

August 4, 2009

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

Pembroke Public Schools

v.

Darryl

BSEA # 09-7357

BEFORE

LINDSAY BYRNE

HEARING OFFICER

Parent Pro Se
Mary Ellen Sowyrda, Attorney for Pembroke

**COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Pembroke Public Schools and Darryl¹

BSEA #09-7357

Decision

This Decision is issued pursuant to M.G.L.c. 71B and 30A, 20 U.S.C. 1401 et. seq., 29 U.S.C. 794 and the regulations promulgated under those statutes. A hearing was held in the above entitled matter on July 20, 2009, at the Bureau of Special Education Appeals in Malden, MA. Present for all, or parts, of the proceeding were:

Ms. D.	Parent
Darryl	Student
Laurie Casna	Special Education Coordinator, Pembroke Public Schools
Mary Ellen Sowyrda	Attorney for Pembroke Public Schools
Tami L. Fay	Legal Intern – BSEA
Lindsay Byrne	Hearing Officer – BSEA

The official record of the Hearing consists of: documents submitted by the School marked S-1 through S-14 and approximately 1.5 hours of recorded oral testimony. The record closed on July 20, 2009 after oral closing arguments.

ISSUE

- 1 a) Whether the evaluations of Darryl conducted by Pembroke Public Schools in May of 2009 were comprehensive and appropriate; and
- b) if not, is the Student entitled to a publicly-funded independent educational evaluation?

¹ Darryl is a pseudonym selected by the Hearing Officer to protect the privacy of the Student in documents available to the public.

SUMMARY OF THE EVIDENCE

1. Darryl is a 16 year old rising junior at Pembroke High School. She resides in Pembroke with her parents and younger brother. Darryl has been served by an individualized education plan (IEP) since the first grade when she was originally identified as a special needs student due to auditory processing and memory problems (S-3; S-11). She is frequently described as a motivated, hard-working student with many extra-curricular commitments in which she excels (See S-13; S-8; S-9). Darryl has a specific learning disability that affects her ability to efficiently break down information and results in slower processing speed and relatively weaker information recall (S-6).
2. At the end of Darryl's 7th grade year in May of 2006, Pembroke conducted special education eligibility re-evaluation testing. Darryl's scores on standardized measures of intellectual functioning fell within the average range, with relatively weaker math and perceptual reasoning scores (S-10; S-11).
3. Additional testing to assess Darryl's memory and behavioral functioning was conducted by Pembroke on June 2, 2006 (S-11). The school psychologist indicated that Darryl has "adequate encoding and retrieval skills," although she can be "scattered in her thoughts" and she is "vulnerable to proactive interference" (S-11). The report also noted parental concerns about Darryl's "anxiety and withdrawal" (S-11).
4. The IEP for Darryl's 10th grade year, which ran from May 2008 – May 2009, provides for math support in an inclusion classroom, and daily academic support for math, study skills, and memory in the substantially-separate Learning Center (S-7; S-8). The parties do not challenge the appropriateness or implementation of Darryl's 2008-2009 IEP.
5. In May of 2009, Pembroke conducted the requisite three year re-evaluation. On May 11, 2009, as part of an educational achievement assessment, Darryl was observed in the classroom and then given the WIAT-II standardized academic achievement test. Darryl scored entirely in the average or high-average ranges on the WIAT-II, including on the

math reasoning section on which she had scored in the low average range in 2006 (S-8). The evaluator noted that Darryl was “to be commended for her self-advocacy and her willingness to take full advantage of the supports and accommodations that are available to her” (S-8).

6. On May 5, 2009, Katherine Allery, Pembroke’s school psychologist², administered the WISC-IV. Consistent with prior results, Darryl achieved scores in the average range with a relatively weaker performance in processing speed and working memory (S-9). At the hearing, Ms. Allery accounted for the 6-point difference in Darryl’s 2006 and 2009 digit span subtest scores by explaining that Darryl was visibly anxious during the 2009 testing session when she achieved the lower score. Ms. Allery also noted that testing was conducted without the accommodations Darryl would usually receive in class. Therefore Darryl was understandably less comfortable during testing (Allery). Ms. Allery also observed Darryl in Spanish class, a subject in which Darryl had reported a high level of anxiety (S-9). Ms. Allery noted that Darryl worked diligently during class and was not hesitant to ask the teacher for clarification (S-9).

7. On May 18, 2009, Pembroke convened a TEAM meeting to discuss the re-evaluation. Ms. Allery presented the results of her psychological evaluation and recommended that Darryl continue to receive and make use of her current accommodations and strategies. Ms. Allery did not believe Darryl needed additional testing. Ms. Allery reported that Darryl and her teachers already possessed a good understanding of Darryl’s capabilities (testimony, Allery). The Parent marked a form indicating that she was satisfied with the testing, by which she meant that she did not dispute the results although she wanted additional testing (S-6; Parent; Allery). Pembroke crafted a new IEP at this meeting, which differed from the previous IEP only in reducing the frequency of Darryl’s support in the inclusion math classroom from six times per cycle to four times (S-7; S-6). The Parent has not accepted this proposed May 2009 – May 2010 IEP (S-6).

² By agreement of the parties Ms. Allery testified at the hearing by way of speakerphone.

8. By letter dated May 18, 2009, the Parent requested an independent educational evaluation. The Parent indicated her concern about the difference in Darryl's score on the digit span subtest between the 2006 and 2009 administrations of the WISC-IV (S-2). The Parent perceived the score difference as an indication of an absolute decline in Darryl's working memory. At the hearing however, the Parent said there had been no day-to-day indication that Darryl's memory abilities were deteriorating (Parent). The Parent requested further testing to specifically address memory and auditory processing concerns (S-2). In an email dated May 20, 2009, the Parent indicated that Darryl's pediatrician recommended a neuropsychological evaluation (S-3).
9. On May 21, 2009, Pembroke denied, in writing, the Parent's request for an independent evaluation indicating that the May 2009 testing was "valid, reliable, and comprehensive" (S-4). Pembroke advised the Parent of the sliding fee program available to assist with costs associated with independent evaluations and alerted Parent that a request for hearing was being filed with the Bureau of Special Education Appeals that same day (S-4).
10. On July 8, 2009, Pembroke requested the Parent's permission to conduct a speech and language evaluation to respond to the Parent's stated concerns about Darryl's auditory processing (S-5; Casna). The Parent did not consent to the proposed speech and language evaluation. (S-5; Parent).
11. Darryl passed all her academic classes for the 2008-2009 school year. Her grades averaged in the high B range, and her lowest grade was a C in math (S-14). Darryl's progress reports throughout the 2008-2009 year indicate that her teachers were pleased with her motivation, behavior, and willingness to ask questions in class (S-13).
12. There are no expert educational recommendations in this record for additional or alternate evaluations.

FINDINGS AND CONCLUSIONS

Darryl is an individual with a disability falling within the purview of the Individuals with Disabilities Education Act³ (IDEA) and the state special education statute.⁴ As such, she is entitled to a free appropriate public education (FAPE).⁵ Darryl's eligibility status and current IEP services and accommodations are not in dispute. In this matter Pembroke seeks a determination by the BSEA that its evaluations of Darryl in May of 2009 were comprehensive and appropriate, and that it is therefore not responsible to fund the independent educational evaluation sought by the Parent.

Upon careful consideration of the testimony and documents admitted in evidence, I conclude Pembroke has amply supported its claim that its evaluations were comprehensive and appropriate. In this regard, Pembroke met its burden of persuasion pursuant to *Schaffer v. Weast*, 126 S.Ct. 528 (2005)⁶. My reasoning follows:

The IDEA⁷ regulations confer upon parents of disabled students the right to seek independent evaluations at public expense when the parents disagree with an evaluation conducted by the responsible school district. 34 CFR 300.502.

Consistent with federal law and regulations, the Massachusetts special education regulations also provide that parents may request an independent evaluation if they disagree with the results of the evaluation conducted by the school. 603 CMR 28.04(5)(a).

Massachusetts Regulations further provide that

If the parent is requesting an independent education evaluation in an area not assessed by the school district, ... the school district shall respond in accordance

³ 20 USC 1400 *et seq.*

⁴ MGL c. 71B.

⁵ MGL c. 71B, ss. 1 (definition of FAPE), 2, 3.

⁶ *Schaffer v. Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief.

⁷ See 20 USC 1415(d)(2)(A).

with the requirements of federal law. The district shall either agree to pay for the independent education evaluation or within five school days, proceed to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate. (Emphasis added) If the Bureau of Special Education Appeals finds that the school district's evaluation was comprehensive and appropriate, then the school district shall not be obligated to pay for the independent education evaluation requested by the parent. 603 CMR 28.04(5)(d).

In the instant case, the evidence shows that Pembroke conducted the necessary three year evaluations pursuant to 603 CMR 28.04(3), notified Parent of the results of those evaluations, and convened the Team on May 18, 2009 to create an IEP responsive to those results.

The evidence shows that Pembroke denied the Parent's request for an independent evaluation and filed a request for hearing with the BSEA on May 21, 2009, consistent with 603 CMR 28.04(5)(d), on the basis that its evaluation was comprehensive and appropriate (S-4; Casna).

The Parent does not dispute the accuracy or validity of Pembroke's evaluations, which addressed all areas of Darryl's suspected disability: cognitive, behavioral, and learning style. When the Parent raised additional concerns about Darryl's memory Pembroke's school psychologist explained the different standardized test results. Taken together with the Parent's own observation and the Student's testimony, I find no persuasive support for additional memory testing. When the Parent raised additional concerns about Darryl's auditory processing, Pembroke offered to conduct a speech-language evaluation targeted to that area, thus an independent evaluation of Darryl's auditory processing would be premature. (S-11; S-5; Casna).

The testimony of Ms. Allery, and the comments of Darryl's teachers, indicate that Darryl understands her learning disability and the necessary accommodations and is able to use appropriate services and strategies to complete her academic work and make effective educational progress (S-13; S-8; S-9; Allery; Casna). Darryl's testimony at the hearing evinced a good understanding of her own strengths and weaknesses (Student). Although the Parent's

concern and more holistic view of her daughter is to be respected, she offers no persuasive evidence of the need for or utility of additional testing. There is no showing that Darryl's cognitive or learning profile has changed over time, that the services she participates in are inappropriate or ineffective, or that the evaluations conducted by Pembroke in May 2009 were inadequate or invalid. Darryl has demonstrated no documented or anecdotal decline in her memory abilities since the 2006 testing (Parent). Neither Darryl's teachers nor her transcript indicates a drop in the quality of her work or concern regarding the school's understanding of her particular learning needs (S-13; S-14). On the contrary, the evidence shows Darryl is making progress commensurate with her abilities with the accommodations and services implemented by Pembroke in accordance with the accepted IEP (Allery; S-13; S-14).

Therefore I find that Pembroke has met its burden of persuasion in showing that its evaluations were comprehensive and appropriate. As such, it is not responsible to provide public funding for the independent educational evaluation sought by Parent.

ORDER

The special education evaluations conducted by Pembroke Public Schools in May of 2009 were comprehensive and appropriate, and therefore Darryl is not entitled to a publicly funded independent educational evaluation.

August 4, 2009

Lindsay Byrne, Hearing Officer⁸

⁸ The Hearing Officer gratefully acknowledges the invaluable assistance of BSEA legal intern Tami Fay in the preparation of this Decision.