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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: N.G.

Date of Birth: [redacted]

Date of Hearing:
June 3, 2010

CLOSED HEARING

ODR Case # 00986-0910KE

Parties to the Hearing:

Mother

Father

Dr. Ron VanLangeveld
Wallingford-Swarthmore School District
101 Plush Mill Road
Wallingford, PA 19086

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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Pro Se

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June 23, 2010

July 8, 2010

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an early teen-aged student residing in the Wallingford-Swarthmore School District (“District”). The parties dispute whether the student is a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)¹. The District’s evaluation found that the student was not eligible under IDEIA. The student’s mother filed a complaint requesting, among other things, an independent education evaluation (“IEE”) at public expense. The student’s father participated in the proceedings in his own interest, supporting the claims brought by mother. Subsequent to the filing of the complaint, the student’s mother withdrew all claims except the claim for an IEE. The District defended the appropriateness of its evaluation and denied that the student is entitled to an IEE at public expense. For the reasons set forth below, the student’s parents will prevail, and the District will be ordered to provide an IEE at public expense.

ISSUE

Must the District fund an IEE?

FINDINGS OF FACT

¹ It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

1. The student has been diagnosed with asthma, sleeping problems, and bulimia. (Parent Exhibit ["P"]-9 at pages 8-10, P-11 at page 2, P-13 at pages 1 and 4; School District Exhibit ["S"]-4 at page 1; Notes of Testimony ["NT"] at 37, 134-135).
2. The student has also been diagnosed with, or had indications of, trichotillomania (plucking out body hair), obsessive-compulsive disorder, anxiety issues, and poor impulse control, but these diagnoses/indications were not shared with the District during its evaluation process. (P-9 at page 4, P-13 at page 1; S-4; NT at 93-100, 135).
3. The student's asthma leads to poor sleep/insomnia which, in turn, makes the student tired the next day. As a result, the student exhibits excessive tardiness and absences. (P-11 at page 2; P-13 at pages 1 and 4; S-5; NT at 40-41, 134-135).
4. The student has scored at the advanced level in reading and mathematics on the Pennsylvania System of School Assessment exams. Student's IQ, as tested in the spring of 2010, is 119, in the high average range. (P-8 at page 5; S-2).
5. The student did not exhibit any problems with school attendance through the 2007-2008 school year, the student's 6th grade year. (S-5 at page 1).

6. In the fall and winter of the 2008-2009 school year, the student's 7th grade year, the student's attendance continued to be unremarkable. (S-5 at page 2).
7. Beginning in February 2009, however, the student began to exhibit a pattern of tardiness and absences that continued through the end of the school year. (S-5 at page 2).
8. In February 2009, the student was tardy twice and absent twice. In March 2009, the student was tardy three times and absent six times. In April 2009, the student was tardy three times and absent once. In May 2009, the student was tardy three times and absent four times. In June 2009, the student was tardy ten times and absent once. This pattern of tardiness and absence was elevated from prior attendance patterns and had a negative effect on the student's academic performance. (S-1 at page 2, S-5 at pages 1-2).
9. Over March and April 2009, the student was diagnosed by a pediatrician with asthma and consequent sleep problems. (P-9 at pages 3 and 4; NT at 40-41).
10. In April 2009, the student's mother communicated with the District about the student's attendance issues. The District instituted a reward system to improve the student's attendance. The District also recommended that the student receive private, family-funded counseling. (P-10 at page 1; NT at pages 40-43, 140-141).

11. In May and June 2009, the student began to receive detention for tardiness. (S-5 at page 6).
12. Over the summer of 2009, the student treated with a private counselor who continued to treat the student for a host of issues, including problems with sleeping. The treatment indicated that there were not any in-school stressors but that there were stressors in the student's home environment. The continuing theme was that a lack of sleep led to attendance issues. (P-10 at pages 1-11).
13. The student began the 8th grade year without attendance issue, but by the end of September 2009, the pattern of continuing tardiness and absences returned. (S-5 at pages 3-4; NT at 45).
14. In October 2009, the District was communicating with the student's private counselor. The student's mother provided a prescriptive note from the student's pediatrician that the student required an adjustment in the student's daily schedule. (P-9 at page 8, P-10 at pages 14-16).
15. By the end of the first quarter of the 2009-2010 school year, the student had a D- in science and social studies and a F in math and language arts (playwriting). (S-1 at page 3).
16. In November 2009, the District began communicating with parent about potential discipline against the student for excessive absences. (P-1, P-17 at pages 2, 5-7, 9; NT at 54-59).

