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Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 15920-1415AS

Child's Name: I.D.

Date of Birth: [redacted]

Date of Hearing: 4/30/15

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
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Date Record Closed:

Date of Decision:

Hearing Officer:

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May 4, 2015

May 29, 2015

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INTRODUCTION AND PROCEDURAL HISTORY

This case arises from a Local Education Agency (LEA)/Intermediate Unit (IU) complaint to support the appropriateness of its initial and reevaluation of an eligible young child (Child) who had previously qualified for Part-C IDEA services. After the initial evaluation in the fall of 2013 established the Child's Part-B IDEA eligibility due to developmental delay, the Child began receiving pre-school (ages 3—5) special education services from the IU.

At Parent's request, the IU reevaluated the Child in the fall of 2014, which resulted in changing the Child's eligibility category to autism. After the parties met to review the reevaluation report (RR) and the Child's IEP, Parent requested an IEE in all of the areas covered by the IU reevaluation, as well as independent physical therapy and assistive technology evaluations and functional behavior assessment (FBA).

After refusing Parent's IEE request, the IU filed the due process complaint to support the appropriateness of its reevaluation, and to the extent necessary, its initial evaluation. The documentary evidence and testimony produced at the single brief hearing session established that the IU evaluation and reevaluation, as completed, met all substantive federal and state IDEA requirements and that the record does not otherwise support Parent's claim for an IEE at public expense in any area, notwithstanding procedural violations that occurred in connection with the reevaluation and subsequently.

ISSUE

Did the Intermediate Unit/EI Program conduct appropriate evaluations of the Child in that the LEA evaluations sufficiently identify all of the Child's strengths and needs, or should the LEA be ordered to fund independent evaluations in one or more areas as requested by Parent?

FINDINGS OF FACT

1. Child, born [redacted] and now [pre-school aged], resides within the Intermediate Unit and is eligible for pre-school special education services. (Stipulation, N.T. pp. 12, 13)
2. The Child has been identified as IDEA eligible in the Autism disability category, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code — §§14.101, 14.102 (2)(ii), 14.153. (Stipulation, N.T. p. 13)
3. The Child began receiving Infant/Toddler early intervention services in early infancy for physical therapy (PT) due to torticollis.¹ The physical therapist subsequently noted a leg length discrepancy, low muscle tone (hypotonia) and developmental delays. (N.T. pp. 120, 121; S-1 p. 9²)
4. In later infancy, the physical therapist referred the Child for speech/language and occupational therapy (OT) services due to feeding issues and a delay in pre-language communication (babbling). (N.T. p. 121)
5. The Child's difficulty with participating in the various therapies led to a recommendation for a functional behavioral assessment (FBA) by a Board Certified Behavior Analyst (BCBA), who also began working on the feeding issues, assessed the Child's developmental levels and administered a screening tool that indicated the possibility of autism. The BCBA recommended using sign language to help the Child's development of communication/language skills. (N.T. pp. 121, 122)
6. Increasing concerns identified by the early intervention providers led to the Child's examination by a developmental pediatrician, resulting in a medical diagnosis of autism, additional behavior therapy and applied behavior analysis (ABA) therapy. The Child continued to receive PT, OT, Speech/Language Therapy and behavior services through the Infant/Toddler EI program throughout the birth to age two eligibility period. (N.T. pp. 121—124)
7. As the Child approached the upper age limit for Part C IDEA services, the Infant/Toddler EI Program provider referred the Child to the IU for an initial evaluation to determine eligibility for Part B pre-school services. (N.T. p. 28; S-1 p. 4)
8. A part of the evaluation, an IU school psychologist obtained input about the Child's background, medical/developmental history and concerns about the Child from Parent, as well as information from teachers and service providers with respect to the Child's services/progress, and behaviors of concern. (N.T. pp. 30, 31; S-1)

¹ Defined as “a twisting of the neck to one side resulting in the head being twisted.” (Encarta Dictionary)

² Commendably, both parties agreed to use the same exhibits in this matter, which avoided an unnecessarily long documentary record. Although there are effectively joint exhibits in this matter, they are designated by the letter “S” followed by the exhibit number.

