

*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: T. O.  
ODR #19236-1617 AS

Date of Birth:  
[redacted]

Date of Hearing:  
August 3, 2017

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent(s)

Pro se

Pocono Mountain School District  
135 Pocono Mountain School Road  
Swiftwater, PA 18370

Glenna Hazeltine Esq.  
One West Broad Street  
Suite 700  
Bethlehem, PA 18018

Date of Decision:

August 25, 2017

Hearing Officer:

Charles W. Jelley, Esq.

## **Background**

The Student<sup>1</sup> attends a regular education class in the Pocono Mountain School District. Because of academic difficulties the Student is exhibiting in the school setting the District sought the Parents' permission to evaluate Student. The Student's Parents withheld consent for an initial evaluation to be performed, believing that Student does not need to be evaluated and possibly to receive a special education classification. The District requested this due process hearing to obtain an Order to evaluate the Student.<sup>2</sup> After reviewing all of the evidence, I am granting the District's request and ordering a comprehensive evaluation in all areas of unique need.

## **Issue**

Should the School District's request for an Order to perform a multidisciplinary evaluation of Student over the objections of the Parent be granted?

## **Findings of Fact**

1. The Student is a resident of the School District and has been attending school in the District since September 2011. [SD #1]<sup>3</sup>
2. Prior to enrolling in the District, the Student attended kindergarten as a cyber school Student. [SD#1]
3. In October 2016, while the Student was in 6<sup>th</sup> grade, the teachers during a monthly teacher meeting about the Student's lack of progress, raised concerns about the Student's "odd" pencil grip and the possible need for an occupational therapy assessment [SD#14, NT p.51]
4. Early in the 2016-2017 school year when concerns arose about the Student's performance in the core academics of reading, math, writing and overall literacy the District instituted a series of interventions designed by the District's Multi-

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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. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> The hearing was completed in one session. References to the record throughout this decision will be to the Notes of Testimony [N.T.], Parent Exhibits [P-] followed by the exhibit number, School District Exhibits [S-] followed by the exhibit number, and Hearing Officer Exhibits [HO-] followed by the exhibit number. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

- Tiered Support System (MTSS) to improve the Student's below grade level performance. [SD##4-10, NT p.36]
5. The MTSS team noted the Student's quiz grades, test grades, benchmark testing and state wide assessment were below expectations in the core academic areas. [SD##4-10, SD#12, SD#13,SD#15, SD#16, SD#17,SD#19, NT pp. 41-57]
  6. The MTSS team noted that during 5<sup>th</sup> grade, the Student received passing grades in regular education with informal support in a co-taught classroom with the help of a special education teacher [NT pp. 56-61]
  7. The 6<sup>th</sup>-grade regular education progress monitoring of Student's reading using the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) indicates little progress [SD#8, SD#9, SD#13, SD#14]
  8. The Student is a hard worker, who struggles tremendously with new concepts, who needs on-on-one-direction and constant repetition to acquire new skills. [SD#7 p.1, NT pp. 64-68]
  9. When the multiple interventions did not improve the Student's performance, on February 1, 2017, the District forwarded to the Parents Prior Written Notice for an Initial Evaluation and Request for Consent; the Parents returned the Notice and refused to consent to the evaluation. [S#10 p.3, NT. pp.41-46]
  10. The District and the Parents had a face-to-face meeting to review the Student's grades and the Student's progress after receiving intensive supports each school day for 45 minutes [NT pp.38-41]
  11. On March 24, 2017, the District informed the Parents the Student was in danger of failing two or more academic subjects and that the Parents should enroll the Student in summer school at the cost of \$250.00 [SD#12].
  12. The building principal testified that when a student is failing and the grade is below 55, for the first three marking periods of the school year, the teacher must give the Student a minimum grade of 55 so that students have a chance to progress. The District policy does, however, change in the fourth quarter where the teachers are expected to give the Student an accurate grade based on graded work product. [ NT pp.62-65]
  13. At the beginning of the summer session, the Student scored a 27.3% in math and a 40% in reading. Since the scores were low, the program provided in summer school courses was below the Student's current grade level. The summer school classes were not taught at grade level. [NT pp.62-64 SD#19]
  14. In summer school the Student earned a final grade of 67.2% in Math and 77.4% in a foundations of reading program. [SD#19, NT pp.62-64]

15. It is the District policy that if a student attends and completes summer school, the student is promoted to the next grade [NT pp.62-630]

16. In 6<sup>th</sup> grade, the Student failed all academic classes, with the exception of science, in which the Student was one point away from receiving a failing grade [NT pp. 58-610]

17. The Student's end of the year grades in 5<sup>th</sup> and 6<sup>th</sup> grade were

5<sup>th</sup> grade 2015-2016

Math, 78

English Language Arts, 84

Science, 71

Spelling, 81

6<sup>th</sup> grade 2016-2017

Math, 56

English Language Arts, 62

Science, 65

Spelling, No grade

[S#16 pp. 10-1]

### **Applicable Legal Principles**

#### **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 (3<sup>rd</sup> 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 critical to the determination.

