

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

Child's Name: K.L.

Date of Birth: [redacted]

Date of Hearing: January 7, 2011

OPEN HEARING

ODR Case # 01651-1011AS

Parties to the Hearing:

Parent[s]

Ms. Doris Galante
Cheltenham Township School District
2000 Ashbourne Road
Elkins Park, PA 19027

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Judith Gran, Esq.
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January 11, 2011

January 25, 2011

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an elementary school aged student who is a qualified handicapped person under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).¹ The student resides in the Cheltenham Township School District (“District”).

As a qualified handicapped person under Section 504, Student receives certain modifications of Student’s education program through a Section 504 plan. While not raised as an explicit issue in this hearing, the parties dispute whether or not the student should also be identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”).² In this regard, at least from parents’ perspective, the student is thought-to-be-eligible under IDEA.

A functional behavior assessment (“FBA”) was issued by the District in February 2010. Parents feel the FBA is inadequate and requested from the District an independent FBA at public expense. The District did not agree to pay for the independent FBA and, as required under the IDEA, filed the complaint in the instant case to defend the

¹ It is this hearing officer’s preference to cite to the implementing regulations of the relevant portions of Section 504 at 34 C.F.R. §§104.1-104.10, 104.31-104.39.

² It is this hearing officer’s preference to cite to the implementing regulations of the relevant portions of IDEIA at 34 C.F.R. §§300.1-300.818.

appropriateness of its FBA.³ The District argues that it undertook and issued an appropriate FBA for the student. The parents counter that the District's FBA is inappropriate due to a variety of substantive flaws.

For the reasons set forth below, I find in favor of the parents to the extent that the District must perform an additional FBA of the student. The District, however, will have the opportunity to evaluate the student and present its findings to the multi-disciplinary team.

ISSUES

Is the District's FBA appropriate?

If not, are parents entitled to an FBA at District expense?

FINDINGS OF FACT

1. The student moved into the District in the summer of 2008.

Student attended a pre-kindergarten program and, at that time, information was shared with the District about a diagnosis of pervasive developmental delay/not otherwise satisfied which the student received in [redacted country]. (School District Exhibit ["S"]-1; Notes of Testimony ["NT"] at 31-32).

³ 34 C.F.R. §300.502(b)(2)(i).

2. The District performed an evaluation and, in August 2008, issued an evaluation report. The student was found to have a disability but was found not to need specially designed instruction. (S-1).
3. The student attended kindergarten in the 2008-2009 school year. The student achieved predominantly satisfactory ratings on most academic areas and learning skills. (S-2).
4. Based on the diagnosis in [redacted country] and the need to gauge the student's acclimation to English language, the District had intended to re-evaluate Student at the end of the kindergarten year. Parents shared concerns about the student before the end of the school year and so the District sought and received permission to re-evaluate Student. (S-1, S-4; NT at 37).
5. The evaluation was completed by a bilingual evaluator who spoke English and [language redacted].⁴ The evaluation report was issued in May 2009 with recommendations that the student receive special education for needs in communication skills, writing, and motor skills. Additionally, the evaluator recommended that the student receive further evaluation for speech and language and occupational therapy. Finally, the evaluator recommended that the student receive social skills training. (S-5).
6. At approximately the same time, in June 2009, the student underwent a psychiatric evaluation. The diagnosis in the report,

⁴ The student speaks with the parents in both English and [redacted language] in the home . (NT at 316).

- inter alia, was that the student “evidence(d) symptomatology meeting criteria for a pervasive developmental disorder/not otherwise specified” although the report went on to indicate that interventions seemed to have improved the student’s symptoms. (S-7).
7. The results of the bilingual re-evaluation and the psychiatric evaluation were included in the District’s re-evaluation of June 2009. The District also conducted its own assessments. (S-8).
 8. The re-evaluation report found that the student continued to be a student with a disability but that the student did not require specially designed instruction. Based on the June 2009 re-evaluation report, the District recommended that the student be provided with a Section 504 plan. (S-8, S-9).
 9. In December 2009, during the student’s 1st grade year, due to parental concerns, parents granted the District permission to perform an FBA. (S-10).
 10. The evaluator, an experienced board-certified behavior analyst employed by the local intermediate unit, performed two classroom observations of the student in January 2010. In the FBA issued in February 2010, she concluded that the student exhibited some off-task behavior in the classroom but that these behaviors were “low in frequency and of short duration”. (S-13; NT at 110-126).