9. Using assessments that are widely accepted as providing relevant information with respect to whether a child is demonstrating a developmental delay, the school psychologist completed or coordinated assessments in all relevant developmental areas:

<u>Domain</u>	<u>Assessments</u>	<u>Completed By</u>
Cognitive	Battelle Developmental Inventory	School Psychologist
Communication	Receptive Expressive Evaluation of Language (REEL-3)	SLP
	Functional Language Questionnaire (home setting)]	Parent
Social/Emotional	Autism Spectrum Rating Scale (ASRS)	Parent, Teacher;
	Childhood Autism Rating Scale (CARS)	School Psychologist
	Vineland Social-Emotional Early Childhood Scale	School Psychologist
Physical/Adaptive	Developmental Assessment of Young Children (DAYC-2)	
	Gross motor skills	Physical Therapist
	Self-care skills	Occupational Therapist
	Peabody Developmental Motor Scales (PDMS-2)	
	Perceptual Skills, Fine Motor Skills	Occupational Therapist
	The Sensory Processing Measure-Preschool-Home	Parent

(N.T. pp. 28—31; S-1)

10. Direct assessment of the Child’s gross motor skills, along with Parent input and information provided by the physical therapist (PT) who provided home-based services to the Child revealed no delay in gross motor skills likely to impact the Child’s ability to participate in pre-school gross motor activities. Parent commented that during the direct assessment, the Child performed skills that she had not seen at home, such as walking backwards, and that the Child had not demonstrated during PT evaluations in the medical setting, such as getting up on command from a prone position on the floor. (S-1 p. 16)
11. The school psychologist formally observed the Child at the preschool s/he attended and during assessments. Information compiled from the assessment results, teacher input and classroom observations conflicted in some respects with Parent reports of less developed skills and a higher level of problem behaviors at home and in private therapy sessions. (N.T. pp. 31, 36; S-1 pp. 13, 16, 19, 22, 24)
12. Although the Child had a medical diagnosis of autism, and obvious delays in the communication, social and adaptive skills domains, rating scales administered during the initial evaluation, teacher input concerning the Child’s classroom functioning and the classroom observation by the school psychologist did not fully support that conclusion in terms of assigning a disability category. The IU evaluation team, therefore, identified the Child as IDEA eligible due to developmental delay. (N.T. pp. 35—39; S-1 pp. 19—27)
13. The initial evaluation report (ER) included a recommendation that the school psychologist work with the IEP team to monitor Student’s communication, social and behavioral development in order to determine the most appropriate educational disability category and whether further assessments were needed. (N.T. p. 49; S-1 p. 30)

14. Based upon the initial evaluation results, an IEP was developed for implementation upon the Child's third birthday. The IEP provided for placement in an IU developmental pre-school class for three half-days weekly; included goals/outcomes, special education instruction with specified teaching strategies in the areas of communication/social interaction and fine motor skills; provided for OT, speech/language therapy, transportation and school psychologist services. (N.T. p. 80; S-2)
15. The IU honored Parent's request to reevaluate the Child in the fall of 2014. The November 13 permission to reevaluate (PTRE), which Parent approved without comment on the same day, specified that the reevaluation would include parent information, a sensory history/checklist, observation, developmental checklist, standardized tests of development, basic skills, speech/ language and articulation, criterion referenced instruments in one or more developmental areas and the ADOS (Autism Diagnostic Observation Schedule) (S-3, S-5 p. 22)
16. The school psychologist, the Child's teacher, a speech/language pathologist and an OT again assessed the Child's cognitive, communicative, social-emotional, fine motor, visual/ motor, and adaptive skills development using many of the same standardized instruments administered during the initial evaluation, along with some additional assessment instruments, direct observation, Parent input and information from the initial evaluation. (N.T. pp. 32—35, 9, 943; S-5)
17. The Child's demonstration of pre-academic, academic, language/communicative and social skills was, and is, inconsistent within the pre-school classroom, and somewhat dependent on setting and circumstances, but higher overall than reported by Parent and private therapists who provide services to the Child. (N.T. pp. 88, 93—95; S-5)
18. Classroom observations also revealed that the Child continued to have needs in the areas of social interactions, communication and self-help skills, but is physically able to navigate the classroom and outdoor play environments without difficulty. Since there had been no change in the Child's gross motor skills, the reevaluation did not include a PT assessment. (N.T. pp. 37, 38, 88, 91; S-5)
19. No behaviors of concern were observed in the preschool classroom. The Child is able to follow the preschool classroom routine with minimal prompting, is generally compliant with demands and has no difficulty with transitions between activities and areas in the preschool setting. (N.T. pp. 38, 89; S-5, S-6 p. 17)
20. To further explore whether the Child is on the autism spectrum, the school psychologist had the teacher complete the ASRS rating scale, which again indicated a low probability of autism. Results of the ADOS-2, a semi-structured observation form focusing on social and communicative behaviors in a play setting, indicated that the Child met the criteria for autism. (N.T. pp. 32—34, 37; S-5 pp. 22, 23, 25)
21. The school psychologist told Parent that she was surprised about the ADOS-2 result, although it was consistent with Parent's report of the developmental pediatrician's

ADOS-2 results, since she had observed the Child perform many of the skills that were not demonstrated during her ADOS-2 observation. (N.T. p. 129)

