New Hampshire Department of Education

Student/Bartlett School District

IDPH-FY-08-03-050

Due Process Hearing Order

I. Overview

The school district requested due process on two issues in this matter: 1) the parent's request for an independent evaluation, and 2) the student's continuing eligibility for special education services. The issues are intertwined as the point of the evaluation process is in large part to determine whether the child qualifies for special education services and, if so, what services the child needs. The student in this case is currently eligible for special education as a student with a speech language impairment. She has an IEP with goals in speech and OT. The school's evaluation process led the team to conclude that the student was no longer eligible for services under the IDEA.

II. Legal Standards

The IDEA and relevant state laws provide parents' with the right to request an independent evaluation. See 34 CFR § 300.502 and relevant state laws, Ed 1107.03 and Ed 1125.07 which in this case just incorporate the federal requirements. When a parent disagrees with the school district's evaluations and requests an independent evaluation at public expense, these laws require the school district to grant that request or demonstrate that its evaluations were appropriate under the law. To demonstrate appropriateness under the law, the school district must show that its evaluations meet the relevant legal requirements which in this case include 34 CFR § 300.301-305 and corresponding state regulations. These provisions require the school to conduct a full and individual evaluation to determine if the student is eligible for special education services and to determine the educational needs of the student. 34 CFR § 300.301. The regulations provide specific requirements for the evaluation process and the assessments used in the evaluation process as detailed in 34 CFR § 300.304 and § 300.305.

To be eligible for special education services a student must be a child with a disability as that term is used under the law. See 34 CFR § 300.8. Here, the parents' contend that the student remains eligible under speech language impairment and also seem to be saying that the student should be evaluated for eligibility under the categories of specific learning disability, Other Health Impaired, and Autism. Each of these categories of disability has a requirement that the student's disability adversely affect their educational performance.

Educational performance includes more than just academics. It also includes social/emotion issues and other functional and developmental areas. 20 USC § 1400(c)(5); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007). While adversely affects educational performance has been broadly interpreted by the First Circuit, there still has to be some affect on educational performance. See *L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d at 16 "a disability cannot qualify a

child for IDEA benefits unless it has a negative effect on educational performance; no effect, or a positive one, will not do."

The final requirement for special education eligibility is that the student must need special education services as a result of their disability and its adverse affect on the student's educational performance. 34 CFR § 300.8; § 300.306.

In determining adverse affect and the need for specialized instruction, courts will often look to whether a student can complete required coursework without specialized instruction, though as noted above, the analysis can go beyond coursework depending on the student's needs. *See Kevin T. v. Merrimack Valley Sch. Dist.* CV 96-485-B (D.N.H. 3/05/98); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007); *Yankton v. Schramm*, 93 F. 3d 1369 (8th Cir. 1996).

III. Discussion

The evidence presented at the hearing demonstrates that the school district met the legal requirements for evaluating the student and their evaluations are appropriate under the law. The parents did raise some points regarding administration of some of the assessments and whether the assessments themselves answered all of the questions that the parents had about their daughter's disability, but the important thing to keep in mind is that assessment requirements have some limitations or parameters under the law.

For example, the parents made the point that the school did not perform normed assessments in certain areas and did not complete the reading fluency portion of an assessment it conducted. Under the IDEA, the assessment process includes more than just normed assessments and the evaluation requirements must be viewed in the context of providing information related to the student's eligibility for special education and the student's educational needs as they relate to the student's eligibility for services.

While normed assessments are part of the process, so are other assessment tools that gather relevant functional, developmental and academic information about the student. These can include prior evaluations, classroom based assessments and observations, local school-wide assessments, and observations by teachers and service providers. If those other assessment methods along with the normed assessments that are performed provide sufficient information about the student, than the school is not obligated to perform additional assessments. See 34 CFR §300.304 – 300.305.

In this case, the thing that stands out is that the student does not seem to be having difficulties at school either academically, functionally, or developmentally beyond the services the student receives for articulation issues. The service providers and classroom teacher testified that the student is working at grade level, completes her work at school in the allotted time, and does well in all areas including socially/emotionally, functionally and developmentally without specialized instruction. The school records show the student has progressed and is doing well in academic areas. There were some progress reports that show difficulties with organization and following directions, but there was no evidence that those deficits adversely affected the student's performance or required specialized

instruction. The teacher testified that these issues were addressed using regular classroom techniques. No evidence to contradict that information was provided.

There were also BASC ratings forms that showed that the student was clinically elevated in a number of areas, but again there wasn't evidence presented that these findings were adversely affecting the student at school academically, socially, emotionally, functionally, or developmentally, or that the student needed specialized instruction to address these issues.

There was no evidence that the student struggles at school or needs additional help or instruction to complete her schoolwork, or to address other issues, besides the speech articulation issues, beyond the regular classroom techniques that the teacher testified about.

The parents did provide evidence of testing by Dr. Jacobs, that notes a number of areas where the student may have difficulties and he does make a number of recommendations, but that assessment is now almost two years old, was done while the child was in pre-school, and does not address any specific issues the student has at school.[1] Many of the items he testified to or noted in his report were things he said could be problems later on for the student as academic demands increased. As the school points out, the student is doing well at school at this time without these interventions. If things change in the future, the school would be obligated under the IDEA to revisit the issue.

