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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: TC

Date of Birth: xx/xx/xx

Dates of Hearing:
3/18/08, 4/17/08
CLOSED HEARING
ODR #8450/07-08 AS

Parties to the Hearing:

Conrad Weiser School District
200 Lincoln Road
Wernersville, PA 19565

Representative:

Pro Se

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Date Record Closed:

April 17, 2008

Date of Decision:

May 2, 2008

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a xx year old resident of the Conrad Weiser Area School District (District). (NT 12-13.) The Student is identified with Specific Learning Disability. (NT 13-14.) During the 2004-2005 school year, he was diagnosed with ADHD. (NT 14-15; P-1.) Parents have requested an independent educational evaluation at public expense. They contend that the District's latest evaluation was inadequate because it did not adequately address a suspected disability of autism. (NT 20-21; S-3.) The District contends that its evaluation was conducted according to the standards of the IDEA, addressed all of the Student's suspected disabilities, and therefore was appropriate. (NT 19.)

On November 20, 2007, the District issued a reevaluation report for the Student. (NT 19; S-1.) On January 7, 2008, the Parents requested an independent educational evaluation at public expense. (NT 19; S-3.) On January 17, 2008, the District requested a due process hearing as required by the IDEA, 34 C.F.R. §300.502(b)(2). (NT 19.) The hearing was held in two sessions, on March 18, 2008 and April 17, 2008. The record closed on April 17 with receipt of oral summations.

ISSUES

1. Was the District's reevaluation of the Student, as reported on November 20, 2007, appropriate?
2. Should the hearing officer order an independent educational evaluation at public expense?

FINDINGS OF FACT

1. The District's initial evaluation in February 2005 reported that the Student had been diagnosed with ADHD and that medications were being administered to him. (P-1.)
2. In the years before the re-evaluation of November 2007, from the Student's kindergarten through his second grade years, the Student exhibited behaviors consistent with ADHD and behaviors and academic needs that correlated with his identification with a specific learning disability in language arts. (P-1.)
3. Behavioral observations and reports from kindergarten through second grade indicated needs in the areas of behavior and social skills development. It

was reported that the Student seemed to be withdrawn and to have few friends at school, exhibited possible self stimulatory behavior such as making noises, talking to himself and spinning on the floor, and engaged in inappropriate social interactions or inappropriate comments in group discussions. These observations and reports also included behaviors that were not consistent with a disability on the autistic continuum, such as good rapport with peers in certain settings. (P-1.)

4. The District's reevaluation report of November 2007 found a continuing discrepancy between the Student's ability and achievement and continued his identification as a child with a specific learning disability. (S-1.)
5. The District's reevaluation report of November 2007 utilized a variety of tools and strategies to assess the Student, and did not rely upon any single measure or assessment. (NT 25-37; S-1.)
6. The District's reevaluation report of November 2007 addressed functional, developmental and academic spheres of functioning, obtaining data in each sphere. (NT 28-32; S-1.)
7. The District's reevaluation report of November 2007 included review of grades and other curriculum based assessments, and the state PSSA scores for 2007. (NT 24-25, 106-115; S-1.)
8. The District's reevaluation report of November 2007 considered observations of the Student's behavior both within and outside of the classroom. (NT 26-27, 46-48; S-1.)
9. The District's reevaluation report of November 2007 was based upon a review of information provided by the Parents, including the Student's ADHD diagnosis and Parent input forms which they completed, reporting their observations of the Student's behavior. (NT 24-25, 26; S-1.)
10. The District's reevaluation report of November 2007 relied upon technically sound instruments, utilized for appropriate purposes, and the District's school psychologist was trained and knowledgeable in their use. (NT 22-24, 102-105.)
11. As part of the District's reevaluation report of November 2007, the IEP team determined that more data was needed, including data on social and emotional functioning and a functional behavioral assessment. (NT 25-39; S-1.)
12. As a result of this determination, the District also elicited data on behaviors associated with autism spectrum disorders, by administering an inventory known as the Social Responsiveness Scale (SRS). (NT 36; S-1.)