22. Despite the school psychologist's lingering misgivings about the appropriate disability category, she recommended that autism replace developmental delay as the Child's primary disability category based upon the ADOS-2 results. She also recommended continued observations to determine whether additional autism assessments should be conducted. (N.T. pp. 44, 45, 54, 55; S-5 p. 22, 27)
23. After the reevaluation was completed, the parties met to review the reevaluation results and revise the Child's IEP. At that meeting the Child's MDT/IEP team discussed whether an augmentative communication assistive technology device might facilitate the Child's communication with peers in unstructured settings. (N.T. pp. 83, 90, 91; S-6 p. 29)
24. The proposed IEP again included goals in the areas of social interaction/communication, and speech/language. Based upon the reevaluation results, the goal in the area of fine motor skills was eliminated. Goals for developing pre-academic skills and social skills were added. Special education instruction, speech/language services, transportation and school psychologist services were continued, but OT services were eliminated. (N.T. p. 92; S-6)
25. In connection with the social skills goal, the proposed IEP provided for trialing voice output devices over a four month period through an Assistive Technology Needs Assessment Tool, most likely the SETT (Student, Environment, Tasks, and Tools) framework. The IU did not issue a PTE for an assistive technology evaluation, and because Parent has not approved the proposed IEP, there has been no assistive technology assessment. (N.T. pp. 84—87; S-6 p. 29)
26. Medical professionals and therapists who provide services to the Child privately have advised Parent that the Child needs and should have ABA therapy; "trialing" various assistive technology devices with the Child should be done with caution due to the Child's prompt dependency; that the Child should be receiving physical therapy services from the IU to address problems with the Child's vestibular system that the private PT providers have identified; that the Child needs more intensive and/or different OT services and a specialized chair. (N.T. pp. 124—128)
27. Parent requested an IEE because of the school psychologist's uncertainty about the Child's disability category and reports of inconsistent demonstration of skills in different settings. Parent requested a number of different independent assessments³ because she and the private therapists see many needs in the Child that were not identified in the IU evaluations and are not being addressed in the Child's IEP. Parent's request for an independent FBA is based upon reports from the private OT that the Child is prompt dependent, as well as her observation that the Child sometimes "shuts down" and refuses

³ Psychoeducational, speech therapy, occupational therapy, physical therapy, assistive technology and functional behavioral assessment.

to participate in activities. In general the results of the IU reevaluation are not consistent with the private therapists' assessments and observations (N.T. pp. 129—139, 154, 155; S-7)

28. None of the private therapists have spoken to the IU service providers, teachers or the IU psychologist about the Child's functioning and needs in the pre-school setting. Although neither the private therapists nor Parent have ever observed the Child in the pre-school setting, Parent believes that the issues the private therapists have identified as the basis for their service recommendations are adversely affecting the Child in school. (N.T. pp. 128, 138, 153)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

Federal IDEA Evaluation/Reevaluation Requirements

The IDEA statute and regulations require an initial evaluation, provided in conformity with statutory/regulatory guidelines, as the necessary first step in determining whether a child is eligible for special education services and in developing an appropriate special education program and placement. *See* 20 U.S.C. §1414; 34 C.F.R. §300.8(a).

After a child is determined to be eligible, the IDEA statute and regulations provide for periodic re-evaluations, which “may occur not more than once a year unless the parent and public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that an evaluation is unnecessary.” 20 U.S.C. §1414(a)(2)(B)(i), (ii); 34 C.F.R. §300.303(b). LEAs, however, also have the obligation to “ensure that a reevaluation of each child with a disability is conducted” at any time “the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation.” 20 U.S.C. §1414(a)(2)(A)(i), (ii); 34 C.F.R. 300.303(a).

The standards for an appropriate evaluation or re-evaluation, found at 34 C.F.R. §§300.304—300.306, require a school district to: 1) “use a variety of assessment tools;” 2) “gather relevant functional, developmental and academic information about the child, including information from the parent;” 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas related to the suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs,” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Once an evaluation or reevaluation is completed, a group of qualified LEA professionals and the child’s parents determine whether he/she is a “child with a disability” and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the LEA is required to: 1) “Draw upon information from a variety of sources,” including those required to be part of the assessments, assure that all such information is “documented and carefully considered.” 34 C.F.R. §300.306 (c)(1).

Independent Educational Evaluations

The IDEA statute and regulations provide that Parents have the right to obtain an independent educational evaluation (IEE) and, if the private evaluation meets the standards of the

LEA, and parents share it with the LEA, to have the evaluation considered in making decisions concerning the provision of FAPE to a child. 34 C.F.R. §300.502(a), (b)(3), (c)(1).

