

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
Final Decision and Order

CLOSED HEARING
ODR File Number: 20551-17-18

Child's Name: J.R. **Date of Birth:** [redacted]

Dates of Hearing:
6/18/2018, 9/6/2018, 9/7/2018

Parent:
[redacted]

Counsel for Parent
Tiffany E. Sizemore, Esquire
Tribone Center for Clinical Legal Education
Duquesne University School of Law
600 Forbes Avenue, Tribone Building
Pittsburgh, PA 15282

Local Education Agency:
Pittsburgh School District
341 South Bellefield Avenue
Pittsburgh, PA 15213-3516

Counsel for the LEA
Aimee Rankin Zundel, Esquire
Weiss Burkardt Kramer, LLC
445 Fort Pitt Boulevard, Suite 503
Pittsburgh, PA 15219

Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 9/23/2018

INTRODUCTION AND PROCEDURAL HISTORY

The student (Student)¹ is an early elementary school-aged student residing in the Pittsburgh Public School District (District). Student was determined to meet criteria as a protected handicapped student under Section 504 of the Rehabilitation Act of 1973² during the 2016-17 school year to address needs resulting from Student's Autism Spectrum Disorder. Following a Parent-requested evaluation in first grade during the 2017-18 school year, the District again concluded that Student qualified under Section 504 but was not eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).³ Student's Parent filed a due process complaint against the District asserting that its eligibility determination was not appropriate and that Student is in need of special education and related services.

The case proceeded to a due process hearing which convened over three efficient sessions,⁴ at which the parties presented evidence in support of their respective positions. The Parent sought to establish Student's IDEA eligibility, while the District maintained that its decision to qualify Student under Section 504 only was appropriate for Student.

For the reasons set forth below, the Parent's claim cannot be sustained and will be dismissed.

¹ In the interest of confidentiality and privacy, Student's name, gender, and other personal information are not used in the body of this decision to the extent possible. All potentially 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 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

³ 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).

⁴ Two hearing sessions scheduled for early August were rescheduled due to unavoidable circumstances for both parties; two of the sessions that did convene were approximately one half day in duration to accommodate schedules. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number.

ISSUE

Whether Student is eligible for special education and related services under the IDEA?

FINDINGS OF FACT

1. Student is a primary elementary school-aged student who is a resident of the District. (N.T. 16-17.)
2. Student was diagnosed with Pervasive Developmental Disorder (now considered within the realm of Autism Spectrum Disorder) at approximately age two, and received early intervention services in preschool addressing speech/language, social communication skills, social/emotional skills, and physical development. (N.T. 216-17; S-1 at 2, 3.)

2016 EVALUATION

3. The District conducted an initial evaluation in the fall of 2016, Student's kindergarten year, and issued an Evaluation Report (ER) to the Parent in January 2017.⁵ (S-1)
4. The 2016 ER included input from the parent and kindergarten teacher. The Parent expressed concerns with social/emotional, motor, and communication skills, as well as with fine motor skills and homework completion. The teacher reported that Student was distractible, required prompting to complete tasks, and needed to improve handwriting; however, Student did not present with aggression or disruptive behavior. Student's functional performance was not a concern. (S-1 at 2, 5, 6, 13.)
5. Cognitive assessment for the 2016 ER (Wechsler Preschool and Primary Scale of Intelligence for Children – Fourth Edition) yielded low average (Visual Spatial and Fluid Reasoning Indices) to average (Verbal Comprehension, Working Memory, and Processing Speed Indices) range Composite scores with a Full Scale IQ of 89 (upper end of the low average range). S-1 at 7-9.)
6. Assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) reflected average range scores on all subtests and composites with the exception of the Listening Comprehension Composite (standard score of 84, upper end of the low average range) and the Alphabet Writing Fluency subtest (standard score of 81). Student's performance was determined to be commensurate with cognitive ability. (S-1 at 9-11.)

⁵ Because there was a second evaluation in November 2017, for clarity, the ER completed in the fall of 2016 and issued in January 2017 will be referenced as the 2016 ER.

