

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

Child's Name: B.L.

Date of Birth: [redacted]

Dates of Hearing: 4/23/2015, 4/28/2015

CLOSED HEARING

ODR File No. 16036-14-15-KE

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney

Local Education Agency
Owen J. Roberts School District
901 Ridge Road
Pottstown, PA 19465-8423

LEA Attorney
Sharon Montanye Esq.
Sweet, Stevens, Katz & Williams
PO Box 5069, 331 Butler Avenue
New Britain , PA 18901

Date Record Closed:

4/28/2015

Date of Decision:

5/7/15

Hearing Officer:

William Culleton Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is an eligible child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Student lives within the respondent District. (NT 8-9.) Student is identified under the IDEA as a child with the disabilities Autism, 34 C.F.R. §300.8(c)(1), and Intellectual Disability, 34 C.F.R. §300.8(c)(6)². (NT 8.)

The Parents requested an Independent Educational Evaluation (IEE) at public expense, after disagreeing with the District's re-evaluation of Student dated February 21, 2015. In response, the District filed this complaint requesting an order concluding that its re-evaluation dated February 2015 is appropriate under the IDEA, and denying Parents the requested IEE.

The hearing was completed in two sessions. I conclude that the District has failed to demonstrate that its re-evaluation was appropriate, and I order a complete IEE at public expense.

ISSUES

1. Was the District's re-evaluation of Student, report dated February 21, 2015, appropriate under the IDEA?
2. Are Parents entitled to an IEE at public expense?

FINDINGS OF FACT

1. Student is [teenaged], and is in eighth grade. Student is diagnosed with autism and

¹ Student, Parents and the respondent District are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. Because the Student's father engaged in many transactions with the District, he is referred to below as "Parent" in the singular.

² Although the IDEA category is labeled "mental retardation", 34 C.F.R. §300.8(c)(6), in Pennsylvania, this classification is referred to as "intellectual disability" in keeping with the most recent nomenclature, as recognized by the American Psychiatric Association and the American Association on Intellectual and Developmental Disabilities. See generally, Commonwealth v. Hackett, 99 A.3d 11, 49 n. 2, 50 (Pa. 2014)(Baer, dissenting)(citing recognizing entities).

intellectual disability, and is classified with those disabilities for purposes of the IDEA. (NT 8.)

2. Student attends an approved private school, placed there by the District pursuant to Student's eligibility for special education. Student has been at the APS for two years, and Student's teachers report that Student has made some progress in basic academic skills, as well as communication skills, activities of daily living, and other basic adaptive skills. (S 5.)
3. In October 2014, Parents requested that the District perform a re-evaluation of Student for purposes of ascertaining whether Student continues to need special education under the classifications of autism and intellectual disability, and for purposes of updating Student's educational needs. (S 2.)
4. On December 23, 2014 District personnel convened a meeting with Parent to discuss the District's plans to re-evaluate Student. Parent met with the supervisor of special education and the school psychologist selected by the District to perform the re-evaluation. The participants discussed the fact that there might be more than one visit to the APS. Parent believed indicated that multiple evaluations of Student at the APS was problematic for both the APS and the Student. (NT 25-28; S 2.)
5. The District provided Parents with a Permission to Re-evaluate form. The form notified Parents of the District's intention to commence a re-evaluation, for purposes of classification and for purposes of updating educational needs. After discussion, the District revised the form to include a description of the assessments that would be included in the re-evaluation report. (S 2, 3.)
6. Parent agreed to the re-evaluation but imposed conditions upon Parent's consent. Parent stated explicitly and in writing that Parent did not consent to multiple days of observation. Parent also explicitly and in writing agreed to classroom observation; standardized assessment of cognitive ability; assessment of academic skills, both standardized and through observation and analysis of performance; standardized assessment of adaptive behavior through adaptive behavior rating scales, including consent to analysis of completed rating scales; standardized assessment of social and communication skills; teacher input and parent input. (NT 100; S 2; P 20.)
7. In December 2014, there was an outstanding due process hearing, and the parties' communications about the re-evaluation were copied to the hearing officer, who encouraged the parties to go forward based upon the consent documents that had been provided. (NT 100; S 3; P 20.)
8. The school psychologist is qualified to perform a re-evaluation. The psychologist has a doctoral degree, and is Pennsylvania certified as a school psychologist. The psychologist has over four years of experience in performing school psychologist duties, including evaluations and re-evaluations. (S 5.)