Parents can obtain an IEE at public expense if they disagree with an evaluation obtained by the LEA and it either agrees to fund the independent evaluation or the LEA evaluation is found inappropriate by the decision of a hearing officer after an administrative due process hearing. 34 C.F.R. §300.502(b)(1), (2)(ii). Once a parent has requested an IEE, the LEA “must, without unnecessary delay,” file a due process complaint to show that its evaluation is appropriate or assure that the IEE is provided. 34 C.F.R. §300.502(b)(2)(i), (ii).

An IEE is defined in the IDEA regulations as “an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” 34 C.F.R. §300.502(a)(3)(i),

Additional Pennsylvania Evaluation/Reevaluation Requirements

Pennsylvania special education regulations impose additional requirements for procedurally and substantively appropriate evaluations, generally, and with respect to evaluations of young children specifically. Accordingly, under 22 Pa. Code §14.123,

(a) The group of qualified professionals, which reviews the evaluation materials to determine whether the child is a child with a disability under 34 CFR 300.306 (relating to determination of eligibility), shall include a certified school psychologist when evaluating a child for autism, emotional disturbance, mental retardation, multiple disabilities, other health impairments, specific learning disability or traumatic brain injury.

(b) In addition to the requirements incorporated by reference in 34 CFR 300.301 (relating to initial evaluations), the initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60-calendar days after the agency receives written parental consent for evaluation, except that the calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted.

(c) Parents may request an evaluation at any time, and the request must be in writing. The school entity shall make the permission to evaluate form readily available for that purpose. If a request is made orally to any professional employee or administrator of the

school entity, that individual shall provide a copy of the permission to evaluate form to the parents within 10-calendar days of the oral request.

(d) Copies of the evaluation report shall be disseminated to the parents at least 10 school days prior to the meeting of the IEP team, unless this requirement is waived by a parent in writing.

The Pennsylvania regulations that relate to providing special education to young children further provide as follows in 22 Pa. Code §14.153:

Notwithstanding the requirements in 34 CFR 300.122 (relating to evaluation):

(1) Evaluations shall be conducted by early intervention agencies for children who are thought to be eligible for early intervention and who are referred for evaluation.

(2) Evaluations shall be sufficient in scope and depth to investigate information relevant to the young child's suspected disability, including physical development, cognitive and sensory development, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family's perceived strengths and needs which will enhance the child's development.

(3) The assessment must include information to assist the group of qualified professionals and parents to determine whether the child has a disability and needs special education and related services.

(4) The following time line applies to the completion of evaluations and reevaluations under this section:

(i) Initial evaluation or reevaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60 calendar days after the early intervention agency receives written parental consent.

(ii) Notwithstanding the requirements incorporated by reference in 34 CFR 300.303 (relating to reevaluations), a reevaluation report shall be provided within 60 calendar days from the date that the parental consent for reevaluation was received.

(iii) Reevaluations shall occur at least every 2 years.

(5) Each eligible young child shall be evaluated by an MDT, to make a determination of continued eligibility for early intervention services and to develop an evaluation report in accordance with the requirements concerning evaluation under §14.123 (relating to evaluation), excluding the provision to include a certified school psychologist where appropriate under §14.123(a).

Specifics of the Issue in Dispute

Although the hearing in this matter was brief and the single issue identified on the record after opening statements is apparently straightforward, the testimony at the hearing identified several different or additional issues/sub-issues which will also be addressed, at least briefly. Specifically, there is a legal issue with respect to the scope of Parent's reevaluation request in terms of whether evaluation components that were not explicitly requested in Parent's reevaluation request, and/or not were provided as part of the IU evaluation or reevaluation automatically entitle Parent to an IEE in those areas. Issues were also raised, at least implicitly, with respect to services the Child is receiving, but those are far beyond the scope of the complaint in this case, and, therefore, cannot be resolved in this proceeding.

Appropriateness of the IU Evaluation/Reevaluation As Completed

The primary issue to be addressed is the appropriateness of the IU's 2014 reevaluation in light of Parent's reevaluation request and the PTRE listing reevaluation components and assessments. Before reaching those matters, however, it is necessary to review the 2013 initial evaluation, since the appropriateness of the reevaluation depends, to some degree upon whether the initial evaluation was sufficient in scope to identify the child's disability and needs and was appropriate in light of the applicable legal standards.

The initial evaluation addressed all areas of inquiry included in the Pennsylvania Chapter 14 regulatory provision relating to evaluations of young children, which provides greater specificity to the federal regulations relating to the components of an appropriate initial special education evaluation. *See* federal and state regulatory provisions set forth at length above. FF 9.

