

State of Maine

Special Education Due Process Hearing Decision

Lewiston School Department v. Parents Case: 01.062

REPRESENTING THE SCHOOL: Eric Herlan, Esq.
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REPRESENTING THE PARENT: Parents Represented Themselves
HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7207-B et seq., and 20 USC §1415 et seq., and accompanying regulations.

The case involves Student, whose date of birth is dob. She resides with her parents, who live in Lewiston, Maine.

The school requested this due process hearing on March 5, 2001, in order to obtain a hearing officer order to conduct an initial evaluation of Student.

Student is identified as a student with a disability under the category of "other health impaired" and "speech and language impairment". She is diagnosed with Down's Syndrome. She has a congenital heart defect, and a thyroid imbalance, which is treated with medication. She received services from Child Development Services and a parent supported placement prior to entering the Lewiston School system. Student is presently in the eighth month of kindergarten. An IEP was developed prior to the beginning of school. Services began in September, but the parents have not signed a consent form giving the school permission to conduct an evaluation.

The parties met in a prehearing conference on March 27, to exchange documents¹ and witness lists. The school introduced one hundred and forty-four documents; the parents introduced ninety-nine documents². The school then petitioned the Hearing Officer to issue a ruling, that, as a matter of law the school is required to evaluate all students suspected of being 'a student with a disability', thereby giving them permission to conduct an evaluation. They argued that the documentary record was sufficient for such a ruling. The parent objected, wanting the Hearing Officer to hear witness testimony. The Hearing Officer reviewed potential witnesses for each party and arguments for and against additional testimony. The Hearing Officer stated that the parties would be informed no later than March 31 if the hearing would go forward as scheduled. After a review of the documentary record, the parties were notified in writing that no hearing would be held and that they would receive a written decision on the matter from the Hearing Officer by April 14. Following is the decision in this matter.

¹ On March 28 the parents requested that ten additional documents, which had already been hand-delivered to the school, become part of the record. Since they were still within the five-day disclosure period, these additional documents are included. The school, by letter, noted that none of these documents had been shared with the school previous to the hearing.

² Parent documents are numbered by title; school documents are numbered by page.

I. Preliminary Statement

The student is a xx old kindergarten student in a regular public school classroom. She receives full-time support from an individually assigned aide. Occupational and speech therapies are delivered in the classroom twice a week.

In the fall of 1999 when the student was first eligible for special education services the parent elected to place the student privately. In May 2000 the PET met twice to consider evaluation, programming and placement for the student. Services were agreed to and an individualized educational plan was adopted. At both meetings members discussed evaluation needs, but deferred the decision until the student was more stable on her thyroid medication. In November the PET met again, and again discussed evaluation needs. No consent was given by the parents to go forward with the evaluation in either May or November.

In early March 2001, the school requested a hearing for permission to evaluate the student. They argue that there is no dispute that the student is school age, is in need of special education and related services, and that there currently are no evaluations in the student's record that meet the regulation standard. It is their contention that law and regulations direct them to conduct an evaluation to assess all areas of the student's suspected disability, using the type and variety of assessment tools and strategies required by regulation, and that they have been unable to do so because of the parents' refusal to grant consent.

The parents take the position that sufficient assessment data currently exists to make programming decisions for the student. They argue that the evaluation proposed by the school would not provide an accurate picture of their child.

The school requested that the Hearing Officer issue a ruling, as a matter of law, that the school must conduct an initial evaluation on the student. They argued that this ruling could be made on the present record, and that further evidence through witness testimony was not required. The parent objected and requested that the hearing go forward. The Hearing Officer reviewed the documentary record and notified the parties that there was sufficient evidence to make a decision without witness testimony. The hearing was cancelled.

II. Issue

Should the Hearing Officer issue a ruling that gives the school permission to proceed with the proposed evaluation without parent consent?

III. Findings of Fact

1. The parties agree that the student meets the criteria as a student with a disability in need of special education. The student is diagnosed with Down's Syndrome. In addition, she has a congenital heart defect and takes medication to treat a thyroid condition. Evaluations performed in 1995, 1998 and 1999 show delays in speech and language, and gross and fine motor development. (Ex. P. 96, 118, 122, 136 and 147; S. 83-96)
2. As an infant and preschool student she received services through Child Development Services (CDS).³ In 1998 and 1999 she received developmental therapy services, occupational therapy services, physical therapy services and speech and language services. (Ex. S. 120-144; P. 118, 122, 147)
3. In June 1999 the student became school age and was eligible for services through the Lewiston School Department. A Pupil Evaluation Team (PET) meeting convened on June 8 and June 17, 1999, to transition the student from CDS into the public school, and develop a program plan for that setting. The parents attended the meeting. Also in attendance were proposed public school providers and previous preschool providers. (Ex, S. 110-114; S. 117-119)
4. On June 30, 1999 the parents notified the school in writing that they had decided to place the student in a private preschool, and that they would assume the cost of all services for the 1999-2000 school year. (Ex. S. 107-18)
5. On May 15, 2000 the PET convened to discuss programming for the 2000-2001 school year. The student's parents, public school staff and private providers were in attendance. In addition to discussions of program needs, the PET determined that psychological/cognitive assessment would be completed when the student "is more stable on the thyroid medication" (Ex. S. 97-99)
6. On May 31 the PET again met to continue discussions of the parent's concerns about the proposed program and evaluations. It was agreed that evaluators would "contact parents and teachers before the evaluations for appropriate modifications during the assessments". (Ex. S. 79-80)
7. In August 2000 the school requested the parents sign a Release of Information form so that information could be shared between the school and the student's physician. The form remains unsigned. However, the student's mother did sign a one-way release requesting the school to send information from the student's school records to the private occupational and speech therapists. (Ex. S. 78)
8. "Consent to Conduct Individual Evaluations", dated August 30, 2000, was not signed by the parent. (Ex. S. 73)
9. On May 12, 2000 the student's pediatric endocrinologist wrote a letter stating that the student's thyroid levels were abnormal. He made clear that a true evaluation of her cognitive abilities would be difficult to obtain until her levels were within a more normal range. In early October, in a second letter, her levels continued to be abnormal, in the hypothyroid range. Her endocrinologist again cautioned that until the levels stabilized, valid results of cognitive and developmental testing were questionable. (Ex. S. 63, 64)

³ Child Development Services is the system that serves children with disabilities in Maine from birth to age 5 in accordance with the Individuals with Disabilities Education Act.

10. On November 8 the PET met to review the student's program and again discuss the need for cognitive and developmental evaluation. The parents agreed to meet with the school's psychologist to discuss the evaluation. That meeting took place on January 23, 2001. (Ex. S. 46-49, 37, 38, 35, 34A, 30, 26)
11. On January 24, 2001 the school again requested the parents sign a "Consent to Evaluate" form. The description of evaluation lists academic testing, classroom observation, motor skills evaluation, speech/language testing, and psychological evaluation. The parents did not give consent for the evaluation to proceed. In late February the school sent another copy of the "Consent to Evaluate" form to the parents, again requesting their signature, and informing them that they would be requesting a due process hearing if the parents failed to provide consent to evaluate. That form remains unsigned. (Ex. S. 30-33, 12-15)

IV. Conclusions

Should the Hearing Officer issue a ruling that gives the school permission to proceed with proposed evaluation without parent consent?

State and federal regulations are clear in their instruction to schools to perform evaluations of any student suspected of meeting the definition of a student with a disability. The obligation of the district is equally clear in regards to the need to secure written parent consent before these evaluations are conducted.

When identifying the special education needs of students, the Pupil Evaluation Team shall make its determinations based on a full and individual evaluation of the student. The Pupil Evaluation Team shall ensure that the student is assessed in all areas related to the suspected disability... No single evaluation, diagnostic procedure, or source of data shall be used as the sole criterion to determine a student's need for special education. Both measured evidence (as from testing) and evidence based on classroom observations and classroom-based performance shall be used in making this determination." [Maine Special Education Regulations, 9.2]

If an evaluation...precedes the student's initial provision of special education and supportive services, then written consent [from the parents]...shall be obtained. [Id, 9.3]

The dispute in this hearing focuses on the parents' refusal to grant consent for the initial evaluation of a young student who is currently receiving special education and related services. There has been no formal evaluation conducted by the school, yet the parties agree that she is a student with a disability. She came into the system having been identified and provided services through the CDS system.

Progress notes and anecdotal reports identify developmental delays in adaptive behavior, language, speech and gross and fine motor skills. The school seeks to have the hearing officer grant permission to the school to conduct an initial evaluation over the parents' refusal.

If the parents of a student with a disability refuse consent or initial evaluation...the school administrative unit may use the...hearing procedures...to secure parental consent. [Id., 12.4]

The parents take the position that there is sufficient information in the record to determine services and program goals for the student, and that additional evaluation is not required at this time. There is extensive information in the record about the student. There are, to be sure, many professional reports that speak to the student's progress toward meeting program goals. However, a review of the documents makes clear that very little exists in the way of evaluative data that meets the standard set out in regulations. In fact, the only evaluations in the record that meet regulatory standards are two occupational therapy evaluations dating from 1998 and early 1999, and two speech evaluations dating from 1998. The student was not enrolled in the public school at the time and the school conducted none of these evaluations.

In conducting an evaluation, the school administrative unit shall...use a variety of assessment tools and strategies to gather relevant functional and developmental information...and [u]se technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors... Any standardized tests that are given to the student shall have been validated for the specific purpose for which they are used, are administered by trained and knowledgeable personnel who meet state licensure or certification standards, and are administered in accordance with any instructions provided by the producer of such tests... [Id, 9.5]

In May when the school began the process to evaluate the student, the parent presented a letter from the student's endocrinologist that cautioned the school about the validity of cognitive and developmental assessments given the child's reduced vitality as a result of her thyroid hormone imbalance. In October this again appeared to be the case. These are legitimate concerns, and the school did not insist on completing the evaluations at that time. There is no evidence, however, that this continues to be the case. The parents' presentation of a letter from the student's primary care physician does not build the same case. There is no mention in this letter of any current concerns about the student's medical condition or lack of vitality that would lead the reader to conclude that the school should not move forward with its evaluations. This physician states an opinion, based on his review of the student's "medical file along with information provided by her mother", when he writes, "I see no need for further evaluations... I question the necessity and the appropriateness of such evaluations and battery tests due to the fact so much data exists in our medical file on [the student]". While he may be correct that there is extensive data in the student's medical file, unless

it contains information not available in her school record, there are no cognitive assessments, educational assessments or recent speech and language assessments⁴. There certainly are no assessments that were performed by the school as required by regulations.

The courts have reasoned that because the school is required to provide students with special education and related services, it ought to have the right to conduct its own evaluation of the student. *Andress v. Cleveland Independent School District*, 64 F.3d 176 (5th Cir. 1995) (If a student's parents want him to receive special education under IDEA, they must allow the school itself to evaluate the student and they cannot force the school to rely solely on an independent evaluation.); *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. Dec. 22, 1995) (No. 95-1837); *Gregory K v. Longview School Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987) (If the parents want [the student] to receive special education under the Act, they are obliged to permit testing.); *Dubois v. Connecticut State Bd. of Educ.*, 727 F.2d 44, 48 (2d Cir. 1984) ([T]he school system may insist on evaluation by qualified professionals who are satisfactory to the school officials.); *Vander Malle v. Ambach*, 673 F.2d 49, 53 (2d Cir. 1983) (School officials are entitled to have [the student] examined by qualified professionals of their choosing.).

While the dispute over evaluation has persisted since May of 2000, there is no dispute over the child's need for special education and related services. The school began to provide services as defined by the student's IEP in September. The district cannot, at this juncture, merely stop all services based upon the parents' refusal to allow for a full evaluation of the student. The parties are then left with two options. The school is allowed to evaluate the child over the parents' refusal, or the school violates the student's right to have educational determinations based on a full and individual evaluation of the student in accordance with regulations. Evaluations are necessary to determine the educational needs and appropriate services for each child and, without them, the district will not be able to ensure a free appropriate public education as guaranteed by the Individualities with Disabilities Education Act. The parents have presented no justifiable basis for withholding their consent to the evaluation. Failure to allow the school to conduct evaluations as required by regulation may result in the interruption of services to the student.

⁴ The parent presented speech and language evaluations performed by private practitioners dated October and November 1998 when the student was 4 years, 4 months old and 4 years, 5 months old respectively. These evaluations cannot be considered "recent" given the developmental leaps made by children between the ages of 4 and 6.

V. Order

The school shall conduct the evaluations described in the "Consent to Evaluate" form accompanying Mr. Levesque's letter of February 26, 2001. The evaluations shall include academic testing, observation, motor skills evaluation, speech/language testing, psychological evaluation and any additional assessments deemed necessary by the PET. These evaluations shall be completed and presented to the parents and the PET within 45 school days of the date of this hearing decision. A copy of the completed evaluation report shall be forwarded to the parent and the Department of Education at that time.

Carol B. Lenna
Hearing Officer

April 13, 2001