

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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

DECISION AND ORDER

ODR No. 1443-1011 AS

Child's Name: A.G.¹
Date of Birth: [redacted]

Dates of Hearing:
March 23 and 29, 2011

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Lower Merion School District

Representative:

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Date Record Closed: April 25, 2011

Date of Decision: May 7, 2011

Hearing Officer: Brian Jason Ford, Esquire

¹ Except for the caption, all references to the Student's name and other identifying information have been omitted or redacted from this Decision and Order.

Introduction

This due process hearing concerns the Student's right to an independent educational evaluation (IEE) at public expense. For context, a separate due process hearing between these parties is pending as of the date of this Decision and Order. The other hearing, ODR No. 01897-1011 AS, was requested by the Parents on December 15, 2010. *This* hearing, ODR No. 1433-1011 AS, was requested by the District on January 31, 2011. After discussion with the parties, it was determined that the other hearing should be continued until this hearing is resolved. That decision was made, in part, because the Parents suggested that the resolution of this hearing might resolve issues presented in their Complaint.

On March 7, 2011, the District filed a Motion for Judgment as a Matter of Law (District's Motion). Therein, the District argued that under the facts alleged in its own Complaint, the Parents are not entitled to an IEE at public expense. The District's motion was denied on March 8, 2011. The Order denying the District's Motion is made part of the record in this matter at H-1.²

This hearing convened during two sessions; the first on March 23, 2011 and the second on March 29, 2011. By agreement of the parties, closing briefs were submitted on April 25, 2011 and a due date for this Decision and order was set for May 7, 2011.

Issue

The single issue presented for consideration in this hearing is: are the Parents entitled to an IEE at public expense?

Findings of Fact

1. Early in the 2007-2008 school year, the Student's Learning Support teacher perceived that the Student was having difficulties with impulsivity, attention and focus. The Learning Support teacher brought these issues to the Parent's attention. (NT at 292-295, 326-327). These concerns were shared by other teachers and by the Student. (NT at 293, 295). Ultimately, these concerns led the District to propose a reevaluation.³
2. The District employs an individual who is both a certified school psychologist and a Pennsylvania licensed psychologist (District's CSP). The District's CSP also has a private practice. (S-143, NT 24). On October 12, 2007, the District's CSP issued a Permission to Reevaluate form (PTRE), seeking parental consent to reevaluate the Student. The District did not receive that PTRE back from the Parents, and the

² There is an error in the date of H-1 at page 2. There, the Order says "this 8th day of May, 2011..." It should say "this 8th day of March..."

³ Previously, the Student had qualified for special education as a student with specific learning disabilities in reading and math.

District's CSP sent the PTRE again on November 3, 2007. (S-51, S-52, NT at 50-51). The PTRE was approved by the Parents on November 15, 2007.

3. Although a reevaluation was pending, an IEP team meeting convened on November 26, 2007. The Student attended that meeting and shared concerns similar to those noted by the Learning Support teacher. (S-54 at 3, NT at 51-52, 58).
4. The District's CSP completed a reevaluation report on February 21, 2008 (2008 RR). The 2008 RR includes a records review and administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV); the Wechsler Individual Achievement Test, Second Edition (WIAT-II); the Behavioral Assessment System for Children, Second Edition, Student Version (BASC-2); and the School Motivation and Learning Style Inventory (SMALSI). (S-67, NT at 120). The District's CSP also spoke with the Mother by phone, and parental input is noted in the 2008 RR. *Id.*
5. According to standardized, normative testing, the Student's overall intelligence is in the average range. More specifically, the WISC-IV administered as part of the 2008 RR revealed a Full Scale IQ of 99. Previously, in 2003, similar testing (a WISC-III) showed the Student's Full Scale IQ of 95. (S-67 at 6-7, S-18, NT at 142-143) Differences between the WISC-IV and the WISC-III notwithstanding, the Student's overall intelligence as measured in these standardized tests has not changed over time in a significant way, given the standard deviations applicable to both protocols.
6. Sub-tests of the WISC-IV were administered as part of the 2008 RR. One of those sub-tests, Block Design, is designed to assess visual perception, organization and reasoning. Block Design also requires visual-motor coordination and spatial processing skills. The District's CSP testified, generally, that Block Design could indicate a student's problem-solving ability. The Student's performance in Block Design was below average (16th percentile). (S-67, pp. 6-7; NT at 145-147). Another WISC-IV sub-test administered as part of the 2008 RR was "Digit Symbol," which is described in the 2008 RR as "a measure of visual-motor integration and speed." (S-67 at 7). The Student received a below average score on that sub-test as well (16th percentile). *Id.*
7. Block Design and Digit Symbol were the only two sub-tests in which the student scored below average. Ten sub-tests were administered. All other sub-tests were in the average range except for "Digit Span," which was in the above average range (95th percentile). *Id.* at 6-7. Moreover, as shown in the 2008 RR, sub-tests are grouped into indexes. Testing generated the Student's standard score for each index, which correlates with a normed percentile. At the index level, the Student's scores were:
 - a. Verbal Comprehension: Standard Score 96 | 39th Percentile | Average Range
 - b. Perceptual Reasoning: Standard Score 98 | 45th Percentile | Average Range
 - c. Working Memory: Standard Score 120 | 91st Percentile | Superior Range
 - d. Processing Speed: Standards Score 85 | 16th Percentile | Low Average Range*Id.* at 6

8. As described in the 2008 RR, “Verbal Comprehension provides a measure of the ability to use language to solve problems. ... Perceptual Reasoning provides a measure of non-verbal problem solving ability. ... Working Memory refers to the ability to hold on to auditory information long enough so that it can be processed and manipulated. ... [and] Processing Speed involves the ability to work quickly on visual-motor tasks.” *Id* at 7.
9. The WISC-IV is designed to assess cognitive ability. The WIAT-II, in contrast, is designed to measure academic skills. But like the WISC-IV, the WIAT-II includes sub-tests that are grouped into indexes. At the index level, the Student’s performance was as follows:
 - a. Reading: Standard Score 103 | 58th Percentile | Average Range
 - b. Math: Standard Score 93 | 32nd Percentile | Average Range
 - c. Written Language: Standard Score 117 | 87th Percentile | Average Range*Id* at 7-8.
10. The BASC-2 was administered as part of the 2008 RR to assess the Student’s social and emotional functioning. The BASC-2 presents statements to students for endorsement. The 2008 RR states that the Student “did not score in the Clinically Significant range on any of the BASC-2 scales.” *Id* at 8. However, the Student “scored in the At Risk range on the Attention Problems scale.” *Id*. The At Risk range (t-score of 60-69) is lower than the Clinically Significant range (t-score of 70+), meaning that a student in the At Risk range will likely exhibit fewer problems than a student in the Clinically Significant range. Even so, students in the At Risk range will likely exhibit more problems than the normatively average student in the sample population.
11. Regarding the BASC-2, the 2008 RR also notes that, “at the same time, [the Student] also responded ‘False’ to the item, ‘I have attention problems,’ suggesting that [the Student] does not fully accept that focusing is an issue...” The BASC-2 also includes Critical Items that may have clinical importance on their own. As reported in the 2008 RR, the Student “endorsed the following Critical Items: Sometimes ... No one understands me; I hate school.” *Id* at 9. No discussion of the endorsed Critical Items is included in the 2008 RR.
12. The SMALSI was administered as part of the 2008 RR to assess the Student’s attitudes towards school and learning. As with the BASC-2, the SMALSI is a self-report. On the SMALSI, the Student reported organizational techniques to be in the “inadequate development” range. The Student also reported study strategies, note-taking/listening skills, reading comprehension strategies, writing/research skills, test-taking strategies, and time-management skills to be in the “below average development” range. (S-67, p. 9; NT at 130- 132, 159-160). The Student’s self-rating was “no more problematic than for most students” in the areas of academic motivation, text anxiety, and concentration/attention to difficulties, The SMALSI’s

normative sample population corresponds to the demographic makeup of the population. (NT at 156, 158).

