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**THE SPECIAL EDUCATION DUE PROCESS APPEALS PANEL
COMMONWEALTH OF PENNSYLVANIA**

**IN RE: THE EDUCATIONAL ASSIGNMENT : SPECIAL EDUCATION
OF J.D., A STUDENT IN THE MINERSVILLE : OPINION
AREA SCHOOL DISTRICT : No. 1742**

**BEFORE APPEALS PANEL OFFICERS CAUTILLI, KAUFMAN &
McELLIGOTT**

OPINION BY KAUFMAN

BACKGROUND:

Student is a fourteen year old student, residing with parents (“Parent”) in the Minersville School District (“District”). At the time of these proceedings, the Student was attending eighth grade at the local District junior/senior high school (NT at 23-24). The Student has been deemed eligible for special education services on the basis of a diagnosis of Asperger’s Syndrome, which is a disorder on the autistic spectrum (NT at 11).¹ The Student’s current placement is itinerant learning support (less than 21% of the school day) in which the Student receives one-on-one or small group assistance in academic subjects from a learning support teacher for 40 minutes per week² and one-on-one or small group social work services once a week for 25 minutes (NT at 24, 29-31, 54, 78, 81, 84, 110; P-16). Otherwise, the Student is “included” with regular education students (NT at 24). The Student also has a TSS worker who assists at school at the end of the day and at home and a behavior support specialist and mobile therapist who comes to the home once a week (NT at 197, 205-207, 269, 272-273).

There is no dispute as to the Student’s eligibility to special education services (NT at 11-12). The sole issue for these proceedings is the Student’s entitlement to an Independent Educational Evaluation (“IEE”) at public expense (NT at 10).

The parties agreed to an IEE and executed an agreement (“mediation agreement”) to that effect on July 30, 2004 (NT at 35; SD-1). (This mediation agreement was the result of Parent initiating due process and the parties participating in mediation (NT at 36)). The mediation agreement stated the following: “A psychological evaluation will be

¹ Initially, several years prior to these proceedings, the Student was identified as “emotional support” due to the Student being bi-polar, which was later modified to Asperger’s Syndrome (NT at 25). The Student received an initial Individualized Education Program (“IEP”) in third grade (NT at 223).

² The itinerant learning support teacher pulls the Student out of class and allows the Student to work on homework, have questions answered, study for tests and help other students (NT at 75).

provided by an Intermediate Unit #29 Certified School Psychologist. The psychological evaluation should include input from the parent's psychologist Dr. Rogers. Parents will grant a release of information from Dr. Rogers to share information and communicate with the IU#29 psychologist." (SD-1). The assistant principal of the junior/senior high school, who was in attendance at the mediation session at which time the mediation agreement was signed, testified that Parent had requested a "comprehensive independent evaluation" and that he understood that to entail "An evaluation that covers the psychological, psychiatric, and behavioral needs of a student." (NT at 49).

The resultant evaluation, performed by an Intermediate Unit #29 school psychologist, culminated in an Evaluation Report ("ER"), issued on November 30, 2004 (P-3). The stated reason for referral in the ER document was to determine whether the Student needed more social work services (NT at 144-145; SD-3 at 1). The Parent chose the evaluator from a list of four evaluators provided by the District; all of these evaluators were employed by the Intermediate Unit (NT at 36, 50, 142-143). The District does not employ its own school psychologists and always utilizes Intermediate Unit evaluators when it needs an evaluation performed on a student (NT at 144-146). Nonetheless, the District considers the evaluator who performed the evaluation dated November 30, 2004 to be completely independent from the District (NT at 142).

The ER was comprised of the following: a review of previous testing (including a social work assessment performed in 2004), reports of the Student's teachers³, Parent input, and current testing (the Woodcock Johnson intelligence and achievement tests)⁴. Absent were any psychological tests or questionnaires designed to measure social skills, behavior or emotional aspects of development. The evaluator outlined the difference in opinion amongst the parties as to the Student's needs, and made a blanket statement: that the Student needs "more services" from the Social Work Services to address the Student's needs, while warning at the same time, that the social skills training not impede the Student's academic performance (P-3 at 7). The evaluator opined that the previous amount of social work services prescribed, which was one hour per month, would suffice (P-3 at 6).

The psychiatrist who has been treating the Student privately since 2004 and who testified at the hearing, criticized the ER as not addressing the Student's difficulties related to the Asperger's disorder, including excessively focusing on minutiae, oppositional behavior, difficulty attending to activities of daily living, social isolation, etc. (NT at 156-157). This witness faulted the evaluation in its lack of personality and projective testing (*i.e.*, the Rorschach, MMPI, TAT, sentence completion) and opined that the evaluation failed to contain an analysis of pertinent history which could be gleaned from the Student and the Student's family (NT at 158). The psychiatrist opined that this

³ Most of the teacher's reports were positive; *i.e.*, the Student gets along with classmates, is eager to please, is cooperative, has offered to share pencils with classmates, is always attentive, is well-mannered (P-3 at 2-3). If a problem did exist, the teacher would rationalize that other students have these same problems (*i.e.*, P-3 at 2-3; math teacher's comment).

⁴ The Student's scores on the cognitive measurement showed average verbal ability and thinking ability, with low average cognitive efficiency (P-3 at 4). The Student's scores on the achievement measurement showed average performance (P-3 at 4-5).

type of testing (*i.e.*, “projective”) would generate more specific recommendations for remediation than what was contained in the ER (NT at 158, 177-179).

The psychologist who has been treating the Student privately since 2000⁵ and who testified at the hearing, pointed out that it was initially the behavioral problems which led to the Student being referred to him and mentioned the difficulty with coming to the diagnosis of Asperger’s (NT at 185-186; P-2).⁶ He testified as to the importance of the Student being evaluated by an independent professional, outside of the system, who could perform a comprehensive evaluation to address the social, behavioral and other Asperger’s-related needs (NT at 189, 193).

Parent wanted a comprehensive, independent evaluation in order for the District to appropriately program for the Student “socially”, which Parent feels the District does not do (NT at 233-234; P-6). Parent’s understanding was that the evaluation would be performed by “somebody that would be more looking at not only education but the social development...” by a professional, more understanding of the particular disability the Student demonstrated (NT at 235). In addition, Parent did not understand that the evaluation would be limited to the purpose (stated in the ER dated November 30, 2004), of whether to increase social work services (NT at 235; *see* P-3).

Being dissatisfied with the evaluation performed by the Intermediate Unit and also being dissatisfied with the resultant IEP dated January 26, 2006, on February 1, 2006 (the contents of which is described below), Parent requested an independent evaluation (P-15). When that request was denied, the result was due process (NT at 235-236, 245-246). On February 1, 2006, Parent submitted the names of two potential evaluators to the District (P-15). These professionals, who are psychologists, purportedly have experience testing children who have been diagnosed with Asperger’s and adjustment disorders. (A previous evaluation Parent had obtained, in January 2003, during the Student’s fifth grade year, for the purpose of qualifying for wrap-around services, was comprehensive with respect to reporting and administering emotional and personality assessments (NT at 226-227; P-5)).

The IEP drafted after the Intermediate Unit evaluation, dated January 25, 2006, contains vague information in the way of present levels of academic performance and no standardized tests results or grade-levels with regard to same (P-16). The IEP contains two goals: one targeted at developing age-appropriate behaviors and decision making skills and the other in the area of organizational skills (P-16). Nothing with regard to coping skills is included in the IEP (NT at 122). Program modifications and specially designed instruction deal primarily with missed assignments and assistance with long-term projects (P-16).

⁵ At this time, the Student is not actively treated by the psychologist, but does receive wrap-around services (NT at 187).

⁶ Previously, the Student had been diagnosed with bipolar disorder, ADHD, Oppositional Defiant Disorder and Disruptive behavior Disorder (P-2).

Behavioral/social skills problems evidenced during this past school year includes reports of a few incidences of bullying (NT at 56-58) and calling out in class, although these problems have lessened in frequency during the past school year, due to an increase in the Student's coping skills, according certain District witnesses who testified (NT at 61, 106-107, 113-114). Socially, the Student often responds to situations in a "more immature way than other students" and misperceives social cues and behaviors of others and these problems have also been allegedly, according to the District, decreasing during the past school year (NT at 97, 103). The guidance counselor, who is not trained in autism, does not believe that the misperception of social cues is necessarily related to the Student's autism (NT at 103). Observations as to elevated anxiety levels have been noted this past year by the social worker (NT at 139-140).

According to the assistant principal, the Student's social skills needs, which he notes are enumerated in the IEP, are addressed by classroom teachers, the social worker and the itinerant teacher (NT at 58-59). No specific social skills program exists in the school the Student attends, but the assistant principal views the basic extracurricular activities offered to all students as serving as social skills programs (NT at 58, 85-86). Although the teachers confer informally amongst themselves about the Student and might be aware of the Student having a "bad day", there is in fact no specific plan in the IEP regarding addressing social skills issues (NT at 85, 97). The guidance counselor is available on an as needed basis and the Student often drops into her office on an informal basis to discuss a problem or concern (NT at 97-99). The social worker also does not perform her duties in accordance with a plan, but works with the Student once a week for 25 minutes; she will typically allow the Student to direct the content of the session and this is often based upon what the Student's needs were that week (NT at 120-121). Also, the social worker will take suggestions from the guidance counselor as to the Student's needs for that week (NT at 124-125). The social worker has kept no data reporting the Student's progress (NT at 132). This individual does not deliver her program in conjunction with other agencies servicing the Student, but works strictly in the school setting (NT at 139). When asked about the social work services assessment she performed in the Student's sixth grade year, May 2004,⁷ she reported that it was not based upon a standard list of questions, because "social work services was relatively newer and getting involved in the process" (NT at 134-135).

