

*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

Child's Name: N.H.

Date of Birth: [redacted]

Dates of Hearing: 7/30/2015

### CLOSED HEARING

ODR File No. 16008-14-15 KE

Parties to the Hearing:

Representative:

Parents

Parent[s]

Parent Attorney

None

Local Education Agency

Mount Lebanon School District

7 Horseman Drive

Pittsburgh, PA 15228-1107

LEA Attorney

Patricia Andrews, Esquire

Andrews & Price

1500 Ardmore Boulevard

Suite 506

Pittsburgh, PA 15221

Date Record Closed:

August 4, 2015

Date of Decision:

August 29, 2015

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a mid-teenaged student in the Mt. Lebanon School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parents filed a due process complaint against the District under the IDEA and Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> asserting that it denied Student necessary accommodations on standardized tests administered for students with Limited English Proficiency (LEP) and English Language Learners (ELL), resulting in the requirement that Student receive English as a Second Language (ESL) services.

Following denial of the District's Motion to Dismiss, the case proceeded to a due process hearing which convened over a single session.<sup>4</sup> The hearing addressed the sole issue presented that related to Student's special education program; the scope of the hearing, on Motion of the District, was limited to the time period of March 2013 through the present. For the reasons that follow, I find in favor of the District.

### **ISSUE**

Whether Student was provided with all necessary accommodations and/or modifications in the District's assessment of Student's need for ESL services during the relevant time period?

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. Although Student's Mother was the parent primarily in communication with the District for the relevant time period and was the participant at the due process hearing, the plural Parents is used where it appears she was acting on behalf of both Parents.

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

<sup>3</sup> 29 U.S.C. § 794.

<sup>4</sup> The hearing records for Student and a sibling were consolidated.

## **FINDINGS OF FACT**

1. Student is a mid-teenaged student who is eligible for special education. Student is a resident of the District. (Parent Exhibit (P-) 17)
2. Student was first registered in the District in August 2011. At that time, the Parents expressed concerns about Student receiving ESL services, believing that Student did not need them. Those concerns continued through the date of the due process hearing. (N.T. 63, 214-17; P-3)
3. Pennsylvania utilizes the WIDA Consortium<sup>5</sup> program of assessment and instruction for ESL students. (N.T. 86-87)
4. The District, through the local Intermediate Unit (IU), assesses students for ELL needs with the WIDA Access Placement Test (hereafter W-APT), and for ESL programming annually using the WIDA ACCESS for ELLs English Language Proficiency Test (hereafter WIDA). (N.T. 51-52, 120)
5. The District has an ESL coordinator who oversees the needs of students in its ESL program, including scheduling assessments for ELL students. The ESL coordinator is provided the results of all assessments and provides those to the parents and teachers. Pennsylvania Department of Education (PDE) criteria are used to determine whether students qualify for ESL services. (N.T. 51-52, 120, 178)
6. Part of the process of enrolling a student in the District is completion of a Home Language Survey. If any language other than English is noted on that Survey, the student is referred to the ESL program coordinator. (N.T. 65, 100)
7. Based on the Home Language Survey completed for Student, which indicated that Student's first language was not English, the District determined that Student should be tested using the W-APT. (N.T. 100-01; P-3)
8. Student and the family previously resided in another state where parents may opt out of ESL services. (N.T. 70)
9. Pennsylvania regulations do not permit parents to opt out of ESL services, although there is a provision for a religious exemption. (N.T. 70, 128-29; 22 Pa. Code §§ 4.4(d)(3), 4.26)
10. The publisher of the W-APT and WIDA limits accommodations that may be provided, but does permit additional accommodations that a state provides for its standardized testing, such as the Pennsylvania Statewide System of Assessment (PSSA). (N.T. 87-88, 123-24, 129)

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<sup>5</sup> According to its website, WIDA was originally an acronym but is no longer associated with the terms that previously formed its name. See <https://www.wida.us/aboutus/mission.aspx> (last visited August 27, 2015).

11. Student was first assessed by the IU using the W-APT at the start of the 2011-12 school year. The W-APT assesses four areas of proficiency: Listening, Speaking, Reading, and Writing. (N.T. 75-78, 94, 175, 177)
12. The test administrator used the script provided by the W-APT publisher for the four areas assessed. In addition to generally making sure a student is comfortable, she also provided general accommodations permitted by the W-APT at the time of that assessment: testing in a separate room, review of instructions and sample questions, and provision of as much time as the student needed to complete the test. (N.T. 75-80, 88, 90-94)
13. On the W-APT in 2011, Student did meet the criteria established by PDE for ESL services. Ten hours per week of ESL instruction at the beginning level was the recommendation. (N.T. 95-96; P-1 pp. 6-7; School District Exhibit (S-) 21)
14. The District conducted an evaluation of Student and issued an Evaluation Report (ER) in May 2012. The ER provided a summary of family, medical, and educational information provided, including previous evaluations. New data was obtained to clarify Student's need for ESL services versus a specific learning disability, and to assess social and behavioral functioning; classroom observations were also conducted. The ER concluded that Student was eligible for special education on the basis of a specific learning disability and other health impairment. (P-17)
15. Student's January 2013 IEP contains the following testing accommodations for state and local assessments: accompany oral directions with written directions; permit additional or extended rest breaks; increase test time; and test in separate room or small group. General program modifications and items of specially designed instruction related to assessments were for small group testing and extended time on assignments/tests/quizzes. (P-24)
16. Student's January 2014 IEP contains the following testing accommodations for state and local assessments: accompany oral directions with written directions; permit additional or extended rest breaks; increase test time; and test in separate room or small group. General program modifications and items of specially designed instruction related to assessments were for small group testing and extended time on assignments/tests/quizzes. (P-15)
17. At IEP meetings for Student in 2013 and 2014, there were discussions about accommodations for standardized testing, but no discussions about accommodations specific for ESL testing. (N.T. 188-89)
18. Student was administered the WIDA in 2013 and 2014. In 2014, the test administrator gave the test to Student in a separate room, one on one, and used the script provided by the publisher including reading the directions. Student was given as much time as Student needed to complete the test, and redirection and breaks as needed. (N.T. 148-51, 161-63; S-9, S-10)
19. The Parents were not contacted by the District or IU prior to any WIDA administration to Student. (N.T. 81-82, 156, 216-17)

20. The Parents requested that ESL services be eliminated for Student for religious reasons at the start of the 2014-15 school year, and the District accommodated that request. (N.T. 130, 232; P-5, P-11 p. 2; S-1)
21. Student was not provided with any ESL services during the 2014-15 school year. (N.T. 60-61, 130-31, 143-44, 146, 232)
22. Student has never met the criteria established by PDE for exiting the ESL program. (N.T. 128; P-10; S-8, S-9, S-10)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that 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). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses to be credible, testifying to the best of their recollection. In reviewing the record, the testimony of every witness and the content of each exhibit were considered.

## IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who are eligible for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324.

## Section 504 Principles

Generally speaking, the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Section 504 of the Rehabilitation Act of 1973 further prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise

qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

*Ridgewood* at 253.

### The Parents’ Claims

The sole issue that this hearing officer may resolve is whether the District provided Student with all necessary accommodations and/or modifications in the assessment of Student’s need for ESL services during the relevant time period. Review of the record compels the conclusion that it did.

School districts are required to provide ESL services to “each student whose dominant language is not English [.]” 22 Pa. Code § 4.26. This provision is not part of Chapter 14, which contains the regulations in Pennsylvania for implementing the IDEA. Nevertheless, ELL and LEP students who are also eligible for special education are further entitled to the protections of the IDEA and its implementing federal and state regulations, since those provisions apply to all children with disabilities. *See also generally* U.S. Department of Education *Questions and Answers Regarding Inclusion of English Language Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives* (DOE 2014); *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (DOE and DOJ 2015); Pennsylvania Basic Education Circular, *Educating Students with Limited English Proficiency (LEP) and English Language Learners (ELL)*, (PDE July 1, 2001). Those protections extend to assessment of students with LEP. 34 C.F.R. § 200.6.

Student’s IEPs for the relevant time periods include accommodations to be provided to Student for all state and local assessments, which would necessarily include administrations of the W-APT and WIDA. Each of those accommodations was provided to Student during the

relevant administrations of those specific assessments as among those which the publisher permits. Simply put, there is no evidence to suggest that Student was not provided with the accommodations specified in Student's then-current IEPs with respect to the W-APT and WIDA assessments. Moreover, review of the ER and the other testing accommodations provided as part of Student's general special education program do not reveal that any other accommodations were necessary in the administration of the W-APT and WIDA, such that the District would have failed to address all of Student's needs in that regard. Thus, I find no violation of the IDEA. For all of the same reasons, the Parents' related claim of discrimination under Section 504 must also be denied.

The Parents expressed several rather understandable concerns with the provision of the accommodations for Student's LEP assessments. First, they noted that the accommodations provided during W-APT and WIDA testing were not formally documented. (*See, e.g.*, N.T. 214, 219) While it may be helpful for parents to have written confirmation that specific accommodations were provided for their child, and the IEP team may wish to consider providing this information in the future, the Parents point to no such requirement for these particular assessments, and this hearing officer has located none. Next, they criticize the District for not ensuring that Student's ESL teachers were part of the IEP team. (N.T. 217-19) While it certainly would not be inappropriate to include a student's ESL teacher as part of an IEP team, and the guidance documents referenced above encourage that practice, again there is no such requirement either cited by the Parents or located by this hearing officer, nor is there any indication that the Parents asked for those individuals to be invited to a team meeting and were denied that request. Lastly, the Parents elicited testimony throughout the hearing that they were not informed of the WIDA assessments prior to their administration. While this advance notice



might also be appropriate and helpful, once again there has been nothing cited to suggest the District was remiss in failing to advise the Parents of those assessments in advance. Whether or not the Parents elect to permit Student to receive ESL services in the future, this hearing officer suggests that the team including the Parents consider whether such notice should be provided prior to the administration of specific assessments.

Two other matters merit final mention. The Parents raised questions about Student's progress with ESL services and the manner in which the Commonwealth of Pennsylvania administers its obligations to provide those services. (N.T. 220-25) Those matters are far outside the scope of this hearing and the authority of this hearing officer. Similarly, the Parents' concerns with events that are described in the 2012 ER (N.T. 225-26; P-17) provided some background information, but were not materially relevant to the issues identified prior to and at the beginning of the hearing. Accordingly, these particular contentions will not be discussed further.

### **CONCLUSION**

Based on the foregoing discussion, I conclude that the District did not fail to comply with its obligations under the IDEA or Section 504 with respect to the W-APT and WIDA assessments of Student during the time period at issue.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District did not fail to provide necessary accommodations in its administration of ESL/ELL/LEP assessments to Student, and it need take no action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: August 29, 2015