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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING
ODR File Number 6913/06-07 KE

Name of Child: MR

Date of Birth: xx/xx/xx

Date of Hearing:
Xx/xx/xx

OPEN HEARING

Parties to the Hearing:

Ms.

Tonya DeVecchis-Kerr
Special Education Director
Mount Union Area School District
28 West Market Street
Mount Union, PA 17066

Representative:

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Date Transcript Received: September 30 2006

Date Record Closed: October 6, 2006

Date of Decision: October 10, 2006

Hearing Officer: Lynda A. Cook, Ed. D.

BACKGROUND

Student, a xx year old resident of the Mount Union School District, is in the eleventh grade. She is identified as eligible for and receives services for specific learning disability in reading, written expression and math. She also meets criteria for and receives emotional support services. In response to the Parent's refusal to consent for a reevaluation and subsequent request for an independent educational evaluation (IEE), the District filed for due process to determine whether it has the right to conduct the reevaluation.

ISSUES

Whether the District has the right to reevaluate Student? (N.T. 10)

FINDINGS OF FACT

1. This case was filed by the District on 09/01/06 subsequent to the Parent filing for Due Process on 08/14/06, seeking an Independent educational evaluation (IEE) at public expense. The hearing was scheduled for 09/18/06. On 09/15/06, Parent's counsel informed the District counsel via e-mail that Parent had withdrawn the request for a due process hearing on "ripeness grounds". (HO 1, 2; SD 18; P 11, 14)
2. The 09/25/06 hearing date for this current case was determined during a conference call convened by this Hearing Officer on 09/15/06 to clarify issues in both cases. Because neither the Parent nor her counsel was available to participate in the 09/18/06 hearing date, the 09/25/06 hearing date was determined. (HO 2)
3. This Hearing Officer requested that counsel for each party file written closing statements by the end of the business day on 10/05/06. District's counsel did so. Parent's counsel requested via e-mail and was granted a one-day extension. (N.T. 267-268)
4. The parties stipulate that Student is a resident of Mount Union School District, is an eligible student, and currently is receiving services. (N.T. 24)
5. The most current District evaluation of the Student resulted in an Evaluation Report (ER) on 04/11/03. (SD 1; P 3,4; N.T. 52) Parent signed agreement on the 05/12/03 Notice of Recommended Educational Placement (NOREP) for part time learning support/emotional support. (SD 19; N.T. 60)
6. Responding to the mandate for a triennial evaluation, the District issued Permission to Reevaluate/Agreement to Waive Reevaluation form on 04/11/06. District recommended that a reevaluation was unnecessary. The reason offered for this recommendation was, "the student responds very well to the special education services in place, and she has experienced a great deal of success in school with

those services. After review of current evaluation report, data indicates that Student is making expected progress”. (SD 4; P5; N.T. 65)

7. An IEP meeting was not convened on 04/11/06. (N.T. 178)
8. Parent did not return or sign this Permission to Reevaluate/Agreement to Waive Reevaluation form, although District witnesses testified that both the District and Parent agreed that a reevaluation was not necessary. (SD 4; P5; N.T. 67, 104-106, 118)
9. On 06/01/06, Student’s IEP team, including the Parent, convened to develop a new IEP for the 2006-2007 school year. (N.T. 201)
 - a. In preparation for and during the course of this meeting, Student’s transition needs were discussed, specifically in relation to math and career. (N.T. 107-109, 118, 202, 257)
 - b. Student’s 06/01/06 Individualized Education Program (IEP) plan, Present Levels of Academic Achievement and Functional Performance/Functional Performance, states: “Student will receive a complete psychological re-evaluation at the beginning of the next school year to determine her exact math learning support needs and what math class Student should be scheduled for next year. (SD 5; P 6; N.T. 71, 120, 139)
 - c. District witnesses testified that both the Parent and District representatives at the meeting agreed to the need for a re-evaluation, and that this evaluation would take place at the beginning of the 2006-2007 school year. (N.T. 109-110, 127-128, 139-140)
 - d. Notation was made on the IEP that Mr. D, special education director at the time of the IEP team meeting, would arrange with the school psychologist to have the evaluation scheduled. (SD 5; P 6; N.T. 71, 108-109, 111, 175)
 - e. On 06/02/06, Mr. D told the school psychologist to schedule math testing at the beginning of the 2006-2007 school year. (N.T. 145-146)
10. Parent did not sign the 06/01/06 IEP, although she was in attendance at the IEP meeting. In the signature block, the following notation is made: “Parent requested not to sign IEP until pending evaluation regarding math”. (SD 5; N.T. 71, 110, 119, 126, 174, 201, 240-42)
11. Testimony identifies several reasons for the change in recommendation concerning an evaluation from April to June.
 - a. Parent indicated to Student’s emotional support teacher in discussions to schedule the June IEP meeting that she was concerned about Student’s math. (N.T. 105, 118)
 - b. At the 06/01/06 IEP meeting, Parent expressed concern about Student’s math classes for the 2006-7 school year, as well as the need for a more