The Student's current grades range from the "A" range to the "C" range, with a grade point average of 84 (NT at 26, 69; SD-3). Parent feels that the Student has not been academically challenged and in support of this belief points out that the Student does not study at home and does all homework in school (NT at 166-167, 169, 249, 256-257).

Only some of the District witness who testified reported training or experience dealing with autism spectrum disorder (NT at 101).

⁷ This assessment was basically a compilation of teacher's comments, record review, informal observation, and results of the Student interview (P-4).

The Student's private psychiatrist, who meets with the Student every two or three months for the purpose of dealing with behavioral issues and prescribing medication, admitted that there was an attempt, on the recommendation of the psychiatrist, a year or so ago, to have the Student placed in a residential treatment center, due to an increase in physical aggression and oppositional behavior, but that the placement never materialized (NT at 149, 151-152, 154-155, 269; P-1). At present, the psychiatrist does not believe the Student shows the amount of aggression formerly demonstrated,⁸ but does believe residential treatment might be warranted due to a failure to provide the Student with other services that are needed within the emotional and behavioral arena (NT at 170). Like the psychiatrist, the treating private psychologist also recommended, in the spring 2005, a residential treatment center (P-2). His report, issued in April 2005, notes the Student's peculiarity in speech and thought processes and notes the Student's grimaces and uncooperativeness (P-2 at 4). He further reports "many instances of socially inappropriate behavior" and expansive affect (P-2 at 4).

The Student is presently medicated with anti-psychotic medication and ADHD medication (NT at 169-171). The psychiatrist documented additional problems with grooming and hygiene and cognitive limitations, including tending to respond concretely, rather than by embellishment and elaboration (NT at 173-174; P-1). Further, she noted "terrible" judgment, with a child-like view of the world (NT at 174-175; P-1 at 3).

Parent noted that the Student has no friends, does not interact appropriately with other children and that her hygiene is poor if not monitored by Parent (NT at 208-210, 216-217, 266). The assistant principal stated that the Student did indeed have friends; this statement was supported by other District personnel but denied by Parent and Parent's witnesses (NT at 98, 208, 282).

The District failed to present the Intermediate Unit evaluator at the hearing for testimony.

Following a full day hearing session on April 25, 2006, the Hearing Officer found in favor of the District, deeming the evaluation to be appropriate, and denied Parent's request for an IEE. Parent filed timely exceptions, claiming, as follows:

- (1) The Hearing Officer erred in finding that the Social Work Evaluation⁹ qualified as an adequate evaluation under the law;
- (2) The Hearing Officer erred in finding that the Social Work Evaluation complied with the mediation agreement as understood by Parent and intended by the parties;
- (3) The Hearing Officer erred in basing his decision upon facts not in evidence and which were in contradiction of the evidence;
- (4) The Hearing Officer erred in finding that the District met its burden of proof regarding the adequacy of the Intermediate Unit evaluation; and

⁸ Parent concurs in that the Student does not presently show the amount of aggression formerly shown and attributes the aggression to the medication administered at that time (NT at 208).

⁹ Parent refers to the Intermediate Unit evaluation of November 30, 2004 as the Social Work Evaluation.

(5) The Hearing Officer erred in failing to find that Parent is entitled to an Independent Educational Evaluation.

For the reasons set forth below, the Panel will reverse the Order of the Hearing Officer.

DISCUSSION:

The Panel's standard of review requires an independent review of the record in addition to a determination of whether any error of law has been committed. However, the Panel must defer to the findings of the hearing officer as to credibility "unless non-testimonial extrinsic evidence in the record would justify a contrary conclusion, or unless the record read in its entirety would compel a contrary conclusion." *Carlisle Area School Dist. v. Scott P.*, 62 F. 3d 520, 524 (3d Cir. 1995). In viewing the record as a whole (the testimony as well as the Intermediate Unit ER, in particular) and applying the facts to the law, we find that the Hearing Officer committed error in deeming the ER to be sufficiently comprehensive so as to be appropriate.

