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

OPEN HEARING

ODR File No. 19053-1617KE

Parties to the Hearing	Representative
Parent	*Pro se*
Parent[s]	

Local Educational Agency	LEA Attorney
School District of Philadelphia 440 N Broad Street Philadelphia, PA 19130	Andrea Cola, Esq. Office of General Counsel 440 N Broad Street, Suite 313 Philadelphia, PA 19130

Child's Name: J.A.

Date of Birth: [redacted]

Dates of Hearing: 06/30/2017, 07/17/2017, 07/18/2017, 07/19/2017

Date of Decision: 08/07/2017

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction

This special education due process hearing concerns the education of a student (the Student), who is a student in the School District of Philadelphia (the District).[1] The District is the Student's Local Educational Agency (LEA). The District wants to conduct an educational reevaluation of the Student. The Student's grandparent (the Grandparent) has withheld consent for the District to conduct the reevaluation. The Grandparent is the Student's legal guardian, and has all the same rights as a parent for purposes of this hearing. The District requested this hearing to conduct the reevaluation without the Grandparent's consent. The District also seeks an order permitting it to change the Student's placement while that evaluation is pending.

The Grandparent also requested a due process hearing against the District. The Grandparent alleges that the District discriminated against the Student based on the Student's disability. The Grandparent also alleges that the District retaliated against the Grandparent and the Student because the Grandparent advocated on behalf of another student. The Grandparent's complaint (ODR No. 19171-1617KE), was heard on a single record with this case. Although I must issue separate decisions for each complaint, there is overlap between the findings and analysis in each case.

As discussed in greater detail below, this matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

Issues

1. May the District reevaluate the Student?

2. May the District change the Student's placement while a reevaluation is pending?

Findings of Fact

All evidence presented in this case was carefully considered. I make findings of fact, however, only as necessary to resolve the issues before me. Consequently, not every piece of evidence is referenced in the findings below.

1. Both parties agree that the Student is a "child with a disability," as that term is defined in the IDEA at 20 U.S.C. § 1401(3).

2. In a prior evaluation, the Student was found eligible to receive special education as a student with Other Health Impairment (OHI) based on an Attention Deficit Hyperactivity Disorder (ADHD) diagnosis and symptoms. S-6, P-1, P-3, P-5.

[1] Identifying information is omitted to the extent practicable.

3. Before the 2016-17 school year, the Grandparent and the District signed a settlement agreement. As part of that agreement, the Student transferred school buildings within the District.

4. Before the 2016-17 school year, a Positive Behavior Support Plan (PBSP) was drafted for the Student. The PBSP was distributed to teachers either in advance of the 2016-17 school year, or as the 2016-17 school year was starting. P-3

5. The PBSP included a provision under which the Student would be detained in school after the school day to complete any unfinished class work. The Student's new school could not offer that accommodation. *See* NT 148.

6. At the start of the 2016-17 school year, the Student showed symptoms that are generally considered to be consistent with ADHD. The Student appeared to be distracted, and was occasionally out of the Student's chair. District personnel also observed poor social interactions between the Student and other students. NT *passim, see e.g.* NT 586-588.

7. As the 2016-17 school year progressed, the Student's behaviors escalated, both in frequency and intensity. The Student became verbally aggressive towards teachers and other students, and would use profanity. *See e.g.* P-6, P-7, P-8, P-24. The Student would also destroy property and jump off furniture. NT 588. The Student also became physically aggressive on occasion, and would sometimes elope both from the classroom and from the school building. *See e.g.* NT 84-85. The Student also exhibited problematic behaviors on the school bus. S-17

8. Parents of other students reported that the Student was bullying other students. S-15.

9. During the 2016-17 school year, the Student was referred for crisis intervention on three separate occasions. On each of these occasions, District personnel perceived the Student as being a threat to the Student's own self or others, and were unable to deescalate the Student's behaviors. NT *passim, see e.g.* 80, 109, 205, 209, 343, 439, 441.

10. During the 2016-17 school year, the Student was supported by Therapeutic Support Staff (TSS). A third-party agency provided one-to-one (1:1) support to the Student for most of the school day. It was not the TSS worker's job to instruct the Student. The TSS worker was not effective in reducing the frequency or intensity of the Student's behaviors, or in deescalating the Student after a behavioral incident. NT 564.

11. The District documented the Student's behaviors using behavioral charts that complement the Student's PBSP (P-11, S-18), disciplinary referral forms (S-16), bus incident reports (S-17), and bullying complaints (S-15). These documents contain many sloppy errors. Some papers that purport to describe the Student's behaviors in school

are dated on weekends. Some forms are completed in such a way that suggests the Student was in a class during days that class did not convene.

12. Overall, the District's documentation of the Student's behaviors is accurate. Errors in the documents are likely attributable to carelessness, but are not attributable to malice. Taken as a whole, the District's documentation paints an accurate picture of the escalating frequency and intensity of the Student's behaviors.

13. On September 27, 2016; October 11, 2016; and October 18, 2016, District personnel observed the Student and used those observations, teacher input, and information from prior testing to draft an FBA. P-6. The FBA's date of creation is November 1, 2016.

14. Two additional, substantively identical FBAs are dated November 15, 2016, and November 21, 2016. P-7, P-8. These documents were generated because the District's IEP management software creates a new document with a new date if the document is altered. The FBA's form was edited on both November dates. No changes were made to the FBA's substance. *See also* NT 375.

15. The Student's IEP team met in November 2016, around the time that the Student's behaviors started to escalate. During that meeting, the team discussed the current school's inability to detain the Student after the school day. The District also proposed providing cab service, since the Student's behaviors on the school bus had escalated. The team also discussed adding 1:1 support to the Student's IEP.

16. The November 2016 IEP team meeting did not yield changes to the Student's IEP. The after-school detention clause, however, was removed from the Student's PBSP.[2] S-6.

17. After the November 2016 IEP team meeting, the Student's behaviors continued to escalate, as found above. By this point, the school counselor and the school principal were routinely called to help deescalate the Student. This happened with such frequency that the school principal became a *de facto* 1:1 aide for the Student whenever the Student needed de-escalation – which was sometimes daily. S-24.

18. The Student's school building houses an Autistic Support classroom and a sensory room used primarily by students who receive autistic support. It is not clear if the sensory room is directly connected to the Autistic Support room, but the sensory room contains equipment that helps students calm down. *See, e.g.* NT 427.

[2] The Grandparent contends that by removing the after-school detention clause from the PBSP, the District unilaterally changed the Student's placement without consent. That issue is not before me. Regardless, the Grandparent had actual, contemporaneous knowledge that the Student was never held after school during the 2016-17 school year, and that the school had no ability to do so.

19. District personnel would bring the Student to the Autistic Support classroom or the sensory room to help the Student calm down. The Student received no academic instruction in the Autistic Support room, but using the sensory equipment helped deescalate the Student. The Student also had positive interactions with District personnel and other students in the Autistic Support classroom. *See, e.g.* NT 70-74.

20. The frequency with which the Student was brought to the sensory room or the Autistic Support classroom was not documented.

21. The Student's IEP team reconvened in February 2017. At that time, the District personnel on the IEP team believed the Student's needs were not being appropriately met in the Student's placement. The District recommended changing the Student's placement to Emotional Support at a supplemental level as a mechanism that would make more supports available to the Student. S-14. The District also recommended an educational reevaluation, including a Functional Behavioral Assessment (FBA), academic testing, behavioral assessments, and a review of records. S-8.

22. After the February 2017 IEP team meeting, the District issued a proposed IEP that changed the Student's placement to Emotional Support at the supplemental level, and a revised PBSP. S-14. The primary substantive difference in the proposed IEP is the inclusion of 1:1 support (provided by the District, not TSS). The District also issued a Permission to Reevaluate (PTRE) form, seeking the Grandparent's consent to reevaluate the Student. S-8.

23. The District scheduled a meeting with the Grandparent to discuss the documents issued after the February 2017 IEP team meeting. The meeting was canceled because the District had a snow day that day. The meeting was rescheduled, and then canceled by the Grandparent for an emergency. S-11, S-12, S-13.

24. On March 8, 2017, the Grandparent rejected the District's proposed placement and affirmatively denied consent for the District to conduct the proposed evaluations. S-8. Around the same time, the Grandparent refused a third attempt by the District to reschedule a meeting to discuss the District's proposals.

Legal Principles and Discussion

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise.

See N.M., ex rel. M.M. v. The School Dist. of Philadelphia, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the District is the party seeking relief and must bear the burden of persuasion.

Credibility

Hearing Officers are 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 no significant credibility issues with any of the witnesses. Although I disagree with the Grandparent's assessment of the evidence in this case, I perceive that the Grandparent believes everything that she said under oath. I give more weight to the testimony of the educational professionals who worked with the Student. Their testimony, particularly regarding their failed efforts to address the Student's behavior, was candid and un-embellished.

The District was Obligated to Request Consent for a Reevaluation

The IDEA requires LEAs to "ensure that a reevaluation of each child with a disability is conducted … if the [LEA] determines that the educational or related services needs,[3] including improved academic achievement and functional performance, of the child warrant a reevaluation…" 20 U.S.C. § 1414(a)(2)(A), (A)(i).

