

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
Final Decision and Order

Closed HEARING
ODR File Number: 20789-17-18

Child's Name: N. M. Date of Birth: [redacted]

Dates of Hearing:
08/03/2018

Parent:
[redacted]

Counsel for Parent
Pro Se

Local Education Agency:
Pocono Mountain School District
135 Pocono Mountain School Road
Swiftwater, PA 18370

Counsel for the LEA
Glenna Hazeltine Esq.
Suite 700
One West Broad Street
Bethlehem, PA 18018

Hearing Officer: Charles Jelley Esq. Date of Decision: August 29, 2018

Background

The Student¹ attends regular education classes in the District. Due to academic difficulties dating back to Kindergarten, the District in 2nd and 3rd grades issued a Permission to Evaluate (PTE) to determine if the Student is a person with a disability in need of specially-designed instruction. On each occasion, the Student's Parents have withheld consent for an initial evaluation. The Parents contend, rather than evaluate the Student for special education, the District should provide additional regular education services, supports and interventions. The District counters the Parents' request, arguing that after four years of regular education interventions and after failing a core class such as 3rd grade English and Language Arts the Individuals with Disabilities Education Act IDEA now requires the District to complete a comprehensive evaluation of the Student in all areas of suspected disability. The District now requests that this hearing officer enter an Order directing the District to evaluate the Student. After reviewing all of the evidence, I will now grant the District's request and Order a comprehensive evaluation in all areas of suspected disability.

Issue

Should the District's request for an Order to perform a multidisciplinary evaluation of the Student in all areas of suspected disability over the objections of the Parents be granted?

Findings of Fact

1. The Student is a resident of the District and has been attending school in the District since Kindergarten (SD #1).²

¹ 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).

² 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.

2. On November 5, 2014, while the Student was in Kindergarten the District informed the Parents that based upon the beginning of the year Dynamic Indicators of Basic Early Literacy Skills (DIBELS) Benchmark scores, the Student was recommended to receive a specialized regular education intensive reading program. The letter stated that the intervention(s) would not change the content or the Student's regular educational placement (S-2, S-3).
3. From November 2014 through June 2015, the Student received daily supplemental instruction during a free period, outside of the regular classroom. By March 2016, the data indicated the Student had concerns with sight words and blending (saying every sound) (S-2, S-4).
4. On October 20, 2016, when the Student was in 1st grade, after reviewing the DIBELS Benchmark score, the District recommended that the Student receive specialized intensive reading instruction. Five of the Student's DIBELS scores were rated "Well Below Benchmark" and one score was rated "Below Benchmark" (S-9, S-10).
5. During 1st grade the Student received Tier 2 and Tier 3 supports (S-8, S-9).
6. The Student continued to receive supplemental Tier 3 reading instruction on a daily basis (S-7, N.T. 63-65).
7. On April 18, 2017, when the Student was in 2nd grade, the District sent the Parents a Permission to Evaluate the Student. When the Parents did not return the form indicating approval or disapproval the Supervisor of Special Education sent a follow up letter requesting a response by May 11, 2017. After receiving the follow-up letter, the Parents refused to consent to the initial evaluation (S-8, S-9).
8. The Student's Kindergarten, 1st, 2nd and 3rd Grade DIBELS profiles indicates that Student has not reached benchmark score levels in any school year (S-10).

9. In 3rd grade, on the Word Identification and Spelling Test, regularly administered to students receiving regular education interventions, three of the Student's scores were in the "Very Poor" range and one score was in the "Poor" range. Three of the percentile rank scores were at the less than 1st percentile and one score fell at the 1st percentile. All scores placed the Student's reading at 2nd grade level (S-10 14, S-19 18, NT 41-44).
10. On March 19, 2018, the District issued a second Permission for an Initial Evaluation. After meeting with the District staff, the Parents refused to consent to the initial evaluation (S-12).
11. The Student's Kindergarten, 1st, 2nd and 3rd Grade report cards all note the Student "Needs Improvement and is not progressing toward expected standards with substantial teacher assistance." The 2nd grade report card noted the teacher provided accommodations and considered the Student for grade level retention. In 3rd grade the Student earned a failing English Language Arts grade of 62% (S-12, S-15 3, NT 45-47).
12. The Student is a hard worker, who struggles in English and Language Arts class (S-15).
13. In 3rd grade the Student earned the following final grades: Math 85, English and Language Arts 62 and Science 90 (S#20 4).³
14. The 3rd grade teacher noted that by the third and fourth quarter of the school year, even with additional time, the Student could not complete reading and writing assignments at benchmark levels. (S-19).
15. A review of the Student's English and Language Arts grading history in 3rd grade from May through June indicates that although the Student earned a 95.7% for homework assignments, 100% for classwork participation, and 93.6% on Projects, Quiz grades are 36.4% with an overall test score average of 36.5% (S-20 3).

