

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING**

March 10, 2009

Case No. 09.044H, Bangor School Department v. Parent

Representing the School: Peter Lowe, Esq.

Representing the Family: Robert Meggison, Esq.

Hearing Officer: Peter Stewart, Esq.

INTRODUCTION

The hearing in this matter was conducted pursuant to the provisions of Title 20-A MRSA 7207-B et seq. and 20 USC 1400 et seq., and accompanying regulations.

The student involved in this case is a student (DOB xx/xx/xxxx) who lives with her mother in Bangor, Maine. Prior to enrolling in xx, the student received services within the Childhood Development Services (“CDS”) system. She had been diagnosed with Down Syndrome and was determined eligible for CDS services under the identification as “Other Health Impaired”. In September of 2008, she was enrolled as a xx student at the Abraham Lincoln School, her neighborhood school operated by the Bangor School Department (“school”). Based upon the results of the initial screening given to all entering xx students and the early observations of the regular education xx teacher, as well as the student’s records from CDS, the school staff concluded that the student should receive an initial evaluation to determine her eligibility for special education services under state and federal special education law. The student’s mother refused to consent to such an evaluation in September and has consistently refused to consent to any evaluation of the student since. On January 14, 2009, the school filed a Hearing Request Form with the Due Process Office of the Maine Department of Education that has lead to this hearing.

At the pre-hearing conference held on February 3, 2009, in the Bangor offices of the Maine Department of Health and Human Services, the school provided the hearing officer and the student's mother with a pre-hearing statement, witness list and copies of its proposed exhibits.¹ At the hearing, the hearing officer admitted the school's exhibits S-1 through S-31 into the record without objection. The school presented three witnesses. The mother testified briefly as the family's single witness.

The school asserts that it is entitled under current law and regulations to an order permitting it to evaluate the student to determine if she is eligible to receive special education services, even in the absence of parental consent. The school argues that, under the facts and circumstances presented here, the IDEA authorizes a school to use the due process hearing for this purpose, that it has solid reasons to perform an initial evaluation of the student and that the hearing officer should issue an order permitting it to do so. The family maintains that the IDEA requires a school to obtain parental consent prior to doing an initial evaluation. Further, the family argues that since the IDEA does not require a family to accept special education services even after a student has been found eligible for those services, a school cannot compel a family to accept an initial evaluation, which is the first step toward the provision of those services.

The parties agreed to submit written closing arguments to be postmarked on or before February 20, 2009. The hearing officer received the last of those arguments on February 24, 2009. The decision is therefore due to be issued on or before March 11, 2009.

ISSUE

Whether the student should receive an initial evaluation to determine her eligibility for special education services under the IDEA, absent parental consent.

¹ The mother, who was not represented at the pre-hearing conference, did not provide any documents or witness list. Upon her arrival at the conference, the mother stated that she had been "advised" not to participate in the conference and therefore she was not going to speak or respond to questions. She complied with that advice. After the conference, she obtained counsel who appeared at the hearing with her.

FINDINGS OF FACT

Based upon the testimony and documents introduced into evidence at the hearing, the hearing officer finds the facts to be as follows:

1. The student involved in this hearing is the student (DOB: xx/xx/xxxx) who lives with her mother in Bangor, Maine. In September of 2008, the student was enrolled in xx at the Abraham Lincoln School (“ALS”). ALS is operated by the Bangor School Department, educates children in xx through xx grade and is the student’s neighborhood school. (Testimony of Shaw, Armstrong, Hearing Request Form.)
2. Prior to enrolling in xx, the student had been diagnosed as having Down Syndrome and was found eligible to receive services from the Child Development Services system, a federal program that serves children from 0 to 5 years old, under the identification of “Other Health Impaired”. Those services included occupational, physical, speech and developmental therapy. The school received the student’s CDS records on September 4, 2008. (S-1, S-6, S-8; Testimony of Shulman)
3. Upon enrollment, the student received the standard pre-xx screening given to every other entering student, though many of her classmates had been “screened” prior to the beginning of school. This screening is intended to help the regular education xx teacher understand the educational and developmental status of each entering student generally, as well as to identify any special needs as early as possible. The screening results indicated that the student was significantly below average with regard to “all xx standards including gross motor skills, fine motor skills, both language and articulation skills and cognition. The regular education teacher also observed the student’s behavior, speech and interactions in the classroom. Her observations supported the conclusions of the screening. Based on the records from CDS, the results of the xx screening and the observations in xx, the regular education teacher concluded that the student should be referred to the PET for further evaluation to determine her eligibility for special education

