

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: J.T.
ODR #13422/12-13-KE

Date of Birth:
[redacted]

Date of Hearing:
February 1, 2013

CLOSED HEARING

Parties to the Hearing:
Parent

Representative:
Pro Se

Upper Darby School District
4611 Bond Avenue
Drexel Hill, PA 19026

Scott Gottel, Esquire
Holsten and Associates
One Olive Street
Media, PA 19063

Date Transcript Received:

February 5, 2013

Date of Decision:

February 8, 2013

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

Background

Student¹ attends a regular education kindergarten class in the Upper Darby School District (herein referenced as District). Because of academic difficulties and concerning behaviors Student is exhibiting in the school setting the District sought the Parent's permission to evaluate Student in order to assist in developing an appropriate program. Student's mother (hereinafter Parent) withheld consent for an evaluation to be performed, believing that Student is too young to be evaluated and possibly to receive a special education classification. The District therefore requested this due process hearing to obtain an Order that Student be evaluated.

Issue

Should the District's request for an Order to perform a multidisciplinary evaluation of Student over the objections of the Parent be granted?

Findings of Fact

1. Student is a resident of the District and has been attending kindergarten in the District since September 2012. [NT 19]
2. Student had never been to preschool or daycare; kindergarten is Student's first school experience. [NT 96]
3. Early in the school year because the school had significant concerns Student was brought to the attention of the Student Support Team, which is composed of the principal, the psychologist, the reading specialist, two special education teachers, and the social worker. [NT 44-45]
4. Concerns about Student were across the board in the areas of academics, behavior, speech/language, communication, and social skills. [NT 65]
5. Student's kindergarten teacher has 27 years of teaching experience and has had special education students in her classroom receiving additional supports and services. [NT 17]
6. Student's teacher has the experience to recognize when a child is in need of extra support in the educational setting. [NT 17-18]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

7. Student is “extremely below” all in academic areas as reported by the teacher. The 1st Trimester report card reflects that Student had not yet met proficiency in any reading or mathematics area. [NT 19, 47-48; S-1]
8. Whenever possible the teacher worked with Student one-to-one. [NT 68]
9. Based on screening results, Student has been receiving one-to-one phonics instruction with a reading specialist using the Wilson Reading Readiness program, “Foundations”. Student has failed to make progress commensurate with the kindergarten peers whose screening scores also supported the need for this additional instruction. [NT 33, 40-42; S-4]
10. Progress monitoring of Student’s reading using AIMSWeb indicates little progress despite the one-to-one instruction from the classroom teacher and the reading specialist. [S-3]
11. Student’s speech/language is also “extremely delayed” according to the teacher’s observation. Student is difficult to understand and becomes frustrated when asked to repeat. [NT 20-21]
12. The speech/language therapist has taken Student into a small group to provide assistance with articulation and sentence formation. [NT 68]
13. When the Parent registered Student in the District she indicated that Student’s first language was English and that Student does not speak a language other than English. [NT 84-86, 107-108; HO-1]²
14. At the hearing the Parent testified that a dialect of the family’s ethnic language, was spoken in the home from Student’s birth but that the family started weaning Student away from that language beginning at age 4 when Student started having play dates with English-language speakers. [NT 99-102]
15. Student’s teacher and Student’s principal testified that they had not heard this information before the day of the Parent’s testimony at the due process hearing. [NT 67-68, 70-71, 76, 83]
16. Student’s teacher had a specific telephone conversation with the Parent wherein the Parent said that only English is spoken in the home, that Student does not know any other language, and that the only person who speaks the ethnic dialect with Student is Student’s grandmother who does not live with the family. [NT 81-82]
17. The principal has experience with children who enter school not speaking English. Student’s presentation is very different from these children. [NT 73-75]

² The hearing officer observed that the Parent spoke English fluently without an accent and used the idioms and phrasing of a native English speaker; the Parent alluded to having been educated in the United States.

18. In the classroom Student has difficulty focusing and paying attention even when a behavior chart is used and Student is offered preferred rewards to stay on task. The teacher celebrates Student's successes to reinforce positive behavior. [NT 44-45, 59]
19. Student has a difficult time interacting with other children and sharing the teacher's attention in the school setting. [NT 45]
20. Student becomes over stimulated and covers Student's ears when the setting becomes loud. [NT 49-50]
21. Student spins Student's body in circles or walks around in circles. [NT 50]
22. Student received an occupational therapy screening with a registered occupational therapist. Findings were that visual-motor, fine-motor and visual-perceptual areas are delayed. The occupational therapist recommended an occupational therapy evaluation. [S-6]
23. The occupational therapist has worked with Student on visual-motor skills in a small response-to-intervention group and has made preliminary suggestions for activities and materials for use in the home and in the classroom. The Parent has been cooperative with these suggestions. [NT 68-69]
24. Student's vision was tested at the pediatrician's office but Student did not pass, possibly because Student could not identify the letters on the chart. [NT 103, 116]
25. Student received a hearing screening at the school but could not understand the directions so no results were generated. Student received a hearing test at the pediatrician's office and passed as reported by the Parent. [NT 36, 67, 103]
26. Student has been absent at least thirteen days since the start of the school year. These absences were not excused through a physician's note. The Parent testified that she sometimes has kept Student home because Student is unhappy at school. [NT 43-44; S-5]
27. The principal of Student's school has undergraduate and graduate degrees in special education, has taught regular education and special education, and has provided instructional support at the Kindergarten Center. She has been with the District for 35 years. [NT 61-62]
28. The principal observes that every day Student has come to school unable to establish the daily routines peers have mastered such as getting off the bus, coming into the school, sitting in a line, going up the stairs and into the classroom,

- taking off coats and unpacking backpacks without constant verbal prompts. [NT 63, 66]
29. Often Student [exhibits problematic behavior] as Student is sitting in the line. [NT 63]
 30. The principal goes into Student's classroom as well as into Student's small group daily, and is within earshot of the classroom. She hears Student when Student is experiencing a "meltdown". [NT 63-64]
 31. The principal perceives that Student is very unhappy in school. The Parent also testified that Student is unhappy at school. [NT 69]
 32. The District provided a Permission to Evaluate to the Parent on three occasions. On December 7, 2012 the Parent signed, indicating that she did not give consent for an evaluation. [NT 50-52; S-2]
 33. When she learned of Student's difficulty in school the Parent had Student tested at a commercial private tutoring company. Although a copy of the testing results was not provided to the District the Parent's testimony indicates that the California Achievement Test was used. The tutoring company found that Student was in need of their services and tutoring for 30 minutes a session once a week is just beginning. The Parent is paying for the tutoring herself. [NT 53, 96-98]
 34. The Parent testified that Student can do many of the things at home that Student reportedly cannot do at school. [NT 92-94]
 35. The Parent testified that she does agree that Student may be over-reacting in school because she sees this at home as well at times. [NT 95]

Discussion and Conclusions of Law

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The IDEA sets forth the responsibilities (commonly referenced as "child find" responsibilities) borne by Local Educational Agencies including school districts and charter schools, for identifying which children residing in its boundaries are in need of special education and related services such that "[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated..." 20 U.S.C. §1412(a)(3). Parents do not have a duty to identify, locate, or evaluate their child pursuant to IDEA. This obligation falls squarely upon the district. *Hicks, ex rel. Hicks v. Purchase Line School Dist.* 251 F.Supp.2d 1250, 1253 (W.D.Pa., 2003), citing, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.1996).

In the discharge of its Child Find obligations, the IDEA requires a local educational agency to conduct a “full and individual initial evaluation” 20 U.S.C §1414(a)(1)(A). 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 requirement adds that this includes “social and emotional status” 34 C.F.R. §300.304(c)(4). 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).

Regarding parental consent, the IDEA provides that if a parent refuses consent to an evaluation sought by the local educational agency, then the agency may seek authorization by way of a request for due process. 20 U.S.C. §1414(a)(1) (D)(ii)(I). *See also*, 20 U.S.C. §1415(b)(6)(A) (permitting due process complaint by any party “with respect to any matter relating to the identification, evaluation [or placement] of the child”) Thus, due process is available to the local educational agency in order to “override” parental refusal to consent to an evaluation. 34 C.F.R. §300.300(c)(1)(ii); §300.300(a)(3). In this matter, then, the School was within its rights and fulfilling its Child Find duties to seek an Order from a special education hearing officer that it proceed with an evaluation of Student.

The United States Supreme Court has 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. Thus, the moving party must produce a preponderance of evidence.³ *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). *See also L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Having requested this hearing, the District had the obligation to present a preponderance of evidence in support of its position. The District’s evidence was not only preponderant, it was compelling; it was therefore not necessary to apply *Schaffer* in this matter. Student’s behavior warrants a full and complete evaluation and I will so order.

Student is having great difficulty keeping up with kindergarten peers in all areas of the curriculum – academic, behavior, and socialization. Student is also showing serious delays in fine motor and visual-perceptual-motor skills, as well as in speech/language skills both receptive and expressive. Although the Parent’s testimony about Student’s only recently experiencing spoken English in the home was not convincing, it is clear that even if Student were hypothetically an “English Language Learner” [ELL] Student’s difficulties in school are significantly beyond, and qualitatively apart from the typical situation of the ELL peers.

Dicta: The Parent’s commitment to her child was palpable and I have no doubt that she has acted in what she believes are her child’s best interests. Her immediate cooperation with the occupational therapy recommendations and her seeking out and paying for

³ 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.

private tutoring are noted and commendable. However, by law her child is entitled to and should receive at no cost to herself a thorough age-appropriate assessment in all areas of current difficulty so that an effective program can be offered for her consideration. Although I am ordering the District to evaluate Student over the Parent's objection, I would hope that the Parent will actively engage in and support the process so that a thorough assessment of Student's educational needs can be done. I note that the Parent does not want to "put [her child] through" testing, but as a psychologist who for many years had a particular interest in preschool children, I assure her that the assessments available for young children are designed to engage the child and are not onerous, and when administered by the specialists trained to work with young children the test activities are interesting and even fun for the child. Additionally, although the Parent reiterated several times that she believes her child is "too young" to be tested or classified, educators and other professionals working with children will agree that the earlier intervention can begin the better the outcome for the child. Finally, I was impressed by the ability of the mother and the school personnel present at the hearing to be pleasant and conversational with one another during several extended breaks in the hearing session, and believe that in this case the potential for an excellent working family/school relationship exists and that the tensions that usually accompany having a due process hearing can fairly quickly dissipate as the parties move forward in the child's best interests.

Order

It is hereby ordered that:

1. The School District must conduct a complete multidisciplinary evaluation of Student, including but not limited to:
 - Parent interview[s];
 - Teacher interview[s] including interview of private tutor;
 - Classroom and small group observations;
 - Records review including CAT testing from the tutoring service and results of vision and hearing assessments performed by Student's pediatrics provider[s];
 - Cognitive testing using an instrument assessing non-verbal intelligence as well as an instrument assessing both verbal and non-verbal intelligence;
 - Achievement testing in the areas of reading, mathematics and pre-written expression skills;
 - Adaptive functioning inventory;
 - Occupational therapy evaluation including visual-perceptual-motor functioning and sensory integration;
 - Speech/language evaluation including an oral-motor assessment;
 - Pervasive developmental disorder/ spectrum disorder screening;
 - Social/emotional/behavioral functioning inventory[ies];
 - Psychiatric assessment;
 - Vision assessment if indicated following review of pediatric records;
 - Audiology assessment if indicated following review of pediatric records.
2. This evaluation is to be conducted despite the objections of the Parent.
3. If Student should dis-enroll from the District prior to the evaluation's being initiated or completed, this Order shall stand if and when Student returns to the District.

February 8, 2013

Date

Linda M. Valentini, Psy.D., CHO

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