9. On February 11, 2015, the school psychologist observed Student at the APS for about two hours. After this observation, the school psychologist assessed Student using standardized test instruments for about two hours. (NT 31, 33-34, 112; S 5.)
10. The school psychologist attempted a second direct observation on February 13, 2015, but Parent instructed the APS to deny access to the Student for this purpose. (NT 32; S 4, 5.)
11. The school psychologist reviewed Student's educational file, which included some prior evaluation reports on Student. The school psychologist gleaned information from review of documents, including Student's educational history in both [another state] and Pennsylvania, evaluation reports from January 14, 2004 and January 23, 2004, a psychoeducational evaluation performed in February 2009, and an evaluation report completed by the District in 2012. (NT 114; S 5.)
12. The school psychologist obtained input from Parents, who listed Student's needs as including learning support, life skills support, speech and language support, autistic support, communication skills support, and a leisure activity. Parents also indicated that Student needs individualized and intensive service, to address Student's difficulty in learning. Parents noted that Student does not always benefit from instructions, even when repeated. Parents indicated that Student needs more speech services, to address a "language level" at a first grade level, an inability to process language, an inability to understand the meaning of language, an inability to understand or answer the question, "are you a boy or girl?", and an inability to answer questions. Parents commented that Student "has no common sense that a regular person should have", cannot "justify right or wrong", and needs to learn "basic knowledge that a regular person should have in daily life." Parents also indicated that Student has severe deficits in daily self-help skills, and needs "more OT sessions." Parents indicated that Student "does not have a hobby or sports [Student] could have in leisure time." Parents requested that the District provide Student "at least, a sports." [sic] Parents indicated that Student is sensitive to the environment, including noise and enclosed spaces. (NT 273-277; S 5.)
13. The school psychologist reviewed Student's current performance at the APS, as reported through the Pennsylvania Alternate System of Assessment (PASA) in the spring of 2013. The school psychologist reviewed Student's IEP goals, and progress monitoring on those goals. (S 5.)
14. The school psychologist reviewed current progress monitoring data that were reported to the school psychologist by Student's teachers at the APS. (NT 170-173; S 5.)
15. The school psychologist received and considered input from Student's teachers at the APS, given in narrative form by the classroom teacher, an occupational therapist, and a speech and language pathologist. (S 5.)
16. The school psychologist reviewed a narrative report by the "house parent", who monitored Student's lunch periods at a portion of the APS called [redacted]. The house parent reported on Student's adaptive functioning. (S 5.)

17. The school psychologist reviewed the recommendations of Student's teachers, which included recommendations for specially designed instruction and accommodations. (S 5.)
18. The school psychologist assessed Student's cognitive functioning and academic achievement through standardized tests of cognitive ability and academic achievement. (S 5.)
19. The school psychologist administered an autism spectrum rating scale to Student, in order to address whether or not Student is properly classified with autism, as well as to address Student's adaptive functioning. (S 5.)
20. The school psychologist made clinical observations of Student's behavior and adaptive functioning during the process of administering the standardized assessment. (NT 30-35; S 5.)
21. The school psychologist assessed Student's adaptive functioning by administering an adaptive behavior inventory, the Adaptive Behavior Assessment System-Second Edition (ABAS). The school psychologist distributed ABAS questionnaires to Student's classroom teacher, to Student's house parent, and to Student's Parents. All three questionnaires were returned, scored and analyzed. (NT 37-38; S 5.)
22. Each item on the ABAS calls for the respondent's report of his or her observation of Student's ability to perform certain skills when needed, independently. The respondent is required to indicate whether or not the Student has the identified skill, and whether or not the Student demonstrates that skill when needed - either never, sometimes or most of the time. Respondents can make notes on each of the items indicating any difficulties or questions, and indicating whether or not they are guessing at the answer. (S 5, 11, 14.)
23. Responses are grouped into ten skill areas; these are further grouped into three "domains", conceptual, social and practical. All of these groupings are scored, based upon a standardized sample. Standardized results include a global score, as well as scores on separate skill areas and domains. (NT 60, 68; S 5, 11; P 30.)
24. The standardized scores on the ABAS are based upon scientific research and statistical analysis. Standardized scores are valid and reliable for accurately describing the degree to which individuals display normal adaptive skills. (NT 50-51; S 5, 11.)
25. The standardized scores of the ABAS consistently show that Student was functioning at a very low level in adaptive skills, across both school and home settings. (S 5.)
26. Based on all of the testing, including the ABAS, the school psychologist concluded that Student was appropriately classified with autism and intellectual disability. (S 5.)
27. In order to address Student's educational needs, the school psychologist performed an "item analysis" of the ABAS responses. The school psychologist noted differences between the

adaptive, basic skills, displayed by Student at home and at school. The school psychologist concluded that Student was displaying "a bit more independence in the school setting as compared to the home setting." The psychologist also concluded that Student "demonstrates more functional skills" at school than at home. (NT 38-39, 45-46, 61, 190-192, 406-431; S 5.)

28. The psychologist based these conclusions primarily upon a review and analysis of both the specific items in the ABAS protocols and nine of the ten skill areas in which the individual items are grouped in the ABAS. (NT 45-4, 200-201, 209, 412-413; S 5, 10.)
29. As a result of these conclusions, the school psychologist recommended that the IEP team provide recommendations to Parents for behavioral and other strategies aimed at helping Student to generalize behaviors learned at school to the home setting. The psychologist also recommended that the District provide a behavioral specialist to consult with Parents, with parental consent. (NT 45-46; S 5.)
30. The items in the ABAS protocols are a selection of the universe of basic adaptive skills; the protocols do not inquire into every basic skill that a child may have. Items are included based upon research into what are the most important basic skills, which skills are most helpful for treatment and education purposes, what skills can be most easily reported upon by persons filling out the forms, and the need to keep the forms short enough to be filled out reliably. (NT 46-50, 407-430; S 11; P 31.)
31. Item analysis for purposes of planning educational programs is supported and approved by the publisher's manual for the ABAS, as well as by best practices in the profession of psychology. The manual supports its use for identifying specific behaviors that may be prioritized or focused upon in planning educational programs for children. (NT 44-45, 51-55, 175-178; S 11; P31.)
32. There is no research showing that item analysis is either valid or reliable for the purpose of indicating the skills that should be addressed in clinical or educational interventions. Reliability may be reduced by inaccurate recording of skill observations by respondents, or by administrative or scoring difficulties. (NT 51-54, 183-184, 192-194, 202, 209, 219-223, 261-262, 269-273, 430-431; S 11.)
33. The publisher's manual recommends that the psychologist discuss a respondent's notes with the respondent. The school psychologist did not discuss with Parent the single note that Parent made on the response regarding Student's independence in using the bathroom. (NT 150-157; S 11.)
34. There is no research showing that item analysis is either valid or reliable for the purpose of comparing a child's functioning or demonstration of either basic skills or independence in the home as contrasted with the school. (NT 51-55, 183-184, 430-431; S 11.)
35. The publisher's manual for the ABAS does not expressly recommend item analysis for the purpose of reaching conclusions about differences in a child's demonstration of either basic

skills or independence in the home as contrasted with the school. (NT 51-55, 175-178, 192-194; S11.)