11. Contemporaneously with the FBA, in February 2010, the student underwent a private speech and language evaluation. This evaluation, supplemented by the District's own assessments, was included in a re-evaluation report issued in June 2010. (S-12, S-17).
12. Over the course of the 2009-2010 school year, the student's 1st grade year, the student's academic and learning skills ratings were largely satisfactory, although the ratings for reading fluently, multiple measures of writing and "controls own behavior" are almost uniformly satisfactory-minus (S-) as opposed to satisfactory (S) or satisfactory-plus (S+). (S-11).
13. Over the course of July, August, and September 2010, the parties met and/or communicated about the student's evaluations and section 504 plan. (Parents' Exhibit ["P"]-19; S-19, S-21, S-22, S-23, S-24).
14. By letter dated September 25, 2010, the parents requested an independent FBA, listing multiple problematic behaviors in school and asserting that the District's FBA of February 2010 was inadequate. (S-25).
15. In the current school year (2010-2011), the student's 2nd grade year, the student has not exhibited disruptive classroom behaviors and is easily re-directed. (S-14; NT at 231-234).

16. The student is provided with mental health services. A behavior specialist who began working with the student in January 2010, during the student's 1st grade year, focused on three areas: increasing Student's compliance with directives, increasing appropriate social interactions, and reducing repetitive behaviors/utterances. (NT at 258-260).
17. In addition to largely home-based observations and therapy, the family behavior specialist observed the student in the school environment over February – June 2010. She found the student's school-based behaviors to be more disruptive than the behavior analyst. Moreover, the behavior specialist found that the student's social interaction and peer relationship skills in unstructured time, such as recess and lunch, led to little peer interaction and, when present, largely misguided or inappropriate. (NT at 263-266).
18. In regular observations in the current school year, the student's 2nd grade year, the family behavior specialist has noted largely improved on-task behavior in classroom settings. In unstructured environments, however, she sees the same difficulties exhibited in initiating and sustaining peer interaction and socialization. (NT at 266-269).
19. Patterns are evident in the student's school-based behavior that point to issues with peer interaction and appropriateness: respecting personal space, inappropriate language, a focus on body

parts and functions, feeling teased and disliked, solitary play and pursuits, distractibility, frequent requests for/trips to the bathroom. (P-7, P-22).

DISCUSSION AND CONCLUSIONS OF LAW

Independent FBA

When parents disagree with the conclusions of a school district evaluation, they may request an independent educational evaluation (“IEE”) at public expense.⁵ In response, 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.⁶ Here, the District is seeking to defend the appropriateness of its evaluation in the form of an FBA.

In this case, the District performed an appropriate FBA in terms of the student’s behavior in structured classroom settings. (FF 10). The student’s academic performance seems to be appropriate and, whatever behaviors are manifested in structured class settings, those behaviors appear to be easily addressed and the student readily, and compliantly, re-directed. (FF 3, 12, 15, 17, 18, 19).

⁵ 34 C.F.R. §300.502(b).

⁶ 34 C.F.R. §300.502(b)(2).

But the record in its entirety supports the notion that the student's behavior in unstructured settings may be different. Indeed, the parents' concerns, and those of their behavior specialist, are focused on peer interaction and socialization, and these interactions/socializations unfold in non-structured settings. (FF 13, 14, 16, 17, 18).

The stances of the parties are, in effect, apples and oranges. The District asserts, and the record supports the assertion, that the student's in-class behavior is largely non-problematic. As such, its FBA is appropriate, both in its findings and recommendations. The parents assert, and again the record supports their assertions, that the student's peer interaction and socialization skills are, at the least, not fluid and, potentially, may reveal deeper programming needs than the student now receives.

In sum, then, the District's FBA, for what it assesses, is appropriate. But it is clear that additional, targeted data-gathering and assessment/analysis is necessary. Therefore, pursuant to the provisions of 34 C.F.R. §300.502(d), the District will be ordered to undertake an FBA, and other assessments that may be appropriate, to evaluate the student for potential needs in peer interaction and social skills in unstructured school settings.

Also, while the behavior analyst who prepared the February 2010 FBA is eminently qualified and produced an appropriate FBA, the parents' views of that FBA and the rigors of the due process hearing

create doubts in the mind of this hearing officer that any follow-on FBA and/or assessment(s) which are prepared by that behavior analyst will be well-received by the parents. Therefore, while the District will be given the opportunity to perform the evaluation of these issues, the order will include a provision that any FBA or other behavioral assessment be performed by different specialist.

CONCLUSION

The student must be further evaluated to determine the extent to which the student may have needs in peer interaction and socialization. The District, however, will have the opportunity to perform this FBA, and any additional assessments, and issue this FBA, and any other results, for consideration by the multi-disciplinary team.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, within 15 days of the date of this order, the student's multi-disciplinary team, including the parents and the parents' behavior specialist, will convene to discuss the parents' behaviors of concern regarding peer interaction, socialization, and anxiety, especially in unstructured school environments. The team shall develop the FBA structure, and other re-evaluation assessments deemed appropriate, to ascertain the students' needs, if any, in these areas.

The District shall select the evaluator(s) to perform the assessments, but the selected individual(s) shall not include the behavior analyst who performed and issued the District's appropriate FBA of February 2010.

Any issue not addressed by this decision and order is dismissed.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

January 25, 2011