- services. On September 11, 2008, the xx regular education teacher filled out a Referral for Special Services form that stated, in part, that the student “isn’t able to follow one-step, one word directions consistently...isn’t able to complete tasks even with 1:1 support, ...isn’t able to attend to tasks or follow instructions.” The teacher noted that the student frequently put inappropriate and sometimes dangerous objects in her mouth, behaved inappropriately with scissors and could not transition from one activity to another without help. Further, the teacher stated that the student couldn’t keep her shoes on during the school, nor follow in a line of other students, nor use the bathroom without assistance, nor function in the lunchroom without help. (Testimony of Shaw, Armstrong; S-14, S-19, S-25)
4. On September 15, 2008, the school scheduled a meeting of the Individual Educational Program Team (IEP Team) meeting for September 26th to discuss the initial evaluation for the student to help determine her eligibility for special education services. The student’s mother canceled this meeting. Another meeting, with the same agenda, was scheduled for October 20th. The school recommended, on September 26th, that the student be evaluated to determine: academic and developmental status, cognitive intelligence, speech and language achievement, psychological and behavioral functioning and physical and occupational therapeutic needs. This recommendation was mailed to the student’s mother on a Parental Consent for Evaluation form dated 9/26/08. The mother did not give her consent for the student to be evaluated at this time. (Testimony of Shaw; S-21, S-23)
 5. Another IEP Team meeting was held on October 20, 2008. The mother attended this meeting briefly, challenged the legitimacy of the meeting by stating that the school had conducted an “illegal” evaluation of the student and then left the meeting without giving her consent to any of the evaluations proposed by the school. (Testimony of Shaw, Shulman; S-27)
 6. The student’s mother has never given her consent for the school to evaluate the student at any time since her enrollment at the school. At the hearing, the mother reasserted her refusal to give her consent for any of the evaluations recommended

by the school. She did not offer any explanation for her choice to withhold her consent. (Testimony of Armstrong, Shulman, Mother)

7. The student attended school from September until the end of October, when her mother removed her from school. She returned to in January 2009, after the Christmas vacation, and attended until shortly before the hearing, when her mother removed her once again. (Testimony of Shaw, Shulman)
8. Since shortly after the student enrolled in xx, the school has assigned an educational technician to assist full-time in the xx classroom as an additional adult available to work with the student at those times when the regular education teacher was not working directly with her. (Testimony of Armstrong, Shaw)

DISCUSSION

The question to be resolved here is whether the school is entitled to obtain an initial evaluation of the student, for the purpose of determining her eligibility to receive special education services, in the face of her mother's refusal to consent to such an evaluation. After considering the testimonial and documentary evidence presented by the parties, and reviewing that evidence under the applicable statutes and regulations, the hearing officer concludes that the school is so entitled. The reasons for this conclusion are discussed below.

By accepting federal funds under the Individuals with Disabilities Education Improvement Act, (hereinafter IDEA), public schools within Maine become obligated to provide "all children with disabilities...a free appropriate public education" (hereinafter "FAPE") that is designed to meet the "unique needs" of those children. 20 USC 1400 (d)(1)(A). The first step in the process leading to an appropriate educational program is to determine whether a particular child is eligible for special education services. Toward this end, the federal/state special education scheme provides that an initial evaluation be conducted by appropriate specialists to aid and inform the school's decision on the eligibility of a child such as the student here. Parental consent is required for such an evaluation and, typically, parents give their consent. Here, however, the student's mother has not given her consent for an initial evaluation, thus creating the issue.

Provisions of both federal and state special education laws and regulations deal expressly with the situation presented here. Both provide that, when a parent refuses to give consent for an initial evaluation of a child, the school “may, but is not required to, pursue the initial evaluation of the child by utilizing the procedures...” of the special education due process system operated by the state as a condition of receiving funds under the IDEA.² Here, the school, faced with the refusal of the student’s mother to give her consent to an initial evaluation, exercised its statutorily created option to “pursue” that evaluation in the manner provided by federal and state law and requested this due process hearing.³ At the hearing, the school argued that its recommendation to evaluate the student was based on legitimate educational concerns, that the failure to evaluate the student would compromise the school’s ability to design an educational program based on the student’s unique educational needs and, therefore the student would not receive the appropriate education to which she is entitled. The family’s position is that since the IDEA does not require a family to accept special education services even for a student who has already been found eligible for those services, it should not be read to allow a school to obtain an initial evaluation to determine a student’s eligibility for those services unless the student’s parent consents to the evaluation.

Lewiston School Department v. Parents, (SEA ME, Case No, 01.062, Lenna, 2001) is a special education due process case also involving a xx student diagnosed with Down Syndrome who received services from CDS during her pre-school years, and it sets out a standard to use in deciding the case at bar. In *Lewiston*, when the student entered xx, the school wanted to evaluate the student both to determine her eligibility for special education and to obtain current information to use in planning her educational program. The student’s parents refused to consent to the initial evaluation, on the grounds that there was already sufficient information available for the school to use. The *Lewiston*

² See, 20 USC 1414(a)(1)(D)(ii)(1); 20 USC 1415: 34 CFR 300.300(a)(3)(i); 05-071 CMR, Ch. 101, V(1)(A)(4)(b).

³ It is instructive to note that both federal and state statutory schemes specifically bar schools from using the special education due process system to seek a ruling ordering the provision of special education services to a student in the absence of parental consent. See, 34 CFR 300.300(a)(3)(ii) and 05-071 CMR Ch 101, V(1)(A)(4)(b)(ii)

hearing officer issued an order directing the school to conduct the initial evaluation on the grounds that:

...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... Evaluations are necessary...without them, the district will not be able to ensure a free appropriate public education...The parents have presented no justifiable basis for withholding their consent to the evaluation...(*emphasis added*)

Lewiston uses a two-part test to determine when an initial evaluation may be ordered in the absence of parental consent: first, are the evaluations recommended by the IEP Team necessary and, second, have the parents advanced any justifiable basis for withholding their consent to the evaluations.

The school's decision to refer the student to the IEP Team for a decision on her eligibility for special education services was both correct and necessary. This decision was based upon a variety of factors including the student's diagnosis as having Down Syndrome, her eligibility for, and receipt of, services during her pre-school years from the CDS system, the xx screening performed by the school staff and the observations of school staff of the student's behavior in her xx class. The student was determined eligible for CDS services under the category of Other Health Impaired, based largely on her diagnosis of Down Syndrome. While within the CDS system, she received occupational and physical therapy, speech therapy and developmental therapy. The xx screening results showed that the student was significantly below average with regard to all xx standards including gross motor skills, fine motor skills and both language and articulation skills. The observation of the xx regular education teacher supported the conclusions of the xx screening. This same teacher also observed that the student was not able to follow even "one step, one word" directions consistently, frequently put inappropriate and dangerous objects in her mouth, could not use the bathroom without assistance, nor function in the lunchroom without supervision and guidance. Given this set of observed behaviors and previously identified needs, the school's recommendation that the student be evaluated to determine her eligibility for special education by investigating her academic and developmental status, cognitive intelligence, speech and

language achievement, psychological and behavioral functioning, and physical and occupational therapeutic needs was thoroughly reasonable. The school's evidence on this point is overwhelming. The school has clearly demonstrated that the evaluations the IEP Team recommended are necessary, thus meeting the first part of the *Lewiston* test. As to the second part of the test, the family did not present even a scintilla of evidence to justify or explain its refusal to consent to the evaluations at issue.

For these reasons, the hearing officer concludes that the school should be allowed to conduct the evaluations described below.

ORDER

The school shall conduct the assessments and evaluations described in the school's exhibit identified as S-23 and any additional assessments and evaluations deemed necessary by the IEP Team.

Peter H. Stewart, Esq.
Hearing Officer

Date

WITNESSES:

For the School:

Shannon Shaw, Student's regular education xx teacher at Abraham Lincoln School.

William Armstrong, Principal of the Abraham Lincoln School.

Murray Shulman, Ed. D., Director of Pupil Services, Bangor School Department.

For the Family:

Student's Mother.

DOCUMENTS:

School's Exhibits

S-1 through S-31