13. The SRS inventory was completed by the Student's Father and by his learning support teacher. (NT 36; S-1.)
14. The Student's Father reported behaviors that severely interfered with everyday social interactions. (NT 36; S-1.)
15. The Student's learning support teacher reported behaviors that only mildly to moderately interfered with everyday social interactions. (NT 36; S-1.)
16. The District's school psychologist concluded that the SRS results contradicted both her own and others' observations, both subjectively reported and reported in structured form in the BASC behavior inventory. (NT 37, 40, 77.)
17. The District's reevaluation report of November 2007 noted that the Student was exhibiting behaviors associated with autistic spectrum disorders, but that these behaviors were not interfering with his functioning in school sufficient to justify identification as autistic. (NT 40-42, 79; S-1.)
18. The psychologist concluded that the Student exhibited a number of behaviors that are inconsistent with the definition of autism, which is a disability of communication and social interaction characterized by engaging in repetitive activities or movements, unusual responses to sensory input, narrowed interest in activities, and resistance to changes in routine, none of which the District staff reported observing. On the contrary, the staff reported that the Student is social and has friends, and the psychologist observed the Student to be able to engage in conversation and communicate his thoughts clearly. (NT 41- 42, 62, 84-88, 116-117, 122-124, 156.)
19. The District's psychologist concluded that many of the functioning deficits reported in the Student's history were due to either ADHD or Specific Learning Disability, and to depressive tendencies, and not due to autism. (NT 62-76, 95.)
20. The District's reevaluation report of November 2007 recommended placement, specially designed instruction and related services to address the Student's needs. (NT 43-45; S-1.)
21. The District's school psychologist recommended against further testing for autism as unnecessary. (NT 44; S-1.)

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 “equipoise” – 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.

EVALUATION

The District in this matter has requested due process in accordance with its legal obligation under the regulations implementing the IDEA amendments of 2004. 34 C.F.R. §300.502. This regulation requires that when the parents in this matter requested an independent educational evaluation at public expense and the District refused, the District was obligated to request due process in order to have a hearing officer determine whether or not the District’s most recent evaluation (here, a re-evaluation) was “appropriate.” 34 C.F.R. §300.502(b)(2)(i). Thus, the hearing officer must determine whether or not the District’s re-evaluation as reported in November 2007 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.

It first must be noted that the evaluation (or re-evaluation) required by 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

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. 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).

for due process is set forth in 20 U.S.C. §1415(b)(1). This section 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)(2)(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). Thus, the District’s obligation is limited to determining the Student’s functioning in school, and how to address deficits in school functioning.

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 [.]

34 C.F.R. §300.15. 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. It is clear that the evaluation is required to address how the child functions for educational purposes, rather than to provide a complete depiction of the child’s medical conditions. 20 U.S.C. §1414(d)(1)(A)(i). The Ninth Circuit Court of Appeals reached a similar conclusion in Park v. Anaheim Union High School District, 464 F.3d 1025 (9 Cir. 2006).

The law requires that evaluations be based upon specified procedures, and 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 procedures for re-evaluations are the same as those for initial evaluations. 34 C.F.R. §300.303.

In conducting an evaluation, a public educational agency must “assure that “ the child “is assessed in all areas of suspected disability... .” 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4). The agency must utilize a variety of tools and strategies to gather relevant information, 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b)(1). These strategies must gather relevant “functional, developmental, and academic” information. 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b)(1). The agency must also 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).

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 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). 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).

ADEQUACY OF THE EVALUATION OF NOVEMBER 2007

The District’s evaluation met all of the criteria set forth in the law for an appropriate evaluation. The District followed all of the procedures that the law specifies. The evaluation utilized a variety of instruments of different kinds, several of which are norm-referenced and valid for the purposes for which they were used. (FF 5, 10.) The District inquired into the Student’s cognitive, academic and behavioral functioning, and also screened him for depression. (FF 6.) Its approach included a comprehensive review of records, including review of the previous evaluation report showing a diagnosis of ADHD, and utilization of observation reports from teachers and the Parents, as well as personal observations by the school psychologist during her testing. (FF 5-9.) Under these circumstances, the District has met its burden to show that its evaluation was appropriate. At the very least, this re-evaluation report was adequate to provide a basis for a comprehensive IEP that would address all of the Student’s educational needs. That is all that the law requires.

The Parents argued that the school psychologist should have “ruled out” an autistic spectrum disorder, and in support of that argument, they pointed out a number of behaviors that the Student had demonstrated and that are consistent with such a disorder. However, their critique of the evaluation is misplaced. It is based upon a faulty premise, that the District is obligated to diagnose the Student medically before it can formulate an IEP. As the discussion above shows, that is not the case; rather, the District is required to address all of the Student’s educational needs. If necessary to address these needs, medical diagnosis might be required in a given evaluation, but this is not the case in the present matter.

