

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

DECISION

ODR No. 15230-1415KE

Child's Name: E.H.

Date of Birth: [redacted]

Dates of Hearing: 10/15/14, 11 /25/14

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Parent[s]

School District

West Chester Area

829 Paoli Pike

West Chester, PA 19382

Representative:

Parent Attorney

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School District Attorney

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Date Record Closed:

December 12, 2014

Date of Decision:

December 29, 2014

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is a middle-school aged District resident who was IDEA eligible by reason of a speech/language impairment for several years, until Student was exited from special education services based upon the results of a reevaluation in 5th grade.

In the middle of the 2013/2014 school year, Parents requested and the District provided an evaluation that established Student's IDEA eligibility in the Other Health Impairment (OHI) disability category due to ADHD. Several months later, Parents requested an IEE, prompting the District to file a due process complaint. Parents also filed a complaint raising child find and denial of FAPE issues, which was to be consolidated for hearing with the District's complaint. Just before the due process hearing began, however, Parents requested that the hearing be postponed pending a court of appeals decision on the limitations period that applies to IDEA claims.

When that request was denied, the hearing proceeded on the District's IEE complaint only, with the District presenting all of its witnesses at the first session in mid-October 2014. Parents subsequently reached an agreement with the District to withdraw their complaint until the court of appeals decision. Since Parents elected to present no testimony with respect to the District's IEE complaint, the second hearing session in late November was limited to the parties' offering exhibits for admission, closing the oral hearing record and setting a briefing and decision schedule.

Because the evidence presented by the District established that its 2014 evaluation was appropriate, and Parents offered no relevant or persuasive evidence or argument calling into question either the appropriateness or sufficiency of the evaluation, there is no basis for ordering the District to fund an IEE as Parents request.

ISSUE

Was the School District's March 12, 2014 evaluation of Student appropriate, in that it conformed to all IDEA requirements, including evaluating Student in all areas related to the suspected disability, and identifying all needs that should be addressed?

FINDINGS OF FACT

1. Student, a [mid-teenaged] child, born [redacted], is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 16, 17)
2. Student has been identified as IDEA eligible in the Other Health Impairment (OHI) disability category in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii). (Stipulation, N.T. p. 16)
3. Student was evaluated and determined to be IDEA eligible in the disability category of Speech/Language impairment in kindergarten. (N.T. pp. 115, 116)
4. Student received special education services, including push-in learning support for assistance with writing and attention to task, until a 2011 reevaluation when Student scored in the average range on standardized speech/language assessments and was, therefore, no longer IDEA eligible in the speech/language impairment disability category. (N.T. p. 116; S-12 p. 1, P-1 pp. 2, 3)
5. Although Student did not receive an IEP after the 2011 reevaluation, a §504/Chapter 15 Service plan was developed and implemented to address Parents' and teachers' continuing concerns with symptoms of attention deficit/hyperactivity disorder (ADHD), specifically Student's level of attention/distractibility and difficulties with organization. (S-9, S-12 pp. 1, 2, 3, P-1 pp. 2, 3)
6. In January 2014, after Student was formally diagnosed with ADHD and began taking medication, Parents requested that the District reevaluate Student to determine whether Student might be IDEA eligible due to ADHD, noting that Student was struggling in the school setting despite the accommodations in the §504 plan and other teacher interventions. (S-9)
7. Parents requested that the evaluation include the same academic achievement assessments that had been administered for the 2011 evaluation, as well as assessments of: Ability; receptive, expressive and pragmatic language skills; auditory processing; vocabulary; listening and reading comprehension; executive functioning; social/emotional functioning. Parents also requested a functional behavioral assessment (FBA) to determine time on task and inattention and an assistive technology evaluation to assess written expression, reading and organizational skills. (S-9)

8. After reviewing Parents' evaluation request and Student's school records, the child study team, including the school psychologist assigned to Student's school, asked that a permission to evaluate (PTE) consent form be issued to Parents for an evaluation that would include a review of records, Parent and teacher input, classroom observations, curriculum-based assessments, standardized cognitive assessments (including executive functioning), standardized academic achievement assessments, social/emotional/behavioral assessments (including executive functioning), a speech/language evaluation and an FBA. (N.T. pp. 37—40; S-7p. 1, S-8, S-9)
9. Parents, who were working with an advocate, approved and returned the PTE the day after it was issued with no requested changes or additions to the types of assessments and academic/functional areas included in the District's PTE. (N.T. p. 39; S-6, S-7 p. 2)
10. Parents' input for the evaluation noted that Student has difficulty with "self-starting" in areas of low interest, staying on task, organizational skills, completing tasks due to difficulty remembering steps for multi-step tasks, and remembering to complete and turn in homework assignments. Academically, Parents noted difficulties with reading comprehension and vocabulary, with a negative impact on tests and assignments. Parents also noted that Student's awareness of needing "special accommodations" and feeling that teachers became frustrated with Student's need for more time to formulate responses adversely affected Student's self-esteem. (S-11 pp. 1, 2, S-12 pp. 2, 3)
11. In general, the District school psychologist selects assessments to determine whether a potentially eligible student fits within any of the IDEA disability categories. Based upon Parents' input, the categories particularly under consideration for Student were OHI due to ADHD, a specific learning disability in reading, and speech/language impairment. (N.T. pp. 45, 46)
12. In March 2014, the District produced the report of its psycho-educational evaluation of Student, which incorporated information concerning Student's strengths, challenges and needs from Parent and all teachers of core academic subjects (reading, English, math, history and science). (N.T. pp. 43, 47, 48; S-12 pp. 2—6)
13. Standardized assessments of Student's cognitive ability and academic achievement placed Student solidly in the average range of functioning, overall, with respect to both ability and achievement when compared to a national sample of same age/grade level peers. (N.T. pp. 51, 52; S-12 pp. 10—13)
14. In addition to the WISC-IV¹ assessment of cognitive ability, the District school psychologist also administered selected subtests of the WJ-III/NU COG² to provide additional, more in-depth information concerning aspects of Student's cognitive ability,

¹ Wechsler Intelligence Scale for Children-Fourth Edition

² Woodcock-Johnson III Normative Update Tests of Cognitive Ability

processing speed, memory and higher level processing/reasoning through a cross-battery assessment. (N.T. pp. 51, 52, S-12 pp. 11, 12)

15. One of the cognitive processes the school psychologist examined through the cross-battery assessment was auditory processing, *i.e.*, the ability to analyze and synthesize auditory information and discriminate between sound patterns, skills needed for reading in particular. Student's scores on the Incomplete Words and Sound Blending auditory processing subtests of the W-J III were in the superior and very superior ranges, respectively. (N.T. pp. 78, 79; S-12 pp. 11, 12)
16. The results of the ability/achievement assessments, curriculum-based assessments, the cross-battery assessment and the results of the speech/language evaluation, established that Student does not have a learning disability. (N.T. pp. 49, 50, 52; S-12 pp. 10—13)
17. The speech/language component of the evaluation was conducted by the speech/language pathologist who had provided services to Student during the elementary school years. She administered several measures of speech/language functioning, all of which confirmed that Student's language abilities remain in the average range, with a few subtests in the above average range. (N.T. pp. 114, 117—121, 127; S-12 pp. 25—28)
18. To assess auditory processing skills necessary for the development, use and understanding of language for academic and daily activities, the speech/language pathologist used the TAPS-3 (Test of Auditory Processing Skills-Third Edition). The results indicated that Student's auditory processing skills, overall, are in the average range with phonological skills in the above average range. (N.T. pp. 118, 126; S-12 pp. 25, 26)
19. The school psychologist assessed Student's behavior, social/emotional functioning and attention by means of the BASC-2³ and other rating scales completed by both of the Parents, three teachers and Student. Although there were some discrepancies among raters, the results indicated that in general, Student fell within the average range of functioning in school with the exception of attention problems, rated in the "at-risk" range on the BASC-2 by Student, one parent and one teacher. Two of three teachers also rated Student in the "at risk" range for two adaptive skills (leadership, social skills). (N.T. pp. 52—57; S-12 pp. 14—17)
20. An FBA based on classroom observations and an interval comparison between Student and a randomly selected peer revealed that Student was off-task more often than the peer who was observed for comparison. (N.T. pp. 58—60; S-12 pp. 22—25)
21. Based upon concerns raised in Parent and teacher input, as well as behavior rating scales, ADHD symptoms and concerns about Student's independence in completing work, the District school psychologist concluded that Student should be identified as IDEA eligible in the OHI disability category. Student currently needs an IEP due to the increasing academic demands and higher teacher expectations that will continue to increase in high school. (N.T. pp. 62—64; S-12 p. 30)

³ Behavior Assessment System for Children-Second Edition

DISCUSSION AND CONCLUSIONS OF LAW

IDEA Evaluations

The IDEA statute and regulations require an initial evaluation, provided in conformity with statutory/regulatory guidelines, as the necessary first step in determining whether a student is eligible for special education services and in developing an appropriate special education program and placement. *See* 20 U.S.C. §1414; 34 C.F.R. §300.8(a). The primary purpose of an initial evaluation is, of course, to determine whether the child meets any of the criteria for identification as a “child with a disability” as that term is defined in 20 U.S.C. §1401 and 34 C.F.R. §300.8, as well as to provide a basis for the contents of an eligible child’s IEP, including a determination of the extent to which the child can make appropriate progress “in the general education curriculum.” 34 C.F.R. §§300.8, 300.304(b)(1)(i), (ii).

After a child is determined to be eligible, the IDEA statute and regulations provide for periodic re-evaluations, which “may occur not more than once a year unless the parent and public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that an evaluation is unnecessary.” 20 U.S.C. §1414(a)(2)(B)(i), (ii); 34 C.F.R. §300.303(b). School districts, however, also have the obligation to “ensure that a reevaluation of each child with a disability is conducted” at any time “the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child’s parent or teacher requests a reevaluation.” 20 U.S.C. §1414(a)(2)(A)(i), (ii); 34 C.F.R. 300.303(a).

The standards for an appropriate evaluation or re-evaluation, found at 34 C.F.R. §§300.304—300.306, require a school district to: 1) “use a variety of assessment tools;” 2)

“gather relevant functional, developmental and academic information about the child, including information from the parent;” 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. 34 C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas related to the suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs,” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Once an evaluation or reevaluation is completed, a group of qualified school district professionals and the child’s parents determine whether he/she is a “child with a disability” and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the district is required to: 1) “Draw upon information from a variety of sources,” including those required to be part of the assessments, assure that all such information is “documented and carefully considered.” 34 C.F.R. §300.306 (c)(1).

Independent Educational Evaluations

The IDEA statute and regulations provide that Parents have the right to obtain an independent educational evaluation (IEE) and, if the private evaluation meets the standards of the local education agency (LEA), and parents share it with the LEA, to have the evaluation considered in making decisions concerning the provision of FAPE to a child. 34 C.F.R. §300.502(a), (b)(3), (c)(1).

Parents can obtain an IEE at public expense if they disagree with an evaluation obtained by the LEA and it either agrees to fund the independent evaluation or the LEA evaluation is found inappropriate by the decision of a hearing officer after an administrative due process hearing. 34 C.F.R. §300.502(b)(1), (2)(ii). Once a parent has requested an IEE, the LEA “must, without unnecessary delay,” file a due process complaint to show that its evaluation is appropriate or assure that the IEE is provided. 34 C.F.R. §300.502(b)(2)(i), (ii).

An IEE is defined in the IDEA regulations as “an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” 34 C.F.R. §300.502(a)(3)(i),

Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. In this case, because the District was required to submit a due process complaint to support the appropriateness of its evaluation after denying Parents’ request for an IEE, the District bears the burden of persuasion.

The burden of persuasion, however, affects the outcome of a due process hearing only in that rare situation when the evidence is in “ equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012).

In this case, the burden of persuasion has no effect on the outcome of the case, since the evidence at the due process hearing overwhelmingly established that the District’s evaluation was appropriate.

