This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR No. 29671-23-24

Child's Name:
C.T.

Date of Birth:
[redacted]

Parents:
[redacted]

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Hearing Officer:
James Gerl, CHO

Date of Decision:
August 23, 2024

BACKGROUND

The school district filed a due process complaint requesting that the parent's request for an independent educational evaluation be denied because the school district contends its evaluation was appropriate. The parent initially resisted the conclusion urged by the school district, but then the parent and parent's counsel decided to boycott the due process hearing.

I find in favor of the parent concerning the issue raised by the instant due process complaint.

PROCEDURAL HISTORY

The procedural history of this case is convoluted. Shortly before the due process hearing, the parent's attorney stated that the parent had withdrawn the parent's request for an independent educational evaluation. Counsel for the school district then stated that the school district wanted nonetheless to pursue its due process complaint. Because it appeared that the controversy underlying the due process complaint would very likely be moot if the parent had withdrawn the request for an independent educational evaluation, I ordered the parties to file written briefs concerning the issue. Each party filed a written brief in response to my directive. It should be noted that the parent's brief was titled a motion to dismiss, but it was instead a brief regarding the mootness issue, as no motion to dismiss had ever been filed by the parent in this case. Because of the very late receipt of this information and the impending due process hearing date, the briefs were made due on or before the date of the hearing. Approximately two days before the due process hearing, counsel for the parent stated that because of the parent's argument that the controversy was moot, the parent and parent's counsel would not be attending the due process hearing. Subsequently, the parent and parent's

attorney boycotted the due process hearing. It was my intention to rule on the question of whether the controversy was moot at the outset of the hearing, but because the parent and the parent's attorney decided not to attend the hearing, no evidence was received into the record concerning the allegation that the parent had withdrawn the request for an independent educational evaluation. The parent's refusal to attend the hearing and put on the necessary evidence of the withdrawal of the request for an independent educational evaluation makes it impossible to hold that the matter is moot. There is no evidence in the hearing record to support a conclusion that the parent withdrew the request for an independent educational evaluation. Accordingly, I did not rule on the mootness issue, and the hearing proceeded.

The due process hearing was conducted in one virtual session. The parent and parent's counsel were not present in the virtual hearing room. The school district counsel and representatives of the school district did attend the hearing. School district exhibits S-1 and S-2 were admitted into evidence. Two witnesses testified on behalf of the school district at the hearing.

After the hearing, counsel for the school district presented written closing arguments/posthearing briefs and proposed findings of fact. Counsel for the parent was invited to submit a posthearing brief, but instead submitted a one-page document incorporating the parent's mootness argument as the parent's only response to the due process complaint and the only argument concerning the evidence presented at the hearing. All arguments submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a

proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUE PRESENTED

As determined at the prehearing conference held before this hearing, in which attorneys for both sides participated, the sole issue presented by this case is the following:

Whether the school district has proven that its evaluation of the student on February 23, 2024 was appropriate and, therefore, that the parents are not entitled to an independent educational evaluation at public expense?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, I have made the following findings of fact: [1]

1. The student is very loving and easygoing. (S-1)

[1] (Exhibits shall hereafter be referred to as "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT___").

2. The school district conducted an evaluation of the student on February 23, 2024 in response to a request by the student's parent because of parent concerns regarding the student's progress in reading. The parent had previously told the school psychologist that the student had been evaluated for ADHD in the past but that no diagnosis had been made. In addition, the parent told the school psychologist that the parent had concerns about the student's self-confidence and emotional issues. (NT 22, 27)

3. At the time of the February 23, 2024 evaluation of the student, the student was in [redacted] grade. The evaluation consisted of academic and cognitive assessments, curriculum-based assessments, rating scales, parent input, teacher input and classroom observation. The testing was done on February 21, and February 22, 2024. (S-1; NT 21)

4. During her observation of the student, the evaluator noted that the student showed a lack of confidence on a number of occasions. The evaluator also observed that the student often looked at the evaluator for approval and otherwise demonstrated a lack of confidence during the assessments that were administered for the evaluation. (S-1, S-2; NT 30-31)

5. The evaluator administered the Wechler Intelligence Scale for Children, Fifth Edition, to measure the student's cognitive ability. The student's full-scale IQ was determined to be 96, which was in the average range. (S-1; NT 23 – 24)

6. To assess academic achievement, the evaluator used the Kaufman Test of Educational Achievement, Third Edition. The student's scores were in the average range, but the student demonstrated weakness on the letter and word identification subtest. (S-1, S-2; NT 23 – 24, 30 - 31)

7. The evaluator also evaluated the student for dyslexia. The student scored in the average range indicating no characteristics of dyslexia. (S-1; NT 32)

8. To assess behavior, the evaluator used the Behavior Assessment Scale for Children, Third Edition. The rating scales were completed by the parent and the student's [redacted] grade teacher. No scores were considered to be in the clinically significant range. Both the parent and the teacher reported on the rating scales indicated that the student had exhibited self-confidence problems. (S-1; NT 24)

9. To evaluate the student for ADHD, the evaluator used the Conners-4. On the assessment, the student showed no characteristics of inattention or hyperactivity. (S-1; NT 24 – 25)

10. The student's teacher told the evaluator that the student had made slow and minimal, measured progress in academic areas. (S-1)

11. There was no discrepancy between the student's cognitive ability and the student's academic achievement. The evaluator determined that there was no evidence of a specific learning disability. (NT 25 – 26)

12. Based upon the evaluation, the school district's school psychologist recommended that the student did not need an IEP. (NT 26)

13. The evaluator did not conduct any additional assessments or consider whether the lack of confidence and negative self-talk by the student raised suspicion of a disability. The evaluator attributed the student's lack of confidence to the student's mother. A teacher had informed the evaluator of a conversation she had had with the mother in the presence of the student during which the mother expressed concerns about the student's lack of educational progress. (NT 35 – 38)

14. On April 8, 2024, the school district sent the parents a Notice of Recommended Educational Placement denying the parent's request for an independent educational evaluation. The NOREP contained two errors in the box stating reasons for rejection of other options considered. One error stated that the student's IEP team "agreed that an independent educational evaluation was necessary." The other error stated that the parent "did return the release" to speak with an outside provider. The school district has not issued a corrected NOREP to fix the errors in the April 8, 2024 NOREP. (S-2; NT 30, 37, 42 – 45)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. If a parent disagrees with a school district evaluation, the parent may request an independent educational evaluation at public expense. IDEA § 615(d)(2)(A); 34 C.F.R. § 300.502(b)(1); PP by Michael P and Rita P v. West Chester Area School District, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009). When a parent requests an independent educational evaluation at public expense, the school district must either pay for the evaluation or else request a due process hearing to show that its evaluation is appropriate. 34 C.F.R. § 300.502(b)(2); JH v West Chester Area School District, 121 LRP 13514 (SEA Penna 2019); 22 Pa. Code § 14-102(a)(2)(xxix).

2. In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. It must use technically sound instruments to assess the child. The assessments must be

conducted by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer. The child must be assessed in all areas related to the suspected disability. The evaluation must be comprehensive. When conducting an evaluation, a school district must review appropriate existing evaluation data, including classroom-based assessments and observations by a teacher or related service provider, and on that basis determine whether any additional data are needed to determine whether the student is eligible, as well as to identify the child's special education and related services needs. Perrin ex rel JP v Warrior Run Sch Dist, 66 IDELR 254 (M. D. Penna. 2015); IDEA § 614; 34 C.F.R. §§ 300.301, 300.304 – 300.305; 22 Pa. Code § 14-123.

3. A local education agency is required to provide prior written notice to the parents of a child with a disability before it proposes or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child. Prior written notice must include a number of necessary components, including a description of the action proposed or refused, an explanation of why the agency proposes or refuses to take the action; and a description of other options that the IEP team considered and the reasons why those options were rejected. 34 C.F.R. § 300.503; 22 Pa. Code § 14-102(a)(2)(xxix). In Pennsylvania, the prior written notice is generally called a Notice of Recommended Educational Placement (hereafter sometimes referred to as "NOREP"). Prior written notice is an important procedural safeguard required by IDEA in order to ensure that parents are afforded meaningful participation in the special education process. T.R. v. School District of Philadelphia, 4 F. 4th 279, 79 IDELR 33 (3d Cir. 2021). Congress established the parent procedural safeguards contained in IDEA in order to address the "natural advantage" in terms of information and expertise that school districts would otherwise have over parents. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

4. An IDEA hearing officer has broad equitable powers to issue appropriate remedies when a local education agency violates the Act. All relief under IDEA is equitable. Forest Grove School District v. TA, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (at n. 11) (2009); Ferren C. v. Sch. Dist. of Philadelphia, 612 F. 3d 712, 54 IDELR 274 (3d Cir. 2010); CH by Hayes v. Cape Henlopen Sch. Dist., 606 F. 3d 59, 54 IDELR 212 (3d Cir 2010); Sch. Dist. of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015); Stapleton v. Penns Valley Area Sch. Dist., 71 IDELR 87 (E.D. Penna. 2017). See Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Ed., Albuquerque Public Schools, 530 F. 3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 52 IDELR 239 (SEA W.V. 2009).

5. The school district has not met its burden of proving that its February 23, 2024 evaluation was appropriate, and therefore, the parents are entitled to the requested independent educational evaluation at public expense.

DISCUSSION

Has the school district proven that the school district's February 23, 2024 evaluation of the student was appropriate and, therefore, that the parents are not entitled to an independent educational evaluation at public expense?

The school district filed a due process complaint challenging the parent's request for an independent educational evaluation. The school district contends that its evaluation of the student was appropriate. The parent did not appear at the due process hearing or present any evidence in this case.

A fair reading of the evidence in the record indicates that the February 23, 2024 evaluation of the student by the school district was not comprehensive, and that the student was not assessed in all areas of suspected disability.

The record evidence shows that the student's parent informed the evaluator prior to the evaluation that the student had problems with self-confidence and engaged in negative self-talk. Similarly, on the rating scales in the evaluation, both the student's teacher and the student's parent reported that the student had self-confidence problems. In addition, the evaluator herself observed that the student had self-confidence issues both while completing the assessments that were given and during the evaluator's observation of the student.

Despite the confidence-related issues, the evaluator did not conduct any additional assessments concerning the student's lack of self-confidence, negative self-talk or possible depression. The evaluator also did not consider whether any other disability should be suspected because of the lack of self-confidence and related issues. The evaluator testified that she attributed the student's self-confidence issues to the actions of the student's parent because the student's teacher had told the evaluator that the student's parent had commented in the presence of the student on the student's lack of progress. The evaluator's conclusion in this regard was not based upon any data or assessments. Instead, the conclusion appears to have been reached because of an assumption concerning the parent's skills as a parent based upon one second-hand account of one anecdotal observation. Education decisions about children with disabilities should not be based upon assumptions or stereotypes. This is the polar opposite of what IDEA requires. The record

evidence shows that the evaluation was not comprehensive, and that it did not assess the student in all areas of suspected disability.

Moreover, the school district's evaluation of the student was rendered inappropriate because of two serious errors in the April 8, 2024 Notice of Recommended Educational Placement that the school district issued concerning its denial of the parent's request for an independent educational evaluation. Both errors are contained in the box concerning the reason for rejecting other options considered. The first reason states that an "independent educational evaluation was necessary." Reason number three for rejection of options states that the parent "did return the release form." Both of these statements are the opposite of what the school district meant to convey. At the hearing, the school district's special education director attempted to pass these errors off as "typos." These significant errors, which state the opposite of what is true, however, are not merely typographical errors.

Importantly, there is no evidence in the record that the school district ever issued a corrected NOREP to remedy these significant errors. The cavalier attitude of the school district in so carelessly completing the prior written notice is compounded by the fact that it never corrected the errors. The complete disregard of the school district for the important parent procedural safeguard of prior written notice is unacceptable.

The purpose of prior written notice, which is generally called a "NOREP" in Pennsylvania, is to ensure that the parents are afforded a meaningful opportunity to participate in the special education process, as has been noted by the Third Circuit Court of Appeals. Moreover, as the U. S. Supreme Court has ruled, the Congress established the parent procedural safeguards in order to address the "natural advantage" in information and expertise that school

districts would otherwise have over parents. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005). Given the crucial role of the parent procedural safeguards enumerated by IDEA, a local education agency must always strictly comply with the requirements for a parent's right to prior written notice, the right to review all records relating to their child, the right to an independent educational evaluation, and the other safeguards.

It should be noted that this was not a FAPE case filed by a parent. In cases filed by parents alleging a denial of a free and appropriate public education, the parents must also prove that an actionable procedural violation adversely affects the student's education or else significantly harms the parent's participation rights. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 281 (3d Cir. 2012); IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a). This case, however, was not a FAPE case, but rather, it was an evaluation case filed by a school district. Where a school district files a due process complaint in order to deny an independent educational evaluation at public expense, it must demonstrate strict compliance with all procedural requirements. See, MP by VC v. Parkland Sch Dist, 79 IDELR 126 (E.D. Penna. 2021)

It is concluded that the school district's evaluation was not appropriate because the evaluation was not sufficiently comprehensive and did not assess the student in all areas of suspected disability. It is further concluded that the school district evaluation of the student was not appropriate because the prior written notice issued by the school district denying the independent educational evaluation contained two egregious errors.

Concerning credibility, the parent called no witnesses, so there can be no credibility analysis of parent witnesses. The testimony of the witnesses called by the school district to the effect that the evaluation was

comprehensive, and that the student had been assessed in all areas of suspected disability was not credible or persuasive. This conclusion is based upon the demeanor of the witnesses, as well as the following factor: the testimony of the school psychologist that the evaluation was comprehensive and that it raised no suspicion of any other suspected disabilities is inconsistent with the documentary evidence and the witnesses' own testimony that self-confidence and related issues were expressed by the parent, the teacher and observed directly by the evaluator.

It is concluded that the school district has not proven that its February 23, 2024 evaluation of the student was appropriate. Accordingly, the parents are entitled to an independent educational evaluation at public expense.

Because all relief under IDEA is equitable relief and should be flexible, and because special education under IDEA requires a collaborative process, Schaeffer v. Weast, *supra*, the parties should have the option to agree to alter the relief awarded herein so long as both parties and any lawyers who represent a party agree to do so in writing.

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. The school district shall provide the independent educational evaluation previously requested by the parent at public expense on or before October 23, 2024; and

2. The parties may adjust or amend the terms of this Order by mutual written agreement signed by all parties and any counsel of record.

IT IS SO ORDERED.

ENTERED: August 23, 2024

James Gerl

James Gerl, CHO
Hearing Officer