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

Student's Name: A.S.

Date of Birth: [redacted]

ODR No. 13135-1213AS

CLOSED HEARING

Parties to the Hearing:	Representative:
William Penn School District 100 Green Avenue – Annex Lansdowne, PA 19050-2095	Kathleen M. Metcalfe, Esquire Jane M. Williams, Esquire 331 E. Butler Avenue New Britain, PA 18901
Parent	Carol Herring, Esquire P.O. Box 407 Glen Mills, PA 19342

Dates of Hearing: January 23, 2013

Record Closed: January 27, 2013

Date of Decision: January 28, 2013

Hearing Officer: Brian Jason Ford, Esquire

Introduction and Procedural History

The procedural history of this matter is lengthy, but well-documented. The summary provided here is for background and context. I am compelled to note that the following represents a small sample of the total procedural history of this case.

Prior to this due process hearing, the Parent[1]had requested a separate due process hearing against the William Penn School District (District). That hearing was ODR No. 3519-1213AS. The instant due process hearing, ODR No. 13135-1213AS, was requested on October 8, 2012 by the District. The District initiated this hearing because it rejected the Parent's request for an independent educational evaluation (IEE) at public expense. The two matters were consolidated.

On November 19, 2012, ODR issued Notices to the parties for both of the consolidated cases. The Notices set hearing dates on January 23, 24 and 25, 2013. At that time, the hearing schedule was agreeable to both parties.

On December 28, 2012, the District filed a Motion for Summary Judgment, arguing that the Parent is not entitled to an IEE as a matter of law because the Student was no longer a resident of the District. The Parent's attorney, Carol Herring, Esq. agreed that the Student was no longer a resident of the District. Ultimately, I dismissed the District's motion in light of my obligation to make findings of fact, but did not preclude the District from raising the same argument during the hearing.

On January 17, 2013, Attorney Herring informed me that the Parent was facing a family emergency and would not be able to attend any of the three scheduled hearing sessions. No other information about the emergency was provided. Initially, Attorney Herring indicated that the Parent would either request a continuance or withdraw the Complaint in ODR No. 3519-1213AS. Later in the day, on January 17, 2013, the Parent moved to dismiss both cases without prejudice because the Parent was not able to attend the hearing.

Still later in the day, on January 17, 2013, I advised the parties that I would dismiss ODR No. 3519-1213AS if the Parent withdrew the Complaint. Regarding this case, I explained that I would consider a request for a continuance, but that the Parent's motion to dismiss did not constitute a continuance request.[2] I also specified that I would consider a motion for a continuance only if the Parent explained the family emergency.[3]

On January 18, 2013, the Parent moved that I stay these proceedings. I denied that motion but, again, reiterated that I would consider any continuance request that

[1] Except for the cover page of this Final Decision, the Student and Parent's names are not used. Other identifying information in not used to the extent possible.
[2] The District objected to any continuance request on January 17 when the Parent moved to dismiss. Since I determined that the Parent had not requested a continuance on January 17, I found that the District's objection was premature.
[3] Attorney Herring experienced at least two emergencies of her own over the course of the consolidated case. Those emergencies were fully explained, and extensions were granted.

explained the family emergency. I also explained that I had the power to grant a party's request to extend the hearing timelines, but could not stay a hearing indefinitely.

The Parent withdrew the Complaint in ODR No. 3519-1213AS on January 21, 2013 and the hearing was dismissed the same day. In the same email withdrawing the Complaint, the Parent moved for a continuance in this matter. The request did not include an explanation of the family emergency and did not indicate when the Parent would be able to attend a hearing in the future. Having previously found it insufficient for the Parent to simply announce that there is a family emergency that precludes participation during any of three hearing dates without saying what the family emergency is or estimating when the family emergency will be over, I denied the continuance request. The Parent was given leave to file a new continuance request with the necessary information.

On January 22, 2013, (the day before the hearing) Attorney Herring sent an email stating, *inter alia*, that 1) she had complied with instructions to describe the nature of the emergency by saying that it was a family emergency, 2) she was given no other information about the emergency, and 3) she had unspecified concerns about disclosing more detailed information about the emergency to me and the District's attorney.[4] The same email renewed the Parent's request for a continuance.