Parent's IEE Request

Parents' arguments in support of their position in this case can best be described as a search for justification for their IEE request. Contrary to Parents' characterization of the legal standards applicable to determining whether an IEE is warranted, there is no right to an IEE based solely upon parents' disagreement with a school district evaluation. Rather, as stated above, if a district declines to fund an IEE requested by parents, it is required to provide an IEE only if the district's evaluation is determined to be inappropriate via a due process hearing. Moreover, there is no suggestion in *Schaffer v. Weast* or elsewhere that the U.S. Supreme Court considers an IEE to be a means for parents to "verify the completeness and conclusions of the District's evaluation or reevaluation." Parents' Written Closing at 3. A school district has no obligation to fund an IEE if its evaluation is determined to be appropriate, however much parents may wish to have more or different information in order to be satisfied that an evaluation includes every possible type of assessment. The standard for school district evaluations, as for other IDEA services, is whether it is appropriate, not whether it is the best and most comprehensive evaluation parents can imagine. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

It is obvious from the factual record in this case why Parents would like to expand the legal basis for an IEE: There was no real dispute that the District's 2014 evaluation of Student met IDEA procedural requirements with respect to the necessary components of an evaluation and no dispute that the District appropriately identified Student as IDEA eligible in the OHI disability category. Parents' primary reason for requesting an IEE is their contention that the District's evaluation did not explore all possible conditions that might affect Student in addition to ADHD, and further explore needs that could possibly arise from any such condition.

The heart of the issue in this case, therefore, is whether there is any reasonable basis for questioning whether Student's educational progress may be adversely affected by some condition in addition to ADHD that the District's evaluation was not comprehensive enough to determine. Parents suggest, specifically, that the District should be required to provide an IEE to assess whether Student might have an auditory processing disorder, as well as an assistive technology evaluation to determine whether there are any available devices that might be helpful for Student.

There is, however no evidence in the due process hearing record to suggest, much less establish, that the District's 2014 evaluation was deficient because it did not include an assistive technology evaluation, an audiological evaluation to explore whether Student may have an auditory processing disorder, or more generally, for failing to include assessments that might uncover any other unspecified possible conditions. Questions to District witnesses suggesting that symptoms of an auditory processing disorder may be similar to ADHD symptoms cannot support an inference that the District's 2014 evaluation was incomplete or insufficient because it did not include a formal auditory processing evaluation. Moreover, contrary to Parents' closing argument, their January 2014 evaluation request included a request for auditory processing assessments, along with other assessments of skills relating to reading skills, not for a formal auditory processing evaluation. (FF 7)

Finally, the only evidence in the record relating to whether an auditory processing evaluation would be at all useful in gathering information about Student came from the District's speech/language pathologist. She testified that an auditory processing disorder is, essentially, a diagnosis of last resort, considered when there are no other conditions that can account for symptoms of inattention and distractibility. (N.T. p. 128) Here, Student was formally

diagnosed with ADHD even before the District evaluation, and the entire pre-hearing focus of Parents, and their expert who provided a written report, was the effect of ADHD on Student's school functioning. *See* P-1, S-9, S-11.

Very simply, there was neither persuasive argument nor any evidence to contradict the District's evidence that its evaluation sufficiently and appropriately assessed all of the areas in which Student had been exhibiting difficulties in school functioning. Parents' evidence in support of an IEE consisted entirely of a review of records expert report that criticized District evaluations from 2006, 2009 and 2011 for not identifying OHI/ADHD as a basis for IDEA eligibility, but identified no deficiencies in the District's 2014 evaluation. (P-1) Nevertheless, Parents' expert report concluded with the statement that "[Student] would benefit from an IEE to uncover all disabling conditions and how these disabilities affect [his/her] functioning levels and future ability to meet [Student's] post-secondary goals and to inform placement and instructional programming." (P-1 p. 7) Nowhere in the report, however, does Parent's expert suggest that Student has any other disabling condition, much less identify even a potential condition for which an IEE may be warranted. An expert opinion based on pure speculation is entitled to no more evidentiary weight than any other purely speculative statement.

Moreover, even if determining that Student "would benefit" from an IEE met the legal standard for concluding that the District's evaluation is inappropriate, which it does not, Parent's expert did not even purport to explain what an IEE should include in order to assure a "benefit" to Student. The recommendation in Parents' expert report for an IEE of an unspecified nature, to "uncover" unspecified possible disabilities, therefore, provides absolutely no support for Parents' IEE request. Parents' arguments concerning the purported "need" for an auditory processing evaluation, with no evidentiary support whatsoever, cannot fill in the blank left by the expert

report. With no evidence in the hearing record that calls into question the appropriateness or the sufficiency of the District's 2014 evaluation, Parents' IEE request must be denied.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the School District need take no action with respect to Parents' request for an independent educational evaluation of Student.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

December 29, 2014