

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: G.S.

ODR #14998 / 13-14-KE

Date of Birth:
[redacted]

Dates of Hearing:
July 22, 2014
September 23, 2014

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Lorrie McKinley, Esquire
McKinley & Ryan
16 West Market Street
West Chester, PA 19382

Great Valley School District
47 Church Road
Malvern, PA 19355

David Painter, Esquire
Sweet, Stevens, Katz & Williams
331 East Butler Avenue
New Britain, PA 18901

Date Record Closed:

October 3, 2014

Date of Decision:

October 16, 2014

Hearing Officer:

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

Background

Student¹ is an early elementary school aged student who was evaluated by the District and found eligible for special education under the primary classification of Other Health Impairment [ADHD] and the secondary classification of Speech or Language Impairment. The Parents requested an Independent Educational Evaluation [IEE] at public expense because they disagreed in several respects with the conclusions of the District's evaluation. The District filed for this hearing as it was required to do when it declined the Parents' request.

Issue

Was the District's evaluation of the Student appropriate under the IDEA?

Findings of Fact²

1. At the District's request, pursuant to a signed Permission to Evaluate dated January 27, 2014 the District conducted a multidisciplinary evaluation of Student and produced its Evaluation Report [ER] on March 28, 2014. [NT 21, 182, 195; S-1, S-3]
2. At the Child Study team meeting attended by the Parents and District personnel concerns about Student were discussed. The Multidisciplinary Evaluation Team then chose instruments to address each of the areas of concern that were expressed. Speech and language assessments were included to address any potential language concerns, cognitive and academic assessments were included to address learning needs, and behavior rating scales were included to address social, emotional and behavioral concerns. [NT 23-24; S-2]
3. The District sought written input from the Parents using a form requesting developmental information. [NT 22; S-11]
4. The District conducted a school records review including information gleaned from the Measures of Academic Progress assessments, from the DIBELS and from Student's progress in reading RTI through the date of the ER³. [NT 26-27, 104-113, 120; S-3]
5. Student's primary teacher provided written input into the evaluation. [NT 25; S-3]

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.

² The testimony of every witness, and the content of each exhibit, was considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties' written closings were also carefully considered.

³ Parents' counsel properly objected to testimony about any portion of the RTI progress reporting that post-dated the date of the ER and the objection was sustained. That portion of the progress monitoring was not taken into account by the hearing officer. [NT 113]

6. The intervention teacher/case manager and reading teacher submitted input into the evaluation. [NT 27-28; S-3]
7. Student was observed in the school setting by the District's intervention teacher/case manager. The observation consisted of a time-on-task observation. [NT 25-26]
8. As part of the evaluation the school counselor and a Board Certified Behavior Analyst [BCBA] from the Intermediate Unit collected data from observations and from home and teachers to create a Functional Behavioral Assessment [FBA]. [NT 31, 73-74; S-3]
9. Rating scales using each parent and Student's main teacher as informants were used to assess overall social, emotional and behavioral functioning [Behavior Assessment System for Children Second Edition: BASC-2], attention and impulsivity issues [Conners-3] and executive functioning [Behavior Rating Inventory of Executive Function: BRIEF]. [NT 29-30, 39-41, 195-196, 208, 230; S-3, P-3, P-5]
10. Mother is familiar with the rating scales given her profession⁴. The Parents did not question the validity of or use of the rating scales at the time they signed the PTE or when they received the scales to complete. [NT 230]
11. In addition to the Parents and Student's teachers the District's evaluation team was composed of properly credentialed staff including a certified school psychologist, a certified reading specialist, and a licensed speech/language pathologist. [NT 20, 102, 157-158; S-10]
12. For purposes of the District's multidisciplinary evaluation nationally normed standardized tests were administered directly to Student by the certified school psychologist, the certified reading specialist and the licensed speech/language pathologist as follows: Cognitive [Wechsler Intelligence Scale for Children Fourth Edition: WISC-IV], Academic Achievement [Wechsler Individual Achievement Test Third Edition: WIAT III], Reading and Writing [Quick Phonics Screener, Graded Word List on the Critical Reading Inventory, Oral and Silent Reading on the Critical Reading Inventory, Writing Sample⁵] and Speech/Language [Clinical Evaluation of Language Fundamentals Fourth Edition: CELF 4, Social Development Test]. [NT 27-29, 114, 159, 169; S-3]

⁴ Mother is a special education professional. [NT 183]

⁵ The Writing Sample is not a nationally normed standardized test. However the sample was scored based on the five areas [focus, content, organization, style, and conventions] assessed on the Pennsylvania State Assessment System. [NT 123]

13. The psychologist and the speech/language pathologist used instruments in accord with the purpose for which the tests were designed.⁶ [NT 29, 160]
14. The psychologist and the speech/language pathologist administered and interpreted these tests following the instructions for administration and interpretation by the test publishers.⁷ [NT 28, 160]
15. The assessment data that was collected for the evaluation supported the primary classification of Other Health Impairment based on ADHD and the secondary classification of Speech or Language Impairment. [NT 34-35, 98, 161; S-3]
16. Although a classification of Emotional Disturbance was considered it was rejected because among other criteria Student does not currently meet a key component for the IDEA classification, the duration of the behavior or symptom for “a long time”. [NT 42-43]
17. The mother’s description of Student as being “happy”, “affectionate” and “easygoing” as well as “getting along with everyone” and always wanting to go out and play with friends lends support for the elimination of Emotional Disturbance at this time. [NT 181-182, 206; S-11]
18. Although the classification of Learning Disability was considered, Student’s functioning on cognitive/academic achievement assessment components of the evaluation as well as on periodic classroom progress monitoring does not currently support this classification. All Student’s areas of academic functioning were in the average range on nationally normed standardized testing. Student did not show functioning significantly below age/grade levels based on developmental expectations. [NT 44-46, 62-65, 71-72, 147-149; S-3, S-9]
19. The Parents disagree with the District’s conclusion that Student has an Other Health Impairment due to ADHD; they believe that Student may have a learning disability, and they also believe that the ER “didn’t flow very well” and therefore would not “be able to drive a really good IEP for [Student]”. [NT 202, 204, 207, 232]
20. The Parents agree that Student has a Speech or Language impairment. However, they believe that Speech or Language Impairment should be the primary disability rather than the secondary disability. [NT 232]
21. The Parents and their advocate believe that the ER did not provide enough information. The Parents would like to take the ER and get a more comprehensive report to tell them exactly where it is that Student needs the most help so they can get Student those interventions. [NT 204, 216, 221-222]

⁶ The reading specialist was not questioned about this point. Nothing in the record suggests that her answers would have been different from those given by the other two professionals.

⁷ See above footnote.

22. On April 25, 2014 Parents requested an IEE at public expense, specifically a neuropsychological evaluation and a speech/language evaluation. [S-4]
23. The District declined the Parents' request and filed a due process hearing request on May 8, 2014 to defend its evaluation. [NT 218; P-9]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the District asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); see also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). I found the personnel of the District to be knowledgeable in their areas of expertise, noted that they refrained from speculation and from going beyond their areas of expertise and also noted that they were respectful under cross-examination, being able to disagree without rancor. Accordingly I accorded significant weight to their testimony. Given that the mother was participating as a parent and not as a special education professional I did not expect her to be objective, but I could not credit her testimony with weight of any significance as it provided no compelling evidence that the ER did not meet the requirements of the IDEA. Although there are good advocates in the community and they often provide valuable information at due process hearings, I found the testimony of the educational advocate/consultant in this matter to be unreliable and if anything to detract from the Parents' case. First of all, her justification for putting herself out as an advocate based on her claim to have over 13 years of experience as a special education teacher was shredded when her actual work experience was probed. With no relevant professional credentials in the mental health field she presumed to opine on a comparison of the latest version of the Diagnostic and

Statistical Manual of Mental Disorders of the American Psychiatric Association with the previous version⁸. Never having administered the standardized cognitive, academic achievement, or speech/language tests the District used with Student she ventured to opine about their usefulness in assessing Student. In combing through her direct and cross examinations I did not find any information I could deem to be reliable and therefore could not credit her testimony with any weight. [See Volume II of transcript]

Independent Educational Evaluations at Public Expense: Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “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...” 34 C.F.R. § 300.502(b)(1). “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 public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

“If a parent requests an independent educational evaluation, the public agency may ask for the parent’s reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.” 34 C.F.R. § 300.502(b)(4). A hearing officer may order an independent evaluation at public expense if the district cannot “show that its evaluation is appropriate. See *Jack B. v. Council Rock Sch. Dist.*, Civ. A. 06-1968, 2008 WL4489793, E.D. Pa. (2008).