While it is certainly possible under the law for a student to do well academically at school, even above average or beyond grade level, and still be eligible for services given discrepancies between ability and achievement, or difficulties in other areas like social/emotional, functional or developmental skills, there still has to be some showing of adverse affect and need for specialized instruction in those areas. In this case, based on the evidence submitted to the hearing officer, that evidence does not appear to be present.

On the reading fluency issue, while the evidence suggests that the student had issues with that on the test administered by the school, the student seems to do fine with reading fluency at school. There was no evidence presented that the student has difficulty reading information she is assigned to read, or reading generally. The teacher testified that the student did not have such difficulties and no evidence to contradict that was provided.

With her current speech language services and eligibility as a student with speech language impairment, the evidence presented was that the student has progressed to the point where her only issue is articulation that does not adversely affect her educational performance or require specialized instruction.

Given the lack of evidence regarding the adverse affect on educational performance, and the various sources of information that the school reviewed, the school could make the determination that further

[1] My comments here about the assessment are not meant to criticize the assessment, nor make any findings regarding the dispute between the parties on its validity, etc. My point is only that it does not consider any information about the student for this school year, or make any specific findings about how the student is actually doing at school at this time, etc.

normed evaluations were not needed in certain areas as the results of that testing would not provide necessary information regarding the student's eligibility or need for services. See 34 CFR § 300.304-305.

IV. Conclusion

I find that the evidence presented at the hearing demonstrates that the district's assessments were appropriate under the law and the district is not obligated to fund the independent evaluation requested by the parents. I also find that the evidence presented demonstrates that the student is no longer eligible for special education services under the IDEA as a student with speech-language impairment.

The issue of whether the student is eligible for services under Other Health Impaired or Specific Learning Disability is not as clear in the record. The school argues that based on the record, the hearing officer should find that the student is not eligible for services under these categories given that the information presented at the hearing shows no adverse educational impact and no need for specialized instruction. The parents argue that the school did not make a determination of eligibility for these categories, or for autism which they also apparently believe is an issue. The record also does not demonstrate the extent to which the parents have asked the school to consider these categories of eligibility. The parents correctly note that the school's paperwork on the issue does not note any discussion or determination of eligibility beyond speech language impairment and testimony about the topic was limited at the hearing.

Given the uncertainty on the issue and lack of a specific decision by the school at a team meeting beyond speech language impairment in the record, I do not feel it appropriate to rule on the student's eligibility for categories beyond speech language impairment. The student is no longer eligible for services under speech language impairment, but the parents may request that the school consider the student for eligibility under other categories by referring the student for consideration as part of the child find requirements in Ed 1107.02 and 34 CFR § 300.111.

I note that such a request does not necessarily require the school to perform additional assessments or evaluations. See Ed 1107.02(c). The referral team may meet and decide that it has sufficient information to make a decision, or it may come to some other conclusion. But, either way, it will give the parents a chance to specify their concerns in terms of their daughter's areas of suspected disability under the IDEA, and it will give a referral team and the parents a chance to meet and specifically deliberate on whether the concerns the parents raise in the referral can be addressed by existing pupil support services available to all children, or if additional information, including testing is needed to address any unresolved concerns. Ed 1107.02.

My ruling does not prevent or limit the parents from obtaining their own evaluation at their own expense, or providing other information that they believe is relevant and presenting it to the school district to consider under the child find requirements in Ed 1107.02 and 34 CFR § 300.111.

V. Requested Findings and Rulings

Parents' Proposed Findings of Fact

The parents submitted proposed findings of fact. I rule as follows on those requests. Many of the denied requests are denied because they contain conclusions or subjective impressions of the testimony, or multiple sentences so while part of it may be supported by the record some other parts are not, etc:

Granted: 2 -6, 8-9, 11, 13, 14, 16, 24, 26, 31, 33-35, 37, 40, 41, 45

Denied: 1,7, 10 on the first sentence, Neither granted nor denied on the second sentence, 12, 15,17,18, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 32, 36, 38, 39, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56.

The parents' requests have a second number 24-32 at pages 6-7. I rule as follows on those:

Granted: 24

Denied: 25, 26, 27, 28, 29, 30, 31, 32

School District's Proposed Findings of Fact:

Granted: 1-26, 28-32, 34-35, 37-38, 41-44, 45 as it relates to speech language impairment, 46-49

Neither granted nor denied as beyond the scope of my decision: 27, 33, 36, 39, 40, 50

Denied: none

So Ordered.

Date: 6-19-08

Scott F. Johnson
Hearing officer

Appeal Rights under Rule Ed 1128.20 and RSA 186-C:16-b

If either party is aggrieved by the Decision of the Hearing Officer set forth above, that party may appeal this decision to a court of competent jurisdiction. The Parents have the right to a transcription of the proceedings. The District shall notify the Commissioner of Education should either party seek judicial review of this decision.