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 to not affect the substance of the document.

Pennsylvania Special Education Hearing Officer

Final Decision and Order

CLOSED HEARING
ODR File Number: 21921-18-19

Child's Name: K. S.

Date of Birth: [REDACTED]

Parent:
[REDACTED]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D.

Date of Decision: 4/26/2019

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)[1] is a middle elementary school-aged student in the District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).[2] In early March 2019, the Parent refused the District's request to provide consent for its personnel to speak directly with Student's medical providers. The District then filed a Due Process Complaint seeking to override that absence of consent because Student was exhibiting physical symptoms at school that concerned teachers and administrators and impacted their ability to provide appropriate programming. On the eve of the hearing, the Parent through newly retained counsel filed a Motion to Dismiss based on, among other things, the Health Care Portability and Accountability Act (HIPAA)[3] and the Family Education Rights and Privacy Act (FERPA);[4] the District filed its Reply on the day of the hearing. Ruling on that Motion was deferred due to the timing and the need to obtain necessary evidence in the event that the Motion would be denied.

The case proceeded to an efficient, single-session due process hearing with both parties presenting evidence in support of their respective positions.[5] The District sought to establish that direct communication with Student's physician was necessary. The Parent did not dispute the

[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. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with 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).
[2] 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).
[3] 42 U.S.C. §§ 1302 *et seq*.
[4] 20 U.S.C. § 1232g.
[5] The parties' exhibits that were admitted to the record (Notes of Testimony (N.T.) 151-52) will be referenced as marked, as necessary to the decision, as School District Exhibits (D-) followed by the exhibit number and Parent Exhibits (P-) followed by the exhibit number. In addition, the Motion to Dismiss has been marked as Hearing Officer Exhibit (HO-) 1, and the Reply to the Motion has been marked as HO-2. Both of these exhibits are hereby admitted.

District's need for certain medical information, but challenged the authority of the hearing officer to order the requested remedy. After review, and for all of the following reasons, the Motion to Dismiss will be denied and the District will be permitted to conduct a medical evaluation of Student.

ISSUES

1. Whether the Parent should be ordered to provide consent to the District to contact Student's physicians as necessary in order to exchange information about Student's medical health; and

2. If the Parent would not provide such consent, or the medical providers decline to communicate with the District, whether a declaration should be made that the District may not be determined to be responsible for any violations of the IDEA and/or Section 504.[6]

FINDINGS OF FACT

1. Student is middle elementary school-aged and resides within the District. Student is eligible for special education under the IDEA based on classifications of Intellectual Disability and Speech/Language Impairment. (N.T. 18-19; D-4.)

2. At the time of a reevaluation in the fall of 2017, Student was taking two medications for Attention Deficit Hyperactivity Disorder (ADHD). Student also reportedly had seasonal allergies and suffered from frequent ear and sinus infections. (D-1.)

3. An Individualized Education Program (IEP) developed for Student in the fall of 2018 (third grade) reflected needs in academic/functional skills, speech/language, and occupational and physical therapy skills. Student continued with ADHD medication at that time. This IEP indicated that Student did not engage in behavior that impeded Student's learning or that of others, but also noted Student was exhibiting behavioral difficulties during academic tasks and transitions so a Functional Behavioral Assessment (FBA) was being conducted. Student had a full time Personal Care Assistant at that time. This IEP provided for a supplemental level of speech/language and learning support. (D-3; D-8; D-9.)

[6] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

4. In mid- to late January 2019, the Parent told Student's teacher that Student's medication had been discontinued. Student's pediatrician confirmed this change by a letter dated January 22, 2019 that was provided to the District. (N.T. 31, 65; D-6.)

5. After Student's medication had been discontinued, Student's behavior at school included impulsivity and some new and more concerning manifestations: increased physical aggression (hitting, kicking, and biting others as well as spitting), attempting to elope from the school building, and removing Student's clothing. However, Student's behaviors were not consistent day to day. (N.T. 66, 75, 81-82, 88-89.)

6. After Student's medication had been discontinued, Student at school also began to verbalize more than previously, and had a better appetite. (N.T. 104-05.)

7. Student was most recently evaluated by the District approximately half way through the 2018-19 school year with the consent of the Parent, with a Reevaluation Report (RR) issued on February 8, 2019. (N.T. 23-24; D-4; D-15 at 10-14.)

8. The 2019 RR included Parent input and a notation that Student's ADHD medication was discontinued in late January 2019. The District did not seek any information directly from Student's physicians. (N.T. 35-36; D-4 at 2-3.)

9. By the time of completion of the 2019 reevaluation, Student's recent behaviors persisted, including becoming more aggressive with peers, refusing to complete tasks, and acting impulsively (described as grabbing objects belonging to others). At times, the Crisis Prevention team was called to assist with Student's aggressive behaviors. (N.T. 24-25, 64-65, 86, 120; D-4; D-13; D-14.)

10. In response to these new behaviors, Student's program was temporarily revised to decrease the amount of time Student was in regular education. Staff also monitored Student's behavior before Student transitioned to other areas of the school building, limiting those transitions if necessary. (N.T. 68-69; D-4 at 9; D-5 at 7, 64.)

11. An FBA completed in conjunction with the 2019 RR identified the three new problematic behaviors (physical aggression, work refusal, and impulsive behaviors). The hypothesized functions were determined to be to gain adult attention and escape activities/tasks (physical aggression); to escape demands (work refusal); and to gain attention, escape demands, or obtain a preferred item (impulsive behavior). A Positive Behavior Support Plan (PBSP) was recommended. (D-4 at 13-18, 22; D-7.)

12. A Board Certified Behavior Analyst developed a PBSP based on the FBA. (N.T. 46.)

13. A new IEP was developed in early March 2019 following completion of the 2019 RR. Student's problematic behavior was a concern to all members of the team, including the Parent. The PBSP was made part of this IEP. Student's program continued a supplemental level of learning and speech/language support. (D-5.)

14. At the March 2019 IEP meeting, the Parent gave consent to have the District communicate with a child psychologist (whom Student had not seen as of the date of the

due process hearing). She revoked that consent the next day. (N.T. 133, 139, 147; D-10.)

15. Also in March 2019, Student began to spit up mucous at school; on several occasions Student vomited. The District learned from a pediatrician on April 11, 2019 that Student's sinus condition would cause Student to spit up from time to time. (N.T. 75-77, 78, 144-45; D-13; P-2.)

16. The District also learned from a pediatrician on or about April 11, 2019 that Student had been undergoing a trial of low dose medication at least by mid-March 2019. (N.T. 74-75, 132-33, 141; P-4.)

17. By the time of the due process hearing, the episode of spitting up or vomiting had subsided, and Student's physical aggression had also abated to a degree. (N.T. 81-82.)

18. Student's special education teacher and District administrators believe it is necessary for them to speak directly with Student's medical providers in order to be sufficiently informed about medical conditions and treatment and respond appropriately at school. (N.T. *passim*.)

19. The Parent is willing to permit District professionals to speak with Student's medical providers if she is also a party to the telephone conversation. She is also willing to share written information from Student's physicians. (N.T. 147-48.)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized 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 must rest with the District as the party filing for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of 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 who testified to be credible, and their testimony was overall not contradictory.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements.

GENERAL IDEA PRINCIPLES: SUBSTANTIVE FAPE

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to its students who qualify for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed.

Local educational agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' " *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Fairly recently, the U.S. Supreme Court considered once again the

application of the *Rowley* standard, observing that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

As *Endrew*, *Rowley*, and the IDEA make extraordinarily clear, an IEP must be responsive to the child's identified education-related needs. *See* 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Ordinarily, those needs are determined through an evaluation process; indeed, the IDEA itself sets forth two purposes of a special education evaluation: to determine whether or not 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). Additional information from outside providers, if shared, can also assist the IEP team in formulating a program. In any event, for purposes of evaluating whether a special education program is appropriate, such "can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same). Critically, an LEA cannot be charged with knowledge of a student's needs that it has been prevented from acquiring.

THE PARENT'S MOTION TO DISMISS

Although the Parent seeks dismissal of the District's Complaint because of the nature of the relief sought that she contends is beyond the jurisdiction of the hearing officer, the Motion must be denied. The central issue presented may be appropriately addressed in this forum with due consideration given to concerns over circumventing any rights conferred by laws addressing Student's privacy, such as HIPAA.

THE DISTRICT'S CLAIMS

The first issue is whether the hearing officer should enter an order that would override the Parent's refusal to provide consent to the District to speak with Student's medical providers. There are certain provisions in the IDEA that permit a similar remedy in particular circumstances where parental consent is required. 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). 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 here has not, however, cited to any similar provision for granting an LEA permission to speak with medical providers without the consent of the parents. Even if this hearing officer were so inclined, and as the District recognizes by its second requested remedy, the effect of any such order would be uncertain.

The facts in this case are substantially similar to those in *Shelby S. v. Conroe Independent School District*, 454 F.3d 450 (5th Cir. 2006), which upheld a District Court decision affirming a special education hearing officer's order for a medical evaluation by the LEA. There, the student's guardian refused to give the LEA permission to speak with the student's physician due to privacy concerns, but did agree to share his answers to written questions submitted by the LEA; the guardian otherwise limited its access to medical information. The guardian then refused the LEA's alternative request to consent to a medical evaluation. The Court of Appeals explained that, "where a school district articulates reasonable grounds for its necessity to conduct a medical reevaluation of a student, the lack of parental consent will not bar it from doing so." *Id*. at 454. Accordingly, and finding no merit to the privacy argument, the Court affirmed.

This hearing officer must concur with the reasoning of the *Shelby S.* Court that a medical evaluation by the District is the appropriate remedy where, as here, the District has established a legitimate basis for requiring medical information about Student (which the Parent does not dispute), but lacks the permission to communicate directly with Student's medical providers; this must be so whether or not the LEA has sought to conduct a medical evaluation. She must, however, disagree with the Parent that some form of written questions and documentation, standing alone, is a reasonable alternative. It is simply not realistic to anticipate that written communications between the District and medical providers, generally exchanged via the Parent, would be an efficient means of ensuring the sharing of accurate, ongoing, and often time-sensitive information among the professionals involved.

The Parent did state at the hearing that she would be willing to permit oral communications provided that she participates in the discussion. Assuming that offer remains open, the parties are encouraged to pursue that option in conjunction with the medical evaluation that will be ordered. Any future concerns regarding confidentiality should be alleviated through a discussion of the various safeguards that District professionals would observe to protect Student's privacy. It is the sincere hope of this hearing officer that the remedy ordered will provide an objective impartial perspective on Student's medical needs at school that will foster a return to a trusting and open relationship between the parties.

Finally, while the District also seeks a declaration that it may not be found responsible for any violations of its FAPE obligations because of its inability to speak with Student's medical providers, such a broad pronouncement cannot be made even before any such allegations might be raised. The parties should bear in mind, however, that the District's inability to communicate directly with Student's medical providers may impede a collaborative IEP process. *See, e.g.,*

Oconee County School District, 2015 U.S. Dist. LEXIS 85226, 2015 WL 4041297 (M.D. Ga. 2015).

ORDER

AND NOW, this 26th day of April, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The Parent's Motion to Dismiss is DENIED.

2. The District's request for an order requiring the Parent to consent to communications between it and Student's medical providers is DENIED.

3. The District shall promptly seek the consent of the Parent to conduct a medical evaluation. The selection of the evaluator shall be made by the District.

4. The chosen evaluator shall have the sole discretion to determine the scope of the evaluation, including procedures and assessments to be used.

5. In the absence of the Parent's consent, this Order shall constitute her permission for the medical evaluation.

6. The report of the medical evaluation shall be promptly shared with the Parent.

7. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21921-1819KE