

*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: A.F.  
ODR #01759/10-11 JS

Date of Birth:  
[redacted]

Date of Hearing:  
December 6, 2010

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Pocono Mountain School District  
PO Box 200  
Swiftwater, Pennsylvania 18370

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

Pro Se<sup>1</sup>

Rebecca Young, Esquire  
King Spry  
One West Broad Street, Suite 700  
Bethlehem, Pennsylvania 18018

December 11, 2010

December 21, 2010

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

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<sup>1</sup> This hearing officer was contacted by email at 6:13 pm on Sunday evening, the night before the hearing, by an attorney who reported that he had just been retained by the Parent and was requesting a 30-day continuance because he was unavailable for the hearing and wanted time to try to work out the dispute. The continuance was denied given the very short notice, although the attorney was invited to participate in the hearing in person or by telephone. To date this hearing officer has heard nothing further from the attorney.

## Background

Student<sup>2</sup> is a protected handicapped student with cerebral palsy attending a private school but receiving supportive services under a 504 Service Plan pursuant to a previous due process agreement. Student's Parent disagreed with the District's latest re-evaluation, believing that Student should be classified as an eligible student, and requested an independent educational evaluation (IEE). Given that the District refused the request, it timely filed for a due process hearing to establish the appropriateness of its re-evaluation as it is required to do as put forth under the IDEIA's implementing regulations at *34 CFR §300.502(b)(1)(2)(3)*.

For the reasons below I find for the District.

## Issue<sup>3</sup>

Was the re-evaluation provided to Student by the Pocono Mountain School District appropriate?

## Findings of Fact

1. Student is an elementary-school aged student who resides within the boundaries of the School District. Student attends a private school, [Private School]. [NT 28]
2. Student has cerebral palsy, and is a protected handicapped student under Section 504. [NT 15]
3. Pursuant to a parental request for an evaluation and a signed Permission to Evaluate the District completed a multidisciplinary evaluation comprising 1) reviews of parent input, non-school evaluation records, teacher input, educational records, and the last District ER; 2) observations of Student inside the school and in the school yard; 3) administration of standardized tests and utilization of standardized observational instruments. [S-1, S-2, S-5]
4. The Occupational Therapy [OT] segment of the evaluation was completed on September 23, 2010. [S-6]
5. For the OT segment the evaluator observed Student in class. [NT 15]
6. The OT evaluator utilized the Educational Assessment of School Youth (EASY) which assesses a student's functioning in the areas of fine motor, gross motor, bilateral coordination, balance, sensorimotor and motor planning, visual perception and visual motor skills. The EASY also assesses handwriting and self-care. [NT 13-14]

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<sup>2</sup> The decision is written without further reference to the Student's name or gender to provide privacy.

<sup>3</sup> The Parent believes that Student should be found eligible for special education, although this was not the issue in this hearing.

7. The OT assessment also included the Mary Benbow Fine Motor Checklist, a developmental inventory of hand skills that examines fine motor skills in more depth. [NT 14]
8. Finally the OT assessment utilized the Developmental Test of Visual-Motor Integration [VMI], a standardized measure of visual-motor skills, visual perceptual skills and motor coordination skills related to handwriting. [NT 14-15]
9. The OT evaluator administered the tests according to the instructions of the test maker, and considers the tests valid. [NT 15]
10. The OT evaluator concluded that Student has the ability to access the educational environment without adaptations. Student is able to access the school environment in the fine motor, visual-motor, and visual perceptual motor areas needed for school. [NT 16]
11. The OT evaluator concluded that Student can write legibly, access the bathroom, practice self-care skills, and manipulate learning materials such as toys, games, pencils pens and rulers. Student functions independently in the school setting without need for accommodations. [NT 16]
12. The Physical Therapy [PT] segment of the evaluation was completed on September 23, 2010. [S-7]
13. For the Physical Therapy [PT] segment of the evaluation the evaluator observed Student for about an hour and a half in the school environment performing the functional tasks required to access that environment. [NT 28]
14. During the PT evaluation, Student was observed getting off the bus, going into the school, hanging up Student's coat, taking things in and out of bins, getting in and out of chairs, climbing the ladder to the loft, and utilizing the bathroom. On the playground Student could access the equipment, and walk through a wooded area with rocks and branches and trees.
15. The PT evaluator concluded that Student can access the school environment independently. [NT 30]
16. For the Psychological segment of the evaluation the evaluator utilized observation of Student, the Behavior Observation System of Schools (BOSS), the Wechsler Intelligence Scale for Children- 4<sup>th</sup> Edition (WISC-IV), the Test of Auditory Processing Skills – 3<sup>rd</sup> Edition (TAPS 3), the Beery Development Test of Visual Motor Integration – 5<sup>th</sup> Edition (Berry VMI-V), the Gilliam Autism Rating Scales – 2<sup>nd</sup> Edition (GARS-II), the Asperger Syndrome Diagnostic Scale (ASDS), the Behavior Rating Inventory of Executive Function (BRIEF) and the Beck Youth

Inventories. The instruments were administered according to the directions of the test manufacturer and under standardized conditions. [S-5]

### Discussion and Conclusions of Law

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The IDEIA sets forth the responsibilities that a District has to appropriately evaluate a student. Although Student is currently served under a 504 plan the Parent believes that Student should be considered eligible for special education, although this issue was not addressed in this District-initiated hearing.

Our United States Supreme Court has held that in an administrative hearing brought under the IDEA the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence<sup>4</sup>. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Therefore the District must present a preponderance of convincing support in favor of the appropriateness of its evaluation. However, the burden of persuasion under Schaffer only comes into play when neither party introduces a preponderance of evidentiary support and the sides of the dispute are evenly balanced, or in "equipoise" as the Court put it, as the party having the burden of persuasion failed to tip the scale in its favor and thus cannot prevail.

In the instant matter, the district has the burden of proving that its evaluation was appropriate. The IDEA 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:

*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*

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<sup>4</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.

*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).*

#### Independent Educational Evaluation

The Parent contends that the District's 2010 evaluation was not appropriate. The IDEA 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, the IDEA 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.*

The District produced a very complete and thorough evaluation of Student in all areas of suspected exceptionality, and each segment of its evaluation met every criterion set forth by the IDEA as quoted above. This hearing officer understands the Parent's desire for an independent evaluation to gain a "third opinion", however she is not entitled to obtain this at public expense. The District's evaluation is appropriate under the Act and therefore the District prevails in this matter.

#### Order

It is hereby ordered that:

The re-evaluation provided to Student by the School District is appropriate and therefore the Student is not entitled to an Independent Educational Evaluation at public expense.

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

December 21, 2010

Date

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

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