- comprehensive assessment of Student's abilities. (N.T. 109, 120, 206, 243)
- c. Student's post-high school options and how the District could meet her needs in this area were discussed at the meeting. (N.T. 176-177, 182-184)
 - d. The school psychologist recommended a more comprehensive evaluation when contacted by the special education director on 06/02/06 because she had never met the student or reviewed the student's file and may want to conduct more than math assessments. (N.T. 146-147)
12. The current director of special education was appointed on 07/18/06, but did not assume duties until the first week of August, 2006. (N.T. 43) Soon after, she reviewed files from the former director of special education and noticed a request from Parent for IEE. (N.T. 48) In August the Superintendent informed her of the Parent's request for an IEE, and she attempted to contact Parent several times by telephone to determine if a resolution was possible. (N.T. 246-7)
13. On 08/09/06, the current director of special education issued a cover letter and the Permission to Evaluate/Agreement to Waive Reevaluation notice. (SD 7; P 10)
- a. The reason for the proposed reevaluation was "The IEP team has reviewed existing evaluation data concerning your child and made the recommendation that there is a need for additional data".(SD 7, P 10)
 - b. The reevaluation was proposed to be conducted on August 30, 31 and September 1, 2006. (SD 7, P 10)
 - c. Specific types of assessment tools, tests and procedures identified to be used included: Wechsler Adult Intelligence Scale-III, Wechsler Individual Achievement Test-II (WIAT-II), Woodcock-Johnson Tests of Achievement (selected subtests), Bender-Visual-Motor Gestalt, Comprehensive Test of Phonological Processing, Behavior Assessment System for Children Rating Scale, Test of Nonverbal Intelligence (TONI-3), Informal assessments of reading fluency, math knowledge, and written language skill, Interviews and informal checklists completed by teachers, student and parent. (SD 7; P 10; N.T. 69,148)
14. Parent signed the 08/09/06 Permission to Evaluate/Agreement to Waive Reevaluation form on 08/14/06 objecting to the proposed evaluation and indicating that she wanted a due process hearing. (SD 8; P 10; N.T. 72)
15. Parent sent three letters to the Superintendent requesting approval for an IEE: on or about July 28, August 14 and 15. In the letter dated 08/15/06, Parent stated having been informed by PDE Division of Compliance Monitoring and Planning that the District must grant her request for an IEE or go to a due process hearing. (SD 8; P 7, 8, 12; NT 72, 87-93)
16. In the cover letter with the 08/09/06 Permission to Evaluate/Agreement to Waive Reevaluation notice, the special education director stated, "The district is entitled

- under IDEIA to conduct its own reevaluation in order to determine Student's needs. Although you requested an independent evaluation, the district is planning to conduct its own evaluation of your child (prior to any independent evaluation).(S 7; P 10)
17. The District's notice to the Parent that they were not approving the request for an IEE at public expense included the cover letter referenced above and phone calls attempted by the special education director. (S 7; P 10; N.T. 86- 87, 92, 97) The Superintendent did not communicate directly with Parent over this matter. (N.T. 214)
 18. On 09/18/06, the independent evaluator with whom the Parent had scheduled an evaluation for 10/25/06 sent letters to Parent and Parent's counsel listing proposed tests, and requesting, "If the district is planning any testing for Student, I would ask that these tests not be included in its battery." Tests identified by the independent evaluator include: Wechsler Adult Intelligence Scale-III, Test of Nonverbal Intelligence 3, Kaufman Brief Intelligence Test/11, Wechsler Individual Achievement Test-II, Woodcock-Johnson/III Fluency Subtests for Reading, Writing and Mathematics, Comprehensive Test of Phonological Processing, Bender Gestalt Visual-Motor Integration Test, BASC-Parent Edition, ABAS-II Parent Form. (P 15)
 19. On 08/18/06, the District, through their solicitor, e-mailed Parent's counsel stating their intent to go to due process. (SD 9)
 20. On 08/29/06, the District again, through counsel, e-mailed Parent's counsel stating their intent to file for due process, and that "the District did not waive its legal right to conduct its own evaluation." (SD 11, 14; N.T. 74)
 21. On 09/01/06, the District filed a Due Process Complaint Notice with the Office for Dispute Resolution. (SD 18; HO 1)
 22. On 09/01/06, the director of special education notified Parent of a Resolution Session scheduled for 09/11/06. (SD 12; P 13; N.T. 75)
 23. Parent did not attend the originally-scheduled 09/11/06 Resolution Session, but did participate in the re-scheduled session on 09/13/06. At the meeting, Parent informed the District that she had scheduled an appointment with an independent evaluator for 10/25/06. The meeting concluded with the Parent informing the District that she would confer with her attorney concerning whether or not she would give permission to the District to complete the evaluation before the IEE appointment. (SD 15, N. T. 75)
 24. Parent's request for an IEE was discussed at the 09/13/06 Resolution Session. (N.T. 93-95, 226-227)

25. Parent has rescheduled the appointment to 10/09/06 for Student to be evaluated by the independent evaluator. (N.T. 212)
26. Parent states that District may evaluate Student after the IEE is completed. (N.T. 223, 260-261)
27. Parent's reason for not wanting the District to evaluate Student is that she does not trust them. (N.T.215-217, 260)

DISCUSSION AND CONCLUSIONS OF LAW

The issue in this case is whether the District has the right to conduct the reevaluation of Student. (N.T. 10)

Each school district has an affirmative obligation to reevaluate a student at least every three years, or earlier if conditions warrant a reevaluation. Specifically, the school district must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR 300.304 through 300.311:

- If 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.

A reevaluation conducted under 34 CFR 300.303(a):

- May occur not more than once a year, unless the parent and the public agency agree otherwise; and
- Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 CFR 300.30; 20 U.S.C. 1414(a)(2)

In this case, the District delivered to these requirements when it issued the Permission to Reevaluate/Agreement to Waive Reevaluation form on 04/11/06 because the last Evaluation Report (ER) was published on 04/11/03. (SD 1, 4, 5; P 3, 4, 5; N.T. 52) The recommendation on 04/11/06 was that a reevaluation was unnecessary, because "the student responds very well to the special education services in place, and she has experienced a great deal of success in school with those services. After review of current evaluation report, data indicates that Student is making expected progress". (SD 4; P5; N.T. 65) An IEP meeting was not convened to develop or issue this form (N. T. 178), a circumstance supported in Section 300.305 (b) which states that the IEP team may conduct this review without a meeting.

A district must obtain parental consent before conducting an initial evaluation or reevaluation. Override of parental refusal to consent to a reevaluation is addressed in the regulations. Section 300.300(c) states that each public agency must obtain informed parental consent in accordance with Sec. 300.300(a)(1) prior to conducting any reevaluation of a child with a disability. Section 300.300(a)(3) allows a public agency to override parental refusal to consent to an initial evaluation by utilizing the mediation

procedures under Sec. 300.506 or the due process procedures under Sec. Sec. 300.507 through 300.516. If a parent refuses to consent to a reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the procedural safeguards in subpart E of this part. Sec. 300.300(c)(1).

If a parent responds and refuses to consent to an initial evaluation or reevaluation, a number of possibilities might follow. School personnel may, and should, discuss the issue with the parent in order to understand her reasons for withholding consent, explain the school system's concerns, and try to come to a mutually agreeable resolution. 34 C.F.R. §300.505(b).

The Parent in this case did not return or sign 04/11/06 Permission to Reevaluate/Agreement to Waive Reevaluation form. (SD 4; P5; N.T. 118) The record of this hearing does not provide evidence or testimony for why the District did not pursue a response from the Parent in this matter, even though testimony by District witnesses is that both the District and Parent agreed that a reevaluation was not necessary. (N.T. 118)

The District proceeded to hold the IEP meeting on 06/01/06 to plan for Student's 2006-2007 school year, the day before the 2005-2006 school term ended. (N.T. 201). The record of this hearing does not include testimony or evidence documenting any discussion with the Parent about the 04/11/06 form, but does address a new recommendation to conduct a reevaluation of the student. Specifically, the recommendation written under Present Levels of Academic Achievement and Functional Performance/Functional Performance, states: "Student will receive a complete psychological re-evaluation at the beginning of the next school year to determine her exact math learning support needs and what math class Student should be scheduled for next year. (SD 5; P 6; N.T. 71, 120, 139)

The record reflects several reasons for the change from April to June regarding the recommendation for an evaluation, including Parent concern over Student's needs, IEP team discussion about student's post-high school options and plans, and input from the school psychologist after the IEP meeting. (N.T. 105, 109, 118, 120, 146-147, 176-177, 182-184, 206) The District clearly was responding to Parent concerns about Student's program needs.

Credible testimony by District witnesses documents that although Parent chose not to sign the IEP, she was in attendance and verbally agreed to the evaluation. (N.T. 109-110, 127-128, 139-140) It is noteworthy, however, that the record of the hearing makes no reference to the District having issued a Permission to Reevaluate/Agreement to Waive Reevaluation form at the 06/01/06 IEP meeting in response to the recommendation for an evaluation. Instead, a notation was made on the IEP that the special education director at the time of the IEP team meeting (who left the district in June, 2006), would arrange with the school psychologist to have the evaluation scheduled. (SD 5; P 6; N.T. 71, 108-109, 111, 175) On 06/02/06, he telephoned the school psychologist to instruct her to schedule testing at the beginning of the 2006-2007 school year. (N.T. 146)

Pennsylvania School Code (22 Pa School Code §14.124(b) Reevaluation sets forth the requirement for a reevaluation timeline: In addition to the requirements incorporated by reference in 34 CFR 300.536 (relating to reevaluation), a reevaluation report shall be provided to the parents within 60 school days from the date that the request for reevaluation was received from the parent or teacher, or from the date that a determination is made by the agency that conditions warrant a reevaluation. Although communication with the Parent likely would have been enhanced had the District issued the permission form in June, the District operated within legal parameters by waiting until August. Even if the District had issued this form on 06/01/06, it would not have been obligated to conduct the evaluation during the summer, when school was not in session. The 60 school day count would have included 06/02/06, and then resumed on the first day of the 2006-2007 school term.

On 08/09/06, the District did issue the Permission to Evaluate/Agreement to Waive Reevaluation notice, proposing to conduct the evaluation on August 30, 31 and September 1, 2006. (SD 7; P 10) Specific types of assessment tools, tests and procedures identified to be used included: Wechsler Adult Intelligence Scale-III, Wechsler Individual Achievement Test-II (WIAT-II), Woodcock-Johnson Tests of Achievement (selected subtests), Bender-Visual-Motor Gestalt, Comprehensive Test of Phonological Processing, Behavior Assessment System for Children Rating Scale, Test of Nonverbal Intelligence (TONI-3), Informal assessments of reading fluency, math knowledge, and written language skill, Interviews and informal checklists completed by teachers, student and parent. (SD 7; P 10; N.T. 69,148)

Prior to the District issuing this Permission to Evaluate/Agreement to Waive Reevaluation notice, however, the Parent wrote to the Superintendent on or about 07/28/06 requesting approval for an IEE at public expense. (SD 8; P 7) When she did not receive a response from the Superintendent, she repeated her request in letters dated 08/14/06 and 08/15/06. (SD 8; P 7, 8, 12; NT 72, 87-93) Parent included in one letter that PDE Division of Compliance Monitoring and Planning told her that the District must grant her request for an IEE or go to a due process hearing. (SD 8; P 7, 8, 12; NT 72, 87-93)

Parent's letters of 08/14/06 and 08/15/06 coincided with her written response on the Permission to Evaluate/Agreement to Waive Reevaluation notice issued by the District on 08/09/06. She signed on 08/14/06 objecting to the proposed reevaluation and requesting a due process hearing. (SD 8) The record of this hearing documents that in the cover letter accompanying the Permission to Evaluate/Agreement to Waive Reevaluation notice, the District did acknowledge Parent's 07/28/06 request for an IEE. The special education director wrote on 08/09/06, "The district is entitled under IDEIA to conduct its own reevaluation in order to determine Student's needs. Although you requested an independent evaluation, the district is planning to conduct its own evaluation of your child (prior to any independent evaluation)." (S 7; P 10) This statement, while not an absolute refusal to provide an IEE at public expense, does demonstrate that the District was not waiving its right to conduct the evaluation.