As such, when a school becomes aware that a student's needs have changed and are not being addressed through an IEP, the school must try to fix the problem. The first step in that process is a reevaluation to determine what the student's needs are, and how the Student's IEP should be changed to address those needs.

By February 2017, the Student's needs had clearly changed. The Student's behaviors were escalating on a regular basis, despite the IEP and PBSP. The District was obligated to offer a reevaluation, and did so.

[3] Related services are defined at 20 U.S.C. § 1401(26)(A) as "… such developmental, corrective, and other supportive services … as may be required to assist a child with a disability to benefit from special education…"

Parental Consent / Override

The IDEA has explicit rules for obtaining parental consent to conduct reevaluations. 20 U.S.C. § 1414(c)(3). Those rules explicitly incorporate the parental consent procedures for initial evaluations. *Id*. Those procedures require LEAs to "obtain informed consent from the parent … before conducting the evaluation." 20 U.S.C. § 1414(a)(1)(D)(i)(I). However, if the parent does not provide consent, the LEA may pursue the evaluation through a due process hearing. 20 U.S.C. § 1414(a)(1)(D)(ii)(I).[4]

Neither the IDEA nor its implementing regulations explicitly say what an LEA must prove when pursuing an evaluation through a due process hearing after a parent withholds consent. *Id, see also* 34 C.F.R. § 300.300(a)(3). In the absence of statutory and regulatory guidance, I have held in prior cases that LEAs must prove that 1) an evaluation is necessary to ensure the provision of a free appropriate public education (FAPE) to the student, and 2) the evaluation that the LEA has proposed is appropriate. *See, e.g. N.M., Cumberland Valley School District*, ODR No. 13612-1213KE.

A Reevaluation is Necessary

The District has very clearly satisfied the first prong of the analysis. All the same facts that prompted the District to seek parental consent to reevaluate the Student also substantiate the need for a reevaluation. The Student's needs have changed, the services in place for the Student are not effective, and an evaluation is necessary so that the District will know what special education and related services are necessary to accommodate and remediate the Student's behaviors.

Preponderant evidence does not support the Grandparent's arguments to the contrary. The Grandparent argued that the District did not implement the Student's PBSP, and that the Student's behaviors are a function of that failure. The record establishes that one component of the Student's PBSP – after school detention when work was not completed in school – was not implemented. This intervention was hardly the backbone of the PBSP, and the District put other interventions in place so that the Student could try to complete all work in school, or finish work at home without penalty.[5] The record otherwise establishes that the District implemented the PBSP.

[4] The only difference between the parental consent rules for initial evaluations and reevaluations is that LEAs may conduct reevaluations without parental consent if the LEA "can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond." 20 U.S.C. § 1414(c)(3). In this case, the Grandparent affirmatively withheld consent, and so that provision does not apply.

[5] This is discussed in greater detail in ODR No. 19171-1617KE.

Data collection forms were revised during the school year, and the District's sloppy errors on those forms detract from what otherwise would be an even clearer case. Even so, those forms, in conjunction with the credible testimony of District witnesses, establish that the District implemented the PBSP, and that did not help the Student.

I reject the Grandparent's argument that the Student's behaviors were invented by District personnel, and that District personnel documented events that did not happen. I reject the Grandparent's argument that District personnel forged bullying reports that purport to be from other parents. The Grandparent may truly believe this, but the only evidence to support this is the Grandparent's own testimony. That testimony highlighted District's careless mistakes. Those mistakes also very likely contribute to the Grandparent's perceptions and overall mistrust. However, the handful of documents with errors is insignificant compared to the overwhelming majority of documents, and highly credible testimony from District personnel, that paints a clear picture of a student whose needs are not being served.

A comprehensive reevaluation is the only way to determine what special education and related services the Student now needs to receive a FAPE.

The Proposed Reevaluation is Appropriate

The IDEA requirements for initial evaluations and reevaluations are the same. 20 U.S.C. § 1414(a)(2)(a). Those requirements, as pertinent to this case, are detailed at 20 U.S.C. §§ 1414(b)(2), (b)(3) and (c) *et seq*. Without listing each criterion, LEAs are obligated to assess all areas of suspected disability, use testing instruments that are designed for their indented purpose, cannot rely exclusively on any one test, and obtain parental input.

The purpose of a reevaluation is to "provide relevant information that directly assists persons in determining the educational needs of the child …" 20 U.S.C. § 1414(b)(3)(C). That is, the reevaluation must be crafted to yield information and programmatic recommendations for the Student's IEP team to consider. In this case, an appropriate evaluation is one that is reasonably calculated to provide the IEP team information about how the Student's behaviors can be appropriately addressed.