36. The re-evaluation report did not contain a complete occupational therapy evaluation. The report indicated that there was no suspected disability in the area of gross motor functioning. The re-evaluation report did not contain an assessment of Student's leisure activities, including sports. Re-evaluation report did not contain an assessment of Student's sensitivity to the environment, including noise and enclosed spaces. (NT 133, 167-168, 231-234; S 5.)
37. The ABAS contains items that may provide data for assessment of a child's leisure activities and skills. (S 14.)
38. The reevaluation report addressed Student's communication needs, through an analysis of Student's progress on IEP goals, as well as the report of the Student's speech language therapist. (S 5.)
39. The re-evaluation report recommended that the District maintain Student's classification as a child with the disabilities of autism and intellectual disability, eligible for special education. The re-evaluation report also recommended maintaining specially designed instruction and related services similar to those that Student was receiving at the time. (NT 38; S 5.)
40. The school psychologist determined the Student's educational needs after reviewing input from Parent and Student's teachers, as well as the speech therapist and occupational therapist. The psychologist did not discuss the formulation of needs with Parent or anyone else, after completing the assessments and other data gathering, and before formulating educational needs. (NT 148-157; S 5.)
41. Although it did not respond to Parents' concerns in an itemized way, the re-evaluation report addressed Parents' concerns with regard to providing Student with learning support, life skills support, speech and language support, and autistic support, by reviewing existing services and Student's progress on IEP goals, and by recommending continuation of the services that Student was receiving at the APS. (NT 30-35, 109,157-159; S 5.)
42. The re-evaluation report addressed Parents' concerns with regard to Student's needs for support in the areas of language and communications, including the ability to understand questions. The school psychologist reviewed Student's performance on IEP goals in these areas, and these areas were assessed through standardized testing. The re-evaluation report recommended continued speech and language services. (NT 141-143, 159-164; S 5.)
43. The re-evaluation report addressed Parents' concerns regarding Student's difficulty in learning, difficulty in understanding and following directions, and basic knowledge needed in daily life; all of these issues were addressed through the cognitive testing and classification of Student with intellectual disability, along with the analysis of Student's progress according to Student's IEP. (NT 30-35; S 5.)

44. The re-evaluation report addressed Parents' concerns with Student's difficulty responding to instructions, by noting clinical observations of this skill, as well as teacher reports and progress monitoring of Student's achievement on IEP goals. (NT 30-35; S 5.)
45. The re-evaluation report addressed Parents' concerns about Student's common sense, basic knowledge needed in daily life, and ability to know right and wrong, through standardized assessment of Student's cognitive ability and academic achievement, as well as through consideration of Students adaptive functioning. (NT 37-38, 161-167; S 5.)

DISCUSSION

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), an IDEA case, the United States Supreme Court held that the burden of persuasion is on the party that requests relief. Thus, the moving party must produce a preponderance of evidence that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in FAVOR DURING Student's of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, the District requested due process and the burden of proof is allocated to the District. The District bears the burden of persuasion that the District's claims are true. If the District fails to produce a preponderance of evidence in support of its claims, or if the evidence is in "equipoise", then the District cannot prevail.

APPROPRIATENESS OF EVALUATION

The District seeks a decision that its re-evaluation was appropriate. Therefore, I am required to determine whether or not the District followed the applicable legal standards when it performed its re-evaluation of Student.

The IDEA requires a district to perform a re-evaluation if the child's parents request a re-evaluation. The re-evaluation must be performed "in accordance with" the IDEA's procedural requirements for evaluations. 20 U.S.C. §1414(a)(2)(A). The IDEA sets forth two purposes of the required evaluation: to determine whether or eligibility as defined in the law, and to "determin[e] the educational needs of the child" 20 U.S.C. §1414(b)(3)(C). These requirements mandate both the scope of any re-evaluation and the process by which it must be conducted.

Parents assert that the District's re-evaluation is inappropriate in four respects. First, Parents assert that the re-evaluation is not comprehensive as defined by law, because the District failed to assess Student regarding Student's ability to engage in leisure skills, specifically including sports activities. Second, Parents claim that the re-evaluation is not comprehensive because it failed to assess Student with regard to Student's "common sense". Third, Parents argue that the re-evaluation failed to comply with the procedural requirements of the IDEA, by using an adaptive behavior inventory to reach a conclusion that it cannot validly support. Fourth, Parents claim that

the District failed to include them in the determination of Student's educational needs. I conclude that the re-evaluation is inappropriate in three of these four respects.

Comprehensive

A re-evaluation must assess the child "in all areas of suspected disability", 20 U.S.C. §1414(b)(3)(B), "including, if appropriate, communicative status, and motor abilities" 34 C.F.R. §300.304(c)(4). It 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" 34 C.F.R. §300.304(c)(6). It must address two questions: whether or not the child is a child with a disability, and "the content of the child's [IEP], 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)(ii). The evaluation must utilize "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child" 20 U.S.C. §1414(b)(3)(C).

