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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

Final Decision and Order
ODR File No. 02001-1011AS

OPEN HEARING

Child's Name: R.B.
Date of Birth: [redacted]

Hearing Date: August 15, 2011

Parties to the Hearing	Representative
Mastery Charter School, Pickett Campus 5700 Wayne Avenue Philadelphia, PA 19144	Lucas Repka, Esquire King Spry Herman Freund and Faul, LLC 1 West Broad Street Suite 700 Bethlehem, PA 18018
Parent[s]	*Pro se*

Record Closed: August 20, 2011
Date of Decision: August 29, 2011

Hearing Officer: Brian Jason Ford

Introduction

The single issue presented in this due process hearing is whether the Mastery Charter School, [Redacted] Campus ([Charter School]) may perform an educational reevaluation of the Student over parental objection.[1] More specifically, Charter School wishes to use the consent override procedures set forth in the regulations implementing the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA). *See* 34 C.F.R. 300.300(c)(1)(II). The Student has missed a considerable amount of school, and Charter School claims that the reevaluation is necessary to determine the Student's needs and provide an appropriate program.

Related Cases and Procedural History

This due process hearing can be understood only in the context of the other two matters concerning the Student that are currently pending in the Office for Dispute Resolution. Those cases are 01632-1011AS and 01633-1011AS (Hearing 1 and Hearing 2, respectively). In those cases, the Student seeks various remedies from both [Charter School] and the [Redacted] School District (District) for alleged denials of educational rights. In response, both [Charter School] and the District denied being the Student's local educational agency (LEA). Those denials ultimately led me to issue a pendency order, which was appealed to the United States District Court for the Eastern District of Pennsylvania before Hearings 1 and 2 ended. There, the Honorable Cynthia M. Rufe, determined that [Charter School] was the Student's LEA for pendency purposes and that [Charter School] must educate the Student in accordance with the IDEA's "stay-put" rule.[2] *See R.B. v. Mastery et al*, 2:10-cv-06722-CRM.

After Judge Rufe issued the pendency order, and after [Charter School's] attempts to have that order stayed were denied, [Charter School] sought the Parent's consent to evaluate the Student. When that consent was denied, [Charter School] initiated the instant matter.

It should be noted that the Parent was represented by an attorney when this case was initiated. However, by the time the hearing convened, the Parent was *pro se*. In addition, the unusually long amount of time between the initiation and conclusion of this matter is due, in part, to the fact that these proceedings were halted by a stay order while the parties pursued federal mediation. That effort to resolve this case and the other two ultimately failed.

[1] Except for the cover page, the Student and Parent's names are redacted. The Student's gender is redacted but the Parent's gender is used in the original version of this *open* decision.
[2] Judge Rufe's order was appealed to the Third Circuit. Other than denying [Charter School's] motion for an expedited hearing, the Third Circuit has taken no action - as far as I know.

Findings of Fact

1. It is not disputed that the Student, who is [late teenaged], is entitled to the substantive rights and procedural protections of the IDEA as a result of an intellectual disability, secondary to a genetic disorder.[3] The Student also suffers from congenital heart disease, pulmonary hypertension and sleep apnea. C-2 at 14.
2. It is not disputed that prior to March, 2009, the Student attended [Charter School] and that [Charter School] was the Student's local educational agency (LEA). *See* N.T. at 25.
3. The Student's last comprehensive educational evaluation was completed on May 30, 2008. C-2, N.T. at 27-28.
4. It is not disputed that the Student stopped attending school in March of 2009.[4]
5. It is not disputed that the Student started attending school at [Charter School] again in January of 2011. *See* N.T. at 25, 30.
6. [Charter School] received no information about the Student during the absence between March of 2009 and January of 2011. N.T at 29.
7. In preparation for the Student's return to school, representatives from [Charter School] met with the Parent in the Parent's home on January 6, 2011. N.T. at 30-31. During that meeting, [Charter School's] representatives attempted to give the Parent a permission to reevaluate form (PTRE) with a notice of procedural safeguards. *Id*, C-3. At that time, the Parent expressed her desire that such requests should be handled through the parties' attorneys. N.T. at 32. Respecting this wish, [Charter School] did not leave the PTRE with the Parent on January 6, 2011. *Id*.
8. The PTRE indicates that the Student's IEP team determined that a reevaluation is necessary. C-3 at 1. Testimony reveals, however, that [Charter School] unilaterally determined that a reevaluation is necessary. N.T. at 75-76
9. Following the meeting in the Parent's home, [Charter School] (through its own attorney) contacted the Parent's attorney via email to memorialize the Parent's request to address the PTRE via counsel. *See* C-4. It is not clear if the PTRE was transmitted to the Parent's attorney at that time. *See id,* N.T. at 43[5]
10. The PTRE that [Charter School's] representatives brought to the meeting on January 6, 2011 proposes several categories of assessments including: cognitive functioning, academic achievement, speech and language, occupational therapy, adaptive behavior, social-emotional functioning, and assessments for transition and post-