7. Speech/language assessment for the 2016 ER (Test of Language Development – Primary – Fourth Edition, Photo Articulation Test – Third Edition, and informal measures) reflected average language abilities and age-appropriate articulation. (S-1 at 3-5.)
8. Occupational therapy assessment for the 2016 ER, including the Developmental Test of Visual Perception – Second Edition, revealed age-appropriate fine motor, visual perception, and visual motor skills. Occupational therapy services were not recommended. (N.T. 191, 193; S-1 at 5-7.)
9. Results of the Parent’s Gilliam Autism Rating Scale – Third Edition and Social Communication Questionnaire for the 2016 ER were consistent with an Autism Spectrum Disorder diagnosis. (S-1 at 12.)
10. The conclusion in the 2016 ER was that Student did have a disability (Autism) but did not require specially designed instruction. There was a recommendation for accommodations through a Section 504 Plan/Chapter 15 Service Agreement (504 Service Plan). (S-1 at 14.)
11. A Section 504 Plan was developed in February 2017. The aids, services, and accommodations in that Plan were as follows:
 - a. Instructional: quiet environment with eye contact during review of information and directions; directions in small steps; chunking of assignments; repeated instructions; prompts as needed; wait time; shorter work periods; additional time for assignments; physical movement; and home/school communication
 - b. Environmental: preferential seating; ability to stand as needed; frequent reminders of rules; and minimization of noise
 - c. Behavioral/Social: given special jobs with movement; fidget toys; and movement
 - d. Testing: small group as needed; additional time; and oral directions.

The Parent approved the February 2017 Section 504 Plan. (S-4.)

2017-18 SCHOOL YEAR (FIRST GRADE)

12. Student began first grade at the start of the 2017-18 school year with the Section 504 Plan. (N.T. 19-21.)
13. Student’s Section 504 Plan was modified near the beginning of the first grade school year. New to the revised plan were reduced homework (instructional accommodation); door to door transportation (environmental accommodation); positive reinforcement for self-advocacy (behavioral/social accommodation); and untimed tests and a reduced number of spelling words (testing accommodations). The transportation accommodation was due to the Parent’s concerns for Student’s safety. (N.T. 22, 236; S-8.)

14. There was a paraprofessional in Student's first grade classroom two days each week for approximately two periods. That paraprofessional supported any student who needed support, sometimes including Student. (N.T. 38-39, 79.)
15. At the start of the first grade school year, Student sometimes lost focus or even fell asleep. The sleeping behavior gradually diminished and then stopped entirely by December 2017. (N.T. 20-21, 26-27, 87, 95-96.)
16. Student required frequent prompts and redirection during the first grade school year and also fidgeted. Those behaviors decreased as the school year progressed. (N.T. 25.)
17. Student did not present with problematic behaviors during the first grade. (N.T. 28.)
18. Student was provided with reduced homework assignments at the request of the Parent during the first grade school year. The reduction included the number of spelling words Student was expected to master each week. (N.T. 25-26, 49, 85.)
19. At times, the first grade teacher provided alternate or reduced assignments to students including Student, such as during spelling activities. (N.T. 42-44, 78-79.)
20. Student and other students were provided with small group instruction by the first grade teacher as needed when exhibiting difficulties with the material presented. Other students also worked in small groups. (N.T. 40-41, 44-45, 80.)
21. Student used fidget toys during first grade. (N.T. 20-21, 27.)
22. Student was provided with testing accommodations during first grade by taking the test with a paraprofessional individually or in a small group. Student was also permitted to retake spelling tests if Student did not attain a good grade. (N.T. 27, 29-30.)
23. All students in Student's first grade classroom were permitted to retake spelling tests. (N.T. 78.)
24. Student had a daily behavior chart in first grade. (N.T. 28.)
25. After a February 2018 meeting, Student was given manipulatives for spelling tests rather than writing the words on paper. (N.T. 30-32, 47-48, 78-79, 226-27.)
26. Student had the opportunity to retake any test on which Student received a failing grade in first grade. (N.T. 29-30, 50.)
27. Student was provided with the accommodations in the then-current Section 504 Plans over the first grade school year. (N.T. 23-28, 30-32, 34, 66-72.)

2017 ER

28. The District conducted a new evaluation of Student in the fall of 2017 at the request of the Parent, and she provided consent. (N.T. 107-08; S-9; S-10.)

