

*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: Z.B.

Date of Birth: [redacted]

ODR No. 00858-0910 AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Mastery Charter School  
35 South 4<sup>th</sup> Street  
Philadelphia, PA 19106

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King, Spry, Herman, Freund & Faul,  
LLC  
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Bethlehem, PA 18018

Date of Resolution Session

April 26, 2010

Date of Hearing:

May 12, 2010

Record Closed:

May 18, 2010

Date of Decision:

May 31, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is an early teen-aged eligible student, who is enrolled in the eighth grade at the Charter School (School). (NT 18-9 to 12.) The Student is identified with Serious Emotional Disturbance. (NT 18-25 to 19-3.) The Parent has requested an Independent Educational Evaluation. (NT 19-6 to 18.)

On or about March 11, 2010, the School filed for due process to defend the appropriateness of its evaluation report. The hearing in this matter commenced on May 12, 2010, and was completed on the same day. The record closed upon receipt of the transcript on May 18, 2010.

## **ISSUES**

1. Was the District's June 4, 2009 Evaluation Report appropriate under the standards set forth in the IDEA?
2. Should the hearing officer order the District to pay for an Independent Educational Evaluation?

## **FINDINGS OF FACT**

1. In the 2008-2009 school year, the Student was exhibiting behaviors that interfered with Student's education and violated the School's code of conduct on numerous occasions. (S-1, S-2, S-4 p. 7.)
2. The School provided regular education interventions including preferential seating, nonverbal cues, positive feedback, redirection and a daily behavior tracking program, but these interventions proved inadequate to help the Student to control inappropriate and disruptive behaviors. (S-4 p. 3.)

3. Numerous curriculum-based and other assessments disclosed inconsistent academic achievement, in some cases below the Student's grade level and Student's ability. (S-4 p. 3.)
4. In March 2009, four of the Student's teachers completed the BASC 2 Teacher Input Form. (S-4 p. 1.)
5. On March 20, 2009, the School's Assistant Principal of Special Education met with the Parent to discuss the Student's behavioral problems. (NT 22-9 to 23-20.)
6. The Parent requested help from the School in early April 2009, indicating that she was considering having the Student evaluated. (S-1.)
7. The Parent signed a Permission to Evaluate form on May 19, 2009. The reason for referral was behavior that impedes learning and that of others, and numerous violations of the School's code of conduct. (S-2.)
8. The District's representatives observed the Student in the classroom on May 27, 2009, using the BASC 2 Student Observation System, a structured time-sampling protocol. (S-4 p. 2.)
9. The Student was tested on May 27 and May 28, 2009. (NT 43-7 to 11; S-4 p. 2.)
10. The evaluation was performed by the District's highly experienced, certified school psychologist. (NT 35-11 to 36-21.)
11. The evaluation was conducted in the Student's native language, and was based on multiple assessments and multiple kinds of assessments. No single fact or factor was the sole determinant of the report's conclusions. (NT 37-10 to 53-21, 55-8 to 56-7, 63-6 to 64-16; S-4.)
12. The psychologist utilized a variety of testing instruments, all of which were valid and reliable for the purposes for which they

were used, and she utilized them pursuant to the publishers' instructions. (NT 41-10 to 43-6; S-4.)

13. The psychologist explored all reasonably suspected and suggested areas of weakness, including Specific Learning Disability and Attention Deficit Disorder. (NT 44-24 to 47-3, 64-18 to 68-10; S-4.)
14. The evaluation was based upon cognitive and achievement testing, interview of the Student, classroom observation including data gathering through structured time-sampling, parent reports, teacher reports and school records. Multiple sources were employed and a broad range of functioning was examined. (NT 37-10 to 53-21; S-4.)
15. The evaluation reviewed records and reports covering about one year's worth of observations and other data concerning the Student's functioning. (NT 68-21 to 70-7.)
16. Both the Parent and the Student's teachers reported that the Student was experiencing significant problems with anger management, hostility and resentment. (NT 50-22 to 53-21, 64-1 to 16; S-4 pp. 8, 9.)
17. The Evaluation reasonably concluded that the Student was experiencing significant emotional distress characterized by chronic agitation, depression, and ongoing tension in interpersonal relationships. Student's outlook on life was extremely negative. Student was found to be at risk for poor judgment, impulsivity, and future oppositional or aggressive behaviors toward others. (NT 25-12 to 18, 28- 21 to 29-1, 62-11 to 16; S-4 p. 13.)
18. The Student was found to meet the criteria for a psychological diagnosis of Oppositional Defiant Disorder. (S-4 p. 13.)
19. The evaluation considered and reasonably ruled out Specific Learning Disability and Attention Deficit Disorder. (NT 53-22 to 54-12, 64-18 to 68-10; S-4 p. 11.)

20. The Evaluation identified the Student with Serious Emotional Disturbance. It recommended full time emotional support services, and specially designed instruction as well as related services, all to address the Student's emotional and behavioral needs. (NT 58-18 to 60-14, 61-23 to 62-9; S-4 p. 14.)
21. The Parent signed in agreement with the Evaluation Report on or about June 4, 2009. (S-4 p. 15.)
22. By her signature on the NOREP dated June 15, 2009, the Parent approved the Student's placement in full time emotional support classes located at the School's [redacted] program located at its [redacted] Campus. (NT 27-19 to 24; S-5 p. 25.)

## **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

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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).

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 Student’s Parents, who initiated the due process proceeding. If the evidence is in “equipoise”, the Parent will not prevail.

### LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The hearing officer must determine whether or not the District’s evaluation was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311. If the District’s evaluation was inappropriate, the Parent is entitled to an independent educational evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

The IDEA obligates a local educational agency to conduct a “full and individual initial evaluation ... .” 20 U.S.C §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to “determine the educational needs of such child ... .” 20 U.S.C. §1414(a)(1)(C)(i). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii).

The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory

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<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.

requirement adds that this includes “social and emotional status ... .” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need ... .” 34 C.F.R. §300.304(c)(2).

The IDEA requires the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information ... .” 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors ... .” 20 U.S.C. §1414(b)(2)(C). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii).

Further, the regulations require that the evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs ... .” 34 C.F.R. §300.304(c)(6). At least one federal court has interpreted the IDEA to require that the evaluation be “sufficient to develop an appropriate IEP ... .” *Brett S. v. West Chester Area School District*, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., *Eric H. v. Judson Independent School District*, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002). The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2). The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance

with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The agency must utilize information provided by the parent that may assist in the evaluation. *Ibid.* This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.533(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ... .” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

#### APPROPRIATENESS OF THE JUNE 2009 EVALUATION

Here, the District fully complied with the procedures required under the IDEA. The District utilized a variety of tools and strategies to gather relevant information, 20 U.S.C. §1412(b)(2)(A). (FF 11,12.) These strategies derived information relevant to “functional, developmental, and academic” functioning. *Ibid.* The District utilized information provided by the parent. (FF 14.) The determination of ineligibility was not based upon any single measure or assessment. 20 U.S.C. §1412(b)(2)(B). (FF 11.) The Student was assessed in all areas of suspected disability. 20 U.S.C. §1412(b)(3)(B). (FF 13.) The parents were consulted adequately and offered an opportunity to provide input to the ER itself, 20 U.S.C. §1412(b)(4)(A). (FF 14, 16, 21.) The report included review of existing evaluation data provided by the parents and teachers, as well as classroom observations. 20 U.S.C. §1412(c)(2)(A). (FF 14, 15, 16.) The instruments used were technically sound, 20 U.S.C. §1412(b)(2)(C), properly administered, 20 U.S.C. §1412(b)(3)(A), non-discriminatory, and utilized according to the publishers’ instructions. (FF 12.) There was no issue as to qualifications of the District’s school psychologist to administer the psychological testing instruments utilized in the evaluation, 20 U.S.C. §1412(b)(3)(A). (FF 10.)

In making findings in this matter, I considered the credibility of all of the witnesses, and I found all of them to be credible. The Parent conducted herself with a business-like demeanor and with apparent sincerity. She did



not joust with District witnesses and showed not a hint of adversarial demeanor or intent. I credit her with a genuine concern for the wellbeing of her child and I have every reason to believe that she will be able to work with the School to plan the Student's educational program for the next school year.

The District's witnesses were similarly business-like and devoid of any attempt to influence me or promote their point of view. Their responses were measured and devoid of any hostility toward the Student or family.

I gave greater weight to the District's witnesses, due to the expertise and judgment that they demonstrated, both in testimony and in the overall way in which this matter was handled by the School. I also find that their depiction of events is corroborated by the documentary record in almost every respect.

The Parent argued at the hearing that the evaluation was inadequate because she was given a choice between expulsion of the Student and acceptance of the recommended full time emotional support placement recommendation. (NT 20-6 to 14, 31-14 to 34-17.) The documents in this matter might be interpreted to corroborate this assertion; however, I do not find that these documents are sufficient to corroborate this assertion. (S-4, S-5.) I do not find that the evaluation was inadequate because of this. This assertion is more relevant to the placement decision and the IEP program that the School offered, and that was not one of the issues in the matter. I find that, regardless of this assertion, the record demonstrates by a preponderance of the evidence that the School's evaluation was manifestly compliant with the requirements of the IDEA with regard to evaluations.

The Parent also argued that the evaluation was rushed and by inference was either pre-determined to find for a full time emotional support program or inadequate because not carefully considered. (NT 68-21 to 70-7.) I find on the contrary that the District's evaluation was conducted in a measured and careful way, and was not rushed at all. (FF 1, 2, 3, 4, 5, 6, 7, 8, 9.) Therefore no inference can be made that it was not offered or conducted in good faith. Moreover, its conclusions were reasonable and well supported by the evidence. (FF 13, 14, 15, 16, 17, 19.)

## **CONCLUSION**

For the reasons set forth above, I find that the District's June 2009 evaluation was appropriate.

## **ORDER**

1. The evaluation provided by the District in June, 2009 is appropriate.
2. The Parents are not entitled to an Independent Educational Evaluation at the expense of the School.

*William F. Culleton, Jr. Esq.*

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

May 31, 2010