

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: N. M.

Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 17747-15-16 AS

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
None

Local Education Agency
Upper Dublin School District
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Date of Hearing:

June 8, 2016

Date Record Closed:

June 10, 2016

Date of Decision:

June 25, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.
NAHO Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a late elementary school-aged, regular education student in the Upper Dublin School District (District). The District filed a Due Process Complaint pursuant to the Individuals with Disabilities Education Act (IDEA)² after it sought unsuccessfully to obtain parental consent to conduct an initial evaluation of whether Student may be eligible for special education. The case proceeded to a very efficient single-session due process hearing, at which the parties presented evidence in support of and against the requested relief. For the reasons set forth below, the District will be permitted to conduct the requested evaluation.

ISSUE

Whether the District should be granted permission to conduct a special education evaluation of Student in the absence of consent by the Parents?

FINDINGS OF FACT

1. Student is a late elementary school-aged, regular education student enrolled in the District. (School District Exhibit (S-) 5)
2. Student was previously enrolled in a different Pennsylvania school district located within the same county as the District. Student was referred to that district's Student Resource Team (SRT) in the spring of 2012 and again in the spring of 2013 based on concerns about Student's reading comprehension and oral reading fluency; spelling; written expression; mathematics skills; and following directions and attending to tasks. Student also exhibited strengths that were noted in the areas of reading decoding, spelling, and

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 plural Parents is used throughout the decision when they acted together or one was clearly acting on behalf of both.

² 20 U.S.C. §§ 1400-1482.

some writing conventions, and was motivated to complete tasks independently. (Notes of Testimony (N.T.) 28, 139; S-1, S-7 pp. 1-2)

3. Student continued in the SRT process in the other school district during the 2013-14 school year to address reading comprehension and basic mathematic skills. At the time, Student was provided one-on-one support in all subject areas (by a classroom assistant or teacher). Student was referred for a multidisciplinary evaluation (MDE) in December 2013 by that school district, but Student's records from that school district did not include an Evaluation Report. (N.T. 30; S-2, S-3)
4. Student first enrolled in the District as a third grade student during the 2014-15 school year. Student was very cooperative during learning activities and tried very hard to do Student's best. (N.T. 27, 79)
5. Soon after Student began attending a District elementary school in the fall of 2014, the District's building reading specialist administered several reading assessments to determine Student's skills. Student performed below grade level expectations in all areas assessed: oral reading fluency, decoding, and reading comprehension. (N.T. 32, 74-75; S-11 p. 5)
6. Also in the fall of 2014, the District administered mathematics assessments to Student, on which Student performed well below grade level expectations. (N.T. 33-34)
7. Student was referred to and placed in the District's Tier 3 Response to Intervention (RTI) program, receiving thirty minutes of intensive small group reading support four days per week during the 2014-15 school year. The Tier 3 students worked on reading fluency, decoding, and comprehension individually and in small groups. (N.T. 32-33, 75-76)
8. Student was referred to the "core team," or child study team, in early October 2014. The reasons for the referral were weaknesses in reading and mathematics skills, as well as some social/behavioral concerns (getting along with peers, a problem encountered by several students in third grade, not only Student). Student's teacher also noted some concerns with organization, assignment completion, following directions, distractibility, and retention of information. (N.T. 33-36, 78-79; S-4)
9. Student's teacher reported to the core team on interventions that had been used and whether they were effective. Extra time was noted as effective, whereas verbal prompts, limiting and repeating directions, modeling, chunking of tasks, and differentiated instruction were not successful. (S-4 p. 4)
10. The core team met in November 2014. Participants at the meeting were the school principal, school psychologist, guidance counselor, reading specialist, Student's third grade teacher, and the Parents. The team discussed an MDE of Student to determine eligibility for special education, with the school psychologist explaining the types of assessments and purpose of such an evaluation. The Parents were not in agreement with conducting an MDE. (N.T. 37-39, 79; S-5)