The proposed evaluation is appropriate. An FBA will help the IEP team better understand why the Student exhibits behaviors, what is likely to trigger those behaviors, what can be done to decrease those behaviors, and what should be done when those behaviors occur. Behavioral assessments will provide a more objective analysis of the Student's behavioral needs, and will help the IEP team determine the Student's correct disability category. Both parties agree that the Student's academic needs are not a primary concern in this hearing, but academic assessments will show what impact, if any, the Student's behaviors have had on the Student's academic achievement.

The proposed evaluation is not only appropriate, it is necessary.

Change in Services

In addition to evaluating the Student, the District requested this hearing to obtain an order that would permit the District to change the Student's placement while the reevaluation is pending. I agree with the District that the Student requires additional services and supports. I cannot, however, permit the District to change the Student's disability category before the reevaluation is complete.

District witnesses testified that the proposed IEP and PBSP simply aligns those documents with services that the District is already providing, but with two important difference: First, by putting those services into the IEP and PBSP, they will be in place before a behavioral incident occurs. Second, the proposal puts proactive 1:1 support in place for the Student. The District believes that by increasing the Student's supports, the Student may have fewer behavioral incidents. Also, with proactive supports in place, the District will be able to better manage the Student's behaviors, decreasing their duration and intensity.

I agree with the District that the services in the offered IEP and PBSP represent the best guess of knowledgeable, dedicated educational professionals, about what can be done immediately to help the Student. That best guess is no substitute for the comprehensive reevaluation that the District wants to do. But, until that reevaluation is complete, action must be taken to foster a safe environment for the Student in school. I will, therefore, permit the District to increase the level of support to the Student, as contemplated in the offered IEP and PBSP.

I will not, however, permit the District to change the Student's special education classification from OHI to Emotional Disturbance. Emotional disturbance has a specific meaning under the IDEA:

> Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
>
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
>
> (C) Inappropriate types of behavior or feelings under normal circumstances.
>
> (D) A general pervasive mood of unhappiness or depression.
>
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

It is reasonable for the District to suspect that the Student qualifies for special education and related services as a child with an emotional disturbance. The reevaluation will help the IEP

team determine if that classification is warranted. Changing the Student's classification before the reevaluation, however, puts the cart before the horse.

A child's disability classification does not limit the type or quantity of special education and related services that the child receives. Once a student is found to be a child with a disability, the LEA is obligated to offer "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). This means that the District must offer appropriate programming regardless of the name of the Student's disability. Changing the Student's classification from OHI to Emotional Disturbance is not necessary to implement the supports that the District wants to provide. Bluntly, an Emotional Disturbance label is not a prerequisite for 1:1 support. I will not permit the District to preemptively classify the Student as a child with an emotional disturbance for that reason.

I note that the District's attempt to classify the Student as a child with an emotional disturbance is part of the reason that the Grandparent objects to the District's proposed reevaluation. The Grandparent testified as to her belief that reevaluation is simply a procedural mechanism by which the District may do what it has already decided to do – label the Student as child with an emotional disturbance and then change the Student's placement. The Grandparent's belief, although sincere, is not supported by evidence. Even so, I urge the District to proceed with caution and carefully consider all sources of information, including parental input, when conducting the reevaluation. I will not permit the District to change the Student's building placement before the reevaluation is complete for the same reason.

Conclusion

Throughout the 2016-17 school year, the Student's behaviors escalated to a point where it became clear that the Student's IEP and PBSP were not effective. In response, District personnel proposed a reevaluation to better understand the Student's needs, and what special education is necessary to provide a FAPE to the Student. The District also proposed increasing the services that the Student receives through changes to the Student's IEP and PBSP. Those changes would also change the Student's disability category from OHI to Emotional Disturbance. The Grandparent withheld consent both for the reevaluation and the revised IEP and PBSP. The District requested this hearing to both reevaluate the Student and implement the offered IEP and PBSP.

As discussed above, the District may conduct the proposed reevaluation, and may increase services and supports to the levels in the proposed IEP. The District may not, however, change the Student's eligibility classification or building placement before the evaluation is complete.

An order consistent with the foregoing follows.

ORDER

And now, August 7, 2017, it is hereby **ORDERED** as follows:

1. The District shall conduct the reevaluation proposed in the Permission to Evaluate Consent Form, entered into evidence at S-8.

2. The District shall increase the services and supports that the Student receives to those in the IEP entered into evidence at S-14.

3. The District shall not change the Student's eligibility category from Other Health Impairment to Emotional Disturbance, or change the Student school building, before the reevaluation is complete.

4. Nothing in this Order prohibits the Grandparent and District from coming to any agreement about the Student's program and placement while the reevaluation is pending, if the agreement is in writing and signed by both parties.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER