

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**

Student's Name: H.G.

Date of Birth: [redacted]

ODR No. 1453-10-11-JS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Dates of Hearing:

March 31, 2011, April 28, 2011, May 23,
2011, June 9, 2011

Record Closed:

June 28, 2011

Date of Decision:

July 13, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (Student) is an eligible resident of the upper Dublin School District (District), and attends a District elementary school. (NT 9-10.) Student is identified with Other Health Impairment and Speech and Language Impairment, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Ibid. The District filed this request for due process, seeking an order authorizing it to proceed with a re-evaluation of Student without parental consent. Parent withholds consent for parts of a psychoeducational evaluation, particularly cognitive and achievement testing, as well as assessment of adaptive functioning; Parent asks me to uphold Parent's decision to withhold consent.

The hearing was conducted in four evening sessions and the record closed upon receipt of written summations. I conclude that the request to re-evaluate is appropriate and I order the re-evaluation as requested by the District.

ISSUES

1. Is the District's request to re-evaluate, including cognitive and achievement testing, as well as an assessment of adaptive functioning¹, appropriate in light of the Student's educational needs and achievement given existing supports and services?
2. Should the hearing officer order that the District is authorized to re-evaluate the Student as requested in the absence of parental consent?

FINDINGS OF FACT

1. Student suffers from a genetically-based condition that is associated with a spectrum of associated disabilities. Student has various disabilities in cognitive functioning, including

¹ Belatedly in summation, Parent asserts that the District is not entitled to an order authorizing it to conduct an adaptive functioning evaluation, because it has not pled that type of assessment. I reject this argument. I conclude that the IDEA pleading requirement in this type of case does not require the local education agency to list every area of functioning that it wants to evaluate. It suffices that the parent knows that District wants an override of Parent's refusal to consent to an educational evaluation. Moreover, this type of evaluation was part of the hearing explicitly, and the District had requested it, albeit indirectly, in a letter to Parent in January 2010. (NT 39-41; S-26.)

a history of developmental delays, attention difficulties, visual-perceptual and motor difficulties, delays in school readiness and speech and language impairment, working memory deficits skills, behavioral problems associated with frustration and anxiety, and adaptive functioning delays. (NT 25; P-14, S-1, 22.)

2. By 2010, Student had fallen below grade in reading, and was experiencing significant difficulties in writing and mathematics. (S-31.)
3. Student attended elementary school in a different school district for three years and then transferred to the District, where Student is in elementary school and will be graduating to Middle School for the coming school year. (NT 57-59, 165; S-1.)
4. Student was reevaluated by personnel of the previous district and identified as a child with a disability. Student was re-evaluated at the previous district in December 2006. (P-14.)
5. The District has continued to provide specially designed instruction to Student, including itinerant learning support, speech and language therapy, occupational therapy, physical therapy and behavioral supports. (S-8 to 12, 21, 30, 35.)
6. The supervisor of special education for Student is state certified, with a masters degree in mental retardation and learning disabilities and many years of experience in special education, including evaluating children and teaching about educational assessment. The supervisor has experience with children who have Student's genetic condition. (NT 43-54.)
7. The assigned school psychologist has a Ph.D. degree in school psychology and two masters degrees – one in education and one in counseling psychology. The psychologist has years of experience in school psychology with specific experience with the genetic condition that Student has. The psychologist has state certification and state licensure. (NT 371-377.)
8. The District has requested permission to re-evaluate, including cognitive, adaptive and achievement testing, various times in 2009 and 2010, at the recommendation of the supervisor of special education and the District school psychologist. (NT 81-87; S-16, 18, 26, 27.)
9. The District requested permission to perform this testing because the information on hand was fragmented and inconsistent. The private cognitive testing had yielded little usable information, especially on how Student processes information. Private test reports indicated deviations from standard protocol, and relied upon instruments that are not as valid or comprehensive as the tests proposed by the District. There were substantial discrepancies between what Parent reported as to Student's functioning and what District personnel were reporting. There were numerous disagreements between parent and District educators regarding the programming that the Student needed. (NT 369-371; 399-416, 418, 428-429, 441-446; S-2, 4, 8, 13, 14, 15, 18, 19, 21, 26, 29, 31, 32, 36, 37, 38, 42, 46; P-14.)