11. The District sent a Permission to Evaluate (PTE) form to the Parents in mid-November 2014 after the core team meeting, but the Parents did not return that form. The PTE indicated that assessments would include cognitive and achievement measures; tests of attention, memory, visual motor skills, fine and gross motor skills, articulation, and receptive and expressive language; social/emotional/behavioral functioning including a functional behavioral assessment; and psychiatric evaluation. A parent input form and copy of the procedural safeguards was also provided to the Parents. The District sent a second PTE form with the same enclosures in December 2014, at which time the Parents did not consent to the MDE. (N.T. 39, 40; S-6)
12. Student performed inconsistently on the regular progress monitoring assessments of Student's oral reading fluency over the 2014-15 school year, at times reaching the goal but not making marked improvement over time. On an end-of-year diagnostic reading assessment, Student performed well below grade level in all areas: word reading, vocabulary, and comprehension. (N.T. 77-78; S-11 p. 2, S-21 pp. 1-2)
13. The core team met again in May 2015. At the time, the District representatives expressed continued concerns with Student's academic progress, and recommended that Student attend the summer learning program. Students in the five-week long summer learning program met four days per week for four hours each day and worked on reading and mathematics skills. Student did attend that program in 2015. (N.T. 44-45, 47)
14. Student's grades for the 2014-15 school year reflected that Student met expectations in completing homework and in several special subject areas, but had made limited progress toward meeting grade level expectations in many skills in the areas of reading, writing, and mathematics; and, needed to improve in demonstrating many responsibilities of a successful learner. (S-7 pp. 3-4)
15. Student's scores on the Pennsylvania System of School Assessment (PSSA) in the spring of 2015 were in the below basic range in both English/Language Arts (ELA) and mathematics. (S-12)
16. Throughout the 2014-15 school year, the Parents arranged for private tutoring of Student. (N.T. 129-30, 132-33, 136)
17. Student was again placed in the Tier 3 RTI program at the beginning of the 2015-16 school year. That year, interventions addressing reading fluency and comprehension were provided in small groups three times each week for forty five minutes. (N.T. 80-81)
18. Student was referred to the core team again at the start of fourth grade, the 2015-16 school year. At that time, Student's teachers reported several strengths (working cooperatively in groups, exhibiting respect, and a positive attitude), but concerns with reading, mathematics, and writing skills. Behavioral concerns were noted with respect to following directions, organization, assignment completion, following directions, distractibility, retention of information, and independent work skills. The core team met with the same participants as in the prior year, except that Student's fourth grade teacher

was involved. The District representatives again discussed and recommended an MDE, but the Parents continued to disagree. (N.T. 49, 50-53, 97, 111-13; S-13, S-15)

19. Student's teacher also reported on interventions that had been used and whether they were effective. Verbal prompts, limiting and repeating directions, chunking, redirection, preferential seating, extra time, multi-modal instruction, and modeling and positive reinforcement of behavior were noted as effective; visual cues, manipulatives, organizational tools, modification of assessments, and differentiated instruction were not successful. (S-13)
20. Student participated in daily ELA instruction in the fourth grade classroom, as well as in daily mathematics instruction. Instruction was delivered in large and small groups. The fourth grade teacher modified and adapted most of Student's work and assignments so that the materials were at Student's instructional level. Student's reading comprehension weaknesses impacted Student's understanding of content area classes. (N.T. 93-97)
21. Student struggled with mathematics instruction in the fourth grade classroom. Assignments and materials were modified, and Student worked individually with the teacher or a paraprofessional on assignments because Student was not able to complete them independently. (N.T. 100)
22. Student began to exhibit work avoidance during fourth grade. (N.T. 80, 97-98)
23. The District issued a new PTE form in January 2016, indicating that the evaluation would include parent and teacher input; classroom observations; assessment of intelligence, achievement, memory, processing; behavior rating scales (to determine any social, emotional, or behavioral factors influencing Student's ability to learn); and a review of records. A parent input form and copy of the procedural safeguards was also provided to the Parents. A second PTE form was sent in April with the same enclosures. As in the prior school year, the Parents did not provide consent in their response received in early May 2016. (N.T. 113-16; S-16, S-17, S-18)
24. As of the end of the 2015-16 school year, Student had made progress in oral reading fluency, achieving scores near the benchmarks for Student's grade level. Student did not exhibit growth in the area of reading comprehension, however, performing inconsistently over the course of the school year. On an end-of-year diagnostic reading assessment, Student similarly performed well below grade level in the areas assessed: vocabulary and comprehension. (N.T. 54, 81-83, 85-86; S-8, S-11 pp. 3-6, S-19, S-21 pp. 3-4, S-22)
25. As of the end of the 2015-16 school year, Student's mathematics skills were well below grade level expectations in most areas. (S-11 pp. 9-10)
26. Student's grades for the 2015-16 school year reflected that Student met expectations in demonstrating some responsibilities of a successful learner and in several special subject areas; but Student had made limited progress toward meeting grade level expectations in many skills in the areas of reading, writing, and mathematics. Student also needed to improve skills related to organization and learning engagement. (S-7 pp. 5-6)

27. At the time of the due process hearing in June 2016, District personnel working with Student were concerned over Student's progress in the areas of reading comprehension and basic mathematics skills. For many students, improvement in reading fluency leads to better reading comprehension skills; however, that was not true for Student by June 2016. (N.T. 54-55, 58, 83, 87-88, 99-100; S-11)
28. The elementary school reading specialist in the building Student attended has an undergraduate degree in elementary education and a master's degree in reading. She is certified as a reading specialist and has fourteen years' experience as an elementary school teacher and nine years' experience as a reading specialist. (N.T. 71-73)
29. Student's fourth grade teacher has an undergraduate degree in elementary and early childhood education with an emphasis on children with exceptionalities. She has eight years' experience as an elementary school teacher that includes work with children with disabilities. (N.T. 91, 101; S-25)
30. The District's school psychologist is certified and licensed in the Commonwealth of Pennsylvania and conducts a number of special education evaluations each year. He also maintains a clinical practice. (N.T. 109, 119; S-26)
31. The elementary school principal in the building Student attended has undergraduate and master's degrees in education as well as a master's degree in educational administration. She has fourteen years' experience as a classroom teacher and sixteen years' experience as an administrator. (S-24)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

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 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). Accordingly, the burden of persuasion in this case rests with the District as the party requesting this hearing. Nevertheless, application of this principle 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, as 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). This hearing officer found each of the witnesses to be generally credible, testifying to the best of their ability and recollection. The one factual area about which there was some disagreement (N.T. 98-99, 102, 125-26, 136), while serving to help explain the sense of tension between the parties, is more likely the product of divergent perspectives and memory than deceit; in any event, those discrepancies are not material to the narrow issue presented in this hearing. In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered.

IDEA Principles

The IDEA and state and federal regulations mandate that local education agencies (LEAs), including school districts, locate, identify, and evaluate all children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); 22 Pa. Code §§ 14.121-14.125. That obligation, commonly referred to as Child Find, commences when the LEA has reasonable suspicion that a child has a disability. *P.P. v. West Chester Area School District*, 585 727, 738 (3d Cir. 2009).

A “child with a disability” is defined in the IDEA as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction

which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a); *see also* 20 U.S.C. § 1401(3). Further,

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

There is an additional requirement before an LEA may proceed with an evaluation for special education eligibility. Specifically, the LEA must obtain informed consent of the child's parents prior to conducting a special education evaluation. 20 U.S.C. § 1414(a)(1)(D)(i)(I); 34 C.F.R. § 300.300(a)(1). The requisite "consent" requires that the parents be fully advised of all information pertinent to the request, including a description of the matter for which the consent is sought. 34 C.F.R. § 300.9. If the child's parents do not provide consent to the evaluation, the LEA is permitted to request a due process hearing and ask a hearing officer to grant permission to conduct the evaluation. 20 U.S.C. § 1414(a)(1)(D)(ii)(I); 34 C.F.R. § 300.300(a)(3). The District in this matter has chosen to pursue an order through due process in order to proceed with an evaluation of Student.

The Evaluation Claim

The District has sought permission to conduct an evaluation of Student to determine whether Student is eligible for special education on the basis of ongoing concerns with Student's academic and social/emotional/behavioral functioning. As explained below, the record overwhelmingly supports the District's request.

Prior to District enrollment, and despite Student's efforts to try Student's best to succeed, Student struggled academically in the prior school district. That district implemented its SRT process (a form of RTI) in first and second grade that included one-on-one support in all subjects, but the team referred Student for an MDE midway through the second grade school year. The record does not indicate what occurred after that referral was made.

When Student first enrolled in the District in third grade, Student's reading and mathematics skills were assessed well below grade level expectations in all areas of reading and mathematics skills tested. Student began in the most intensive level of RTI support and was also referred to the core team due to academic and social/behavioral concerns. Student was also provided with private tutoring for that school year arranged by the Parents.

The same Tier 3 and core team support continued into fourth grade with Student's academic and non-academic functioning in many areas remaining significantly discrepant compared to grade level expectations. While Student did show strong growth in oral reading fluency, there was no parallel improvement in reading comprehension. Thus, with two school years of experience during which Student was clearly not achieving grade level standards in the regular education environment, along with considerable behavioral manifestations continuing and increasing, the District quite reasonably suspected that Student had a disability that was impacting Student at school; and, it sought to comply with its IDEA Child Find mandate by conducting an evaluation.

There is no question that the District professionals who were involved with Student on a daily basis (the fourth grade teacher, reading specialist, and building principal), and

participated in the decision to refer Student for an MDE, are well qualified and experienced.³

Thus, there is no reason to question the instructional approaches that its teaching staff utilized in providing RTI and core team support, including a number of regular education interventions that proved to be unsuccessful, or at best inconsistently helpful, for Student, including differentiated instruction, prompting and redirection, chunking of tasks, modification of materials and assignments, and organizational tools. Moreover, Student's social/emotional/behavioral functioning became increasingly more concerning as Student presented with inattention, distractibility, difficulty retaining information and following directions; and, in fourth grade, avoidance behaviors. Taken as a whole, the District witnesses provided persuasive testimony about the significance of Student's academic and social/emotional/behavioral performance over the course of two school years that support the request for an evaluation.

It is also of particular concern that Student is about to enter fifth grade, and is struggling with comprehension of content area materials in all subject areas because of weak reading skills. As Student continues to mature and move into higher grades, the trend toward reading to learn (as opposed to learning to read) will continue and, consequently, the gap between Student's skills and those of same-age or same-grade peers will almost certainly grow. An understanding of the reasons for Student's academic struggles and not insignificant social/emotional/behavioral manifestations is crucial to ensuring that Student's educational program addresses Student's unique and specific needs. It is also evident that the District's January 2016 PTE form⁴ provided

³ The District's school psychologist is similarly well qualified, but lacked any real experience with Student specifically. The Parents' concerns with his testimony (N.T. 119-21) are again noted, but even without his opinion, the record supports the District's requested remedy.

⁴ The prior, November 2014 PTE form provided for a broader array of assessments; however, this hearing officer will consider the more recent PTE form as the one relevant to the issue in this case.

notice to the Parents of the assessments that it intended to conduct; and, all are plainly directly related to the concerns regarding Student's specific functioning in the school setting.

The Parents recognize that Student is behind and struggles academically. (N.T. 123-24, 128-29, 133-34, 137) However, they are concerned about Student being placed into "special education" (N.T. 148-49); and they sincerely believe that, if given sufficient support and individualized attention in the classroom, Student would succeed in regular education. (*Id.*) However, Student has already demonstrated academic and nonacademic struggles for at least four school years, in two different school districts, and the various regular education interventions provided have not been sufficiently intensive to allow Student to make progress toward grade level expectations in many areas. Tellingly, Student's mother made a very poignant point at the end of her closing argument, suggesting that if Student is lagging so far behind peers, the District needs to take steps to ascertain the reasons for the achievement gap. (N.T. 151-52) A special education evaluation is designed to answer that very question, by identifying Student's strengths and weaknesses, and determining whether Student has a disability and, by reason thereof, needs specially designed instruction.

In conducting a special education evaluation, the law further imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained. The LEA 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, that may assist in determining the child's eligibility for special education and the content of an Individualized Education Program (IEP). 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).

Even more specific to the Parents’ concerns, the special education evaluation process further requires specific inquiry into whether other factors may play a role in the eligibility determination, including a lack of appropriate instruction in reading or mathematics. 20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b). Furthermore, and crucially, the Parents will be members of the MDE team and will have an opportunity to provide input into the process, as well as to participate in the determination of whether Student is eligible under the IDEA. 20 U.S.C. § 1414(b)(2) and (4); 34 C.F.R. § 300.306.

While not an issue for this hearing, it is also important to recognize that special education is not a place. On the contrary, the IDEA maintains a strong preference toward provision of special education supports in the regular education classroom; a continuum of services must be made available so that a child may be educated in the regular education environment to the maximum extent appropriate for the child’s needs. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.115, 300.116. Thus, even if Student is determined to be eligible for special education, it does not follow that the team would necessarily conclude that Student should be removed from the regular education classroom in order to receive appropriate services and support. Finally, and as was previously explained to the Parents, a determination by the MDE team of eligibility

for special education does not automatically mean that Student will be provided with an IEP; the evaluation that the District may now take is merely one step in the process.

CONCLUSION

Based on the foregoing, this hearing officer concludes that the District must be permitted to conduct an evaluation of Student to determine whether Student may be eligible for special education.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District is granted permission to conduct a special education evaluation of Student as outlined in its January 4, 2016 PTE Form in accordance with the timelines applicable to such evaluations.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: June 25, 2016