The Parents list a number of behaviors that they see at home indicating to them that the Student suffers from autistic spectrum disorder. They note supportive language in the DSM IV-TR. They understandably want to “get to the bottom” of the diagnostic mystery presented by their son’s behavior, and any parent will understand the wisdom of their desire to do so. However, the law does not place responsibility for medical diagnoses and treatment upon the District. Its role is limited to addressing a child’s educational needs, as set forth above.

Thus, the issue is not whether it is appropriate to have the Student diagnosed or tested further; the only issue is whether or not the District is responsible legally for doing so. In this case, the hearing officer finds that the District is not responsible legally for doing so.

The District’s school psychologist made it clear that she carefully considered the hypothesis that the Student was exhibiting behaviors due to autism, and concluded that this was not the case. (FF 12-19.) In doing so, the psychologist was guided by the legal definition of autism, not by its medical definition. The IDEA defines an eligible child as one who has, among other things, autism, and who needs special education and related services by reason of this condition. 20 U.S.C. §1401(3). The law, in the regulations implementing the IDEA, defines autism as follows:

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before the age of three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

34 C.F.R. §300.7(c)(1)(i) (emphasis supplied). The District’s psychologist analyzed the data according to this definition, and found that there was no evidence of an effect upon verbal and nonverbal communication, no evidence of repetitive activities of a significant nature, no evidence of resistance to change and no evidence of unusual response - in the sense of hypersensitivity - to sensory input. (FF 19.) Thus, the District’s evaluation carefully considered whether the Student needed to be classified as autistic. This is what the District was obligated to do. However, in a reasonable exercise of professional judgment, the school psychologist concluded that the Student did not need to be so classified for educational purposes. (FF 18-19.) Such a judgment was within the psychologist’s discretion, and the record firmly supports this professional judgment.

Nevertheless, the evaluation report did give full credence to the evidence that autistic-like social problems were adversely affecting the Student’s educational performance. (FF 17, 20.) The report identified that as an educational need, and made recommendations for intervention by way of special education and related services. (FF 20.) Thus, the District did not have to rule out autism as a diagnosis, because that was

not necessary to enable it to address any educational needs created by autistic-like behaviors. In fact, the District in effect assumed that the Student has autism, by accepting autistic-like behaviors as an educational need. Thus, there is no reason to require the District to go further and obtain an actual medical diagnosis or ruling out of the diagnosis at public expense.

The Parents argue that the District's school psychologist erred by failing to do further testing to explore the hypothesis that the Student was exhibiting autism. The hearing officer disagrees. The psychologist administered an instrument which is normed and valid for the purpose for which she used it: to screen for autistic characteristics. (FF 12.) In her testimony, the psychologist showed that she is knowledgeable and competent in the use of various instruments, and the hearing officer finds that the psychologist was familiar enough with the available instruments that she was able to select the instrument she used due to its comprehensiveness, which in her professional judgment was what was needed. (FF 12, 16, 18, 19.)

The psychologist determined that the data from that instrument were conflicting. (FF 13-16, 18.) The Student's Father reported autistic-like behaviors that interfered with the Student's daily social interaction severely, while the teacher reported only mild to moderate interference. (FF 13-16.) Based upon her own trained eye in clinical observations of the Student that contradicted the hypothesis of an autistic spectrum disorder, and based upon contradictory observations from other experienced professionals, the psychologist concluded that the behavior was best explained by ADHD and Specific Learning Disability. (FF 16, 18, 19.)

The psychologist was within her professional competence and discretion to conclude that the hypothesis of autism was not substantially supported by all the evidence before her. Moreover, the hypothesis of autism did not point to any educational needs that the District was not already addressing through the legal identification of Specific Learning Disability. Based upon demeanor and the way she answered numerous questions, the hearing officer finds that the psychologist was patently credible in her depiction of her analytical process, and that her clinical judgment on the question of autism is to be given substantial weight.

While the law does not require the District to fund an independent evaluation in this matter, it does require the District to take into consideration any independent evaluation or diagnosis that the Parents obtain at their own expense. 34 C.F.R. §300.502(c)(1). Thus, the District will continue to be receptive to any information that the Parents provide to it concerning the Student's diagnosis. Meanwhile, the District will continue to address the behaviors of concern, albeit under a different disability category. This is the extent of its obligation in the present matter; the evidence demonstrates by a clear preponderance that the District is not obligated to fund further diagnostic testing, because its re-evaluation was appropriate.

ORDER

1. The District's re-evaluation of the Student, as reported on November 20, 2007, 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

May 2, 2008