BEFORE THE IOWA DEPARTMENT OF EDUCATION

Cite as 26 D.o.E., App. Dec 36 (2010)

In re Elizabeth Jane M., a child.

Stacey M.,

Complainant,

v.

The Tripoli Community School District & Area Education Agency 267,

Respondents.

Docket Number SE-348

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING RELIEF

In response to the Joint Application of the counsel for the Complainant and the School District and the AEA, and being fully advised in the premises, the Administrative Law Judge hereby enters his findings of fact, conclusions of law, and order granting relief.

I. Findings of Fact

The parties have stipulated to the following material facts, and the Administrative Law Judge hereby adopts those stipulated facts as his findings of fact in this proceeding:

1. The child's name is Elizabeth Jane M., and she was born on July 5, 1994. She has a specific learning disability in the area of reading comprehension. This disability adversely affects her education, and, by reason of that disability, she has need of specialized instruction.

2. Elizabeth lives with her mother, Stacey M., who is the Complainant herein, and they reside within the boundaries of the Tripoli Community School District and Area Education Agency 267.

3. The School District and the AEA had reason to suspect that Elizabeth Jane was a child with a disability in need of special education from and after October 15, 2007, when Stacey M. reported specific concerns regarding her daughter's deficits and needs and requested testing of her daughter's disabilities and needs by the AEA. The School District and the AEA also had reason to suspect that Elizabeth Jane was a child with a disability from and after December 21, 2007, when Stacey M. presented to them an evaluation by Dr. Lynn Charles Richman and Dr. Kevin M. Wood. The evaluation concluded that Elizabeth Jane M. has dysnomia and dyslexia and a need for specialized instruction and related services.

4. Notwithstanding the fact that they had reason to suspect a disability and a need for special education, the School District and the AEA did not conduct a full and individual evaluation of Elizabeth Jane and did not prepare a consent for such an evaluation until January 27, 2009.

5. The School District and the AEA did not provide written notice to Stacey M. of their refusal to conduct a full and individual evaluation. This failure was prejudicial to Stacey M. and her daughter because they were not contemporaneously aware that the "screening" conducted by the AEA was not a full and individual evaluation, either procedurally or substantively, and because they were not aware of their right to secure such an evaluation within sixty calendar days.

6. On December 21, 2007, the very day they received the independent evaluation report of Elizabeth Jane M. by Dr. Lynn Charles Richman and Dr. Kevin M. Wood, the School District and the AEA resolved that they would do more testing. Formal testing instruments, or parts of formal testing instruments, were administered to Elizabeth Jane M. in January of 2008. The administration of these tests was contemporaneously described as "additional screening" and the purpose of conducting the tests was to refute the evaluations and considered conclusions of Drs Richman and Wood. The instruments that were administered in January of 2008 included the reading subtests of the Woodcock Johnson Tests of Achievement and two of the three subtests of the Stanford Reading Test, and, they were not administered to other children. The Schoo

District and the AEA did not obtain informed consent from Stacey M. prior to conducting these evaluations, and they did not provide prior notice to Stacey M. regarding these evaluations. The IEP team did not meet to determine what data was needed, and Stacey M. was not part of any team that made such a determination.

7. From and after November 26, 2007, and through as recently as July 21, 2009, the School District and the AEA have utilized the following criteria or guidelines to deny eligibility under the IDEA to Elizabeth Jane M.:

a. In assessing whether Elizabeth Jane "needs" special education, the School District and the AEA did not make a sufficient individualized determination of need. They placed too much weight on the fact that the student had advanced from grade to grade and that her grades or test scores did not fall below the tenth percentile.

b. In assessing whether Elizabeth Jane "needs" special education, the School District and the AEA did not give sufficient consideration to "outside or extra learning support provided to the child."

c. In assessing whether Elizabeth Jane M. needs "special education," it appears from the record that the School District and the AEA have determined that "individualized instruction in reading comprehension" is a general education intervention, and not the provision of special education.

8. On March 9, 2009, more than sixteen months after Stacey M. first requested formal testing by the AEA, the School District and the AEA completed an "Educational Evaluation Report" concerning Elizabeth Jane M. On the same day, the School District and the AEA mailed a Prior Written Notice refusing eligibility. Two days later, on March 11, 2009, Ms. Meyer filed a Request for Preappeal Conference which was subsequently docketed as Iowa Department of Education Docket No. PRE-592. The preappeal conference was held on May 29, 2009, and the

parties entered into an agreement to secure an additional evaluation from a neighboring AEA. The additional evaluation was completed, and an IEP meeting was convened on July 21, 2009. On the same day, July 21, 2009, the School District and the AEA delivered a Prior Written Notice to Stacey M. denying eligibility to Elizabeth Jane. Two days later, on July 23, 2009, the School District and the AEA faxed a new "Educational Evaluation Report" to Stacey M. The new Educational Evaluation Report is dated July 21, 2009.

9. The Educational Evaluation Report dated July 21, 2009 was not presented to Stacey M., Elizabeth Jane M., or their advocate at the IEP meeting held on July 21, 2009 to address the subject of eligibility, and it contains numerous prejudicial statements and conclusions that were not part of the independent evaluation. It also contains statements and conclusions that were not considered or approved by the IEP team.

10. Many of the evaluations summarized in the Report dated July 21, 2009 were not used for purposes for which the assessments or measures are valid and reliable and were not administered in accordance with any instructions provided by the producer of such assessments.

11. In preparing their full and individual evaluation report on March 9, 2009, and, in preparing a second report on or after July 21, 2009, the School District and the AEA did not document whether or not Elizabeth Jane M. has a specific learning disability.

12. The School District and the AEA did not give full consideration to the independent evaluation secured by Stacey M., but, instead, rejected that evaluation on *a priori* grounds, as though the documented and considered opinions of Dr. Lynn Charles Richman and Dr. Kevin M. Wood were inherently suspect.

13. In November of 2007, and again in February of 2008, and again in January of 2009, the School District and the AEA implemented strategies concerning the education of Elizabeth Jane M. that they contemporaneously characterized as general education interventions. The interventions were not designed in accord with sound scientific principles. The School District

and the AEA did not use objective and consistently measured tests to monitor the effect of designated interventions.

14. The School District and the AEA utilized general education interventions to delay a full and individual evaluation of Elizabeth Jane M.'s disability and educational needs, and they did so without advising the parent of her right to trigger a full and individual evaluation within sixty calendar days of consenting to such an evaluation.

15. The general education interventions were implemented with inadequate parental participation and inadequate contemporaneous communications to the parent.

II. Conclusions of Law

The parties have jointly proposed certain conclusions of law in this proceeding, and the Administrative Law Judge has independently satisfied himself that those conclusions are consistent with the provisions of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, the governing federal regulations, and the relevant precedents. Accordingly, I hereby make and enter the following Conclusions of Law:

1. The Respondents' delay in initiating a full and individual evaluation after they had reason to suspect a disability and a need for specialized instruction was a violation of numerous provisions of state and federal special education law, including the child find obligation set forth in 34 C.F.R. § 300.111(c)(1), which specifically states that child find must include children "who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade."

2. The Respondent's failure to provide written notice to Stacey M. of their refusal to conduct a full and individual evaluation was a violation of 20 U.S.C. § 1415(b)(3), which mandates written notice whenever a school or AEA refuses to initiate an evaluation of the child.

3. Dyslexia and dysnomia are qualifying disabilities under 20 U.S.C. § 1401(30)(B).

4. The Respondents' failure to make an individualized determination of need is contrary to the Eighth Circuit rule as set forth in *Yankton v. Schramm*, 93 F.3d 1369 (8th Cir. 1996). That failure was also contrary to the long-standing position of the U.S. Department of Education (as set forth in *In Response to Lillie*, 23 IDELR 714 (OSEP 1995): "Generally, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child . . ., as such information may indicate that the child's current educational achievement reflects the service augmentation, not what the child's achievement would be without such help."

5. Specifically designed instruction in reading comprehension may be special education as defined in 20 U.S.C. § 1412(a)(5).

6. Special education can be provided in general education classrooms under the principles set forth in 20 U.S.C. § 1412(a)(5).

7. The Respondents' failure to present the Educational Evaluation Report dated July 21, 2009 to the parent on or before the eligibility determination meeting held on July 21, 2009 was a prejudicial violation of the IDEA and inconsistent with the basic principle that a parent is a full partner in making eligibility determinations.

8. Some of the Respondents' assessments violated the substantive standards set forth in 20 U.S.C. § 1414(b)(3)(A) because they were not "used for purposes for which the assessments or measures are valid and reliable" and/or because they were not "administered in accordance with any instructions provided by the producer of such assessments."

9. The Respondents' failure to document whether or not Elizabeth Jane Meyer has a specific learning disability violated 34 C..F.R. § 300.311(a), which specifically states that, "[f]or a child suspected of having a specific learning disability, the documentation of the determination

of eligibility, as required in § 300.306(a)(2), must contain a statement of . . . [w]hether the child has a specific learning disability [and the] basis for making the determination." Respondents acknowledge that operating in a "non-categorical" state still requires them to fully comply with the law.

10. The Respondents' rejection of the independent evaluation secured by Stacey Meyer on *a priori* grounds was a violation of their duty to use information provided by the parent, as required by 20 U.S.C. § 1414(b)(2). As a matter of law, a local education agency must give good faith consideration to independent evaluations and other information provided by the parents.

11. The Respondents' general education interventions in 2009 violated the IDEA because they were not designed in accord with sound scientific principles, because they were not thoroughly implemented, and because the Respondents did not use objective and consistently measured tests to monitor the effect of designated interventions. When general education interventions are part of a local education agency's child find and evaluation procedures under the IDEA, those interventions must be implemented with integrity and in accord with sound scientific principles.

12. General education interventions that are part of child find and evaluation procedures require the use of scientifically based methodology, objective and consistent monitoring, parental involvement and consent, and notification of procedural safeguards.

13. The Respondents' administration of assessments to Elizabeth Jane M. in January of 2008 violated 20 U.S.C. § 1414(a)(1)(D)(i)(I), because they did not obtain the informed consent of Stacey M. prior to conducting those evaluations. The failure to provide prior notice to Stacey M. violated 20 U.S.C. § 1414(b)(1), which specifically states that the "local educational agency shall provide notice to the parents of a child with a disability . . . that describes any evaluation procedures such agency proposes to conduct." The failure to include Stacey Meyer in making the determination of what data was needed was a direct violation of 20 U.S.C. § 1414(c)(2) and

20 U.S.C. § 1414(c)(1)(B).

III. Order for Relief

On the basis of the foregoing findings of fact and conclusions of law, in accord with the stipulations of all parties, and consistent with the principles of awarding relief in IDEA cases, I hereby enter the following Order for Relief:

1. The Complainant is entitled to reimbursement relief for the costs of securing a tutor specializing in reading instruction for her child and for mileage expenses to and from that tutor. The child, Elizabeth Jane M., is entitled to compensatory education for past denials of eligibility and appropriate services, including the future provision of needed tutoring services to address reading comprehension difficulties. By stipulation of the parties, the reimbursement and compensatory relief will be in the liquidated amount of $9,828 payable by the Respondents to the Complainant.

2. An IEP team will meet as soon as possible to develop an appropriate Individualized Education Plan for Elizabeth Jane. The IEP will focus on her deficits in reading comprehension, and the services will be reasonably calculated to both remediate and accommodate that disability. The Administrative Law Judge will retain jurisdiction of this matter to insure good faith compliance with this order.

3. The Complainant is the prevailing party in this proceeding. She is entitled to an award of attorney fees to be calculated and determined in accord with the precedents governing the award of attorney fees in IDEA cases.

Ordered this 23rd day of November, 2009.

Dr. Carl Smith
Administrative Law Judge