[3] Applicable Pennsylvania regulations still refer to "mental retardation" instead of "intellectual disability." As this matter was initiated pursuant to federal law, the term "intellectual disability" will be used in accordance with Rosa's Law, Pub. L. No: 111-256.

[4] Evidence in other cases suggests that the Student stopped attending sometime in April of 2009 and was dis-enrolled in June of 2009. In this case, [Charter School] argues - without objection or contention - that the Student stopped attending in March of 2009. *See* N.T. at 103. This is consistent with Judge Rufe's pendency order. *See R.B. v. Mastery et al,* 2:10-cv-06722-CRM at 6. Further, there are considerable disputes about the circumstances surrounding the period of time leading up to the gap in the Student's education. For purposes of this due process hearing, those disputes do not matter. In this case, the reason why the Student stopped attending school makes no difference. However, the reason why the Student stopped attending makes a considerable difference in the other two pending cases, 01632-1011AS and 01633-1011AS.

[5] Testimony indicates that the PTRE was sent to the Parent's attorney as an attachment to the email at C-4. The document itself does not indicate any attachment.

secondary planning. C-3 at 1. The PTRE also seeks approval for a classroom observation and review of records. *Id*.

11. The Parent rejected the PTRE, prompting [Charter School] to request this hearing on January 26, 2011.
12. Disputes regarding the Student's return to [Charter School] pursuant to Judge Rufe's pendency order resulted in the Parent initiating contempt proceedings against [Charter School]. Those proceedings, in turn, resulted in the parties' participation in federal mediation. These proceedings were stayed by court order during that mediation. Throughout that process, the issue of reevaluation was discussed.
13. At the unsuccessful conclusion of the federal mediation, the Parent became *pro se*. Shortly thereafter, on July 25, 2011, [Charter School] re-issued the PTRE one last time. *See* C-5. The re-issued PTRE was not approved. *Id*.
14. The Student's most current educational reevaluation, as of the date of this Decision and Order, is three years and three months old. *See* C-2 (dated May 30, 2008).
15. [Charter School's] Assistant Principal of Special Education, who is a masters-level certified special education teacher, explained that the proposed evaluations are necessary to understand the Student's needs – particularly the Student's cognitive functioning, academic and vocational skills, and transition skills.[6] *See* N.T. at 36.
16. Since the Student's return, [Charter School] has attempted to effectuate the Student's last-approved individualized educational plan (IEP). That IEP is dated October 24, 2008 and was introduced as Exhibit C-1. *See* N.T. at 46-47.
17. The Student's IEP includes goals that require progress monitoring through analysis of the Student's work, teacher observations and "teacher assessments". *See* C-1 at 12-17. The IEP also refers to "short term objectives" and "benchmarks" synonymously. *Id*.
18. Testimony reveals that all students who attend [Charter School] are assessed every six weeks with a "benchmark test." N.T. at 49. [Charter School] modified its benchmark test to gauge the Student's progress towards IEP goals. N.T. at 49-50.
19. Contrary to testimony from [Charter School's] Assistant Principal of Special Education, it is not "clearly stated" anywhere in the Student's IEP that [Charter School] is "required" to assess the Student using benchmark testing – modified or otherwise. *Compare* N.T. at 50 *with* C-1. Rather, in the IEP, "benchmarks" refer to short term objectives. *See, e.g.* C-1 at 13.
20. Even assuming "teacher assessment" refers to a modified benchmark test, the frequency of administration and type of modification is not addressed in the IEP. *Id*.
21. Benchmark tests have not been an effective means to gauge the Student's progress or assess the Student's current needs. The Parent has vigorously protested all of [Charter School]'s efforts to conduct benchmark testing and instructed providers from other agencies who work with the Student during the school day to keep [Charter School] from administering benchmark tests. N.T. at 49-50, 77.

[6] The Assistant Principal also testified that the evaluations were necessary as a matter of statutory compliance. That particular bit of testimony is not persuasive because statutorily mandated reevaluations may be waived if unnecessary or unwanted. It is the actual need to evaluate the Student, not the statutory evaluation timeline, that controls this matter.

22. [Charter School's] Assistant Principal of Special Education testified, credibly, that the Parent called 911 when [Charter School] attempted to administer a modified benchmark assessment over objection. N.T. at 50.
23. The Parent does not object to the Student being evaluated. Rather, the Parent objects to [Charter School] or "any person that's connected to [Charter School]" conducting the evaluation. N.T. at 109-110. The reason for this objection is that the relationship between the Parent and [Charter School] is dysfunctional and that the Parent does not trust [Charter School] to conduct the evaluation. *See, e.g.* N.T. at 110.
24. More specifically, the Parent believes that the Student *should* have academic achievement, transition, adaptive behavior assessments and a classroom observation, but not from [Charter School]. *See* N.T. at 261-265. The Parent does object to some proposed assessments outright (regardless of who does the evaluation), but only because information obtained through those evaluations is of a "personal and private" nature. N.T. at 266.
25. The Parent articulated her perception that [Charter School] finds her (the Parent) or the Student undesirable, and that the proposed evaluation is the first step in [Charter School's] plot to place the Student elsewhere. More specifically, the Parent testified that [Charter School] had opened a new school to "warehouse" its students with disabilities and believes that an evaluation will be [Charter School's] first step in moving the Student to that warehouse. *See, e.g.* N.T. at 17-19, 295, 301-302, 307.[7]
26. The relationship between [Charter School] and the Parent was good once, but soured during the events leading up to Hearings 1 and 2. *See* N.T. at 68 (Parent had approved a PTRE from [Charter School] previously).

Pertinent Laws and Jurisprudence

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). In this particular case, [Charter School] bears the burden of persuasion because it requested the hearing as is seeking relief. To obtain the relief it requests, [Charter School] must meet its burden by a preponderance of the evidence. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia,* 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). Under the this standard, [Charter School] must prove entitlement to the relief it seeks by preponderant evidence and cannot prevail if the evidence rests in equipoise.

[7] This Hearing Officer found no evidence to support the Parent's contention that a "warehouse" school actually exists. Testimony to the contrary from [Charter School] employees was entirely credible and no findings of fact have been made in regard to other programs or placements operated by [Charter School] or its parent company. N.T. at 252.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See L.E. v. Ramsey, 435 F.3d at 389 n. 4 (3d Cir.2006); see also David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found the witnesses who testified in this case to be generally truthful and forthright. I find that conflicts between documentary evidence and testimony (e.g. FF 19) do not indicate any deliberate attempt at deception. All witnesses, including the Parent, testified to the best of their abilities.

Educational Reevaluations, Parental Consent & Override Procedures

Thorough and accurate educational evaluations are a necessary first step in designing IEPs that are calculated to provide a free appropriate public education (FAPE). The IDEA requires LEAs to conduct reevaluations at least every three years, unless both the LEA and parents agree that a reevaluation is not necessary. 20 U.S.C. § 1414(a)(2)(B)(ii). Pennsylvania regulations shorten the timeline to every two years for students with intellectual disabilities. 22 Pa Code § 14.124(c). The Pennsylvania regulation does not include a provision for a mutual waiver. Parents and teachers may also request a reevaluation at any time, and LEAs must propose a reevaluation when a student changes to the point where new assessments are necessary to understand his or her needs. *See* 20 U.S.C. § 1414(a)(2)(A).

As with initial evaluations, LEAs must obtain parental consent before conducting an educational reevaluation. 20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(i). "If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described [at 34 C.F.R. § 300.300(a)(3), establishing consent override procedures for initial evaluations]." 34 C.F.R. § 300.300(c)(1)(ii). In turn, the override procedures for initial evaluations allow LEAs to pursue evaluations over parental objection using the full gamut of dispute resolution options available under the IDEA. Pennsylvania regulations give LEA's the same options. *See* 22 Pa Code § 14.162(c).

It is clear that LEAs may request a due process hearing to permit a reevaluation over parental objection. It is also clear that LEAs requesting such a hearing bear the burden of persuasion. It is not clear, however, exactly what LEAs must prove in such cases. Initiating a hearing to override parental non-consent is not mandatory and, not surprisingly, there is a dearth of case law on point (particularly compared to cases involving parental requests for independent evaluations). However, as I articulated during the hearing, I believe that the foregoing statues and regulations compel the Charter to prove the appropriateness of the proposed evaluations. This is consistent with the only other administrative hearing that I am aware of that is directly on point. *See Tustin Unified School District*, 110 LRP 23125 (Ca. SEA; April 13, 2010).

