

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

DECISION

Child's Name: A.L.

Date of Birth: [redacted]

Date of Hearing: July 8, 2011

CLOSED HEARING

ODR No. 1885-1011JS

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Plum Borough School District
900 Elicker Road
Plum, PA 15239

Andrew Evankovich, Esquire
Andrews and Price
1500 Ardmore Blvd., Suite 506
Pittsburgh, PA 15221

Date Record Closed:

July 13, 2011

Date of Decision:

July 15, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student)¹ is an elementary-school-aged student in the Plum Borough School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et seq.* The District filed a due process complaint after it requested the Parents' consent to a medical evaluation. Student's Father agreed while Student's Mother did not.

The matter proceeded to a hearing which convened over one session, at which time the parties presented evidence in support of their respective positions. For the reasons which follow, I find in favor of the District.

ISSUES

Whether the District should be permitted to obtain a medical evaluation of Student by a pediatric orthopedist or physiatrist at public expense without parental consent, and further be provided with the results of that evaluation; and

Whether the District should be provided with an updated prescription for physical therapy for Student for the 2011-12 school year?

FINDINGS OF FACT

1. Student is an elementary school-aged student of the District who is eligible for special education by reason of an orthopedic impairment (OI). Student attends elementary school in the District where Student has been since first grade, and has performed well in regular education classes. (Notes of Testimony (N.T.) 31-32, 149; School District Exhibit (S) 8)
2. Student has been diagnosed with spastic quadriplegia cerebral palsy and requires assistance with fine and gross motor activities in the school setting, generally provided by a one-on-one personal care aide (PCA). At the time of Student's most recent re-evaluation in May 2010, Student was navigating through the school building through hand-walking (with no device but with hand-held assistance of an adult); use of a walker (with adult assistance); and use of a wheelchair. (N.T. 76, 126; S 8)
3. The May 2010 re-evaluation report (RR) noted that over the course of the 2009-10 school year, Student demonstrated increased difficulty with stabilization of the waist and legs, resulting in difficulty ambulating between classes without missing class time. (S 8)
4. At the time of the May 2010 RR, Student was using a Rifton chair in the classroom, although Student sometimes demonstrated fatigue at the end of the school day. Student

¹ Student's name and gender, as well as other potentially identifying information, are omitted from the body of this decision for confidentiality reasons.

was in all regular education classes, and was provided with adaptations for physical education class as well as occupational therapy (OT) and physical therapy (PT). (S 8)

5. Cognitive and achievement testing administered for the May 2010 RR revealed generally average academic achievement and average cognitive ability.² Input from one of the Parents and Student's teachers, and a report of an observation by a physical therapist during ambulation from the school bus to the classroom, were also included. The RR determined that Student remained eligible for special education on the basis of OI, and recommended continuation of the one-on-one PCA, additional time to complete assignments as needed due to fatigue, and accommodations in the classroom as necessary. (S 8)
6. The Individualized Education Program (IEP) which followed the May 2010 re-evaluation contained annual goals addressing fine and gross motor needs including adaptations in physical education class, and a goal for reading comprehension. The IEP also provided for a number of program modifications/items of specially designed instruction and related services (OT, PT, adaptive physical education, and a PCA). (N.T. 33-36; S 1)
7. During the 2010-11 school year, Student was provided with ½ hour of direct PT each week, and the physical therapist also consulted with other District staff. During the direct PT sessions, the therapist observed and assisted with Student's exit from the bus, ambulation to the classroom, and seating in the Rifton chair. The physical therapist assessed Student's motor ability, and provided instruction to the PCA on assisting Student. (N.T. 71-74, 89-90, 120-24)
8. For most of the 2010-11 school year, Student was provided with four to five opportunities each day to walk with the walker, although safety concerns sometimes limited the number of opportunities that Student walked each day. (N.T. 73-74, 95-96)
9. Over the course of the 2010-11 school year, and particularly by February 2011, District personnel observed that Student was demonstrating decreased stability in the ankle and knee joints, decreased muscle tone, and difficulty maintaining upright posture. When Student was fatigued, these motor difficulties became more pronounced, which in turn resulted in even more fatigue. Student also was exhibiting difficulty controlling the walker and maintaining foot position with the Rifton chair. (N.T. 62, 77, 84, 126-29; S 2 at 7)
10. The physical therapist was particularly concerned with Student's deteriorating physical abilities because the joint instability could lead to damage to Student's joints and a resulting inability to ambulate by walking. (N.T. 78, 84-85)
11. A new IEP was developed in April 2011 with the participation of Student's Father. Annual goals addressed fine and gross motor skills, adaptations in physical education class, and management of classroom materials; a number of program modifications/items

² Certain subtests of the Wechsler Intelligence Scale for Children – Fourth Edition were not administered due to Student's fine motor weaknesses. (S 8 at 4-6)

of specially designed instruction were also provided, as were related services (OT, PT, adaptive physical education, and a PCA). New items of specially designed instruction addressed, among other things, self-advocacy and use of a walker for all ambulation across distances of 25 feet or less, with a provision that Student would not be hand-walked at school at any time. The IEP team also recommended that Student be evaluated by an orthopedist and/or physiatrist. (N.T. 36-37, 42-44, 75, 95-97, 141, 145-46; S 2)

12. Student's Mother subsequently provided input into the April 2011 IEP, resulting in slight revisions to the program modifications/items of specially designed instruction. (N.T. 38-39, 173; S 3)
13. After the April 2011 IEP meeting, the District sent a Permission to Evaluate form to Student's mother to obtain a "functional and medical physical evaluation" by an orthopedist or physiatrist. (N.T. 44-45; S 4)
14. In May 2011, the District sent a letter to Student's mother requesting an updated physical therapy prescription as well as the medical evaluation by a pediatric orthopedist and/or physiatrist. The requested assessment cannot be conducted by a general practitioner or general pediatrician because of the concerns about Student involve bone density, bone deformities, and specific characteristics of ligaments, muscles, tendons, and joints. (N.T. 46-47, 126-27, 130-31; S 6)
15. By the time of the May 2011 letter, Student required the assistance of two adults to ambulate with the walker at school, whereas previously Student only needed one adult to assist. (N.T. 126-27)
16. Student's Father has also observed deterioration in Student's balance and ability to ambulate since approximately the beginning of 2010. (N.T. 186-89)
17. The District provided a list of physiatrists and pediatric orthopedists to the Mother, from which she could select the person(s) to conduct the requested evaluation. (N.T. 130-31; S 9)
18. The physical therapist responsible for Student's PT is required to have an updated PT prescription for all students. (N.T. 82-83, 124-25)
19. After receiving no response from Student's mother, the District filed a due process complaint. (N.T. 49)

DISCUSSION AND CONCLUSIONS OF LAW

Generally speaking, the burden of proof consists of two elements: the burden of production, and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion in an administrative hearing such as this lies with the party seeking relief.

Schaffer v. Weast, 546 U.S. 49, 62 (2005);³ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the District which requested the hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible, and the testimony with respect to facts necessary to a determination of the issues was more consistent than not. Credibility of specific witnesses is discussed further in this decision as necessary.

The IDEA ensures, *inter alia*, that all children with disabilities are provided with a free, appropriate public education (FAPE) to meet their individual needs. Local education agencies, including school districts, are required under the IDEA to conduct a “full and initial individual evaluation” of a student before it provides special education and related services to that child. 20 U.S.C. § 1414(a)(1)(A); *see also* 34 C.F.R. § 300.301(a). In conducting an evaluation, a local education agency must ensure that it uses procedures to determine whether the child has a disability and to determine the child’s educational needs. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. §

³ The burden of production, “*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

300.301(c)(2). The child must be assessed “in all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(B); *see also* 34 C.F.R. § 300.304(c)(4). Specifically, 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). Re-evaluations are subject to these very same requirements. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303.

Parental consent must be obtained prior to any evaluation. 20 U.S.C. § 1414(a); 34 C.F.R. § 300.300. Where a parent refuses to provide such consent, a District may resort to due process to obtain authorization to proceed with the evaluation. 20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300. In the instant case, the District filed a due process complaint seeking to override the lack of parental consent by the Mother to obtain the evaluation, as well as to be provided with the results of any evaluation ordered to be conducted.

This hearing officer finds that the District met its burden of establishing by a preponderance of the evidence that a medical evaluation by a pediatric orthopedist or a physiatrist is necessary in order to develop an appropriate educational program for Student based upon Student’s needs. At the time of the May 2010 RR, Student was demonstrating increased difficulty with stabilization and ambulation between classes as compared to the beginning of that

school year. (Finding of Fact (FF) 3) Further, Student exhibited increased motor difficulties during the 2010-11 school year with respect to stability of the knee and ankle joints and maintaining an upright posture. (FF 8, 9, 10) Student's muscle tone appeared to have decreased over this same time period. (*Id.*) These difficulties, coupled with Student's fatigue during the school day in a circular cause and effect relationship, clearly have had a significant impact upon Student's ability to access the educational program. Moreover, Student's Father has noticed similar deterioration in Student's balance and ambulation for at least one year. (FF 16)

Both Parents testified, convincingly, that Student's cerebral palsy is not a condition which is expected to worsen over time, and that Student needs to work hard to maintain and improve muscle tone and strength. (N.T. 187-88, 202⁴) There is also no question that Student needs to continually work on motor skills during the school day. (FF 6, 8; S 1) Even accepting the fact that Student at times showed an ability toward the end of the 2010-11 school year to walk some distance with assistance (hand walking) but without a walker (N.T. 176), the substantial evidence of the increased difficulties noted above is significant, and the cause of the deterioration is unknown and cannot be attributed to Student's medical diagnosis. The District also presented credible testimony that, from a physical therapy perspective, progressively deteriorating joint instability could lead to possible permanent damage to Student's joints. In view of all of this information, the District clearly needs to be provided with an evaluation from a medical professional which will enable it to understand and appropriately program for Student's current needs. (FF 10) This hearing officer is also persuaded that an appropriate assessment to thoroughly address these concerns must be conducted by a specialist who is

⁴ Although the statement on N.T. 202 was part of the Mother's closing argument, which is technically not evidence, this witness had been under oath and was summarizing her position of agreement with the statements of the Father on this topic.

familiar with bones, ligaments, muscles, tendons, and joints. (FF 14) For all of these reasons, this hearing officer concludes that the District has established that it may proceed with a medical evaluation of Student by a pediatric orthopedist or a physiatrist. The evaluation will, of course, be at public expense.

It should be noted that Student's Mother does not appear to truly challenge the need for an appropriate evaluation of Student by a qualified specialist. Rather, her main concern is with confidentiality over Student's medical records (N.T. 149, 154), and particularly the District's access to them, which is the basis for her objection to the District's second form of requested relief. Permitting the District to proceed with a medical evaluation without also providing it with the results of that evaluation, however, would defeat the purpose of its request. More importantly, the reason the District will be permitted to obtain the requested evaluation is so that it may use the results in order to appropriately identify all of Student's current special education and related service needs, so that the IEP team may then develop an appropriate educational program for Student.

With respect to Student's privacy, there is no suggestion in this record that the District is not aware of its obligations to maintain confidentiality of educational records, which would include an evaluation report of Student. Nevertheless, giving due consideration of this concern raised by the Mother, the District will be reminded in the accompanying order of its responsibility to ensure that the report of the medical evaluation obtained must be shared only with appropriate personnel.

The last request of the District is that it be provided with an updated prescription for PT for the 2011-12 school year. There is no dispute that Student continues to need PT, and that a current prescription is required by the physical therapist. (FF 11, 18) Accordingly, the District

is entitled to this form of relief. If it is not promptly provided with a current PT prescription from the Parents, the District may request one from the pediatric orthopedist or physiatrist who conducts the medical evaluation.

There is one other area which merits mention. The record demonstrates that communication between the Mother and some of the District personnel has become less than cordial and, perhaps, contentious at times. The reasons for this are not clear. However, there was a reasonable suggestion made by the Mother during the hearing that, if she were willing to proceed with having Student evaluated by a pediatric orthopedist or physiatrist and then provide the results of that evaluation to the District (N.T. 160), the issues would be resolved. Nothing in this decision should be read to preclude the parties from proceeding in this manner. To the contrary, it is the sincere hope of this hearing officer that the parties begin to think again in terms of cooperation, with a goal toward improved communication between the Mother and the District. Student, at this age, has a number of years left in the District during which the parties will be required to participate together in educational programming decisions. The parties should be mindful of this as Student prepares to begin the 2011-12 school year.

CONCLUSION

For all of the foregoing reasons, the District's request for an order authorizing it to obtain a medical evaluation of Student by a pediatric orthopedist or a physiatrist is appropriate, and will be granted. The District will also be permitted to have access to the results of that evaluation, although it will be reminded of the necessity to maintain the confidentiality of those results. The District will be further permitted to obtain a current prescription for physical therapy for Student for the 2011-12 school year.

ORDER

In accordance with the foregoing findings of fact, discussion, and conclusions of law, it is hereby ORDERED as follows.

1. The District's request to obtain a medical evaluation of Student by a pediatric orthopedist or physiatrist for the purpose of obtaining information which is necessary to the development of an appropriate educational program for Student is granted, consistent with the foregoing discussion.
2. The District's request that Student's IEP team be provided with the results of the requested evaluation is granted. The District is cautioned, however, to be mindful of the need to maintain Student's confidentiality, and shall not permit indiscriminate disclosure of those results beyond the members of the IEP and/or evaluation team, or to any other person involved with Student's educational program who does not have a legitimate need for such information.
3. The District's request that it be provided with an updated prescription for physical therapy for the 2011-12 school year is granted, consistent with the foregoing discussion.

It is FURTHER ORDERED that any claims or issues not specifically addressed in this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: July 15, 2011