

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.S.

Date of Birth: [redacted]

ODR No. 2702-11-12-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent

Pro Se

Capital Area IU/EI Program
55 Miller Street
Summerdale, PA 17093

William J. Zee, III, Esquire
Hartman, Underhill & Brubaker, LLP
221 East Chestnut Street
Lancaster, PA 17602

Date of Hearing:

February 9, 2012

Record Closed:

February 20, 2012

Date of Decision:

March 6, 2012

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Child) is an eligible young child entitled to receive preschool early intervention services, from the Intermediate Unit named in the title page of this decision (IU), pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) and the Pennsylvania Code, 22 Pa. Code §14.151 et seq. (NT 8-10.) Child currently receives Infant and Toddler services through an Individualized Family Service Plan (IFSP), provided by the local behavioral health agency for children aged birth to three. (NT 8-10.) Child is of an age to transition from the Infant and Toddler program to Early Intervention, (NT 8-10), and the IU has evaluated Child for that purpose.

Child's Grandparent (Grandparent)¹, named in the title page of this decision, brought this Complaint for due process hearing, challenging the appropriateness of the IU's evaluation.² In particular, Grandparent raised the concern that the evaluation did not identify all of the disabilities with which the Child has been diagnosed or from which Child suffers. The IU asserts that its evaluation is appropriate under the IDEA, and that it has appropriately identified Child for services that will address all of Child's educational needs.

The hearing was concluded in one session. At the request of the IU, I allowed the parties to submit written summations, and the record closed upon receipt of those summations. I conclude that the IU's evaluation was appropriate, and I decline to order the relief sought by Grandparent.

¹ For purposes of this decision, no issue was raised and no evidence admitted concerning the Grandparent's standing to assert all rights under the IDEA and Pennsylvania Code. Therefore, I assume that Grandparent has standing for purposes of this decision.

² Grandparent's Complaint Notice included other issues going to prospective programming. Grandparent agreed, with the IU's consent, to withdraw all of the complaint except issues regarding evaluation and identification, without prejudice for res judicata and limitation of actions purposes. (NT 11-15.) Therefore, this decision is limited to the appropriateness of the IU's evaluation and identification of the Child.

ISSUES

1. Was the IU's evaluation of the Child appropriate?
2. Did the IU's evaluation recognize the appropriate category or categories of disability as part of its determination of eligibility?
3. Did the IU's evaluation recognize all of the educational needs of the Child that require specially designed instruction and related services?
4. Should the hearing officer provide declaratory or proscriptive relief and order the IU to identify the Child with the classifications that the Grandparent requests?

FINDINGS OF FACT

1. In November 2010, at the age of 22 months, a privately retained psychologist evaluated Child and diagnosed Child to determine if Child met the diagnostic criteria for Autism. The evaluator noted many areas of delayed functioning, including communication, and many medical conditions, including history of [redacted]. The evaluator diagnosed Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS). The evaluator found that Child presents with an autism spectrum disorder but was unable to confirm a diagnosis of autism without ruling out physical impairments as the cause of the Child's developmental delays and functional impairments. (IU-9, 30.)
2. Assessments in October and November 2010, through the local Infant and Toddlers Program, noted developmental delays in cognitive, communication, adaptive, and fine and gross motor skills. (IU-9.)
3. Evaluations in 2010 noted no problem behaviors or hearing impairments. Delays were noted regarding cognitive, physical, adaptive, social and emotional development. Services provided included speech pathology, psychological, occupational therapy, [redacted], and physical therapy. (IU-5.)
4. In October 2011, the Grandparent provided a signed Permission to Evaluate form to the IU, and the IU assembled a multidisciplinary team (MDT) including a school psychologist specializing in early childhood evaluation, speech language pathologist, physical therapist, occupational therapist, and teacher [redacted]. Personnel from the Infant and Toddlers program also attended an MDT meeting. In December 2011, within 60 days, the IU provided an evaluation report (ER) to Grandparent, which found the Child to be eligible for special education services through the IU Early Intervention program. (NT 56-57; IU-7, 17.)
5. The school psychologist for the MDT is a doctoral level licensed clinical psychologist and certified school psychologist with over fifteen years of experience, including over three years of evaluating young children for special education, and including experience

with diagnosing and evaluating for autism. The other members of the MDT team are trained specifically and experienced in identifying children with autism. (NT 64-69; IU-24.)

6. The referral questions for the evaluation included concerns with development, speech and language, motor and sensory functioning, and socialization. The original draft of the ER included ruling out autism as a referral question. Child was 33 months old at the time of evaluation. (IU-6, 7.)
7. The Grandparent placed limits on the MDT's access to medical history information. (IU-18.)
8. The MDT reviewed prior assessments made available to them, including the November 2010 private assessment and reports from the Infant and Toddler program in which Child had been served and assessed. (NT 56-57, 72-73; IU-7.)
9. The Grandparent met with the MDT and the ER reflected Grandparent's input. (NT 72-74, 99-102; IU-6, 7, 14, 16, 17.)
10. The evaluation included a hearing screening. (IU-7.)
11. The evaluation included a [redacted]. (IU-7.)
12. Child was not able to participate in formal standardized cognitive or achievement testing; however, the MDT psychologist appropriately administered a developmental profile that yielded scores showing functioning in the severely delayed range in all areas evaluated. The developmental profile assesses motor, language, personal and self-help, social and intellectual development. (NT 71-72; IU-7.)
13. The School psychologist concurred with the private evaluation in 2010 and declined to diagnose Autism, due to the possible causation by [redacted]. Instead, the psychologist educationally classified Child with Multiple Disabilities, due to significant delays in cognitive, communication, motor, social/emotional and adaptive skills, as well as [redacted]. The psychologist chose this classification because it encompasses more disabilities than the classification of autism, because a diagnosis of autism could not have been made at the time of evaluation, and because Multiple Disabilities more appropriately fit the presentation and needs of the Child. (NT 74-80, 87-91; IU-7.)
14. The developmental profile also contributed to assessment of Child's language ability, along with informal assessment through interaction with Child, language sample and family report. The MDT considered Child's receptive and expressive language skills, as well as response to directions and social interaction. (IU-7.)
15. The MDT considered gross and fine motor functioning through clinical observation and assessment and family report, and sensory functioning. (IU-7.)
16. The MDT considered adaptive development, as well as the needs of the family in assisting the Child's development and participation in everyday activities. (IU-7.)

17. The evaluation included a [redacted] assessment obtained through clinical observation and assessment, as well as review of previous evaluations. (IU-7.)
18. In January 2012, the MDT amended the ER to add language that specified Child's diagnosis of PDD-NOS, and Child's significant delays in cognitive, communication, motor, social/emotional and adaptive skills, as well as [redacted]. (IU-8.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.³ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁴ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

³ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

⁴ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Grandparent, who initiated the due process proceeding. If the Grandparent fails to produce a preponderance of the evidence in support of Grandparent's claim, or if the evidence is in "equipoise", the Grandparent cannot prevail under the IDEA or the Pennsylvania Code provisions for special education.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The hearing officer must determine whether or not the IU's evaluation was appropriate. 34 C.F.R. §300.507. In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311.

The IDEA obligates a local educational agency to conduct a "full and individual initial evaluation" 20 U.S.C. §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to "determine the educational needs of such child" 20 U.S.C. §1414(a)(1)(C)(i). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed at enabling the child to participate in the "general education curriculum" and "determining an appropriate educational program" for the child. The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally" 20 U.S.C. §1414(b)(3)(A)(ii).

The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs" 34 C.F.R. §300.304(c)(6). Evaluation procedures must be sufficient to "assist in determining ... [t]he content of the child's IEP." 34 C.F.R.

§300.304(b)(1). Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need” 34 C.F.R. §300.304(c)(2). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii). Selected instruments should “assess the relative contribution of cognitive and behavioral factors” 20 U.S.C. §1414(b)(2)(C).

The Pennsylvania Code requires essentially the same breadth of inquiry in an evaluation of a suspected eligible young child. The relevant sections states:

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.

22 Pa. Code §14.153(2).

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002). These procedures must include the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information” 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency may not use

“any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2).

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

APPROPRIATENESS OF EVALUATION

I conclude that the IU’s evaluation meets the above standards. It was sufficiently comprehensive to identify all of the Child’s special education and related services needs. It also

met the IDEA's procedural requirements. Therefore, I conclude that the IU's evaluation was appropriate, and I decline to order either declaratory or prospective relief, as the Grandparent requests.

The scope of the evaluation was sufficiently comprehensive, as proven by a preponderance of the evidence. (FF 4.) The Child's areas of disability are broad, and the ER is sufficiently broad to encompass all areas of disability. (FF 1-3.) The referral questions included autism, speech and language, motor and sensory functioning, and socialization. (FF 6.) In addition to the above disabilities, the ER also evaluated the Child's cognitive, fine and gross motor, adaptive and social and emotional functioning (including social communication), as well as the Child's sensory needs. There was a hearing screening and a [redacted] assessment, as well as an assessment of family needs for support of the Child. (FF 4, 7. 10-17.)

As to autism, the testimony made clear beyond any question that the MDT had considered whether or not the Child should be classified with autism. (FF 13.) The original draft of the ER listed this as a referral question, although that referral question was dropped inexplicably in the final draft. (FF 4.) This difference in the documentation of the scope of the evaluation does not disprove the clear and unquestionable evidence in the record that the MDT thoroughly considered whether or not to classify Child with autism.

Thus, the IU's evaluation addressed all areas of the child's functioning that could have been affected by the physical disabilities that were reported to the IU, including [redacted]. This fulfilled the IU's obligation to comprehensively identify all of Child's needs arising from the disabilities enumerated in the IDEA. This also fulfilled the requirements of 22 Pa. Code §14.153(2). There is no claim or evidence that the Child suffered from any other enumerated disability that was not considered by the MDT.

The evidence is preponderant that the IU's evaluators complied with the procedural requirements of the IDEA. The evaluators utilized a variety of assessment tools and strategies, including a hearing screening, [redacted], language sample, review of previous assessments, considering information given by Grandparent, and meeting with providers from the infant and toddler program. (FF 6-17.) The MDT evaluators observed the Child in various play settings, including occupational therapy and physical therapy areas. (FF 14-17.) A developmental assessment was administered after it became clear that standardized cognitive and achievement testing would not be possible due to the Child's developmental delays. (FF 12.) The record is preponderant that all instruments and tests used by the evaluators were technically sound and were used appropriately. (FF 12, 17.) All IU MDT members were appropriately qualified and trained. (FF 5.)

Grandparent argues that the evaluation was inappropriate because it did not classify the Child with all of the Child's disabilities, including Autism, Speech or Language Impairment, [redacted]. Grandparent argues that the Child qualifies for each of these classifications and that including each of them would better describe the Child's disabilities and better describe the Child's needs for special education and related services. Grandparent contends that the evaluation is the basis for placement, program planning and development of the Child's Individualized Education Program (IEP); therefore it is imperative that the team developing the IEP be made aware of all of the Child's needs arising from all of the Child's disabilities. Grandparent requests that the hearing officer order the IU to identify Child with all of these disabilities.

I am concerned that Grandparent may believe that the label set forth in the ER is the outer limit of the Child's right to special education – that unless the ER says explicitly that the Child is

entitled to services for a given disability, those services will not be provided, even if the Child needs them in order to develop and learn. The Grandparent should be assured that the Multiple Disabilities classification is intended to have the opposite effect – it is intended to be inclusive, not exclusive. It is intended to alert the IEP team that programming for more than one disability is required, just as its definition states. 34 C.F.R. §300.8(7). Moreover, educational agencies are obligated to address all of a child or student’s needs for special education and related services, not just those arising from a single disability category. 34 C.F.R. §300.324(a). The testimony in the present matter supports this view of the multiple disabilities classification: the IU’s psychologist made it clear that the Multiple Disabilities classification states that the Child’s needs are far greater than what the autism classification alone would require. (NT 88-90.)

In any event, the law does not require the IU to classify Child with autism. The evidence is preponderant that there is not a diagnosis of autism from a medical point of view. While the 2010 private evaluation indicated that there was evidence indicating that the Child has an Autism Spectrum disorder, the evidence was preponderant in this matter that this is not the same as a diagnosis of autism, and it is not the same a qualifying for the educational classification of Autism. (FF 1, 13.) Therefore, there is no legal basis to compel the IU’s MDT to classify Child with autism. I reviewed the testimony of the school psychologist carefully and I find no basis to question that professional’s judgment in this regard. (FF 13.)

The evidence undercuts Grandparent’s concern that the ER does not call for addressing the Child’s needs with regard to [redacted]. When Grandparent told the MDT about this concern, the ER was changed to specify all of these impairments. (FF 18.) Therefore, the IU is acknowledging and promising to address all of these impairments to the extent that they interfere with Child’s learning. Based on a preponderance of the evidence, I conclude that it is not

necessary or appropriate for the MDT to list every possible IDEA disability instead of using the category of Multiple Disabilities.

Grandparent argues that there was a procedural violation because the MDT used a computer based ER form that did not allow them to spell out all of the Child's disabilities. Again, the evidence undercuts this argument. The witnesses made clear that they worked around this limitation of their software by typing the list of disabilities on the final copy of the ER. (FF 18.) It is clear from their testimony that this modification became part of the ER. Therefore, going forward, all of those listed disabilities must be addressed by the Child's IEP to the extent that they affect Child's learning, along with any other educational need for special education and related services that are caused by Child's various disabilities.

CONCLUSION

I conclude that the IU's evaluation was appropriate; consequently, I will not order the IU to change the ER. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The IU's evaluation of the Child was appropriate.
2. The IU's evaluation recognized the appropriate category or categories of disability as part of its determination of eligibility.
3. The IU's evaluation recognized all of the educational needs of the Child that require specially designed instruction and related services.

4. The hearing officer will not provide declaratory or proscriptive relief and order the IU to identify the Child with the classifications that the Grandparent requests.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

March 6, 2012