10. The District proposed alternative instruments for cognitive testing and proposed to use at least two tests for that purpose. (S-26.)
11. The District recognized that there are limitations on the validity of standardized testing for some children including those with Student's genetic condition. Nevertheless, the tests are valid for their stated purpose when used with Student, and they offer opportunities for clinical observation and particularized assessment of functioning that renders them essential as part of a comprehensive evaluation of the Student. (NT 446-449, 462-488.)
12. The District proposed to accommodate Student's unique needs in the testing situation in a way that would be consistent with standard conditions. (NT 409-412, 433-442.)
13. The District proposed a comprehensive evaluation that would address cognitive, academic, speech and language, fine and gross motor, social and behavioral skills. (NT 416-442; S-26.)
14. The proposed evaluation would include information from multiple sources, including classroom observation, curriculum based assessment, and input from teachers and Parent. (NT 416-442; S-34.)
15. Parent has repeatedly declined to consent to cognitive, adaptive and achievement testing. (S-19, 27, 28, 37, 40.)
16. Intelligence Quotient as a measure of cognitive skills is less valid at the age at which Student was tested than it would be at the present time. (NT 395-399.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.² In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence³ that the other party failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the District, which initiated the due process proceeding. If the District fails to produce a preponderance of the evidence in support of its claim, or if the evidence is in “equipoise”, the District cannot prevail under the IDEA.

APPROPRIATENESS OF REQUESTED RE-EVALUATION

Local educational agencies are required to conduct re-evaluations every three years and when needed in order to determine a student’s educational needs and needs for programming. 34 C.F.R. §300.303, 300.305(a). When a parent withholds consent for an evaluation or re-evaluation, (FF 15), the local education agency may request due process and seek an order authorizing it to evaluate or re-evaluate without parental consent. 34 C.F.R. §300.300(a), (c). The decision is an application of the hearing officer’s equitable authority, and rests within the hearing officer’s sound discretion. See, e.g., G.B. v. San Ramon Valley Unified Sch. Dist., 51 IDELR 35 (N.D. Cal. 2008).

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.

I conclude that the requested evaluation is appropriate and should be conducted. The District's reasoning is based upon the recommendation of an experienced multidisciplinary team consisting of a very qualified school psychologist and a highly experienced supervisor of special education. The evidence is preponderant that the recommendation is the product of the professional judgment of the school psychologist and the supervisor. I have examined the reasons that these professionals advance for their recommendation and I find that they are facially reasonable and based upon data and experience within the knowledge of these professionals. The record is preponderant that the professionals' judgment is not a pretext or part of an orchestration of the record to proceed with a pre-determined placement decision, as alleged by the Parent.

The District's supervisor of special education is highly experienced in designing special education programming and in making determinations concerning the need for evaluation and the content of such evaluations. (FF 6.) Similarly, the school psychologist is very qualified to make the professional judgment that a given test or strategy is necessary to comply with the IDEA's mandate that re-evaluations be comprehensive and individualized. (FF 7.) I conclude that their determinations are entitled to deference unless shown to be the product of non-professional considerations. The record is preponderant that I should indeed accord these professionals deference with regard to their recommendation as to the appropriate testing needed to comply with the IDEA and to obtain the data and information that is necessary to address the Student's educational needs appropriately.

This conclusion is based in consideration on the credibility and reliability of the testimony of these professionals. The supervisor of special education responded frankly about this professional's attitudes concerning the litigation. The supervisor was honest about what was

remembered and what forgotten, and declined an opportunity to embellish by declining to give answers favorable to the District during direct examination when the supervisor did not remember a fact. The supervisor's testimony on the whole was consistent with the record and based upon a persuasive application of expertise to the facts of the case.

The school psychologist admitted limited knowledge of the Student's case, but demonstrated mastery of school psychology and testing that was commensurate with the witness's high level of education and experience. The witness did not give District counsel what she obviously wanted during direct examination, and readily made eye contact with the Parent during testimony that clearly raised difficult issues that could be understandably disturbing to the Parent. Similarly, this witness looked directly at Parent's counsel during cross examination.