13. The Student was interviewed by the District's CSP on December 7, 2008 and the 2008 RR includes a summary of the interview. During the interview, the Student acknowledged earning poor grades, and attributed that to an increase in both the amount and difficulty of work compared to middle school. The Student reported being confused and "lost" in some classes, while other classes were "great." The Student also acknowledged past, but not current, problems with homework completion, and that participation in Learning Support was beneficial. (S-67 at 10). In addition to the interview, the 2008 RR notes that the District's CSP observed the Student in class and describes the observation. Narrative reports from teachers are also included, generally noting minor behavioral difficulties, homework completion problems, and distractibility.
 14. A section of the report is titled "Functional Behavioral Assessment." That section is consistent with the observation and reports, but does not actually hypothesize a function of the Student's observed behaviors. (S-67).
 15. The Mother was interviewed by the District's CSP. Information provided by the Mother is somewhat in conflict with information provided by the Student's teachers. The Mother reported that the Student's transition to high school (including the start of 9th grade) was difficult, but that the Student was more focused by the time of the 2008 RR. According to the Mother, the Student was focused when doing homework and could maintain focus for 30 to 60 minutes. As reported by the District's CSP in the 2008 RR, the Mother "said she is basically happy with [the Student's] progress and educational program." (S-67 at 3).
 16. At the time of the 2008 RR, the Student's first quarter, second quarter and midterm grades were as follows (the Student attended one learning support class in the first quarter and two in the second quarter):
Key: Class | Q1 | Q2 | Midterm
 - a. Beginner Spanish | D | D | B
 - b. African and Asian Studies | F | D | D
 - c. English F | D | C
 - d. Intro to Algebra B | B | A
 - e. Biology F | D | F
 - f. Information Technology D | C | Not Reported
 - g. Learning Support D | C | NA
 - h. Learning Support NA | A | NA
- S-67 at 3.
17. Concerning eligibility, the 2008 RR reads as follows: "[The Student] presents as a youngster who was diagnosed with a learning disability in reading and math five years ago. Over the years, [the Student] has made good progress in those areas to the point where [] basic academic skills are commensurate with [] cognitive ability.

However, [the Student's] performance is inconsistent due [to] fluctuations in [] attention and the interference of emotional factors with [the Student's] ability to sustain focus on academic tasks. ... [The Student] remains eligible for special education services. [The Student's] disability category should be changed to Other Health Impairment to reflect problems with focusing and difficulty controlling [] emotions. Problems with focusing attention and controlling [] emotional reactions to perceived threats to [] self-image have a significant impact on [] academic performance. [The Student's] parents may want to share the results of this evaluation with [the Student's] pediatrician to discuss treatment options for managing [] inattentiveness."⁴

18. At the time that the 2008 RR was drafted, the District's CSP was of the belief that the Parents (the Student's mother in particular) were adverse to any suggestion that the Student had Attention Deficit Hyperactivity Disorder (ADHD). (NT at 92-94). However, at the time of the 2008 RR, the District's overall impression of the Student was that the Student displayed ADHD-like symptoms and believed that there was a strong possibility that the Student had ADHD. *Id.* In an effort to secure the Parents' approval of the 2008 RR, the District intentionally avoided any reference to ADHD in that document. Instead, the 2008 RR describes the Student's observed symptoms and concludes that the Student is eligible for special education services under the category Other Health Impairment (OHI). *Id.*, S-67.
19. Both Parents signed the 2008 RR in agreement during a meeting on May 29, 2008. (S-67, p. 11; NT at 39-42, 261-263). At that time, there was also concern that the Student's behavior may be adversely affected by the Student's sibling's (Sibling) recent enrollment in the military. The Student is close with the Sibling, and both the Parents and District shared this concern. (NT at 38-41, 285-287). There is some testimony to suggest that the Parents signed the 2008 RR to keep service in place during the Sibling's deployment. The Parents' motivation notwithstanding, the 2008 RR was used in the creation of an IEP of April 28, 2008. (S-67, S-70; NT at 270-271, 275).
20. About two and a half years later, the Parents raised questions about the 2008 RR during a meeting with the District on December 22, 2010. (NT at 42-43). Specifically, the Parents wanted to know what the Student's disability actually was. At the same meeting, the Parents were presented a new PTRE form, dated December 8, 2010, in anticipation of the Student's regular tri-annual reevaluation (required by 20 U.S.C. § 1414(a)(2)(B)(ii)). (S-116; NT at 44-45).
21. Before the PTRE was returned, the District's CSP completed a review of the Student's records without evaluating the Student. That records review is dated January 20, 2011 and was sent to the Parents. (S-146; NT at 46). The 2011 records review found a need for further evaluations. Consequently, another PTRE was drafted and transmitted to the Parents via counsel on January 17, 2011 (at this point,

⁴ [] indicates redaction of gender-specific pronouns.

the Parents had already initiated Hearing No. 01897-1011 AS). The second PTRE proposed different evaluations. (S-138, NT at 46).

22. Both parties met at a resolution meeting for Hearing No. 01897-1011 AS on January 19, 2011. At that meeting, the Parents verbally requested an IEE at public expense. (NT at 359, 362-363). Through counsel, the Parents rejected the second 2011 PTRE and demanded an IEE at public expense in writing on January 21, 2011. That rejection and request was received by the District on January 24, 2011. (S-138; NT at 47-48, 359-360).
23. The Parents retained an independent certified school psychologist (Independent CSP) to conduct a review of the Student's educational records. The Independent CSP did not have a complete copy of all of the Student's records but, using what she had, drafted an independent records review. (S-7; NT at 401-405). The independent records review is not dated, but the Independent CSP recalled that the document was drafted around March 20 or 21, 2011 - after the Parents requested an IEE at public expense. (NT at 408). The Independent CSP likely is mistaken, however, as this hearing convened in two sessions on March 23 and 29, 2011. Regardless, the independent records review references the District's 2011 records review and, therefore, must have been drafted after January 20, 2011. (S-7 at 1). Neither party characterizes the independent records review as an IEE, and it includes no actual evaluation of the Student.
24. Recently, the Student was accepted to college and plans to matriculate at the start of the 2011-2012 school year. (NT at 316).

Applicable Statutes

The following statutes and regulations are pertinent to this due process hearing:

The Right to an IEE at Public Expense

Parental rights to an IEE at public expense are established by the IDEA 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).

The Burden of Proof

Usually, the burden of proof in special education due process hearings is established by case law – namely *Schaffer v. Weast*, 546 U.S. 49 (2005) and *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Under those cases, the party seeking relief must prove their claims by preponderant evidence. This due process hearing, however, was requested by the District pursuant to 34 C.F.R. § 300.502(b)(i), which is

described *supra*. As such, in this hearing, the District must prove by preponderant evidence that its evaluation is appropriate or that the threshold criteria that would entitle the Parents to an IEE at public expense are not met.

Hearing Officers' Obligation to Make Findings of Fact

Shortly after the District filed its complaint, the District moved for Judgment as a Matter of Law. In sum, the District argued that the Parents' request for an IEE at public expense was improper because they withheld consent for a reevaluation and did not disagree with the District's last reevaluation, as required by 34 C.F.R. § 300.502(b)(1).

The IDEA specifies that decisions "made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i). Pennsylvania's General Rules of Administrative Procedure also specify that hearing officers are "authorized to rule upon any motion... except that no motion made before or during a hearing, a ruling upon which would involve or constitute a final determination of the proceeding, shall be ruled upon by a presiding officer except as a part of his proposed report submitted after the conclusion of the hearing." 1 Pa. Code § 35.180(a).

Under the foregoing provisions, there are very few circumstances under which hearing officers may decide dispositive motions before facts are established either through stipulations or through evidence and testimony. At the time of the District's motion, there were no stipulations and no evidence or testimony had been presented. Consequently, the motion was denied. See H-1. The District makes substantively similar arguments in its closing brief.

Discussion

Timeline of the Request and Intended Purpose of the IEE Do Not Suggest a Challenge to the 2008 RR

The District argues, *inter alia*, that the Parents have no right to an IEE at public expense because they agreed with the 2008 RR when it was issued. Under the plain language of 34 CFR § 300.502(b)(1), the Parents do not have a right to a District-funded IEE unless they disagree with the 2008 RR. However, neither the IDEA nor its implementing regulations specify whether a parent can first agree and then disagree with an evaluation when seeking an IEE at public expense. Similarly, neither the IDEA nor its implementing regulations specify when the requisite disagreement must occur. Current jurisprudence, however, sheds light on these issues.

In *P.P. ex rel. Michael P. v. West Chester Area School Dist.*, 583 F.3d 727 (3rd Cir. 2009), P.P.'s parents made an appointment with an independent evaluator for an IEE, then requested an evaluation from P.P.'s school district, then sought public funding for the IEE they had already scheduled. These facts led the Hearing Officer, the Appeals Panel, the District Court and the Court of Appeals all to conclude that P.P.'s parents were not "challenging the District's evaluation." *Id* at 740. At every level, the tribunals

looked to the timing of the request for public funding to determine if the parents actually disagreed with the district's evaluation.

In this case, the District presented the 2008 RR to the Parents on May 29, 2008. At that time, the Parents were given the option to approve or disapprove the 2008 RR. The Parents approved the 2008 RR and used it as members of the Student's IEP team to draft IEPs for the Student. Years later, the District attempted to obtain parental consent for the Student's regular, tri-annual reevaluation by preparing and presenting a PTRE form to the Parents on December 22, 2010. After receiving the PTRE form, but before responding to it, the Parents requested a due process hearing for the Student on December 13, 2010. See ODR No. 01897-1011 AS, *pending*. On January 13, 2011, the District revised the PTRE form based on a review of records, and sent this revised copy to the Parents. The Parents signed and returned this form, rejecting the offered tri-annual reevaluation and seeking an IEE at public expense on January 21, 2011.

The foregoing timeline does not suggest that that the Parents requested an IEE at public expense because they disagreed with the 2008 RR. The Parents agreed with the 2008 RR when it was drafted and acted upon its recommendations for two and a half years. Moreover, assuming *arguendo* that the IDEA allows parents to approve an RR, use that RR in IEP development, and then later disagree with the RR and seek an IEE at public expense, that standard would not be met in this case.

The Father testified as to why he asked for an IEE at public expense. Specifically, the Father believes that an evaluation is necessary to determine if the Student has a disability and, if so, how the Student's needs can be met in college. (NT at 343-344). Consistently, the Independent CSP also testified that an IEE would be appropriate if the Parents were "to seek [special education] services at the college level." (NT at 390). In addition, the Father does not trust the District's CSP and, as a result of that distrust, does not want the District's CSP or anybody else who works for the District to evaluate the Student. See NT at 369-370. In sum, the Father feels that a new evaluation is necessary to assess the Student's needs, but does not want the District to conduct the evaluation. Rather, the Father wants an IEE at public expense in lieu of the tri-annual evaluation that the District is otherwise obligated to provide.

During the hearing, the Father testified credibly. This Hearing Officer found the Father to be forthright and honest; he testified to the best of his ability. There are particular instances where this Hearing Officer has found that the District transmitted documents that the Father does not recall receiving. This Hearing Officer believes that any discrepancy is due to imperfect memory, not any attempt at deception. The Father's testimony concerning why the Parents want an IEE – both why an evaluation is necessary and why they believe someone outside the District should do it – was particularly direct and candid. The Father should be commended for his honesty, but his legitimate desires do not comport with the IDEA's standard for publicly-funded IEEs.

Impact of Findings Regarding the 2008 RR Upon the Pending Due Process Hearing, ODR No. 01897-1011 AS:

The Parents are not entitled to an independent educational evaluation at public expense because they seek the same in lieu of the tri-annual evaluation that the District is otherwise obligated to conduct. However, the vast majority of this hearing - at this Hearing Officer's direction - concerned the appropriateness of the 2008 RR. The Parents claimed that the 2008 RR was inappropriate, and that this Hearing Officer's consideration of that document and the independent records review could yield a determination that the Student does not have (and has never had) a disability. The Student's disability status is a significant issue in the pending case.

In a technical sense, it is not necessary to determine the appropriateness of the 2008 RR or the Student's current disability status to resolve *this* due process hearing. However, it would be extremely inefficient for the parties to present the evidence and testimony in this case all over again in the pending case. Consequently, the findings of fact concerning the 2008 RR made in this decision shall be adopted in Hearing No. 01897-1011 AS.

This includes findings that the District predicated the Student's entitlement to special education upon observations of symptoms that fit into a broad disability category, OHI, as opposed to any actual diagnosis; that the District intentionally avoided and omitted the term ADHD; that the District strongly suspected ADHD at the time of the 2008 RR but did not say this to the Parents; and that the 2008 RR suggested consultation with a doctor.

Conclusion

The Parents' argument that their entitlement to an IEE at public expense flows from a disagreement with the 2008 RR is inconsistent with testimony both from the Independent CSP and the Father, and with the sequence of events. Preponderant evidence demonstrates that the Parents seek an IEE at public expense in lieu of the reevaluation that the District is otherwise obligated to perform. The IDEA and its implementing regulations do not establish a parental right to an IEE at public expense under these circumstances. Therefore, the District has established that the Parents are not entitled to an IEE at public expense.

Nothing in this decision is intended to limit the Parents' right under 34 C.F.R. § 300.502(b)(3) to obtain an IEE at their own expense. Further, nothing in this order is intended to imply that the District may proceed with any evaluations that have been rejected by the Parents. The District has not sought to override the Parents' affirmative refusal of offered evaluations, and the Student is on the verge of graduation and the beginning of a college career.

ORDER

And now this 7th day of May, 2011, it is hereby **ORDERED** that the Student is not entitled to an independent educational evaluation at public expense.

/s/ Brian Jason Ford
HEARING OFFICER