

This is a redacted version of the original hearing officer decision. Select details may 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: VN

Date of Birth: xx/xx/xx

Date(s) of Hearing: April 20, 2007

CLOSED HEARING

ODR NO. 7458/06-07 LS

Parents

Parents' Representative:

Mr.

N/A

School District:

District Representative:

Seneca Valley School District
126 Seneca School Road
Harmony, PA 16037-9101

N/A

Date Final Transcript Received: May 2, 2007

Date Record Closed: May 2, 2007

Date of Decision: May 15, 2007

Hearing Officer: Margaret Drayden, Esq.

Précis

Student was placed in a private residential facility by Parent, as a regular education student. Shortly thereafter, Parent requested an evaluation and a due process hearing. Before the District received either the signed Permission to Evaluate or the Request for a Due Process Hearing, Student was removed from the residential facility. Five days after receiving the Permission to Evaluate, Parent withdrew Student from the private residential facility, at which time Student no longer resided in the District or attended any school within the District.

Findings of Fact

1. On 2/2/07, Parent placed Student in the [redacted], a private residential facility, which is located in the Seneca Valley School District (District”). (SD-1; NT at 11, 12.)¹
2. On 2/15/07, Student toured and was accepted into Academy, the school located on the residential facility’s property. (SD-1; NT at 21-22.)
3. Parent was in agreement with a placement at Academy. (NT at 19.)
4. Academy is a private academic school, licensed for regular education children.
(NT at 19.)

¹Parents’ exhibits are noted as “P-”; District exhibits are noted as “SD-”; Hearing Officer exhibits are referenced as “HO-”; Noted Transcript is referenced as “NT”; Findings of Fact are noted as “FF”.

5. On 2/16/07, the District mailed Parent a “Permission to Evaluate” form and Procedural Safeguards letter. Student was referred for evaluation for both learning and emotional concerns. (SD-2; NT at 12, 14-15.)
6. On 2/21/07, Parents² signed the Consent form. (SD-2, SD-3; NT at 15.)
7. On 2/21/07, Parent completed a Request for Due Process Hearing, stating, as “Parent’s Position” “to schedule an IEP for [Student] 3 grade levels behind , attending R.T.F. schooling while away from home (due to truancy problems). Volunteer, not court ordered.” (SD-7.)
8. 2/26/07 was Student’s first day of school at Academy. (SD-1, SD-4, NT at 12.)
9. On 3/11/07, Student was approved for a one-day home visit to attend a family-related funeral. (SD-1, SD-3; NT at 13.)
10. On 3/13/07, the District received Parent’s signed Permission to Evaluate. (SD-1, SD-2, SD-3; NT at 12, 15.)
11. On 3/21/07, the District received a copy of Parent’s Due process Hearing Request. (SD-1, SD-7.)
12. On 3/21/07, the District’s school psychologist attempted to reach Parent to discuss the hearing and reach a settlement but Parent’s home phone number was disconnected and there was no answer at his place of employment. (NT at 13, 14.)
13. On 3/24/07, the District again attempted to reach Parent; the effort was unsuccessful. (NT at 14.)
14. On 3/26/07, The District tried to reach Parent at another telephone number, but there was no answer. Student’s residential facility case manager was also unable

² Although Student lives with Father, both parents signed the Consent form.

- to reach Parent. (NT at 14.)
15. On 3/26/07, Student, who had not returned to school after 3/11/07, was discharged from residential facility. (SD-1, SD-3, SD-5, SD-6; NT at 13, 16, 24.)
 16. On 4/11/07, the District attempted to reach Parent via phone, but the call was unsuccessful. (NT at 23.)
 17. On 4/16/07, the District attempted yet again to reach Parent via phone, but the call was unsuccessful. (NT at 23.)
 18. On 4/16/07, the District sent a certified letter to Parent stating that it was no longer responsible for an evaluation report (ER) because Student no longer attended school in the District. (SD-3, NT at 15.)
 19. District has received no response to the 4/16/07 letter. (NT at 15.)
 20. Student attended Academy for only 9 days. (SD-4; NT at 12-13.)
 21. Student's grades, during her 9 days' attendance, ranged from a low of 70 to a high of 95. (SD-4; NT at 16.)
 22. Student attended school as a regular education student, not as a student identified as one with an exceptionality. (SD-6.)
 23. Father has custody and educational rights of Student. (NT at 11.)
 24. Residential Facility is a residential treatment facility (RTF). (NT at 11.)
 25. The District's school psychologist made a referral to Academy as an appropriate educational placement. (NT at 12.)
 26. Residential Facility is a private academic school, not an approved private placement (APS), for students 6-18 years of age with severe emotional problems. It is a mental health placement and children are either court appointed or referred

- through a psychiatric placement. (NT at 21.)
27. Residential Facility is a mental health placement. (NT at 21.)
28. Residential Facility provides both a day and a residential program. (NT at 21.)
29. Students who are residents at Residential Facility are considered residents of the District and can attend District classes or other schools, such as [redacted, redacted] or Academy. (NT at 22.)
30. Student arrived at Residential Facility/Academy due to a combination of factors, including emotional problems at her previous school, behavior problems such as truancy, and she was also considered a run risk. (NT at 12.)
31. Student's home school district is Pittsburgh School District. (NT at 12.)
32. Student's 9-day attendance at Academy did not allow time to conduct an evaluation. (NT at 12, 13.)
33. The District's school psychologist received a discharge notice form in the mail from Residential Facility informing District that Student had been discharged. (NT at 13.)
34. The District has not been contacted by any school district regarding Student's educational program subsequent to her discharge on 3/26/07. (NT at 17.)
35. No Resolution Meeting was held. (NT at 21.)
36. The Resolution Meeting was not waived. (NT at 21.)
37. Student has not been identified as having any exceptionality. (SD-6, SD-7, NT at 24.)
38. In Parent's request for a hearing, Parent noted the RTF placement was not court ordered, but was "volunteer". (SD-7; NT at 25.)

39. In Parent's request for a hearing, Parent requested an IEP for Student because Student was "3 grade levels behind." (SD-7.)
40. On 4/30/07, a due process hearing was held as scheduled. (NT at 4.)
41. Parent did not appear; the Hearing Officer made 4 telephone calls to Parent's place of employment, but there was no answer; Parent's home phone number was disconnected. (NT at 4.)
42. The Hearing Officer delayed the start of the hearing for 1 hour and 20 minutes to allow Parent time to attend the hearing. (NT at 5.)

Witness Credibility

43. School Psychologist - Attended [redacted] University's School Psychology Program and is certified as a school psychologist in Pennsylvania. She has 6 years' experience and has been with the District since December 2005. She is experienced in conducting special education evaluations and making determinations regarding educational placement for students attending Residential Facility. She conducted herself in a professional manner while testifying. It was clear that although she never met Student, she acted professionally in her attempts to reach Parent to ascertain Student's availability for testing, learn the reason(s) for Parent's due process hearing request and see if there was a basis for settlement. The witness was highly credible.

Discussion and Conclusions of Law

Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined parameters. Thus, any concerns parents may have regarding education services which concern matters beyond those parameters are beyond the purview of this process and this Hearing Officer.

Witness Credibility

Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses” and “give some reason for discounting”³ or crediting evidence. Further, Hearing Officers’ decisions are to “specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions”.⁴ The Third Circuit, in Shore Regional High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. Id.”⁵ Carlisle Area School v. Scott P., 62 F.3d 520, 527-29 (3d Cir. 1995). Specifically, this means that a District Court must accept the state agency’s credibility determinations ‘unless the non-testimonial, extrinsic evidence

³ Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

⁴ *Id.* at *34.

⁵ Citing S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)

in the record would *justify* a contrary conclusion.’ Carlisle, 62 F.3d at 592 (emphasis added). In this context the word ‘justify’ demands essentially the same standard of review by a federal appellate court. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).”⁶ This court further held that “the task of evaluating [witnesses’] conflicting opinions lay in the first instance with the ALJ in whose presence they testified.”⁷

Similarly, credibility has been addressed in various jurisdictions. Looking to California, Stevens v. Parke Davis & Co., 9 Cal.3d 51, 67-68 (1973) held that a trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted....[and also] reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” Further, a fact finder may reject the testimony of even an expert witness, although not contradicted. Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 890 (1971) California courts have also found that “one credible witness may constitute substantial evidence”. Kearl v. Bd. Of Medical Quality Assurance, 189 Cal.App.3d 1040, 1052. (1986).

Burden of Proof

The burden of proof consists of both the burden of production and the burden of persuasion. Neither the IDEA nor the IDEIA⁸ addressed the subject of burden of proof

⁶ Shore Regional at 199.

⁷ *Id.* at 201.

⁸ The IDEIA is variously referred to in case law as the IDEIA or IDEA 2004. In either event, it is one and the same.

and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden in an administrative hearing challenging an Individualized Education Program (“IEP”) generally fell to the LEA. Recently, however, the United States Supreme Court addressed this issue in Schaffer v. Weast, 126 S.Ct. 528 (2005). In the concluding paragraph of the Opinion of the Court, Justice O’Connor held: “The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”⁹ In Antoine M. v. Chester Upland School District, Civ. Action No 05-3384, (E.D.Pa. Mar. 14, 2006), the Court held that even where the challenge is not to the sufficiency or appropriateness of an IEP, but rather for the failure to find a child eligible for one, “the overarching logic of Schaffer – that, in the context of the IDEA, the party bringing the challenge bears the burden of proof...[and] [a] student’s challenge to a district’s determination that he or she is not eligible for an IEP should not be treated any differently than a challenge to the adequacy of an IEP.” Thus, where a “case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, *Schaffer* controls.”¹⁰

The burden of persuasion in an administrative proceeding lies with the party seeking relief.¹¹ This requires the Hearing Officer to make a determination of whether or not the evidence is “equipoise” rather than preponderant. Preponderance of the evidence is defined as evidence presented by one party that is of greater weight or more convincing

⁹ 126 S.Ct. at 537.

¹⁰ L.E. v Ramsey Bd. Of Educ., 435 F.3d 384, 391 (3d Cir. 2006).

¹¹ Greenwood v. Wissahickon Sch. Dist., Civ. Action No. 04-3880 (E.D. Pa. Feb. 3, 2006) (“Hence, because there is no Pennsylvania law imposing the burden on the district, *Schaffer* applies and the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP”.)

than the evidence offered by the other party. In other words, where there is evidence which tips the scales, the party which presented that evidence prevails. However, where the Hearing Officer finds the evidence is equally balanced on an issue, the non-moving party prevails.

Issues

Issue No. 1: Is the District responsible for conducting an evaluation to determine if Student qualifies for special educational services as a child with a disability?

Issue No. 2: Is Student entitled to an IEP?¹²

Preliminarily, this Hearing Officer feels compelled to state that this hearing was unusual in several respects. Parent's due process hearing request failed to meet regulatory requirements. It did not include the Student's name, address of Student's residence, name of the school Student attended, a description of the nature of the problem, and a proposed resolution of the problem.¹³ Additionally, Parent did not meet with the District for the required Resolution Session within 15 days of Parent's notifying the District of the hearing request.¹⁴ Both of these failings were, individually, grounds for dismissal had the District made a timely request of the Hearing Officer.¹⁵ However, as no such requests were made, no dismissal was granted and the Parent's hearing request was deemed sufficient.

Schaffer placed the burden of proof in an administrative hearing on the party which challenged an IEP. Although the Supreme Court stated it was not deciding

¹² These issues, while not specifically so stated on the record, are garnered from District Exhibit No. 7, page 3 of 6, and NT at 25-27.

¹³ 34 C.F.R. § 300.508(b).

¹⁴ Id. at 300.510.

¹⁵ Id. at 300.508(d)(1), 300.510(b)(4).

whether states could, through regulations or statutes, impose the burden on school districts, Pennsylvania has no such law or statute in place. Until the *Schaffer* decision, Pennsylvania school districts bore the burden of proof in due process hearings. Pennsylvania now places the burden on the party which files for a hearing, unless the Hearing Officer determines a change in the order of presentation is warranted.¹⁶ In this case, however, Student does not have an IEP. Therefore, the question is whether *Schaffer* controls in due process hearings where the student has not yet been identified as a student in need of special education and related services. This Hearing Officer declined to decide this procedural issue as moot because Parent failed to appear at the hearing.¹⁷ Several attempts were made to reach Parent at his residence and place of employment.¹⁸ After waiting well over an hour, to ensure Parent was not merely delayed due to traffic, the hearing proceeded with the District presenting the school psychologist as its sole witness.¹⁹

Issue No. 1: Is the District responsible for conducting an evaluation to determine if Student qualifies for special educational services as a child with a disability?

The Individuals with Disabilities Education Improvement Act of 2004, found at 20 U.S.C. § 1400, et seq., and its implementing Regulations,²⁰ provide the federal legal framework for special education services.²¹ A student with a disability is defined as “a child evaluated in accordance with 300.304 through 300.311 . . . and who, by reason

¹⁶ Pennsylvania’s Special Education Dispute Resolution Manual, Section 810(B).

¹⁷ FF #41.

¹⁸ Id.

¹⁹ FF #42, 43.

²⁰ 34 C.F.R. Part 300.

²¹ Pennsylvania’s corresponding state regulations are found at 22 PA Code § 14, et seq.

thereof, needs special education and related services.”²² A student is not a student with a disability “if it is determined through an appropriate evaluation under 300.304 through 300.311, that a child...only needs a related service and not special education.”²³

An appropriate evaluation requires the use of a variety of assessments and the child must be assessed in all areas related to the suspected disability.²⁴ This evaluation will determine if the child is a child with a disability and the child’s educational needs.²⁵ Within 60 school days of receiving Parent’s consent for the evaluation, the initial evaluation must be completed and a copy of the evaluation report must be presented to Parent.²⁶ This timeline does not apply, however, if Parent fails to produce the child for the evaluation.²⁷

Parent placed Student at Residential Facility on 2/2/07, which is located within the Seneca Valley School District.²⁸ Student toured and was accepted into Academy, which is located on Residential Facility’s property, but did not start classes until 2/26/07.²⁹ However, on 2/16/07, the District mailed Parent a “Permission to Evaluate” form (PE); Student was referred for evaluation for both learning and emotional concerns.³⁰ On 2/21/07, Parent both requested a due process hearing, asking to “schedule an IEP”³¹ and signed the PE form.³² On 3/11/07, Student left for was supposed to be a

²² 34 C.F.R. §300.8(a)(1).

²³Id. at §300.8(a)(2)(i).

²⁴ Id at §300.304 (b, c).

²⁵ Id. at §§300.301(c)(2), 300.306(c)(1).

²⁶ The Federal Regulations provide for 60 calendar days unless state guidelines provide for a different timeline. 34 C.F.R §300.301.(c)(1)(i), (ii). Pennsylvania’s Education Regulations provide for 60 school days. 22 PA Code, §14.123(b).

²⁷ 34 C.F.R. §300.301(d).

²⁸ FF #1

²⁹ FF #2, 8.

³⁰ FF #5.

³¹ FF #7.

1-day home visit to attend a family-related funeral.³³ However, Student never returned to the District. On 3/13/07, the District received the signed PE form³⁴ and on 3/21/07 the District received a copy of Parent's due process hearing request.³⁵ Therefore, the District was left in the awkward position of having a signed PE with the concomitant legal obligation to provide a complete evaluation of Student's suspected areas of disability within 60 school days, but had no access to Student. The District, through the school psychologist, tried repeatedly to contact Parent (via mail and telephone) to determine the reason for the hearing request, but Parent's phone number was disconnected and there was no answer at his place of employment, and there was no reply to the correspondence.³⁶

Student attended class for a total of only 9 days³⁷ and on 3/26/07, five days after receiving the PE, Parent withdrew Student from Residential Facility.³⁸ Clearly, the District tried to reach Parent to determine Parent's intentions regarding Student's educational needs but there was no legal obligation to provide educational services, whether regular or special education or an evaluation to determine any possible need for special education and related services, to this Student who no longer resided within the District. Further, the federal regulations clearly state that Parent has the obligation to provide Student for evaluation. Parent failed to do so. Without the opportunity to

³² FF ##6, 10.

³³ FF #9.

³⁴ FF #10.

³⁵ FF #11.

³⁶ FF ##12, 13, 14, 16, 17, 18, 19.

³⁷ FF #20.

³⁸ FF #15.

evaluate Student, no Evaluation Report can issue, and, without the Evaluation Report, there is no basis for crafting an IEP, which Parent requested in the due process hearing request.

Issue No. 2: Is Student entitled to an IEP?

The above discussion is hereby incorporated by reference.

Parent's request for an IEP, based upon an Evaluation Report to be provided by District, is denied.

Summary

Student was placed in a private residential facility by Parent, as a regular education student on 2/2/07. Shortly thereafter, Parent requested an evaluation and a due process hearing. Before the District received the either the signed Permission to Evaluate or the Request for a Due Process Hearing, Student was removed from the residential facility. Five days after receiving the Permission to Evaluate, on 3/26/07, Parent withdrew Student from the private residential facility, at which time Student no longer resided in the District nor attended any school located within the District and the District's obligation to evaluate Student terminated. While Parent sought an IEP to address Student's academic and emotional concerns, an IEP is a document based upon a variety of evaluation criteria which is documented in the Evaluation Report. The Evaluation Report serves as the foundation upon which the IEP is constructed and without that Report, determining that Student is both (1) a child with a disability and (2) needs special education and related services, there can be no IEP.

ORDER

For the reasons hereinabove discussed, it is hereby ordered:

1. The District is not responsible for conducting an evaluation to determine if Student qualifies for special educational services as a child with a disability; and
2. Parent's request for an IEP is denied.

Margaret Drayden

Hearing Officer