³ The Student's English and Language Arts grade for the four marking periods ranged from a low of 61 to a high of 65% (S-15 4).

16. In 1st, 2nd and 3rd Grade the Student received 45-minutes a day of intensive reading instruction in addition to the 90-minutes a day of English and Language Arts instruction (S-15 NT 42-45).

The Student has good attendance and the Parents are actively involved with the teachers (S-14).

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 (3rd Cir. 2012). In this case, the District requested the hearing and thus shoulders 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.

General Legal Principles

Special education eligibility disputes 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) of the Student. The purpose of evaluation and assessment 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 school districts to obtain parental consent prior to an 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, school districts may request a due process hearing to “override” a parent’s refusal to consent to an initial evaluation 34 C.F.R. §300.300(c)(1)(ii); §300.300(a)(3).

Once an evaluation is completed, a district may not use the IDEA mediation or due process procedures to obtain an agreement or a ruling that the student must receive special education services. Assuming a parent refuses to agree to allow the student to participate in the district’s proposed program, the

district will not be considered to be in violation of the requirement to make a free appropriate public education (FAPE) available to the child because of the failure to provide the child with special education and related services 34 CFR §300.300 (b)(3).

Discussion and Conclusions of Law

No one disputes the fact that the Student is having difficulty keeping up with the demands in the core curriculum class of English and Language Arts. In this District, English and Language Arts includes reading, writing and spelling. The response to intervention data and the report cards note several important points. First, the Student is a hard worker. Second, the Parents regularly work with the Student to complete all homework assignments. Third, the lack of progress in reading cuts across the core content areas of writing and spelling. These English and Language Arts interrelated core content areas are the foundation for later learning. All of the staff stated although the Student is a hard worker who completes all assignments, Student somehow is not meeting grade level standards and benchmarks.

The Parent's testimony about Student is compelling and helpful in understanding the Student's work ethic and the Parents' commitment to the Student. However, when the Parents' suggested solution of continued regular education interventions absent a comprehensive evaluation is viewed against the backdrop of the last four (4) years, their proposal is at best an incomplete solution to the problem of understanding why a hard working student who completes the homework and works hard in class is not meeting benchmark standards. The Student's four year pattern of lack of progress after participating in the multiple interventions is very troubling; despite multiple interventions the DIBELS trend line is not improving. The work is getting harder and the Student's reading level is still one to two grade levels below the expected grade level benchmarks. Moreover, Student is now at the age and grade where independent reading is increasingly required to learn subject matter content in all areas of the curriculum. This group of facts leads me to conclude that a comprehensive evaluation is warranted. Accordingly, consistent with the IDEA child find requirements I am now Ordering the District to complete a comprehensive evaluation of the Student in all areas of suspected disability.

Dicta

The Parents' love and commitment is palpable. I have no doubt that the Parents believe that delaying the testing is in the Student's best interest. The Father made several compelling heartfelt statements. First, the Parents desperately want the Student to succeed. Second, the Parents do not want the Student to be unduly stigmatized. Third, the Parents want the Student to get whatever help is needed. My hope is that after the evaluation the Parties will have a better understanding of what the Student needs. Finally, I sincerely hope that the disagreement over the testing will not stand in the way of the Parties finding a path to work collaboratively going forward. Although I am ordering the evaluation over the Parents' objection, all Parties know that in the event the Student is determined to be IDEA eligible, the ultimate decision to consent to special education services rests with the Parents.

Order

It is hereby **Ordered** that:

1. The District is directed to conduct a complete multidisciplinary evaluation of Student, consistent with the assessments identified in the PTE, including but not limited to:

Cognitive ability testing;
Achievement testing in the areas of reading, mathematics and written expression skills.

2. The initial evaluation must be completed within 45 calendar days of the date of this Order.
3. Once the initial evaluation is completed the District is directed to meet with and review the results with the Parents.
4. All other claims or defenses not otherwise discussed are dismissed with prejudice.

August 29, 2018

Charles W. Jelley
Special Education Hearing Officer
ODR FILE # 20789-1718 KE