Later, on January 22, 2013, I wrote to the parties saying that the hearing would convene as scheduled on January 23, 2013. I instructed Ms. Herring to attend the hearing even if the Parent was unable to participate. I explained that I would hear oral argument on the Parent's motion to continue at the start of the hearing, thereby giving the Parent a final opportunity to explain the emergency.

The hearing convened on January 23, 2013 at 9:00 a.m. As the hearing was starting, Ms. Herring sent emails objecting to the hearing proceeding without the Parent, but refusing to appear on the Parent's behalf. Neither these emails nor the proceeding emails indicated any scheduling conflict for Ms. Herring herself.

At the start of the hearing, I accepted all of the Parent's prior correspondence as the Parent's continuing motion for a continuance and as the Parent's argument in favor thereof. I then heard the District's objection to the continuance. I then denied the Parent's continuance request for the same reasons articulated above and in my emails of January 17, 18, and 22. Noting my obligation to make findings of fact, and the District's burden of proof, the hearing then proceeded *ex parte*.

Issue

Is the District required to fund an IEE for the Student?

[4] Assuming the truth of all statements in Ms. Herring's email of January 22, Ms. Herring had already disclosed everything that she knew about the emergency but was, simultaneously, concerned about disclosing more information.

Findings of Fact

1. The Student attended first grade during the 2010-11 school year in a different school district.

2. The Student enrolled in the District at the start of the 2011-12 school year.

3. The Student repeated first grade during the 2011-12 school year. The Student turned [redacted] years old towards the end of the school year.

4. In response to the Parent's concerns about the Student's academic progress, the District issued a Permission to Evaluate (PTE) - Consent Form on March 14, 2012. The purpose of that form was to obtain the Parent's consent for an initial special education evaluation. The Parent signed the form, providing consent, on March 19, 2012. The District received the form back from the Parent on March 27, 2012. (S-1).[5]

5. The PTE form indicates that the District would review the Student's records, obtain input from the Parent and teachers, measure the Student's intellectual functioning, measure the Student's academic achievement, and possibly measure the Student's adaptive behaviors. (S-1).

6. As part of the evaluation, the District provided the Parent with a Parent Input Form. The Parent completed the form and returned it to the District. On the Parent Input Form, the Parent explained concerns about the Student's math, writing and reading abilities. The Parent also noted difficulties with "focus in school for long periods of time." (S-2).

7. Through the Parent Input Form, the Parent indicated a concern that the Student "needs to play at [the Student's] age level." At the time of the evaluation, the Student was [older] than most first graders in the District. (NT at 52, 63; S-4).

8. It is not clear if English is the Parent's first language. The record does not reveal what language is spoken in the Student's home, or whether English is the Student's first language. On the Parent Input Form, however, the Parent stated that the Student needs to "learn to speak more pronounced and meaningful American English." (S-2).

9. In response to the Parent's comments about the Student's needs, the District administered a W-APT test. The W-APT is an English language proficiency screener test that assesses speaking, listening and reading. (S-3). Based on the results of that test, the District determined that the Student was proficient in English, that there

[5] Evidence admitted during the hearing is referenced as S-# for the School District's exhibits and H-# for the Hearing Officer's exhibits. References to the notes of testimony (transcript) are indicated by NT at #. During the hearing, efforts were made to ensure that the documents offered by the District included all of the documents that the Parent, through counsel, indicated that the Parent would present. Consequently, I have carefully reviewed all of the documents that the Parent had a right to introduce during the hearing.

was no need for additional testing to determine the Student's English proficiency, and that the Student did not qualify for services as an English language learner.

10. District evaluators observed the Student in class. Teacher input was also taken. Notes from the observation, teacher input, and Parent input (taken in large part from the Parent Input Form) were all included in the final Evaluation Report (ER), which is dated May 25, 2012. (S-4).

11. The ER reports AIMSweb data from the 2011-12 school year. It is not clear that the AIMSweb data was obtained through testing specific to the ER, or through curriculum-based assessments that the Student received as a regular education student. (S-4). This data indicates that the Student scored in the second percentile (characterized as "Well Below Average") in Oral Counting, Number Identification, Quantity Discrimination, and Missing Numbers. The Student scored in the thirteenth percentile (characterized as "Below Average") for Reading, which was specifically identified as a curriculum based assessment measuring words correct per minute. (S-4).

12. As a part of the evaluation, the District administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV). The results of the WISC-IV are reported in the ER. (S-4). The WISC-IV was administered under standard conditions. (NT at 45, 48). Results of the WISC-IV indicate that the Student was assessed to be in the "Borderline" range in the Perceptual Reasoning (5th percentile), Working Memory (4th percentile), Full Scale IQ[6] (2nd percentile) and General Ability (7th percentile) indexes.[7] The Student scored in the "Low Average" range in the Verbal Comprehension index (13th percentile). The Student scored in the "Extremely Low" range in the Working Memory index (2nd percentile). (S-4).

13. The ER includes a written narrative of how the WISC-IV scores were obtained, and what they may indicate about the Student's educational needs.

14. As a part of the evaluation, the District administered the Wechsler Individual Achievement Test, Third Edition (WIAT-III). The WIAT-III was administered under standard conditions. (NT at 45, 48). The results of the WIAT-III are reported in the ER. (S-4). On the WIAT-III, the Student scored in the "Average" range in the Mathematics (21st percentile) and Written Expression (27th percentile) composites.[8] The Student scored in the "Below Average" range in the Basic Reading (7th percentile) and Total Reading (5th percentile) composites. (S-4).

15. The ER includes a written narrative of how the WIAT-III scores were obtained, and what they may indicate about the Student's educational needs.

[6] The Student's full scale IQ was found to be 70, measured as a standard score.
[7] Index scores are calculated based on various subtest scores, which are also reported in detail in the ER. (S-4).
[8] Composite scores are calculated based on various subtest scores, which are also reported in detail in the ER. (S-4).

16. The above-described testing was administered and analyzed by a District-employed Certified School Psychologist (the Evaluator). In the ER, the Evaluator noted that the Student did not demonstrate significant discrepancies between ability and achievement as compared to other first graders. However, significant discrepancies emerged when the Student was compared to other [same-age peers]. The Evaluator felt that the latter was a better measure of the Student's needs, and agreed with the Parent's concerns about the Student's opportunity to socialize with same-aged peers. (S-4).

17. The Evaluator found that the Student met eligibility criteria as a student with a Specific Learning Disability in the areas of reading, written expression, and math. (S-4).

18. In concluding that the Student met eligibility criteria, the Evaluator was concerned about the Student's potential lack of appropriate instruction in reading and math during – and prior to – the 2010-11 school year (when the Student attended a different school district). Through conversations with the Parent, the Evaluator learned that the Student received no academic instruction before first grade in the prior school district. These concerns notwithstanding, the Evaluator ultimately concluded that the Student's learning disability was not a function of a prior lack of instruction. (S-4).

19. Through the ER, the Evaluator made recommendations to the IEP team. (S-4). Specifically, the Evaluator recommended that the Student receive special education, small group instruction, and materials at the Student's instructional levels. The Evaluator recommended that the IEP team draft measurable annual goals to monitor the Student's progress in reading (decoding, sight vocabulary, fluency and comprehension), written expression (sentence and paragraph construction), and math (problem solving). (S-4).

20. The Evaluator also recommended that the Student be placed into third grade at the start of the 2012-13 school year so that the Student could develop social skills with same-aged peers.[9] (S-4).

21. After the ER was drafted, a copy of the ER was sent to the Parent, and the District used the ER to write a draft Individualized Education Program (IEP). On June 1, 2012, the District also invited the Parent to an IEP team meeting. (S-5). The meeting convened on June 6, 2012. Both the ER and draft IEP were discussed during the meeting.[10] (NT at 57).

[9] The ER did not identify any particular social skill deficit but, as noted, the Evaluator agreed with the Parent that the age difference between the Student and average first graders was an increasing concern.
[10] The meeting invitation stated that the purpose of the meeting was to "discuss the results of the team evaluation of your child. An Individualized Education Program (IEP) will be developed at the meeting." (S-5).

22. During the IEP team meeting, the Parent raised concerns about placing the Student into third grade. The Parent did not voice any other concerns about the ER at that time. (NT at 57-59).

23. After the IEP was discussed, the District offered the IEP with a Notice of Recommended Educational Placement (NOREP). Initially, the Parent neither accepted nor rejected the NOREP.

24. The Parent requested an IEE via a letter dated August 14, 2012. (S-6). According to the post markings, the letter was mailed on August 20, 2012. The letter was incorrectly addressed, resulting in a delivery delay. The District received the letter on September 5, 2012, which is the day after the Parent requested a due process hearing (ODR No. 3519-1213AS). (S-6).

25. The Parent's attorney, two child advocates and the proposed independent evaluator were copied on the letter. (S-6).

26. Through the letter, the Parent again raised concerns about placing the Student into third grade. No other concerns about the ER are raised in the letter. (S-6).

27. On September 13, 2012, the District invited the Parent to another IEP meeting and a resolution meeting for hearing 3519-1213AS. (S-7). Those meetings were originally scheduled for September 18, 2012. *Id*. The meetings were then delayed. The resolution meeting for hearing 3519-1213AS ultimately convened on October 8, 2012. (S-7; NT at 76).

28. The Parent reiterated the IEE request during the resolution meeting.[11]

29. Later in the day on October 8, 2012, the District requested this due process hearing. (S-9; H-1).

30. The Student withdrew from the District on November 2, 2012.[12] (S-10). At that time, a different school district became the Student's local educational agency (LEA). (NT at 83).

Discussion

I. The Right to an IEE at Public Expense

This matter arises pursuant to the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 *et seq*. Parental rights to an IEE at public expense are established by the IDEA

[11] As noted during the hearing, resolution meetings are confidential. I permitted testimony regarding the resolution meeting only to the extent that such testimony confirmed that 1) the meeting convened and 2) the Parent reiterated the IEE request at that time.

[12] Although it was not entered as an exhibit, the Parent's attorney did confirm via email that the Student has withdrawn from the District.

and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…" 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either— (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense…" 34 C.F.R. § 300.502(b)(2)(i)-(ii).[13]

II. The Burden of Proof

The District requested this hearing pursuant to 34 C.F.R. § 300.502(b)(2)(i). As such, the District is the party seeking relief (*i.e.* declaratory judgment that its ER was appropriate). 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). Parties seeking relief must prove entitlement to their demands 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 particular case, the District must bear the burden of persuasion.

III. The District's Arguments

The District makes two arguments in the alternative. First, the District argues that it is not obligated to fund an IEE for the Student because it is no longer the Student's LEA. More specifically, the District claims that the Student's withdrawl and enrollment in a different school district terminated any obligation to fund an IEE, even if the ER was not appropriate. Second, in the alternative, the District argues that the ER was appropriate.

IV. The ER was Appropriate

In framing its argument, the District urges me to find that it has no obligation to fund an IEE regardless of the appropriateness of the ER before examining the appropriateness of the ER. I decline to analyze this case in the order suggested by the District, and start by considering the appropriateness of the ER.

The IDEA establishes a legal framework for initial evaluations at 20 U.S.C. § 1414(a)(1) and §§ 1414(b) though (c).[14] The first subsection, § 1414(a)(1), concerns evaluation timelines and parental consent. In this case, parental consent was sought and obtained through a PTE form. The ER was completed 58 days after the District's receipt of the PTE form. Consequently, the consent and timeline requirements for initial evaluations were satisfied.

[13] Parents always have the right to obtain an IEE, even when an LEA is not obligated to fund it. *See* 34 C.F.R. § 300.502(b)(3).

[14] Pennsylvania regulations concerning reevaluations essentially adopt the federal regulations, but set faster timelines under some circumstances. *See* 22 Pa Code § 14.124.

The second subsection, § 1414(b), concerns evaluation procedures and the substantive content of initial evaluations. Additional requirements are found at 20 U.S.C. § 1414(c).

When conducting evaluations, LEAs 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 (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... ." 20 U.S.C. § 1414(b)(2)(A).

Consistent with the obligation to use a "variety of assessment tools," an LEA may "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..." 20 U.S.C. § 1414(b)(2)(B). Further, the assessment tools must be "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)(C).

LEAs must select assessment tools that will yield information about each student's disability or suspected disability that can be used by the IEP team for making programming decisions. *See* 20 U.S.C. § 1414(b)(3); *see also* 20 U.S.C. § 1414(c)(2). At the same time, the assessment tools must account for linguistic and cultural differences, and must be used in a non-discriminatory way. *See* 20 U.S.C. § 1414(b)(3).

"As part of any initial evaluation... [the multidisciplinary team] shall (A) review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers" to determine the student's present academic achievement and needs. 20 U.S.C. § 1414(c). This information should enable the team to determine whether the student is "a child with a disability" as defined by the IDEA, the student's present academic levels, the student's need for special education, and the student's need for related services. 20 U.S.C. § 1414(c)(1)(B).

In this case, the ER satisfies all of the foregoing criteria. The District used reliable, common, standardized, nationally-normed assessments. The District not only collected, but was responsive to information provided by teachers and the Parent. This information helped the Evaluator select instruments that assessed all suspected areas of need. Those instruments were properly administered and were used to determine that the Student had a disability and was in need of special education. Multiple, technically sound assessments were used to reach that conclusion. The ER also included significant information and recommendations to assist the IEP team.

In completing the ER, the District was careful to avoid cultural and linguistic bias by selecting normative testing, assessing the Student's English proficiency, collecting

information from both teachers and the Parent, and by formally observing the Student in school. This, and the standardized administration of evaluations by trained and knowledgeable personnel (a Certified School Psychologist), assures the validity and reliability of the assessments.

Similarly, the District paid close attention to the "special rules for eligibility determinations" found at 20 U.S.C. § 1414(b)(5). The District conducted assessments to ensure that the "determinant factor" in the eligibility determination was neither limited English proficiency nor a lack of appropriate instruction in English or Math.

In sum, all of the technical requirements of 20 U.S.C. § 1414 were met. Of equal importance, the Evaluator's conclusions and recommendations, drafted into the ER itself, are sound. The conclusions and recommendations flow directly from, and are consistent with, the data and information obtained through the evaluation – including information supplied by the Parent.

The evidence in this case yields a conclusion that the Parent's only point of disagreement with the ER was the recommendation to place the Student into third grade. I agree with the District that the recommendation was appropriate. Had the Student remained in first grade, the Student would be [older] than other first graders at the start of the 2012-13 school year. The [redacted] age gap during the 2011-12 school year was already a concern for both the Parent and the Evaluator at the time of the ER. Recommending appropriate accommodations to enable the Student to attend school with same-aged peers was entirely reasonable.

For all of the foregoing reasons, the ER was appropriate and the District will not be ordered to fund an IEE for the Student.

V. Termination of the District's Obligation to Fund an IEE

The District's primary argument is that all obligation to fund an IEE terminated when the Student withdrew from the District and enrolled in another LEA. To support this argument, the District cites *M.S. v. Mullica Tp. Bd. of Educ.*, 485 F.Supp.2d 555 (D.NJ. 2007). Regardless, this argument is moot. I have already determined that the Parent is not entitled to an IEE at public expense because the District's ER was appropriate.

Conclusion

The District requested this due process hearing in response to the Parent's request for an IEE at public expense. The District has proven the appropriateness of its ER, and so the Parent is not entitled to an IEE at public expense.

ORDER

And now, January 28, 2013, it is hereby ordered as follows:

1. The Evaluation Report of May 25, 2012 was appropriate at the time it was authored.

2. The Parent is not entitled to an Independent Educational Evaluation at public expense.

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

/s/ Brian Jason Ford
HEARING OFFICER