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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: S.M.
ODR #8020/07-08 LS

Date of Birth:
Xx/xx/xx

Date of Hearing:
October 5, 2007

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Haverford Township School District
1801 Darby Road
Havertown, Pennsylvania 19083

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:
Pro Se

Natalie Habert, Esquire
BeattyLincke
2 West Market Street, 6th Floor
West Chester, Pennsylvania 19383

October 10, 2007

October 12, 2007

Linda M. Valentini, Psy.D.

Background

Student is a xx year old student who resides in the Haverford Township School District (hereinafter District) and is currently parentally-placed at a parochial school. Mr. and Mrs. (hereinafter Parents) have asked the District to provide Student with occupational therapy (OT) and physical therapy (PT) services. The District has requested permission to complete an occupational therapy evaluation and a physical therapy evaluation in order to assess eligibility for the services and, if Student is eligible, to establish baselines and plan the treatments. The Parents have refused the District permission to evaluate their son.

The District requested this hearing to obtain an order that Student be evaluated against the wishes of his Parents, and an order relieving the District from any responsibility to provide occupational and/or physical therapy to Student if the Parents do not make him available for the scheduled evaluations, if they are in fact ordered, until such time as the Parents do make him available for these evaluations.

On the date of the hearing Mrs. (whose name appeared on the hearing notice) had not arrived by the appointed time, and had not contacted the District or the hearing officer to request a time or date change. The hearing officer called the Office for Dispute Resolution and also ascertained that no call had been received at that office and that Notices had been sent from that office to the Parents. The District's Pupil Services Office and the Coordinator for Secondary Special Programming had left messages on the Parents' answering machine a few days prior to the hearing and the District's attorney had sent the required 5-day notice and information. The hearing officer called the home, and Mr. answered. He confirmed that the District's Attorney's letter had been received, and he agreed to try to contact Mrs. When he was unable to reach his wife on her On-Star system, Mr. offered to attend the hearing, and arrived within 15 minutes, whereupon the session began.¹

Issue

May the Haverford Township School District conduct occupational therapy and physical therapy evaluations of Student over the objections of his Parents?

Findings of Fact

1. Student is a xx-year-old student residing in the Haverford Township School District. (NT 24)
2. Student is enrolled at [redacted] School, a parochial school. (NT 24)

¹ Had the hearing officer not been able to reach the family the hearing would still have been held given that appropriate notice had been provided as per Pennsylvania Special Education Dispute Resolution Manual, Section 802: Failure to Appear at a Hearing.

3. Student received a multidisciplinary evaluation from the District, and the ER was dated April 10, 2007. (NT 28; S-5)
4. Student received an Independent Educational Evaluation (IEE), and the report of that IEE was dated July 30, 2007. (NT 28; S-6)
5. The Parents requested that the District provide Student with special education services in the form of physical therapy (PT) and occupational therapy (OT). (NT 24)
6. At some time prior to January 30, 2007 the Parents indicated to the District that they would forward a private OT evaluation report for review. (NT 24-25; S-2)
7. As of April 20, 2007 the Parents had not yet forwarded the OT report. (NT 26; S-3)
8. The District sent the Parents a Permission to Evaluate form dated April 20, 2007 in the event that the private OT report was not forthcoming. (NT 26-27; S-3, S-4)
9. The Parents did not execute and return this form to the District. (NT 27)
10. The Parents forwarded to the District a letter dated April 30, 2007 from [redacted], Student's private OT provider. The letter provided one eight-line paragraph related to OT services Student had received from April 11, 2006 through June 13, 2006, making the information about one year old. (NT 29-30, 48; S-7)
11. The Parents forwarded to the District a one-page form/report of a May 17, 2007 PT evaluation performed by [private PT provider]. (NT 30-31; S-8)
12. The District contracts with Pediatric Therapeutic Services (PTS) for OT and PT services. (NT 31)
13. The District provided the April 30, 2007 OT letter and the May 17, 2007 PT evaluation to PTS for review. (NT 31, 46-47)
14. In a letter dated July 31, 2007 PTS advised the District that the documents reviewed were not sufficient to allow a physical therapist or an occupational therapist to determine Student's eligibility for service, or to design a service program if he were eligible. (NT 31-32; S-12)
15. As a result of the information from PTS the District issued another Permission to Evaluate form dated May 22, 2007 to the Parents. (NT 32; S-9)
16. The Parents did not execute and return this form to the District. (NT 33)

