

*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: L.F.

Date of Birth: [redacted]

Dates of Hearing: August 16, 2010

CLOSED HEARING

ODR No. 1277-09-10 KE

### **Parties to the Hearing:**

#### **Parents**

#### **School District**

Mark Klein, Superintendent  
Council Rock School District  
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Date Record Closed:  
Date of Decision:  
Hearing Officer:

### **Representative:**

#### **Parents' Attorney**

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#### **School District Attorney**

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August 17, 2010  
August 28, 2010  
Rosemary E. Mullaly, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (“the Student”) is a [teenaged] student residing in the Council Rock School District. [Student] is not identified as “a child with a disability” according to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. Section 1400 et seq.

The hearing in this matter was initiated by the District, as required by the IDEA implementing regulations at 34 C.F.R. Section 300.502(b), because it had denied the Parents’ request for an independent educational evaluation at public expense. This matter was originally scheduled for hearing on July 28, 2010, but was postponed until August 16, 2010 so that the parties could participate in mediation in attempt to resolve this matter without need of an administrative hearing. The parties waived the resolution meeting in favor of the mediation session.

Neither party asserted an objection as to the timeliness of the disclosure of evidence and records. The Parents, who were accompanied by counsel and notified of the options for an open or a closed hearing, opted for the hearing to be closed.

The process for admission of exhibits was explained to the parties – that if a document were identified on the record it was admitted into the record – unless objected to by opposing counsel. In each circumstance in which a document was objected to due to hearsay evidence contained therein, the document was excluded from the record in this matter.

The only issue presented to the hearing officer is whether the Student’s Parents are entitled to an independent educational evaluation (“IEE”) at public expense. Both parties were represented by counsel and were aware of the limited scope of this hearing and neither side waived any rights by failing to raise any additional issues during the compilation of the record in this matter. The record in this matter closed on August 17, 2010.

### **ISSUE**

Whether the Student’s Parents are entitled to an independent educational evaluation at public expense?

### FINDINGS OF FACT

1. The District initiated an evaluation because [Student] was presented at a team meeting primarily based upon parent-raised concerns. The reason indicated for the referral was “due to low average grades combined with low social functioning.” The scope of the evaluation was to “explore [the Student]’s strengths and weaknesses as a learner and determine eligibility for special education services. (S-7, at 1; N.T. 63).
2. Testing of the student took place on three dates: October 27 and 28, 2009 and November 17, 2009. (S-7 at 1; N.T. 32).
3. Input was sought from the Student’s mother who expressed concern about the Student’s home behavior. (N.T. 28-29, 40, 78, 82, 115).
4. In addition to providing information regarding how the student was functioning at home, the Parents submitted a psychiatric evaluation report performed by a psychiatrist at Children’s Hospital of Philadelphia (“CHOP”), dated September 9, 2009. (S-4; S-7, at 2; N.T.27).
5. The CHOP psychiatric evaluation indicated that the Student had been diagnosed with ADHD and possibly Asperger’s but contained no test results or additional information as to when, by whom, or whether treatment was on-going. The District did not receive any additional reports from the Parents at the time of the evaluation. (P-4, at 1 and 3; N.T. 47-48, 88).
6. The CHOP psychiatric evaluation indicates that the student was taking medication to decrease ADHD symptoms and Zyrtec and Sertraline for seasonal allergies. (P-4, at 2).
7. The CHOP psychiatric evaluation indicated that the student had just started therapy with Dr. B. (P-4, at 2).
8. The Student’s teachers for the 2009-2010 school year provided input regarding the Student’s functioning. They reported the following observations about the Student: “[Student] is very polite and quiet [child] who seems to rarely socialize with others. [Student] is a hard worker and completes [Student’s] assignments. No behavioral difficulties were noted by [Student’s] teachers.” (S-7, at 2; N.T.40, 43-45, 83, 90, 104, 112, 140, 122, 195-200).
9. The evaluator indicated that while the student appeared somewhat tense and on-edge, and had difficulty maintaining good eye contact, the results of the assessment were valid estimation of [Student’s] current skills levels. (S-7, at 3; N.T. 34, 36, 38).
10. The report included what was characterized as “Classroom Based Assessment” which was limited to the students grades in 7<sup>th</sup> grade, the first marking period in 8<sup>th</sup> grade, and PSSA scores for 3<sup>rd</sup> -6<sup>th</sup> grades. (S-7 at 4).
11. During the 2009-2010 school year, the student achieved as final grades three B’s, two B-’s, one A-, and five A’s. (S-3).
12. While the Student was in 7<sup>th</sup> grade during the 2008-2009 school year, [Student] scored “Proficient” in Mathematics and Reading on the PSSAs. S-8. While in 6<sup>th</sup> grade during the 2007-2008 school year, the Student scored “Proficient” in Mathematics and Reading; the report indicated that the Student had “demonstrated achievement of required state academic standards” in both areas tested. The Student’s final grades for the 2008-2009 school year were in the low average range. (S-8, at 1,2; N.T. 25).

13. While [Student's] grades improved from the 7<sup>th</sup> grade level, during the 2009-2010 school year the student had difficulty in the English class (P-7; N.T. 70. 195-200).
14. During the Fall of 2009-2010 school year, the Student refused to go to school complaining of a stomach ache (N.T. 196-199).
15. During the 2009-2010 school year, the Student was absent from school for 13 days with either an indication of "Illness" or "Physician's Note." Of these 13 days, [Student] missed four consecutive school days between October 28 and November 2, 2009. (S-4 at 1-2).
16. The evaluation completed by the District consisted of the following assessment instruments: Intellectual/Academic – Woodcock Johnson III Tests of Cognitive Abilities and the Woodcock Johnson III Tests of Achievement and Social/Emotional and Behavioral Functioning Behavior Assessment System for Children, 2<sup>nd</sup> Edition (BASC-2) and the Conners Third Edition that were rated by the Student, [Student's] mother and math and English teachers. (S-7, at 5-11; N.T. 26-53).
17. The District evaluation determined that the Student's overall cognitive functioning is in the average range, although [Student] had a relative weakness in the task of paired association learning. The Student scored in the average range in all areas of academic achievement except for a significant strength in broad written language. Based upon this, the district concluded that the Student's current achievement levels were commensurate with [Student's] ability and did not evidence a specific learning disability. (S-7, at 12-13; N.T. 37-39).
18. The District concluded that while [Student's] current social and emotional function in the school setting was marked by shyness and anxiousness, low social skills, and low communication skills, they did not appear to be significantly impeding [Student's] educational performance. (S-7, at 13; N.T. 40; 51-52).
19. The report noted that while the Student's social and emotional functioning is similar to children who have been diagnosed on the autism spectrum, [Student's] issues did not appear to be significantly impacting [Student's] educational performance at this time and therefore do not fulfill criteria for the Chapter 14 definition of Autism. (S-7, at 13; N.T. 50).
20. Based upon the evaluation, the District concluded that "The student does not have a disability and therefore is NOT ELIGIBLE for special education." (S-7, at 13; N.T. 51).
21. On November 19, 2009, the Dr. H forwarded to the Student's mother a copy of the Evaluation Report and offered to schedule a meeting to discuss the results. (S-6; N.T. 52).
22. By means of a NOREP dated December 4, 2009, the District notified the Parent of the following: "Your child is not in need of special education and should continue in [Student's] present assignment." (S-5).
23. On March 16, 2010, the Parents requested an independent educational evaluation at public expense. (P-8, 5; N.T. 205).
24. By means of correspondence dates May 6, 2010 and a NOREP, the District denied the Parents request for an IEE at public expense. (S-1, S-2).

25. The parent indicated her disagreement with the District's denial of an IEE at public expense and sought mediation via statements made on the May 6, 2010 NOREP form (P-1 at 2-3).
26. The District notified the parent that it was required to initiate a hearing if it could not gain her agreement regarding the IEE. (S-1).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Burden and Standard of Review**

The IDEA requires that a court reviewing a hearing decision must base its decision on the preponderance of the evidence. *See* 34 C.F.R. 300.516(c)(3); *L.E. v. Board of Education*, 435 F.3d 384, 389 (2006). At administrative hearings challenging an IEP, the burden of proof rests with the party seeking relief. *Schaffer ex rel. v. West*, 546 U.S. 49, \_\_\_, 126 S.Ct. 528, 537 (2005). In the instant matter, the Parents are seeking relief in the form of an independent educational evaluation at public expense because they disagree with the appropriateness of the District-completed educational evaluation. Unlike cases wherein the parent is challenging an IEP, however, districts are obligated by regulation to initiate a due process hearing when it denies a parents' request for an independent educational evaluation in order to show that its evaluation was appropriate.

Therefore, prior to analyzing the facts of this case, it is necessary to determine which party bears the burden of proof in the instant matter. The cases cited in the Parents' closing statement, *Bernardsville Board of Education v. JH*, 42 F.3d 149, 157 (3d Cir. 1994) and *Warren G. by and through Tom G. v. Cumberland County Sch. District*, 190 F.3d 80, 87-88 (3d Cir. 1999) both pre-date the *Schaffer* decision, so they are not dispositive on the issue. Moreover, rules of regulatory interpretation require that the section of the IDEA implementing regulations be read consistently with the U.S. Supreme Court's interpretation of the IDEA notwithstanding the fact that this implementing regulation was promulgated prior to the *Schaffer* decision.

The IDEA-implementing regulation provides that "the public agency must, without unnecessary delay ... file a due process complaint to request a hearing to show that its evaluation is appropriate." *See* 34 C.F.R. 300.502(b)(2)(i). Unlike the scenario in the *Schaffer* case, where the initiation of the hearing was tied to the request for relief, when a District denies a parent request for an IEE at public expense, it must initiate the hearing even though it is not seeking relief from the Parents. In that there is nothing in statute, regulation or post-*Schaffer* caselaw specifically addressing the issue of the burden of proof or otherwise compelling the conclusion that the burden of proof should rest with the District in cases involving IEE at public expense, it is necessary, then, to look to the legislative history of the IDEA itself for guidance.

The enactment of the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400 et seq. (IDEA) was an exercise of Congress' authority under the Spending Clause, U.S. Const., Art. I, § 8, cl. 1. The US Supreme Court in *Arlington Central School District v. Murphy*, 548 U.S. 291 (2006) stated regarding this point

Congress has broad power to set the terms on which it disburses federal money to the States, see, e.g., *South Dakota v. Dole*, 483 U. S. 203, 206-207 (1987), but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out "unambiguously," see *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 17 (1981); *Rowley*, *supra*, at 204, n. 26. "Legislation enacted pursuant to the spending power is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds must accept them "voluntarily and knowingly." *Pennhurst*, 451 U. S., at 17. States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain." *Ibid.* Thus, in the present case, we must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that [this is] one of the obligations of the Act.

*Id.* at 296. Without a clear statutory or regulatory statement notifying the District of an exception to the *Schaffer* rule for the burden of proof for matters related to IEEs at public expense, the statutory history of the IDEA does not support the conclusion that the District must bear that burden.

Moreover, the regulation pertaining to IEEs at public expense can be read consistently with the *Schaffer* decision. The requirement that the District initiate a hearing is essentially a "burden of production." Generally, a burden of production tells the tribunal which party must come forward with evidence to support a particular proposition. See *In re Loudenslager's Estate*, 240 A.2d 477, 482 (Pa. 1968). As articulated in the regulation, the District's burden is, without unnecessary delay, ... "to file a due process complaint to request a hearing to show that its evaluation is appropriate." Therefore, nothing in the regulation compels a different outcome related to the burden of proof articulated in *Schaffer*. In this matter, the Parents as the party seeking relief- specifically public funding for an independent educational evaluation of the Student - bear the burden of proof, *id.* at 537, while the District bears the burden of production.

## **Legal Discussion**

### **A. Individuals with Disabilities Education Act**

#### **1. Child with a Disability**

The IDEA-implementing regulations provide, in pertinent part,

A "child with a disability" is defined by regulation as a "child evaluated in accordance with 300.304-300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or

multiple disabilities, and who, **by reason thereof, needs special education and related services**. 34 C.F.R. § 300.8(a)(1) (emphasis added).

“Autism” is defined as a developmental disability **significantly affecting** verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. 34 C.F.R. §300.8(c)(1)(i)(emphasis added).

In order to determine if a child is eligible for special education and related services, the public agency performs an evaluation. The contents of the evaluation are specifically prescribed by regulation, as follows at 34 C.F.R. § 300.304 in relevant part

(b) *Conduct of evaluation*. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

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

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

(c) *Other evaluation procedures*. Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child’s aptitude or achievement level or

whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

\* \* \*

(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

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

See 34 C.F.R. § 300.304 (b)(c). Upon completion of the administration of assessments and other evaluation measures a group of qualified professionals and the parent of the child determine whether the child is a child with a disability, as defined in Sec. 300.8. See 34 C.F.R. Sec. 300.306.

## **2. Parent Right to an Evaluation at Public Expense**

If a parent does not agree with the evaluation completed by the public agency, the IDEA implementing regulations at 300.502(b) provide that

(1) 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, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) 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, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

This section of the IDEA regulations addresses two options for districts to avoid payment for an IEE. Specifically, it can request a hearing to show its evaluation is appropriate, see 34 C.F.R. Sec. 300.502(b)(2)(i) or demonstrate that the evaluation obtained by the parent did not meet agency criteria, see 34 C.F.R. Sec. 300.502(b)(2)(ii). In the instant matter, the District pursued the former since the parents offered no evidence to suggest that they had obtained an IEE prior to the date of the hearing.<sup>1</sup>

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<sup>1</sup> While not specifically stated therein, it is consistent with the terms of this regulation, that the right to an IEE at public expense applies in both the situation when a parent has not obtained an independent evaluation as well as when the parent has paid for an evaluation and is seeking reimbursement.



Review of the District's evaluation report indicates that for purposes of the evaluation, the certified school psychologist interviewed the Parent, reviewed school records including PSSA test results and report cards, interviewed the student and [Student's] teachers; observed the student in both structured and unstructured settings, administered testing on three dates using valid instruments for the purpose of assessing learning difficulties and emotional functioning. The evaluation met the standard established under 34 C.F.R. Sec. 300.304.

The statutory and regulatory framework of the IDEA establishes that a medical diagnosis of Asperger's Syndrome or ADHD alone is not sufficient for a child to be eligible for services under the IDEA. The regulatory definition of a "child with a disability" requires that the child manifest a disability that fits within the definition of one of thirteen possible IDEA classifications AND must require special education and related services. Therefore, if a child has a medical diagnosis that does not fall within one of the thirteen IDEA disability classifications, he or she would not be considered a "child with a disability." If a child does have a disability that falls within one of the thirteen IDEA classifications, but does not require specially designed instruction then he or she would not be considered a "child with a disability." Crucial to the analysis regarding whether the Student is a child with a disability is the regulatory definition of "autism" which contains the requirement of adverse impact on educational performance. If a child's developmental delay does not significantly affect functioning, it would not fall within the regulatory definition of "Autism."

The fact that the District's evaluation did not identify the student as eligible for special education under the IDEA, even though at the time of the evaluation parent provided some information about a diagnosis of Asperger's and ADHD, does not compel the right to an IEE at public expense. The Student did not fit within the definition of "a child with a disability" in that [Student] did not require specially designed instruction. Moreover, based upon the evaluation results, at the time of the testing [Student's] Asperger's did not have an adverse impact upon [Student's] educational performance. While it may have been reasonable for the District to follow-up on issues referenced in the CHOP psychiatrist's report or track down the student's mental and behavioral health providers, it was not fatal to the appropriateness of its evaluation that it did not do so since the medical diagnosis which were referenced, in themselves, based upon the totality of the assessments did not detract from the validity of the District's findings at the time of the evaluation.

While the student may not qualify as a "child with a disability" for purposes of the IDEA, [Student] may well be eligible for reasonable accommodations to [Student's] educational program under other federal statutes. The sole issue in the instant matter, however, was limited to the issue of whether the student was entitled to an independent educational evaluation at public expense. The applicable law and the specific facts of this case support a denial of the Parent's request for an IEE at public expense pursuant to the IDEA.

**B. Remedies under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 2008**

According to the IDEA's the statutory framework, a child who has a disability or impairment does not automatically qualify for special education services. If the child has a disability but does not need special education services, the child may nevertheless receive protections under Section 504 of the Rehabilitation Act. The relevant portion of Section 504 of the Rehabilitation Act states:

*(a) Promulgation of nondiscriminatory rules and regulations*

No otherwise qualified individual with a disability in the United States, as defined in Sec. 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 C.F.R. Sec, 794(a). *See also* 34 C.F.R. §104.4(a).

To be eligible for protections under Section 504, the child must have a physical or mental impairment. This impairment must substantially limit at least one major life activity. Major life activities include walking, seeing, hearing, speaking, breathing, learning, reading, writing, performing math calculations, working, caring for oneself, and performing manual tasks. The key is whether the child has an "impairment" that "substantially limits . . . one or more . . . major life activities." *See* 104.3(j)(2)(i)-(iv).

The Americans with Disabilities Act, as it applies to public entities, has identical requirements, and provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

*See* Subchapter II, Part A, of the Americans with Disabilities Act at 42 U. S. C. § 12132 and § 12133.

Chapter 15 of the Pennsylvania Education Regulations implementing the Section 504 mandates provides that

A school district shall provide each protected handicapped student enrolled in the district without cost to the student or family, those related aids, services or accommodations which are needed to afford the student equal opportunity to

participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities. See 22 Pa. Code Sec. 15.3.

The language of ADA tracks Section 504 and explains that the remedies, procedures and rights under the ADA are the same as under the Rehabilitation Act. Significantly, under both the ADA and Section 504, benefits to children with disabilities are limited as compared to the IDEA. As it relates to procedural safeguards, Section 504 does not include a "Prior Written Notice" requirement while the IDEA provides a system of procedural safeguards designed to protect the child and parents including written notice before any change of placement. While the IDEA explicitly provides for an IEE at public expense if certain criteria are met, neither Section 504 nor the ADA, however, so provide.<sup>2</sup>

While the parents may feel that the Student is eligible under both Section 504 and the ADA, the relief of an IEE at public expense is not available under either of these statutes. Because this hearing was limited in scope as to whether the parents were entitled to an independent educational evaluation at public expense under the IDEA, the issue of whether or not the student is eligible for protections – including modifications and accommodations - under Section 504 or the ADA was not addressed. Nothing about this decision should be interpreted as limiting or otherwise precluding the Parents from seeking remedies under any statute or regulation offering protection to children with disabilities.

### **CONCLUSION**

The District has completed an appropriate evaluation under the IDEA of the Student. At this time, the parent is not entitled to an independent educational evaluation of the Student at public expense.

### **ORDER**

AND NOW, this 27th day of August, 2010, it is hereby ordered that, for the reasons cited above, the [School District] has completed an appropriate evaluation pursuant to 34 C.F.R. 300.503, and therefore the parents are not entitled to an independent educational evaluation at public expense.

*Rosemary E. Mullaly, Esquire*

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SPECIAL EDUCATION HEARING OFFICER

Date of decision: August 28, 2010

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<sup>2</sup> Both federal and state Section 504 implementing regulations provide for parent initiated evaluations, see 34 C.F.R. Sec. 104.35 22 PA. Code Sec. 15.6(a), but neither section provides for an independent evaluation at public expense.