First we address the Intermediate Unit ER dated November 30, 2004. In 2004 Parent requested a comprehensive evaluation in order that the Student's needs in the emotional/social area be assessed and programmed for. Even the assistant principal admitted, in his testimony, that a comprehensive evaluation would cover the psychological, psychiatric, and behavioral needs of a student. In the case of a student with Asperger's, the heart of an evaluation is the social, emotional, communicative and behavioral needs. The Panel does not deem the document that resulted from this request and subsequent agreement on the part of the District to perform a "psychological evaluation" by a certified school psychologist to be comprehensive in nature. The end result was a document of seven pages which consisted of very little history of the Student's educational career and developmental milestones; a paucity of testing (only the Woodcock Johnson cognitive abilities and achievement assessment measures);¹⁰ and no testing designed to elicit information about the Student's social, emotional and communicative ability - only a few comments from teachers; only a few sentences of comments from Parent; and a lack of complete reporting as to the findings of the treating psychologist. As to the latter reference, it was mentioned in the mediation agreement that the evaluator would obtain input from this treating psychologist; however, no such input was incorporated into the ER of November 30, 2004. In looking at the Federal Regulations which prescribe the content of an evaluation, found at 34 CFR §300.320 and §531-533, it is clear that this evaluation did not fulfill these requirements. The Regulations speak of assessing the child "in all areas related to the suspected disability, including, if appropriate...social and emotional status...communicative status..." (§300.532 (g)). "A variety of assessment tools and strategies are used to gather relevant

¹⁰ Furthermore, with respect to the testing that **was** done (*i.e.*, the Woodcock Johnson cognitive and achievement assessments), the evaluator failed to interpret the results of the subtest scores or to explain the significance of same (*See* P-3 at 4). All that was stated was an overall range, which is virtually meaningless in terms of programming.

functional and developmental information about the child...” (§300.532). The information is needed for effective programming for the child (§300.533).

Because the evaluator did not even appear at the hearing to defend the evaluation, we are left to consider primarily the documentary evidence of the evaluation itself and the criticism offered by the Student’s treating psychologist and psychiatrist, who both faulted the document as failing to be comprehensive. That weighing procedure, when used in conjunction with the standard established by law, leaves us with no choice but to side with the Parent; the District failed to meet its burden of proof in terms of the appropriateness of its evaluation pursuant to the standard established in *Schaffer v. Weast*, 126 S.Ct. 528 (Nov. 14, 2005) and 34 CFR §300.502.

The Student presents as a child with Asperger’s Syndrome, on the autistic spectrum. This is a disorder involving communication failures, with social and behavioral components, as gleaned from descriptions of the Student in the record. In failing to investigate those areas sufficiently, if at all, the evaluator failed to present material with which the Student’s needs could be identified in order to program for those needs. Furthermore, even the assistant principal testified that he understood Parent was requesting a comprehensive evaluation which covers the psychological, psychiatric, and behavioral needs of the Student. By implication, the Parent, in signing the mediation agreement, was also agreeing that this would be done. Clearly, no such comprehensive evaluation was performed, as is required by law, and no such comprehensive document was drafted.

Given the failure of the Intermediate Unit ER to be sufficiently comprehensive, we further find that it did not comply with the intent of the parties as expressed in the mediation agreement. Parent believed that the end result would be an evaluation which would uncover the needs of the Student as they relate to Asperger’s Syndrome and not the Student’s academic needs. Because the evaluator failed to investigate the social, emotional and behavioral aspects of the Student, and only performed a cursory investigation into the cognitive and achievement of the Student, the evaluation fails in comprehensiveness both in terms of the parties’ expectations and in terms of the requirements of the law.

Due to the aforementioned failures of the Intermediate Unit evaluation, the Student is entitled to an IEE pursuant to 34 CFR §300.502.

Due to our finding that the Intermediate Evaluation is inappropriate because of a lack of comprehensiveness, contrary to the finding of the Hearing Officer, we will grant Parent an IEE at public expense pursuant to 34 CFR §300.502.

ORDER

AND NOW, this 29th day of June, 2006, the Decision and Order of the Hearing Officer is **REVERSED**, as follows:

An Independent Educational Evaluation shall be performed at District expense. The evaluation shall be comprehensive in nature, taking into account the Student's cognitive, emotional, social and behavioral manifestations. A psychologist, chosen by Parent, experienced in evaluating children on the autistic spectrum and diagnosed with Asperger's Syndrome, shall be the designated evaluator.

Any exceptions not addressed by this opinion and order are dismissed.

Pursuant to PA. CODE §14.162 (o), this order may be appealed to the Commonwealth Court of Pennsylvania or to the appropriate Federal District Court.

Date signed: 6/29/06

Date mailed: 6/29/06

Madeleine R. Kaufman
Appeals Panel Officer