

*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: AM

Date of Birth: XX/XX/XXXX

ODR No. 00524-0910 LS

### **OPEN HEARING**

Parties to the Hearing:

Representative:

Pro Se

Pocono Mountain School District  
P.O. Box 200  
Swiftwater, PA 18370-0200

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Date of Ruling:

April 6, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

## **INTRODUCTION**

(Student) is an eleven year old resident of the Pocono Mountain School District (District); she is in sixth grade and her Parents are providing her with home-schooling. She previously was enrolled at the District's [Redacted] Intermediate School. (NT 23-6 to 7, 54-55 to 21.) The Student is not identified. (NT 61-3 to 7.)

The District filed this due process request on November 30, 2009, in order to defend their evaluation after the Parents requested an independent educational evaluation. (NT 56-8 to 19, 62-4 to 24; SD 7.) The District asserts that their evaluation is appropriate and in compliance with the IDEA. Parents claim that the evaluation is inappropriate because the Student manifests "imperfect" ability to listen, think, speak, read, write, spell or do mathematical calculations. (NT 60-20 to 61-7.) Each party seeks a finding in support of its position; the Parents additionally seek dismissal because they have withdrawn their request for an independent educational evaluation, and have withdrawn their child from school in favor of home schooling, which has been approved by the District. (NT 61-8 to 24.)

## **PROCEDURAL HISTORY**

Prior to the hearing, the Parents sought to expand the scope of the hearing, without filing a Complaint Notice. They sought to have adjudicated issues of FERPA compliance, 504 compliance, child find, provision of FAPE and attorney fees. I denied the Parents' request to expand the scope of the hearing, because they had not filed a Complaint Notice as required by law. (NT 12- 9 to 16-3; SD 28.)

Parents also requested a subpoena for broad discovery of District documents, including emails and other written communications among school staff, copies of tests and work portfolios, and teacher grade books. (SD-13.) The District denied further discovery, asserting that some of these documents were not educational records maintained by the District, and some were already available or not in the District's possession. (SD 11.) The Parents then declared that they would not participate in the hearing. (SD 15.) Because the Parents would not be utilizing any of the documents that they sought, I found that they had waived any right they might have to discovery on fairness grounds; in addition, I found the request to be aimed at eliciting suspected evidence of matters outside the scope of the hearing.

Therefore, I denied the request. I also declined to address any FERPA claim on jurisdictional grounds. (SD 16.)

The Parents thereupon presented several email messages, in which they indicated several possible intended courses of action, including possibly participating in the hearing, and possibly withdrawing their request for an IEE. (NT 269-23 to 272-3; SD 18.) I concluded that I could not be certain that the Parents would participate, and I found the requested documents irrelevant to the narrow issues of the hearing. (NT 194-24 to 195-2, 269-23 to 272-3; SD 20.) Thereupon, the Parents requested that I recuse myself for bias, and I declined that request. (SD 21, 24.)

Parents did enter an appearance initially at the hearing and represented themselves. (NT 5-22 to 25.) Parents moved to dismiss on grounds that they withdrew their request for an IEE. I denied this motion at the hearing. (NT 62-4 to 63-7; SD 36.) At the hearing, I also ruled on a motion in limine to exclude numerous witnesses and documents that the Parents had sought to introduce. (NT 12-9 to 53-8.)

In the midst of cross examining the District's first witness – the school psychologist - Parents terminated their participation, expressing anger and frustration and indicating an intention to abandon their further participation in the hearing. (NT 183-17 to 185-22, 194-7 to 196-22.) Despite receiving adequate notice, the Parents did not attend or participate in the subsequent and last hearing date on March 22, 2010. (NT 183-17 to 185-22, 194-7 to 196-22; P-2.)

### **ISSUES**

1. Was the District's November 10, 2009 Evaluation Report appropriate under the standards set forth in the IDEA?
2. Should the hearing officer order the District to pay the cost of an Independent Educational Evaluation?

## FINDINGS OF FACT

### PARENTS' REFERRAL AND PROCEDURES EMPLOYED BY DISTRICT

1. In the Fall of 2009, the Student's fourth grade teachers advised Parents that the Student needed differentiated instruction, including some one-to-one instruction in reading and mathematics, and that she needed to be placed in a slower-paced class. (NT 69-14 to 18; SD-4.)
2. On or about September 21, 2009, the Parents requested that the District evaluate the Student, citing suspected learning disability. (SD-1.)
3. On September 21, 2009, the District issued and the Parents signed a Permission to Evaluate form, citing the Student's recent placement in lower levels of classes due to her ISS and PSSA test results. (SD-2.)
4. On or about November 11, 2009, the District issued an evaluation report and on or about November 12, the District's school psychologist sent a copy to the Parents. (NT 69-19 to 70-14; SD-3.)
5. By custom and practice, the psychologist considered the report sent to the Parents to be a draft, not a final report, because it would be subject to possible change as the result of a multidisciplinary team meeting to be convened after Parents' receipt of the report. (NT 70-15 to 20, 73-18 to 76-13, 219-10 to 23, 222-9 to 223-4; SD-3.)
6. On November 13, 2009, the Parents sent an email message questioning the conclusions drawn by the District's school psychologist from the reported data, and again raised the suggestion that the Student suffers from a learning disorder. They requested an Independent Educational Evaluation. (SD-4.)

7. On November 19, 2009, the District invited the Parents to a meeting to discuss the evaluation and possible section 504 accommodation. (SD-5.)
8. On November 30, 2009, the District filed the instant request for due process. (SD-5.)
9. The Parents did not attend the offered meeting, and on January 6, 2010, the District offered again to host a meeting. (SD 5.)
10. On January 15, 2010, the District convened the team meeting after repeated attempts to obtain the Parents' participation. (NT 73-18 to 76-13, 227-2 to 9; SD-37.)
11. The Parents ostensibly refused to participate because the District's lawyer was in attendance; however, they were notified of the lawyer's planned attendance ahead of time. (NT 73-18 to 76-13, 236-18 to 240-21; SD-34, 37.)

#### NOVEMBER 2009 EVALUATION REPORT

12. The evaluation was performed by the District's highly experienced, certified school psychologist. (NT 66-1 to 69-7, 83-13 to 16.)
13. The evaluation was conducted in the Student's native language, and was based on multiple assessments and multiple kinds of assessments. No single fact or factor was the sole determinant of the report's conclusions. (NT 76-15 to 77-4, 156-5 to 160-4.)
14. The psychologist utilized a variety of testing instruments, all of which were valid and reliable for the purposes for which they were used, and she utilized them pursuant to the publishers' instructions. (NT 77-5 to 82-18, 197-19 to 198-1; SD-37.)
15. The psychologist explored all reasonably suspected and suggested areas of weakness. (NT 160-5 to 9, 174-12 to 179-20, 199-15 to 202-7, 206-3 to 207-4; SD-37 p. 30.)

16. The evaluation was based upon cognitive and achievement testing, classroom observation including data gathering in fifteen minute intervals, parent reports, teacher reports and school records. Multiple sources were employed and a broad range of functioning was examined. (NT 83-18 to 91-21; SD-37 pp. 28 to 30; P-3.)
17. Classroom observation did not disclose any evidence of atypical behavior, retention difficulties or learning difficulties. (NT 97-13 to 100-14; SD-37 p. 5.)
18. The Student's teachers reported that she required some repetition to acquire new skills. (SD-37 p. 6.)
19. The fifth grade PSSA test showed weakness in oral fluency, inferencing skills, interpretation of and analysis of details and word recognition. Cognitive testing confirmed a weakness in fluency. (SD-37 p. 6, 27, 28.)
20. The District's psychologist further explored the fluency results with additional testing, and in conclusion, ruled out specific learning disability. (NT 104-14 to 128-6.)
21. Parental reports of medical and developmental history and the reports of classroom teachers, along with a review of existing school records, raised no significant academic, behavioral or functioning problems and no cause for concern, except for the Student's vision; this was checked and the Student received glasses. (NT 90-17 to 92-21, 93-4 to 97-9, 101-2 to 102-15; SD-37 p. 6.)
22. The Student's grades indicated that she was making educational progress during relevant time periods. (NT 130-1 to 133-17, 230-10 to 233-13, 234-8 to 235-8.)
23. Although the Student was in a slower-paced class for a short period, it was a regular education class and placement there did not indicate need for special education. (NT 135-17 to 19, 210-5 to 214-11, 233-14 to 234-7, 235-9 to 236-16.)

24. Teachers reported that the Student was making progress in sixth grade. This was corroborated by the Student's report cards. (SD-37 p. 7, 33.)
25. The Student was referred for vision screening. (SD-37 p. 7.)
26. Achievement testing revealed achievement in the average range in reading, writing and mathematics. (SD-37 pp. 8, 9, 25.)
27. Cognitive testing revealed no weaknesses that would compromise learning or performance. The student's nonverbal reasoning abilities are much better developed than her verbal reasoning abilities. Processing speed is average. Her full scale IQ is high-average. (S-37 p. 14.)
28. The school psychologist administered additional tests and found no problems with visual-motor integration, and parent/teacher observations of behavior such as executive function. (SD-37 pp. 18 to 24)
29. The evaluation found that the Student had no need of specially designed instruction, because she was progressing normally in school. (SD-37 p. 30.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>1</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer

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<sup>1</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence<sup>2</sup> to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon the District, which initiated the due process proceeding. If the evidence is in “equipoise”, the District will not prevail.

#### LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The hearing officer must determine whether or not the District’s evaluation was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311. If the District’s evaluation was inappropriate, the Parent is entitled to an independent educational evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

The IDEA obligates a local educational agency to conduct a “full and

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<sup>2</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).



individual initial evaluation ... .” 20 U.S.C §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to “determine the educational needs of such child ... .” 20 U.S.C. §1414(a)(1)(C)(i). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii).

The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status ... .” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need ... .” 34 C.F.R. §300.304(c)(2).

The IDEA requires the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information ... .” 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors ... .” 20 U.S.C. §1414(b)(2)(C). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii).

Further, the regulations require that the evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs ... .” 34 C.F.R. §300.304(c)(6). At least one federal court has interpreted the IDEA to require that the evaluation be “sufficient to develop an appropriate IEP ... .” *Brett S. v. West Chester Area School District*, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. Courts have

approved evaluations based upon compliance with these procedures alone. See, e.g., *Eric H. v. Judson Independent School District*, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002). The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2). The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The agency must utilize information provided by the parent that may assist in the evaluation. *Ibid.* This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.533(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ... .” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

### APPROPRIATENESS OF THE NOVEMBER 2009 EVALUATION<sup>3</sup>

Here, the District fully complied with the procedures required under the IDEA. The District utilized a variety of tools and strategies to gather

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<sup>3</sup> There was much dispute about whether or not the November evaluation was a final evaluation or a draft. I find this dispute to be inconsequential, except to the extent that it reveals that the District solicited input from the Parents at a multidisciplinary team meeting in January, and also updated its data at that time. (FF 4, 5.) The evaluation was essentially complete in November. (FF 4.) Therefore, I will treat it as finished then.

relevant information, 20 U.S.C. §1412(b)(2)(A). (FF 13, 14, 16, 20, 28.) These strategies derived information relevant to “functional, developmental, and academic” functioning. Ibid. The District utilized information provided by the parent. (FF 16, 21, 28.) The determination of ineligibility was not based upon any single measure or assessment. 20 U.S.C. §1412(b)(2)(B). (FF 13.) The Student was assessed in all areas of suspected disability. 20 U.S.C. §1412(b)(3)(B). (FF 15.) The parents were consulted adequately and offered an opportunity to provide input to the ER itself, 20 U.S.C. §1412(b)(4)(A). (FF 5, 7, 9, 10, 11, 16, 21, 28.) The report included review of existing evaluation data provided by the parents and teachers, as well as classroom observations. 20 U.S.C. §1412(c)(2)(A). (FF 16, 17, 18, 21, 24, 28.) The instruments used were technically sound, 20 U.S.C. §1412(b)(2)(C), properly administered, 20 U.S.C. §1412(b)(3)(A), non-discriminatory, and utilized according to the publishers’ instructions. (FF 14.) There was no issue as to qualifications of the District’s school psychologist to administer the psychological testing instruments utilized in the evaluation, 20 U.S.C. §1412(b)(3)(A). (FF 12.)

I find it particularly convincing that the District’s psychologist followed up with additional testing and review of data after her initial testing. That testing revealed that there was an unusual pattern of differences between the Student’s verbal and nonverbal reasoning, and evidence of relatively slow processing skills, although still within the normal range. (FF 18, 19, 23, 27.) The psychologist administered more specific testing and analyzed all of her data to determine whether or not it revealed a learning disability. (FF 15, 20, 28.) Weighing all of the evidence, including consistent evidence of academic progress, (FF 21, 22, 24, 26), the psychologist concluded that the Student was not in need of specially designed instruction. (FF 29.)

I gave great weight to the testimony of the school psychologist. I made a point of frequently questioning her myself, because of the imbalance in skill and experience between the parents appearing pro se – especially with their ambivalent participation - and the skill and experience arrayed against them from the District and its highly experienced counsel. I considered this helpful to assure the reliability of my own fact finding. I found that every answer demonstrated that the psychologist was careful in her methodology, knew the worth and purposes of her instruments, modestly described the inferences that could be drawn, and honestly admitted the limits of her data. In addition, she comprehensively and expertly defended

her results with more than substantial data based upon experienced professional judgment.

On the other hand, the Parents evidenced from the start that they were not deriving well founded inferences from the data at hand. They clearly were motivated by a passion for justice and a parental concern for the Student's welfare, but their suspicion and anger toward the District made me question whether or not they had adequate evidence to justify the conclusions they reached. I found that, in every instance, their accusations and suspicions were rebutted by the weight of the evidence on the record.

The Parents' main argument was that the District's psychologist, whom they credited on the record for skill and experience, was being manipulated by the District, and was not privy to salient facts. The record did not bear this out; on the contrary, the psychologist was sufficiently aware of the Student's placement in a slower regular education class, and was aware that she had struggled to some extent. (FF 1, 3, 6, 15, 18, 19, 23, 25.) One physical weakness, the Student's vision, was detected and resolved in the course of the evaluation. (FF 21, 25.) The psychologist found that these difficulties were not sufficient in magnitude to either change or reopen her evaluation results. (FF 20, 22, 29.) In contrast, I find that the Parents exaggerated the Student's difficulties. Her grades and teacher reports all supported the District's conclusion that she was making adequate progress in school. (FF 15.) The Parents did raise concern about the Student's failure of a small number of mathematics quizzes, and the District offered to deal with their concerns extensively, but the Parents did not follow up on the invitation. (FF 7, 9, 10, 11.)

Similarly, the Parents raised concerns about the Student's January DIBELS testing. The District did not have these scores when it issued the evaluation, and these scores do not merit a re-evaluation. (NT 245-4 to 246-21.) Thus, I find no basis to invalidate the evaluation based upon lack of knowledge of salient facts.

### **CONCLUSION**

For the reasons set forth above, I find that the District's November 2009 evaluation was appropriate.

**ORDER**

1. The evaluation provided by the District in November, 2009 is appropriate.
2. The Parents are not entitled to an Independent Educational Evaluation at District expense.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

April 6, 2010