

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: QG

Date of Birth: xx/xx/xxxx

Dates of Hearing: May 26, July 21, July 22, 2009

OPEN HEARING

ODR No. 9860/08-09 AS

Parties to the Hearing:

Parents:

Representative:

Sonja D. Kerr, Esq.
Public Interest Law Center of Philadelphia
125 South 9th Street, Suite 700
Philadelphia, PA 19107

School District:

Dr. Barbara Shapiro
Director of Student Services
Lower Merion School District
301 East Montgomery Avenue
Ardmore, PA 19003

School District Attorney:

Amy T. Brooks, Esq.
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Date Record Closed:

August 11, 2009

Date of Decision: August 24, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ (Student) is a high school student with a disability who requested the Lower Merion School District (District) to provide an independent neuropsychological evaluation at public expense. The District denied the request and requested this due process hearing to defend its own March 12, 2008 re-evaluation report (RR). Because the District's March 12, 2008 RR is appropriate, the District's denial of Student's independent educational evaluation (IEE) request is affirmed.

ISSUE

Whether Student is entitled to an IEE at public expense?

FINDINGS OF FACT

1. Student, whose date of birth is [Redacted], attends the District's high school, has an average IQ, and is a hard worker, compliant and motivated to complete tasks. (S1,pp.1-2)² Student has had an individualized education program (IEP) for specific learning disabilities for approximately 9 years. (S2;S3)
2. At two weeks old, Student spent three or four days in the hospital with viral spinal meningitis and a fever of 104 degrees. (NT 239; S1, p. 2) Parent had informed the District of Student's meningitis history. (NT 105, 240; J1,p.43)

¹ Further references to Student will be impersonal and gender-neutral. This is not to be disrespectful, but to ensure Student's confidentiality.

² References to "NT" are to the transcripts of the hearing in this matter. References to "J," "S," "P" and "HO" are to the Joint, District, Parent and Hearing Officer exhibits, respectively. Joint Exhibit J2 is a 55 page exhibit consisting of the 4-pages-to-a-page (219 pages total excluding the word index) deposition testimony of the District's Director of Student Services.

3. On December 14, 2007, Parent requested an IEE. (P2; S13; NT 242, 249)
4. On December 17, 2007, the District refused Parent's request for an IEE, stating that because Parent had agreed with the District's previous, September 2006 evaluation report (ER), the District was under no obligation to consider Parent's IEE request. (P3; D14) The District then reiterated its own, previous request for parental permission to conduct its own reevaluation. (P3)
5. On January 14, 2008, Parent granted permission to the District to conduct its own reevaluation. (S9; S10; P4; NT 30, 31, 141, 265)
6. On March 12, 2008, the District issued a re-evaluation report (RR) concluding that Student has a specific learning disability in math. (S25,p.13; P12,p.13) It further concluded that, while Student does have reading needs, particularly in the area of reading fluency, testing does not reveal clinically significant indicators of a specific learning disability in any area of reading. (NT 55-56, 70-71, 74, 77-78; S25; P12)
7. The RR was based upon a Wechsler Intelligence Scale for Children IV (WISC-4), a Woodcock-Johnson Psycho-Educational Battery III (WJ3), a Nelson-Denny Reading Test, Bender-Gestalt Test of visual motor integration, and a School Motivation and Learning Style Inventory (SMALSI). (NT 48-60, 67; S25) It also reviewed past evaluations, parent and teacher input, state and local assessments, and grade reports. (NT 34-36, 38-44; S25; P12) The evaluator, Dr. C, holds a Doctorate in psychology and is a licensed and certified school psychologist. (NT 26-28) In addition to having a private practice, Dr. C has been employed as a school psychologist for the District, for the Montgomery County Intermediate

Unit, for residential schools, for hospitals and for private schools. (NT 26-27)

Dr. C has conducted approximately 400 evaluations over the last four years, and probably 50 per year before that. (NT 27)

8. In response to Parent's report that Student had read from right to left on a vision test (NT 266), Dr. C observed Student's reading during his own evaluation and administered two tests to determine whether Student might have a perceptual disability. (NT 117, 123, 266) The block design subtest result on the WISC IV was low but did not, in itself, indicate a perceptual disability, and the Bender Gestalt II resulted in normal findings regarding Student's visual perceptual abilities. (NT 126-132; S-25 p. 15)
9. On April 7, 2008, the District developed an IEP based upon the RR. (NT 160-165, 178-181; S-27) The IEP included a transition plan for Student, based upon the information already available, including Student's own interest inventory. (S-15; NT 173-176) The District did not require additional information to create a transition plan for Student. (NT 171-173; S-25 p. 11)
10. On two separate occasions, May 20, 2008 and April 8, 2009, Student received diagnostic reading evaluation at private expense from the Lindamood Bell Center (Center). (P7; P8) Ms. S, a certified reading specialist and director of the Center for eight years, is also a professor at Eastern University. (NT 292-295, 304-305) Ms. S believes Student has a learning disability in reading, specifically in phonemic awareness, phonics and fluency, as well as reading comprehension. (NT 317, 338, 346-347) Although Student's overall reading ability was at grade 11.5, Student reads extremely slowly and Student's comprehension tested at the

- 5.4 grade level. (NT 310; P7,p.4) Although Ms. S does not believe Student requires a neuropsychological evaluation in order for the Center to program for Student, Ms. S does support overall Student's desire to see a neuropsychologist to determine if there is additional information to help Student. (NT 323-324, 342)
11. On June 10, 2008, the District reviewed the Center's test results. (P10) The District informed Parent that it would continue to offer only math support services. (P10)
 12. On February 17, 2009, Parent requested an independent neuropsychological evaluation for Student at public expense. (P5; S28; NT 253-255) Parent was concerned that Student's skills were far below grade level. (NT 256-257) She noted, as an example, that Student would have an F at mid-term even though Student eventually received a C and a B in geometry. (S25,p.4)
 13. On March 3, 2009, the District denied Parent's request for an independent neuropsychological evaluation at public expense. (S29; S31; P6; J1,p.15-16)
 14. On March 24, 2009, the District requested a due process hearing. (P6; S30) On May 13, 2009, the parties conducted a mandatory resolution session. (S35)
 15. On May 26, July 21 and July 22, 2009, I conducted due process hearings in this matter. Joint Exhibits J1 and J2 were admitted into the record. (NT 353) Parent exhibits P2-P4, P5, P7, P9 and P24 through P40 were admitted into the record. (NT 356, 358) District exhibits S1-S4, S9, S14-S17, S19, S21, S24, S25, S27 and S32-S34 were admitted into the record. (NT 356)

DISCUSSION AND CONCLUSIONS OF LAW

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) If one party produces more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, the District bears the burden of persuasion because it seeks affirmance of its refusal to provide an IEE at public expense.

Under the IDEA, parents of a child with disabilities are entitled to an opportunity to obtain an IEE, 20 U.S.C. 1415(b)(1) and (d)(2)(A),³ which is defined as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. 34 CFR §300.502(a)(3)(i) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency, unless the District files a due process hearing request to show that its evaluation is appropriate. 34 CFR §300.502(b)(1), (b)(2) A parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees. 34 CFR §300.502(b)(5)

When a parent requests an IEE, the School District has two options: 1) provide the IEE at public expense; or 2) request a due process hearing to demonstrate that the School District's evaluation is appropriate. 34 CFR §300.502 In this case, the District elected to request a due process hearing and defend its evaluation.

³ Federal regulations implementing this IDEA provision are found at 34 CFR §300.502 and are incorporated into state regulations at 22 Pa. Code §14.102(a)(2)(xxix).

A School District evaluation must satisfy certain requirements, including a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information including information provided by the parent. 34 CFR §300.304(b). The evaluation must also be sufficiently comprehensive to identify all of the child's special education and related services needs. 34 CFR §300.304(b)(c)(6). The School District must evaluate the child in all areas of suspected disability and make certain that the evaluation is sufficiently broad to identify all of the child's special education and related needs. 34 CFR §300.532, §300.540 No single measure or assessment may be used as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child. 34 CFR 300.304(c)(2). Only technically sound instruments that assess the relative contribution of cognitive and behavioral factors in addition to physical or developmental factors may be used. 34 CFR 300.304(b)(3). Assessments and other evaluation materials must be used for purposes for which they are valid and reliable; must be administered by trained and knowledgeable personnel; and must be administered in accordance with any instructions provided by the producer. 34 CFR 300.304(c)(1)(iii)-(v). The School District must review any existing evaluation data making sure to include information from the parents, current classroom based-assessments, and observations by teachers and related service providers. 34 CFR §300.533, §300.542

The District's March 12, 2008 RR is appropriate. It meets regulatory criteria, School District witnesses credibly explained it, and its conclusions are sound and supported. The RR was based upon a Wechsler Intelligence Scale for Children IV (WISC-4), a Woodcock-Johnson Psycho-Educational Battery III (WJ3), a Nelson-Denny

Reading Test, Bender-Gestalt Test of visual motor integration, and a School Motivation and Learning Style Inventory (SMALSI). (NT 48-60, 67; S25) It also reviewed past evaluations, parent and teacher input, state and local assessments, and grade reports. (NT 34-36, 38-44; S25; P12) The evaluator, Dr. C, holds a Doctorate in psychology and is a licensed and certified school psychologist. (NT 26-28) In addition to having a private practice, Dr. C has been employed as a school psychologist for the District, for the Montgomery County Intermediate Unit, for residential schools, for hospitals and for private schools. (NT 26-27) Dr. C has conducted approximately 400 evaluations over the last four years, and probably 50 per year before that. (NT 27)

Parent argues that the District's March 12, 2008 RR is inappropriate because it did not identify Student's serious reading difficulties in all five areas of reading. Parent notes that Ms. S, a certified reading specialist, director of the Center for eight years, and professor at Eastern University (NT 292-295, 304-305), believes Student has a learning disability in reading, specifically in phonemic awareness, phonics and fluency, as well as reading comprehension. (NT 317, 338, 346-347) Although Student's overall reading ability was at grade 11.5, Student reads extremely slowly and Student's comprehension tested at the 5.4 grade level. (NT 310; P7,p.4)

The RR and Ms. S's conclusions are not inconsistent. The RR reasonably concludes that, while Student does have reading needs, particularly in the area of reading fluency, testing does not reveal clinically significant indicators of a specific learning disability in any area of reading. (NT 55-56, 70-71, 74, 77-78; S25; P12) Further, although Student is requesting an independent neuropsychological evaluation at public expense, Ms. S does not believe Student requires a neuropsychological evaluation in

order for the Center to program for Student. (NT 323-324, 342) Ms. S simply supports overall Student's desire to see a neuropsychologist to determine if there is additional information to help Student. (NT 323-324, 342)

Parent argues that the District's March 12, 2008 RR is not sufficiently comprehensive. Parent argues that she did not know that she could ask for a vision test nor did she know that she could ask the District to hire a doctor to review Student's situation and determine if Student needed a neurology exam given the history of meningitis. (NT 278) There is no basis in the record for concluding that Student's early viral meningitis must be considered when assessing Student's reading needs. Even Parent's reading specialist, Ms. S, does not believe Student requires a neuropsychological evaluation in order for the Center to program for Student. (NT 323-324, 342) Further, in response to Parent's report that Student had read from right to left on a vision test (NT 266), Dr. C observed Student's reading during his own evaluation and administered two tests to determine whether Student might have a perceptual disability. (NT 117, 123, 266) The block design subtest result on the WISC IV was low but did not, in itself, indicate a perceptual disability, and the Bender Gestalt II resulted in normal findings regarding Student's visual perceptual abilities. (NT 126-132; S-25 p. 15) Accordingly, the District's March 12, 2008 RR was appropriately comprehensive.

Parent argues that the District's March 12, 2008 RR is inappropriate because it did not include any type of transition evaluation or survey to determine Student's transition needs. IEPs of qualifying Students must include transition plans based upon age appropriate transition assessments related to training education, employment and, where appropriate, independent living skills. 34 C.F.R. § 300.320 (b) There is no legal

requirement, however, that the District's March 12, 2008 RR must contain a transition evaluation.

Parent argues that she is entitled to an IEE at public expense because she had requested an IEE in 2007 and the District unreasonably delayed requesting a due process hearing. In fact, the District never requested a due process hearing in response to Parent's 2007 IEE request. Federal regulations do require Districts to respond to IEE requests "without unnecessary delay." 34 CFR §300.502(b)(2) On December 17, 2007, the District informed Parent that, because Parent had agreed with the District's previous September 2006 evaluation report (ER), the District was under no obligation to consider Parent's IEE request. (P3; D14) While this may have been an illegal response that may have denied Student a free and appropriate public education, and while this District behavior might serve as the basis for a separate compensatory education claim (which is already scheduled for due process hearing), it does not serve as the basis for ordering, today, an IEE at public expense.

The basis for ordering an IEE at public expense is explicitly stated in the regulations at 34 C.F.R. §300.502(b)(2)(i), i.e., if the District's evaluation was inappropriate. The District evaluation at issue in this case is its March 12, 2008 RR. (S25; P12) On February 17, 2009, Parent requested an independent neuropsychological evaluation for Student at public expense. (P5; S28; NT 253-255) The District denied Parent's request on March 3, 2009 (S29; S31; P6; J1,p.15-16), and the District requested a due process hearing on March 24, 2009. (P6; S30) Clearly, the issue to be decided in determining whether Student is entitled to an IEE at public expense is the appropriateness

of the District's March 12, 2008 RR, not the legality of the District's 2007 behavior. As described earlier in this decision, the District's March 12, 2008 RR is appropriate.

Finally, Parent suggests that the hearing officer should exercise his independent authority to request an IEE as part of a hearing on a due process complaint. 34 C.F.R. §300.502(e) The record does not warrant use of the hearing officer's independent authority to request an IEE at public expense under 34 C.F.R. §300.502(e). The issue in this case is whether Student is entitled to an IEE at public expense. That issue can be decided on the record and does not require a hearing-officer-ordered IEE in order to be resolved.

CONCLUSION

While the District's 2007 behavior regarding an earlier IEE request may be relevant to a compensatory education claim, it is not relevant to the appropriateness of the District's March 12, 2008 RR. The District's March 12, 2008 RR meets regulatory requirements and is sufficiently comprehensive. The record establishes that Student is not entitled to an independent neuropsychological evaluation at public expense, and the District's denial of that request is affirmed.

ORDER

- The District's March 12, 2008 RR is appropriate.
- Student is not entitled to an IEE at public expense.
- The District's denial of Student's IEE request is affirmed.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

August 24, 2009

Student
District
ODR No. 9860/08-09 AS