17. The District requested that the Parents sign a HIPPA release which would allow [private OT/PT provider] to share its records with the District. The Parents refused to sign the HIPPA release. (NT 33)
18. The District did not receive any additional OT or PT records from [private OT/PT provider]. (NT 33)
19. By letter dated July 20, 2007 the District told the Parents that additional information in the form of OT and PT evaluations was required as the documents provided by the Parents from [private OT/PT provider] were insufficient to qualify Student for services. (NT 34-35; S-10)
20. In the July 20, 2007 letter the District confirmed that it was seeking to have a HIPPA release signed to obtain information from [private OT/PT provider] that could avoid an evaluation given that the Parents were disinclined to have Student evaluated. (NT 35; S-10)
21. In the July 20, 2007 letter the District indicated that it was enclosing another Permission to Evaluate. The Permission to Evaluate form that was enclosed is dated July 20, 2007. (NT 35-36; S-10, S-11)
22. The Parents did not execute and return this form to the District. (NT 36-37)
23. In an email message dated July 30, 2007 the Parents indicated that there was “no reason to have Student retested for OT & PT”. The Parents did not indicate that they were willing to have Student receive an OT or a PT evaluation. (NT 38-40; S-13)
24. In an email message dated July 30, 2007 the District responded that the “reports [the Parents] submitted do not support the eligibility criteria as set forth by the agency that provides services to our district students”. (S-13)
25. In the July 30, 2007 email the District informed the Parents that it would be requesting a formal due process hearing to resolve the situation. (S-13)
26. The District filed a Due Process Complaint Notice on August 13, 2007. (S-1)
27. The Parents had a reasonable basis of knowledge that the proposed OT and PT evaluations of Student would be at no cost to them as the District’s ER was provided at no cost, the IEE was funded by the District at no cost to the Parents, and by letter dated May 22, 2007 the Parents received a copy of the Procedural Safeguards Notice which indicate that evaluations are provided at no expense to parents. (NT 41-43)

28. The executive director of PTS, who holds bachelor and master's degrees in occupational therapy, has training to administer and interpret the Sensory Integration and Praxis Tests², holds a certificate from the National Board of Certification of Occupational Therapy, and is licensed as an occupational therapist by the Commonwealth of Pennsylvania. She has 27 years of experience as a pediatric occupational therapist and 20 years experience in managing and supervising other occupational therapists. (NT 44-46; S-15)
29. Accepted as an expert witness, the PTS/OT identified the April 30, 2007 letter from [private OT provider] as the document she had been asked by the District to review. (NT 47; D-7)
30. The PTS/OT testified that there was no way that she could determine that the student would qualify for educationally necessary OT services, or if eligible, what OT services the student would need to benefit from or access his educational program, on the basis of the letter from [private OT provider]. (NT 47)
31. The PTS/OT noted that the information contained in the letter was a year old, but that even if it were current it was insufficient to determine eligibility and plan treatment. (NT 48)
32. The PTS/OT testified that a comprehensive OT evaluation is necessary to determine whether OT services are needed, and if so to determine functional goals and objectives, specially designed instruction (SDI) and treatment frequency. (NT 48-49)
33. The PTS/OT identified the May 17, 2007 PT evaluation from [private PT provider] as the document her agency had been asked by the District to review. (NT 49; S-8)
34. The physical therapist from PTS who reviewed the May 17, 2007 PT [private PT provider] one-page evaluation/form holds a bachelor's degree in physical therapy, and has taken continuing education courses over the last ten years increasingly focused on pediatric PT. She has about 25 years experience as a physical therapist. She is licensed by the American Physical Therapy Association and is licensed by the Commonwealth of Pennsylvania as a physical therapist. (NT 56; S-16)
35. The PTS/PT evaluates and provides PT services to children in school settings. She assists teams in determining a student's eligibility for services, in determining the level of services a student needs and in drafting PT goals and objectives for an IEP or modifications necessary for a Chapter 15 service agreement. (NT 57-58)

² The hearing officer takes judicial notice of the fact that this particular training is over and above that required to receive degrees in occupational therapy, having heard extensive testimony on this credential in several past proceedings.

36. Accepted as an expert witness, the PTS/PT identified the May 17, 2007 PT [private PT provider] one-page evaluation/form as the document she had been asked by the District to review. (NT 58-59; D-8)
37. The PTS/PT testified that the [private PT provider] evaluation/form did not provide the information she needed to judge Student's safety or his functioning in his school environment. (NT 59)
38. The PTS/PT noted that although it appeared that [private PT provider] had administered the Bruininks, a standardized test of motor proficiency, no standard scores were listed, contrary to best practice in the PT community as standard scores are more accurate than age-equivalent scores. (NT 59-60)
39. The PTS/PT noted that in her experience the Bruininks test, which is more medically-based than educationally based, does not always functionally correlate with a student's proficiency in the school setting, and that the student's functioning in school may be better than the score he received on the Bruininks. (NT 60, 64)
40. Although the [private PT provider] evaluation/form allowed the PTS/PT to make inferences about Student's safety when he navigates the halls in the school setting, she could not tell from the evaluation/form whether Student has difficulty with skills such as sitting up, copying from the board, body strength, stair negotiation, and overall safety needed within the school environment. (NT 56-57, 62-63)
41. The PTS/PT testified that the [private PT provider] evaluation/form does not provide enough information to determine whether Student requires PT services to benefit from or access his educational program. (NT 64-65)
42. The PTS/PT testified that the [private PT provider] evaluation/form provided no baseline data on Student's functional mobility in his school setting from which to develop goals and objectives were he to qualify for PT services. (NT 63)
43. The PTS/PT testified that a functional assessment of Student's mobility in a school environment is needed to determine whether he qualifies for services, and if he qualifies, to develop functional goals, treatment frequency, and SDI or program modifications. (NT 65-66)
44. The PTS/OT and the PTS/PT testified that the letter dated July 31, 2007, written by the PTS/OT in her capacity as executive director of PTS, represents accurately the fact that it is not possible to determine the need for educationally based OT and/or PT services for Student based upon the material provided to the District by the Parents. (NT 50, 66-67; S-12)

45. The PTS/OT and the PTS/PT testified that the letter dated July 31, 2007, written by the PTS/OT in her capacity as executive director of PTS, represents accurately the fact that it is not possible from the material provided by the Parents to determine educationally relevant functional goals, treatment frequency or appropriate SDI for Student were he eligible for PT and/or OT. (NT 50, 66-67; S-12)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.³ Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child’s special education experience. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

The three witnesses that testified for the District in this proceeding were all judged to be highly credible, based upon their educational and experiential credentials and upon their demeanor and command of the subjects about which they were testifying. The witnesses’ testimony was congruent with the documentary evidence offered, and was individually and collectively consistent. The Parents did not present testimony or evidence for this proceeding.

Discussion and Conclusions of Law

Legal Basis

Burden of Proof

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

³ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the District asked for this hearing, the District bears the burden of persuasion. However, 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.

Evaluations

A district's (or LEA's) obligation to serve a student commences within a "reasonable time" after the district should have suspected the child to be disabled, the "reasonable time" being allowed to the district to conduct an evaluation, identify the student as disabled, and formulate an appropriate program for the child. See Puxatawney Area School District v. Kanouff and Dean; Ridgewood; W.B. v. Matula; Palmyra Board of Education v. F.C.; T.B. v. School District of Philadelphia; In Re: The Educational Assignment of R.A. Special Education Opinion No.1431 (Jan. 5, 2004).

Informed parental consent must be obtained before conducting an initial evaluation. 34 C.F.R. §300.505(a)(i)

If the parents of a child with a disability refuse consent for an initial evaluation the agency may continue to pursue the evaluation by using the due process procedures. C.F.R. §300.505(b)

The IDEA regulations at 34 C.F.R §300.301 (c)(d) provide, regarding Procedures for Initial Evaluation, that:

The initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation, or if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe.

State Special Education Regulations⁴ at 22 PA. Code § 14.123(b) promulgated on June 9, 2001 provide that:

In addition to the requirements incorporated by reference in 34 CFR 300.531-300.535, the initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60 school days after the agency receives written parental consent.

The above timeline applies equally to evaluations ordered by a hearing officer.

Discussion

In this matter the District is willing to provide OT and PT services to Student , a resident of the District who is parentally-placed in a parochial school, provided that Student is eligible for these services. Eligibility for supportive services is predicated upon a student's need for the services in order to access and benefit from that student's educational program. Eligibility for service(s) is based upon an appropriate evaluation

⁴ Currently in revision phase, the 2001 Regulations are still in effect.

specifically geared toward the service(s) being contemplated. Service(s) cannot be provided without an evaluation.

Once eligibility is determined, a plan of OT and/or PT services needs to be developed. The plan includes a baseline of functional performance, needs ascertained from the assessment, goals and objectives designed to address these needs, service frequency, and specially designed instruction and/or modifications in the school setting – all based upon the evaluation(s), and all geared toward enabling the student to access and benefit from his educational program.

Student's Parents have requested that the District provide him with OT and PT services. The District cannot provide these services without first determining eligibility, and then if eligibility is established, planning the services appropriately. The Parents have withheld permission for the District to evaluate Student. Federal and state law provides that an evaluation cannot be performed without parental permission, unless a hearing officer orders the evaluation. The District requested this hearing to obtain an order that Student be provided with OT and PT evaluations.

Through testimony and documentary evidence offered during the due process hearing, the District has met its burden of proof and prevails in this matter. Accordingly, this hearing officer will issue an order that Student be provided with an occupational therapy evaluation and a physical therapy evaluation by evaluators of the District's choosing, and further, that the District is relieved of any obligation to provide Student with occupational therapy or physical therapy services if the Parents do not make Student available for the scheduled evaluations.

Order

It is hereby ordered that:

1. The Haverford Township School District shall arrange that Student be provided with an occupational therapy evaluation and a physical therapy evaluation by evaluators of the District's choosing.
2. The evaluations shall be scheduled such that written reports are provided to the Parents and the District within 60 school days of the date of this decision, unless this decision is appealed.
3. If the Parents fail to cooperate in scheduling the evaluations, or schedule the evaluations but do not make Student available for the evaluations on the scheduled date(s), the District is discharged from any obligation to provide occupational therapy services or physical therapy services to Student unless and until the Parents do present Student for the ordered evaluations.

October 12, 2007

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer