

**STATE OF OHIO
DEPARTMENT OF EDUCATION**

The Hamilton Local School District

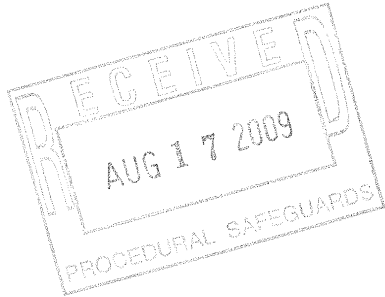
Case No. SE-2274-2009

And

August 14, 2009

Student

Marcie M. Scholl
Impartial Hearing Officer



DECISION

This cause came on for a due process hearing on June 25 and 26, 2009. Present at the hearing were Hamilton Local School District (hereinafter District) designee Wynona Smith, Director of Special Education appearing *pro se*, and Elizabeth Sherowski, representing Student's mother.

HOLDING

It is hereby found that the MFE which the District conducted was not appropriate and Parent is entitled to an IEE at public expense. Such IEE should include psychiatric, psychological and medical evaluations of Student in order to determine if he is a child with a disability under IDEA.

BACKGROUND INFORMATION AND ISSUES PRESENTED

On April 21, 2009 the District filed a due process request with the Office of Exceptional Children, Ohio Department of Education regarding Student . Student is an eight year old boy who attended first grade at Hamilton Elementary School during the 2008-2009 school year. A multifactored evaluation (hereinafter MFE) was completed on Student by the District on March 17, 2009. The result of that evaluation was that Student was determined not eligible as a student with a disability under the Individuals with Disabilities Education Act (hereinafter IDEA). Student's mother disagreed with that determination and requested the District to conduct an independent education evaluation (hereinafter IEE). The District then filed this due process request, seeking to have the MFE declared appropriate, thus denying Parent's request for an IEE.

STIPULATION BY THE PARTIES

Missy Zimmerman, a Licensed Independent Social Worker for the Hamilton Local School District, attempted to contact April Lerner, LPCC, Student's therapist at Nationwide Childrens (sic) Behavioral Health, but was unsuccessful. This was the complete extent of Ms. Zimmerman's involvement in Student's MFE.

STATEMENT OF THE CASE

The District's first witness was Shelley Lemasters, school psychologist. Ms. Lemasters stated she is a contract employee of the District and is a member of the Response to Intervention (RTI) team at the elementary school level. Ms. Lemasters testified that a multi-dimensional assessment was conducted on Student, as the goal is to gather as much information as possible. She stated background information was

collected from the mother, teacher input was sought and educational records were reviewed. Parent, Student's mother, gave input and completed a rating scale which was provided to her by Ms. Lemasters and Ms. Payne.

Ms. Lemasters testified she administered the Wechsler Intelligence Scale for Children, 4th Edition (hereinafter WISC). She stated she chose that particular instrument as it measures cognitive levels, is standardized, normed in Ohio and is valid, reliable and appropriate. Ms. Lemasters testified it is the most appropriate test for a child.

Student and Ms. Lemasters worked together for approximately one and one-half hours after school. She stated she had to set expectations and boundaries for Student and at the beginning, he needed more re-direction than at the end of the testing. Ms. Lemasters testified once Student received clear and distinct boundaries, he did not veer from those. She stated that Student's ability to stay on task was typical of a seven year old.

The Behavior Assessment System for Children, 2nd Edition, (hereinafter BASC-2) was also utilized by Ms. Lemasters. She explained it is a multi-dimensional system which provides ratings used by parents and teachers. In looking at the results, Ms. Lemasters testified that the rating provided by the teacher came up with a rating of "caution". For hyperactivity, the teacher rating was "at risk" and the parent's was "clinically significant". For attention problems, the teacher rated "average" and the parent rated "clinically significant". When asked about the differences in the ratings, Ms. Lemasters testified that the ratings measured different environments of home vs. school

and stated that this assessment was one piece of information to be considered with all of the other information gathered.

Ms. Lemasters testified she observed Student in his classroom twice and conducted both of those toward the end of the day. She stated that during her observations, he was on task and for the most part, was doing what he was supposed to do. She did not note that he did anything significantly different from his peers.

On cross examination, Ms. Lemasters confirmed that at the Evaluation Team Report (hereinafter ETR) meeting, she did state that Student was pretty hyperactive and that when she asked him about it during her testing, he told her he had eaten cake. Ms. Lemasters stated she wrote that down as part of her observations and statements. On the BASC-2, Ms. Lemasters confirmed that the aggression score was “clinically significant” as reported by both parent and the teacher, meaning that it needs further evaluation. The hyperactivity score was “at risk” on the teacher’s scale and “clinically significant” on the parent’s scale. That means further evaluation and monitoring. Ms. Lemasters testified she did not use the Attention Deficit Hyperactivity Disorder (hereinafter ADHD) profile as provided in the manual for Student.

Ms. Lemasters testified the MFE was completed in ten days, as the parent requested an expedited evaluation. She testified she would have liked more time to do the evaluation and was concerned that others also needed more time. Ms. Lemasters testified, however, that she could not say if the evaluation would have been better or not if more time was allowed. She also admitted that at the ETR meeting, she stated it was “fifty-fifty” as to if Student was a child with a disability, as there was evidence that he met the criteria and there was evidence that he did not.

On redirect examination, Ms. Lemasters explained that Student's classroom was an interactive one and more active than others. She also stated that as her assessment with Student progressed, his hyperactivity lessened. Ms. Lemasters testified she had to take into consideration that Student had not been in school prior to the test, as he was out on expulsion and that he was out of his routine. She also opined that an IEE would not necessarily determine the function of Student's behavior, as that would call for more observation.

The District's next witness was Lisa Payne, a certified school psychologist for four years. She stated she has worked for the District for one year. Ms. Payne testified she tested Student on March 11, 2009 and administered the Wechsler Individual Achievement Test, 2nd Edition. She stated Student had lots of energy that day and she did have to redirect him, but no more than other children. Since she wants the children to do their best, she often spreads the evaluation over two days and that is what she did with Student. The first day he was in a chair that spun and the second day she gave him a different chair. The second day was not as long as the first day.

Ms. Payne testified she also administered the Scale for Assessing Emotional Disturbance (hereinafter SAED). She explained that it is a tool that aids in identification and it is not a diagnostic tool. Student's mother and the classroom teacher completed the assessment and Ms. Payne stated Parent had questions when she was completing it. That scale showed that Student was demonstrating inappropriate behavior at home and school. Ms. Payne testified that she also looked at Student's academic scores and his classroom performance. Those were in the average to low average range. She also looked at the AIMS web data, which she explained is used at the elementary level

to track reading progress and identify students at risk. Student was meeting the target or was above the target on that data. Ms. Payne testified she was aware that Student was seeing a counselor, who provided a diagnosis of Oppositional Defiant Disorder. She stated the District considered that information along with all of the other information.

Ms. Payne testified that she did not see anything in the MFE that flagged a diagnosis of ADHD and that during her testing, she did not see any ADHD on the part of Student.

On cross examination Ms. Payne testified she is aware that the SAED is arbitrary in places, so that is why she looks at other information also. Ms. Payne stated she was told the MFE was to be expedited, so it was done in a week or less, while the standard evaluation takes sixty days. She testified she did not observe Student when he was with other students and stated that it would have been helpful to do so.

In looking at the document provided by Student's doctor, Ms. Payne confirmed that the doctor examined Student on May 19, 2008 and completed the document on March 6, 2009, using information that was approximately one year old.

Ms. Payne opined that good information was gathered on Student and even if there would have been more time to do the MFE, she did not think it would change the result.

The District's next witness was Laura Uher, an employee of the Educational Service Center of Central Ohio as a behavior intervention consultant. She explained that when a child "comes on her radar", she does a functional behavior assessment, then devises a plan to try to modify a child's behavior. Ms. Uher testified that a referral

regarding Student was made to her on January 13, 2009. She heard from others that his behaviors began in December, 2008. She then began an “ABC” assessment with “A” standing for antecedent or looking at what happened before the behavior began; “B” for the behavior itself and looking at what the behavior looks like; and “C” for the consequence of the behavior. Ms. Uher testified that she was not able to assist the ETR team in identifying a definitive function of Student’s behavior, but was able to identify two main areas of function. One was seeking attention from adults and the other was the power to control as Student wanted that sense of authority.

Ms. Uher explained that there are different tiers to a response to intervention, with the first tier being basic interventions in the classroom. In December 2008, it was determined Student needed more help and that is when she was called in and that was tier two. In that tier, a Behavior Support Plan is developed to identify the problematic behaviors. She stated that she saw Student was functioning academically at grade level, so his academics were not impacted by his behavior. The Plan was to introduce and put in place preventative strategies, such as having a predictable daily schedule; timers for the beginning and end of activities; breaks; calming activities after recess; responsibilities and tasks; move Student’s supplies so they wouldn’t be used as weapons; and have a reinforcement schedule. The second prong was to have teaching strategies such as crisis management so that the staff knows what to do when the behaviors are present. The Plan is to be assessed after about a month, but it is to be expected that sometimes there is an “extinction blast”, where typically the behavior gets worse before it gets better.

On cross examination Ms. Uher confirmed that Student was out of school frequently due to verbal and physical aggression. She stated she did do one observation of Student, but it was not part of the MFE. Ms. Uher testified she is familiar with Oppositional Defiant Disorder and stated that it can exist with other disorders. Ms. Uher explained that if a child is off task and can get back on task after being re-directed, then that is not counted as a behavior. She noted that Student seemed to do better with novel activities and movement.

Ms. Uher confirmed that Student was expelled on March 5, 2009 for the very same behaviors that were being addressed through the Plan. He returned to school and in less than a week, he was expelled for forty days for the same behaviors. She stated that the MFE determination was made on the same day that the resolution meeting on the expulsion took place.

On redirect examination Ms. Uher testified that in children with Oppositional Defiant Disorder, firm boundaries and expectations need to be set. She testified that the reports show that Student was able to respond to intervention and that evaluations are judged on comprehensiveness and not time frames. When asked if it was unusual for the Plan to be in existence and have Student suspended and expelled under the Plan, Ms. Uher testified that there is an escalation period where kids push back. She opined that is what was happening with Student and stated that it is hard with aggression because there are safety issues, so the school has to follow through with the consequences, which are also part of the Plan.

The District's next witness was Collette Hayes, a team member of the RTI and currently a guidance counselor at the District for the past three years. She testified that

her role in the MFE was one of observation. In January or February 2009, Student had a crisis situation and she talked with him and made contact with his mother. She testified that during her observation of Student, he was seated at the door, away from the main group. The kids were doing a random sharing of poems and Student had his shirt pulled up over his face. During the transition, he had a question and he became frustrated and started humming. She went over to Student and tried to de-escalate the behavior and then the class transitioned to something else and Student was fine. Ms. Hayes testified she did not observe Student being off task or having a lot of re-directions.

On cross examination Ms. Hayes testified she did her observation on February 3, 2009, which was before the MFE was requested. She stated it was not done for the MFE, but was done as part of the RTI team.

Ms. Hayes testified that it was typical for the RTI documents to be part of the MFE documentation also.

The District's next witness was William Scott Koehler, Student's first grade teacher. He stated he has been teaching for three years at the District and that his style of teaching is to let the children help him make the rules and let them have self-driven activities. In looking at the AIMS web data, Mr. Koehler stated it showed that Student was above grade level in reading and math and at grade level in writing. He testified Student did not need specialized instruction in those subjects, at least no more than the typical seven year old. Mr. Koehler testified he did not see any attention problems in Student, that he saw more of a motivation issue. Student loved to learn and routinely took extra work home and had a completely average behavior for a seven year old. Mr.

Koehler testified that Student did have outbursts and behaviors and he could tell when Student was tired. Mr. Koehler stated that when Student was tired, it was a difficult day. He stated it was hard for Student to realize when he had a choice and when he didn't. Mr. Koehler testified he talked to Student's mom about his observations and she said she would work with him. He stated things went south in December, January and February, but he could not pinpoint a catalyst.

Mr. Koehler testified he first thought Student's behaviors were just toward writing, but then the stoppage of work popped up everywhere. The first event was when Student refused to do his work. He climbed under his desk and pushed his chair, his desk and the desks and chairs of others. He was removed from the classroom. This occurred in October or November.

The behaviors escalated, such as shoving a desk toward people, throwing things, running around the classroom throwing things, tearing things off the wall and breaking boxes. Mr. Koehler stated he had to remove the students from his classroom due to Student's behaviors. He testified Student would have an incident, then there would be a lag of time before another incident that was worse and then the time between the incidents grew shorter and the incidents became more aggressive. Mr. Koehler testified that Student's mother did not seem particularly receptive when he talked to her.

On cross examination Mr. Koehler testified he completed a checklist of behaviors for Ms. Uher and that when Student did not want to do something, he would fidget and slump, but those were not able to be explained on the checklist. Mr. Koehler testified that Student's behavior hinders him from being safe in a classroom so he is taken out, but then since he cannot be in the classroom, he can't learn and therefore his

performance suffers. Mr. Koehler described Student's behavior as impulsive in that he gets angry and impulsively reacts. He opined that is what he has seen his mother do and so he responds the same way. Mr. Koehler testified he does not believe that Student has a disability under the IDEA but that something else is going on. He stated that even if more time had been taken in the evaluation process, he does not think the results would change as he does not believe that they will find the cause of Student's behaviors to be at school.

The District's last witness was Lisa Gabriel, and Occupational Therapist with twenty-four years of experience. Ms. Gabriel testified that emotionally disturbed students can have sensory processing disorders or difficulty with different inputs which can then lead to other difficulties. She stated that sensory issues can lead to behavioral difficulties and an occupational therapist can help identify the underlying function.

Ms. Gabriel testified that her part in the MFE was the Sensory Processing Measure. She worked directly with Student and gave the teacher and parent a questionnaire, which she scored. Nothing in that questionnaire came out as significant other than the social participation, which they already knew Student had problems with. Ms. Gabriel testified the sub-tests scores were in the typical range, showing that Student had no more difficulty than any child his age. She stated the parent and teacher scores were pretty consistent and there were no red flags.

On cross examination Ms. Gabriel testified that because there were no red flags and because there was not enough time, she did not do the third piece of the questionnaire which looks at art, music and physical education. She stated the bus, cafeteria, etc., could also have been looked at if there was time and stated she was

unaware that there had been problems with Student on the bus. Ms. Gabriel testified she is not convinced that Student has an emotional disturbance as she feels he is just a challenging kid or as Dr. Greenspan would put it “a difficulty child personality”.

Parent testified that Student crawled late, talked at age three and walked at age two. He sat up at one year and he has a nine year old brother and a six and one-half year old sister. He does not have any contact with his dad.

Parent stated that Student started kindergarten shortly after he turned five. In kindergarten he was always up and out of his seat, behind in his work and did not do what he was told. He would be taken out of the classroom and they would try to get him to calm down. Because of those reasons, Student repeated kindergarten. He was able to learn a little better the second year in kindergarten, but still not able to stay in his seat, but he went on to first grade.

In first grade, Student’s behavior problems accelerated, with there being a lot of incidents. Parent testified to the following incidents:

9/10/08	1 day suspension	bus incident
10/21/08	bus suspension	refused to sit down
10/30/08	in school suspension	pushed in hallway, shoved students
11/6/08	bus suspension	refused to listen to driver
11/8/08	bus suspension	hit other kids
11/21/08	1 day emergency removal	under desk and knocked desk over
12/4/08	1 day suspension	refused to do work
12/10/08	2 day suspension	refused to listen
12/18/08	bus suspension	

1/5/09	3 day suspension	pulled over a bookcase
1/22/09	10 day bus suspension	
2/2/09	emergency removal and 1 day in school suspension	destroyed things and not doing what was told to do
2/6/09	suspended from bus for one year	
2/6/09	in school suspension	refused to do what was told
2/10/09	emergency removal 2 day suspension	refused to listen
2/12/09	out of school suspension and put up for expulsion	refused to listen

Parent testified there was not intervention done in kindergarten for Student. In looking at the medical form that is part of the MFE, Parent testified she was given the document from Ms. Smith and then she had to get it filled out by the doctor. The District told her the last exam date would be fine, which was May 19, 2008. She had asked if she needed to get Student a new physical and the District told her no. Parent testified that for several months, in July and September 2008, her family doctor tried to get Student referred to a therapist at Children's hospital. It took until January 2009 to get an appointment for an evaluation and to begin therapy. The counselor gave her a diagnosis of Oppositional Defiant Disorder and Parent testified that she immediately passed that information along to the District.

Parent testified she has a high school degree and an associate degree in criminal behavior. She stated she does not know why Student is acting like he is and she believes him to have a disability due to his Oppositional Defiant Disorder and his behaviors. Parent testified she did not ask the District to do the MFE quickly and that her first request for an MFE was dated January 8, 2009. After that, there was a meeting

and the District told her they did not suspect a disability, so she signed in agreement. She stated she did not know what her options were and she was not represented then. On the same date as the MFE meeting, March 17, 2009, Parent testified there was a meeting for the resolution of the expulsion, but she was not aware that the results of the evaluation were going to be presented on that same day. She stated she thought the evaluation was done quickly. The team could not tell her why Student did his behaviors and the team mentioned that the decision could go either way.

On cross examination Parent testified she did not see that two boxes were checked on the invitation to the meeting of March 17, 2009. She stated she has shared with the counselor her concerns about Student's hyperactivity and lack of attention and she confirmed that on a questionnaire she completed, she stated Student does homework easily. Parent further explained that Student could stay focused on his homework in the evening but when he was home all day due to the suspensions, then she saw that he could not stay focused all day. Parent testified that she cannot think of anything that happened at home which would have caused his behaviors.

FINDINGS OF FACT

and

ANALYSIS AND CONCLUSIONS OF LAW

The sole issue in this case is if the District's MFE regarding Student was appropriate under the pertinent laws and rules. The burden is on the District to prove, by a preponderance of the evidence that the MFE was appropriate, thereby negating the need for an IEE. *Shaffer v. Weast*, 546 U.S. 49, 56-62 (2005).

An MFE is conducted by a District, after obtaining parental consent, in order to determine if a child has a disability under the criteria outlined in IDEA. If the answer to that determination is yes, then the child qualifies for services under the provisions of IDEA. If the answer to the determination is no, then conversely, the child is not eligible for services under the provisions of IDEA.

Pursuant to 34 C.F.R. section 300.304(b)(1), a public agency (i.e., the District) must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, in order to determine if the child has a disability under the criteria of IDEA. In addition, administrative rule 3301-51-06(E) of the Ohio Administrative Code (hereinafter OAC) also sets out requirements that the District must follow in conducting an MFE. Those requirements are as follows:

(2) Conduct of evaluation

In conducting the evaluation, the school district must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining:

(i) Whether the child is a child with a disability as defined in paragraph (B)(10) of rule 3301-51-01 of the Administrative Code; and

(ii) The content of the child's individualized education program (IEP), including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child to participate in appropriate activities);

(b) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Other evaluation procedures

Each school district must ensure that:

(a) Assessments and other evaluation materials used to assess a child under this rule:

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information about what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(d) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

If the District conducted the MFE in accordance with the above administrative regulations, then the MFE will be found “appropriate” as that term is used in section 3301-51-05(G)(2)(b)(i) of the OAC. Once again, if the MFE is found to be appropriate, then the District is not obligated to pay for the parent-requested IEE.

Parent first requested an MFE on January 8, 2009. On February 5, 2009, the District and Parent met and it was determined at that time that Student was not suspected of having a disability. The primary reason stated was “there is no adverse affect to Student’s educational performance.” District Exhibit 1, pg 63-66. Prior written notice, dated March 4, 2009, was given to Parent stating that an initial evaluation was going to be conducted and that no Manifestation Determination Review was going to be conducted. District Exhibit 1, pg. 69. The paperwork was completed and the process of conducting a MFE began.

The record has established that all of the school personnel who administered tests to Student during the MFE process were properly licensed and certified. District’s Exhibit 2. The parent did not contest this fact. Therefore, the District has met the requirement that the testing be done by “trained and knowledgeable personnel”.

Assessments were done on Student for fine motor skills, vision and hearing. All of these showed no problems in those areas and none of those areas appeared to have an adverse effect on Student’s academic functioning. District Exhibit 2, pg. 72. Ms. Lemasters, the school psychologist, administered the WISC – IV edition. That test assess the intellectual ability of children. Student was found to have a full scale IQ of 88, which is in the Low Average range. He scored in the low average range

in verbal comprehension, perceptual reasoning and working memory. District Exhibit 2, pg. 73-75.

Ms. Lemasters also administered the BASC-2, which evaluates the behavior and self-perceptions of children and young adults. Student's teacher, Mr. Koehler, and Student's mother both completed rating scales, which showed elevated responses on hyperactivity, with the teacher's rating in the "at risk" category and the parent's at the "clinically significant" category. Attention problems were rated "average" by Mr. Koehler and at "clinically significant" by Student's mother. District Exhibit 2, pg. 86-89.

Lisa Payne, another school psychologist, administered the WIAT-II, which is used to assess skills in reading, math, written expression and oral language. In the sub-tests for reading, Student was low average in three of them and average in reading comprehension. In the sub-tests for math, Student was low average in numerical operations and borderline in reasoning and composite. In the spelling sub-tests, Student was low average in spelling, high average in written expression and average in writing composite. District Exhibit 2, pg.77-78.

Ms. Payne also administered the SAED, which assists in identifying students who may meet the criteria for Emotional Disturbance. Once again, Student's teacher and mother completed rating scales, with both of them showing elevated scores in the Inappropriate Behavior and Relationship Problems areas. The teacher indicated Student's academic performance was slightly affected by his behavior, while Student's mother indicated his academic performance was severely affected by his behavior. District Exhibit 2, pg. 90-92.

In the assessment done for Early Literature, Student was at the average and established ranges. District Exhibit 2, pg. 79-80.

There was also an evaluation done by a speech language pathologist, although she was not available to testify as to her results at the hearing. Her report is included as part of the MFE and for purposes of this hearing, the report is only being considered to show that the District did conduct an assessment of Student's communication skills. District Exhibit 2, pg. 81-83.

Lisa Gabriel, an Occupational Therapist, administered a Sensory Processing Measure, to evaluate Student's overall sensory processing. It consists of three parts, a home form, main classroom form and school environment form. The latter was not completed. The conclusions reached by Ms. Gabriel were that all areas were within the Typical Performance range with the exception of Social Participation. District Exhibit 2, pg. 84-85.

The form completed by Student's doctor contained information from a physical performed on Student approximately one year prior to the other MFE documents. District Exhibit 2, pg. 93-94. The information provided by the doctor was sparse.

Both Ms. Lemasters and Ms. Hayes, school counselor, observed Student in his classroom and wrote of their observation results for purposes of the MFE. District Exhibit 2, pg. 96-97.

The District complied with the OAC requirement of "using a variety of assessment tools and strategies". They also complied with the requirement of using "technically sound instruments" to do their assessments. One area that was lacking in

the District's MFE was that found in administrative rule 3301-51-06(E)(3)(h) of the OAC. That paragraph states as follows:

Medical consultation shall be encouraged for a preschool or school-age child on a continuing basis, especially when school authorities feel that there has been a change in the child's behavior or educational functioning or when new symptoms are detected;

The District gave a medical form to Student's mother to take to Student's doctor for completion. She asked if a new physical should be obtained, as he was not yet due for one, but the District told her no, it was not necessary. Tr. 281. Given the fact that Mr. Koehler testified that Student's behaviors began to escalate during the school year and he could not pinpoint that escalation to anything at school, Tr. 218-219, and the fact that Student's mother also stated his behaviors began to escalate in December 2008 and she could not pinpoint the cause to anything at home, Tr. 270, 308, the District should have sought more medical information, as per the administrative rule. The record reflects that the District tried to contact Student's therapist, but did not have success in doing so. The information the District had to consider in the MFE from the therapist came from the information that Student's mother supplied them with. There was no evidence that the District tried to contact Student's medical doctor for any information.

The District argued that the MFE showed that Student did not have a disability under the criteria of IDEA and that the interventions they put in place were not in place long enough to be analyzed to determine if they were working. Testimony from Ms. Uher was that after an intervention plan is put into place, the behavior of the student

sometimes gets worse before it gets better and this was probably what was happening to Student. Tr. 149, 181.

The use of positive behavioral plans, pursuant to 34 CFR section 300.324(a)(2)(i), are to be considered in cases where the student's behavior is impeding the student's learning or the learning of other students. In the case of a child with a disability, a behavioral plan is appropriate to be included in the child's IEP, regardless of if the behavior is a manifestation of the disability. See 34 CFR section 300.530(c), (d), (e) and (f).

The behavior plan that the District put into place is marked as District Exhibit 2, pgs. 103-105. It is titled Positive Behavioral Support Plan and was put into place in February, 2009. Tr. 167. Ms. Uher, who worked with the team in putting this plan into place, testified Student did not "come onto her radar" until January 2009. Tr. Pg. 138. The Plan states that "Student's target behaviors include noncompliant acting-out episodes". It also states that "Currently, a primary function to Student's target behaviors is inconclusive." The preventative strategies include a predictable daily schedule; breaks and retreats; a calming activity after recess; classroom jobs and responsibilities; keeping school supplies away from Student's desk; and a positive reinforcement schedule. The Plan also includes several teaching strategies as well as consequence strategies.

As stated above, the plan was implemented in February 2009. In February, Student had five incidents for which he received suspensions. Tr. 275-278.

In looking at the "Team Summary and Interpretation of the Multifactorial Evaluation", District Exhibit 2, pg. 106-107, it states that both Student's mother and

teacher indicated he “demonstrates significant inappropriate behavior at home and school.” It also states:

Student’s weakest performance is in Word Discrimination. This subtest requires the student to attend to the prompt after one presentation. Difficulty maintaining attention can adversely affect classroom performance.

The Plan continues to state:

Both Student’s mother and teacher note difficulties with interacting appropriately with peers and adults, resolving peer conflicts, and maintaining appropriate eye contact during conversations. His teacher noted some difficulties with fidgeting at his seat, falling out of seat, leaning on walls for support, and poor posture at desk these factors alone are not considered significant.

Under description of educational needs, it states Student needs frequent redirection to stay on task.

The behavioral plan was considered part of the MFE packet and was presented by Ms. Uher at the MFE meeting. Tr. 140. She testified that she also conducted a functional behavioral assessment in order to try to identify the function or purpose behind Student’s behavior. When asked if she was able to identify the definitive function of Student’s behavior, Ms. Uher replied “not a definitive function”. Tr. 138-140. She continued to state that two main areas were identified, attention seeking and the power to control. Tr. 140.

In spite of the above comments in the behavioral plan and in the Team Summary of the MFE, the District concluded Student does not have a disability under IDEA. Student's mother argued that one of the reasons the MFE is not sufficient and thorough is because of the short time period in which it was conducted. The District agreed on March 4, 2009 to conduct an MFE. District Exhibit 1, pg. 59. On March 5, 2009, Student was expelled from school. District Exhibit 1, pg. 71. On March 10, 2009, Student's mother filed for an expedited due process hearing. Tr. 284. On March 17, 2009 a Resolution session on the expedited due process hearing was scheduled as well as the MFE meeting to discuss the results and make a determination as Student's eligibility for services under IDEA. District Exhibit 1, pg. 108. Therefore, the entire MFE was completed from March 4 to March 17, 2009.

While the MFE contained a variety of assessments, it lacked depth. It only scratched the surface of several areas that needed more evaluation. The District was in a rush to get the evaluation completed. If Student would have been found to be eligible for services under IDEA, then their ability to suspend or expel Student would have been severely hampered by the procedural safeguards put in place regarding a manifestation determination. It is impossible to say what the determination would have been had the District taken more time to conduct its evaluation, but the evidence has established that several members of the MFE team voiced their concerns over the short time period they had to conduct the evaluation. Ms. Lemasters testified she would have liked more time to complete the evaluation and was concerned with its completeness. Tr. 63. Ms.

Smith stated at the ETR meeting that there was not enough time to find out what the function of Student's behavior was. Tr. 64-65. Ms. Payne stated that she did not have time to observe Student with other kids, which she thought would have been helpful. Tr. 117. Ms. Lemasters also stated at the ETR meeting that it was fifty-fifty as to if Student was a child with a disability, stating it could go either way. Tr. 65.

Student has had problems in school since day one. He was retained in kindergarten, expelled twice for forty days each time, had a total of nineteen days of suspension from school, was removed from school eight times, two in-school suspensions and was suspended from the bus numerous times. District Exhibit 1, pg. 71. Tr. 269-278. Student has knocked over bookcases and had verbal altercations with students and teachers. Tr. 269-278. The remarks on the behavioral plan and statements from his teachers indicate he has a problem with listening and out of seat behavior. District Exhibit 1, pg.71. Yet, in spite of all that documentation, the MFE did not explore if Student has ADHD or focus problems. The ADHD portion of the BASC 2 was not administered. Tr. 61. The District did not gather any information from Student's bus driver although he had several suspensions from the bus. The functional behavior assessment was not done as part of the MFE, but instead was done to help set up the positive behavioral plan. Tr. 155.

Much of the information was based on subjective assessments and ratings, which were largely ignored. On the BASC- 2, Student's teacher ranked him in the "at risk" and "caution" category for hyperactivity and overall,

respectively. The parent rating came up as “clinically significant” for hyperactivity and attention problems. The aggression portion came out as “clinically significant” by both the parent and teacher. Tr. 34-36. The SAED showed inappropriate behavior at school. Tr. 92, 93. The Sensory Processing showed a problem with social participation. Tr. 242. Yet, the testimony from Ms. Lemasters and Ms. Payne was that a decision should not be based on one instrument. Tr. 38, 93. While that may be true, the District had the results of three instruments or rating scales, all indicating a problem. While one may not be significant, three certainly indicates that further exploration is needed.

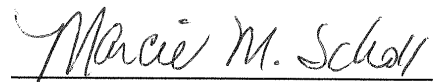
The academic portion of the MFE showed Student to be low average or below average in verbal comprehension, perceptual reasoning, working memory and in reading and math. District Exhibit 1, pg. 73-78. No evaluation was done to determine if Student had a specific learning disability in those areas. The testimony and the documents reflect that one of the reasons Student was found to not have a disability is that his academic performance was not being adversely affected. The phrase “adversely affects educational performance” appears in most of the disability definitions. This does not mean, however, that a child must be failing in school to receive special education and related services. According to IDEA, states must make a free appropriate public education available to “any individual child with a disability who needs special education and related services, even if the child has not failed or been retained in a course or grade, and is advancing from grade to grade.” 34 CFR section 300.101(c)(1). In Student’s case, he was retained in kindergarten.

Even though the BASC-2 indicated a possible problem with hyperactivity and aggression, the MFE did not include any exploration of OIH as a possible category of disability with regard to Student. There was no evaluation of Student to determine if he had a “heightened alertness to environmental stimuli . . . due to ADD or ADHD.” 34 CFR section 300.8.

The MFE conducted by the District was not appropriate and did not address the behaviors that Student was having. While the District ruled out ED due to the results of the MFE, there was no discussion or evaluation of Student with regard to ADHD, ADD or OIH. It did not provide answers and quite frankly, it appeared to be rushed and only considered that which was minimally required, due to the self-imposed time constraints. The MFE was done quickly and not thoroughly. It skimmed the surface and did not give an in-depth evaluation of the behaviors that Student has been exhibiting for approximately two years. Anyone who looks at Student’s disciplinary record over the short time period that he has been in school would be suspicious of a disability being present. He has been suspended from the bus numerous times, Tr. 270 – 278, yet no one talked to the bus driver and did not seek any input from him. The District ruled out the category of ED, but failed to look at others, especially OIH and SLD. Student has exhibited behaviors common to both. His behaviors have been going on for two years and are getting increasingly worse. Surely a complete, thorough, in-depth, relevant and appropriate MFE would have taken longer than thirteen days to complete and the participants would not have voiced their concerns over the limited amount of time they had to do the evaluations. They would not have commented that more observations would have been beneficial and that time was not allotted to complete all of their

evaluations. The comment that it was “fifty-fifty” and “could go either way” would not have been made.

The case of *Kenston Local School District*, 41 IDELR 47 (2003) made it clear that an MFE must thoroughly evaluate all of the problems that the team is aware of. This MFE did not do that. Therefore, it is hereby found that the MFE which the District conducted was not appropriate and Parent is entitled to an IEE at public expense. Such IEE should include psychiatric, psychological and medical evaluations of Student in order to determine if he is a child with a disability under IDEA.



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