

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

LINDA M. VALENTINI, PSY.D., CHO

DECISION

DUE PROCESS HEARING

Name of Student: A.M.
ODR #18509/ 16-17 -KE

Date of Birth:
[redacted]

Date of Hearing:
December 12, 2016

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Pro Se

Upper Darby School District
4611 Bond Avenue
Drexel Hill, PA 19026

Scott Gottel, Esquire
Holsten and Associates
One Olive Street
Media, PA 19063

Date of Decision:

December 19, 2016

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

Background

Student¹ is a middle school-aged student enrolled in the District. Because of Student's concerning behavioral and social difficulties the District sought the Parent's permission to evaluate Student to determine eligibility for special education and related services. Student's father (hereinafter Parent) withheld consent for an evaluation. The District therefore requested this due process hearing to obtain an Order that Student be evaluated.

Issue

Should the School District's request for an Order to perform a multidisciplinary evaluation of Student over the objections of the Parent be granted?

Findings of Fact

1. Student attended the [local] County Intermediate Unit's Head Start program from age three and received 1 hour of Itinerant Educational Support and 1 hour of Speech/Language Support. [S-1]
2. Beginning in Kindergarten Student received Itinerant Speech/Language Therapy which continued into 3rd grade and also received Itinerant Learning Support to monitor and maintain appropriate grade level skills from 1st through 3rd grades. [S-1]
3. Based upon a re-evaluation completed in April 2012 (3rd grade) Student was exited from special education programming via a Notice of Recommended Educational Placement (NOREP) which Student's mother approved on April 20, 2012. [S-1, S-2]
4. [One of] Student's [parents] passed away in August 2014, just prior to Student's 6th grade year. [NT 87]
5. In 6th grade Student's final report card shows final academic grades ranging from mid-70's to mid-80's. [S-3]
6. Student's PSSA scores were Proficient in 4th and 5th grades, and Basic in 6th grade. [S-12]

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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).

7. In 7th grade Social Studies class Student made some unusual (“bizarre”) comments and some inappropriate sexualized comments, called out in class, and lacked social skills. [NT 18-22; S-5]
8. The 7th grade attendance record shows one 5-day suspension in late September 2015 and a 1-day suspension in early June 2016. The September suspension was incurred pursuant to repeatedly punching another student in the cafeteria. The record is silent regarding any suspensions in the current school year. [NT 18; S-11]
9. In 7th grade Student’s final report card shows final academic grades ranging from mid-70’s to mid-80’s. [S-4]
10. Based on concerns in 7th grade the District through an April 19, 2016 phone conference sought the Parent’s permission to conduct a multidisciplinary evaluation to determine whether Student was eligible for special education programming and additional supports and services. The District’s psychologist followed up the conversation with a letter dated April 26, 2016. [S-6]
11. On May 6, 2016 the Parent informed the District psychologist by telephone that [the Parent] did not want Student evaluated. On May 11, 2016 the psychologist followed up with a letter asking that the Parent complete the permission to evaluate form indicating [the Parent’s] disapproval if he/she continued to hold that opinion, or indicating his/her approval if [the Parent] changed his/her mind. [S-7]
12. On May 13, 2016 the Parent signed his/her disapproval of an evaluation. [S-8]
13. In late October of 8th grade, the 7th grade social studies teacher provided information for a referral to the Student Assistance Program/Student Support Team (SAP/SST) because of short attention span, difficulty with organization, making inappropriate sexual comments in class, and coming late to class. [NT 23; S-5]
14. At the time of the SAP/SST referral in October 2016 Student’s 8th grade First Marking Period grades were recorded as: 60 (Science); 78 (Social Studies); 84 (Math); and 98 (unidentified subject²). [S-5]
15. Comments from the 8th grade teachers were “Stays on task, completes classwork; needs more consistent homework” (Math); “Can complete assignments when on task; needs consistency in completing work” (Social Studies); “Able to do above average work if not distracted; needs help in ignoring distractions” (Science). [S-5]

² Most likely Language Arts

16. The referral form indicates that the 8th grade Social Studies and Math teachers implemented strategies of student conferences, parent conference and preferential seating. The 8th grade Science teacher moved Student's seat, contacted the Parent and provided Student with encouragement. [S-5]
17. On the referral form the 8th grade Math teacher stated, "I have nothing negative to say about Student". The Science teacher noted repeated use of inappropriate language including yelling at others, being chronically late to class, and using phone in class. On one occasion Student had a tantrum when required to turn in a quiz. [S-5]
18. The Parent reported that at the report card conference in November 2016 he/she spoke with four teachers and only the Science teacher had negative comments about Student. The Parent is working with Student on being appropriate in Science class. [NT 74-75, 78]
19. Student has friends outside the school setting. [NT 72-73]

Discussion and Conclusions of Law

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

The IDEA sets forth the responsibilities (commonly referenced as "child find" responsibilities) borne by Local Educational Agencies including school districts and charter schools, for identifying which children residing in its boundaries are in need of special education and related services such that "[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated..." 20 U.S.C. §1412(a)(3). Parents do not have a duty to identify, locate, or evaluate their child pursuant to IDEA. This obligation falls squarely upon the district. *Hicks, ex rel. Hicks v. Purchase Line School Dist.* 251 F.Supp.2d 1250, 1253 (W.D.Pa., 2003), citing, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.1996).

In the discharge of its Child Find obligations, the IDEA requires a local educational agency to conduct a "full and individual initial evaluation" 20 U.S.C §1414(a)(1)(A). 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). 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).

Regarding parental consent, the IDEA provides that if a parent refuses consent to an evaluation sought by the local educational agency, then the agency may seek authorization by way of a request for due process. 20 U.S.C. §1414(a)(1)(D)(ii)(I). *See also*, 20 U.S.C. §1415(b)(6)(A) (permitting due process complaint by any party “with respect to any matter relating to the identification, evaluation [or placement] of the child”) Thus, due process is available to the local educational agency in order to “override” parental refusal to consent to an evaluation. 34 C.F.R. §300.300(c)(1)(ii); §300.300(a)(3). In this matter, then, the District was within its rights and fulfilling its Child Find duties to seek an Order from a special education hearing officer that it proceed with an evaluation of Student.

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the District asked for the hearing and thus bore the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to 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); *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). I did not find any significant issues that would lessen the credibility of the two witnesses for the District or the credibility of the Parent.

Discussion

Although Student exhibited concerning behaviors such as unusual or inappropriate comments and actions during 7th grade, the District adduced no evidence that the severity of these behaviors is continuing into the current 8th grade school year. The only teacher who testified taught Student in 7th grade. As the District bore the burden of proof, I would expect that if the same types and frequency and severity of concerns continued into 8th grade the District would have called Student’s current teachers. With the exception of Science, the first marking period grades for 8th grade were somewhat higher than grades in the two previous years.

Although the Parent misunderstood the potential special education placements that could be available to Student, for example beginning with regular education classes with special education supports, and although [the Parent] was clearly and without foundation suspicious of the psychologist's ability to keep an open mind regarding eligibility, his/her testimony that, with the exception of one teacher, no significant issues were raised during the end-of-November report card conference was persuasive.

Clearly, although there are some indications that an evaluation would be beneficial to rule out social/emotional issues and/or emerging learning issues, and there is no downside of any substance to the Student's having an evaluation, the District simply did not present sufficient evidence to warrant my over-riding the Parent's withholding consent. Therefore I will not order that Student be evaluated.

Accordingly, the parties are on notice that as of the date of this decision Student is no longer "thought to be eligible", does not enjoy the disciplinary protections of an identified student, and must remain in a regular education program. Additionally as of the date of this decision the District is not vulnerable to any assertions of denial of FAPE based upon Child Find or lack of provision of special education programming.

Dicta: For the benefit of the Parent I made clear on the record that even if I ordered an evaluation and the child was found to be eligible the Parent has the final say over whether or not a special education program was put into place. I also, for the Parent's benefit, asked that should [the Parent] prevail in this hearing he/she keep an open mind about an evaluation if Student's grades and or/behaviors should worsen. Given the nature of the concerns that were raised in the hearing, [the Parent's] description of how Student was in the past, and the unfortunate loss of Student's [other Parent] it is important that the District and the Parent work together to resolve the insurance issues so that Student can receive some professional counseling. Although the District has fulfilled its Child Find obligations as of the date of this decision, the District should again seek the Parent's permission to evaluate Student if additional concerns surface, and it is hoped that the Parent will provide consent at that time.

Order

It is hereby ordered that:

1. The School District may not conduct a complete multidisciplinary evaluation of Student without the Parent's consent.
2. The School District has discharged its Child Find responsibilities towards Student as of the date of this decision.
3. Student is no longer considered as a "thought to be eligible" student.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

December 19, 2016

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official