

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

**PENNSYLVANIA**

**SPECIAL EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING

Name of Child: W.G.

ODR #18613 / 16-17 KE

Date of Birth:  
[redacted]

Date of Hearing:  
January 19, 2017

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Representative:  
Pro Se

Radnor Township School District  
105 South Wayne Avenue  
Wayne, PA 19087

Tracey Waldmann, Esquire  
Raffaele & Puppio  
19 West Third Street  
Media, PA 19063

Date of Decision:

February 7, 2017

Hearing Officer:

Linda M. Valentini, Psy.D. CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is an elementary-school aged child attending a District school. An initial evaluation conducted early in first grade at Parents' request found mild needs in certain areas and Student was found to be eligible for special education. Upon reevaluation Student was found to be no longer eligible. The Parents disagree with the District's recommendation that Student be exited from special education and are seeking an independent educational evaluation (IEE) at public expense to obtain a second opinion. The District filed for this hearing to defend the appropriateness of its evaluation.

After listening carefully to the witnesses and thoroughly reviewing the exhibits I find in favor of the District for the reasons put forth below.

## Issue

Was the District's November 22, 2016 evaluation appropriate under the IDEA, and if not is Student entitled to an IEE at public expense?

## Findings of Fact

### Initial Evaluation and Progress

1. The Parents expressed some concerns about Student early in first grade, so the District completed an initial evaluation report (ER) that found mild deficits in several areas. [NT 25]
2. Because there were a number of mild weaknesses and the Student was young, the District offered Student an IEP to address the weaknesses early. [NT 25-26]
3. At a December 2015 IEP meeting the team discussed that Student was doing well. Student had caught up in reading, and was demonstrating grade level reading, math, and written expression skills. Student's behavior was appropriate for age and grade level. Student didn't need to utilize any of the specially designed instruction or accommodations. Student had met the IEP goals, and was being dismissed from PT and OT. [NT 26-28]
4. As the District was not sure what other IEP goals could be designed for Student, the District issued a Permission to Re Evaluate form (PTRE) proposing that a reevaluation be conducted to determine if there were any needs or any areas that the team was missing that could potentially warrant continuing in special education. The District believed that absent new information Student would perform well in the regular education environment. [NT 27, 67-68, 77; S-2]

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<sup>1</sup> This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

5. The Parent wasn't comfortable with the District conducting a reevaluation at that time because she wanted to give Student some more time to make sure Student had maintained the noted progress. The Parent believed that it was too soon to make the judgment whether to continue in special education or to exit Student, so did not approve the District's proposal to re-evaluate Student. [NT 27, 68-70, 77; S-1, S-2]
6. The District agreed to postpone the evaluation until the fall of 2016. [NT 27, 70, 77]
7. From mid-December 2015 to the time of the reevaluation in November 2016 Student's IEP had one goal, directed towards monitoring Student's remaining on grade level. Student received no direct instruction since the IEP's one goal was a monitoring goal. Student received all instruction in regular education. [NT 71-73]

#### Reevaluation

8. The District completed the reevaluation on November 22, 2016 eleven months after the Parent had asked for a postponement. [S-4]
9. The reevaluation was performed by a doctoral level Pennsylvania certified school psychologist. The testifying psychologist who had conducted the initial evaluation in first grade and who had participated in the December 2015 IEP meeting reviewed the reevaluation report and spoke with the psychologist who did the November 2016 reevaluation. It was this person who testified at the hearing.<sup>2</sup> [NT 26-28, 63-67; S-7]
10. The psychologist included relevant background information and noted the Parent's concerns which were similar to those she had expressed in December 2015: reading comprehension and higher level reading skills as well as a recent math test grade<sup>3</sup>. The reevaluation report accurately reflected the Parent's concerns. [NT 31, 42, 79]
11. The evaluating psychologist obtained input from Student's teacher for purposes of the reevaluation and the teacher reported that everything was as expected for age and grade. The testifying psychologist obtained updated information a few weeks prior to the hearing from the teacher, who reported no significant concerns. The teacher did note that Student was easily distracted during instructional times, but redirecting Student was nothing different than the differential instruction she provides to all her third grade students. [NT 34-36; S-4]

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<sup>2</sup> For reasons not entirely clear the District chose not to call the psychologist who conducted the reevaluation. Although this was not ideal, I find that the testifying psychologist had sufficient background with the Student and sufficient knowledge of the reevaluation process and outcome to be able to offer a reliable opinion. When "the psychologist" is referenced it is the evaluating psychologist; the testifying psychologist is referenced as "the testifying psychologist".

<sup>3</sup> The evaluating psychologist pointed out that the District has switched to a new math curriculum that year and that many students had difficulty with the format of that particular test. [NT31; S-4]

12. The psychologist observed Student in class using the Saudargas-Creed, an ‘on task/off task’ method similar to that employed in the initial evaluation. The method can employ a control peer for comparison purposes. On this measure Student was on-task 95% of the time while the control peer was on task 85% of the time. The psychologist’s observations matched the teacher’s description of Student. [NT 37-38, 58; S-4]
13. Prior to beginning formal testing the psychologist established rapport with Student. [NT 38]
14. The psychologist did not rely on a single measure, but instead used a variety of standardized tests that assessed Student’s areas of previous weakness as well as general academics and behavior. The assessment tools used were free of cultural bias, reliable, valid, technically sound, research-based and well respected assessment instruments. The psychologist administered the tests in accord with the instructions of the test publishers. [NT 38-39, 60-61; S-4]
15. Standardized academic testing yielded average scores in reading, math and written expression. [NT 39; S-4]
16. To assess social/emotional/behavioral needs the psychologist used the Behavior Assessment System for Children – Third Edition (BASC-3), a research-based and recognized rating inventory that the Parent and the teacher completed. The teacher’s ratings resulted in no clinically significant results, whereas the Parent’s ratings yielded concerns in the areas of aggression and adaptability. [NT 32-33]
17. To assess executive functioning the psychologist used the Behavior Rating Inventory of Executive Functioning (BRIEF), an instrument that is likewise well-researched and recognized in the professional community. Again, the teacher’s ratings resulted in no significant areas of concern, while the Parent’s ratings showed significant elevations in inhibition, self-monitoring, shifting and emotional control. [NT 32-33; S-4]
18. The testifying psychologist explained that it is not uncommon to see differences between home and school, and some reasons for these variances could be such factors as different expectations, different types of structure, different schedules, and/or different relationships with different people. The structure and the demands at school are usually very different from those at home. [NT 33-34]
19. The psychologist assessed Student in all areas of suspected disability. The reevaluation was sufficiently comprehensive to identify all of the child’s special education and related service needs and provide relevant information that directly assisted the IEP team in determining the child’s educational needs. [NT 42; S-4]

20. The conclusion the District reached based on the totality of the reevaluation data in addition to Student's functioning over the past year was that Student was no longer eligible for special education. [NT 43; S-4]
21. The Parents requested an Independent Educational Evaluation (IEE) at public expense in order to obtain a second opinion. [NT 73]

### Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the District asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). All witnesses were judged to be credible.

Independent Educational Evaluations: Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public

expense or filing a due process complaint to request a due process hearing to defend the public evaluation.” 34 C.F.R. § 300.502(b)(4).

Standards for Evaluations: The purpose of an initial evaluation is to determine whether the child meets any of the criteria for identification as a “child with a disability” as that term is defined in 34 C.F.R. §300.8, as well as, if the child is found to be eligible, to provide a basis for the contents of the child’s IEP, including a determination of the extent to which the child can make appropriate progress “in the general education curriculum.” C.F.R. §§300.8, 300.304(b)(1)(i), (ii).

Generally the IDEA’s requirements for reevaluations are similar, although a reevaluation may not necessarily be as extensive as an initial evaluation.

The general standards for an appropriate evaluation/reevaluation are found at 34 C.F.R. §§300.304—300.306. The public agency is required to 1) “use a variety of assessment tools”; 2) “gather relevant functional, developmental and academic information about the child, including information from the parent”; 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child’s educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2).

There is a two-pronged test for eligibility for special education under the IDEA. To be eligible for special education services and entitled to an IEP, the IDEA requires that a child be determined to have at least one of the disabilities identified and defined by the Act, and by reason thereof need special education and related services. 34 C.F.R. §300.8(a). If a child has a disability but does not need specially designed instruction and services to access the general education curriculum the child is not eligible under the IDEA.

## Discussion

Before discussing the reasons for my findings it is important to understand that parental disagreement with an evaluation's conclusions is not evidence that an evaluation is inappropriate; parental disagreement with supported conclusions is irrelevant to the inquiry. If this were not the case, parents could defeat any school district's defense of its own evaluation by simply disagreeing with the outcome. Further, the inquiry is not even whether or not a hearing officer agrees with a school district's evaluation results. Provided that a district conducted its evaluation under IDEA standards and supported its conclusions with data derived from properly administered assessments the evaluation must be deemed appropriate. The inquiry when the hearing issue is an LEA's denial of a parental request for an independent educational evaluation at public expense is whether the LEA's evaluation met the standards for appropriateness set forth in the IDEA.

Other than disagreeing with the conclusions of the reevaluation, the Parent focused on three specific areas of concern. She believed that the psychologist did not conduct a long-enough classroom observation of Student, inferring that the time conducting the structured time on task assessment was the totality of the time period Student was assessed. The Parent's belief is not supported in the record, but even if it were supported, limited time spent on the classroom observation would not be a fatal flaw in an otherwise comprehensive assessment that included all the elements required under the IDEA including the teacher's day to day knowledge of Student in the educational setting as well as eleven months' worth of additional data that followed the District's December 2015 position that Student had met all IEP goals and likely did not qualify for continued eligibility. [NT 44-50] The Parent also questioned why the teacher had not done a second administration of a curriculum-based reading test. The testifying psychologist explained that the test was one all the children in the grade received and that since Student was found to be at grade level on the first administration, all a second administration would have shown was show whether perhaps Student was above grade level. Student read words at grade level with 98% accuracy and answered 8 out of 10 comprehension questions correctly. [NT 50-52, 58] Finally the Parent questioned the implication of the discrepancy between behaviors observed in the home and those observed in school. The testifying psychologist explained that given that Student does not display significant behavior concerns in school, in the absence of academic concerns, special education services are not warranted. She also explained that the District can offer support services in regular education if needed or facilitate a referral for the Parents to access outside therapeutic services if the home behaviors warrant this. [NT 52-56]

If parents believe that a District's evaluation or reevaluation is not appropriate they are entitled to request an independent evaluation at public expense. A District may grant the request, or after reviewing its evaluation/reevaluation decide to ask for a hearing to defend its work. If a hearing officer agrees with the parents and deems a District product inappropriate then the Student will receive an independent evaluation. If however the hearing officer finds the District's evaluation/reevaluation procedures appropriate then the parents may pursue an independent evaluation but not at public expense. IEE's are not designed to provide second opinions, they are designed to correct inadequacies in a District's evaluation/reevaluation that may result in a denial of FAPE to a child.

Based on the hearing record and a review of the District's reevaluation report I conclude that the District conducted its evaluation under IDEA standards and supported its conclusions with data derived from properly administered assessments. I therefore must deny the Parent's request for an IEE at public expense.

Order

It is hereby ordered that:

The District's November 2016 reevaluation of Student was appropriate.

Student is not entitled to an IEE at public expense.

Any claims not specifically addressed by this decision and order are denied and dismissed.

February 7, 2017

*Linda M. Valentini, Psy.D., CHO*

Linda M. Valentini, Psy.D. CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official