

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania

Special Education Hearing Officer

DECISION

DUE PROCESS HEARING

Name of Child: AE  
ODR #0352/09-10 LS

Date of Birth:  
XX/XX/XXXX

Date of Hearing:  
December 1, 2009

CLOSED HEARING

Parties to the Hearing:  
Mr. and Mrs.

Representative:  
Pro Se

Lower Merion School District  
301 E. Montgomery Avenue  
Ardmore, Pennsylvania 19003

Lawrence Dodds, Esquire  
Wisler Pearlstine  
484 Norristown Road, Suite 100  
Blue Bell, Pennsylvania 19422

Date Transcript Received:

December 7, 2009

Date of Decision:

December 10, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.  
Certified Hearing Official

## Background

The student is a 5-year-old child who resides in the Lower Merion School District (hereinafter District). Pursuant to an evaluation conducted by the District, The parents asked for an independent educational evaluation (IEE) at public expense because they believe the evaluation was inappropriate; specifically they do not agree with the results of the District's evaluation. The District denied the Parents' request, and filed for a due process hearing to defend its evaluation.

## Issues

Was the School District's evaluation of Student appropriate?

## Findings of Fact

1. On January 9, 2009 the Parents<sup>1</sup> gave consent for a multidisciplinary re-evaluation, specifically a Psychological evaluation to include assessment of cognitive and academic skills/rating scales for attention, adaptive behavior, social-emotional skills, developmental history, observations, permission to speak with past and/or present educators/medical providers/therapists/evaluators; a Physical Therapy evaluation to assess functional gross motor skills; an Occupational Therapy evaluation to assess fine motor skills; Review of records; a Speech/Language evaluation that may include but not be limited to formal receptive and expressive language testing, formal phonological awareness testing, formal pragmatic testing; and, Medical information relevant for educational programming to be gathered by District nursing staff. [NT 51-52, 111; S-6]
2. Pursuant to the Parents signing the Permission to Re-Evaluate the District evaluated Student and completed the Re-Evaluation Report (RR) on March 5, 2009. The Parents received the RR on or before March 9, 2009, within the regulatory timelines. [NT 55; S-9]
3. The District psychologist coordinated her findings with the other members of the multidisciplinary re-evaluation team, consulted with the team members, and produced the final written RR. [NT 53]

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<sup>1</sup> The mother and father filed jointly for this hearing and the plural Parents is used, although during the hearing the mother acted on behalf of both of them.

4. The RR document accurately reflects the assessment procedures and the data collected by the multidisciplinary team members, and accurately reflects the evaluator[s] interpretation of the assessment data. [NT 54]
5. The District psychologist is a school psychologist who is school certified in Pennsylvania. She is also a licensed psychologist in Pennsylvania. The District psychologist received her Bachelor's Degree in Psychology from the University of Pennsylvania, and her Master's and Doctoral degrees from the University of Pennsylvania's Graduate School of Education. She has over 20 years of experience, many of those years spent evaluating preschool and transitioning age children. [NT 48-50]
6. The District psychologist's education, training and experience qualify her to administer and interpret the assessment instruments she used with the Student. [NT 50-51]
7. The District psychologist reviewed the then-current IEP from the Intermediate Unit [IU], progress reports from the Lovaas program, and the IEP and Evaluation Report [ER] completed by the Montgomery County Intermediate Unit [MCIU]. [NT 55-57]
8. The District psychologist interviewed the mother for approximately 30 to 60 minutes to collect relevant information, and asked questions of the Student's PCA. [NT 59-60]
9. The District psychologist observed the Student at the typical day care classroom for about an hour. The Student was accompanied by the PCA during the observation. [NT 61-62]
10. The District psychologist spoke with Student's teacher at the typical day care classroom and asked the teacher to complete rating scales regarding areas of adaptive functioning and executive functioning. [NT 61]
11. The District psychologist conducted individual testing of the Student. The instruments used were the Wechsler Preschool and Primary Scale of Intelligence – Third Edition [WPPSI-III], the Kaufman Survey of Early Academic and Language Skills [K-SEALS]. The WPPSI-III and the K-SEALS are valid and reliable instruments, were used for the purposes for which they were designed, the District psychologist is trained in the use of these instruments, the District psychologist is experienced in the use of these instruments, the District psychologist followed the publisher's instructions for the use of these instruments adapted through the use of edible reinforcers, prompting and changing of the wording of some items. [NT 65-68, 77-80]
12. At the specific request of the Parents and pursuant to their signing another Permission to Re-Evaluate the District psychologist met with the Student a second

- time and administered the non-verbal subtests of the Differential Abilities Scale – Second Edition [DAS-II]. The DAS-II was utilized under the same conditions as the WPPSI-III and the K-SEALS, with the same adaptations of administration as described above.. [NT 70-72, 74-75]
13. An Addendum to the original RR was completed on May 8, 2009 to add the results of the DAS-II. [NT 72-73; S-14]
  14. In order to obtain information about the Student's adaptive functioning the District psychologist asked the Parents and the preschool teacher to complete a rating scale form, the Adaptive Behavior Assessment System – Second Edition [ABAS-II]. This instrument is recognized as valid and reliable, and was used for the purpose for which it was designed. [NT 80-81]
  15. Although the teacher's completed form was not received in time for the results to be included in the RR, the data generated was consistent with that generated through the Parents' form and did not change the nature of the recommendations. [NT 82-83]
  16. The District psychologist attempted to utilize the Brown ADD Scales to assess the Student's attention abilities. The instrument is a rating scale and was given to the Parents and the teacher. The Parents' form was not able to be scored because of missing items and/or question marks by the item, but information was able to be gleaned from the responses that were provided. [NT 85-87]
  17. The teacher's Brown ADD form was not received back in time to have the results included in the RR, but it was scorable and results were included in an addendum. [NT 87-88; S-18]
  18. In order to obtain an assessment of the Student's social and behavioral functioning, the District psychologist asked the Parents and the teacher to complete a rating scale, the Preschool and Kindergarten Behavior Scales-2 [PKBS-II]. [NT 89-90]
  19. The Parents' form was scorable and results used in the RR. As with the other teacher forms, the PKBS-II was not returned in a timely manner but results were included in an addendum. [NT 90]
  20. The Parents requested that an addendum to the RR be prepared regarding the teacher's ABAS-II results, the teacher's Brown ADD results, and the teacher's PKBS-II results, and the District psychologist complied through issuing a Second Addendum on June 9, 2009. [NT 82-83; S-18]
  21. The District psychologist incorporated information from the District's school nurse into the RR. [NT 93; S-9]

22. The District psychologist incorporated information from the occupational therapist into the RR. [NT 93-94; S-9]
23. The physical therapist is an independent contractor with the District. She holds a Bachelor's Degree in physical therapy from the University of Connecticut and a specialist certification in School-Based Therapy from Hahnemann University. She has worked in the PT field for over 30 years. [NT 32-33; HO-1],
24. Even though the Student did not qualify for PT services as part of the Early Intervention program, at the Parents' request the physical therapist participated in the Student's multidisciplinary evaluation. [NT 33-35]
25. The physical therapist reviewed the intake information provided by the Parents and the ER from the IU. She observed the Student for approximately an hour and fifteen minutes at the preschool program and interviewed the teacher and the PCA. The physical therapist did not administer standardized testing to the Student. [NT 33-36, 40-44; S-1, S-29]
26. The assessment procedures the physical therapist utilized are accepted methodology in her field. [NT 44-45]
27. The input from the physical therapist was included in the RR. [NT 45; S-9]
28. The special education teacher participating on the multidisciplinary evaluation team is the coordinator of the school-aged transition team. She holds a Bachelor's Degree in Special Education K-12 from Bloomsburg University and a Master's Degree in Elementary School Counseling from West Chester University. She is certified in Special Education K-12. She has 23 years of experience in her field, and prior to assuming her current position she taught in a variety of special education settings. [NT 106-107, 111]
29. The special education teacher observed the Student for an hour in the preschool classroom and gathered information from the teacher and the PCA. [NT 111, 113]
30. The special education teacher observed the Student at home for about an hour and a half during which time she observed the Student working with one of the Lovaas instructors. She also spoke with the Lovaas instructor and the mother. [NT 114-115]
31. The special education teacher spoke with the Student's itinerant teacher from the MCIU and the Lovaas supervisor for approximately 15 minutes and ten minutes respectively. [NT 115-116]
32. The information gathered and observations made by the special education teacher were incorporated into the RR [NT 112, 119; S-9]

