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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING  
ODR File Number 5896/05-06 LS

Name of Child: E. O.

Date of Birth: xx/xx/xx

Date of Hearing:  
October 26, 2005

CLOSED HEARING

Parties to the Hearing:

Parent

School District of Philadelphia 440  
N. Broad Street 3<sup>d</sup> Floor  
Philadelphia, Pennsylvania 19130

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

Franca Palumbo, Esquire  
1831 Chestnut Street Suite 300  
Philadelphia, Pennsylvania 19103

James Tone, Esquire  
Fox, Rothschild, O'Brien & Frankel  
1250 S. Broad Street Lansdale,  
Pennsylvania 19446

October 31, 2005

November 10, 2005

Linda M. Valentini, Psy.D

### Background

Student is an xx-year-old student who has resided in the School District of Philadelphia (hereinafter District) since the start of the 2004-2005 school year. Since he came to Philadelphia Student has been receiving regular education. Previously he resided in [another state] and was enrolled in [another] School District as a special education student.

The facts were in dispute as to when Student's mother (hereinafter Parent) informed the District that Student had been in special education in [the other state]. In April 2005, the Parent through counsel requested an independent educational evaluation, and in response the District performed its own evaluation, finding Student ineligible for special education services. The Parent asked for this hearing to challenge the District's evaluation and to obtain an independent educational evaluation (hereinafter IEE) at public expense.

The hearing was held in the afternoon and went into the evening. This decision is rendered on the 15<sup>th</sup> day after the hearing, with October 27<sup>th</sup> starting as Day One.

### Issue

Was the District's September 2005 evaluation of Student appropriate?

### Findings of Fact

1. Student is an xx-year-old student residing in the District.
2. Student received Early Intervention services in a specialized nursery school program. (NT 174)
3. Student had been receiving special education in [another state] prior to moving to Philadelphia.' (P-4)
4. When she enrolled Student in the District the Parent did not inform the District that Student had been receiving special education. (S-4, S-5)

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<sup>1</sup>Student and his [sibling, name redacted] lived with [a relative] at the beginning of the 2004-2005 school year while the Parent remained in [the other state]. The Parent moved to Philadelphia around the end of October 2005. (NT186, 212)

5. When she enrolled Student in the District the Parent checked "no" to the question of whether he had been receiving special education prior to coming to Philadelphia. (NT 125; S-4)
6. When she was preparing to have Student and his [sibling] enrolled in school the Parent prepared a notarized statement referencing records including birth certificates(s) health and immunization record(s) and report card(s) but did not reference an IEP or special education. (NT 130, 187-189; S-5)
7. Near the beginning of the school year the Parent went through the normal process required to have Student's [sibling, name redacted] placed in special education. (NT 131, 196-197)
8. At the time she was proceeding to have [the sibling] placed in special education, the Parent did not mention Student's having, or needing special education. (NT 131-132)
9. During the first seven months of the school year the Parent did not inquire as to Student's receiving or not receiving special education services. (NT 192)
10. After first meeting with her attorney the Parent expressed her belief that Student should be in special education to the District<sup>2</sup>. (NT 199-200)
11. The District was not aware until late March or early April 2005 that Student had had an IEP in [the other state]. (NT 142)
12. In April, through a letter from her attorney, the Parent requested that Student be evaluated by an independent evaluator and in response the District performed its own evaluation. (P-6)<sup>3</sup>
13. In mid-August the Parent, through her attorney, supplied the District with Student's [out of state] IEP. (P-6)
14. The District performed an evaluation on September 8 and 9, 2005 and produced an evaluation report (ER) dated September 21, 2005, in compliance with the regulatory timelines in effect at the time. (S-1)
15. At the time she evaluated Student the District psychologist was not informed by the District that he had been in special education in [the other state] and was not given previous evaluation reports or the last IEP from [the other state]. (NT 112-113)

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<sup>2</sup> The Parent's testimony contradicts Ms. Palumbo's account of the situation as being that the Parent "repeatedly asked" that Student be placed in a special education classroom, as contained in Ms. Palumbo's letter of April 25, 2005. (See NT 192, 199-200 in contrast to P-6)

This exhibit was used only to illustrate how the evaluation process was initiated. It is not cited to support any of the other assertions contained therein regarding when the Parent gave Student's IEP to the District and when she informed the District that Student had been a special education student.

16. At the time she evaluated Student the District psychologist was not informed by the Parent that he had been in special education in [the other state]. (NT 111)
17. The District's psychologist administered the most recent versions of appropriate cognitive and achievement tests, a test of visual-motor integration, a behavior rating scale and observed Student as well as soliciting input from a teacher from the previous year and from the parent and reviewing Student's report card from the previous year. (S-1)
18. The [other state's] evaluations were performed in December 2002, nearly three years previously. The last test of cognitive ability was administered in September 2000 when Student was xx years old. (S-2, S-3)
19. Although Student's IEP from [the other state], dated 6-18-04 provides for speech/language therapy, there are no evaluation data to support the need for this service and the IEP does not contain goals or objectives in the area of speech/language. (P-4)
20. The Parent is not certain why Student received speech/language services and cannot identify any needs related to that area at this time. (NT 208-209, 176-177)
21. Although the June 2004 [other state's] IEP team endorsed the statement, "Behavior does not seriously interfere with instruction and can be addressed by the general education teacher", and the only note under Social/Emotional Management Needs is, "Sometimes he needs attention and support", the IEP notes that Student received counseling as a related service. (P-4)
22. The ER performed in December 2002 notes only that Student had been in a fight, that his dog died, and that he had a tendency to "act out his aggressive impulses". Given a lack of supportive additional data, it appears that the conclusion regarding acting out aggressive impulses was reached on the basis of Figure Drawings and a Sentence Completion task. (S-2)
23. Since Student has been attending school in Philadelphia he has never had a formal disciplinary written report sent home and has not been suspended. He had one fight in school last year but it did not rise to the level of having to be reported immediately to the Parent, who found out about it at back-to-school night. (NT 181-184)
24. Student received all passing grades at the end of the 2004-2005 school year, in regular education, despite having just moved into the area, living apart from his mother for part of the year, and being out of school for six weeks with a broken leg. (S-1)

25. The District psychologist did not recommend to the team that Student be found eligible for special education services. (S-1)

### Discussion and Conclusions of Law

The Individuals with Disabilities Education Act was reauthorized in December 2004, and relevant sections became effective as of July 1, 2005. This matter spans the period covered by the end of the "old" IDEA (IDEA 1997) and the beginning of the reauthorized IDEA (IDEA 2004). Although IDEA 1997 did not specify a timeline for completion of an evaluation following written parental consent, the Commonwealth of Pennsylvania established a 60 school day time limit. Therefore the District was within the boundaries of Pennsylvania regulations when, after receiving an April 25, 2005 written notice from Parent's counsel that an independent educational evaluation (IEE) was being sought, it completed a written Evaluation Report (ER) on September 21, 2005. The evaluation itself was conducted on September 8 and September 9, 2005.

Although IDEA 2004 explicitly provides directives for a school district's obligation to provide appropriate special education services to a child enrolling from another state [Section 614(d)(2)(C)(II)], IDEA 1997, which was in effect when Student enrolled in the District, was silent in this regard. However, case law evolved and established the precedent that a receiving District had no obligation to implement the IEP of a student entering from another state but was required to evaluate the child in a timely manner. As this hearing officer finds that the District was not informed until March or April 2005 that Student was an eligible student when he was in [the other state], the District fulfilled its threshold obligation to Student through conducting a timely evaluation.

This inquiry then turns to the specific issue in this matter, that is, was the evaluation conducted by the District appropriate. If the District's evaluation was not appropriate, then Student is entitled to an IEE at public expense. It is therefore necessary to look at what constitutes an appropriate evaluation in light of the federal statute. IDEA 2004 provides, at Section 614(b) (2) that

In conducting the evaluation the local educational agency shall

*Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including*

*Whether the child is a child with a disability; and*

*The content of the child's individualized education program*

*Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and*

*Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.*

Further, IDEA 2004 at Section 614(b) (3) imposes additional requirements that local educational agencies ensure that

*Assessments and other evaluation materials used to assess a child*

*Are selected and administered so as not to be discriminatory on a racial or cultural basis;*

*Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or, administer;*

*Are used for purposes for which the assessments or measures are valid and reliable;*

*Are administered by trained and knowledgeable personnel; and Are administered in accordance with any instructions provided by the producer of such assessments;*

*The child is assessed in all areas of suspected disability;*

*Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.*

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEA 2004 provides, at Section 614(b) (4) that

*Upon completion of the administration of assessments and other evaluation measures,*

*The determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).*

A district has the burden of proving that its evaluation and IEP process are appropriate. Carlisle Area School District v. Scott P., 62 F.3d 520 (3d Cir. 1995); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993); Furhmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); East Penn School District v. Scott B., 213 F.3d 628, 29 IDELR 1058 (E.D. Pa. 1999).

IDEA 2004 at Section 615(b)(6) provides for the opportunity for any party to present a complaint - with respect to any matter relating to the identification, evaluation, or educational placement of the child, and for that complaint to be resolved at a due process

hearing. An appropriate remedy for a district's failure to provide an appropriate evaluation for a student is the awarding of an independent educational evaluation at the district's expense.

Although federal regulations to assist in implementing the IDEA 2004 have not yet been issued, guidance regarding the appropriate process when a parent disagrees with the appropriateness and/or the conclusions of a District's evaluation is found under the previous regulations for IDEA 1997 as follows:

*A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b) (1) (2) (3).*

In this case the parent raised issues with the District's evaluation that included timeliness, review of records, attention to speech/language needs and adequacy of emotional and academic testing.

As a threshold matter, this hearing officer considered the issue of whether and when the District had knowledge that Student had been an eligible student in [the other state]. The District and the Parent presented contradictory testimony, and this hearing officer found the witness for the District to be credible. The Parent stated that she told the District Student had been in special education in [the other state] and gave a copy of Student's IEP to District personnel. She explained her checking "no" to the question of whether or not he had received special education by saying that she was in a hurry. However the Parent had the organizational skill and thoroughness to carefully provide information relative to the children's temporary guardian in a notarized statement and the Parent presented as an intelligent and concerned individual. Her level of organization and her presentation belied her assertion that she was merely careless in filling out the enrollment form for her child. It appears more likely that the Parent decided to give her son a try at regular education in Philadelphia after a long stint of special education in [the other state]. Whatever the circumstances this hearing officer is convinced that the District knew nothing about Student's former special education status until March or April 2005. Accordingly, commencing the assessment following the Parent's attorney's written communication and obtaining parental consent, the District completed its evaluation in a timely manner in accord with the state statute in force.

After listening to testimony and reviewing the records in this case, this hearing officer finds for the District based on three factors: the persuasiveness of the District psychologist's testimony and the data contained in her report, Student's performance in regular education the previous year, and the lack of persuasiveness of the Parent and the Parent's psychologist witness.

In the instant matter, the District's psychologist testified credibly and persuasively at the due process hearing. Her report, introduced as a document, supported the hearing officer's impression of her credibility. The District's psychologist used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, did not rely on any single measure or assessment as the sole criterion for determining whether Student is a child with a disability, and used technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. Furthermore, the District's psychologist selected and administered tests so as not to be discriminatory on a racial or cultural basis, provided and administered the tests in the language and form most likely to yield accurate information on what Student knows and can do academically, developmentally and functionally, used the specific instruments for purposes for which the assessments or measures are valid and reliable and administered the tests in accordance with any instructions provided by the producer of such assessments. Furthermore, the District psychologist was trained and knowledgeable.

In addition to her battery of tests and interviews with the parent and the student's teacher, the psychologist had the advantage of reviewing Student's report card from the previous year, his first in the Philadelphia area, when he was not receiving special education. Keeping in mind that for the first part of the year he was separated from his mother and living with relatives in a new city, attending a new school, and was out of school for about six weeks with a broken leg, Student's performance in the previous grade was more than adequate. Her review of his report card assisted the District psychologist in making her recommendation to the team that Student not be found eligible for special education as neither the testing results nor his actual performance in the general education curriculum indicated that he required specially designed instruction. Furthermore the District's psychologist interviewed Student's teacher from the previous year and reviewed input forms. There were no indications from the interview or from her own observations that Student required speech/language therapy and a referral for a speech/language evaluation was not warranted. Additionally, there were no indications that Student presented behavioral challenges or emotional concerns in the school setting, and the decision to limit emotional assessment to the BASC Self-Report was appropriate.

The Parent raises concerns that the District psychologist did not review Student's complete school records from [the other state]. Although the District had the IEP as of August 12<sup>th</sup>, it was not clear when the ER's were received. This hearing officer was persuaded that the District's psychologist did not know that such material existed, and further, it is clear that when she was asked to evaluate Student the District psychologist was not informed that the child had been an eligible student in another state. Although under some circumstances this failure to communicate important information to the District psychologist may create fertile ground for a



fatal flaw in an evaluation, in this case the omission created an advantage for the child in that there was, so to speak, a clean slate, and there were no preconceived notions that he was or was not eligible.

When the Parent's counsel attempted to introduce into the record the entirety of Student's educational records from [the other state] the hearing officer denied the request as having not had access to these records at the time of the evaluation the District could be highly prejudiced if they were included in the hearing record. However, the hearing officer offered to adjourn the proceedings and order the District psychologist to review the [other state's] data and, if necessary, revise or supplement her report. This option was rejected by the Parent through her counsel. (NT 202-203) From the documents potentially available to the District psychologist, i.e. the [other state's] ER's and the last IEP, this hearing officer believes that had she reviewed these documents the District psychologist would have been compelled to come to the same conclusion as previously, that is, that Student is not currently eligible for special education services. These documents provided little information beyond the fact that Student had been eligible. The evaluations from [the other state] were nearly three years old, dated December 2002, and of poor quality and provided little if any assistance in understanding Student. The last test of cognitive ability on record was administered in September 2000 when Student was 8 years old. Although the IEP, standing alone, was somewhat better crafted than the evaluations, without the underpinning of a sound evaluation identifying specific needs it is impossible to determine whether or not the IEP had been appropriate or in fact, necessary.

As noted above, the Parent's account of how and when she informed the District of Student's former special education status was not credible. It was striking that at one point in her testimony the Parent seemed to confuse what may have been a mental health evaluation or even an SSI evaluation with the school district evaluations (NT 175). To be clear, this hearing officer did not find that the Parent carelessly filled out the enrollment forms, did not find that she gave a copy of the IEP to the District upon Student's enrollment and did not find that she, as asserted in the attorney's letter, repeatedly asked that Student be placed in special education and/or evaluated. Mother's testimony that she did not inquire as to Student's special education placement prior to his breaking his leg was credible.

The Parent presented a school psychologist's testimony in favor of an IEE and in criticism of the District's report. The individual's credentials are sound and include current employment in a school district, private practice (psychoeducational evaluations and consultations) and an adjunct faculty position at a local university. (NT 221; P-7) In what was notably a non-collegial approach, the Parent's witness raised numerous questions about the District report, mainly centering upon "what ifs" and "we just don't know's". This hearing officer received the impression that, rather than proceeding from a specific hypothesis, this witness was advocating a fishing expedition, recommending a number of additional tests just in case something should turn up. (NT 224, 226, 233, 239, 241) Alternatively, she

advocated a testing procedure nearly identical to that undertaken by the District's psychologist. (NT 230) This witness had neither met the child (NT 238-239) nor interviewed a teacher of his and formed her opinion and offered testimony based simply upon her reading of the District's report, the [other state's] ERs from December 2002 and the June 2004 [other state's] IEP. Her testimony was not persuasive and this hearing officer afforded it little weight.

In closing, this hearing officer affirms the finding of the District that Student is not currently eligible for special education services, and does find herself in agreement with the Parent's psychologist witness that it is difficult to discern the reasons that Student was in special education in [the other state] for so many years. (NT 224, 227, 235) It appears that although he was in need of some services in his early years, Student apparently eventually caught up with his peers. It is possible that he may simply have been tracked in special education year after year without benefit of a thorough reevaluation and/or a proactive push toward inclusion. In any event there is no evidence that Student currently has a disability or that he requires specially designed instruction.

## Order

It is hereby ordered that:

The School District's evaluation of Student completed in September 2005 was appropriate.

The District is required to take no further action.

November 10, 2005  
Date

***Linda M. Valentini***  
Linda M. Valentini, Psy.D.  
Hearing Officer