Although this hearing does not focus on the issue of Independent Educational Evaluation (IEE), the issue clearly is at the core of the Parent's interaction with the District over whether they have the right to reevaluate her child. The IDEA regulations at 20 U.S.C. § 1451(b)(1) provide that an IEE may be provided at public expense under the following circumstances:

- (b)(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.
- (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay either (i) initiate a hearing under §300.507 to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under §300.507 that the evaluation obtained by the parent did not meet agency criteria. 34 C.F.R. §§300.502(b)(1)-(2)

From the perspective of applying the concept of unnecessary delay, as required by §300.502(b)(2), there is nothing in the statute, case law or regulation that establishes a per se standard of unnecessary delay. (Special Education Opinion 1760 (2006)) The special education director did attempt to contact the Parent regarding the 07/28/06 letter by telephone in early August, and again by letter on 08/09/06, soon after assuming her new role. (SD 7; P 10; NT 246-7) Even if one discounts the attempts to reach Parent by telephone, the written response on 08/09/06 constitutes a timeframe of only seven business days. Further, the District informed Parent's counsel on 08/18/06 of its intent to go to due process. (SD 9) The District again informed Parent's counsel of this fact on 08/29/06, and stated that it did not waive its right to conduct the evaluation. (SD 11, 14; N.T. 74)

This Hearing Officer recognizes that a parent has a fundamental right to be involved in their child's education, and to provide or refuse consent in certain circumstances. However, in balancing the Parent's exercise of their rights in regards to the child's education, with the District's assertion of their right to conduct the reevaluation of this Student, the hearing officer must look to the events leading up to the Parent's refusal to provide consent in relation to the legal parameters. After the District proposed in April of 2006 to waive reevaluation, Parent did not respond either with consent or objection. In discussion leading to the June IEP meeting and during the meeting itself, the Parent requested and the District agreed to conduct a reevaluation which would take place at the beginning of the 2006-2007 school term. (SD 4; P5; N.T. 67, 104-106, 118)

Parent's testimony does not reveal disagreement with the District's evaluation procedure or with a particular evaluation of the Student, conditions indicated by Third Circuit Court of Appeals as required before a parent may receive reimbursement for an IEE. Holmes v Millcreek Twp. Sch. Dist., 205 F.2d 583, 591 (3d Cir. 2000) (citing Bernardsville Bd. Of Educ. v J.H.U., 42 F.3d 149, 157 (3d Cir. 1994); Abington School District, Special Education Opinion No. 1760 (2006) Parent testified that she did not trust the District, not a compelling reason for this Hearing Officer to determine that the District does not have

the right to conduct an evaluation of this Student. (N.T.215-217, 260)

In due process hearings under the IDEA, a hearing officer has the authority to grant a public education agency's request to proceed with the evaluation and assessment of a student with a suspected learning disability, even where the parent refuses to consent to such a process. Dallas School Dist., 27 IDELR 663 (Ore. 1998); South Texas Indep.Sch. Dist., 30 IDELR 73 (Tex. 1998). Putnam County School System, 32 IDELR 47 (Ga. 1999). The purpose of the evaluation is to determine whether a child has a disability, and the nature and extent of the special education and related services that the child needs. §300.500(2)

After careful consideration of the evidence and testimony in light of regulatory requirements, I conclude that the District does have the right to conduct the reevaluation of this Student. The record of the hearing, taken as a whole, while painting a picture of arguably lax follow-through on communication with the Parent on the part of the District, does not reveal the level of procedural inadequacies that would negate the District's right to reevaluate.

ORDER

The Mount Union Area School District does have the right conduct the reevaluation of Student.

Lynda A. Cook, Ed. D.
Hearing Officer

DECISION DATE:
October 10, 2006