29. The 2017 ER summarized input from the Parent that included concerns with elopement, coping skills that would lead to meltdowns, hyperactivity, and handwriting. At the time, Student was also exhibiting difficulty at home with fine motor skills and completing homework. (N.T. 112, 129, 217-21; S-10 at 1-2.)
30. The 2017 ER included input from the first grade teacher that reflected Student's average to slightly above average academic skills and "wonderful" behavior (S-10 at 2). Current assessment scores, including curriculum-based measures, and grades were also provided. Minor teacher concerns were noted with respect to social skills (shyness in large and small groups, lack of initiative in seeking friendships); independent work completion; illegible handwriting at times; and falling asleep in class. The teacher also reported on the effectiveness of many of the accommodations in the Section 504 Plan; notably, providing wait time was not a successful strategy for Student. (N.T. 129-30; S-10 at 2-4, 6, 13-14.)
31. A summary of previous evaluations was also contained in the 2017 ER, but the report noted that parentally-obtained evaluations had not been provided to the District. (S-10 at 2, 19-20)
32. Cognitively, Student was assessed for the 2017 ER with the Wechsler Intelligence Scale for Children –Fifth Edition. Student exhibited a relative strength on the Verbal Comprehension Index, and relative weaknesses on the Visual Spatial and Fluid Reasoning Indices; the Full Scale IQ was reported to be 86 (low average range). (N.T. 109-10; S-10 at 6-9.)
33. The 2017 ER included a new administration of the WIAT-III. Student earned average range scores on all composites with the exception of the Mathematics Composite (standard score of 80); only the Spelling subtest of the Written Expression Composite (standard score of 97) was attempted because of Student's lack of exposure to a writing curriculum by the fall of first grade. Student also attained average range scores on all subtests of the WIAT-III with the exception of Expressive Vocabulary (below average range) and Oral Word Fluency (above average range) on the Oral Language Composite; Oral Reading Fluency (below average range) on the Basic Reading Composite; and Numerical Operations (below average range) on the Mathematics Composite. Student's performance was determined to be commensurate with cognitive ability. (N.T. 136; S-10 at 9-13, 21.)
34. All standardized assessments administered to Student by the District school psychologist who conducted the fall 2017 ER were in accordance with the publishers' standardization protocols. (N.T. 134.)
35. Social/emotional/behavioral functioning was assessed through rating scales (Behavior Assessment System for Children – Third Edition (BASC-3)) completed by the Parent and first grade teacher. The Parent's ratings endorsed clinically significant concerns with hyperactivity, anxiety, depression, atypicality, withdrawal, and attention problems, as well as with adaptability on the adaptive scales; at-risk concerns were reported with respect to aggression and somatization, as well as with social skills, activities of daily

living, and functional communication on the adaptive scales. The teacher ratings reflected clinically significant concerns only with respect to atypicality and withdrawal, in addition to functional communication on the adaptive scales; those ratings also revealed at-risk concerns with somatization and attention problems, in addition to social skills, leadership, and study skills on the adaptive scales. Overall, the Parent reported more significant concerns in these domains than did the teacher. (S-10 at 14-16.)