#### **Credibility**

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing the 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. "See, *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). All witnesses were judged to be credible.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. § 1400 *et seq.* The IDEA sets forth the responsibilities (commonly referenced as “child find” responsibilities) borne by school districts and charter schools, for identifying which children residing within its boundaries who are in need of special-designed instruction and related services such that “[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated...” 20 U.S.C. §1412(a)(3). Parents do not have a duty to identify, locate, or evaluate their child pursuant to IDEA. The child find duty falls squarely upon the district. *Hicks, ex rel. Hicks v. Purchase Line School Dist.* 251 F.Supp.2d 1250, 1253 (W.D.Pa., 2003), citing, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.1996).

In the discharge of its child find obligations, the IDEA requires school districts to conduct a “full and individual initial evaluation ... .” 20 U.S.C §1414(a)(1)(A). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii). The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs ...” 34 C.F.R. §300.304(c)(6).

The IDEA requires parents to consent to the initial evaluation. *Id.* When a parent refuses to consent to an evaluation sought by the district, the district may seek authorization to conduct an initial evaluation by way of a request for due process hearing. 20 U.S.C. §1414(a)(1)(D)(ii)(I). *See also*, 20 U.S.C. §1415(b)(6)(A) (permitting due process complaint by any party “with respect to any matter relating to the identification, evaluation [or placement] of the child ... .”). Thus, due process is available to the school districts in order to “override” parental refusal to consent to an initial evaluation. 34 C.F.R. §300.300(c)(1)(ii); §300.300(a)(3). In this matter, the District in requesting the hearing is filling its statutory obligation to locate, identify and evaluate a thought to be exceptional Student.

### **Discussion and Conclusions of Law**

The Student is having a great deal of difficulty keeping up with the demands of school in core areas of math, reading, language arts and science. In particular, the response to intervention data notes the Student is showing delays in reading and math. All of the staff state the Student is a hard worker who completes the work but somehow just does

not “get it.” Yet, when the Student was in the co-taught 5<sup>th</sup> grade class, the record is clear that the Student did “get it.” Although the Parent’s testimony about Student is helpful in understanding the Student’s study habits, the Student’s work ethic and the Parents’ commitment to the Student, the Parents’ suggested solution, of providing tutoring during the day or after school, absent the evaluation, is at best incomplete.

After a rough 6<sup>th</sup> grade year and summer school the Student’s performance is below grade level. The significant difficulty in classroom performance is inconsistent with the Student’s hard working attitude. The lack of response to the multiple interventions is also troubling. Accordingly, I am directing the District to undertake an expedited comprehensive evaluation of the Student’s needs, including Parent input.

### **Dicta**

The Parents’ commitment to the child was palpable, and I do not doubt that they are acting in what they believe is the Student’s best interests. However, by law, the Student is entitled to and should receive, at no cost to the family, a thorough age-appropriate cognitive and achievement assessment in all areas of current difficulty and suspected disability. It is my sincere hope that this first step will lead to an effective program. Although I am ordering the District to evaluate Student over the Parents’ objection, I would hope that the Parents will actively engage in and support the process so that a thorough assessment of Student’s educational needs can be done. Finally, I was impressed by the strong working relationship between the Parties in the midst of this important dispute.

### **Order**

It is hereby ordered that:

1. The District is directed to conduct a complete multidisciplinary evaluation of Student, including but not limited to:
  - Soliciting Parent input;
  - Cognitive ability testing;
  - Achievement testing in the areas of reading, mathematics and written expression skills; and,
  - An occupational therapy evaluation
2. This evaluation must be completed within 45 calendar days of the date of this Order.
3. If Student should dis-enroll from the District prior to the evaluation being initiated or completed, this Order shall stand if and when Student returns to the District.

4. Once the initial evaluation is completed the District is directed to meet with and review the results with the Parents.

August 25, 2017

[Charles W. Jelley](#)  
Special Education Hearing Officer  
ODR FILE #19236-1617 AS