

*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

Child's Name: P.S.

Date of Birth: [redacted]

ODR No. 00851-0910 KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro Se (Absent from Hearing)

Northampton Area School District  
2014 Laubach Avenue  
Northampton, PA 18067-0118

Glenna M. Hazeltine, Esquire  
King, Spry, Herman, Freund & Faul,  
LLC  
One West Broad Street, Suite 700  
Bethlehem, PA 18018

Date of Resolution Meeting

None

Date of Hearing:

September 7, 2010

Record Closed:

September 7, 2010

Date of Decision:

September 17, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION AND PROCEDURAL HISTORY

Student is a teen-aged student of the Northampton Area School District (District), who is in ninth grade at a District School. (NT 13-4 to 8.) The Student is not identified as a child with a disability under either the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), or the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504). Ibid. In May 2010, Parents withdrew their signed Permission to Evaluate, which had been requested by the District. Thereupon, the District requested due process, seeking an order to evaluate. (NT 13-14 to 14-1.) The District attempted to convene a resolution meeting, but the Parents did not respond to repeated communications. (NT 14-2 to 6.)

The hearing was conducted and concluded in one session on September 7, 2010. The Parents did not attend the due process hearing, despite repeated communications. (NT 6-12 to 8-17.) The record closed on the day of the hearing.

## ISSUES

1. Did the District give adequate written prior notice to Parents of its intention to evaluate the Student, including procedural safeguards, and did it request that the Parents provide informed consent to an initial evaluation?
2. Did the Parents refuse to provide consent to evaluate?
3. Should the hearing officer order that the District is permitted to evaluate the Student in accordance with its requested Permission to Evaluate dated February 5, 2010?

## FINDINGS OF FACT

1. In February 2009, the District sent a state approved form to the Parents constituting a request for Permission to Evaluate, along with procedural safeguards notice also on the state approved form. (S-16.)
2. The request for permission to evaluate and enclosed procedural safeguards contained all pertinent information necessary to enable the Parents to provide informed consent to an initial evaluation, including information concerning the reason for the request for permission and the assessments and tests that the District proposed to administer to the Student. (NT 22-19 to 23-6, 25-14 to 26-12; S-14, S-15, S-16.)
3. The Parents received the request for permission to evaluate and procedural safeguards and they signed and returned the Permission to Evaluate document, initially giving their informed consent to an initial evaluation. (NT 26-18 to 25; S-12, 16, 26.)
4. The District requested to evaluate because of its concern about the Student's behavior, which had been problematic and which raised a concern that the Student might be suffering from a disability requiring special education services as defined by law. (NT 37-15 to 39-21, 42-4 to 43-8, 48-4 to 21, 49-5 to 50-3, 52-15 to 53-25, 62-20 to 63-5, 63-9 to 64-12; S-12, 13, 17 through 22, 25, 27, 30, 34, 39 through 44, 46 through 50.)
5. Initial testing conducted before permission was withdrawn indicated concerns about the Student's cognitive functioning and achievement. Further testing was indicated, appropriate and necessary, but further testing was prevented when the Parents withdrew their consent. (NT 57-11 to 62-19, 62-20 to 63-5.)
6. In May 2009, the Parents withdrew their consent to the evaluation, after some of the assessments had begun. (NT 56-13 to 57-12, 59-15 to 19; S-23, 24.)
7. In August 2009, and again in December 2009, January 2010, and February 2010, the District sent Notice of Recommended Placement forms to the Parents, again requesting and providing an opportunity for informed consent to the proposed evaluation. (NT 36-14 to 37-8, 50-8 to 52-10, 66-11 to 73-18; S-28, 31 through 34, 47.)
8. The District requested due process in March 2010. In May 2010, the District attempted to convene a resolution meeting, but the Parents did not respond. (NT 44-6 to 45-23; S-36, 37.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>1</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence<sup>2</sup> to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon the District, which initiated the due process proceeding. If the evidence is in “equipoise”, the District will not prevail.

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<sup>1</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>2</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

## GOVERNING LAW

The IDEA, 20 U.S.C. § 1414(a), requires local educational agencies to obtain informed consent from the parents prior to evaluating a child to determine whether or not the child is a child with a disability. 20 U.S.C. § 1414(a)(1)(D)(i)(I), 34 C.F.R. §300.300(a)(1). The notice required includes prior written notice of the intention to evaluate. Ibid., 34 C.F.R. §300.300(a)(1), 300.503, 300.504. If parents refuse to consent to evaluation, the agency is allowed to request due process and seek an order of the hearing officer permitting it to conduct the evaluation. 20 U.S.C. §1414(a)(1)(D)(ii)(I), 34 C.F.R. §300.300(a)(3).

## APPROPRIATENESS OF THE DISTRICT'S REQUEST TO EVALUATE

I find that the District appropriately requested permission to evaluate the Student. (FF 1 to 3, 7.) The District provided a clear and thorough description of the evaluation it sought, and did so on numerous occasions. (FF 2, 7.) I find it significant that District and school personnel had communicated with the Parents about the Student's behavior and academic struggles on numerous occasions. (FF 2, 7.) This included discussions of the need to evaluate. Ibid. Thus, the documents actually sent were in a context of even greater explanation to the Parents. Therefore, a preponderance of the evidence of record shows that the Parents were provided with an opportunity to provide informed consent to an initial evaluation. (FF 2, 7.) The record also shows that their decision to revoke consent was based upon a conscious choice, as they had expressed disagreement with the District concerning the need for evaluation previously. (FF 6, 7.)

The preponderance of the evidence of record also establishes that the District's request to evaluate is appropriate. (FF 4, 5.) Its concern that the Student's behavior was linked to a learning

disability is supported by the record. Ibid. Its witnesses all testified in a forthright manner, without any hint of manipulation or selling, and without any notable factual contradictions. These credible and reliable witnesses all stated that there is a need for evaluation, and that further evaluation is necessary in order to provide a reliable and valid conclusion to the Parents concerning whether or not the Student is a child with a disability who needs special educational services. (FF 6, 7.)

I note one concern about the District's procedures in pursuing this due process request. There is not evidence of record that the District attempted to convene a resolution meeting within fifteen days of the request for due process, as the law requires. (FF 8.) As this factual matter was not central to my findings or necessary to resolve the issue presented to me, the record is not complete as to the timing of the District's attempts to convene a resolution session. Consequently, I make no finding on this point, and simply note my observations.

### CONCLUSION

For the reasons set forth above, I find that the District has complied with the legal requirements for providing the Parents with an opportunity for informed consent, and appropriately seeks permission to evaluate. I further find it appropriate to enter an order permitting the District to complete its evaluation. Any claims not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District gave adequate written prior notice to Parents of its intention to evaluate the Student, including procedural safeguards, and it did request that the Parents provide informed consent to an initial evaluation.
2. The Parents refused to provide consent to evaluate.
3. The hearing officer hereby orders that the District is permitted to evaluate the Student in accordance with its requested Permission to Evaluate dated February 5, 2010.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

September 17, 2010