Discussion

Throughout these proceedings, the Parent has expressed her belief that the [Charter School]'s ultimate goal is to remove the Student from the school. At the same time, the Parent readily agrees that the Student should be evaluated, but not by [Charter School] – and not all of the evaluation results should be shared with [Charter School].

[Charter School] argues that the evaluations are necessary for the provision of FAPE. In light of Hearings 1 and 2, this must be accepted as an argument in the alternative because [Charter School] continues to disclaim being the Student's LEA. Moreover, [Charter School] cannot alter the Student's program or placement while the stay-put order is in effect, whatever the evaluations may say.

Both parties, however, agree that new evaluations are warranted. This makes sense because new evaluations are unquestionably necessary in order for the Student to receive FAPE going forward. Under ordinary circumstances, the needs of children with disabilities are expected to change over time. This is the reason why the IDEA both calls for a reevaluation every three years and requires LEAs to propose reevaluations when there is reason to believe that a student's needs have changed. The expectation of change is heightened for students with intellectual disabilities, as evidenced by the shortened, two-year evaluation cycle. In this case, the most recent evaluation is over three years old.

[Charter School]'s employees, particularly the Assistant Principal of Special Education, testified that a reevaluation is necessary to assess the Student's current strengths, needs and abilities. This knowledge is necessary to develop an appropriate individualized education plan (IEP) for the Student. In short, it is not possible to draft an IEP that is calculated to provide a meaningful educational benefit without first knowing what sort of program the Student needs. The proposed reevaluation will provide this information by comprehensively assessing the Student's aptitudes, abilities, strengths and needs. These assessments, if conducted appropriately by trained and certified personnel, should reveal what programming the Student needs now to gain skills that will yield greater freedom and independence later in life. This is particularly important because the Student will soon age out of school programming. The Parent does not dispute any of this. The Parent only objects to [Charter School] (or anybody selected by [Charter School]) conducting the reevaluation and gaining information that the Parent thinks of as private.[8]

This Hearing Officer recently had the opportunity to consider a similar situation. In *A.G. v. Lower Merion Sch. Dist*, 1433-1011 (Ford, 2011), the school district initiated a due process hearing when refusing a parental request for an independent educational evaluation (IEE) at public expense. In that case, the parents were not disputing a evaluation or reevaluation conducted by their school district. Rather, the parents did not trust their district and believed that their district's evaluators may have ulterior motives.

[8] The information gained in any educational evaluation or reevaluation is private. That privacy is protected by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99.

In that case, this Hearing Officer determined that a lack of trust does not trigger the statutory entitlement to a publicly-funded IEE.

This case is similar to the extent that the Parent objects to the proposed *evaluator*, not the proposed evaluation. Both federal and Pennsylvania regulations set forth minimum requirements for personnel conducting reevaluations. *See* 20 Pa Code § 14.124. The Parent does not complain that the proposed evaluator fails to meet those requirements. More to the point, the broken relationship between [Charter School] and the Parent does not render an otherwise qualified evaluator unqualified.

Conclusion

[Charter School] has presented a preponderance of credible evidence that the Student must be reevaluated. The Parent objects to the proposed evaluator, not the proposed evaluations. Those objections take two forms: the Parent does not trust [Charter School] to do the evaluation and the Parent does not want [Charter School] to have some of the sensitive information that that the evaluations will likely yield. There is no legal basis for either objection, particularly in light of the need for a reevaluation. [Charter School], therefore, will be allowed to reevaluate the Student despite the Parent's objection. What [Charter School] can do with that reevaluation is limited by other orders and proceedings, and those limitations will also be reflected in the order to follow.

ORDER

And now, this 29th day of August, 2011, it is hereby ordered that:

1. [Charter School] may conduct the reevaluation proposed in Exhibit C-6 of these proceedings, provided that the reevaluation is conducted in accordance with 20 Pa Code § 14.124(a), (b) and (d).
2. [Charter School] may not alter the Student's program or placement while the Honorable Cynthia M. Rufe's Order of December 28, 2010 is in effect.
3. Nothing in this Decision and Order is intended to limit the Parent's right to obtain an independent educational evaluation in accordance with 34 C.F.R. § 300.502.
4. Any claims not specifically addressed in this Decision and Order are denied and dismissed.

/s/ Brian Jason Ford
HEARING OFFICER