

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

ODR No. 15800-1415KE

Child's Name: C.R.

Date of Birth: [redacted]

Dates of Hearing: 2/12/15

CLOSED HEARING

Parties to the Hearing:

Parent
Parent[s]

Representative:

Parent Attorney
None

School District
Norristown Area
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Date Record Closed:
Date of Decision:

February 12, 2015
March 2, 2015

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is enrolled in a District elementary school, where the staff has expressed significant concerns about Student's classroom conduct. Student's Father (Parent) has consistently refused consent for a psycho-educational evaluation to determine whether Student's difficult behaviors arise from or are related to a disability for which Student may be eligible for special education services. The District, therefore, initiated a due process complaint to override Parent's refusal to permit the evaluation.

The hearing was held in one brief session on February 12, 2015 at which the District presented testimony and documents to support its request to conduct the evaluation. Parent presented no evidence other than his own testimony to explain the reasons that he does not believe an evaluation is warranted. After consideration of the entire record, the District will be permitted to proceed with the evaluation described in its most recent Permission to Evaluate (PTE), and will also be permitted to include additional evaluation components if the initial results suggest a need for more assessments.

ISSUE

Should the School District be permitted to conduct a psycho-educational evaluation of Student, as it requests, in order to determine whether Student is eligible for special education services, and if Student is determined to be eligible, to identify Student's special education needs and recommend a special education placement and services?

FINDINGS OF FACT

1. Student, a [preteen-aged] child born [redacted] is a resident of the School District and is enrolled in a District elementary school. (Stipulation, N.T. pp. 18, 19; S-2)
2. In accordance with Federal and Pennsylvania standards, the District requests permission to conduct an evaluation of Student to determine whether Student is a child with a disability. 34 C.F.R. §§300.8 (a); 300.15; 300.300(c)(ii), 300.301, 304, 305, 306; 22 Pa. Code §§14.101; 14.102(a)(1); 14.123. (N.T. pp. 128—131;; S-1)

3. During the 2013/2014 school year, Student and a sibling were enrolled in their neighborhood elementary school. The children reside with their Father, only, since their Mother died when Student was [younger]. Parent acknowledges that Student appears to be significantly affected by the loss. (N.T. pp. 33, 148; S-2 pp. 1, 2, S-8 p. 2)
4. Student's difficult classroom behaviors during the 2012/2013 and 2013/2014 school years included non-compliance with directives from authority figures, work refusal, property destruction, verbal and physical aggression toward peers and staff, particularly when corrected, property destruction and elopement from assigned areas to other parts of the school building. Student's classroom and specials teachers frequently requested assistance in managing Student's behaviors from the school's lead teacher, whose duties include handling disciplinary incidents and follow-up. (N.T. pp. 31, 35—39, 42—44, 46; S-8, S-10)
5. Although the lead teacher developed a good rapport with Student, and she and the school counselor provided various behavior interventions that were initially and intermittently successful to some extent, behavior incidents persisted in all school settings, including recess, lunch and on the bus, resulting in numerous disciplinary referrals and consequences. (N.T. pp. 33—38, 44—48, 52—56, 58—66; S-8 pp. 2, 6, S-10 pp. 1—3, 5—10, 28—47)
6. The lead teacher had frequent contact with Parent concerning Student's behaviors, including forwarding daily behavior reports from Student's classroom teacher during the fall and early winter of the 2013/2014 school year. Throughout the school year, Parent was called on many occasions to take Student home before the end of the school day due to behavior issues, resulting in loss of instructional time for Student. (N.T. pp. 34, 40, 48, 57, 58, 67, 68; S-8 p. 2, S-10 pp.11-27, S-22)
7. The lead teacher and school counselor recommended that Parent obtain private counseling for Student. Although Parent took Student to a counselor for a short period, he discontinued it because he was not happy with the counselor. (N.T. pp. 42, 50, 51, 71, 72; S-8 p. 2, S-10 pp. 2, 3)
8. In November 2013, the District became concerned about Student's anger outbursts and discussed with Parent the need for an evaluation to determine whether Student's behaviors arose from or were related to a disability. In December 2013, the District issued its first PTE for Parent's approval. (N.T. pp. 49, 50, 55, 60, 61, 111—113; S-8, S-9, S-10 pp. 9—11, 13, 15, 17—20)
9. Parent initially agreed to submit a written request for an evaluation, but did not sign and return the PTE subsequently issued by the District. Parent changed his mind and withheld consent for the evaluation after reviewing the components and proposed assessments, and after learning that the District had initiated a report to the local Office of Children and Youth (OCY) concerning both Student and sibling. Student's behaviors that presented a danger to staff and peers continued and increased during the second half

- of the 2013/2014 school year. (N.T. pp. 61—64, 115, 116, 124—128, 133, 152, 153, 155, 156; S-10 pp. 21—47, S-12)
10. Parent did not return the forms to either provide or refuse consent when the District re-issued PTEs in February and April 2014, but orally informed District staff that he would not consent to an evaluation. (N.T. pp. 115—120; S-13, S-14, S-18, S-23)
 11. Throughout the 2013/2014 school year, Parent was frequently called to take Student home from school before the end of the day due to behavior issues, resulting in loss of instructional time for Student. (N.T. pp. 67, 68; S-22)
 12. At Parent's request, both Student and the sibling were transferred to another District elementary school for the 2014/2015 school year. (N.T. pp. 68, 69; S-2 pp. 3, 4, S-16)
 13. On a daily basis during the current school year, Student engages in the same kinds of defiant, disruptive, destructive and otherwise unacceptable classroom behaviors reported during the prior school year. On numerous occasions, Student has destroyed instructional materials and engaged in verbal and physical aggression toward both staff and peers, resulting in physical injury to peers, and continued disciplinary referrals. (N.T. pp. 81—86, 91, 97; S-10 pp. 48, 49, S-19)
 14. On September 19, 2014, early in the current school year, Student had a severe behavior incident that escalated into an assault on the school principal and police involvement. (N.T. pp. 86—88, 101—105; S-19, S-20)
 15. As in the prior school building, Student was referred to the Comprehensive Student Assistance Program (CSAP), composed of teachers who develop strategies to support children experiencing difficulties that adversely affect school functioning. (N.T. pp. 99, 100)
 16. The school counselor, who oversees CSAP and also assists teachers in developing behavior charts and strategies, began working with Student after the September behavior incident. Student was given a pass to see the counselor at any time, but visited her office only twice more since September 2014. (N.T. pp. 100, 101, 107,)
 17. In an effort to avoid provoking serious behavior outbursts and the consequent disruption to instruction, Student's current teacher tries to remove objects that Student might destroy or throw and speaks to Student privately about unacceptable behaviors. The teacher also requests assistance from the lead teacher in the building. When the lead teacher enters the classroom, Student's behaviors generally improve, and the classroom teacher is sometimes successful in persuading Student to curb behaviors for the remainder of the school day, but the behaviors recur each day. (N.T. pp. 88—91)
 18. The classroom teacher frequently ignores Student's refusal to comply with classroom rules, including not requiring immediate completion of academic work that Student does not want to do. Although Student eventually returns to work with teacher

encouragement, Student still misses important skill reinforcement opportunities, due to extreme behaviors when required to work in the classroom centers, and during whole group instruction. (N.T. pp. 89, 93, 95, 96)

19. The District issued its most recent PTE on September 24, 2014, proposing to conduct assessments of intellectual, social/emotional/behavioral and visual-perceptual functioning, as well as assessments of academic achievement and auditory processing. The evaluation the District proposes would also include a functional behavioral assessment (FBA) by a behavior specialist, behavior rating scales, a classroom observation, review of records, parent and teacher input. A speech/language evaluation would be added if deemed necessary based upon initial screening results. (N.T. pp. 118—123, 129—131; S-21 p. 1)
20. Parent did not return the latest PTE, and does not believe that an evaluation that includes cognitive ability and academic achievement testing is needed because Student's report cards, as well as academic knowledge and skills demonstrated at home, indicate to Parent that Student has no academic difficulties. Parent also expressed some doubt concerning the reported frequency and severity of the reported behaviors, noting that he has only the word of District staff members as evidence that Student engages in unacceptable classroom behaviors that are as significant and frequent as they describe. (N.T. pp.122, 150, 153—157, 161)
21. Parent further noted that he regularly discusses the importance of education and proper classroom behaviors with his children, and that Student has reported incidents that Parent believes provoked negative reactions from Student. (N.T. pp. 148, 150, 151, 160, 161)
22. Although Parent understands that if Student is determined to be IDEA eligible, he can refuse special education services, Parent is concerned about the District collecting so much information to "build a case" for an evaluation in light of Student's age and early grade in school. (N.T. pp. 149, 150, 155, 158, 163)
23. Regardless of the outcome of an evaluation, and whether Parent consents to special education services or not, District staff believes that an evaluation, including a formal FBA, will assist the staff working with Student to understand the causes of Student's behaviors and to develop additional regular education interventions to address Student's continuing behavior issues. (N.T. pp. 108, 109, 131, 132)
24. Student's report card from the first quarter of the 2013/2014 school year indicated that Student was meeting skill level and content expectations in all academic areas, and exceeding expectations in one reading and one math skill area. Nevertheless, the classroom teacher included the comment that Student was not working up to potential. (S-17)
25. During the first quarter of the 2014/2015 school year, Student was again meeting expectations with respect to most academic skills, but there were a few areas, including two of three components of writing, and one math skill component in which Student's

grades indicated that Student was “approaching expectations.” There were no areas in which Student exceeded expectations. Student’s teacher does not consider Student to be making acceptable progress due to Student’s lack of focus and attention to instruction and refusal to complete work. (N.T. pp. 92, 93, 120; S-24)

DISCUSSION AND CONCLUSIONS OF LAW

The record in this case leaves no doubt that Student’s behaviors in the school setting are creating significant difficulty in all school settings, have persisted over a long period with no sign of reduction, and that strategies to address the behaviors have been minimally successful at best. (FF 4, 5, 7, 11, 13, 14, 16, 17, 18) In addition, notwithstanding Student’s ability to gain academic skills, a comparison of Student’s first marking period report cards from the past two school years, along with the testimony of the teacher who currently instructs Student for most academic subjects, suggests that loss of instructional time due to Student’s behaviors is negatively affecting Student’s learning and academic progress. (FF 24, 25)

Although Parent expressed concerns during testimony at the due process hearing about the District’s extensive documentation of Student’s behavior issues, as well as some doubt that the behaviors are as severe as District staff describes and about the wisdom of proceeding with a comprehensive evaluation, Parent presented no evidence to contradict the District’s testimony and documentary evidence. (FF 20, 22) Parent also believes, or more accurately hopes, that the negative school behaviors will lessen over time and will not significantly impact Student’s learning and academic progress, presumably as a result of Parent talking to Student about the importance of school. (FF 21)

Parent’s hopes are no doubt shared by everyone who works with Student, but the history of Student’s classroom behaviors over the past three school years provides no reasonable basis for agreeing with Parent that continuing to, in essence, “wait and see” is the right course of action and will result in improvement of Student’s classroom functioning with respect to

behavior, including, work completion. (FF 4, 5, 6, 11, 13, 14, 17, 18) It is virtually inevitable that Student's academic progress will fall short of the potential Student has shown so far if Student continues to refuse or delay completing classroom tasks and to participate fully in instruction, as academic tasks become more difficult and increasingly require use of previously acquired information and skills to make appropriate educational progress.

Parent also suggested during his testimony that he does not perceive in District staff what he considers to be an appropriate level of care and concern for Student, and all children. *See, e.g.,* N.T. p. 162. In this regard, it must be noted, first, that the District's primary responsibility is to create in all classrooms and throughout each school building an environment that is, above all, safe for all pupils, and that promotes attention to academic instruction and completion of academic tasks. The efforts of staff at the levels of both individual school buildings and District administration to fulfill those obligations is all that is necessary to demonstrate an appropriate level of care and concern for all students.

Second, with respect to Student, specifically, the record establishes consistent efforts by District staff to implement supports and strategies to address Student's difficult behaviors, but such efforts have unfortunately been unsuccessful overall. (FF 5, 6, 7, 15, 16, 17, 18) Those actions demonstrate appropriate care and concern for Student as a child in a regular education setting. Further, in proposing an evaluation of Student, the District has very clearly complied with its "child find" obligation under the IDEA statute and federal regulations, which require each local education agency (LEA) to identify, locate, and evaluate all potentially disabled children for whose education it is responsible, including those who may be "advancing from grade to grade." 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1); *G.D. v. Wissahickon School District*, 2011 WL 2411098 (E.D. Pa 2011) at *6.

To fulfill that obligation, a school district must, within a reasonable time after it has notice of facts likely to indicate a disability, “conduct an evaluation of the student's needs, assessing all areas of suspected disability,” *P.P. v. West Chester Area School District*, 585 F.3d 727, 730 (3d Cir.2009) (citing 20 U.S.C. § 1414(b)); *O.F. v. Chester Upland Sch. Dist.*, 246 F.Supp.2d 409, 417 (E.D.Pa.2002) citing *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir.1995). “Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE.” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008), quoted in *G.D. v. Wissahickon School District* at *6.

The District in this case met its child find obligation with respect to Student by proposing an evaluation of Student in both the 2013/2014 and 2014/2015 school years to explore whether the defiant and disruptive behaviors that Student has been exhibiting in school for several years arise from or are related to a disability. (FF 8, 10, 19, 23) Although school districts are clearly required to propose an evaluation when they have reason to suspect that a child may have a condition that meets the criteria for one or more of the listed IDEA disability categories, and that by reason of the suspected disability, a child requires special education, school districts may not proceed with an evaluation unless a child’s parents consent, after receiving notice of the proposed evaluation, including a description of the proposed assessments. 34 C.F.R. §§300.8(a), (b); 300.300(a), (c)(1). Notably, although school districts may use the due process hearing procedures to override parents’ denial of or refusal of consent in order to proceed with a proposed evaluation, school districts are under no obligation to do so, and do not violate their child find duty or their obligation to provide special education to an IDEA eligible child by not proceeding with a due process hearing. 34 C.F.R. §300.300(c)(i), (ii)

Contrary to Parent's suggestion in this case that the District has shown a lack of care and concern for Student, its decision to incur the significant expense of initiating a due process complaint and proceeding with a hearing, despite no legal obligation to continue to pursue an evaluation of Student when Parent refused consent, shows a high degree of care and concern for Student. It is unfortunate that Parent appears to interpret the District's actions in pursuing an evaluation as an attack on his parenting skills and success, but perhaps that is understandable when the issue underlying the District's evaluation request is behavior, which is often perceived to be a matter of willingness to exercise self-control and conform to expectations. A child with a disability, however, may be unable to exercise the level of control needed to meet classroom behavior expectations without supports and services, and possibly medical treatment, regardless of how much he or she would like to be able to do so.

No one would ever suggest that seeking a medical diagnosis and interventions for a child with a high fever or a broken bone indicates a lack of parenting ability or skills, because parents who are not doctors are not expected to have the specialized knowledge and skills required to diagnose and treat their children's medical problems. That is equally true of recognizing and determining how to address symptoms of a disability, since that also requires specialized knowledge and skills that even very competent and caring parents do not ordinarily have, and are not expected to have. Parenting skills and ability in both situations are best demonstrated by seeking and relying on the advice of knowledgeable professionals. Here, although it is impossible to determine whether Student's behaviors are related to a disability until and unless an evaluation is completed, there is certainly enough of a factual basis to agree with the District that the next, and essential, step in addressing Student's school behaviors is to permit a comprehensive evaluation. As the District pointed out, even if no disability is found, or even if

Parent refuses consent for special education services if a disability is found, the information that will result from an evaluation is still more likely than not to be useful. (FF 23)

Finally, it is necessary to address Parent's belief that at least some of the assessments the District proposes are not needed in light of Student's academic progress. The IDEA statute and regulations requires school districts to conduct a "full and individual initial evaluation" ...using "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." 20 U.S.C §1414(a)(1)(A), (b)(2)(A)(i). A school district and may "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. §1414 (b)(2)(B).

The purpose of the evaluation 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). In order for a school district to properly fulfill its evaluation obligations, the child must be "assessed in all areas related to the suspected disability," specifically including "social and emotional status, general intelligence academic performance, communicative status," and the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs" 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6).

The evaluation components and types of assessments proposed by the District in its most recent PTE meet the IDEA evaluation standards, and, therefore, the District will be permitted to conduct the assessments it proposes. (FF 19) The record in this case, however, suggests that it may not be possible to develop a fully comprehensive picture of the underlying basis of Student's behaviors with the tools available only to non-medical professionals, especially in light of the unfortunate circumstance of Student's Mother's death when Student was very young.

Consequently, the District will be permitted to expand the scope of the evaluation should the results of the initial assessments suggest the need for a psychiatric, or other medical evaluation to assure a complete picture of Student. Should any additional assessments be needed, the District is not required to complete them within the 60 day timeline, since it may take some time to determine the need for additional assessments or evaluation components and arrange for additional evaluations if needed.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the School District is permitted to conduct a full evaluation of Student that includes all of the components of a comprehensive evaluation to determine whether Student is a “child with a disability” as defined in the IDEA statute and regulations, including

- 1.) All of the kinds of assessments listed on the District’s September 24, 2014 PTE, and specifically including a formal classroom observation by a behavior specialist;
- 2.) Additional assessments and evaluations, if any, suggested by the results of the specified assessments, which may include, but are not limited to:
 - a.) A psychiatric evaluation;
 - b.) A speech/language evaluation;
 - c.) A medical evaluation.

It is **FURTHER ORDERED** that only the initial evaluation report that includes the assessments specified on the permission to evaluate form dated September 24, 2014 must be completed within 60 calendar days of the first full school day after the date of this order, inasmuch as the initial evaluation results must be analyzed prior to the District determining whether additional assessments and/or evaluations are advisable.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

March 2, 2015