

*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 Due Process Hearing Officer**

**Final Decision and Order**

**ODR File Number:**

**24666-20-21**

**CLOSED HEARING**

**Child's Name:**

J.S.

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

**Local Education Agency:**

Aliquippa School District

800 21<sup>st</sup> Street

Aliquippa, PA 15001

**Counsel for the LEA:**

Christina Lane, Esquire

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Pittsburgh, PA 15203

**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

05/11/2021

## Introduction

This special education due process hearing concerns the educational rights of a student (the Student). This hearing was requested by the Student's father (the Father) against the Student's public school district (the District). The Father objects to the District's determination that the Student is a child with disabilities for purposes of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

The Father and the Student's mother (the Mother) are divorced. The Student lives with the Mother in Pennsylvania within the District's boundaries. The Father lives in another state. The Father and Mother share legal custody of the Student, including educational decision-making rights. The Mother is not a party to these proceedings.<sup>1</sup>

The Student attended a Pennsylvania charter school (the Charter) until the 2020-21 school year. The Charter evaluated the Student and determined that the Student was a child with a disability as defined by the IDEA. The Student then aged out of the Charter and transferred to the District. The District reevaluated the Student and confirmed that the Student is a child with a disability. The Father then requested this hearing to challenge the District's determination that the Student is a child with a disability.

As explained below, I find that the District's reevaluation conformed to the IDEA's substantive and procedural requirements. I also find that the

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<sup>1</sup> The Mother received notice of this hearing and responded, via her own attorney, to say that she is not a party to this hearing but that her position is the same as the District's. Thereafter, the Mother continued to receive hearing notices and a copy of this Decision and Order, but no other correspondence.

evidence in this case is insufficient to overturn the District's determination that the Student is a child with a disability.

### **Issue**

The Father presented a single issue for adjudication: Did the District, through its reevaluation, correctly determine that the Student is a child with a disability?<sup>2</sup>

### **Findings of Fact**

Although the parties did not formally file stipulations, the parties are in general agreement about the facts of this case. I reviewed the entire record, and find as follows:

### **Background**

1. The Father and Mother are divorced. The Student lives with the Mother within the District's geographical boundaries. The Father lives in another state. *Passim*.
2. The Father and the Mother share joint legal custody over the Student. A custody order from a Pennsylvania Court of Common Pleas explicitly

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<sup>2</sup> The Father's due process complaint can be read to include a claim that the District evaluated the Student without his consent. At the start of the hearing, the Father agreed that the District evaluated the Student with his consent but that the Charter did not get his consent before evaluating the Student. The Father included statements about prior evaluations without his consent within his complaint for background and context. NT *passim*.

gives educational decision-making rights to both the Father and the Mother.<sup>3</sup> S-12 at 3-4, P-6, P-8.

3. [Redacted]. *See, e.g.* P-5.
4. The Student attended the Charter during the 2014-15 school year, which was the Student's 1<sup>st</sup> grade year. S-4.
5. The Student's mother referred the Student for a multi-disciplinary evaluation due to behavioral concerns. The Charter evaluated the Student and issued an Evaluation Report (ER) on March 5, 2015.
6. The ER included information from the Mother, information from the Student's teachers, an observation by a School Psychologist, standardized, normative assessments of the Student's intellectual abilities and academic achievement, a review of the Student's grades, and a review of the services that the Student received outside of school. S-4.
7. The ER noted that the Student had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Posttraumatic Stress Disorder (PTSD) by outside professionals. The Charter's evaluator opined that the Student's presentation in school was consistent with those diagnoses. S-4.
8. Although the Student's behaviors in school were concerning, the Student was academically successful. S-4.

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<sup>3</sup> I omit the full name of the court to protect the parties' privacy.

9. Through the ER, the Charter found that the Student was a child with a disability but did not need Specially Designed Instruction (SDI) and, therefore, was not eligible for special education. S-4.
10. Through the ER, the Charter found that the Student would benefit from a Section 504 Service Agreement.<sup>4</sup>
11. The Father was not informed of the ER. As a result, the Mother participated in the evaluation, but the Father did not. S-4, P-7.
12. The Student continued to attend the Charter through the 2019-20 school year, which was the Student's 6<sup>th</sup> grade year. S-10.
13. I take judicial notice that, on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19 pandemic. The Student was enrolled in the Charter, not the District, at this time. The record of this case establishes that the District complied with the Governor's order. The record of this case is silent as to whether the Charter also complied. It is reasonable to assume, however, that the Charter did comply.
14. The Charter reevaluated the Student and drafted a Reevaluation Report dated March 25, 2020 (the 2020 RR). S-10.

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<sup>4</sup> Section 504 is Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* A Section 504 Service Agreement is the document through which schools and parents memorialize agreements as to what accommodations children with disabilities who are *not* in need of special education will receive. Pennsylvania implements Section 504 through regulations at 22 Pa Code § 15.

15. The 2020 RR included information from the Mother, information from the Student's teachers, an observation by a School Psychologist (conducted before the shutdown), standardized, normative assessments of the Student's intellectual abilities and academic achievement, standardized, normative ratings of the Student's behaviors, a review of the Student's grades and standardized test scores, and a review of the Student's Section 504 accommodations. S-10.
16. As with the ER, the Father was not a part of the Student's evaluation team at the Charter for the 2020 RR. *See, e.g.* S-10 at 28.
17. Through the 2020 RR, the Charter found that the Student was academically successful and showed no discrepancy between intellectual ability and academic achievement. Consequently, the Charter found that the Student did not have a specific learning disability. S-10.
18. Through the 2020 RR, the Charter found that the Student had behavioral problems observed by teachers, evaluators, and the Mother. Behavioral problems were also substantiated through standardized rating scales. These observations and ratings, in conjunction with the Student's PTSD and ADHD diagnoses, were consistent with the IDEA disability categories of Emotional Disturbance and Other Health Impairment (OHI). S-10.
19. Through the 2020 RR, in addition to finding that the Student was a child with an Emotional Disturbance and OHI, the Charter found that

the Student was in need of SDI and, consequently, was eligible for special education. S-10.

20. After the 2020 RR, the Charter developed an IEP for the Student. Under that IEP, the Student received an itinerant amount of learning support.<sup>5</sup>
21. The Charter ends its program with 6<sup>th</sup> grade. The Mother enrolled the Student in the District for 7<sup>th</sup> grade. *Passim*.

### ***The 2020-21 School Year (7<sup>th</sup> Grade)***

22. The Student transferred to the District for the 2020-21 school year as a child with a disability under the Charter's IEP, which provided itinerant learning support. *Passim*.<sup>6</sup>
23. After the Student enrolled in the District, the District concluded that it could better implement the Charter's IEP through the District's itinerant emotional support program. S-6, S-8.
24. On November 19, 2020, the District issued a Notice of Recommended Educational Placement (NOREP). As used in this instance, the NOREP is a form through which the District sought both parents' consent to change the Student's placement from itinerant learning support to

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<sup>5</sup> The Charter's IEP is not in evidence. The District's documents characterize the Student's placement in the Charter as itinerant learning support, and the Father does not dispute that characterization. *See, e.g.* S-6 at 8.

<sup>6</sup> The Student's enrollment paperwork is not in evidence, and there is no direct testimony on this point. However, the record as a whole is consistent on this point, and there is no dispute between the parties about the Student's status at the time of the transfer.

itinerant emotional support. The District did not propose changing the Student's special education (specially designed instruction and related services) in any other way. The NOREP would only change the program through which the Student received special education, not the special education itself. S-6, S-8.

25. On November 20, 2020, the Father sent a Permission to Reevaluate – Reevaluation Request Form to the District.<sup>7</sup> On that form, the Father wrote, “My concern is that the IEP is being implemented as a safeguard for [Student’s] misbehaving, not because [Student] is in any way unstable.” S-7 at 1.
26. On November 29, 2020, the Father rejected the NOREP proposing the change from itinerant learning support to itinerant emotional support. On the NOREP, the Father wrote that the District’s proposed action was part of a “ploy” by the Mother, and that the Student is not “emotionally imbalanced or unstable.” S-6 at 3, S-8 at 3.
27. On December 9, 2020, the Mother approved the NOREP. S-6 at 7.
28. On December 9, 2020, the Mother also sent a Permission to Reevaluate – Reevaluation Request Form to the District. The Mother did not explain why she wanted a reevaluation on the form. S-7 at 3.

