

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

OPEN HEARING

ODR File Number 22268-18-19

Child's Name: M. C.

Date of Birth: [redacted]

Date of Hearing:

06/28/2019

Parent:

[redacted]

School District:

Catasauqua Area School District
201 N. 14th Street
Catasauqua, PA 18032

David Knerr, Esquire
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Allentown, PA 18106
Counsel for LEA

Hearing Officer: Michael J. McElligott, Esquire

Date of Decision: 07/12/2019

INTRODUCTION

Student (“student”)¹ is an eligible student of elementary school age who resides in the District (“District”). In April 2019, in another special education due process hearing before a different hearing officer, the hearing officer in those proceedings ordered an independent functional behavior assessment (“FBA”) for consideration by the student’s individualized education program (“IEP”) team. (Hearing Officer Exhibit [“HO”]-1 – decision at consolidated ODR file numbers 21647/21677/21691-1819). The order at HO-1 provided a structure for the identification and selection of an independent board-certified behavior analyst (“BCBA”) and included a provision that “the selected BCBA shall determine the scope of the FBA including what observations and other procedures or assessments are necessary”. (HO-1 at page 24).

An independent BCBA was identified under the terms of the order and arrangements were made for that person to perform the independent FBA. As part of the preparations for the FBA, the District issued to parent a consent form for the release of educational records for review by the BCBA. The parent did not provide consent for the release of records. The District filed the complaint at this file number seeking relief from the terms of the order at HO-1, as it claims it cannot comply with the mandate to provide the independent

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

FBA under the terms of that order without parent's consent for the release of records to the independent BCBA.

As set forth below, the terms of the order at this file number will outline how the independent BCBA is to be provided, through parent's consent, with the necessary educational records for review by the BCBA, or, failing provision of that consent and/or lack of parental participation in the independent FBA process, how a District-performed FBA shall be issued.

ISSUES

How can the student be provided with a FBA, necessary for the student's educational programming?

FINDINGS OF FACT

1. On April 13, 2019, a hearing officer different from the undersigned hearing officer issued a decision in the consolidated ODR file numbers 21647/21677/21691-1819. (HO-1).
2. Under the terms of that decision, the District was ordered to provide an independent FBA at public expense. The order structured a process for the identification and selection of an independent BCBA to conduct the independent FBA. (HO-1).
3. Utilizing the structure outlined in that order, an independent BCBA was identified and selected. (Notes of Testimony ["NT"] at 8-89; School District Exhibit ["S"]-12).²
4. At the outset of the independent FBA process, the independent BCBA requested the student's educational records from the District. A review of these records before undertaking a FBA is part of the independent BCBA's process in performing a FBA. (NT at 8-89; S-4, S-12).

² There is no dispute as to the independent BCBA performing the FBA. Both parties continue to support her role as the independent BCBA. (NT at 8-89).

5. The District issued to the parent a consent for authorization to release to the independent BCBA the student's educational records. (S-12).
6. The parent returned the consent form with heavy redaction, seeking to limit the documentation the independent BCBA could review and the individuals the independent BCBA could speak with. (S-13, S-24).
7. Communication continued between the District, the parent, and the independent BCBA regarding the records and their necessary role in the independent FBA process. (NT at 8-89; S-13, S-15, S-18, S-24).
8. At the hearing, the independent BCBA testified forthrightly and credibly to the necessary role of records review in preparing a FBA, and of speaking with individuals who have observed or worked with the student in educational settings, in the FBA process. (NT at 8-89; S-4).

DISCUSSION AND CONCLUSIONS OF LAW

At the outset, it must be recognized that the parties do not dispute the need for a FBA. The hearing officer in the prior round of special education due process was not confident in the FBA that had been produced and ordered an independent FBA. The parties utilized the structure of that order to identify and select an independent BCBA. In preparing the FBA, the independent BCBA must review the student's comprehensive educational records, and speak with individuals who observe and work with the student in educational settings.

The sticking point, and reason that this decision is necessary, is that parent seeks to limit both the records that the BCBA can review and the individuals that the BCBA can speak with, or from whom she can gather input. The independent BCBA testified forthrightly and credibly at the hearing that, as part of the FBA process, she must review the student's comprehensive

educational records and must speak with individuals who have worked with the student in the educational environment. The order below will reflect this and will structure a process through which the independent BCBA can obtain the necessary records and allow her to gather the necessary input for the independent FBA.

In a prehearing conference call, however, the undersigned hearing officer stressed to the parties that it is imperative that the student receive a FBA. Nothing can be allowed to stand in the way of obtaining a FBA, to allow the student's IEP team to consider its findings and conclusions. Therefore, the order below will reflect this as well and will provide for a FBA to be performed by the District, should the independent BCBA be unable to perform the independent FBA in a way that she, in her sole discretion, deems necessary.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above:

- A. Within 10 calendar days of the date of this order, the School District shall issue to parent a consent for the release to the independent BCBA of the following comprehensive, unredacted records for the student's entire educational history at the school district as those documents are in the possession of the school district (developed from the list of educational records listed in

exhibits S-4 and S-12 of this hearing): permanent school records, education history/testing, attendance history, discipline records, school health records, medical/medication history, diagnostic evaluations, comprehensive school-based evaluation report(s)/re-evaluation report(s), outside report(s) in the possession of the school district, previous FBA/positive behavior support plan(s)/behavioral intervention(s), intervention data/graphs, IEPs, classroom logs/notes, and developmental/social history, as well as a provision that parent consents to allow the independent BCBA to speak with and/or solicit written input, or verbal input, or both, from any school district employee who the independent BCBA, in her sole discretion, identifies by name and/or title and/or role.

- B. The consent form shall also include consent for provision to the independent BCBA of a copy of the unredacted April 13, 2019 decision at consolidated ODR file numbers 21647/21677/21691-1819 as well as a copy of the unredacted decision at this file number, especially given the fact that provisions of this order specifically identify actions and communications that lie within the orbit of the independent BCBA.
- C. Within 20 calendar days of the date of this order, the parent shall return to the school district the signed consent form. If the consent form is not returned to the school district within 20 calendar days of the date of this order, the school district may consider the

parent to have withheld consent for the independent FBA process, and the provisions of paragraph I below (“Withholding Consent”) shall apply.

- D. To the extent that the consent form is returned within 20 calendar days of the date of this order but contains any limitation, exclusion, directive, message, or other substantive marking other than parent’s signature granting consent, the school district may consider the parent to have withheld consent for the independent FBA process, and the provisions of paragraph I below (“Withholding Consent”) shall apply.
- E. Should parent grant consent for the sharing of records as outlined in the foregoing paragraphs, within 30 calendar days of the date of this order, the school district shall provide to the independent BCBA the records listed in paragraph A of this order. The preference for the form of those records (whether hard copy or electronic) shall be ascertained from the independent BCBA and provided according to that preference.
- F. The relevant portions of the order at consolidated ODR file numbers 21647/21677/21691-1819 shall remain in effect at paragraphs 1.d, 1.e, and 2 of that order except that the written report as a result of the independent FBA referenced in paragraph 1.e shall be issued within a reasonable time not to exceed 45

calendar days from the first school day of the 2019-2020 school year at the school district.

- G. If at any point after the independent FBA process has begun with parent's consent to release records under the terms of this order, and the independent BCBA, in her sole discretion, communicates in writing via email to the school district and the parent that she feels she cannot complete the independent FBA because of parent's non-participation in, or in the view of the independent BCBA because of parent's interference with, the FBA process, the independent FBA process shall cease as of the date of that written email communication. Within 5 business days of the date of that written email communication, the independent evaluator shall provide to the school district a final invoice for services rendered as part of the independent FBA process to that point. To the extent the independent evaluator wishes to make part of that invoice the time spent preparing for, and participating in, the hearing session on June 28, 2019, the evaluator may do so, and the school district shall pay for the preparation for/participation in that hearing session.
- H. If the independent BCBA indicates to the parties in writing via email communication her unwillingness to continue the FBA process under the conditions outlined in paragraph G immediately above, the lack of parental participation in the independent FBA

process shall release the school district from the obligation to provide an independent FBA at public expense as ordered at consolidated ODR file numbers 21647/21677/21691-1819, and the school district shall commence its own FBA process for the student. A school district FBA undertaken as the result of this paragraph shall be issued no later than (a) 75 calendar days if the date of the written email communication from the independent BCBA is dated on or before July 25th, (b) 60 calendar days if the date of the written email communication from the independent BCBA is dated July 26th – August 5th, (c) 55 calendar days if the date of the written email communication from the independent BCBA is dated August 6th – August 11th, (d) 45 calendar days if the date of the written email communication from the independent BCBA is dated August 12th – August 19th, (e) 40 calendar days if the date of the written email communication from the independent BCBA is dated August 20th – August 25th, or (e) within 30 calendar days if the date of the written email communication from the independent BCBA is dated August 26th or thereafter. This order shall serve as permission to conduct a school district FBA under the terms of this order.

- I. *Withholding Consent.* If the parent withholds consent as outlined in paragraphs C and/or D above, the lack of parental participation in the independent FBA process shall release the school district from

the obligation to provide an independent FBA at public expense as ordered at consolidated ODR file numbers 21647/21677/21691-1819, and the school district shall commence its own FBA process for the student. Should the parent withhold consent, within 3 business days of the triggering event that serves as withholding of consent, the District shall notify the independent BCBA that the independent FBA shall not take place and request from that evaluator a final invoice for services rendered to that point. To the extent the independent evaluator wishes to make part of the final invoice the time spent preparing for, and participating in, the hearing session on June 28, 2019, the evaluator may do so, and the school district shall pay for the preparation for/participation in that hearing session. A school district FBA undertaken as the result of this paragraph shall be issued within 30 calendar days from the first school day of the 2019-2020 school year at the school district. This order shall serve as permission to conduct a school district FBA under the terms of this order.

- J. Should the independent FBA be completed, and the written report be issued pursuant to paragraph 1.e of the order at consolidated ODR file numbers 21647/21677/21691-1819, to the extent the independent BCBA wishes to make part of the final invoice the time spent preparing for, and participating in, the hearing session on June 28, 2019, the evaluator may do so, and the school district

shall pay for the preparation for/participation in that hearing session.

Any claim not specifically addressed in this decision and order is denied.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

July 12, 2019