

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:

24725-20-21

Child's Name:

B.S.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

None

Local Education Agency:

Maritime Academy Charter School
2275 Bridge Street, Building 11
Philadelphia, PA 19137

Counsel for LEA:

Eugene Mattioni, Esquire
2275 Bridge Street, Building 11
Philadelphia, PA 19137

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

05/06/2021

INTRODUCTION

The student, B.S. (hereafter Student),¹ is an early elementary-aged student enrolled in Maritime Academy Charter School (School). Student is currently a regular education student. In March 2021, the School filed a Due Process Complaint under the Individuals with Disabilities Education Act (IDEA)² seeking permission to conduct a special education evaluation to determine whether Student is eligible for services under the IDEA. The case proceeded to a due process hearing convening over a single session.³

For the reasons set forth below, the School's claim must be granted.

PROCEDURAL HISTORY

1. The Complaint was filed on March 25, 2021 (S-1) and assigned to this hearing officer in due course.
2. On April 1, 2021, this hearing officer sent (via email) standard prehearing information to the identified Parents and counsel for the School, including various procedural resources. (HO-1.)
3. On April 15, 2021, a conference call for hearing planning was scheduled (via email) based on

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 §§ 711.1 – 711.62.

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 (HO-) followed by the exhibit number.

availability provided; the Parents themselves had not responded but they and School counsel were provided with the requisite information to dial into the call. (HO-2.)

4. The conference call was held as scheduled on April 16, 2021. The Parents did not join the conference call. (HO-3 at 1-2.)
5. On April 17, 2021, this hearing officer sent the Parents (via email and U.S. mail) a summary of the conference call, notice of the information necessary to join the remote hearing on April 26, 2021, and the method for submitting any exhibits. She additionally resent the information provided on April 1, 2021. School counsel was copied on that communication. (HO-3.)
6. The hearing convened on April 26, 2021 as scheduled through the remote platform. The Parents did not attend, although this hearing officer called the telephone number provided for them by the School at the start of the hearing and, on the record, left a voicemail message with the telephone number to participate in the hearing. (N.T. 5-6, 62-63.)
7. The Parents did not submit any evidence but were provided copies of all exhibits admitted at the hearing. (N.T. 11-12.)

ISSUE

Whether the School should be permitted to conduct a special education evaluation of Student despite an absence of consent of the Parents?

FINDINGS OF FACT

1. Student is an early elementary school-aged student who has been enrolled in the School since the fall of 2020. (N.T. 26-27, 42.)
2. Student has been in foster care for several years and there are currently related proceedings pending in the family court system. However, Student did not have a foster parent at the time of the due process hearing. (N.T. 31-32, 34, 47-48, 51-52, 54-55.)
3. The family court judge ordered a psychiatric evaluation of Student in January 2021. The appointed psychiatrist provided diagnoses of Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and Conduct Disorder. Psychiatrist recommendations included therapeutic interventions and support at the School through an Individualized Education Program (IEP). (S-4.)
4. The School has a comprehensive student review process for students who exhibit academic or behavioral difficulties. As part of that process, regular education interventions are implemented, monitored, and revised as necessary; and a referral for a special education evaluation may be considered if warranted. (N.T. 24-27.)
5. The School has two Board Certified Behavior Analysts on its staff. (N.T. 35, 43.)
6. Student was referred for the comprehensive student review process by Student's teacher because of concerns with Student's behaviors in

December 2020 that were not sufficiently addressed by regular education interventions. (N.T. 27-28, 58-59; S-3.)

7. Student's concerning behaviors included emotional dysregulation and impulsivity that was disruptive to the classroom and peers. Examples of Student's behavior included verbal and physical aggression toward others, other physical aggression such as throwing objects, noncompliance, preventing teachers from entering the classroom, hiding from staff, and elopement. Student continued to exhibit these and similar behaviors into January through March 2021 that were not typical of peers. (N.T. 59-60; S-3; S-5.)
8. Regular education interventions that were implemented by the School included strategies and tools for managing emotions, frequent breaks, positive reinforcement, and alternatives for completing tasks. Those interventions were partially successful during some morning hours but were less effective over time and particularly into the second half of the school day. (S-6.)
9. The School attempted to meet with the Parents on more than one occasion in March 2021 to discuss the process for conducting a special education evaluation. The School also directly sought their consent through a Permission to Evaluate form. The Parents did not appear to meet as scheduled and did not agree to the evaluation. One of the Parents then asked that School communication with them cease. (N.T. 29-31; S-1 at 6-7; S-6; S-9 at 1-2.)
10. In late March 2021, Student was admitted to a local hospital medical behavioral unit where Student has been provided with one-on-one support. (N.T. 32, 48-49.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party seeking relief.⁴ Therefore, the burden of persuasion in this case lies with the School as the party filing for this administrative hearing. In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in light of the burden of persuasion.

Special education hearing officers are also responsible for making credibility determinations of the witnesses who testify as part of the fact-finding process. This hearing officer found each of the witnesses who testified to be credible and convincing. The testimony was essentially quite consistent where it overlapped.

IDEA Principles

The IDEA and state and federal regulations mandate that local educational agencies (LEAs), including charter schools, locate, identify, and evaluate all children with disabilities who need special education and related services.⁵ That obligation, commonly referred to as Child Find, commences when the LEA has reasonable suspicion that a child has a disability.⁶

A “child with a disability” is defined in the IDEA as a child who has been evaluated and identified with one of a number of specific classifications

⁴ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁵ 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); 22 Pa. Code §§ 711.21 – 711.25.

⁶ *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009).

and who, “by reason thereof, needs special education and related services.”⁷ With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs.⁸ Further,

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.⁹

There is an additional requirement before an LEA may proceed with an evaluation for special education eligibility. Specifically, the LEA must seek to obtain consent of the child’s parents for the evaluation.¹⁰ The requisite “consent” requires that the parents be fully advised of all information pertinent to the request, including a description of the activity for which the consent is sought.¹¹ If the child’s parents do not provide consent to the evaluation, the LEA is permitted to request a due process hearing and ask a hearing officer to grant permission to conduct the evaluation.¹²

⁷ 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a).

⁸ 34 C.F.R. § 300.39(a); *see also* 20 U.S.C. § 1401(3).

⁹ 34 C.F.R. § 300.39(b)(3).

¹⁰ 20 U.S.C. § 1414(a)(1)(D)(i)(I); 34 C.F.R. § 300.300(a)(1).

¹¹ 34 C.F.R. § 300.9.

¹² 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 34 C.F.R. § 300.300(a)(3).

The School's Claim

The School in this matter has chosen to pursue an order through due process in order to proceed with an evaluation of Student after the Parents declined their consent. The record preponderantly supports its claim.

Student has been exhibiting behaviors of concern since December 2020 that have disrupted the classroom and peers, engaging in acts of aggression and elopement. The safety of Student, as well as peers and staff at School, have clearly been compromised. The testimony of the qualified School professionals that Student's behaviors are significant and not typical of peers was persuasive, was supported by the documentary evidence, and was accorded significant weight. The School was also provided several psychiatric diagnoses for Student pursuant to a court-ordered evaluation that provided more than ample reason to suspect that Student had a disability. Prior to taking the step of an evaluation, a number of regular education interventions were implemented that were not successful, indicating that Student is in need of additional support.

The School made efforts to discuss its concerns with the Parents, explain the process of conducting a special education evaluation, and seek their permission. In all respects, the School complied with its child find obligations, attempting regular education supports before considering and proposing the evaluation that was the subject of this hearing. In this hearing officer's view, the evidence more than preponderantly supports a conclusion that the School should be permitted to conduct an evaluation to determine whether Student has a disability and, by reason thereof, is in need for specially designed instruction and related services.

It merits mention that the procedure for conducting a special education evaluation requires LEAs to ensure that sufficient and accurate

information about the child is obtained. The LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including input provided by the parents, that may assist in determining the child's eligibility for special education and the content of an Individualized Education Program (IEP).¹³ The evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]"¹⁴ Additionally, the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified," and utilize "[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]"¹⁵ In order to be comprehensive, the evaluation in this case unquestionably must include a Functional Behavioral Assessment.

Additionally, the special education evaluation process requires specific inquiry into whether other factors may play a role in the eligibility determination, such as a lack of appropriate instruction.¹⁶ Furthermore, and crucially, persons in the role of parents of a child are members of the multidisciplinary team and have an opportunity to participate in the determination of whether a student is eligible under the IDEA.¹⁷ And, if Student is determined to be eligible for special education, the team will together determine the appropriate services and level of support to address

¹³ 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. §§ 300.304(b).

¹⁴ 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B).

¹⁵ 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

¹⁶ 20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b).

¹⁷ 20 U.S.C. § 1414(b)(2) and (4); 34 C.F.R. § 300.306.

Student's needs. The evaluation that the School will now be permitted to conduct is merely one important step in this process.

CONCLUSION OF LAW

The School must be permitted to conduct a special evaluation of Student even in the absence of parental consent.

ORDER

AND NOW, this 6th day of May, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The School's request for permission to conduct a special education evaluation of Student is **GRANTED**. The School shall conduct a comprehensive evaluation in accordance with the criteria set forth in the IDEA and all relevant implementing regulations by qualified professionals of its own choosing.
2. The evaluation shall include a Functional Behavioral Assessment by a Board Certified Behavior Analyst as soon as reasonably practical.
3. The School shall proceed with the evaluation as promptly as possible with due consideration given to Student's availability particularly while hospitalized. Should the evaluation or any part thereof not be completed within the applicable timelines because of Student's unavailability, periodic reports of progress on that

evaluation shall be given to the Parents and/or individuals granted educational decision-making authority to include, as possible, dissemination of any interim evaluation report(s).

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire.
HEARING OFFICER
ODR File No. 24725-20-21