Both District professionals expressed their professional opinions that the re-evaluation of Student should include evaluation of cognitive functioning, academic achievement and adaptive functioning. (FF 8.) Both witnesses testified that an evaluation of Student without such testing would be incomplete and thus inappropriate. (FF 8, 9.) Given the circumstances of these recommendations and the corroborative evidence in the record that these recommendations were provided prior to litigation, I conclude that these recommendations were in good faith and entitled to deference in the absence of preponderant evidence undercutting the good faith of these professionals and of their recommendations.

The professionals provided extensive testimony of the reasons for their recommendations. The supervisor testified that the Student was overdue for re-evaluation, 34 C.F.R. § 300.303, since the last re-evaluation had been in December of 2006. Thus, it was reasonable for the supervisor to desire an updated evaluation. (FF 1-5, 8.)

Significantly, that evaluation had been conducted by different professionals in a different district. (FF 1-4.) I conclude that it was plausible and reasonable for the supervisor to desire that District personnel perform a complete educational evaluation. The supervisor knows these professionals and has every right to have an enhanced sense of confidence in their work; the supervisor also would have a particularized sense of the meaning of their findings and the inferences to be drawn from them, based on knowing how they conduct their evaluative and testing activities.

The Supervisor also pointed out that there was conflicting information from educators working with the Student and from the Parent, concerning the nature of the Student's learning style. (FF 9.) The Parent and a private tutor insisted that the Student is an auditory learner, learns best from a gestalt approach, and learns best from modeling by peers. In contrast, teachers reported that the Student is a visual learner, who can benefit from a sequential approach, and who learns well in a small group setting or one to one setting regardless of the availability of peer modeling. Each of these cognitive functional styles would imply a different set of interventions and techniques of specially designed instruction.

The school psychologist pointed out that it is necessary to address the Student's cognitive functioning because the Student is performing well below grade level. (FF 1, 5, 9.) Cognitive testing, with its associated battery of sub-tests, is important to obtain a differentiated understanding of the Student's cognitive strengths and weaknesses.

The witnesses frankly acknowledged that the Student's genetically based condition is highly correlated with intellectual disability. Thus achievement and adaptive functioning also needed to be assessed, to determine whether or not the Student is functioning in the intellectually disabled range. (FF 13.) The witnesses pointed out that the Student's condition can sometimes

lead to a child losing cognitive abilities and educational gains; also, testing early in life can be less reliable than testing done at a later age. (FF 16.) Thus it is important to measure cognitive ability; the IEP team should consider whether or not to focus upon adaptive skills in the Student's individualized education program.

The proposed evaluation would meet the standards of the IDEA, 20 U.S.C. §1414. It would be comprehensive. (FF 13.) It would utilize a variety of instruments and strategies to assess the Student's cognitive, developmental and behavioral needs. (FF 10, 14.) It would elicit information from a variety of sources, including the Parent. (FF 14.)

Parents argue that these professionals' recommendations are merely a pretext for an orchestrated attempt to relegate Student to a separate special education setting. Parent emphasizes that the District's personnel, including the supervisor, have stated that the Student may be intellectually impaired due to the course of the condition. Moreover, various District personnel have recommended that the Student needs more time in a learning support classroom. From this, Parent urges the conclusion that the evaluation is a ploy to justify a more restrictive placement. Thus, Parent asserts that I should find the District's personnel to have acted in bad faith and their recommendations to be unworthy of deference.

I find no evidence of such a conspiracy or predetermination. The supervisor and the school psychologist made it clear that the literature supports their view that intellectual impairment correlates with the Student's genetic disorder. District staff were frank in reporting to Parent that they believed that the Student needed more time in the learning support classroom. The IDEA encourages such open communication between educators and parents, to generate greater collaboration. The evidence is preponderant that the staff were providing information to

Parent, and this in itself shows that there was no conspiracy to change Student's placement peremptorily.

The Parent introduced little evidence to challenge the asserted correlation between Student's condition and intellectual impairment. Through cross examination, Parent sought to establish that cognitive testing tends to under-report the "true" extent of a child's cognitive skills when the child is afflicted with the Student's condition – thus raising the implication that the literature on correlation is wrong, and that testing in this case would create a skewed and inaccurate result. There was considerable discussion of the psychometric properties of the recommended testing instruments.

I find no reason to conclude that the results of the evaluation would be misleading because of any psychometric weaknesses in the instruments chosen, because all parties know of the literature in this area and can factor it into any discussion of the assessment results. (FF 11.) Moreover, it is standard practice for psychologists to look for consistencies and inconsistencies in the results of all tests and attempt to explain them. There was no reason to conclude from the evidence in this matter that the use of cognitive or achievement tests would lead to an inaccurate assessment of the Student's abilities and academic achievement. Nor is there evidence that the tests chosen for Student would not be valid and reliable for the purpose for which they were chosen. The school psychologist testified to the contrary, and Parent propounded no expert evidence to contradict this testimony.

Parent argued that cognitive testing was unnecessary. Parent argued that the Student's cognitive scores from 2006 were thorough and complete and should suffice, because cognitive functioning is generally stable over time. Parent also argued that the District has enough

information from other forms of testing, including curriculum based measures and private evaluations provided by Parent at Parent's expense.

The school psychologist showed that these arguments are fallacious. The previous testing may not provide a true picture of cognitive abilities because the Student's condition can lead to a lowering of cognitive ability. Curriculum based assessments do not provide the kind of articulated view of functioning that the cognitive tests provide. The private reports contained serious flaws and the school psychologist's judgment is not to give them weight. (FF 9.)

Parent also argued that the testing would be misleading because of the Student's assertedly unique approach to tasks, in which Student resists tasks directly demanded but will perform for people who know how to encourage the Student indirectly. Parent argues that these unique qualities would make it impossible to test Student, citing previous failed attempts at standardized testing.

I find this argument to be unpersuasive, not because I doubt Parent's extensive experience with the Student's unique qualities, but because I am satisfied that the school psychologist is fully capable of dealing with the full range of children in the testing setting. The record is preponderant that the school psychologist is fully capable of testing Student in a way that will elicit Student's true abilities.

The assertion that previous testers were unable to use standardized tests is not determinative. Student was much younger when tests were attempted, (FF 16), and testing failures could have been attributable to the testers or the circumstances, none of which would be replicated in the District's testing.

Parent argues that the achievement testing would be useless because the District is teaching Student a curriculum that is below grade level. Even if this assertion were true, I find it difficult to understand why standardized achievement data would not be useful in understanding Student's educational needs. If Student is behind Student's peers, that information is descriptively useful regardless of the cause of that delay. Parent's argument really confuses the purpose of achievement testing, which is not to divine the cause of poor achievement, but to measure it.

Parent argued that the testing will harm Student, because Student becomes extremely anxious and upset when confronted with direct demands to perform. Parent reasons that it is inappropriate to put a child through that suffering. The school psychologist assured this hearing officer that the approach to testing for this and every child takes into consideration their reaction to the demands of testing, and those demands can be accommodated without detracting from standardized conditions. (FF 12.) Thus I find by a preponderance of the evidence that the proposed testing will not harm the Student.

In making these findings, I consider the credibility of Parent and the weight to be accorded to Parent's testimony. I found several instances of exaggeration in the Parent's testimony that leads me to be cautious about the reliability of the Parent's testimony. I note that the Parent has considerable expertise as a teacher. However, the Parent demonstrated little knowledge of psychological testing and thus I give greater weight to the testimony of the school psychologist on matters of testing.

FIRST AMENDMENT CHALLENGE TO PROPOSED TESTING

Parent argues that overriding Parent's lack of consent would infringe upon Parent's right to practice Parent's religion. I do not reach the legal issue of whether or not the First Amendment applies factually in this situation. Rather, I reject the argument because I find by a preponderance that the proposed evaluation does not contradict the religious principles that Parent relies upon.

Parent asserted that there are two principles affirmed by Parent's religion, and that these are contradicted by the proposed evaluation. The first principle is to do no harm. The second is to honor the potential of a child. I find that the proposed evaluation will do no harm to Student. I also find that there is absolutely no evidence that the proposed evaluation will fail to honor the good in Student. On the contrary, all the evidence shows that it is the purpose of the evaluation and the District's efforts to honor the Student as a unique individual and to enhance Student's educational potential.

CONCLUSION

I conclude that the re-evaluation requested by the District is appropriate and I will order the re-evaluation. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's request to re-evaluate, including cognitive and achievement testing, as well as an assessment of adaptive functioning, is appropriate in light of the Student's educational needs and achievement given existing supports and services.
2. The District is authorized to re-evaluate the Student as requested in the absence of parental consent.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

July 13, 2011