for Guided reading time; (5) assisted PE as deemed necessary; (6) aide and teacher will not intervene unless they would otherwise intervene for any non-disabled child; (7) teacher(s) and/or aide(s) will intervene if safety is a concern. (SD 10)
13. On 9/22/06 the District issued a Permission to Reevaluate/Agreement to Waive Reevaluation notice, on which Parents signed their objection. (P 6)
 - a. The District's reason for requesting informed consent was, "504 team has review existing data concerning your child and made the recommendation that there is a need for a reevaluation or eval."
 - b. Specific types of assessment tools, tests and procedures are listed as: updated psych-ed, updated speech & language evaluation, updated occupational therapy and/or physical therapy evaluation, diagnostic learning support, curricular based assessment.
14. On 10/2/06 the Upper Dauphin Area School District issued a Permission to Evaluate letter and form to Parents stating that an evaluation was needed to gather additional data to determine appropriate supports. (P 8)
 - a. The Special Education Director testified, "... I incorrectly issued a permission to re-evaluate. And I know I was incorrect because the compliance officer corrected me. He said you should have issued a permission to evaluate. So I re-issued a permission to evaluate." (N.T. 103)
 - b. Specific types of assessment tools, tests and procedures are listed as: Comprehensive Assessment of Spoken Language, The Language Processing Test-revised, The WORD-R test, a test of expressive vocabulary and semantics, the Structured Photographic Expressive Language Test, The Comprehensive Test of Phonological Processing and the Arizona Test of Articulation Proficiency, Scales of Independent Behavior Revised, Woodcock Johnson III Tests of Abilities and Achievements, WISC-IV, OT Evaluation, PT Evaluation, Vision Evaluation.

- c. Parents signed page 2 of this letter on 10/11/06 objecting to the proposed evaluation, and requested that mediation be scheduled.
15. The District filed for mediation with ODR, and a session was scheduled but not held. Parents and District personnel disagree over whether or not Parents provided notice that they were unable to attend the mediation session. (S 1; P 1; N.T. 103-104, 216-217)
16. Complete education records arrived in October, 2006 from the Connewago Valley School District/ New Oxford Elementary School. Parents had enrolled him in July 2006, but moved to the Upper Dauphin Area School District before the start of the 2006-2007 school year. (N.T. 26, 175)
17. Records forwarded from Connewago Valley School District included an evaluation report dated 6/25/03 and an IEP signed by the parent on 4/6/06. Parent signed the IEP indicating disapproval. These documents were developed by the South Western School District. (N.T. 27, 35; SD 5)
18. The September 2004 IEP is the last agreed to IEP for Student. (SD 6)
19. Whether or not the January 2006 IEP was appropriate was one of several issues heard in a due process hearing brought by the South Western District for Student (June 21, 2006 decision date). The hearing officer at that time determined that the IEP was not appropriate, and that the South Western District needed to complete a comprehensive evaluation to determine Student's "levels of functioning in a host of areas".(SD6, N.T. 177-178, 185)
20. Whether or not the South Western District could complete a multidisciplinary evaluation of Student was a second issue in the due process referenced above (June 21, 2006 decision date). The hearing officer determined that the South Western District could complete the evaluation of Student, including a psycho-educational assessment completed by a school psychologist, a speech therapy assessment, a mobility assessment, an assistive technology assessment, a PT assessment, and an OT assessment. (SD 6, N.T. 208)
21. Parents did not make Student available for South Western to complete the evaluations ordered by the hearing officer (June 21, 2006 decision) because they had "no intentions of returning there." (SD 6; N.T. 222)
22. The District's School Psychologist, who also serves as the Special Education Director, again raised the issue with the Parents of conducting an evaluation of the Student when District personnel observed that Student required more assistance than that provided through the Chapter 15 Service Agreement. The School Psychologist stated that it was apparent Student had more than just a neuromuscular disability, and that "his cerebral palsy was seemingly affecting his

- central nervous system, which was subsequently affecting his intellectual abilities. . .his visual abilities”. (N.T. 95-96, 104, 113)
23. Student’s second grade classroom teacher, who has 12 years of experience in elementary education, identified areas in which Student is having difficulty with academic work expected of second grade students. (SD 8; N.T.65-79)
 - a. The DIBELS reading assessment, which is administered to all students, places Student at a beginning first grade level. (N.T. 67)
 - b. Student usually requires more time than classmates to complete work. (N.T.68)
 - c. Even when Student has produced a correct verbal response demonstrating that he understands a concept, he tends not to be able to provide a correct response several minutes later. (N.T. 68-69)
 - d. Student does not know all the letters of the alphabet. (N.T. 71)
 - e. Student’s written responses often do not match his verbal or oral responses. (N.T. 74)
 - f. Student has difficulty tracking or keeping his place on papers. (N.T. 77)
 24. Student’s second grade teacher believes a comprehensive evaluation will identify Student’s problems and provide strategies to assist his learning. (N.T. 75, 80)
 25. The School Psychologist discussed with Student’s Mother a proposed plan for an evaluation, which included using reports from doctors, private therapists and a clinical psychologist rather than having the District conduct all aspects. The School Psychologist discussed this option as a compromise to the intermediate unit’s diagnostic program. (N.T. 115-117, 118-120)
 26. Parents acknowledge need for evaluation, but will give permission only if they can observe the evaluation and exercise visitation rights in order to be partners in the process. (P 6; N.T. 217-218, 223-224, 229-230)
 27. The School Psychologist testified that having parents observe evaluations “typically skews the reliability of the data”. (N.T. 120)
 28. Parents had Student evaluated privately before the start of the 2006-2007 school year, but have not provided the report or results to the District. (N.T. 226-227)
 29. Parents’ rationale for hesitating to provide permission to evaluate includes experiences with previous districts and previous evaluators who did not hold high expectations for Student. (N.T. 212-215)
 30. This hearing officer sent a letter to both parties on 12/3/06 summarizing communication from each party to the hearing officer without both parties being present. The letter provided an explanation of *ex parte* communication. (HO 2)

DISCUSSION AND CONCLUSIONS OF LAW

The single issue in this case is whether the District has the right to conduct an evaluation of Student. (N.T. 5-6)

A district must obtain informed parental consent prior to conducting an initial evaluation or reevaluation, and prior to the initial provision of special education services. 20 U.S.C. §1414(a)(1)(D) and §1414(c)(3); 34 C.F.R. § 300.505. This requirement serves to ensure that school districts do not make decisions regarding the identification of children with disabilities without consulting the parents, and also obligates districts to respond adequately to parental concerns about their children.. *Pasatiempo v. Aizawa*, 103 F.sd 796, 802-3 (9th Cir. 1996); *Jaynes v. Newport News Sch. Bd.*, 2000 U.S. LEXIS 21684 (E.D. VA. 2000)

If a parent refuses to give permission for an evaluation or reevaluation of a child with a disability, the local educational agency may pursue those evaluations by using the due process procedures or mediation procedures. 20 U.S.C. §1414(a)(1)(D)(ii). School personnel may, and should, discuss the issue with the parent in order to understand her reasons for withholding consent, explain the school system's concerns, and try to come to a mutually agreeable resolution. 34 C.F.R. §300.505(b). Section 300.300(a)(3) allows a public agency to override parental refusal to consent to an initial evaluation by utilizing the mediation procedures under Section 300.506 or the due process procedures under Section 300.507 through 300.516.

The record of this hearing reflects that the District issued forms for Parent consent to evaluations on three separate occasions. First, the District issued a Notice of Recommended Educational Placement (NOREP) on 8/24/06 when Student enrolled, proposing a diagnostic program through the Capital area Intermediate Unit (CAIU). Father signed disapproval on 8/24/06, stating, "We want (Student) to have the opportunity to try to be successful in regular ed setting and review progress in 30 days." (SD 9) The District next issued a Permission to Reevaluate/Agreement to Waive Reevaluation notice on 9/22/06. Finally, on 10/2/06 the District issued a Permission to Evaluate letter and form to Parents stating that an evaluation was needed to gather additional data to determine appropriate supports. Parents signed on 10/11/06 objecting to the proposed evaluation, and requested that mediation be scheduled. (P 8; N.T. 103) The Special Education Director testified, "... I incorrectly issued a permission to re-evaluate. And I know I was incorrect because the compliance officer corrected me. He said you should have issued a permission to evaluate. So I re-issued a permission to evaluate." (N.T. 103)

Within three months, the District issued three different forms seeking parent permission for evaluation, all of which were not approved by the Parents. Although not directly related to the issue of this hearing, this situation clearly could have caused confusion on the Parents' part. Additionally, the District's less than accurate completion of paperwork does not send a clear message to parents. (SD 9)

Despite testimony by District personnel that they were not informed by the parents when the Student enrolled that he had disabilities beyond cerebral palsy, the District issued a NOREP on 8/24/06. The placement sought was for a diagnostic program outside of the district. (SD 2, 9; N.T. 105, 107, 144-45, 150, 206-207) Also on 8/24/06 the District developed a Chapter 15 Service Plan to which the parents agreed. (SD 10; N.T. 27-29, 92-95) The next two forms issued sought permission to conduct evaluations, but each proposed different tests and procedures. (P 6, 8) Only the 10/2/06 form listed specific types of assessment tools and procedures. (P 8)

The record of the hearing reveals that even though the Student enrolled in the District in August 2006, the District did not receive Student's prior and complete school records until October 2006. The records were forwarded from the Connewago Valley School District/ New Oxford Elementary School where Parents had enrolled him in July 2006. The family then moved to the Upper Dauphin Area School District before the start of the 2006-2007 school year. (N.T. 26, 175) Records forwarded from Connewago Valley School District included an evaluation report dated 6/25/03 and an IEP signed by the parent on 4/6/06. Parent signed the IEP indicating disapproval. These documents were developed by the South Western School District, the district where Student had attended for first grade during the 2005-2006 school year. (N.T. 27, 35; SD 5)

The District also obtained a decision from a due process hearing held on behalf of the Student during the 2005-2006 school year. (SD 6) Whether or not the January 2006 IEP was appropriate was one of several issues heard in the due process hearing brought by the South Western District. The hearing officer at that time determined that the IEP was not appropriate, and that the South Western District needed to complete a comprehensive evaluation to determine Student's "levels of functioning in a host of areas." (SD6, N.T. 177-178, 185) A second issue was whether or not the South Western District could complete a multidisciplinary evaluation of Student. The hearing officer determined that the South Western District could complete the evaluation of Student, including a psycho-educational assessment completed by a school psychologist, a speech therapy assessment, a mobility assessment, an assistive technology assessment, a PT assessment, and an OT assessment. (SD 6, N.T. 208) Parents did not make Student available for South Western to complete the evaluations ordered by the hearing officer in June 2006 decision because they had "no intentions of returning there." (SD 6; N.T. 222)

The District responded to the Parents' 10/11/06 request for mediation by filing with ODR for a mediation session, which was scheduled but not held because Parents could not attend. Parents testified that they had wanted to re-schedule the mediation session, but the District opted to move forward with filing for a due process hearing based on their opinion that the Parents had not provided adequate notice to postpone the session. (S 1; P 1; N.T. 103-104, 216-217) The record of the hearing does not provide any indication for why the District waited until Parents requested mediation following receipt of the third request for consent.

On 11/13/06 the District filed a Due Process Complaint Notice with ODR. (SD 1) The hearing was held in two sessions. The first session was held on 12/14/06, the date set by

this Hearing Officer on 11/22/06 upon assignment by ODR to the case. This date was maintained because both parties could not agree to another date more convenient to the Parents. Because parents opted to represent themselves, and because Father was presenting their case and unavailable on 12/14/06, a second session was held on January 5, 2007. The January 5 session convened at 4:00 p.m. to accommodate Father's work schedule. (HO 1, 2, 3, 4)

This Hearing Officer recognizes that a parent has a fundamental right to be involved in their child's education, and to provide or refuse consent in certain circumstances. Further, this Hearing Officer is sympathetic to Parent's concerns regarding past experiences. However, in balancing the Parent's exercise of their rights in regards to the child's education, with the District's assertion of their right to conduct the evaluation of this Student, the hearing officer must look to the events leading up to the Parent's refusal to provide consent in relation to the legal parameters.

The District has attempted to serve Student's needs in the regular second grade. They developed a Chapter 15 Service agreement Plan on 8/24/06 to address his physical needs. Components of the 8/24/06 Service Agreement include: (1) help with toileting (i.e., transfer); (2) lunch assistance (i.e., help with tray); (3) recess assistance (i.e., transitioning to equipment); (4) transfer assistance to carpet for Guided reading time; (5) assisted PE as deemed necessary; (6) aide and teacher will not intervene unless they would otherwise intervene for any non-disabled child; (7) teacher(s) and/or aide(s) will intervene if safety is a concern. (SD 10)

Student's second grade teacher provided credible testimony about his difficulties with academics. (N.T.65-79; SD 8) The School Psychologist/Director of Special Education District testified that school personnel observed that Student required more assistance than that provided through the Chapter 15 Service Agreement. He stated that it was apparent Student had more than just a neuromuscular disability, and that "his cerebral palsy was seemingly affecting his central nervous system, which was subsequently affecting his intellectual abilities. . .his visual abilities". (N.T. 95-96, 104, 113)

Parents' rationale for hesitating to provide permission to evaluate in this case includes their experiences with previous districts and previous evaluators and practitioners who did not hold high expectations for Student. (N.T. 212-215) This rationale does not provide a compelling reason for this Hearing Officer to determine that the District does not have the right to conduct an evaluation of this Student. Parents do acknowledge the need for an evaluation, but are willing to give permission only if they can observe the evaluation and exercise visitation rights in order to be partners in the process. (P 6; N.T. 217-218, 223-224, 229-230) Parents further testified that they had Student evaluated privately before the start of the 2006-2007 school year, but have not provided the report or results to the District. (N.T. 226-227)

In due process hearings under the IDEA, a hearing officer has the authority to grant a public education agency's request to proceed with the evaluation and assessment of a student with a suspected learning disability, even where the parent refuses to consent to

such a process. Dallas School Dist., 27 IDELR 663 (Ore. 1998); South Texas Indep.Sch. Dist., 30 IDELR 73 (Tex. 1998). Putnam County School System, 32 IDELR 47 (Ga. 1999). The purpose of the evaluation is to determine whether a child has a disability, and the nature and extent of the special education and related services that the child needs. §300.500(2)

In Student's case, an evaluation is necessary to determine his disabilities so that the District can provide an appropriate education program. Currently, no clear statement of Student's disabilities or need for special education and related services is available to the District. The record of this hearing provides documentation of the 6/25/03 Early Intervention IEP and the 6/21/06 due process hearing, each of which articulate different perspectives relative to Student's disabilities. (SD 5, 6) The complaint notice filed by the District on 11/13/06 with ODR adds yet another perspective. (SD 1) Results of an evaluation arranged privately by the Parents in the summer of 2006 have not been made available to the District. (N.T. 226-227)

After careful consideration of the evidence and testimony in light of regulatory requirements, I conclude that the District does have the right to conduct the evaluation of this Student.

ORDER

Parent's refusal to sign consent for evaluation is overridden. The Upper Dauphin Area School District may proceed as soon as possible to schedule and conduct a comprehensive evaluation.

Lynda A. Cook, Ed. D.
Hearing Officer

DECISION DATE: January 17, 2007