Standards for Evaluations: The purpose of an initial evaluation is to determine whether the child meets any of the criteria for identification as a “child with a disability” as that term is defined in 34 C.F.R. §300.8, as well as to provide a basis for the contents of an eligible child’s IEP, including a determination of the extent to which the child can make appropriate progress “in the general education curriculum.” C.F.R. §§300.8, 300.304(b)(1)(i), (ii).

The general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The District is required to 1) “use a variety of assessment tools”; 2) “gather relevant functional, developmental and academic information about the child, including information from the parent”; 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; and 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3).

In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently

⁸ DSM-5 vs. DSM-IV

comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child’s educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2). 305(a)(1),(2).

Once the assessments are completed, the qualified district professionals and the child’s parents determine whether the child is a “child with a disability” and the child’s educational needs. 34 C.F.R. §300.306(a). In making such determinations, a district is required to: 1) “Draw upon information from a variety of sources,” including those required to be part of the assessments, and assure that all such information is “documented and carefully considered.” 34 C.F.R. §300.306 (c)(1).

Specific Learning Disabilities: Special rules apply when evaluating students with specific learning disabilities. IDEA regulations at §300.309 and §300.310 specify when determining the existence of specific learning disabilities: (a) The group described in § 300.306 may determine that a child has a specific learning disability, as defined in § 300.8(c)(10), if—(1) The child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards: (i) Oral expression.(ii) Listening comprehension.(iii) Written expression. (iv) Basic reading skill.(v) Reading fluency skills.(vi) Reading comprehension.(vii) Mathematics calculation.(viii) Mathematics problem solving. (2)(i) The child does not make sufficient progress to meet age or State-approved grade level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child’s response to scientific, research-based intervention; or (ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305; and (3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of—(i) A visual, hearing, or motor disability; (ii) Mental retardation; (iii) Emotional disturbance; (iv) Cultural factors; (v) Environmental or economic disadvantage; or (vi) Limited English proficiency. (b) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§ 300.304 through 300.306— (1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified

personnel; and (2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents. When determining the existence of a specific learning disability, a district must conduct an observation of the child according to § 300.310: (a) The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty. (b) The group described in § 300.306(a)(1), in determining whether a child has a specific learning disability, must decide to— Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or (2) Have at least one member of the group described in § 300.306(a)(1) conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with §300.300(a), is obtained.

Discussion

An evaluation is the initial first step in conferring special education eligibility, and if a child is found eligible the evaluation provides a blueprint for developing the child's individualized educational program [IEP]. Periodic re-evaluations are necessary to establish a child's continued eligibility for special education. Given the crucial role of evaluations as the gateway to special education, the standards to be met in order for an evaluation to be deemed "appropriate" are far from minimal. Rather, the IDEA sets forth a comprehensive set of requirements that an evaluation of a child with a disability must fulfill.

Parental disagreement with an evaluation's methodology and/or conclusions is not evidence that an evaluation is inappropriate. Further, the IDEA provision that opens the door to parents' obtaining an independent evaluation at public expense does not confer the right to a "second opinion". Except in limited circumstances, only when an evaluation conducted by an LEA does not conform to the specific requirements of the IDEA may a hearing officer order an independent evaluation. Even if a hearing officer would have a professional disagreement with the conclusions of an evaluation, the evaluation must be deemed appropriate if it conformed in all respects with the requirements under the IDEA.

In the instant matter the District's evaluation met each aspect required by the IDEA as listed above. In fact the ER was exceptionally well done as judged by this hearing officer, a Pennsylvania licensed psychologist and a Pennsylvania certified school psychologist whose primary focus for many years was the evaluation and treatment of children ages two through seven. The Parents and their advocate are asking for an IEE to provide additional information through different instruments. No matter if an evaluation is completed by a school district or by a private practitioner, there are always additional tests that could have been chosen, and if the Parents wish to seek additional information privately they are free to do so, but not at public expense. The District's evaluation did

what it was supposed to do: it assessed Student in all areas of suspected disability, it found Student eligible for special education under the two classifications that at this time best fit the diagnostic picture, and it provided ample data upon which an appropriate IEP can be based. Accordingly the Parents' request for an IEE at public expense must be denied.

Order

It is hereby ordered that:

The District's evaluation of Student is appropriate under the IDEA.

The District is not required to fund an independent educational evaluation.

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

October 16, 2014

Date

Linda M. Valentini, Psy.D., CHO

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