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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: SO
ODR #7703/06-07 LS

Date of Birth:
Xx/xx/xx

Date of Hearing:
July 16, 2007

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Reading School District
800 Washington Street
Reading, Pennsylvania 19601

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:
Pro Se

Richard Guida, Esquire
1100 Berkshire Boulevard
Suite 201
Reading, Pennsylvania 19610

July 24, 2007

July 27, 2007

Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old student who resides in the Reading School District (hereinafter District). Pursuant to a parentally-requested evaluation the District found Student ineligible for special education services. Mr. and Mrs. (hereinafter Parents), assert that the District's determination was incorrect and that Student is a child who is eligible for special education. As the Parents had asked for an independent educational evaluation (IEE) at public expense, the District filed for a due process hearing to defend its position. In on and off the record discussions it was clarified by all participants that the core issue was eligibility, and that if the hearing officer found that an IEE was needed to assist in this determination one would be ordered.

It should be noted that the Parents¹ were pro se in this matter. Although they had an advocate, and she was expected to be at the hearing, she did not appear. The District established on the record that the advocate was informed directly of the date, time and place of the hearing during the week prior to the hearing session. (NT 75-76)

Issues

Was the Reading School District correct in determining that Student is not eligible for special education?

Findings of Fact

1. The Parents requested that Student be evaluated to determine his eligibility for special education, and the District performed a multidisciplinary evaluation which found him non-exceptional. (S3: S-4)
2. Student was in his current school for pre-kindergarten (2005-2006) and for kindergarten (2006-2007). (NT 27)
3. His principal noted him to be among the "top performers" in his grade levels. (NT 28)
4. Student never came to the attention of the principal for disciplinary matters. (NT 28)
5. The principal observed Student on numerous occasions as part of her observation of the classroom teachers and the classrooms, and found him to play and work with his peers in a fashion typical of kindergarten level. (NT 28)

¹ Although the term "Parents" is used, the mother was the only parent present at the hearing and acted on behalf of both parents.

6. Neither of Student's two teachers reported to the principal any concerns about him emotionally, behaviorally or academically. (NT 29)
7. During Student's pre-kindergarten year the school's guidance counselor saw him in various school settings during the day, usually on a daily basis because of the location of her office. She observed him to be delightful and to behave the same way his classmates behaved. (NT 34-35)
8. During pre-kindergarten the school counselor did not see anything in Student's emotional, behavioral, or academic functioning to raise concerns that he might have a disability. (NT 35)
9. Although Student was overweight, the counselor did not observe him to have physical difficulty with sitting, standing, or negotiating the stairs. (NT 36-37)
10. Overseeing the kindergarten lunch, the school counselor observed Student to be behaviorally appropriate, and an example of the kind of good behavior she looks for in the lunchroom. (NT 37-38, 43)
11. Student was socially interactive with his peers. He spoke to the other children at lunch, he would sit and socialize with the child next to him in class. (NT 43-45)
12. With other students the counselor observed Student to be a great helper, directly and by asking the teacher to help other children when they need assistance. (NT 38)
13. Because the Parents had signed a Permission to Evaluate, the school counselor was drawn to pay particular attention to Student during kindergarten. (NT 39)
14. The school counselor absolutely did not see anything whatsoever in her observations of Student that indicated he required special education services. (NT 40)
15. The school counselor noted Student to be second in his class academically during kindergarten. (NT 39-40)
16. Student's teachers did not express any concerns about him to the school counselor. (NT 39)
17. Because the Parents were raising the question of Autism regarding Student, and the previous evaluation and its addendum had found him ineligible, the District had a third psychologist see Student specifically around the issue of eligibility for special education services under the autistic classification. The evaluator had experience evaluating children with autism. (NT 49, 51, 57)

