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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
OAL DKT. NO. [EDS4309-99](#)
AGENCY DKT. NO. 99-2730

**CAMDEN CITY BOARD
OF EDUCATION.,**

Petitioner,

v.

N.B.,

Respondent.

Charles W. Dortch, Jr., Esq., appeared for petitioner (Sumners, George & Dortch, P.C., attorneys)

Jamie Epstein, Esq., appeared for respondent

Record Closed: June 24, 1999

Decided: July 27, 1999

BEFORE **ANTHONY T. BRUNO,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises as a result of petitioner's letter requesting a due process hearing pursuant to [20 U.S.C. §1415](#)(f) and *N.J.A.C.* 6A:14-2.7: "to determine: (1) the appropriate providers of independent general medical, as educationally required, neurological, behavioral, educational, and psychological evaluations of N.B., . . . (2) the appropriate interim educational program for N.B. pending results of these independent evaluations and development of an IEP. . . [and for] an order: (3) prohibiting N.B. (through her representatives and/or agents) from contracting for educationally related assessments, evaluations, instruction, counseling or services for which reimbursement for, or direct payment of, will be sought from the petitioner or responsibility for any such arrangements that may exist at the time of the hearing in this matter."

The matter was transmitted to the Office of Administrative Law for a hearing on June 17, 1999 and the hearing commenced on that date. At the completion of petitioner's presentation the parties conferred and agreed that N.B. would continue the program of psychotherapy with Dr. Brown provided the sessions did not conflict with N.B.'s school schedule. With that proviso, petitioner agreed to pay Dr. Brown's bill for services to N.B. and, N.B.'s travel costs to date as well as for future treatment. The hearing was continued to June 24, 1999 for the presentation of testimony on the only issue remaining, that is, whether the Behavioral Assessment (Exhibit P-1) and Learning

Re-evaluation (Exhibit P-2) were appropriate, for enclosing respondent from obtaining an independent educational evaluation at public expense pursuant to 34 CFR §300.503(b).

The hearing concluded on June 24, 1999. Witnesses who testified and exhibits entered into evidence are listed in the appendix. The hearing record closed on June 24, 1999.

FACTUAL CONSIDERATIONS

The factual background for this matter is gleaned from N.B.'s Individualized Education Program (IEP) (Exhibit P-3) and the Psychiatric Evaluation report of Dr. Gail Edelsohn (Exhibit C-1). N.B. was classified multiply handicapped ("MH") and attending Archway school in September 1998 when she was sexually assaulted in a school bus. In November N.B. began receiving home instruction at the Cream School Library.

In April 1999, Margaret Inscho, School Psychologist with the petitioner observed N.B. on 2 occasions. Inscho testified that her purpose was to evaluate N.B.'s behavior and consult with N.B.'s teacher to determine whether a specific behavioral program was needed. Based upon her observations and discussions Inscho concluded that a specific behavioral program was not needed for N.B.'s current educational program.

On cross-examination Inscho testified that she was not familiar with N.B.'s behavior program while N.B. was at Archway, nor before N.B. started attending Archway. However, based upon N.B.'s history of inappropriate behavior in group settings, a re-evaluation would be necessary were N.B. to be placed in a new setting.

Marcia Berry is a Learning Disability Consultant with petitioner. On April 16, 1999, Berry administered 5 tests to N.B., the Woodcock Johnson Tests of Achievement, Peabody Picture Vocabulary Test, the Berry Developmental Test of Visual Motor Integration, a test of Auditory-Perceptual Skills and a Visual-Perceptual Skills test. Berry's report (Exhibit P-2) recited the scores N.B. achieved in each test together with N.B.'s percentile rank. Berry testified that N.B. was working at mid-first grade to early second grade level, that N.B.'s distractibility level was nil, and that N.B. functioned well in the noise of the school library. N.B. needed a very structured teacher who kept lessons short, but structured in order for N.B. to learn. N.B. needs positive reward and reaction to progress.

Berry did not review N.B.'s records at Archway. Berry had first met N.B. at N.B.'s intake at age 3. Berry was also aware of the many acting-out incidents and other problems involving N.B. while N.B. attended special education classes at Molina School in Camden.

The testimony of Dr. Benjamin Wolfson and Isaac Bryant was limited to N.B.'s need for psychotherapy and the appropriateness of Cooper Hospital to furnish the therapy program that Dr. Edelsohn recommended in her report (Exhibit C-1). Because this issue was made moot by the agreement of the parties the testimony of Dr. Wolfson and Bryant is no longer material.

G.K. is N.B.'s legal guardian. G.K. testified that she attended the several meetings to discuss and formulate N.B.'s IEP. Through her attorney G.K. requested an independent behavioral assessment of N.B. and G.K. thought petitioner agreed to an independent behavioral assessment.

Although N.B. attended Archway for a short period of time, G.K. could not understand why Inscho and Berry did not review N.B.'s Archway records.

Dr. Edna Barenbaum testified by telephone. Barenbaum has 15 years of experience in Educational Psychology with Special Educators, having supervised 1000 to 1500 special education teachers. Barenbaum was accepted to give expert testimony in the fields of Special Education, Educational Psychology and School Psychology. Barenbaum testified that she read the learning re-evaluation reported by Berry and was concerned that the report was "very negative," emphasized what N.B. could not do rather than what she could do, provided no background information, and was extremely brief. Berry's report made no recommendations for N.B.'s educational program and the development of an education program for N.B. based on Berry's re-evaluation would be impossible.

Barenbaum critique of the behavioral assessment prepared by Inscho (Exhibit P-1) was also negative. Barenbaum was concerned about what behavior N.B. was being observed for and what behavior N.B. had difficulty with. No baseline was provided for measuring whether N.B.'s behavior was getting better or worse.

In Barenbaum's opinion the quality of both reports was "disappointing," did not show an understanding of N.B. and failed to provide a basis to plan a program for N.B. In conclusion Barenbaum again stressed that the reports had no recommendation and did not cite N.B.'s strengths and weaknesses.

Both Berry and Inscho testified in rebuttal to Barenbaum. Both indicated that their reports were intended to show N.B. on the date of observation. Berry made no recommendations in her report because as a member of N.B.'s IEP team, Berry would contribute to the recommendations made by the team. Inscho identified no behavior of N.B. needing targeting. In her present educational setting of home instruction, N.B. showed no behavior interfering with her learning.

DISCUSSION AND CONCLUSION

Counsel for respondent, in his closing comments, highlighted the 3 issues raised in petitioner's request for a due process hearing. The first issue, the psychiatric therapy program was settled with the agreement to continue N.B.'s treatment program with Dr. Brown. The second point involves the parent's right to obtain an independent educational evaluation of the child with disabilities are provided at [20 U.S.C. §1415\(b\)\(1\)](#). If the educational evaluation conducted by the public agency is not appropriate, the parent has the right to an independent educational evaluation at public expense. 34 CFR §300.503(b).

In N.B.'s present situation, respondent contends that the behavioral assessment (Exhibit P-1) and learning re-evaluation (Exhibit P-2) were not appropriate, not thorough, contained none of N.B.'s history, omitted any suggestions or recommendations, and overlooked any research of the numerous known incidents of N.B.'s inappropriate behavior. Further, Berry had been a member of N.B.'s IEP Team for only 2 months, was not familiar with N.B. having no history of N.B.'s problems.

The third issue was whether G.K. and the petitioner had agreed to an independent behavioral

assessment. If so, that agreement had to be enforced.

On this third issue there is no documentary verification of such agreement, and in fact the petitioner denies the existence of a firm understanding of that undertaking. Petitioner contends that Inscho's Behavioral Assessment (Exhibit P-1) and Berry's Learning Re-evaluation (Exhibit P-2) are adequate and meet all standards of appropriateness. Both evaluators thoroughly reviewed N.B.'s school records, interviewed N.B.'s special education teacher and spoke with G.K. At a later date there may be need for a behavioral program or a change in N.B.'s educational program, but there is no indication that either program at this time.

Although Barenbaum testified by telephone and therefore her demeanor and visual reaction to questioning was impossible, Barenbaum's testimony and report (Exhibit R-1) were most persuasive. Barenbaum's Curriculum Vitae (Exhibit R-2) supports her proffered expertise to criticize the 2 reports and testimony of petitioner's witnesses. Without parroting Barenbaum's report and testimony at length, I concur in her opinion that although Berry's report was entitled "learning re-evaluation," N.B.'s educational program was not evaluated. N.B.'s test results and her comparison among other students were reported. An "evaluation" is defined at 34 CFR §300.503(b) to mean "procedures . . . to determine . . . the nature and extent of the special education and related services that the child needs." I **CONCLUDE** that the Learning Re-evaluation of April 16, 1999 (Exhibit P-2) does not meet that definition.

The "purpose" of the behavioral assessment was "to develop a behavior modification plan" for N.B. However, no behavior modification is recommended, nor is reference made to a behavioral program in place and to remain in place. G.K. had "expressed concern" that N.B. had stolen money and attempted shoplifting, but the assessment makes no recommendation for a behavior modification plan for such conduct. I **CONCLUDE** that the Behavioral Assessment (Exhibit P-1) is not adequate for the stated purpose of developing a behavior modification plan for N.B.

I **CONCLUDE** that petitioner has failed to establish by the preponderance of the credible evidence that its educational evaluation of N.B. is appropriate.

ORDER

Accordingly, it is **ORDERED** that the petition in this matter be **DISMISSED**.

This decision is final pursuant to [20 U.S.C.A. §1415\(e\)](#) and 34 *CFR* §300.509 (1990) and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States. [20 U.S.C.A. §1415\(e\)2](#), 34 *CFR* §300.511. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Division of Special Education.

DATE **ANTHONY T. BRUNO, ALJ**

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