

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

**Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order**

CLOSED HEARING

ODR No. 29618-23-24

Child's Name:

L.B.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for the Parents:

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Hearing Officer:

Brian Jason Ford

Date of Decision:

06/05/2024

Introduction

This matter concerns the special education rights of a child with disabilities (the Student). The Student's public school district (the District) evaluated the Student in 2023 and concluded that the Student was eligible for special education. The District reevaluated the Student in 2024 and concluded that the Student remained eligible for special education.

The Student's parents (the Parents) claim that the reevaluation was insufficient in several domains. To address those alleged insufficiencies, the Parents asked the District to fund an independent educational evaluation (IEE). The District declined the Parents' request.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The IDEA required the District to request this due process hearing to defend its reevaluation because the District denied the Parents' request to fund an IEE.

Discussed below, I find that the District's reevaluation was appropriate when it was written and that the District need not fund an IEE.

Findings of Fact

1. The Parents asked the District to evaluate the Student. The Parents were concerned about the Student's reading skills and "specifically Dyslexia." S-2 at 1.
2. On February 26, 2023, the District completed the evaluation and issued an evaluation report (the ER). S-1.
3. Through the ER, the District found that the Student qualified for special education as a child with a Specific Learning Disability (SLD). The ER concluded that the Student required specially designed instruction (SDI) to address basic reading skills and math problem solving skills. Concerns about anxiety were also noted. S-1.¹
4. On March 27, 2023, the Student's IEP team met, and the District proposed an IEP for the Student (the 2023 IEP). P-4.²
5. On January 8, 2024, the District proposed a reevaluation consisting of a Functional Behavioral Assessment (FBA), and assessments of the

¹ No issues concerning the ER are presented in this hearing.

² No issues concerning the 2023 IEP are presented in this hearing.

Student's emotional and behavioral functioning. At that time, the IEP team had concerns about the Student's emotional needs and how the Student's behaviors affected the Student's learning. The Parents consented to the reevaluation the same day. S-4.

6. On or about February 8, 2024, the Parents obtained a private Occupational Therapy (OT) evaluation of the Student. The Parents shared the private OT evaluation with the District sometime between February 8 and 23, 2024. See S-5.
7. On February 23, 2024, the District sought the Parents' consent to review the private OT assessment and complete additional OT assessments if needed to determine the Student's eligibility for OT services. S-5.
8. On March 7, 2024, the District issued the Reevaluation Report (the RR) that is the subject of the instant matter. S-6.
9. The RR included a summary of the services that the Student received, and noted that the Student's IEP had been revised in response to the Student's increasing feelings of anxiety. S-6 at 1.
10. The RR included input from the Parents. The Parents reported that the Student had been diagnosed with Anxiety and Dyslexia, and that the Student received out-of-school counseling twice per month.³ The Parents also said that they were, "concerned with the lack of support and knowledge the school has for [the Student's] dyslexia diagnosis." The Parents concerns were all related to the Student's Dyslexia and reading difficulties, how the District was addressing the same, and the impact of the Student's Dyslexia on preferred academic subjects like math (which involved reading problems) the Student's emotional state. S-6 at 2.
11. The Parents expressed a concern that the Student had difficulty expressing needs to peers. S-6 at 2.
12. As part of the reevaluation, the District's school psychologist called a reading consultant who is a friend of the Parents. The reading consultant expressed concerns about the Student's progress within the

³ Outside reports diagnosing the Student with Anxiety and Dyslexia were not entered into evidence and it is not clear when the Parents informed the District of these diagnoses or provided those reports.

District's reading program and recommended different reading interventions. S-6 at 3.

13. As part of the reevaluation, the District's school psychologist called a Licensed Clinical Social Worker (LCSW) who provided therapy to the Student two times per month. The LCSW found that the Student's in school behaviors were consistent with the Student's anxiety, and that the Student's behaviors were more prevalent at home. The LCSW was working with the family to identify triggers and provide rewards when the Student completed non-preferred activities. S-6 at 3.
14. The RR included a summary of the outside OT evaluation. The OT evaluation concluded that the Student had "sensory modulation challenges" that impacted upon nearly every conceivable domain of the Student's life. The OT evaluation recommended several types of interventions including weekly home or outpatient based Occupational Therapy. See S-6 at 3.
15. The RR reported the results of a standardized, normative assessment of the Student's intellectual ability (the WISC-V) that was completed as part of the ER. The assessment determined that the Student was in the average range in nearly every domain, resulting in an average Full Scale IQ. S-6 at 3-4.
16. The RR reported the results of a standardized, normative assessment of the Student's academic achievement (the KTEA-3) that was completed as part of the ER. The Student's overarching Academic Skills Battery was in the Average range, as were the Student's composite scores in Math and Written Language. The Student's Reading composite score, however, were below average. Many of the sub-domains contributing to the Student's below average Reading composite were associated with Dyslexia. S-6 at 4-5.
17. The RR reported the results of a standardized assessment of the Student's phonological processing (the CTOPP-2) that was completed as part of the ER. The Student's Phonological Awareness composite score and all sub-tests from which that score is derived fell in the Below Average range. All other composites and sub-domains fell in the average range. S-6 at 5
18. The RR reported the results of a standardized, normative rating of the Student's behaviors (the BASC-3), which included ratings by the Parents, a teacher, and a Student self-report, all of which were completed as part of the ER. While some of the Parents' ratings placed

the Student above the average range in domains related to anxiety and depression, the ratings were almost entirely within the average range. S-6 at 6-7.

19. The RR reported the Student's recent performance on curriculum-based assessments, IEP goals, classroom benchmark tests, and norm-references assessments that were administered as part of the Student's reading program. S-6 at 7-17.⁴
20. The RR included narrative input from the Student's learning support teacher, general education teacher (albeit a small amount), and school counselor. S-6 at 14-15.
21. The RR included teacher recommendations related to math problem solving, basic reading, and symptoms of anxiety. S-6 at 15-16.
22. The RR incorporated an Occupational Therapy report (the report for which the District sought consent on February 23, 2024 – S-5). The District's OT report included an in-school observation of the Student and a normative OT assessment (the SPM). The Student was functioning within the typical range across all SPM ratings. That, in conjunction with the observation, resulted in the District's Occupational Therapist's conclusion that the Student did not qualify for school-based OT to address educational needs. S-6 at 18-19.
23. The RR incorporated a FBA (the FBA for which the District sought consent on January 8, 2024 – S-4). The FBA defined "Refusal Behavior" and "Dysregulated Behavior" for the Student. The evaluator then used narrative reports from teachers, a functional behavior screening tool (the FAST), data collection from other District personnel, and two direct observations to develop hypotheses and recommendations to address the Student's behavior. The evaluator recommended the development and implementation of a Positive Behavior Support Plan (PBSP), and made recommendations about what the PSBP should include. S-6 at 19-24.
24. The RR included a re-administration of the BASC-3. One of the Parents, a General Education Teacher, and a Special Education Teacher

⁴ The parties disagree about the meaningfulness of the Student's progress, how the Student's performance on certain assessments should be interpreted, and whether certain tests are invalid for deviation from publisher's guidelines. Questions concerning the appropriateness of the Student's program are not before me, and so characterizing the Student's performance would be tantamount to issuing an advisory opinion in a dispute that may be raised in the future.

all completed the BASC-3 ratings. Overall, the Parent rated the Student's behaviors at higher levels than both teachers. The teacher's ratings were like each other, but there were some differences between the two as well. The teachers' ratings did not suggest a likelihood of Autism or ADHD, but the Parent's ratings suggested a high level of behaviors associated with those conditions. All three adults' ratings found behaviors associated with anxiety and depression, albeit to varying degrees. S-6 at 24-34.

25. The Student also completed a BASC-3 self-rating and reported a high level of behavioral and emotional difficulty at school. *Id.*
26. The Parent's ratings prompted the evaluator recommend a follow-up Autism-specific assessment. The evaluator specifically recommended the ARS and ADOS-2. S-6 at 34.
27. The RR concluded with a finding that the Student remained eligible for special education as a child with disabilities. The District found that the Student's primary disability was a Specific Learning Disability in basic reading and math problem solving, and secondary disability was an Emotional Disturbance. S-6 at 34-35.
28. The RR included recommendations to the IEP team concerning the Student's strengths, needs, behaviors, and anxiety. S-6 at 34-36.
29. On March 15, 2024, the District sought the Parents' consent to conduct additional evaluations to assess "behaviors consistent with Autism." The Parents affirmatively withheld consent the same day. S-7.
30. On April 3, 2024, the Parents asked the District to fund an IEE. While the Parents asked the District to fund a "comprehensive" IEE, they were particularly concerned about the Student's language and academic abilities. The Parents specifically requested that an ASHA-accredited Speech and Language Pathologist conduct the IEE. S-10.
31. On April 15, 2024, the District rejected the Parents' request to fund an IEE and advised the Parents of its obligation to request this hearing. P-8, P-9.
32. Upon rejecting the Parents' request to fund an IEE, the District issued a Notice of Recommended Educational Placement (NOREP) to document the rejection. The Parents returned the NOREP, completing the form to reiterate their position that the RR did not evaluate all the

Student's suspected areas of disability, and that a Speech and Language evaluation was needed. S-9.

33. On April 25, 2024, the District requested this hearing by filing its due process complaint.
34. On April 30, 2024, the District sought the Parents' consent to conduct an Autism evaluation and a Speech and Language evaluation. The Parents did not return the form. S-14.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly. To some extent, witnesses reached different conclusions from the same information. Those represent genuine differences of opinion, and do not impact upon each individual witness' credibility.

Applicable Laws

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if

the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the District is the party seeking relief and must bear the burden of persuasion.

Evaluation Criteria

The IDEA establishes requirements for evaluations. 20 U.S.C. § 1414. Substantively, those are the same for initial evaluations and reevaluations, and so I use those terms interchangeably.

Evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

Discussion

Noted above, the District must prove that its reevaluation was appropriate. The Parents have no burden in this case. Even so, it is instructive to examine the Parents' argument because it highlights the basis of the parties' disagreement. The Parents argue that the District failed to evaluate all areas of the Student's suspected disability, and focus on the Student's speech, language, and literacy needs. That alleged failure is the crux of this case. Other requirements for reevaluations – like using multiple, nondiscriminatory measures – are not in dispute.

Despite the apparent absence of a dispute, for completeness I find that RR did not use any single measure or assessment as the sole criterion for determining whether the Student is a child with a disability or determining what program is appropriate for the Student. I find that the RR relied upon technically sound instruments. I also find that all elements listed at 20 U.S.C. § 1414(b)(3)(A) are satisfied. I agree with the Parents that the case turns on the question of whether the District evaluated all areas of the Student's suspected disability.

I find that the District evaluated all areas of the Student's suspected disability at the time that the RR was drafted. Three considerations drive the analysis: the time between the ER and the RR, the data that the District collected between the ER and the RR, and what disabilities were suspected at the time of the RR.

At the time of the RR, the District was obligated to determine if new testing was needed and, if so, what tests to complete. *See, e.g.* S-6 at 17-18. The time between the ER and the RR, and the data that the District collected between those evaluations were pertinent to that analysis. The ER was completed on February 26, 2023, and the RR was completed just over a year later, on March 7, 2024. Much of the standardized testing in the ER should not be completed more than once per year and may be invalid if completed more frequently. At the time of the testing for the RR (January and February 2024 – see S-4, S-5), the Student was right at the point where the validity of new testing was questionable. In addition to the relatively short time between the ER and the RR, the District collected a significant amount of data concerning the Student's academic progress, with a focus on the Student's reading abilities, and reported that data in the RR.⁵ Given the

⁵ Again, the Student's receipt of a FAPE is not an issue in this case. The parties do not agree that the District's data indicates that the Student received a FAPE. The parties analyze the same data and reach different conclusions but, with a notable exception, the record of this case reveals no dispute that the data is an accurate representation of the Student's

information available to the District at the time of the RR, I agree with the District's conclusion that new measures of the Student's intellectual abilities and academic performance were unnecessary.

I also agree with the District that new testing was needed to assess the Student's emotional, behavioral, and occupational therapy needs. The Student's IEP team (which included the Parents and school personnel) was concerned about the Student's behaviors and emotional state. Those concerns are what prompted the RR, and so a new assessment in those domains was necessary. The Parents also obtained a private OT evaluation which suggested the Student had significant OT needs, most of which were sensory in nature. The District was obligated to determine if those OT needs manifested in school such that school-based OT was necessary. The District's re-administration of the BASC-3, completion of an FBA and of a school-based OT evaluation were all appropriate. All of those new assessments targeted the domains of the Student's suspected disabilities for which updated information was needed.

I must determine if the RR was appropriate at the time it was drafted. Information acquired after the RR that the District could not have known about at the time of the RR is not relevant to the analysis. Nothing in the record indicates that the District suspected or should have suspected Autism or a Speech or Language Impairment at the time of the RR. Rather, the testing completed for the RR caused the District's evaluator to suspect Autism. In response to that information, the District immediately proposed an Autism evaluation and a Speech/Language evaluation. The District recommended the Autism evaluation within the RR and sought the Parents' consent for both an Autism and Speech/Language evaluation shortly after issuing the RR. The Parents withheld consent, and so those evaluations did not proceed. Regardless, it is not the Parents' withholding of consent that shields the District. Rather, the absence of an Autism or Speech/Language evaluation in the RR does not render the RR inappropriate because those disabilities were not suspected disability at that time.

The Parents' focus (both in their IEE request and at the hearing) was on the Student's Speech and Language needs. There is no evidence in the record of this case that either party suspected, or had any reason to suspect, a speech or language impairment at the time of the RR. Rather, as part of the RR, the Parents shared their concerns about the Student's ability to communicate with peers about the nature of the Student's reading disability. The Parents expressed a belief that the District's reading interventions and the Student's

academic abilities. Data concerning the Student's reading abilities was robust, and I reject the Parents' argument that the RR failed to consider the Student's literacy needs.

emotionality made the Student stand out to peers, and that the Student had difficulty explaining to peers why the Student received specially designed instruction. The Parents explicitly linked this concern to the Student's anxiety and emotional state. None of this suggests a speech or language disability. Rather, this concern was consistent with the behavioral and emotional issues that prompted the RR. The District examined those domains through new testing completed for the RR.

The IDEA categorizes Speech and Language Impairments and Autism separately. In practice, Autism is a broad spectrum and often has implications for social communication. However, when a child qualifies for special education under any disability, the LEAs job is to provide a FAPE by addressing the child's needs. The child's eligibility categories do not limit the services that the LEA must provide to ensure that the child receives a FAPE. In this way, if a child qualifies for special education and requires SDI to address communication needs, the LEA must program for those needs no matter what the disability is called. In this case, the Parents presented a concern that the Student's anxiety was impacting upon the Student's ability to communicate with peers. The District assessed that concern through the RR, concluded that new domains of testing were required – testing that would have gained information about the Student's ability to communicate – and the Parents withheld consent for that testing. As noted above, the District's post-RR request for additional assessments and the Parents' response thereto is not relevant to the RR's appropriateness. Rather, this illustrates that the District did assess the Student's disabilities that were suspected at the time of the RR, and then took appropriate action based on the information gained through the RR.

Similarly, by the time of this hearing, the Parents had clearly expressed concerns about the Student's speech and language needs. If the District were to reevaluate the Student today, that reevaluation must include a speech and language evaluation. I find, however, that the District had no reason to suspect a speech or language disability in January or February 2024 (when the District proposed the RR) or in March 2024 (when the RR was completed). I also find that the District did have reason to evaluate the Student's communication needs once the RR was completed, based on its findings. In response to this new concern, the District proposed an evaluation and the Parents declined. In this way, the RR evaluated all suspected areas of the Student's disability; both through analysis of robust and current information and through new testing targeted to the concerns at that time.

For all the above reasons, I find that the District has satisfied its burden to prove that the RR was appropriate. The District is not ordered to fund an

IEE. Nothing herein abrogates the Parents' right to request new or different evaluations from the District. Nothing herein abrogates the Parents' right to obtain independent evaluations at their own expense or diminishes the District's obligation to consider independent evaluations that the Parents share, if any.

ORDER

Now, June 5, 2024, it is hereby **ORDERED** that the District's Reevaluation Report of March 7, 2024, was appropriate at the time it was written.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER