

*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: Student  
ODR #00987/09-10 KE

Date of Birth:  
Xx/xx/xx

Date of Hearing:  
May 17, 2010

CLOSED HEARING

Parties to the Hearing:

Bethlehem Area School District  
1516 Sycamore Street  
Bethlehem, Pennsylvania 18017

Representative:

Pro Se

Lucas Repka, Esquire  
King, Spry, Herman, Freund  
& Faul  
One West Broad Street Suite 700  
Bethlehem, Pennsylvania 18018

Date Transcript Received:

May 21, 2010

Date of Decision:

May 22, 2010

Hearing Officer:

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

## Background

The Student<sup>1</sup> is an elementary school aged child who resides in the Bethlehem Area School District (hereinafter District). Pursuant to an evaluation conducted by the District, Student's Parents (hereinafter Parents) asked for an independent educational evaluation (IEE) at public expense, specifically an independent neuropsychological evaluation and an independent speech/language evaluation because they believe the District's evaluation was inappropriate. The District denied the Parents' request, and filed for a due process hearing to defend its evaluation.

## Issues

Was the School District's evaluation of Student appropriate?

## Findings of Fact

1. Prior to moving to Pennsylvania in June 2008, a non-public service plan had been developed pursuant to Student's being identified as having learning disabilities and speech/language impairment. Before services could be implemented Student moved. [NT 27]
2. The Parents requested a re-evaluation of Student. Pursuant to a Permission to Evaluate issued on January 3, 2009 and signed by the Parents on February 2, 2010 the District conducted a multidisciplinary re-evaluation. [NT 23; S-6]
3. The Parents were requesting updated cognitive and academic testing, an updated speech/language evaluation, and an auditory processing evaluation. [NT 23-24; S-6]
4. The Re-Evaluation Report was issued on March 25, 2010. [S-12]
5. The Re-Evaluation included a thorough record review including previous aptitude and achievement testing, parental input, information regarding classroom-based assessments and/or state assessments provided by both the regular education

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<sup>1</sup> The name, age, gender and current school of the Student is not used in the body of this decision in order to preserve the Student's privacy.

- teacher and the special education teacher, observations conducted by the speech/language therapist and the school psychologist. [S-12]
6. The Re-Evaluation included a speech/language evaluation, an educational audiology consultation, a reading evaluation, a psychoeducational evaluation (cognitive and achievement) and a behavioral evaluation. [S-12]
  7. The Parents provided information via a Parent Information Form. [NT 28-29; S-6]
  8. Classroom based assessment review included PSSA standards testing, classroom testing, and report card data. [NT 29-32; S-12]
  9. Input was collected from the guidance counselor who saw Student in a weekly fourth grade study skills work habit lunch bunch. [NT 32-33; S-12]
  10. Student was observed by the speech/language therapist, the school psychologist and a classroom teacher. [NT 33-34; S-12]
  11. The psychologist's observation was done via a formal instrument, the Behavioral Observation of Students in School [BOSS]. [NT 35-38, 59-67; S-12]
  12. The speech/language pathologist used several assessment instruments in her evaluation of Student. [NT 38-39; S-12]
  13. An educational audiological evaluation was performed by a school audiologist who administered a hearing screening and a diagnostic test of auditory processing. [NT 40-42, 71-77; S-12]
  14. A reading assessment using several structured instruments was administered. [NT 42-45; S-12]
  15. A standardized cognitive test was used and the particular test selected accommodated Student's coming from a bi-lingual household. [NT 46-47; S-12]
  16. A standardized test of achievement was utilized that can be compared to the standardized cognitive test for purposes of performing a discrepancy analysis. [NT 47-51; S-12]
  17. Teacher and Parent input was collected through the Behavior Assessment Scales for Children Second Edition [BASC-II]. [NT 30-31, 52-55; S-12]
  18. The multidisciplinary team members, including the Parents, considered the evaluation results in all areas and found that Student has a specific language disability in the area of written expression and also has needs in the area of speech/language. [NT 57-59; S-12]

19. The Re-Evaluation concluded that Student remains eligible for special education under the disability classifications of Specific Learning Disability and Speech/Language Impairment. [S-12]

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). The District requested this hearing to defend its evaluation and was therefore assigned both the burden of persuasion and the burden of production (presenting its evidence first) in the hearing. Application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case as the District clearly more than met its burden of proof.

Legal Basis -- Evaluations

IDEA 2004 provides, at Section 614(b)(2) that

In conducting the evaluation the local educational agency shall

*Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--*

*Whether the child is a child with a disability; and*

*The content of the child's individualized education program...*

*Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and*

*Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.*

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

*Assessments and other evaluation materials used to assess a child under this section--*

*Are selected and administered so as not to be discriminatory on a racial or cultural basis;-*

*Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;*

*Are used for purposes for which the assessments or measures are valid and reliable;*

*Are administered by trained and knowledgeable personnel; and*

*Are administered in accordance with any instructions provided by the producer of such assessments;*

*The child is assessed in all areas of suspected disability;*

*Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.*

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEA 2004 provides, at Section 614(b)(4) that

*Upon completion of the administration of assessments and other evaluation measures,*

*The determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).*

In the instant matter, the district has the burden of proving that its evaluation was appropriate. IDEA 2004 at Section 615(b)(6) provides for the opportunity for any party to present a complaint - with respect to any matter relating to the identification, evaluation, or educational placement of the child, and for that complaint to be resolved at a due process hearing. An appropriate remedy for a district's failure to provide an appropriate evaluation for a student is the awarding of an independent educational evaluation at the district's expense. This right is explained in the implementing regulations of IDEA 2004:

*A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency... If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process complaint notice to request a hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).*

Credibility of Witnesses: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.<sup>2</sup> Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. 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). This is a particularly important function, as in many cases the hearing officer level is the forum in which the witnesses will be appearing in person.

The District presented two members of the evaluation team, all well-qualified in their respective disciplines, who testified credibly about the appropriateness of their evaluation procedures and their qualification to interpret their findings. The District's evaluators testified clearly, confidently, and cogently and each was able to present a rationale for the assessment procedures and/or instruments she utilized.

The mother presented testimony regarding her belief that Student needs a neuropsychological evaluation. There is no doubt that the mother is loving and caring and highly supportive of her child, but her testimony did not establish that the District's evaluation was inappropriate. The Student testified at the hearing at the request of the Parents. This testimony added nothing to the weight of either party's case.

### Discussion

The re-evaluation completed by the District fulfills in its entirety the demands of the IDEA. The District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, [FF 8 through 17] including information provided by the parents [FF 7 and 17]. The District did not use any single measure or assessment as the sole criterion for determining whether the Student is a child with a disability. [FF 8 through 17] The District used technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. [FF 11 through 17] The assessment instruments utilized by the District's evaluators were selected and administered so as not to be discriminatory on a racial or cultural basis. The tests were administered in the language and form most likely to yield accurate information on what the Student knew and could do academically, developmentally and functionally. [FF 15] The instruments were used for purposes for which they are valid and reliable. The instruments were administered by trained and knowledgeable personnel and were administered in

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<sup>2</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

accordance with any instructions provided by their publishers. [NT 21-22, 70-71]  
The Student was assessed in all areas of suspected disability. [FF 5 and 6]

The IDEA is very specific regarding what an evaluation must contain and how it is to be conducted. The District fulfilled its obligation under the statute to provide an “appropriate” evaluation. Whether or not the Parents agree or disagree with the final results, the evaluation was appropriate in its entirety.

### Conclusion

The District conducted an evaluation that was appropriate according to the law. The evaluation fulfilled each criterion set forth in the IDEA 2004 and its implementing regulations. As the District’s evaluation is appropriate, the Parents are not entitled to an Independent Educational Evaluation for their child at public expense.

## Order

It is hereby ordered that:

1. The School District's evaluation of Student was appropriate.
2. The School District is not required to take any further action.

May 22, 2010

Date

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

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