

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:

25622-21-22

Child's Name:

T.J.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

02/19/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, T.J. (Student),¹ is an early elementary school-aged student in the Tredyffrin-Easttown School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² as a child with Other Health Impairment and Speech/Language Impairment. Student was last evaluated by the District in September 2019 but a separate Augmentative and Alternative Communication Assessment was conducted in May 2021.

In October 2021, the District filed a Due Process Complaint seeking to defend its most recent evaluation of Student after the Parents requested an Independent Educational Evaluation at public expense. As remedies, the District sought a determination that its 2021 evaluation was appropriate, and that the Parents were not entitled to funding of a private evaluation. The Parents disputed the District's position, and the case proceeded to an efficient due process hearing.³

Following review of the record and for all of the reasons set forth below, the claims of the District must be sustained.

¹ In the interest of confidentiality and privacy, Student's name, 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 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.

ISSUES

1. Whether the District's May 2021 Augmentative and Alternative Communication (AAC) Assessment of Student complied with all applicable standards; and
2. If the AAC Assessment did not comply with all applicable standards, should the Parents be awarded public funding of a private evaluation of Student's AAC functioning?

FINDINGS OF FACT

1. Student is an early elementary school-aged student in the District and is eligible for special education under the IDEA. (N.T. 29-30.)
2. Student has a rare medical condition that usually is characterized by, among other things, developmental delay and impairment of verbal language skills. Student is nonverbal and has a Speech/Language Impairment, relying on an AAC device as a primary means of communication. (N.T. 79, 105-06; S-1 at 6.)
3. Student has trialed a number of devices and communication systems over a period of time. (N.T. 140-41, 180-81; P-4; P-6; P-16 at 2-3; S-1 at 22.)
4. The District evaluated Student at the start of the 2019-20 school year when Student was enrolled, and issued an Evaluation Report (ER) in September 2019. The ER incorporated input from the Parents and teachers from the prior school, as well as previous evaluation results. (S-1.)

5. Assessment of developmental functioning for the September 2019 ER revealed significant delays across domains (visual reception, fine motor, receptive language, and expressive language) but areas of relative strengths and weaknesses in each. Assessment of academic achievement was discontinued. (S-1 at 14-15.)
6. Student's adaptive behavior was assessed through parent rating scales for the September 2019 ER, which revealed significant delays across domains (communication, daily living skills, and socialization) and subdomains. (S-1 at 15-18.)
7. Assessment of speech/language functioning was also conducted for the September 2019 ER. Student's deficits included articulation as well as receptive, expressive, and pragmatic language skills. (S-1 at 18-26, 40-41.)
8. Assessment of physical and occupational skills for the September 2019 ER yielded results that indicated a need for both types of therapy services. (S-1 at 26-41.)
9. The September 2019 ER determined that Student was eligible for special education based on Other Health Impairment and a Speech/Language Impairment. A determination based on Intellectual Disability was deferred to a future date. (S-1.)
10. Student uses a particular approach or system for AAC that is a picture-based communication system with levels beyond selecting an icon that provide meaning. Motor planning is a significant element in using this system. (N.T. 42-45.)
11. In the spring of 2021, Student used an iPad to access the communication system at school. Student also has a personal device on which the system is installed but its functionality is limited to that

communication system. The iPad and the personal device function the same with respect to the communication system.⁴ (N.T. 45-48, 136.)

12. Student's personal device has a key guard to assist Student with fine motor skill weaknesses. The key guard helps Student touch an intended icon more easily and accurately. (N.T. 153-56.)
13. An AAC Assessment was conducted for Student in the spring of 2021 with the consent of the Parents to "assist the school team in educational planning" (S-3) as part of an ongoing review of Student's communication skills and needs. The professional conducting the assessment, from the local Intermediate Unit (IU), is a properly credentialed speech/language pathologist with a specialty in AAC. She has provided training to and consultation with District staff regarding Student since the fall of 2020. (N.T. 36-42; S-3; S-4.)
14. Student did not have a key guard for the District's AAC Assessment, but that factor did not impact the results or recommendations for Student. Other accessories for the personal AAC device were not necessary for that evaluation. (N.T. 66-68, 75, 78, 83.)
15. The IU evaluator observed Student in the regular and special education classrooms. Student's average length of utterances was slightly higher during those observations using verbal speech than using the device. (N.T. 53-54; S-5 at 1-2.)
16. The IU evaluator administered two specific instruments for the AAC Assessment, and also completed an AAC Profile using information obtained from the Parents, teacher, and Student's speech/language pathologist. (S-5.)

⁴ Since that time, the parties agreed that Student would use the personal device at school. (N.T. 74; P-18 at 37-38.)

17. The IU evaluator met with the family twice over at least two hours in total to complete the AAC Profile, and also met with District staff to obtain a profile for the school environment. That instrument is used to assess current functioning and is evidence-based. (N.T. 51-53, 117-18.)
18. The Test of Aided-Communication Symbol Performance (a low tech, paper instrument that is evidence-based) was administered for the District's AAC Assessment to evaluate skills related to the use of symbols, primarily for design of a device. During that assessment, Student exhibited inattention and non-compliance, and generally did not use a single finger in isolation to select a picture symbol. Student had difficulty with categorization with that measure. (N.T. 63-66, 84; S-5 at 2-4, 12-13.)
19. The AAC Genie, an informal assessment, was also administered for the District's AAC Assessment in order to evaluate four skill areas: visual identification, visual discrimination, vocabulary knowledge, and picture description. On that assessment, using a tablet device, Student exhibited areas of strength and weakness that suggested organization by categorization would benefit student. That assessment uses screens that change, so a key guard would not have been possible in its administration. (N.T. 65-66, 83-84; S-5 at 4-6, 12-13.)
20. The results of the AAC Profile in the District's AAC Assessment reflected that Student's communicative competency with the device was at a skill set level 2, that of an early AAC communicator with emerging skills across all four areas of learning (operational, linguistic, social, and strategic). The Parents' input suggested that Student was demonstrating some emerging skills at level 3. (N.T. 57-58; S-5 at 6-12.)

21. The IU evaluator ascertained Student's present levels related to AAC, and made a number of recommendations for Student, including use of a key guard with the AAC device configuration, a focus on development of vocabulary and word association, modeling of language, and acceptance of Student's chosen modality of communication when intelligible and support of the AAC device when verbalization is unintelligible. (N.T. 76; S-5.)
22. After the District's AAC Assessment was completed, the Parents requested an Independent Educational Evaluation at public expense, in part because the IU evaluator did not assess Student with Student's personal device. The District denied that request. (S-7; S-9; S-10.)

Private AAC Evaluation

23. The Parents obtained a private AAC evaluation in the fall of 2021. (P-16.)
24. The private evaluator who testified is an expert in the field of augmentative alternative communication and is properly credentialed and experienced in the field of speech/language pathology. (N.T. 202; P-16 at 1.)
25. The private evaluators conducted assessments of Student, including the AAC Profile. Results from another instrument could not be scored. The AAC Profile results also reflected that Student was at skill set level 2, with some language skills at skill set level 3 developing. (P-16.)
26. Student's accuracy with various AAC devices was assessed both with and without the key guard for the private AAC evaluation. Student demonstrated approximately 70% accuracy with the guard and 36% without; less prompting was also required with the key guard. (P-16 at 6-7.)

27. The private evaluation included data on Student's mean length of utterances as determined by the evaluator and also by of the Parents. If there was a difference, the parental report was used. (N.T. 240-41.)
28. The private evaluation provided data on Student's use of different devices both with and without a key guard. Student benefitted from use of the key guard, and the use of different devices with a touch screen was not difficult for Student, who is accustomed to using a tablet and is willing to do so. (N.T. 247.)
29. The private evaluators made several recommendations for Student, including opportunities for using the personal device, revision of the IEP to review current functioning and goals/objectives, and consistent use of the device in developing literacy. Student produced longer utterances using the device than verbally for this evaluation. (N.T. 233; P-16 at 12.)
30. The Parents' private evaluation is comparable to that of the IU evaluator, but the private evaluation is more detailed, including exploring AAC devices and the possibility of a different device recommendation in the future. The AAC Profiles in each were very similar, however, and both evaluations supported a multi-modal communication approach. (N.T. 221-22; P-16; S-5.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof is generally viewed as comprising two elements: the burden of production and the burden of persuasion. 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. 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 District also bore the burden of production.

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 as to the facts based on her recollection, although there was little inconsistency in the testimony relevant to the issue presented. The weight accorded the evidence is noted further below as necessary.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. States, through local educational agencies (LEAs), meet that obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP) which is "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." " *P.P. v.*

West Chester Area School District, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). As the U.S. Supreme Court has confirmed, 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). IEP development, of course, must follow and be based on an evaluation. 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).

Evaluation Requirements

Substantively, the IDEA 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). Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are appropriately examined.

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) 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—

- (i) whether the child is a child with a disability; and
- (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) 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

(C) 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); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability[.]” 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).

Finally, when parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). In such a circumstance, the LEA “must, without unnecessary delay,” file a due process complaint to defend its evaluation, or ensure the provision of an IEE at public expense. 34 C.F.R. § 300.502(b)(2). Whether or not the LEA funds an IEE, a private evaluation that meets agency criteria and shared with the LEA must be considered. 34 C.F.R. § 300.508(c).

The Parties’ Claims

The District contends that its AAC evaluation of Student in the spring of 2021 met the requisite criteria, and that the Parents are therefore not

entitled to an IEE at public expense. The Parents challenge the District's AAC Assessment as not sufficiently comprehensive of Student's unique needs.

The District's AAC Assessment was narrow in scope, and there is no dispute that it was limited to that one discrete area. As such, it was not a comprehensive speech/language evaluation such as that made part of the September 2019 ER. The IU evaluator used three different assessment instruments in addition to observations of Student in the regular and special education environments. One of the instruments required significant input from the Parents and school staff. The other two instruments assessed various skills, and the IU evaluator's testimony that neither could be completed with a key guard was logical and persuasive when the assessments themselves were described. She ascertained relevant present levels of functioning, and made several recommendations to support Student's AAC use in the school environment including the current AAC device configuration, which was also consistent with the private AAC evaluation.

The Parents challenge the IU consultant's failure to conduct any assessment or observation of Student using the personal device. At that time, however, Student was not using that device in school. The purpose of the evaluation was to assess AAC and to assist with educational planning. While such an observation by that evaluator may have been helpful, this hearing officer cannot conclude that the omission is fatal. The Parents also contend that the failure of the IU consultant to assess Student with and without a key guard, as the private evaluator did, is inappropriate given Student's complex skill deficits. However, there is no disagreement that Student benefits from, and even needs, a key guard in order to communicate effectively using the AAC device in light of Student's fine motor skill weaknesses. The IU evaluator provided persuasive testimony that her

recommendations were not affected by the absence of the key guard or other accessories for purposes of her evaluation. Thus, the omission of such data in the District's AAC Assessment does not defeat its substantive appropriateness under the law.

The private AAC evaluation does provide some information additional to that in the District's AAC Assessment. The private evaluation will likely be very useful to the IEP team, and the law requires that the participants consider it. But the fact that the private evaluation may be more in-depth in some respects does not necessarily mean that an LEA's was not adequate; after all, any evaluation could arguably include more input and additional assessments. Similarly, differences between some of the results of the two evaluations is not necessarily determinative. And, although the private evaluators may very well provide significant insight into the issues pending in the companion Parent-filed case, this hearing officer cannot conclude that the District's AAC Assessment is deficient or failed to serve its purpose under the IDEA in light of the narrow issue presented.

It is noteworthy that the private evaluators' recommendations included an understanding of Student's current functioning in order to determine baselines and program appropriately based on Student's profile. The law demands that IEP teams identify a student's individual strengths and needs and develop a program that is appropriately responsive thereto in order to comply with an LEA's FAPE obligations. That recommendation is already mandated. Moreover, there is no issue in this particular case involving the provision of FAPE to Student.

In sum, the evidence is preponderant that the District's AAC Assessment in the spring of 2021 was in compliance with and met all requirements in the applicable law. Accordingly, the Parents are not entitled to an IEE at public expense.

CONCLUSION OF LAW

The District's spring 2021 AAC Assessment of Student was appropriate under applicable standards and the Parents are therefore not entitled to an IEE in the area of ACC at public expense. 20 U.S.C. §§ 1414(a)(1)(C)(i), 1414(b)(2), 1414(b)(3), 1415(b)(1); 34 C.F.R. §§ 300.303(a), 300.304(b), 300.304(c)(4), 300.304(c)(6), 300.304(c)(7), 300.502(b).

ORDER

AND NOW, this 19th day of February, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's AAC Assessment in the spring of 2021 was appropriate. The District's claims in its Complaint are **GRANTED** and no remedy is ordered to be provided.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire.
HEARING OFFICER
ODR File No. 25622-21-22