

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.H.

ODR #15047 / 13-14-KE

Date of Birth:
[redacted]

Date of Hearing:
July 21, 2014

OPEN HEARING

Parties to the Hearing:
Parent[s]

Representative:
Pro Se

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

Scott Gottel, Esquire
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Media, PA 19063

Date Transcript Received:

July 25, 2014

Date of Decision:

July 26, 2014

Hearing Officer:

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

Background

Student¹ is a teen-aged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the classification of Other Health Impairment because of an Attention Deficit Hyperactivity Disorder.

The current matter concerns a due process request from the District in response to the Guardian's request for an Independent Educational Evaluation [IEE] at public expense. The Guardian filed a separate due process request alleging denial of FAPE.² Although the matters were initially consolidated, rather than have the IEE complaint decided later along with the FAPE complaint the hearing officer offered, and the parties agreed upon, a separate abbreviated final written decision on the IEE complaint. The parties were also offered the opportunity to receive the hearing officer's determination immediately rather than wait for the abbreviated decision and they accepted this offer whereupon an order was issued on the record.

Prior to commencing the hearing two threshold matters were addressed, the District's alleged failure to provide the Guardian with Student's complete educational records and the limitations period for the due process complaint filed by the Guardian.³

Records: After taking testimony from the Guardian and the Director of Special Education, the hearing officer determined that copies of test protocols would not be provided directly to the Guardian unless she designated properly credentialed professionals to receive the copies. In lieu of this process, the appropriate District personnel were required to remain at the hearing location and go over the protocols with the Guardian in detail. Testimony from the Director of Special Education credibly established that she personally searched for any and all additional records that might be in the District's possession and found none. She testified that past information that was electronically posted on the Parent Portal was no longer available, as that information is updated on an ongoing basis. This witness also credibly testified that AIMS Web and MCAP raw data was not able to be located but that any information regarding these progress monitoring/assessment tools would be in the IEP. Weekly Social Skills Training reports, if they exist, were not able to be located, and the staff person responsible for providing that training did not respond to an email or a voicemail request from the Director of Special Education. A subpoena will be issued to that individual requiring production of records or testimony as why records do not exist. Finally, explanatory information about the Tiers Program was copied and provided to the Guardian at the hearing; it is noted that this is not part of Student's educational records but is made available on the District's website. [NT 15-27]

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 By mutual agreement of the parties that case will be heard after school begins in September. The case number for that hearing is ODR #15046/13-14-KE.

³ The issue was addressed in this session because, had time permitted, testimony on the FAPE complaint would have commenced according to the initial plan for consolidation of the complaints.

An evidentiary hearing was held regarding the limitations period governing the scope of the hearing on the Guardian's due process complaint. The hearing officer determined that neither of the two exceptions to the IDEA's two-year limitations period exists and made this ruling on the record. Therefore the period that will be addressed in the subsequent hearing regarding this Student will be from May 16, 2012 to the first hearing date in September 2014. [NT 27-60]

Issue

Did the District conduct an appropriate re-evaluation of Student?

Findings of Fact

1. Student is an eligible student and resides with Student's [family member] [hereinafter Guardian] within the boundaries of the District. Student experienced several changes in custody between the parents, and during this time the Guardian was an involved and supportive presence in the child's life. Student eventually came to live with the Guardian who received formal custody in January 2014. The District commenced the re-evaluation process shortly afterwards even though the triennial evaluation was not due until October 2014, given that Student's mother had kept Student from school for a period of time and Student had changed schools when moving between Student's parents' residences. [NT 27-60, 141-148; S-44]
2. The District psychologist who re-evaluated Student is appropriately trained and certified. She provided credible testimony that established that her portion of the re-evaluation was appropriate under all the requirements of the IDEA regarding testing and assessment. She provided credible testimony that outside evaluations and professional opinions were considered. She provided credible testimony that the evaluation results enabled the IEP team to develop an IEP⁴. [NT 66-110; S-41, S-46, S-52, S-53, S-54, S-62]
3. The District speech/language pathologist is appropriately trained and certified, and is qualified to understand and interpret speech//language test results. She testified credibly that she discussed the speech/language portion of the re-evaluation with the speech/language pathologist who completed the testing⁵. She testified credibly that the speech/language portion of the re-evaluation was appropriate under all the requirements of the IDEA regarding testing and assessment. [NT 110-126; S-52, S-56, S-61]

⁴ Insofar as the appropriateness of the IEP may be an issue at the subsequent hearing I do not reach any conclusion here as to whether or not the IEP is appropriate.

⁵ The speech/language pathologist who completed the testing is no longer with the District, having just accepted a position in the Hawaii School District.

4. The District occupational therapist who re-evaluated Student is appropriately trained and certified. He provided credible testimony that established that his portion of the re-evaluation was appropriate under all the requirements of the IDEA regarding testing and assessment. He provided credible testimony that outside evaluations and professional opinions were considered. [NT 127-135; S-41, S-52]
5. The District's special education teacher who conducted curriculum-based assessments and administered standardized achievement testing is appropriately trained and certified to conduct these types of assessments. She was Student's special education teacher in the school year just ending. She provided credible testimony that established that the academic achievement assessment portion of the re-evaluation was appropriate under all the requirements of the IDEA regarding testing and assessment. [NT 137-138, 157]
6. The District's special education teacher who conducted curriculum-based assessments and administered standardized achievement testing also conducted the Functional Behavioral Assessment. She is certified in special education and elementary education, and has a permanent pending reading specialist certification. She was hired as a Behavior Consultant by the District's former Director of Special Education and in the District has worked with the emotional support teams providing social skills groups and assisting teachers with Token Economy programs. She has done FBAs and assisted in writing behavior support plans. [NT 137-138]
7. The individual who conducted the FBA had field experience in college working with emotionally disturbed children. Nine years ago prior to the start of the school year she was trained on doing FBAs by "a panel of people" in the District that she could not recall. She had no prior coursework in behavior analysis or behavior modification, having majored in special education and minored in elementary education. [NT 139-140]
8. For purposes of the FBA the special education teacher conducted a brief series of one to one- and- a- third minute observations totaling 380 seconds and did a 20-minute observation in the reading class. She "popped in" to classes on three occasions for 10-15 minutes per occasion. She did not use any formal observation instruments, nor did she make real-time comparisons with peers during the observations. She failed to note that Student had a medical condition [ADHD] when considering Student's status for purposes of the FBA. [NT 153-15, 163-164, 169-172; S-51]
9. The FBA did not focus on the areas of concern expressed by the Guardian, specifically those behaviors that resulted in disciplinary actions. [NT 164-167, 173-174; S-51]

Discussion and Conclusions of Law

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). In this matter there were no credibility issues – all witnesses appeared to be testifying honestly and candidly.

Independent Educational Evaluations: 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).

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). Although the IDEA obligates a local educational agency to conduct a "full and individual initial evaluation ..." [20 U.S.C. §1414(a)(1)(A)], there is

less specificity regarding reevaluation. C.F.R. §§ 300.304 – 300.305. As part of any reevaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). Evaluation procedures must be sufficient to “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). *Brett S. v. West Chester Area School District*, No. 04-5598 (E.D. Pa., March 13, 2006). The IDEA requires utilization of assessment tools and strategies aimed at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. 20 U.S.C. §1414(b)(3)(A)(ii). The evaluation must be “sufficiently 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). If additional data from testing is utilized in a reevaluation, then that portion of the reevaluation must comport with the requirements set forth in 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3) [instruments must be technically sound] and 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1) [instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher].

The agency must utilize information provided by the parent that may assist in the evaluation including a review of relevant records, evaluations or other information provided by the parents. 20 U.S.C. §1414(b)(2)(A); 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i); 34 C.F.R. §300.305(a)(1)(i). If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. 300.503(c). The persons who review assessment information and complete the report must be qualified professionals who, with the parent, determine the educational needs of the child. 34 C.F.R. § 300.306.

Conclusion: As required under the IDEA, as the Guardian asked for an independent educational evaluation the District requested a due process hearing to establish the appropriateness of its re-evaluation. Based upon the testimonial and documentary evidence presented at the hearing I find that the District’s evaluation is appropriate under the IDEA in all respects except for the Functional Behavioral Assessment. The District will be ordered to conduct or procure a Functional Behavioral Assessment by an individual appropriately trained as a Behavior Specialist to conduct such an assessment.

Order

It is hereby ordered that:

1. The District's re-evaluation is appropriate in all respects except the Functional Behavior Assessment.
2. By November 3, 2014 the District is required to have conducted or procured a Functional Behavior Assessment by an individual appropriately trained as a Behavior Specialist to conduct such an assessment.

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

July 26, 2014

Date

Linda M. Valentini, Psy.D., CHO

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