36. The Parent and teacher also completed the Autism Spectrum Rating Scales for the 2017 ER, which were again consistent with Autism Spectrum Disorder. As with the BASC-3, the Parent reported more significant concerns than did the teacher on this instrument. (N.T. 121-22, 144-45; S-10 at 16-19.)
37. The District school psychologist who conducted the fall 2017 ER observed Student on two different occasions using the Behavioral Observation of Students in School to measure Student's engagement and off-task behaviors in comparison to peers. The observations were during a whole group reading and mathematics instruction (approximately twenty two students) and a small group reading instruction (with one other student and a paraprofessional). Student reportedly exhibited less passive engagement than peers in both large and small group instruction, as well as more passively off-task behavior compared to peers in both groups. However, peers exhibited more motor and verbal off-task behavior in the large group than did Student. (N.T. 113-17; S-10 at 5.)
38. At the Parent's request, an observation of Student during transportation was conducted for the 2017 ER. The behavior specialist who conducted this observation and had previous experience with Student noted that Student did not exhibit any behaviors of concern and was able to enter and exit the vehicle to and from the school building. (N.T. 246-47, 294-95; S-10 at 4.)
39. A Functional Behavioral Assessment (FBA) was also conducted at the time of the 2017 ER. The identified behavior of concern was Student "frequently doz[ing] off during class time, particularly when [] working independently." (S-11 at 1.) The hypothesis of the function of that behavior was determined to be avoidance of independent classwork requiring sustained attention and effort. (S-11.)
40. The District school psychologist who conducted the fall 2017 concluded that Student had a disability (Autism Spectrum Disorder) but was not in need of specially designed instruction. The 2017 ER reflected the same conclusion. (N.T. 124, 145; S-10 at 22.)
41. The 2017 ER made recommendations for continuation of the Section 504 Plan with some revisions/additions. New accommodations were suggested for an occupational therapy consultation; visual models of letters and numbers; repeated/rephrased directions with visual cues; having Student restate directions; and a continuation of interventions in reading (sound/symbol knowledge) and mathematics (operational signs and basic vocabulary). (S-10 at 22.)

42. All of the recommendations that the District school psychologist made in the 2017 ER were for regular education classroom interventions that did not involve modifying expectations. Several of the recommendations are considered to be elements of the District's Response to Intervention program and are not forms of specially designed instruction. (N.T. 147-49, 298-300, 306.)
43. The District's practice when conducting special education evaluations is to make recommendations before reaching a conclusion on IDEA eligibility. That process involves a review of the recommendations to determine whether they constitute differentiation of instruction or modification to the curriculum expectations. (N.T. 260-61, 275-76.)
44. A meeting convened to review the 2017 ER. (N.T. 75, 149-51, 168.)
45. Following the review of the 2017 ER, the team revised Student's Section 504 Plan. (N.T. 23-24, 151-52.)
46. The December 2017 Section 504 Plan retained all of the prior aids, services, and accommodations in the prior Plan, and added several others. Specifically, the December 2017 Section 504 Plan contained the following aids/services/accommodations:
 - a. Instructional: quiet environment with eye contact during review of information and directions; directions in small steps; chunking of assignments; repeated instructions; prompts as needed; wait time; shorter work periods; additional time for assignments; reduced homework; visual models of numbers and letters; teacher support for mathematics operations and vocabulary; Student restating directions; a token economy/behavior plan; physical movement; and home/school communication
 - b. Environmental: preferential seating; ability to stand as needed; frequent reminders of rules; minimization of noise; and door to door transportation
 - c. Behavioral/Social: given special jobs with movement; fidget toys; movement; and positive reinforcement for self-advocacy
 - d. Testing: small group as needed; additional time; oral directions; reduced number of spelling words; and paraprofessional support for spelling tests.

(S-12.)

47. The Parent did not approve the December 2017 Section 504 Plan. (S-13.)
48. Also following completion of the 2017 ER, an occupational therapy screening was conducted by the District based on the Parent's concerns with fine motor skills. Student's first grade teacher did not report any such concerns at that time. (N.T. 178-79, 195-96; S-15.)

49. The District occupational therapist observed Student in the classroom and also during some informal assessment of Student's use of scissors and laces, a coloring task, a writing task, donning a coat and gloves, and opening containers at lunch. (N.T. 180-86, 188, 198-200, 203-04; S-15.)
50. The District occupational therapist obtained samples of Student's handwriting which she concluded were age-appropriate although Student could benefit from daily practice. (S-15.)
51. The District occupational therapist administered one assessment, the Beery-Buktenica Test of Visual Motor Integration – Second Edition (Beery VMI). Student attained an average-range score on that instrument. (S-15.)
52. The District occupational therapist did not find that Student needed occupational therapy services. She did offer suggestions to the Parent for improving handwriting skills at the Parent's request. (N.T. 200-03, 206-07; S-15.)

INDEPENDENT EDUCATIONAL EVALUATION

53. Following completion of the 2017 ER, the Parent requested an IEE. The District agreed to provide an Independent Educational Evaluation (IEE) of Student at its expense. (N.T. 261-63; S-14.)
54. The independent evaluator provided background on Student that included diagnoses of Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, and Separation Anxiety Disorder. Parent concerns were noted with respect to hyperactivity, difficulty completing independent work, poor written work, and unspecified "learning problems" (S-18 at 1). A summary of previous evaluations and pertinent District records was also included in the IEE report.⁶ (S-15 at 1-8.)
55. The independent evaluator observed Student at school for approximately one hour and provided a summary in the IEE report. (N.T. 318, 320, 340; S-18 at 8-9.)
56. Academic achievement assessed for the IEE was of oral language (Controlled Oral Word Association Test) and written expression (select subtests of the Kaufman Test of Educational Achievement – Third Edition (KTEA-3). (S-18 at 10-12, 14-15.)
57. Student attained a low score on the written expression subtest of the KTEA. The independent psychologist attributed that low score to inattention, distractibility, and a dislike of writing tasks, and was not confident that it was an accurate representation of written expression skills. Because of Student's difficulties with that one subtest, no additional test or subtests of written expression from that Composite were administered. (N.T. 316, 320-21; S-18 at 11-12.)

⁶ There are minor inaccuracies in the IEE report regarding information from the 2017 ER, including an inflated Somatization score from the Parent's rating scales.

58. On the Wide Range Assessment of Memory and Learning – Second Edition for the IEE, Student attained scores in the low to average range compared to same-age peers. Those results were determined to be commensurate with the District’s recent cognitive assessment. (S-18 at 11-12.)
59. The independent psychologist obtained the Parent rating scales for the Conners 3 (short version) and the Achenbach Child Behavior Checklist (CBCL). Results revealed significant concerns with respect to thought problems, attention problems, aggressive behavior, affective problems, anxiety, ADHD, defiance, and peer relations, with lesser (at-risk) concerns for anxiety and depression, withdrawal, social problems, oppositional defiance, conduct problems, and executive functioning. There are teacher rating scale forms available for both instruments but neither were obtained. (N.T. 156-57, 271-72, 318; S-18 at 9-10.)
60. Student’s adaptive behavior skills were assessed for the IEE (Vineland Adaptive Behavior Scales – Second Edition) through a Parent rating scale. Results reflected concerns across domains and subdomains with the exception of expressive communication. There is a teacher rating scale for this instrument but it was not obtained. (N.T. 274; S-18 at 12-13.)
61. The IEE included a new administration of the Beery VMI on which Student scored in the low to average range, exhibiting motor weaknesses. (S-18 at 11.)
62. The independent evaluator provided diagnostic impressions in the IEE report: ADHD (combined presentation), Autism Spectrum Disorder Level 1, and “Possible Emerging Specific Learning Disability in Written Expression.” (S-18 at 13.)
63. The independent evaluator concluded that Student was eligible for special education on the basis of Other Health Impairment (ADHD), but not Autism Spectrum Disorder because that condition was not impeding Student’s learning. She further concluded that Student required an “individualized learning plan” (S-18 at 16) to address reading, writing, and spelling deficits. (N.T. 327-28, 343-44; S-18 at 16.)
64. The independent evaluator’s conclusion that Student was in need of special education was based essentially on her view that the Section 504 Plan was extensive and that Student required frequent prompts and redirection during her observation. (N.T. 326, 346.)
65. The independent evaluator made the following educational recommendations: specially designed instruction to support academic, attentional, and executive functioning weaknesses; support for handwriting and written expression; occupational therapy evaluation if handwriting difficulties continue; continuation of door-to-door transportation; and support for homework completion or a reduced workload. A number of strategies were also suggested to support Student with respect to changes in routine/transitions (such as predictable routines and notice of variations); generalizing previously learned information (such as reviewing previously taught information before introducing new concepts and discussing cause and effect); following directions (such as

providing directions using multiple modalities and mnemonic devices); higher-level thinking concepts (such as explanation of abstract concepts and teaching self-advocacy when concepts are unclear); a tendency to become overwhelmed (such as breaks throughout the day and elimination of homework); and executive functioning (such as a structured classroom with minimal distractions and positive reinforcement in a behavior plan). (S-18 at 17-19.)

66. A meeting convened to review and consider the IEE. The independent evaluator attended that meeting. (N.T. 154, 334.)
67. Following the IEE, the District issued a Permission to Evaluate form to examine Student's written expression skills. The Parent did not consent to that testing. (N.T. 160-61, 276-77; S-19.)
68. Student's grades over the course of the 2017-18 school year were in the A to C range with the exception of an E grade in spelling during the fourth quarter. All final grades were C or better. (S-21.)
69. Student was below benchmarks in reading and above benchmarks in mathematics at the end of the 2017-18 school year. Student's handwriting improved between September 2017 and May 2018 but could still be difficult to read and understand. (S-24, S-25, S-26.)

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 this 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 Parent who requested 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, as is the case here.

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, testifying to the best of his or her recollection, and their testimony was essentially quite consistent where it overlapped. The testimony of the District's school psychologists was persuasive and was accorded significant weight. In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit, as well as the parties' closing statements, were thoroughly considered in issuing this decision.

GENERAL SECTION 504 PRINCIPLES

In the context of education, Section 504 and its implementing regulations "require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, an "appropriate education" means "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy" all of the requirements of each of the related subsections of that chapter: §§ 104.34, 104.35, and 104.36. *See* 34 C.F.R. § 104.33(b).

IDEA ELIGIBILITY

The IDEA and its implementing state and federal regulations require local educational agencies (LEAs) to locate, identify, and evaluate children with disabilities who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. A “child with a disability” is defined by the statute to mean a child who has been evaluated and identified with one or more of a number of specific disability classifications, and “by reason thereof” needs to be provided with special education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a). The IDEA classifications or categories for purposes of this definition are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

Merely having an identified disability, however, does not automatically mean that a child is eligible for special education, since that is merely one prong of the two-part test. The other step to IDEA eligibility is a determination that the child needs special education because of that disability. And, “special education” refers to specially designed instruction which is devised to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically,

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).

It also prudent to review the definition of the disability that the private psychologist concluded was applicable, Other Health Impairment, which is defined by those same regulations as follows:

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that -

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.8(c)(9).

SPECIAL EDUCATION EVALUATIONS

Because Student's eligibility determination was based on the District's evaluation along with the IEE, it is prudent to keep in mind the IDEA requirements for LEA evaluations to ensure that sufficient and accurate information about the child is obtained:

- (b) Conduct of evaluation. In conducting the evaluation, the public agency must—
 - (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
 - (i) Whether the child is a child with a disability under § 300.8; and
 - (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
 - (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b); *see also* 34 C.F.R. § 303(a). 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). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

STUDENT’S ELIGIBILITY UNDER THE IDEA

The singular issue presented is whether the District’s conclusion that Student is not eligible for special education under the IDEA was appropriate. As more fully discussed below, the record in its entirety does not support the Parent’s claims.

The District's 2017 ER clearly met the requirements for conducting an appropriate evaluation under the IDEA. That ER summarized input from the Parent that included her concerns, and from the teacher. Student's then-current assessment data was provided in addition to a summary of previous evaluations. Student was observed in two environments by the evaluating District school psychologist, and during transportation by a behavior specialist who knew Student. Cognitive and achievement assessments were conducted in accordance with the publisher's protocols. Information on Student's social/emotional/behavioral functioning was gathered, including Autism Spectrum Disorder characteristics. An FBA identified problematic behavior and led to a hypothesis about its functions for use in the recommended behavior plan. Student's disability (Autism Spectrum Disorder) was identified in the 2017 ER, but the team did not conclude that Student was in need of specially designed instruction by reason of that disability. The 2017 ER provided a wealth of useful information including recommendations for revisions/additions to the Section 504 Plan. None of those recommendations were for any form of adaptations to the content, methodology, or delivery of instruction to Student which would constitute specially designed instruction, the second prong of the eligibility test.

The Parent expressed concerns that Student continued to exhibit difficulty with homework, handwriting legibility, and spelling in first grade, as part of her reasons for her disagreement with the District's conclusion (N.T. 222-26, 234). The private psychologist opined that the Section 504 Plan was rather extensive and, presumably, considered it to be the functional equivalent of an Individualized Education Program (IEP). In her IEE, she rather summarily concluded that specially designed instruction was required to address academic, attentional, and executive functioning weaknesses; however, her recommendations, like those in the 2017 ER,

did not amount to specially designed instruction, and can be easily addressed through a Section 504 Plan.

Although Student struggled with spelling at times and earned a failing grade in one quarter during first grade, Student earned a solidly average range score on that subtest on the WIAT-III for the 2017 ER. Student also earned average to above average final grades for all classes during the 2017-18 first grade school year. The concerning behaviors that Student exhibited at the start of the first grade school year, such as falling asleep in school, diminished over the fall of 2017 and ended by December. As for fine motor skills, an occupational therapy screening after the 2017 ER similarly revealed no concerns in that area. Relatedly, the private psychologist attempted to explore further Student's written expression abilities. However, even she was not able to conclude with any confidence that Student's performance on the one subtest of the KTEA reflected Student's true abilities in that area; indeed, those results supported the persuasive testimony by one of the District school psychologists on the reasons that only the spelling subtest of the WIAT-III was administered for the 2017 ER (N.T. 272-73). Furthermore, the private psychologist's conclusion that Student demonstrated a "Possible Emerging Specific Learning Disability in Written Expression" is not even a category of eligibility under the IDEA.⁷ Lastly, with respect to the private psychologist's determination that Student should be classified as eligible based on Other Health Impairment due to ADHD with its resulting recommendations to address Student's attentional and executive functioning presentation, even assuming that the ADHD diagnosis is valid, it is quite significant that she did not directly obtain information from the District on how Student presented at school in those domains despite the availability of

⁷ The District's efforts to further evaluate Student's written expression skills was clearly an appropriate response.

teacher rating scales for the Vineland, Conners 3, and Achenbach CBCL completed by the Parent.

The Parent further asserted that a number of the accommodations in the various Section 504 Plans are actually items of specially designed instruction. (Parent's Closing Statement at 3-4.) This hearing officer must respectfully disagree. Each of the explicit provisions in the most recent Section 504 Plan (which is the most comprehensive and includes all of those in previous versions), as well as the additional recommendations in the 2017 ER and IEE, are accommodations rather than adaptations to the "content, methodology, or delivery of instruction" to address Student's disability-related needs and ensure access to the general education curriculum. For example, the Parent suggests that providing teacher support to Student for understanding operational signs and mathematics vocabulary is a form of specially designed instruction. Teachers understand that all children learn differently, and are trained to recognize when additional support is needed and to provide differentiated instruction throughout the school day. That is nothing more than good teaching practice in the general education environment and does not amount to reduced expectations. The District's Response to Intervention program is yet another example of its ongoing efforts to provide tiered levels of support based on each student's needs in the regular education environment. Simply put, the Parent has not carried the burden of establishing that Student requires specially designed instruction and is therefore eligible for special education under the IDEA.

The Parent is clearly a very devoted and involved parent and advocate who wants what is best for Student. It is evident, however, that Student presents very differently in the home compared to in the educational setting. Student's inconsistent presentations across the home and school environments appear to form a significant basis for the parties' disagreement, and serve to

explain their conflicting perspectives on Student's eligibility. The Parent's concerns are wholly understandable. Nevertheless, the law does not demand that LEAs provide services beyond those that are appropriate such as those that "loving parents" might desire. *Andrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017); *Ridley School District. v. M.R.*, 680 F.3d 260, (3d Cir. 2012); *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Finally, there is every reason to conclude that the District and the Parent will monitor Student on an ongoing basis and promptly communicate any concerns about whether the Section 504 Plan is appropriately meeting Student's educational needs, including the Parent's continued distress over Student's homework completion. This hearing officer further encourages the Parent to agree to further assessment of Student's written expression abilities and needs as proposed by the District in the spring of 2018.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District appropriately determined that Student is not eligible for special education under the IDEA but can be accommodated through a Section 504 Plan.

ORDER

AND NOW, this 23rd day of September, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's conclusions on Student's eligibility under the IDEA and Section 504 were and are appropriate under the law. The Parent's challenge to those conclusions is **DENIED** and **DISMISSED**.

The District is not ordered to take any action.

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
20551-1718KE