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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: MB
ODR #7733/06-07 KE

Date of Birth:
Xx/xx/xx

Date of Hearing:
July 27, 2007

CLOSED HEARING

Parties to the Hearing:
Mr.
Ms.

Abington School District
970 Highland Avenue
Abington, Pennsylvania 19001

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:
Pro Se

Amy Brooks, Esquire
Wisler, Pearlstine and Talone
484 Norristown Road Suite 100
Blue Bell, Pennsylvania 19422

August 4, 2007

August 5, 2007

Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old student who resides in the Abington School District (hereinafter District). He received Early Intervention services from the Montgomery County Intermediate Unit and will enter Kindergarten in September 2007. Pursuant to an evaluation conducted by the District, Mr. and Ms. (hereinafter Parents) asked for an independent educational evaluation (IEE) at public expense. The Parents believe that their son may be autistic, and do not agree with the District's classification of mental retardation. The District denied the Parents' request, and filed for a due process hearing to defend its evaluation.

Issues

Was the Abington School District's evaluation of Student appropriate?

Findings of Fact

1. The Parents gave consent for an evaluative battery assessing Student through a record and data review, achievement review, functional performance review, parental input, cognitive testing, achievement testing, visual perceptual testing, fine motor testing, social/emotional assessment, speech language evaluation and occupational therapy evaluation. The reasons for each part of the assessment were explained to the Parents. (NT 19-20; S-6)
2. Pursuant to the Parents signing a Permission to Evaluate on January 17, 2007, the District evaluated Student. (NT 19-20; S-6, S-8)
3. The District psychologist is a school psychologist who is certified in [state redacted] and in Pennsylvania. (NT 17-18)
4. The District psychologist has a BA from [university redacted] with a major in psychology and an MS in education from [university redacted]. (NT 17)
5. The District psychologist received an extension certification as a bilingual school psychologist (English/[foreign language redacted]) in the State of [redacted]. (NT 17, 75)
6. The District psychologist has seven-and-a-half years experience working as a school psychologist in [state redacted] and in Pennsylvania, and her work has been primarily in assessment, evaluating students from pre-school through high school. (NT 73-74)
7. The District psychologist has evaluated students who are autistic and students with speech/language impairments. (NT 71-72, 77)

8. The District psychologist reviewed all relevant evaluations and information from the MCIU which served Student since he was two-and-a-half years old. (NT 18, 38-45; S-1, S2, S-3, S-4, S-5)
9. At a transition meeting attended by an MCIU representative, the Parents¹ and District staff, the District gathered information directly from the Parents. (NT 18-19)
10. The District psychologist met with Student's teacher the day before observing Student in his classroom; the teacher had been Student's teacher for two years. (NT 32-33)
11. The teacher reported that she was concerned because Student's rate of progress was slow and that he had problems with age-appropriate independence. Although he was making progress verbally engaging with adults and with peers he had not improved in his interest in engaging with peers. (NT 33-34)
12. The District psychologist observed Student in his classroom for forty-five minutes in addition to administering testing. (NT 29)
13. In his classroom, Student played in a parallel fashion with toys but did show interest in what his peers were doing, although he did not initiate interaction with them. (NT 31)
14. At the time of his individual assessment Student had difficulty separating from his mother, so she was permitted to remain in the room with him during testing. (NT 29-30)
15. Student demonstrated difficulties in following directions presented purely verbally and had difficulty producing verbal responses initially. (NT 29-30)
16. The District psychologist selected testing instruments that are statistically sound, that have good reliability and validity. (NT 28-29)
17. Student was administered the Differential Ability Scales- Upper Preschool Battery (cognitive), the Bracken Basic Concepts Scale Third Edition Receptive (achievement), the Behavior Assessment Scales for Children – BASC (social emotional) and the Adaptive Behavior Evaluation Scales Revised (adaptive functioning). (NT 47; S-8)

¹ The mother and father filed jointly for this hearing and the plural Parents is used, although during the hearing and at other times the mother acted on behalf of both of them.

18. The District psychologist selected the Differential Ability Scales Upper Preschool Battery because she knows it to be a valid and reliable test of cognitive abilities, and she has extensive experience using this instrument. She also chose it because it has many tasks that engage children with concrete objects and engaging picture cues. With the exception of the tasks that specifically assess verbal abilities the tasks are not very verbally loaded. (NT 49)
19. When allowed by standardized administration the District psychologist engaged in modeling and teaching and repetition of questions for Student. (NT 50)
20. On the Differential Abilities Test Student's verbal and his non-verbal scores were commensurate with one another. (NT 49-50)
21. The District psychologist chose the Bracken Basic Concepts Scale – 3rd Edition to assess Student's knowledge of concepts associated with early school learning such as colors, letters, and shapes. The test has direct and simple directions, and many answers simply require a child to "point" or "show me". The test was not influenced by Student's weakness in producing spoken language. (NT 52-54)
22. Student's school readiness score on the Bracken was similar to his scores on the Differential Abilities Test. (NT 52; S-8)
23. The District psychologist assessed Student's social and emotional status by direct observation, by interviewing the teacher and the parents and by having the teacher complete a standardized inventory, the Behavior Assessment System for Children 2nd Edition (BASC). All measures were consistent with one another, with Student being in the At-Risk range, but not the Clinical Range, on aspects of attention, withdrawal and atypicality. (NT 54-55; S-8)
24. Although the BASC-2 assesses adaptive skills, the District psychologist gave the mother the Adaptive Behavior Evaluation Scale – Revised (ABES) because of Student's low cognitive functioning and the Parents' specific question regarding mental retardation. (NT 57-58)
25. The ABES requires the respondent, in this case the mother, to rate the child's behavior across over one hundred items that relate to ten different adaptive behavior skill areas such as social skills, community use, health and safety. (NT 59-60)
26. Student's score on the ABES indicated a major adaptive skill deficit. The test developers specifically indicate that a score of 79 or below should not be interpreted as a borderline score, and that one standard deviation below the mean represents a significant major adaptive skill deficit. (NT 79)
27. The District evaluated Student in the areas of speech/language and occupational therapy needs in addition to cognitive and academic areas. (NT 29)

28. Student's first language is English, but [foreign language redacted] is also spoken in the home. (NT 46; S-18)
29. During the speech/language evaluation Student could not produce a pointing response, so standardized assessment tools for receptive and expressive language could not be administered. The speech/language evaluator therefore used a functional communication profile, an observational tool that also incorporated information from the teacher and the current speech/language therapist. (NT 34-35)
30. The occupational therapist noted that Student continued to require direct occupational therapy support for classroom academic activities as well as for developing age-appropriate self-help skills. (NT 37)
31. At the conclusion of the evaluation session the Parents asked for feedback regarding whether Student was mentally retarded or autistic. The District psychologist declined to give immediate feedback as she had not had the opportunity to review her tests. (NT 24)
32. There had been nothing in the earlier records from any of the previous service providers to suggest that Student was autistic. However, since the Parents had brought up the question at the end of the day that Student was tested the District psychologist said that the District could look into that at a later time. (NT 25, 76)
33. The District psychologist deferred the autism assessment to a later time, the first three to six months of his placement in the District, so that the District would have a chance to see Student in its program and gather more observational data from his teachers. (NT 25-26)
34. When Student is assessed for autism the assessment will be done by the District's specialist in autism who administers the Autism Diagnostic Observation Scale (ADOS). (NT 75)
35. Autism and mental retardation are not mutually exclusive conditions. (NT 77)
36. A copy of the Evaluation Report (ER)² was sent to the Parents and a meeting to discuss the findings of the evaluation with the Parents was held on April 26, 2007. (NT 22)
37. The findings from the District's speech/language evaluation and the District's occupational therapy evaluation were directly integrated into the Evaluation Report (ER). (NT 21; S-8)

² There is an error on S-8, page 8. Student's General Cognitive Ability score was a 48, at below the first percentile and within the Very Low Range. The correct information was contained on page 7. A corrected copy of the report was sent to the Parents. (NT 27-28)

38. The Kindergarten teacher to whose class the District proposes to send Student utilized the ER to develop an IEP for Student that addresses his areas of need. (NT 86-88; S-15)
39. The IEP, based on the findings of the ER, is designed to be delivered in a small (6 to 8 students), cross-categorical, one-year Kindergarten program for children with an array of disability categories. The classroom has enriched occupational therapy, physical therapy and speech/language services. Some of the children would be able to provide Student with good models for speech/language and social interaction. (NT 92-94, 98, 103-104; S-15)
40. The director of special education made his selection of a class for Student based upon the ER findings that detailed the child's specific educational and behavioral needs. (NT 94-95, 97)
41. After the District's psychologist had explained the evaluation results the Parents expressed their disagreement with Student's being classified as having mental retardation, expressing the belief that he may be autistic. The District's psychologist informed them of their rights, beginning with writing a letter indicating their disagreement. (NT 23-24)
42. In a letter received by the District on May 4, 2007 the Parents stated their disagreement with the District's evaluation and requested an independent educational evaluation (IEE) to determine if Student is a child with autism. (NT 22; S-11)
43. The Parents want to discover what Student's exact diagnosis/classification is so that they can ensure he receives appropriate services. (NT 106-107)

Credibility of Witnesses

Hearing officers are specifically charged with assessing the credibility of the witnesses who appear before them. The District's psychologist, on whose testimony the District's case was primarily established, was highly credible and her testimony was given a great deal of weight. She has the educational, training, experiential and linguistic/cultural competence required to evaluate Student. She demonstrated a knowledge of and a respect for standardized instruments she chose to address Student's specific presentation, but did not venture beyond her own knowledge base. She presented fair and balanced testimony and was willing to take the Parents' point of view into consideration while at the same time clearly and confidently explaining her own findings. (NT 63-64) The Kindergarten teacher's testimony credibly served to establish that the District's evaluation provided relevant information that directly assisted her in determining the educational needs of the child for the next year. This individual holds a BS in

education and an MS in special education, and with 14 years of experience, has spent the last 5 years teaching in the classroom to which the District is offering to place Student. She is knowledgeable about and skillful in the process of translating an ER into the goals, objectives, and specially designed instruction that comprise an appropriate IEP for a Kindergarten student whose needs are clear but whose ultimate classification is still in question. The director of special education has a lengthy background as an educational professional, and has served the last 16 years as a special education director. He very credibly put forth the reasons Student was selected for the particular classroom the District is proposing, and demonstrated to this hearing officer that the District is committed to being fair to Student and responsive to his Parents' desire to explore his disability further. He established clearly that the classroom selected for Student has children with a range of disability classifications and that placing Student into this classroom will not seal his fate under one disability category or another. The plan to evaluate the child with a standardized instrument that assesses specifically for autism when the District has had a chance to do more observation and when Student has had the chance for some additional intervention seems reasonable.

The Parent is clearly committed to her son and concerned that he receives an accurate diagnosis/classification and an appropriate educational program. She testified sincerely, without rancor, and appeared to be using her opportunities to ask questions to clarify information more than to challenge the District's testimony. This hearing officer appreciates her concerns and understands that proceeding without definite answers is difficult, particularly when elements of several other diagnoses/classifications present themselves.

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 evaluation 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.

Evaluations

IDEA 2004 provides, at Section 614(b)(2) that

In conducting the evaluation the local educational agency shall

Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--

Whether the child is a child with a disability; and

The content of the child's individualized education program...

Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child under this section--

Are selected and administered so as not to be discriminatory on a racial or cultural basis;-

Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;

Are used for purposes for which the assessments or measures are valid and reliable;

Are administered by trained and knowledgeable personnel; and

Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEA 2004 provides, at Section 614(b)(4) that

Upon completion of the administration of assessments and other evaluation measures,

The determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).

In the instant matter, the district has the burden of proving that its evaluation was appropriate. IDEA 2004 at Section 615(b)(6) provides for the opportunity for any party to present a complaint - with respect to any matter relating to the identification, evaluation, or educational placement of the child, and for that complaint to be resolved at a due process hearing. An appropriate remedy for a district's failure to provide an appropriate evaluation for a student is the awarding of an independent educational evaluation at the district's expense. This right is explained in the implementing regulations of IDEA 2004:

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency... If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process complaint notice to request a hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

The District conducted an evaluation that was appropriate according to the law and was educationally sound. The evaluation fulfilled all the criteria set forth in the IDEA 2004 for evaluations, and the primary evaluator was well-credentialed and competent. The evaluation was sufficient in scope to enable the District and the IEP team to create a program to meet the needs identified. The one-year program for which Student has been recommended will allow for appropriate peer modeling, specially designed instruction in a classroom enriched by supportive services, and the oversight of an experienced Kindergarten teacher. Additionally, the District's having its autism expert evaluate Student during the upcoming school year will provide additional clarification for the Parents and the IEP team.

As the District's evaluation is appropriate, the Parents are not entitled to an Independent Educational Evaluation at public expense.

Order

It is hereby ordered that:

The Abington School District's evaluation of Student was appropriate.

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

August 5, 2007

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

Hearing Officer