18. The original evaluator found cognitive skills in the average range, academic performance in line with cognitive ability, and no emotional, social or behavioral issues that were significant as assessed on a standardized behavior rating scale. (NT 50; S-3:S-4)
19. The third evaluator observed Student in the kindergarten classroom for a good portion of the day. He worked in a group of students in close quarters with no seeming aversion to physical proximity, he played intensely with Play-Doh without demonstrating tactile issues, he showed his work to his peers drawing their attention verbally, he laughed and giggled with peers and was sometimes the initiator, he seemed to enjoy himself, he accepted the invitation of a female peer to join her in an activity, and thanked a male peer for helping pick up puzzle pieces, smiled at the teacher during a transitional activity, and gave appropriate eye contact, at times bending around one peer to look another peer in the eye. At one point he put a sticker on his friend's back, a typical childish gesture, but also took it off. (NT 51-55)
20. The third evaluator also observed Student in the auditorium where the children were sitting close together. He showed no aversion to physical proximity, he made a funny gesture and laughed with his peers who joined him in giggling. On stage he was "packed in the middle of screaming kids" who were singing their graduation songs very loudly and he showed no sensory aversion to this. (NT 54-55)
21. The third evaluator did not notice any mechanical voice tones or other unusual voice qualities. (NT 60)
22. The third evaluator was looking at Student for evidence of a disorder on the autistic spectrum, including Asperger's. (NT 61)
23. In addition to doing an observation the third evaluator administered the Childhood Autism Rating Scale (CARS) with the teacher. Her ratings resulted in the lowest possible score on all items. (NT 55; S:3-S-22)
24. Although the third evaluator wanted to administer the CARS with the mother he did not do so because her phone was disconnected and she was not reachable. (NT 55-56)
25. The third evaluator had access late in the week before the hearing to a document produced by the Parent² that noted "autistic-like behavior". In support of this the third psychologist recalled reading that Student had a fascination with Star Wars and that there was some notation about eye contact.
26. Through his observations, administration of the autism rating scale, and reviewing Student's records the third evaluator could find no evidence of autism or any

² Not introduced into evidence.

- other any area that could be identified as presenting a need for special educational services in the school setting. (NT 61)
27. A contracted physical therapist observed Student in the classroom as part of the multidisciplinary evaluation. She saw that Student was able to move in among crowded chairs, step over things on the floor, and bend down and pick up something. He “bounded” enthusiastically over to do the next activity. (NT 63)
 28. Seen outside the classroom for an individual assessment Student could go down steps, pull open a door, move on and off the floor, and play some age-expected ball games. He had gross motor skills in the normal range, and his muscle strength and range of motion were within the normal range. (NT 63-64)
 29. The physical therapist noted Student to be overweight and thought this seemed to be the basis of his tendency to walk with an external rotation of his feet. (NT 64)
 30. The physical therapist noted nothing about Student that would prevent his being able to function physically within the school environment. (NT 64-65; S-3:S-14)
 31. A contracted occupational therapist observed Student as part of the multidisciplinary evaluation. She had him perform routine school activities such as cutting with scissors, coloring and writing, all of which he did successfully. He was right-hand dominant and did not switch hands. He was coordinated and could cross the midline (reach for something on one side of him with the hand on the opposite side). (NT 66-67, 70-71; S-1)
 32. The occupational therapist noted no issues with strength or fine motor skills. (NT 69)
 33. Student showed no sensory integration issues in the tactile area and seemed to enjoy the activity used to assess this. (NT 67-68)
 34. Student could print the running alphabet from memory with no difficulty. (NT 68, 71-72; S-2)
 35. The occupational therapist administered the School Sensory Profile. The results of this instrument were that Student scored typically for sensory seeking, sensory sensitivity, and sensory avoiding. He scored typically for auditory information, movement information, touch information, and behavior. He scored typically for awareness and attention in the environment. He scored typically for range of tolerance for sensory input. He scored typically for availability for learning. (NT 73; S-3:S-16)
 36. Student scored in the “probable difference” for registration (paying attention) as he was distractible by visual input and for needing external support such as a verbal cue to get his attention. (NT 73-74; S-3:S-16)

37. The occupational therapist observed Student in the classroom interacting with two other boys at the computer; the boys were fooling around a little bit and Student laughed along with the rest of the children when one of the boys stumbled a little bit. The teacher told the three boys that they should “behave and listen”, a typical intervention for typical kindergarten boys. (NT 68)
38. The occupational therapist saw no evidence of any needs of Student’s that would be addressed through occupational therapy. (NT 70; S:3-S-15)
39. A speech/language pathologist evaluated Student and found all areas tested to be in the normal range of functioning for age. He had appropriate pragmatic skills, was attentive and interactive, conversed easily with age appropriate content and vocabulary and responded to questions and statements appropriately. Voice rate and rhythm were within normal limits for age. (S:3-S-13)
40. Student has a resource coordinator/case manager from [agency redacted]. She observed him on one occasion in the school setting and noted that he was doing what he was supposed to be doing (independent work) but kept looking back at her as he was working. (NT 80)
41. The resource coordinator/case manager noted that Student seems “very deeply distracted” at home and noted that he is always talking about Star Wars. (NT 80-81)
42. The Parent notes that Student has been involved with a youth advocate program since age four, and that he had wraparound services – BSC (Behavior Specialist Consultant) and MT (Mobile Therapy) – starting just before he turned five. He had home based TSS (Therapeutic Staff Support) which was stopped but has recently resumed. (NT 85)
43. The Parent asserts that Student has PDD NOS/Autism, that he was diagnosed at age five. Asked whether she remembers giving the District a copy of the report carrying that diagnosis she testified that she couldn’t remember. (NT 82-83)
44. The Parent believes that Student has a learning disability and that he cannot read (decode words), which she believes all the other kindergarteners can do. (NT 82)
45. The Parent asserts that Student requires physical therapy and testified that he is going to begin receiving it privately shortly. (NT 84)

Credibility of Witnesses

A Pennsylvania Special Education Hearing Officer is specifically charged with making credibility determinations regarding the witnesses' testimony, as in the great majority of cases the hearing officer level is the only level at which direct testimony is taken. In this matter each of the District's witnesses was highly credible. Each individual established his or her credibility through solid educational and experiential credentials. Each individual was specific about his/her observations of Student, giving many examples of his behavior and functioning in the school setting and when pertinent, during testing. The witnesses who evaluated Student gave thorough descriptions of behavioral observations and carefully went through exactly how they performed their assessments of the child and explained the results obtained. They compared their results to the diagnostic/classification criteria for an autistic disorder, which the Parent believes Student has, and separately and collectively established that he does not meet the criteria for the classification.

The Parent's sole witness is to be commended for accompanying the Parent and providing support. Her testimony was of limited value, however, as she only observed Student once in his classroom, and does not yet have the educational or experiential credentials to diagnose a child with a disorder. The mother clearly wants to obtain services for her son, and has been successful in obtaining wraparound services in the home for him, and apparently has also arranged for private physical therapy. Given Student's history of receiving wraparound services for one year, there should be at least one comprehensive initial evaluation by a clinical psychologist or psychiatrist. Additionally there would have to be TSS progress notes, BSC progress notes, and MT progress notes. Finally there would be a written treatment plan, revised as often as needed, but at least every 120 days. Notably, the Parents would have been given copies of the evaluation, any re-evaluations and the treatment plan (which mother and/or father must sign), and the progress notes would be available at the offices of the Provider 50 agency. Given the ostensibly available documentation, it is puzzling that the Parents did not produce it for the due process hearing to support their case.

Discussion and Conclusions of Law

Burden of Proof (Persuasion)

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). The District requested this hearing to defend its determination of ineligibility and was therefore assigned both the

burden of persuasion and the burden of production (presenting its evidence first) in the hearing. Application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case as the District clearly more than met its burden of proof and the Parent produced very little countervailing evidence.

