

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:

24799-20-21

Child's Name:

J.C.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Pro se

Local Education Agency:

Centennial School District
48 Swan Way
Warminster, PA 18974

Counsel for LEA:

Karl Romberger, Jr., Esquire
Sweet, Stevens, Katz & Williams, LLP
331 E. Butler Avenue
New Britain, PA 18901

Hearing Officer:

Cheryl Cutrona, Esquire

Date of Decision:

June 22, 2021

INTRODUCTION

The student, J.C. (hereafter Student),¹ is an early elementary-aged student enrolled in the Centennial School District (School). Student is currently a special education student. In April 2021, the Father filed a Due Process Complaint under the Individuals with Disabilities Education Act (IDEA)² pursuing an order through due process to maintain his child's special education services after the Mother revoked her consent to continue special education programming for her child. The case proceeded to a due process hearing convening over a single session.³

For the reasons set forth below, the Father's claim is granted.

ISSUES

1. Whether the student should continue to receive special education services as outlined in the student's Individualized Education Plan (IEP) and that the IEP should be implemented?

PROCEDURAL HISTORY

1. The student has attended school in the District since Kindergarten. The student struggled academically, began receiving interventions from a reading specialist in Kindergarten.
2. On April 1, 2021, in writing, Mother exercised her right to revoke consent for special education services provided to the student.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including the details on the cover page, will be redacted prior to the decision's posting on the website of the Office for Dispute Resolution in compliance with 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 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations pertaining to charter schools are set forth in 22 Pa. Code §§ 14.101 – 14.162.

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.), School Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (H.O.) followed by the exhibit number.

3. On April 5, 2021, the School District issued a NOREP (S-11) proposing to exit the student from special education based on the Mother's request dated April 1, 2021 and place the student in general education.
4. On April 12, 2021, Father signed the April 5, 2021 NOREP (S-11) disagreeing with the School District's proposed action. The reason he stated for his disagreement is because the student "has seen improvement in the program and needs to continue."
5. On May 11, 2021, a "virtual" IEP meeting was convened to discuss the proposed IEP for the student. Father participated in the meeting virtually. Mother did not attend.
6. On May 11, 2021, Father signed the NOREP (S-10) agreeing to the supplemental learning support services proposed in the IEP dated May 11, 2021.
7. Father filed a Complaint with the Office for Dispute Resolution (S-1) on April 15, 2021 seeking a due process decision to ensure that his child continues to receive special education services.
8. In its April 20, 2021 Answer (S-2) to the Complaint, the School District agrees with the Father that the student should remain eligible for an IEP and the IEP should be implemented.
9. On May 20, 2021, Mother emailed the Hearing Officer and the related parties a copy of the April 3, 2019, Custody Order issued by the Bucks County Court of Common Pleas Family Decision (H.O.-1) based on an Agreement reached by the parents in the Child Custody Conference Office. The Order provides that the parents "shall exercise shared legal custody," which means that both parents have the right to participate in their children's educational decision-making.
10. The matter was assigned to this Hearing Officer whose practice it is to hold pre-hearing conference calls to confirm the due process

hearing details. The attorney for the School District and both parents participated in the conference call on May 20, 2021.

11. On May 28, 2021, the one-session virtual due process hearing was held. The Mother did not attend the virtual hearing.
12. After the hearing, the Hearing Officer emailed the Mother offering her an opportunity to have her voice heard by sending written comments within five days after receiving the hearing transcript. Mother did not respond.
13. On the day that the transcript was emailed to the parties, the Hearing Officer reached out to the Mother to confirm that she received the transcript and asked her to confirm that she intended on sending written comments. The Mother did not respond.
14. At all times, the District provided both Parents with an opportunity to meaningfully participate in the IEP process.

FINDINGS OF FACT

1. The Student has been in a District school since Kindergarten, where it soon became apparent that the Student needed and received academic interventions in the classroom by the reading specialist (S-3 at 4).
2. The Student was evaluated in the Spring of 2018 during second grade. The Mother contributed to the evaluation report (S-3 at 1). The Father did not respond to the School's request to do so.
3. The Evaluation Report dated April 29, 2018 concluded that the student qualified for special education services under the primary disability category of Specific Learning Disability (SLD) and a secondary category of Other Health Impairment (OHI)/Attention Deficit Hyperactivity Disorder (ADHD) (S-3 at 20). Both Parents signed the Evaluation Report (S-3 at 24).
4. Although the Hearing Officer was not provided with the first IEP, the Reevaluation Report (RR), dated April 28, 2021, indicates that the

Student began receiving special education services on May 30, 2018 (S-6 at 4).