33. The District's speech/language pathologist holds a Bachelor's Degree in Communication Disorders and a Master's Degree in Speech/Language Pathology from Bloomsburg University. She is school certified in speech and language disorders, maintains a professional license in Pennsylvania, and has her Certificate of Clinical Competence through the American Speech and Hearing Association. [NT 147]
34. The District's speech/language pathologist has over 25 years experience in her field and has worked in classrooms with autistic students from K through 21 years of age. [NT 147]
35. The speech/language pathologist conducted an interview with the mother that lasted about an hour and fifteen minutes and on a second occasion tested the Student for about an hour. [NT 150]
36. The speech/language pathologist utilized the Receptive-Expressive Emergent Language Test – Third Edition [REEL] which is a structured parent interview. Although the instrument is designed for children birth to three, it can be used to gather information about strengths and weaknesses without deriving a standard score. Since the Student was beyond the REEL's standardization range a standard score was not calculated. [NT 152-153]
37. It is standard practice in the field to utilize an instrument to gain information rather than to derive a score. [NT 156-157]
38. The speech/language pathologist also used the Comprehensive Assessment of Spoken Language [CASL]. [NT 154-155]
39. The CASL was used for the purpose for which it was designed, and administered in accordance with the publisher's instructions. It is not discriminatory of the Student's race or culture in any way. [NT 156-157]
40. The speech/language pathologist also gathered a formal language sample from the Student. [NT 157]
41. The instruments and procedures utilized by the District's speech/language pathologist are used with non-verbal students and students with very low verbal skills. [NT 157-158]
42. The findings of the District's speech/language pathologist were incorporated into the RR. [NT 148-149; S-9]
43. There were two multidisciplinary evaluation team meetings convened to discuss the RR. One was held in March 2009 and the other in June 2009. [NT 126]

44. Prior to the convening of the June meeting the Parents provided additional information for the District's consideration. The information was reviewed by the members of the multidisciplinary evaluation team with respect to educational programming. [NT 129-130, 134]
45. The multidisciplinary team members would agree that the Student likely has more cognitive potential than the Student is currently able to demonstrate on intelligence testing or across settings. [NT 136, 139]
46. The multidisciplinary team concluded upon the basis of its evaluation that the Student is eligible for special education services under the disability category of Autism. [NT 95]
47. The team did not base its conclusion upon a single instrument or test score, the instruments and procedures used to evaluate Student were not discriminatory based on the Student's race or culture. [NT 96]
48. The mother, who testified in this proceeding, holds a Bachelor's Degree in Psychology. [NT 168]
49. Although the Parents found the District's evaluation to be very comprehensive they believed that there were flaws and that the re-evaluation was not sufficient to determine a full picture of the Student. [NT 161-162]
50. The Parents note that the Student's performance is different at home and with therapists than demonstrated in the re-evaluation, that the Student was ill in January and February 2009, and that because of being ill the Student regressed. [NT 152, 166, 187-188]
51. The Parents also note that because of an insurance issue the Student was not receiving private occupational therapy and private speech therapy for about a seven week period. [NT 163, 166; S-30]
52. During the seven-week lapse in private services the Student continued to receive occupational therapy and speech therapy through the IU, and continued with ABA. [NT 185-186]
53. The Parents believe that the Student is much smarter than Student is able to express or demonstrate, and note that Student learns well and is excited about learning. [NT 168-169, 190]
54. The Student's developmental pediatrician noted "enormous progress" from October 2008 through May 2009. [NT 170-171, 187-188; S-30]
55. The Student's behavior specialist notes that over the year Student mastered over 50% of the goals, has made progress in language sometimes requires prompting,

- displays great progress in many developmental areas, displays signs of early literacy, displays emotions and is working on labeling feelings. [NT 176; P-1<sup>2</sup>]
56. The Parents disagreed with the District's evaluation, particularly the findings around cognitive functioning and asked that the District provide an independent neuropsychological evaluation at public expense. [NT 97, 183]
57. The multidisciplinary team had no concerns and/or saw no indications that the Student suffered an orthopedic impairment or a traumatic brain injury. [NT 97]
58. The District denied the Parents' request for an IEE at public expense and issued a Notice of Recommended Educational Placement/Prior Written Notice so indicating. [NT 145]

#### Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). The District requested this hearing to defend its evaluation and was therefore assigned both the burden of persuasion and the burden of production (presenting its evidence first) in the hearing. Application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case as the District clearly more than met its burden of proof.

#### Legal Basis -- Evaluations

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 information provided by the parent, that may assist in determining--*

*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*

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<sup>2</sup> District participants in the June 2009 meeting do not believe this letter was shared with them. The mother testified that she is certain she gave it to them.



*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 under this section--*

*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).*

In the instant matter, the district has the burden of proving that its evaluation was appropriate. 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. This right is explained in the implementing regulations of IDEA 2004:

*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, without unnecessary delay, either file a due process complaint notice to request a hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency files a due process complaint notice to request 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).*

Credibility of Witnesses: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.<sup>3</sup> Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003). This is a particularly important function, as in many cases the hearing officer level is the forum in which the witnesses will be appearing in person. Credibility findings are incorporated into the discussion below.

The District presented members of the evaluation team, all well-qualified in their respective disciplines, who testified credibly about the appropriateness of their evaluation procedures and their qualification to interpret their findings. Each of the District's evaluators testified clearly, confidently, and cogently and each was able to present a rationale for the assessment procedures and/or instruments she utilized.

The mother presented passionate testimony regarding her belief, supported by private providers, that the Student possesses higher intellectual ability than demonstrated in the re-evaluation. There is no doubt that the mother is loving and caring and highly supportive of her child; on these points her testimony was credible.

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<sup>3</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

## Discussion and Conclusions of Law

The re-evaluation completed by the District fulfills in its entirety the demands of the IDEA. The District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, [FF 1, 7, 9, 10, 11, 12, 25, 26, 29, 30, 31, 35, 36, 37, 38, 39, 40] including information provided by the parents [8, 14, 16, 18, 24, 25, 30, 35]. The District did not use any single measure or assessment as the sole criterion for determining whether the Student is a child with a disability. [FF 1] The District used technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. [FF 11, 12, 14, 16, 18, 36, 39] The assessment instruments utilized by the District's evaluators were selected and administered so as not to be discriminatory on a racial or cultural basis. [FF 47] The tests were administered in the language and form most likely to yield accurate information on what the Student knew and could do academically, developmentally and functionally as evidenced by the psychologist and the speech/language pathologist's deviating slightly from standardized administration procedures by providing edible reinforcers and repeating or rewording items. [FF 11, 40] The instruments were used for purposes for which they are valid and reliable. [FF 11, 14, 16, 37, 39, 41] The instruments were administered by trained and knowledgeable personnel. [FF 5, 6, 23, 28, 33] and were administered in accordance with any instructions provided by their publishers. [FF 11, 16, 36, 37] The Student was assessed in all areas of suspected disability. [FF 1]

The IDEA is very specific regarding what an evaluation must contain and how it is to be conducted. Very simply, the District fulfilled its obligation under the statute to provide an "appropriate" evaluation. Whether or not one agrees or disagrees with the final results, the evaluation was appropriate in its entirety.

The Parents primarily disagree with the results of the portion of the evaluation addressing their child's cognitive functioning. [FF 56] After the first ER was issued they asked that the school psychologist administer another intelligence test, and the District complied; the results were within the same range as the scores obtained on the initial instrument. [FF 12-13] Additionally, an instrument of adaptive functioning had produced results congruent with the tests of cognitive functioning. The Parents and several individuals working with the child, as well as the child's developmental pediatrician, believe that the child's cognitive functioning is higher than the test results would suggest. [FF 49-56] The District does not disagree. [FF 45] This belief may well be true, for two reasons, one being that tests of cognitive functioning given to young children tend to be somewhat less reliable than those administered when the child is older, and the second being that all tests represent a snapshot in time that on any given day can be affected by many factors including the child's familiarity with the evaluator, current state of health, alertness and motivation. A survey instrument such as that of adaptive functioning completed by the Parent is a truer reflection of the child's overall functioning on a daily basis at the time.

Although the Parents are clearly distressed by their child's scores on intelligence testing the District was clear that it neither labeled the child according to IQ/adaptive functioning level nor based the child's special education eligibility on IQ/adaptive functioning level. Given the Student's currently delayed language and autism, and reports of those who know the child that there has been a great deal of recent progress, it is likely that with an infusion of appropriate special education programming the Student will make progress such that future scores in cognitive and adaptive functioning may well improve. The District certainly anticipates this possibility as it was careful to explain that the child's current status does not necessarily equate with the child's potential.

The District conducted an evaluation that was appropriate according to the law. The evaluation fulfilled each criterion set forth in the IDEA 2004 and its implementing regulations. As the District's evaluation is appropriate, the Parents are not entitled to an Independent Educational Evaluation for their child at public expense. Further, the child would not be well-served by being given another evaluation at this time, even if the Parents chose to pay for it themselves. Although the mother testified that if an IEE were granted and the results were the same as the District's results she and the child's father would deal with it [NT 184], this is an unlikely scenario given her strong conviction that the child has higher ability than is reflected in test scores. It will be far better to allow the child to grow and blossom in an appropriate special education program at the child's current level and then to assess progress at the time of the next mandatory reevaluation. Although the child's classification confers eligibility for a reevaluation in three years, it is strongly suggested that there be a reevaluation in two years at which time it will be more likely that the anticipated gains would be evident.

## Order

It is hereby ordered that:

1. The School District's evaluation of Student was appropriate.
2. The School District is not required to take any further action.

December 10, 2009  
Date

*Linda M. Valentini, Psy.D.*  
Linda M. Valentini, Psy.D.  
Pennsylvania Special Education Hearing Officer  
NAHO Certified Hearing Official