The implementing regulations of IDEA 2004, found at 34 C.F.R. §300.8 define the term “Child with a disability” as follows:

- (a) **General.** (1) Child with a disability means a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, **and who, by reason thereof, needs special education and related services.** (Emphasis added)

Clear in the regulatory provisions, then, is the requirement that even if the child has one of the recognized disabilities, he or she must as a result require special education or specially designed instruction. A Basic Education Circular addressed this topic, stating:

“Specifically designed instruction consists of adaptations or modifications to the general education curriculum, instruction, instructional environments, methods, or materials for exceptional students.... Such specially designed instruction must go beyond the services and programs that a student would receive as part of general education, and must be designed to meet the unique needs of the student.” Basic Education Circular – Specially Designed Instruction, 22 Pa. Code §14.1, September, 1, 1997.

The Parent asserts that Student has PDD NOS, a disorder on the autistic spectrum, but has not backed up this assertion by producing the plethora of documentary material that has to be contained in his wraparound services chart at the provider agency. The Initial Evaluation Report produced by the District however notes that a psychological evaluation was completed in May 2006 and that Student was diagnosed as having “Pervasive Developmental Disorder, Not Otherwise Specified, Mild” and with “rule-outs for Attention Deficit Hyperactivity Disorder, Combined Type and Bipolar, precursors, primary”. An Addendum prepared by the District to supplement the Initial Evaluation Report considers a “neuropsychological discharge summary” from March 2007 that reportedly noted that the Parents “indicated several concerns including oppositional defiant behavior, behaviors typical of Pervasive Developmental Disorder, anger and others”. The discharge summary concludes that Student “does demonstrate features” of PDD and/or Asperger’s although Student “certainly does not strike one as having the full-blown features of the complete disorder”. Additionally the discharge summary concludes that Student does not meet criteria for learning disorders in reading, math or written expression. It is not known how the information for the discharge summary was

collected and the preparer was not present to testify at the hearing. Certainly Student does not manifest any elements of PDD or Asperger's in the educational environment at this time.

However, assuming for purposes of argument that the Parents had been able to prove their assertion that Student is on the autistic spectrum, thus satisfying the first criteria of the definition of a child with a disability, Student clearly fails the second part of the definition – he simply does not require specially designed instruction of any sort at this time. In this hearing the witnesses for the District established clearly by their testimony that Student is not a child with a disability as defined by the IDEA. In the educational setting, over the past two years, he has manifested no needs that would be addressed through specially designed instruction. When evaluated in accord with federal and state special education requirements, by a multidisciplinary team, he was not found to demonstrate characteristics typical of children on the autistic spectrum. Neither did he demonstrate a specific learning disability. He did not demonstrate the need for specially designed instruction in any area or for supportive services such as speech/language, physical therapy or occupational therapy. He is therefore not currently eligible for special education.

Student's Initial Evaluation Report notes his strengths in the regular education setting as: appears self-confident, highly motivated to do well, has leadership abilities, completes all assignments to the best of his ability, works well in a one-to-one situation, works well independently, works well in groups, age appropriate knowledge of his environment and circumstances, cooperative and courteous, follows directions well, works at grade level in content areas, adequate ability to recall facts, reads at grade level, good written language skills, relatively strong verbal skills, expresses thoughts well orally, math at grade level, and good auditory skills. (S3: S-4)

Although the Parents may be disappointed by the outcome of this hearing, they are exhorted to consider the findings of the array of educational specialists who saw Student and to be heartened by their unanimous findings that he is a child who is currently functioning typically in the cognitive, academic, behavioral, social, emotional, physical and sensory areas in the educational environment. Any behavioral problems he may manifest in the home are best addressed through wraparound (Behavioral Health Rehabilitative Services – BHRS) or outpatient mental health services.

Order

It is hereby ordered that:

The Reading School District's determination was correct. Student is not a student who is currently eligible for special education.

The School District is not required to take any further action.

July 27, 2007

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer