

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: Y.I.

Date of Birth: [redacted]

ODR No. 17333-15-16-KE

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Upper Darby School District
601 North Lansdowne Avenue
Drexel Hill, PA 19026

Date of Hearing:

Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Scott C. Gottel, Esquire
Holsten & Associates
One Olive Street, Su. 700
Media, PA 19063

March 31, 2016

March 31, 2016

April 20, 2016

William F. Culleton, Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is a resident of the District named in this matter (District), and is enrolled in the District, but is not yet in first grade. (NT 13-14; S 4.) Student is not identified as a child with a disability under either the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), or the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504). Parents have refused the District's request for their consent to an initial evaluation for special education. (NT 45-46; S 5, 6, 7.) The District has requested due process, seeking a hearing officer's authorization to evaluate Student without Parents' consent.

The hearing was conducted in one session on March 31, 2016, and the record closed on that date. I conclude that the District's request is reasonable, and I authorize it to proceed with an initial evaluation in the absence of parental consent.²

ISSUES

1. Did the District give adequate written prior notice to Parents of its intention to evaluate the Student, including procedural safeguards?
2. Should the hearing officer order that the District is authorized to evaluate the Student in accordance with its Prior Written Notice For Initial Evaluation and Request For Consent Form dated December 21, 2015, in the absence of parental consent?

¹ Student, Parents and the respondent School are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

² The IDEA allows a hearing officer to authorize an evaluation contrary to Parents' withholding of consent; nevertheless, the IDEA does not allow a hearing officer to authorize the District to implement any special educational services if Parents do not consent. Thus, my decision today does not affect whether or not the District will be able to provide special education services to Student.

FINDINGS OF FACT

1. Student entered a District program on the first day of school, September 9, 2015. Immediately, Student began to exhibit severe behavior dyscontrol, including elopement, which created serious safety concerns requiring frequent physical restraint by educational staff. Student's behaviors included aggressive behavior and property destruction, also raising safety concerns. Student's behaviors were considered atypical for Student's age and level of development, and are so considered at present. (NT 31-32, 65-70, 75-80, 92-93; S 1, 2, 4, 5, 6.)
2. Student speaks Parents' native language at home with Parents, and English at school. There is a need to assess Student's language functioning. (NT 58-59, 87-88.)
3. The District personnel who have made judgments about the need for evaluation of Student are experienced educators with advanced degrees in education and/or child psychology, and both have appropriate Pennsylvania certification to plan and implement regular and special education for young children like Student. (NT 25-26, 72-75.)
4. The District immediately created a behavior intervention plan for Student, to be delivered in the regular education setting under a response to intervention model. This intervention consisted of a behavior chart, and was considered a Tier II intervention. (NT 26-27, 78-80, 106-108; S 1, 2, 3, 5, 6.)
5. Student's behaviors did not change as a result of the Tier II intervention, and raised serious safety concerns that the District believed to require intervention at a Tier III level of intervention. The educators determined that this should include an evaluation to determine whether or not to offer special education services for Student. (NT 26-44, 78-80; S 2, 4, 5.)
6. On September 16, 2015, the District prepared to send a form to the Parents constituting a request for Permission to Evaluate, along with procedural safeguards notice. (NT 93-94; S 5, 6.)
7. On the same day, the District received notice that Student had suffered a serious injury in an automobile accident and would be educated on homebound status for several weeks. The District delayed requesting consent for evaluation until Student returned. (NT 29, 93-94; S 5.)
8. Student returned to school on November 30, 2015. Student began to exhibit behaviors similar to those observed in the beginning of the school year, raising staff concerns for Student's safety and educational progress. (NT 69-70, 80-85, 94-95; S 4a, 6.)
9. On November 30, 2015, District personnel attempted to notify Parents of their intention to seek consent for an initial evaluation; however Parents could not be reached by telephone. The school psychologist left a voicemail on that date, and sent the consent request form

home with Student. The form included a prior written notice and request for consent for initial evaluation, along with procedural safeguards. (NT 46, 94-95; S 1, 6.)

10. Parents did not return the consent form. The District's school psychologist and the school social worker conducted a home visit on December 2, 2015. Parents were not at home, and the forms were left in their mailbox. District personnel notified Parents by telephone voicemail that the forms had been left in the mailbox. (NT 95-96; S 1, 6.)
11. The request for permission to evaluate and enclosed procedural safeguards contained all pertinent information necessary to enable the Parents to provide informed consent to an initial evaluation, including information concerning the reason for the request for permission and the assessments and tests that the District proposed to administer to the Student. (NT 95-96; S 7.)
12. During December 2015, Student continued to exhibit behaviors raising concerns with regard to the necessity of restraints, safety, aggression, disruption and property damage. Counting from the beginning of the school year, Student accumulated 31 behavior referrals, including aggressive behavior toward other students and staff, and elopement from the building. (NT 35-44; S 2, 4, 4a, 7.)
13. Student's behaviors have impeded Student's learning. (NT 33-34, 97-101.)
14. The District added additional interventions, including support from the school social worker, principal and school psychologist, as well as assigning a personal care assistant to Student. (NT 40-45; S 7.)
15. On December 21, 2015, the principal of Student's school and the school psychologist met with Student's mother to discuss the evaluation request. At that time they requested parent's signature on an updated Prior Written Notice For Initial Evaluation and Request For Consent Form dated December 21, 2015. (NT 45-46; S 7.)
16. Parents continued to decline to provide consent for an initial evaluation. (NT 95-97; S 7.)
17. In January 2016, Student was suspended twice for behavior in violation of the student code of conduct. (S 1, 4.)
18. Student's inappropriate behaviors, particularly elopement, reduced somewhat when the District introduced a teaching assistant to remain with Student on a one-to-one basis. However, many of Student's inappropriate behaviors continue at present. Moreover, a one-to-one assistant is not a regular education intervention, but requires an Individualized Education Program through special education to be appropriately implemented on a long-term basis. (NT 53-54, 97-98, 102-103.)
19. Student's inappropriate behaviors are not typical for a child of Student's age, grade or developmental level. (NT 105-106.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) 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 (which in this matter is the hearing officer). In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), an IDEA case, the United States Supreme Court held that the burden of persuasion is on the party that requests relief. 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. 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 this matter, the District requested due process and the burden of proof is allocated to the District. The District bears the burden of persuasion that its claims are true. If the District fails to produce a preponderance of evidence in support of its claims, or if the evidence is in “equipoise”, then the District cannot prevail.

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. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

GOVERNING LAW

The IDEA, 20 U.S.C. § 1414(a), requires local educational agencies to obtain informed consent from the parents prior to evaluating a child to determine whether or not the child is a child with a disability. 20 U.S.C. § 1414(a)(1)(D)(i)(I), 34 C.F.R. §300.300(a)(1). The notice required includes prior written notice of the intention to evaluate. 34 C.F.R. §300.300(a)(1), 300.503, 300.504. If parents refuse to consent to evaluation, the agency is allowed to request due process and seek an order of the hearing officer permitting it to conduct the evaluation. 20 U.S.C. §1414(a)(1)(D)(ii)(I), 34 C.F.R. §300.300(a)(3). 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).

APPROPRIATENESS OF THE DISTRICT'S REQUEST TO EVALUATE

I find that the District appropriately requested permission to evaluate the Student. The District provided a clear and thorough description of the evaluation it sought, and did so on numerous occasions. Therefore, a preponderance of the evidence of record shows that the Parents were provided with an opportunity to provide informed consent to an initial evaluation. The record also shows that their decision to revoke consent was based upon a conscious choice, as they expressed disagreement with the District concerning the need for evaluation.

I conclude that the District's desire to evaluate Student is appropriate, based upon a preponderance of the evidence. The testimony of the District's evaluators provides preponderant evidence that it would not be appropriate to simply explain the Student's behavior by attributing it to Student being immature or just being a young child who is learning how to behave slowly. District educators who are experienced and well educated in their professions were able to explain

that Student's behaviors were significantly out of the ordinary. They also showed by a preponderance of the evidence that Student was not able to receive all of the benefits of the education that the District offered, because of these continuing behaviors

Student's behaviors posed serious safety concerns as well. Student's habit of leaving the area without escort had placed Student in danger, and although reduced, these behaviors were not extinguished. Student's behavior of throwing things also could have injured other children and staff. Student had exhibited aggressive behavior toward children and adults. All of these behaviors at present are unpredictable.

Moreover, expert educators testified credibly that they could not get these behaviors under control unless they could better understand the cause or causes of the behaviors. There is no reason to doubt this testimony. District witnesses all testified in a forthright manner, without selling, and without any notable factual contradictions. These credible and reliable witnesses both stated that there is a need for evaluation.

Student's father testified, and, based upon his greater knowledge of the Student, he asserted that Student's behavior is not as bad as District documents indicate, and that Student is simply acting like a young child who has to learn to behave properly. On this basis, Student's father does not believe that an evaluation is necessary. Student's father also objected to the hearsay nature of the facts stated in the exhibits.

While I accept that a father is an expert on his child, in this matter, this does not contradict the conclusions of District educators, for two reasons. First, the educators are basing their conclusions upon what happens in school, and Student's father cannot be in school to contradict their testimony, backed up by extensive records, of what Student's behavior was like in school.

Second, the issue here is only about what is needed to educate Student, and the educators are in the best position to say what information they need for that purpose.

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 principal. The evidence is preponderant that the recommendation is the product of the professional judgment of the school psychologist and the principal. 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.

CONCLUSION

For the reasons set forth above, I find that the District has complied with the legal requirements for providing the Parents with an opportunity for informed consent, and appropriately seeks permission to evaluate. I further find it appropriate to enter an order permitting the District to complete its evaluation. I note, however, that this order runs only to the District and its personnel, authorizing them to proceed in accordance with the IDEA. I am not ordering the Parents or the Student to do anything.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District is authorized to evaluate the Student in accordance with its Prior Written Notice For Initial Evaluation and Request For Consent Form dated December 21, 2015, in the absence of parental consent.

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

William F. Culleton, Jr. Esq.

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

DATED: April 20, 2016