5. The Progress Reports dated May 20, 2020 (S-5) and the Report Cards from grades 4 and 5 (S-9) submitted as evidence all demonstrate that the Student had been making some progress toward the IEP goals. The two-page Progress Report dated May 11, 2021 (S-8) is obviously premature, noting only that the progress will be “concurrent with report cards” which have not been issued as of yet.
6. An RR was conducted during the Spring of 2021. The general recommendation in the RR was that the Student continues to be eligible for special education services for SLD and OHI. The RR recommended that the Student continue in a small-group, special education classroom for reading and math; in the regular education setting for social studies, science, specials, lunch and recess; and receive accommodations in all of classes. The Father signed the RR, the Mother did not (S-6 at 23).
7. An IEP Meeting was held on May 11, 2021 to discuss the IEP dated that same day specifying the goals, objectives, specially designed instruction and accommodations for the coming year. The Father attended the Meeting. The Mother did not attend the meeting (S-7 at 2).

Parents’ Claim

It is the Father’s position that the student should remain in special education because the student has benefitted from the specially designed instruction and smaller classroom.

Father painted a picture of his child as “happy” (N.T. 62) and who has benefitted educationally, socially and emotionally from being in special education. He has noticed a difference in his child from before having an IEP and not doing as well, to now that he sees his child making progress and

taking pride in schoolwork, and having a friend from class. He believes his child is doing much better now and gaining the skills needed to be successful.

Father alleges that the student is absent more often when the Mother has custody of the student. He submitted Absence Records from the School to support his claim. However, without a parenting calendar designating which days the student is with the Mother and which days the student is with the father, the Hearing Office is unable to definitively determine if Father's allegation is accurate despite appearing to be credible throughout the process.

The Mother did not attend the due process hearing, nor did she provide Comments after receiving the transcript of the hearing.

District's Claim

It is the District's position that the student should continue receiving special education supports and services provided by the IEP because they have been beneficial to the student, the student still needs those services in respect to a specific learning disability, and there is no reason to remove the student from those services at this time.

The District asks the Hearing Officer to apply the "best interests of the child" standard because this is not a typical Free Appropriate Public Education (FAPE) situation and, in this case, the evidence is clear that it is in the child's best interest to maintain the IEP (N.T. at 67).

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles and Discussion

Burden of Proof

In general, the burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. Here, it should be recognized that the burden of persuasion lies with the party seeking relief:

the Parents. *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 burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called “equipoise.” On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Father, who filed the complaint initiating the due process hearing. Because the Father appeared *pro se* and the School District concurs with the Father’s position, the District primarily provided the proof.

It was simple for the Father and the District to meet the burden of proof, because the only one who apparently disagrees is the Mother and she did not avail herself of the process nor did she provide any proof to support her position that the child not continue receiving special education services. The Father and the District, together, provided a preponderance of the evidence that the child should remain in the special education program with an IEP that provides specially designed instruction for a specific learning disability.

The District has argued that the FAPE standard does not apply here and that the Hearing Officer should apply the “best interests of the child” standard recognizing that maintaining the student’s IEP provides the student

with a "meaningful educational benefit" which is in the "best interests" of this child (N.T. at 67). Family courts typically base custody decisions on the "best interests of the child" which means that the judge will determine the custody arrangement that best suits the child's needs, based on a variety of factors. This is not family court, which has already determined the custody arrangement, and the Hearing Officer will use FAPE in making this decision.

Eligibility under IDEA

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency ("LEA") representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement

of the special education and related services to be provided to the child." Id. § 1414(d)(1)(A)(i). A FAPE, as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." Id. § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D) To be eligible for special education services under IDEA, the student must (1) meet the requirements of one or more of the disability categories identified in the regulation and (2) require specially designed instruction to benefit from that instruction.

The original ER and the RR establish that the Student meets the two-prong special education eligibility test: (1) the Student continues to meet the requirements of the SLD and OHI (ADHD) disability categories; and (2) the Progress Reports demonstrate that the Student is benefitting from the specially designed instruction that the Student has been receiving since second grade and making progress toward IEP goals and objectives.

IDEA Consent Requirements

The IDEA requires LEAs to obtain parental consent for special education. 20 U.S.C. § 1414(a)(1)(D). When a parent revokes consent for special education, the LEA must discontinue special education and cannot request a hearing to challenge the parent's revocation. See 20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.300(b)(4)(i),(ii). Such revocation also creates a safe harbor for LEAs. When parents revoke consent, LEAs are discharged from their procedural and substantive IDEA obligations, including their obligations to develop an IEP and provide a FAPE. See 20 U.S.C. § 1414(D)(ii)(III); 34 C.F.R. § 300.300(b)(4)(iii),(iv).

Discussion

A parent has the right to withdraw a student with a disability from special education programs and related services. The parent must do so in writing. The *Pennsylvania Parent Guide to Special Education for School-age Children* states in pertinent part, "The LEA must issue a Notice of Recommended Educational Placement (NOREP)/Prior Written Notice to parents prior to the termination of special education and related services. All special education programs and services will cease on the eleventh day from the receipt of the parents' revocation letter. An LEA may not continue to provide special education and related services or use due process to challenge a parental decision to withdraw a student from special education programs. When a child is withdrawn from special education, the LEA is not required to remove references to special education services from the child's records."⁴ In this situation, the Mother followed the suggested protocol to remove the student from special education. When the District issued the NOREP notifying the parents that the student's special education programming was to be discontinued, the Father notified the District that he disagreed with the decision and requested mediation. He subsequently filed a Complaint requesting a Due Process Hearing. The Mother took no such action.

The purpose of a NOREP is to provide prior written notice to parents before the LEA proposes or refuses to initiate or change a child's special education program, and to afford them the opportunity to challenge the proposal or refusal. Filing for due process is one of the available options for resolving the dispute between the LEA and a parent who objects. Parent

⁴ *Pennsylvania Parent Guide to Special Education for School-age Children*, PATTAN (October 2018 edition) page 23. The Hearing Officer notes that this is not binding or authoritative.

participation in a requested due process hearing ensures their opportunity to be heard. Those procedures were followed.

Therefore, the issue boils down to, in this case, whether or not the District needs both parents' consent or if one parent's consent is sufficient to provide special education services.

In *Sheils*, the Court concludes that only one parent would be necessary to approve a change in placement. "The Court recognizes that ... throughout OSERS's analysis of §300.518(d), it repeatedly refers to an agreement between the public agency or hearing officer and *the parent*, which leads the Court to conclude that one parent's consent to changes in the student's placement suffices to form a valid agreement."⁵

Furthermore, the Bucks County custody order submitted by the Mother (HO-1) does not specifically state that both parents must agree on all major decisions regarding education, it merely states that the parents have shared legal custody. Legal custody in Pennsylvania is defined as "the right to make major decisions on behalf of the child, including, but not limited to, medical, religious, and educational decisions."⁶ "Shared" legal custody is defined as "the right of more than one individual to legal custody of the child."⁷

Therefore, this Hearing Officer finds that only one parent's agreement is needed, in this case, to proceed with a decision concerning special education assessments or services at this time.

Furthermore, the District at all times provided both Parents with a meaningful opportunity to participate in the IEP process and notified them as to the procedural safeguards.

⁵ *Sheils v. Pennsbury School District*, United States District Court, E.D. Pennsylvania, January 26, 2015, LEXIS 8330 (otherwise unpublished).

⁶ 231 Pa. Code § 1915.1, Scope. Definitions.

⁷ 231 Pa. Code § 1915.1, Scope. Definitions.

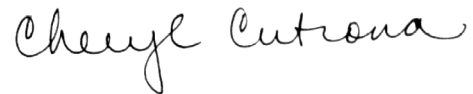
The IDEA is not structured to address disagreements between parents. Special education hearings are not an appropriate forum to raise such disputes. Unlike a family court, a hearing officer cannot resolve disputes between parents. I can only determine whether the student should continue to receive special education services as outlined in the student's IEP as outlined in the May 2021 NOREP.

CONCLUSION

The Student should continue to receive special education services as outlined in the student's Individualized Education Plan (IEP) and that the IEP should be implemented.

ORDER

The Father's claim is granted. The District must continue to implement the current IEP in accordance with the Father's approval of the May 2021 NOREP.



Cheryl Cutrona, J.D.
Hearing Officer

Date of Decision

June 22, 2021

ODR 24799-20-21