

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.28895-23-24

Child's Name:

J.M.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents

Pro se

Local Education Agency:

Bensalem Township School District
3000 Donallen Drive,
Bensalem, PA 19020

Counsel for LEA

Maria Desautelle, Esq.
Sweet Stevens Katz Williams
331 E. Butler Avenue,
New Britain, PA 18901

Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

3/6/24

INFORMATION AND PROCEDURAL HISTORY

The Student¹ is currently [redacted] years old and enrolled in a regular education [redacted] in the District. Early in the school year, the District documented behaviors exhibited by the Student that raised concerns that the child might be a child with a disability. Although the District issued permission to evaluate to the Parents, they refused to consent.² Pursuant to the Individuals with Disabilities Education Act (IDEA)³, the District filed a due process Complaint seeking permission to evaluate to explore areas of concern and determine if the Student qualified as a child with a disability and needed specially designed instruction, accommodations, or related services.

The District filed the Complaint on December 6, 2023, and the Hearing Officer scheduled the hearing for January 12, 2024.⁴ On December 11, 2023, the District requested a continuance on the grounds that its LEA representative was unavailable on the scheduled hearing date. Although the Parent objected, the Hearing Officer granted the District's request.⁵ During the selection of new hearing dates, the Parents indicated they had no availability until February 2024. February 20 and February 21 were

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 Although the child has two parents involved with educational decision making; only one parent assumed the lead in communicating with the District and Hearing Officer.

³ 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.

⁴ Because of the Parent's aggressive and confrontational communication, the Hearing Officer requested the parties to send their dates of availability in separate emails.

⁵ (HO-1)

established as hearing dates.⁶ On January 30, the Parent indicated unavailability for the February hearing dates and requested a continuance until sometime in April.⁷ The District objected on grounds that completion of an evaluation during the school year would be impacted and offered after-school hours and evening availability. The Hearing Officer denied the Parent's continuance request. In an expletive-laden email to the Hearing Officer and District legal counsel, the Parent asked not to be contacted again.⁸ Although the Parents were provided with notice and connection information for the remote hearing, no Parents participated. The Parents were provided with the hearing exhibits and the transcript of the hearing that outlined the requirements to submit a closing statement. The Parents did not submit a closing statement.

Based on the evidence presented, the District's claims are granted.

ISSUE

May the District proceed with an evaluation of the Student without parental consent?

FINDINGS OF FACT

1. During the 2023-2024 school year the Student is enrolled in [redacted] in the District. (S-9; N.T. 19-22)

⁶ Before February 21, the second hearing was determined to be unneeded and cancelled.

⁷ (HO-1)

⁸ (HO-2)

2. Throughout September 2023, the Student engaged in inappropriate and unsafe behavior and disrespect to staff that ranged from elopement from the classroom [redacted], pulling down clothing and [redacted] during class, ripping out the headband of staff, resulting in the pulling out of hair. (S-1, S-4; N.T. 27-28, 32, 35, 83)
3. On September 28, 2023, the District provided the Parents with prior written notice for initial evaluation and request for consent to evaluate (PTE) the Student along with procedural safeguards. (S-2, S-4, S-14; N.T. 68, 89-90. 94-95)
4. The PTE sought permission to conduct a psycho-educational evaluation to include measures of cognitive functioning, academic achievement, social and emotional status behavior, and attention/executive functioning; a functional behavioral assessment (FBA); speech/language evaluation; and an occupational therapy (OT) evaluation. (S-2)
5. The consent indicated concerns related to the Student's ability to adequately participate in lessons, follow routines, remain in designated areas of the classroom and building, use school property, initiate and complete tasks, writing grasp, use and respond to language, demonstrate social awareness, and regulate sensory interests and emotional reactions. (S-2, p. 2; N.T. 28-30)
6. The Parent's September 30, 2023, reply to the District request, copied to national FOX news entertainers, [redacted] emphasized that no permission was or would ever be granted to an evaluation. (S-2, p. 9)

7. On October 3, the Parents indicated they would block the District's email address. (S-2, p. 11)
8. On October 30, 2023, the District's Assistant to the Superintendent for Special Services emailed the Parents, citing the Student's remarkable vocabulary, and again attached the (PTE). (S-5)
9. On November 30, 2023, citing months of verbally aggressive and abusive communication with staff and administrators, the District contacted the Parents and demanded that they cease and desist from all verbal or in-person contact with staff personnel and that all questions, concerns and requests occur via email to its legal counsel. (S-7; N.T. 70)
10. From October 2023 through December 2023, the Student engaged in numerous troubling, unsafe and inappropriate behaviors that included physical aggression toward school staff and classmates, repeated elopement from the classroom, [redacted], multiple incidents of [redacted], disrupting instruction, and task refusal.⁹ (S-1, S-14, N.T. 40-44, 53-62, 66-88, 115-117)
11. The Student does not have a mature and conventional grasp on writing utensils and other school tools, appears unable to use and respond to language in a functional or expected way, demonstrates no social awareness, ability to engage appropriately with peers and/or

⁹ On November 2, 2023, with two school staff present, the Student eloped from the classroom, ten times. (S-1, p.2)

maintain spatial social boundaries. (S-1, S-2, S-4, S-5, S-9, S-14 p. 54- 55, 56; N.T. 28, 29, 30, 35, 39, 51, 52, 84, 85)

12. To address the behaviors, the [redacted] teacher provided the Student with modifications and accommodations that include a weighted stuffed animal, extended time for the completion of assignments, repetition of directions, chunking of classroom work, stencils, choral responding, one-on-one attention, and using a gentle voice. A classroom [redacted] aide now supports only the Student. (S-11; N.T. 43-45, 64-65, 95-97)
13. Academically, the Student demonstrates strong skills in reading and math and has earned As on report cards. (S-9; N.T. 24, 26-27)
14. On December 6, 2023, the District filed a due process complaint. (S-8)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof consists of two elements: the burden of production and the burden of persuasion. 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). Thus, the burden of persuasion in this case must rest with the District, the party that filed the complaint. Application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in

"equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, who assume the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *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). Only District witnesses testified. This hearing officer found each of the witnesses who testified to be credible.

IDEA Principles

Child Find

The IDEA's child find provision requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. § 1412(a)(3); ; 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. For school districts, the child find duty creates a continuing obligation to identify and evaluate all students who are reasonably suspected of having a disability under the statutes. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995); *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); see also 20 U.S.C. § 1412(a)(3). LEAs must evaluate children who are suspected to be children with disabilities within a reasonable period of time after the school is on notice of academics or behavior that is likely to reflect a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012).

Evaluation Consent

The IDEA requires local educational agencies to obtain informed consent from the parents prior to evaluating a child to determine whether or not the child is a child with a disability. 20 U.S.C. § 1414(a)(1)(D)(i)(I), 34 C.F.R. §300.300(a)(1). The notice required includes prior written notice of the intention to evaluate. 34 C.F.R. §300.300(a)(1), 300.503, 300.504. If parents refuse to consent to evaluation, the agency is allowed to request due process and seek an order from a hearing officer permitting it to conduct the evaluation. 20 U.S.C. §1414(a)(1)(D)(ii)(I), 34 C.F.R. §300.300(a)(3). The decision is an application of the hearing officer's equitable authority, and rests within the hearing officer's sound discretion. *Upper Darby School District*, 116 LRP 20230; *G.B. v. San Ramon Valley Unified Sch. Dist.*, 51 IDELR 35 (N.D. Cal. 2008).

The District's Claim

The District has decided to pursue due process to proceed with an evaluation of the Student after the Parents declined to consent. The record preponderantly supports the District's claim.

From the beginning of the school year, this [student] has exhibited behaviors of concern that have disrupted the classroom and interfered with educational access, ranging from [redacted], aggression to peers and staff and elopement from the school building. These behaviors have compromised the safety of Student, as well as peers and school staff. Additionally, the evidence has established that before requesting due process to override the Parents' refusal of an evaluation, the District implemented several unsuccessful educational interventions, indicating that Student may need additional support. The District appropriately 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 District

complied with its child find obligations, attempting educational support before considering and proposing the evaluation that was the subject of this hearing. Finally, the persuasive testimony from the current [redacted] teacher described a range of nearly daily disruptive, disturbing and unsafe behaviors that persist despite incorporated modifications and accommodations. That testimony was fully supported by the documentary evidence and was accorded significant weight.

The evidence is preponderant that the Student's school behaviors, fully documented by the hearing record, appropriately compel granting the District's requested relief. The District will be permitted the ability to proceed with a special education evaluation of the Student.

It is critical, particularly for the benefit of the Parents, to outline the next steps that will occur to ensure that sufficient and accurate information about their child is obtained. For the evaluation, the District 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, which may assist in determining eligibility for special education. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. §§ 300.304(b) 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[.]" 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B) 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[.]" 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3)15 To be comprehensive, the

evaluation in this case unquestionably must include a functional behavioral assessment (FBA). Additionally, the special education evaluation process requires specific inquiry into whether other factors may affect an eligibility determination. 20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b). Crucially, the Parents are members of the multidisciplinary team and have an opportunity to determine whether their child is eligible under the IDEA. 20 U.S.C. § 1414(b)(2) and (4); 34 C.F.R. § 300.306. If this Student is determined to be eligible for special education, together, the team will determine the appropriate services and level of support to address the identified needs.

ORDER

AND NOW, this 8th day of March 2024, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District's request for permission to conduct a comprehensive special education evaluation of Student is GRANTED.

2. The comprehensive evaluation shall be conducted by qualified professionals of the District's choosing, in accordance with the foregoing decision, the criteria set forth in the IDEA and all relevant implementing regulations.

Nothing in this order should be read to limit the ability of the parties to mutually agree otherwise as to the terms of this order, so long as any such agreement is in writing.

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

/s/Joy Waters Fleming, Esquire

Joy Waters Fleming, Esquire
Special Education Hearing Officer

Dated: 3/6/24