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<sup>7</sup> Pennsylvania uses two versions of the Permission to Reevaluate form: The Request version is used by parents to request evaluations and the Consent version is used by schools to obtain parental consent to reevaluate. The form at S-7 is a Request. A Consent form is not in evidence but there is no claim that the District reevaluated the Student without parental consent.

29. The District accepted the Mother's copy of the NOREP and implemented the Student's IEP through its emotional support program. *See, e.g. S-9 at 1.*
30. The District conducted a reevaluation and documented its findings in a Reevaluation Report dated February 10, 2021 (the 2021 RR). S-9.
31. By the time that the 2021 RR was complete, both parents had shared their conflicting points of view with the District. The Father wanted the District to evaluate the Student to determine if the Student should no longer receive special education. The Mother believed that special education was necessary. The District documented these conflicting views along with other information supplied by both parents in the 2021 RR. S-9.
32. The 2021 RR includes a copy of the testing completed by the Charter for the 2020 RR. S-9.
33. The 2021 RR reported the Student's classroom grades as of the time of testing. In comparison to the 2015 ER and the 2020 RR, the Student's grades had declined significantly. *Compare S-4 at 6 and S-10 at 3-4 to S-9 at 10-11.*
34. The 2021 RR includes narrative input from the Student's teachers. S-9.
35. After reviewing existing data, the District determined that there was a need for new testing, which was conducted with enhanced safety precautions to mitigate the risk of transmitting COVID-19. The

evaluator was able to conclude, however, that the precautions did not invalidate the testing. See S-9 at 14.

36. The additional testing included a behavior rating scale and a standardized, normative assessment of the Student's academic achievement (meaning that the test compares the Student's academic skills to a normed sample of same-age peers). S-9.
37. On the academic achievement testing for reading, the Student scored in the "Average" range on all sub-tests yielding an "Average" score on all reading composites and an "Average" score for "Total Reading." S-9 at 15.
38. On the academic achievement testing for writing, the Student scored in the "Average" range on all sub-tests except for "Essay Composition," which was in the "Below Average" range. This yielded an "Average" score for the Student's "Written Expression Composite." S-9 at 15.
39. On the academic achievement testing for math, the Student scored in the "Average," "Above Average," or "High" range on all sub-tests yielding an "Above Average" score for "Math Fluency" (relating to the ability to calculate with automaticity) and an "Average" score for the "Mathematics Composite." S-9 at 15-16.
40. The behavior rating scale used by the District in the 2021 RR is typically completed by parents and multiple teachers. For the 2021 RR, the District had one teacher rate the Student and had the Student complete a self-assessment. S-9 at 16-20.

41. The teacher's ratings placed the Student in the "At-Risk" range (higher than average but lower than "Clinically Significant") for attention and learning problems, social skills, study skills, and functional communication. The teacher's ratings placed the Student in the "At-Risk" range for leadership skills, which relates to accomplishing academic, social, or community goals including the ability to work with others. S-9 at 17.
42. Taken as a whole, the Student's self-ratings fell in the average range. S-9 at 19.
43. Despite strong academic skills, the Student was struggling in school. Ultimately, the District concluded that the Student continued to be a child with a disability and in need of specially designed instruction. However, the District found that the Student qualified as a child with OHI but not an Emotional Disturbance. See S-9 at 20.<sup>8</sup>

### **Witness Credibility**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of

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<sup>8</sup> An IEP watermarked "Draft" was written after the 2021 RR and is in evidence at S-11. The appropriateness of that IEP is not an issue presented in this hearing.

judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

Both of the witnesses who testified in this matter candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. Of equal importance, the outcome of this case does not depend on a credibility determination.

## **Applicable Legal Principles**

### ***The Burden of Proof***

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *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 party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir.

2004). In this particular case, the Father is the party seeking relief and must bear the burden of persuasion.

### ***Child with Disabilities***

The IDEA defines the term “child with a disability” at 20 U.S.C. § 1401(3)(A) as follows:

The term “child with a disability” means a child—

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

The terms “special education” and “related services” are also defined. The IDEA defines the term “special education” at 20 U.S.C. § 1401(29) as follows:

The term “special education” means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including— (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.

The definition of “special education” uses the term “specially designed instruction,” (SDI) which is also defined by IDEA regulations at 34 C.F.R. § 300.39(b)(3) as follows:

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.

The IDEA defines the term, “related services” at 20 U.S.C. § 1401(26)(A) as follows:

The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education,

and includes the early identification and assessment of disabling conditions in children.

With this information in place, the definition of “child with a disability” establishes a two-part test to determine whether a child is entitled to the substantive rights and procedural protections established by the IDEA. First, the child must have any of the disabilities recognized by the IDEA. Second, “by reason thereof,” the child must need SDI and related services.

### ***Evaluation Criteria***

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

Evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP in order for the child to receive a free, appropriate public education (FAPE). 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

assessments and other evaluation materials...

- (i) are selected and administered so as not to be discriminatory on a racial or cultural basis;
- (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;
- (iii) are used for purposes for which the assessments or measures are valid and reliable;
- (iv) are administered by trained and knowledgeable personnel; and
- (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

### ***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 and Conclusions of Law**

The issue presented in this hearing is narrow and focused. The question in this case is not related to the Father's parental rights. Rather, the question in this case is whether the District accurately determined that the Student is a child with disabilities for IDEA purposes. It is the Father's burden to prove otherwise. There is no preponderant evidence in the record of this case that the 2021 RR violated any of the IDEA's procedural or substantive requirements, or that the District's ultimate conclusion is incorrect. To the contrary, more than a preponderance of evidence in this case proves that the 2021 RR complied with all of the evaluation criteria detailed above.

It is particularly noteworthy that the District found that the Student was eligible for special education only as a child with OHI. The 2021 RR did not continue the Charter's determination that the Student is a child with an emotional disturbance. I take the Father's concerns about mislabeling the Student quite seriously, but it seems that the District's removal of the Emotional Disturbance disability category goes a long way towards addressing the Father's concerns.

Beyond the Student's disability category, I appreciate the Father's candor concerning his parenting philosophy, and the intersection between that philosophy and the ongoing acrimony between him and the Mother. The Father's testimony, taken as a whole and in view of the pleadings, reveals a belief that the Student should be disciplined for inappropriate behavior in

school. The same also reveals a belief that, by creating an environment where the Student is not disciplined in school, the Mother will be able to establish that the Student is well-behaved under her care. I recognize that these issues are of great importance to the Father and address them for that reason, despite the fact that they are not strictly relevant to the question before me and despite the fact that I do not sit in judgment of anyone's parenting philosophy.

Regarding behavioral consequences, the IDEA protects children with disabilities from disciplinary changes in school placement, which include removal from school. This protection is critical, but it is also specific. Nothing in the record suggests that the Student is at risk of suspension or expulsion. Nothing in the record suggests that the Student's entitlement to special education comes with a consequence-free educational experience. Instead, the record establishes that Student's IEP team will draft a positive behavior support plan (PBSP) that will include both preventative strategies and outline appropriate consequences for the Student's behavior. Since enrollment, the District has shown a pattern of involving the Father in IEP development, which should extend to the PBSP.

Regarding the relationship between the parents, ODR is not a family court. The IDEA does not address what should happen when parents disagree about a child's special education. In its closing, the District references Letter to Cox, 54 IDELR 60 (OSEP 2009). In Letter to Cox, the federal Office of Special Education Programs recognizes that such disputes place schools in a difficult position and goes on to provide guidance that makes more sense in theory than in practice.<sup>9</sup> Letter to Cox, however, is limited to circumstances

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<sup>9</sup> In practice, Letter to Cox places students in an infinite loop of evaluations until a family court steps in.

in which a divorced parent revokes consent for all services and does not apply when a parent disagrees with a particular service. This case exclusively concerns the Father's disagreement with the conclusion of the District's reevaluation. Questions about the Father's right to revoke consent, or the District's obligations should the Father invoke that right, are not before me.

In the end, as noted above, the IDEA is not structured to address parents who disagree with each other, and special education hearings are an inappropriate forum to raise such disputes. Unlike a family court, I cannot resolve disputes between parents. I can only determine if the District's reevaluation was appropriate in juxtaposition with the IDEA's substantive and procedural standards. I find that it was.

### **ORDER**

Now, May 11, 2021, it is hereby **ORDERED** that the District's Reevaluation Report of February 10, 2021, was substantively and procedurally appropriate and, consequently, the District's determination that the Student is a child with a disability in need of special education shall not be disturbed.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER