

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.T.

ODR #17560 / 15-16-KE

Date of Birth:
[redacted]

Date of Hearing:
April 22, 2016

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Pro Se

Chester Community Charter School
200 East 5th Street
Chester, PA 19013

Gabrielle Sereni, Esquire
Tracey Waldmann, Esquire
Raffaele & Puppio
19 West Third Street
Media, PA 19063

Date Record Closed:

April 25, 2016

Date of Decision:

April 25, 2016

Hearing Officer:

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

Background and Procedural History

Student¹ (Student) is an early elementary school aged student enrolled in the Charter School (School). At the Parent's request the School conducted an initial evaluation and found Student to be eligible for special education under the classification of Other Health Impairment (OHI). Subsequently the Parent requested an independent educational evaluation (IEE) at public expense because although she agrees that Student is eligible for special education she disagrees with the designated classification. Believing its evaluation to be appropriate the School declined the Parent's request and filed for this hearing as is required of an LEA when refusing a parental request for an IEE at public expense.

The hearing officer sent prehearing materials to the Parent and the attorney for the School, including a letter tailored to parents who are not represented by counsel and who did not file for the hearing. On several dates the School and the School's counsel sent correspondence about the hearing to the Parent by email and/or by US Mail but received no response from the Parent. A few days prior to the hearing the hearing officer twice emailed the Parent and counsel for the School checking on the status of the matter. The School's counsel responded but the Parent did not. [NT 4-5, 8-11; HO-1]² On the date and at the time of the hearing the Parent did not appear.

The following attempts to reach the Parent and ascertain her intent were made on the record prior to beginning the hearing: 1) An email to ODR and a phone call to ODR asking if the Parent had made any contact to indicate she could not attend. ODR responded by phone and by email that there had been no contact from the Parent; 2) Phone calls to three phone numbers the School supplied for the Parent [home, cell and work]. The call did not ring through on one number, a voicemail was left on another number, and the third number was not working at the time. Being unable to reach the Parent, the hearing officer conducted the hearing in her absence. [NT 5-8, 22, 25]

Shortly after the hearing ended on Friday the Parent called after receiving the message left on the voicemail and later in the day the hearing officer was able to speak with the Parent. The Parent indicated that she would check but couldn't say for sure if she received the emails that were sent, and supplied another email address to use for the transcript and the decision. The Parent was gracious and did not indicate dissatisfaction with the hearing having been held in her absence. The Parent contacted the hearing officer again on Monday to let her know that she checked her email account and definitely did not receive any emails from ODR, from the hearing officer or from the school. She was advised to acknowledge receipt of the transcript and the decision that would be sent to the new address she had furnished, and counseled that if she disagreed

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 NT refers to the Transcript; HO is a hearing officer exhibit, S is a school exhibit. There were no Parent exhibits.

with the decision she could file an appeal according to instructions that would be supplied.

Issue

Is Student entitled to an independent educational evaluation at public expense?

Findings of Fact

1. Student is currently in an elementary grade at the School. [NT 34]
2. According to the Evaluation Report (ER) the Parent requested an evaluation for Student because she was concerned about Student's academic progress. [S-5]
3. The School's psychologist recalled that Student was referred because of behavior issues. [NT 42]
4. For purposes of the evaluation, the School's psychologist gathered relevant functional, developmental and academic information about the child, including information from the Parent. She conducted a telephone interview with the Parent who shared that with the exception of delayed speech, early life events including pregnancy, birth, and developmental milestones were normal. [NT 23-24; S-5]
5. The Parent reported that Student is required to wear corrective lenses because Student's retinas are "diamond shaped" which affects the visual field. [S-5]
6. The Parent reported that because of delayed speech Student received speech/language services as a preschooler. [S-5]
7. The evaluation included review of existing evaluation data, specifically a March 12, 2014 evaluation completed through a mental/behavioral health facility by a doctoral level psychologist who diagnosed Student with Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder, and Conduct Disorder and a December 9, 2015 treatment plan for Wraparound services in the form of Behavior Specialist Consultant and Therapeutic Staff Support. [S-5]
8. The School's psychologist did not use a single assessment instrument, but rather used a variety of assessment tools: the Wechsler Intelligence Scales for Children 5th Edition (WISC V) to assess cognitive functioning; the Wechsler Individual Achievement Test 3rd Edition (WIAT III) to assess academic achievement; the Adaptive Behavior Assessment System 2nd Edition (ABAS:2) to assess adaptive functioning; and the Behavioral Assessment Scales for Children 2nd Edition

- (BASC II) to assess behavioral, social, and emotional functioning. [NT 25-33; S-5]
9. The assessment tools used for the evaluation were technically sound, research-based and well respected and reliable assessment instruments. [S-5]
 10. The School's psychologist was trained in the administration and interpretation of the instruments she used, by virtue of her education and certification as a school psychologist. Additionally her many years of experience working with younger children made her particularly qualified to evaluate this young child. [NT 36-40]
 11. The School's psychologist administered the tests to Student in accordance with the instructions provided for the assessments. [NT 40]
 12. The evaluation included classroom-based and teacher observations and assessments. These included report card grades, results of the DIBELS assessment and a teacher narrative listing strengths and weaknesses in the areas of reading, math, writing and behavior. [NT 24; S-5]
 13. The School's psychologist, taking the available data into consideration, found Student to have the disability of Other Health Impaired (ADHD) and to require specially designed instruction through special education programming. [S-5]
 14. The evaluation did not include a speech/language evaluation, an assessment of visual/fine motor integration, or an occupational therapy evaluation. [S-5]
 15. The Parent checked that she agreed with the evaluation. [S-5]
 16. Following completion of the initial evaluation the School offered Student an IEP dated February 1, 2016. [S-8]
 17. The School issued a Notice of Recommended Educational Placement [NOREP] on February 1, 2016 proposing to initiate itinerant learning support services for math and writing in the regular education classroom and to provide counseling twice a month for 30 minutes per session. [S-4]
 18. The Parent did not support the recommendation, noting on the NOREP: "My [child] based on evaluation report is below average academically with a very low IQ. I believe [Student] has a cognitive disability which is not being focused on in [Student's] IEP. [S-4]
 19. The IEP is not being implemented as the Parent has not approved the NOREP. [NT 42, 52]

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 School 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). There were no issues concerning credibility of the two witnesses who participated in the hearing.

Charter Schools: 22 Pa Code § 711.3(b)(26) incorporates 34 CFR 300.501—300.508, the IDEA's implementing regulations covering evaluations, reevaluations, and independent evaluations.

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).

The general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The public agency 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; 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 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 public agency professionals and the child’s parents determine whether he/she is a “child with a disability” and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, a public agency 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).

There is a two-pronged test for eligibility for special education under the IDEA. To be eligible for special education services and entitled to an IEP, the IDEA requires that a child be determined to have at least one of the disabilities identified and defined by the Act, and by reason thereof need special education and related services. 34 C.F.R. §300.8(a). If a child has a disability but does not need specially designed instruction and

services to access the general education curriculum the child is not eligible under the IDEA.

Discussion

The inquiry when the hearing issue is an LEA's denial of a parental request for an independent educational evaluation is whether the LEA's evaluation met the standards for appropriateness set forth in the IDEA. It is important to understand that parental disagreement with an evaluation's conclusions is not evidence that an evaluation is inappropriate; parental disagreement with supported conclusions is irrelevant to the inquiry. If this were not the case, parents could defeat any LEA's defense of its own evaluation by simply disagreeing with the outcome. Further, the inquiry is not even whether or not a hearing officer agrees with the LEA's evaluation results. Provided that an LEA conducted its evaluation under IDEA standards and supported its conclusions with data derived from properly administered assessments the evaluation must be deemed appropriate.

If the LEA's initial evaluation serves the purposes of determining whether a child meets any of the criteria for identification as a "child with a disability" as that term is defined in the implementing regulations of the IDEA, and determining whether by virtue of that disability the child requires specially designed instruction to make appropriate progress in the general education curriculum, and, if the child is eligible, providing information to inform the IEP team of the child's educational needs, then that evaluation is appropriate.

In this case the School's psychologist was a trained professional who used a variety of assessment tools that were technically sound and administered in accordance with the instructions given by the test publishers. She gathered relevant functional, developmental and academic information about Student including information from the Parent. She gathered information from the teacher that included classroom assessment scores and anecdotal descriptions. She reviewed information from other sources, namely the evaluation and the treatment plan from the behavioral health agency. Her evaluation provided the data necessary to determine whether Student had an IDEA-defined disability and whether Student needed specially-designed instruction. The evaluation was appropriate under the IDEA in those respects.

However, it is of concern that given Student's history of having received speech/language services in preschool the School did not conduct a speech/language assessment as part of its initial evaluation. It is also of concern, given that Student wears glasses and given the Parent's layperson description of Student's visual situation, the evaluation did not include an assessment of visual/fine motor integration nor an occupational therapy evaluation. These omissions are significant because they leave other areas of suspected disability unexplored and because data from these assessments could be expected to contribute toward a more robust IEP. I find therefore that all areas of suspected disability were not assessed and that as a result the evaluation was not able to fully inform the IEP team of Student's educational needs. Both a speech/language evaluation and an occupational therapy evaluation will be ordered as will a consultation between the School and Student's ophthalmologist.

The Parent disagrees with the School on the issue of Student's classification, believing on the basis of IQ score that her child has an intellectual disability. Notably Student also has low adaptive functioning skills. Reviewing the data at her disposal, the School's psychologist made a difficult call and although arguably she could have decided to classify Student as having an intellectual disability she did not, as Student's success in the area of reading weighed against that finding at this time. Given that the School's psychologist was in the position of making that close call in the case of this young child, a prudent approach will be to conduct a full reevaluation of Student in two years instead of the usual three so that the IEP team can assess if the current classification remains appropriate.

The School filed for this hearing to defend the appropriateness of its evaluation but the School also entered the proposed IEP into the record. Given that the IEP was made part of the record before me I cannot ignore that piece of evidence, especially as the IEP's contents were relevant to the Parent's concerns. Given Student's very significant difference between good reading skills and very poor math and writing skills, I believe that it will be very difficult if not impossible to address Student's need for specially designed instruction in math and writing in the regular education classes. Moreover the IEP goals for math and writing are inappropriate in that they do not have baselines and are overly broad. I also find that the proposal for 30 minutes of counseling twice a month (presumably once every two weeks) is insufficient in frequency given the Student's young age. The IEP team will be ordered to address these concerns when it meets to incorporate any goals and specially designed instruction that may flow from the speech/language evaluation, the occupational therapy evaluation and/or the ophthalmologic consultation.

Order

It is hereby ordered that:

1. The Parent's request for an independent educational evaluation at public expense is denied.
2. No later than forty-five calendar days from the date of this decision the School shall complete a speech/language evaluation of Student to determine if there are needs in this area that must be addressed in the IEP.
3. No later than forty-five calendar days from the date of this decision the School shall complete an occupational therapy evaluation, including an assessment of Student's visual/fine motor integration, to determine if there are needs in this area that must be addressed in the IEP.
4. Within ten calendar days of the date of this decision the Parent shall sign the appropriate consent for the School to communicate with Student's ophthalmologist to determine what school-based accommodations should be

- added to the IEP's specially designed instruction to address Student's visual difficulties.
5. No later than 60 calendar days from the date of this decision the School must convene an IEP team meeting to consider the appropriate delivery, including location, of specially designed instruction for math and writing; the frequency and amount of counseling services; recommendations from the speech/language evaluation; recommendations from the occupational therapy evaluation; and, recommendations obtained from Student's ophthalmologist.
 6. The School shall conduct a full reevaluation of Student and present the written reevaluation report to the Parent two years from the date of the initial evaluation, i.e. prior to January 4, 2018.

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

April 25, 2016

Linda M. Valentini, Psy.D., CHO

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