In addition, the IU school psychologist testified that the standardized assessments administered during the evaluation are generally accepted and commonly used to assess the

development of young children, as well as to determine whether a child meets the criteria for autism as an IDEA disability category. Parent presented no evidence to the contrary with respect to any of the assessments, and instruments such as the Battelle, the CARS and the Peabody scales are, indeed, frequently found and relied upon in special education decisions. The IU, therefore, fulfilled the federal regulatory requirement of using technically sound instruments. The nine different assessments, some including different scales to assess different developmental areas, were administered by professionals trained in the specialized areas that were assessed, as well as by the school psychologist. In compiling the evaluation report, the school psychologist also gathered information about the Child from Parent, teachers, and service providers by means of written input, interviews, review of records and direct observation, as well as by various formal assessments. (FF 8, 9, 10, 11) The evidence, therefore, amply establishes that the IU fulfilled all of the remaining IDEA requirements for appropriate initial evaluation procedures.

Finally, the evaluation results provided sufficient information for the MDT/IEP team to conclude that the Child met the eligibility criteria for IDEA services, notwithstanding conflicting information with respect to whether autism was the appropriate disability category at that time. (FF 12, 13) The Child could just as well be served under the developmental delay category, especially since services are based upon an eligible child's actual needs, not disability category. Here, based upon its thorough and comprehensive initial evaluation, the IU identified needs in all developmental domains except gross motor skills and offered services to address the needs. (FF 14)

The reevaluation in 2014 was also comprehensive and substantively appropriate, sufficient different assessment tools and instruments used to meet the regulatory requirements for an appropriate reevaluation. The reevaluation results further clarified the Child's disability

category, and updated the child's functional performance and disability-related needs as they presented in the preschool classroom. (FF 16, 17, 18, 19, 20, 22)

Procedural Violation/Absence of PT Reevaluation

Although the evaluation and reevaluation as completed by the IU are substantively appropriate, as discussed above, the record does establish a procedural violation by the IU arising from its decision not to include formal PT assessments in its 2014 reevaluation. The record did not disclose the content of Parent's exact request for a reevaluation, and she consented to the reevaluation as proposed by the IU without raising any concerns about the scope of the reevaluation at that time. (FF 15) Parent could, however, reasonably expect that the reevaluation would include all of the components of the original evaluation, including a physical therapy reevaluation. Nothing in the PTRE, which included a broad and general list of the developmental areas to be included in the evaluation and the types of instruments/assessments that were proposed explicitly discloses or suggests that the IU did not intend to include a PT reevaluation, and it could certainly have been fairly encompassed within the scope of the PTRE. (FF 15) The record, therefore, supports the conclusion that the IU committed a procedural violation by not including a formal PT reevaluation in the 2014 reevaluation. The IU should have, at least, specifically disclosed to Parent, on the PTRE or otherwise, that it did not intend to include PT assessments in the reevaluation in order to give Parent the opportunity to explicitly request a PT reevaluation.

On the other hand, however, nothing in the record suggests that there was an actual need for a formal PT reevaluation in the fall of 2014, since a full PT evaluation had been completed just a year before. The testimony of IU staff concerning the Child's motor skills and physical functioning in the preschool classroom provided a sufficient and persuasive basis for concluding

that the Child's and needs had not changed since the initial PT evaluation and are not adversely affecting the Child in the preschool environment. Although Parent testified to her belief that physical issues identified by private therapists are negatively impacting the Child in school, that belief is speculative because it is not based on the direct observation of either Parent or the private therapists' whose views Parent reflected. (FF 28)) Parent's testimony, therefore, is insufficient to support the conclusion that the IU's 2013 PT evaluation was inappropriate, and that the 2014 IU reevaluation is substantively inappropriate due to the lack of a PT reevaluation.

Parent contends, however, that the IU's failure to provide a formal PT assessment in the reevaluation automatically requires the IU to provide a publicly funded independent PT evaluation. Parent's legal basis for that argument is unclear, since 34 C.F.R. §502(b) provides that a publicly funded IEE is available only when a parent disagrees with the results of an LEA evaluation and the evaluation is subsequently determined to be inappropriate. Here, there was no PT reevaluation. Parent's disagreement, therefore, is with the absence of a reevaluation component, not an LEA evaluation. Even assuming that Parent's disagreement is now with the initial PT evaluation, that disagreement provides no basis for a publicly funded independent PT evaluation since the IU's initial PT evaluation is appropriate.

Finally, because the initial PT is appropriate, the IU's procedural violation in failing to provide a PT reevaluation did not substantively affect the Child's right to a FAPE, did not significantly impede Parent's right to participate in the decision-making process concerning the Child, and did not cause a deprivation of educational benefit to the Child. Consequently,

because there was no substantive effect from the procedural violation, there is no basis for any substantive relief.⁴ *See*, 34 C.F.R. §300.513(a).

Parents' Assistive Technology and FBA IEE Requests

The IU reevaluation is neither procedurally nor substantively flawed because it did not include either an FBA or an assistive technology for, essentially, the same reason the IU should have included a PT reevaluation, *i.e.*, neither assessment was included in the IU's initial evaluation, as a PT evaluation was. In the absence of any evidence suggesting that the Parent explicitly requested that the reevaluation include additional areas of assessment, the IU had no reason to know that Parent expected the reevaluation to include either an FBA or an assistive technology evaluation. Both an assistive technology evaluation and FBA would, in fact, have been initial evaluations, not reevaluations. Finally, as noted above, even if the absence of those assessments did constitute a procedural violation, there is no legal basis for concluding that such a violation establishes the right to a publicly funded IEE.

Assistive Technology Initial Evaluation

Although, as explained above, there is no legal basis for ordering an independent assistive technology evaluation, the IU's decision to, in essence offer that evaluation via the proposed IEP without issuing a formal permission to evaluate may constitute a second procedural violation. The Assistive Technology Basic Education Circular (BEC), originally issued by the Pennsylvania Department of Education in September 1997 and reviewed June 1, 2014 (attached as an Appendix to this decision), explicitly provides at p. 2 (p. 21, below) that

All procedural safeguards and timelines set forth in federal and state laws for completing initial evaluations, reevaluations, and developing and implementing IEPs are fully

⁴ Parent also suggested procedural violations arising from combining the meeting about the reevaluation results with December 2014 IEP meeting without a waiver. There was no evidence, however, of any substantive effect if such a violation occurred.

applicable to assistive technology devices and/or services when they are necessary to ensure eligible children receive FAPE.

Although the IU has not issued a PTE for an assistive technology evaluation, it is unclear whether that lapse actually constitutes a procedural or substantive violation in this case, since the record does not establish—and indeed, it is beyond the scope of the issue presented by this case to consider, whether an augmentative communication device is actually necessary for the Child to receive a FAPE. Accordingly, this matter is brought to the parties’ attention for future consideration only.

Services Issues

It became quite apparent from Parent’s testimony at the due process hearing that even if the record had supported ordering an IEE in one or more areas, doing so would not likely contribute to resolving the true issues between the parties that led to the due process hearing in this case. Ordering an IEE in all or even some areas that Parent requested, in fact, would more likely delay rather than encourage resolution of the real disputes between the parties, which is beyond the scope of this hearing. It may, however, be helpful to the parties to attempt to articulate other issues that emerged during the due process hearing in order to focus the parties’ efforts for the benefit of the Child for the remainder of the age 3—5 eligibility period.

In her testimony at the due process hearing, Parent expressed concerns about insufficient services currently provided in the Child’s IEP in several areas, notably the absence of ABA therapy, physical and occupational therapy. (N.T. pp. 124—127; FF 26, 27) Parent’s IEE request, therefore, appears to be based primarily upon her disagreement with the program and services implications of the results of the IU reevaluation. Parent also appears to believe that more information gathered by means of evaluations by independent providers, particularly in the

areas in which she believes the IEP lacks sufficient services, would lead to more and/or different services that would better meet the Child's needs.

Often, that reasoning makes considerable sense, since a lack of complete and comprehensive information about a child's needs, functional abilities, and the underlying source of difficulties a child is experiencing can certainly lead to inadequate and/or insufficient special education services. Here, however, it appears that the underlying source of the true issues between the parties is not the absence of information derived from the IU evaluations, but conflicting information about the Child's disability-related needs and how to address them that Parent is receiving from medical service providers. (FF 26, 27, 28) Parent, therefore, is dissatisfied with the services the Child is receiving because other, already existing, information has caused her to question the results of the IU assessments and/or the conclusions that the IU reached with respect to the child's disability-related needs and how to appropriately provide for them in the pre-school setting. Because of the true nature of the problems that Parent has implicitly identified, independent evaluations that either confirm or challenge the IU evaluation results and conclusions for programming are far more likely to prolong the dispute rather than end it, since one, or possibly both, parties are likely to be dissatisfied with the outcome(s).

Overall, the testimony at the due process hearing suggests that the true center of the parties' dispute appears to be how extensively the IU is required to address an eligible young child's developmental needs that either do not directly impact the child's functioning in the preschool setting or have a minimal impact. That issue was tangentially addressed in the IU's arguments in support of the appropriateness of its evaluations. The question of the appropriate scope of pre-school services, however, is both far beyond the scope of the due process complaint

and hearing in this case, and unlikely to be ripe for a due process complaint, hearing and decision at this point.

It is likely to be far more helpful to the parties, and beneficial to the Child, for the parties to find a means for the medical providers and the IU staff to share their information and determine how best to integrate it. Notably, the regulatory provision that addresses public funding of IEEs also provides that parents have the right to independent evaluations at their own expense if public funding is not ordered, and that an LEA is required to “consider” independent evaluations provided by parents in providing FAPE to an eligible child, as long as the private evaluation(s) meet(s) the agency’s evaluation criteria. 300 C.F.R. §502(b)(3), (c)(1).

The record in this case suggests that Parent might already have information from private providers that may meet the regulatory criteria for consideration by the IU, and even if that is not the case, that the IU is willing to at least discuss the concerns of the medical providers. It may well be that such consultation could resolve some issues between the parties, and even if that does not occur, the discussions might better focus issues between the parties concerning the Child’s services. For example, if the private PT providers observe, or at least discuss, the Child’s motor functioning in the pre-school classroom setting with the EI service providers, that may lead to suggestions for a simple school PT program that can be implemented by staff in the classroom, and/or suggestions for classroom accommodations, and/or the IU’s agreement to provide either direct or consultative PT services.

In short, there is every reason to believe that closer communication between the parties may go a long way toward resolving the issues that exist between them.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Intermediate Unit/EI Program is not required to provide an independent educational evaluation at public expense for the Child in any area.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

May 29, 2015

APPENDIX TO DECISION

ASSISTIVE TECHNOLOGY

20 USC §1401(1-2)

DATE OF ISSUE: September 1, 1997

DATE OF REVIEW: June 1, 2014

PURPOSE

This Basic Education Circular (BEC) has been revised to comply with the Individuals with Disabilities Education Act (IDEA) as amended in 2004 and Chapters 14 and 711. This BEC will provide guidance regarding assistive technology as to the following:

- (1) Increase awareness of assistive technology devices and/or services that are defined in federal law and regulations;
- (2) Clarify the obligation of school districts and charter schools to provide assistive technology devices and/or services to children with disabilities; and,
- (3) Explain supports available to assist school districts and charter schools, as the local educational agencies responsible for providing assistive technology devices and/or services to children with disabilities.

BACKGROUND

As defined in federal law, assistive technology device means “any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities.” Assistive technology devices range from a simple switch for a child with particular physical limitations to a sophisticated augmentative communication (i.e., voice output) device for a child with severe speech impairment. Other examples of assistive technology include assistive listening devices and systems for children with hearing loss and screen reading software for children with visual, neurological, or cognitive impairments. A medical device that is surgically implanted, however, is not considered an assistive technology device.

Assistive technology service means “any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.” Services include but are not limited to evaluation; purchase or lease of a device; designing, customizing, or adapting a device; maintaining, repairing, or replacing a device; coordinating or using therapies with a device; and training or technical assistance for the child, family, and professionals.

By virtue of these definitions, an exhaustive and/or specific list of what constitutes assistive technology devices and/or services is impossible to create.

THE ROLE OF ASSISTIVE TECHNOLOGY WITHIN SPECIAL EDUCATION

Assistive technology devices and/or services may be needed to enable children with disabilities to receive educational benefit. Federal and state special education laws explicitly include assistive technology devices and/or services among those services which local education agencies must provide for a child with a disability, at no cost to parents, if determined by the Individualized Education Program (IEP) team to be necessary for the student to receive a free appropriate public education (FAPE). Such services may be required as part of special education, related services, or supplementary aids and services required to enable a child to be educated in the least restrictive environment.

IEP TEAM RESPONSIBILITY FOR DETERMINING WHAT ASSISTIVE TECHNOLOGY DEVICES AND/OR SERVICES

As with every other special education service, the IEP team is responsible for determining if an assistive technology device and/or service is necessary for a child with a disability to receive FAPE. It is important to remember that assistive technology devices and/or services are not ends in themselves. The IEP team should focus on whether or not assistive technology devices and/or services are necessary for the eligible child to receive educational benefit and Free Appropriate Public Education (FAPE).

ASSISTIVE TECHNOLOGY INCLUDED IN THE IEP

To the extent that assistive technology devices and/or services may be required as part of special education, related services, or supplementary aids or services, a child's IEP must include a statement describing the full extent of devices to be obtained (i.e., no, low, and high technology) and service(s) (i.e., programming of devices, back-up strategies, repairs and maintenance, training and technical assistance, and other relevant needs and considerations) as well as the amount of such service(s). The provision of assistive technology devices and/or services may not be made conditional on subsequent approval by entities outside the IEP process (e.g., PaTTAN, Intermediate Units, Medical Assistance, etc.). It is also noted that FAPE may require that the child have the assistive technology device overnight, on weekends, and during vacations and summers, or receive assistive technology services during such breaks, which should be specified in the IEP.

TIMELINES AND PROTECTIONS

All procedural safeguards and timelines set forth in federal and state laws for completing initial evaluations, reevaluations, and developing and implementing IEPs are fully applicable to assistive technology devices and/or services when they are necessary to ensure eligible children receive FAPE. This means that evaluations must be completed within 60 calendar days upon receipt of parental consent; the assistive technology components of the IEP must be developed within 30 school days and the assistive technology component of the IEP must be implemented within 10 school days. Assistive technology devices should be secured on loan or leased if manufacturer delay is anticipated.

While school districts and charter schools may choose to use assessment processes, such as the SETT (**S**tudent, **E**nvironment, **T**asks, and **T**ools) Framework, to assist in the identification or refinement of assistive technology devices or services, the assessment processes cannot be used to delay the provision of the assistive technology needed for FAPE.

RESPONSIBILITY FOR PROVIDING ASSISTIVE TECHNOLOGY DEVICES AND SERVICES

It is the school district or charter school's responsibility to provide without delay assistive technology devices and services when included as part of a student's IEP. School districts and charter schools are responsible for the ongoing maintenance and prompt repair of assistive technology devices in order to provide FAPE without interruption.

IDEA 2004 also requires local education agencies (LEAs) to ensure that students with disabilities receive accessible instructional materials under the National Instructional Materials Accessibility Standard (NIMAS) at the same time that students without disabilities receive their materials. LEAs also have the responsibility to provide accessible materials under the Section 504 of the Rehabilitation Act. Assurance of accessible materials involves the provision of assistive technology. Refer to the following resources available on the PaTTAN website regarding the implementation of accessible instructional materials: *Accessible Instructional Materials FAQ* and *Pennsylvania's Guidelines for the Provision of Accessible Instructional Material (AIM Guidelines)*.

SERVICES AVAILABLE TO ASSIST IEP TEAMS

PaTTAN and local intermediate units' assistive technology consultants are available to provide technical assistance to IEP teams responsible for selecting, providing access to, and implementing the use of assistive technology devices and/or services necessary for a student to receive FAPE. Assessments are to be provided by qualified professionals knowledgeable and experienced with the range of assistive technology available to students with disabilities.

SUPPORT AVAILABLE FOR SCHOOL DISTRICTS AND CHARTER SCHOOLS WHEN PURCHASING ASSISTIVE TECHNOLOGY

The PDE, through the Bureau of Special Education, allocates funds to Intermediate Units for the specific purpose of funding assistive technology. PaTTAN will assist LEAs in purchasing assistive technology equipment/supplies at significantly reduced costs. The school district and/or charter school remains responsible for the provision of assistive technology devices and services. Alternate funding sources and equipment loans from the intermediate unit and/or PaTTAN Centers may also be utilized.

ACQUISITION OF ASSISTIVE TECHNOLOGY DEVICES AND SERVICES UNDER PENNSYLVANIA'S SCHOOL-BASED ACCESS PROGRAM

Whether a device may be billed under the School-Based ACCESS Program depends on many variables, such as the eligibility of a student to receive Medical Assistance (i.e., Medicaid), parental consent to such billing, the funding source used to purchase the device, the enrollment of the LEA in the School-Based ACCESS Program, and the availability of the device from alternate sources. LEAs should inform families of the School-Based ACCESS Program, how assistive technology may be obtained through it, and requirements for parental notification and consent.

The LEA should inform the family not to assume the device will be billed to Medical Assistance (MA), even if a child's MA number is provided on an equipment acquisition form. If the device is billed to MA, the LEA notifies the parents by sending a transfer of ownership letter (i.e., the device becomes the property of the MA-eligible child). When the parents are in receipt of the transfer of ownership letter, the billing process has begun. If the billing is ultimately rejected by MA, the parents will be informed by letter.

A school district or charter school may not delay or deny a student's receipt of assistive technology: (1) while it attempts to secure MA funding; (2) if the parent does not give consent to bill the School-Based ACCESS Program; or (3) by directing the family to pursue MA or other outside funding on its own for the assistive technology.

REFERENCES:

State Board of Education Regulations

22 Pa. Code Section 14.102(a)(2)(i), (xi), & (xxvii)
22 Pa. Code Section 14.106
22 Pa. Code Section 14.131
22 Pa. Code Section 711.3(b)(1), (10), & (24)
22 Pa. Code Section 711.41
22 Pa. Code Section 711.45

Federal Statutes

20 U.S.C. Section 1401(1)(2)

Federal Regulations

34 C.F.R. Sections 300.5 - 300.6
34 C.F.R. Section 300.105
34 C.F.R. Section 300.323(c)(1)
34 C.F.R. Section 300.324(a)(2)(v)

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