17. On December 1, 2009, the District issued a proposed service agreement to provide accommodations to the student.² The service agreement was dated November 1, 2009 but was issued through the principal of the student's building on December 1, 2009 (P-2).
18. The student's schedule was adjusted to substitute a learning support period for Spanish. Other recommendations for academic classes were included in the service agreement. (P-2; NT at 48, 51, 106-107, 128).
19. The service agreement was not sent to the student's mother until January 22, 2010 and was returned as approved on February 22, 2010. (P-2, P-17 at page 17).
20. Meanwhile, on January 15, 2010, the District issued a permission to evaluate the student as a student with a disability under IDEIA. The permission to evaluate was signed by parent on January 27, 2010 but was not received by the District until February 2, 2010. (S-3, S-4; NT at page 93, 115-116).
21. By the end of the second quarter of the 2009-2010 school year, the student had a C in math, a D- in social studies and a F in science and language arts (playwriting). (S-1 at page 3).
22. Through February, March and April of 2010, the parent continued to communicate with the District and meet with District

² The service agreement was provided under the terms of 22 PA Code §§15.1-15.11 ("Chapter 15"), Pennsylvania's implementing regulations for Section 504 of the federal Rehabilitation Act of 1973 ("Section 504"). See 22 PA Code §15.1 and 34 C.F.R. §§104.1-104.10, 104.31-104.39.

personnel about the student's attendance and academic issues. (P-17 at pages 18-24; NT at 70-73, 76-78).

23. Because of the student's absences, the student could not be assessed as quickly as the District would have liked. (S-5 at page 4; NT at 115).
24. On April 21, 2010, the student's mother filed the due process complaint, 78 days after the District received permission to evaluate the student. (P-6; S-4; NT at 115-116).
25. The District's evaluation was issued on May 11, 2010, 98 days after the District received permission to evaluate. (P-8).
26. The evaluation concluded that the student was not eligible for special education. The report is internally contradictory. While noting that the student does not qualify under the category of emotional disturbance, the report notes that "(the student's) profile fits much more appropriately under Other Health Impairment including (the student's) asthma, sleep disorder, anxiety as well as (the student's) more recent issues with eating" and that "(the student) does present with a need for specially designed instruction and most critically would benefit from accommodations to (the student's) academic program...." Yet the report notes that out-of-school behaviors and medical diagnoses are at the root of the student's attendance issues and that attendance issues are the

sole cause of the student's academic difficulties. (P-8 at pages 13-14).

27. The evaluation includes data gathered from the student's mother. The report did not include any rating or assessment of the student's perceptions of emotions, behaviors or attendance. The evaluation report contains data from an observation by the student's school counselor but does not include any data, reports, ratings, or observations from the student's teachers. (P-8).

28. The District school psychologist testified that expansive teacher recommendations were collected but that data was not reflected in the evaluation report in evidence at the hearing. (P-8; NT at 169-174).

DISCUSSION AND CONCLUSIONS OF LAW

When parents disagree with the conclusions of a school district evaluation, parents may request an IEE at public expense.³ Normally, this is after a school district has issued its evaluation report, and the school district may acquiesce in a parent's request for an IEE at public expense or file for due process to defend the appropriateness of the school district's evaluation.⁴ In this case, however, the District's evaluation report was untimely, and the parent filed for due process requesting an IEE at public expense before the District's evaluation

³ 34 C.F.R. §300.502(b).

⁴ 34 C.F.R. §300.502(b)(2).

report was issued. (FF 20, 24). Still, the District is defending its evaluation and, as such, the issue is ripe for determination through these proceedings.

In this case, the District's evaluation is inappropriate. The evaluation report was untimely⁵; this in and of itself is not necessarily prejudicial, but it does have the appearance of being an evaluation that lingered and was put on track largely in response to the filing of a due process complaint. (FF 23, 24, 25).

More importantly, though the evaluation was comprehensive, on the critical issue of how the student's emotional and behavioral health outside of school potentially affects the student's learning, the District's evaluation is prejudicially deficient. (FF 27, 28). This is especially problematic given the long history of the student's difficulties with attendance and its effect on the student's academic performance. (FF 1, 3, 7, 8 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22).

Furthermore, the conclusions of the evaluation report itself are seemingly contradictory. At points, the report seems to conclude that the student has a qualifying disability and requires special education; at other points, though, the report seems to conclude that the student's problems are rooted outside of the school environment, are medical in nature, and do not require specially designed instruction to be addressed. (FF 26).

⁵ 22 PA Code §14.123(b).

Obviously, the issue of whether the student should be a student with a disability who requires specially designed instruction⁶ is not at issue in this case. This decision does not dispose of those questions. But the District's evaluation prejudicially fails in certain critical areas that render it inappropriate. Therefore, the student's parents are entitled to an IEE at public expense.

CONCLUSION

The District must provide an IEE at public expense.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, pursuant to the pertinent provisions of 34 C.F.R. §300.502(b), the District shall provide an independent education evaluation at public expense.

Any claim by a party not addressed in this decision and order is dismissed.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

July 8, 2010

⁶ 34 C.F.R. §300.8(a).