Parent has asserted that the District failed to re-evaluate Student with regard to Student's ability to engage in leisure skills, specifically including sports activities. I conclude that the District failed to re-evaluate Student regarding this area of the curriculum³; therefore, I conclude that the District's re-evaluation is not comprehensive within the meaning of the IDEA, and is inappropriate.

There is no dispute that Parent wanted the District to re-evaluate Student with regard to Student's participation in sports activities. The District's psychologist noted this input in the re-

³ I note that physical education, commonly including sports activities, is part of the curriculum in Pennsylvania. 22 Pa. Code §4.11(g)(6), (8). Thus, the IDEA requires the re-evaluation to address Parent's concern about educating Student to be able to participate in sports, either immediately or at some later point in Student's development.

evaluation report itself. The psychologist also admitted that the re-evaluation failed to address this⁴. Thus, the evidence is more than preponderant that the District failed to address this area of educational need, and thus failed to provide Student with a comprehensive re-evaluation as defined in the IDEA.

Parents also requested assessment of what they called Student's "common sense", and claim that the re-evaluation did not address this. The record is preponderant that the re-evaluation did address this non-scientific concept, by thoroughly assessing Student's cognitive ability and achievement. The District's psychologist's credible and reliable testimony, along with the re-evaluation report itself, demonstrated preponderantly that the re-evaluation did address Student's overall fund of knowledge and ability to reason, finding that Student is profoundly deficient in knowledge and profoundly disabled in drawing practical conclusions from situations requiring what lay persons like this hearing officer would consider "common sense". The psychologist also explained that the term "common sense" is not defined clearly enough to be assessed directly; it is not a psychological entity that can be assessed. This evidence is preponderant that the re-evaluation was appropriate with regard to the parental request for assessment of Student's "common sense".

Procedural Requirements – Valid and Reliable

Much of the record is devoted to Parents' concern about the District's recommendation that Parents receive training in behavioral techniques that could enable Student to generalize skills from the school setting to the home setting. While this recommendation in itself may appear benign

⁴ The psychologist noted that the ABAS has a section on leisure skills, which makes mention of sports; however, the re-evaluation report does not advert to this subject at all. The presence of data without any analysis or assessment of that data falls short of preponderant evidence that the leisure/sports concern was addressed.

to others, Parents objected strenuously to it, and argued that it was based upon a factual conclusion that was not supported by the assessments given in the re-evaluation.

The premise for the District's recommendation is that Student is exhibiting fewer basic adaptive skills in the home environment than in school. I find, based upon a preponderance of the evidence, that the data marshaled in the re-evaluation do not support that premise. Therefore, I conclude that the re-evaluation failed to provide the IEP team with useful and relevant information with which to determine whether or not Student needs a training program for Parents in the home, 20 U.S.C. §1414(b)(3)(C), because it failed to utilize information that was "valid and reliable" for that purpose, 20 U.S.C. §1414(b)(3)(A)(iii).

While the re-evaluation supported a recommendation that Student continued to be eligible for special education as a child with intellectual disability, the re-evaluation went further. It contained the following recommendation:

Results of standardized adaptive behavior rating scales completed by parents and teachers suggest that [Student] demonstrates more functional skills and independence in the school setting as compared with the home setting. As such, the IEP team is encouraged to discuss possible ways to support [Student's] generalization of functional skills from school to home.

Information regarding specific strategies that have been successful in promoting improvements in [Student's] school functioning should be offered to parents along with suggestions on how to structure settings/activities to promote successful generalization of skills.

With parental consent, consultation with a behavioral specialist may also be helpful in promoting skill generalization across settings.

This recommendation was based upon the following finding:

A comparison of parent and teacher ratings [on the Adaptive Behavior Assessment System – Second Edition (ABAS)] also suggests that [Student] demonstrates a bit more independence in the school setting as compared to the home setting.

The evidence of record is preponderant that the ABAS cannot support a finding that Student demonstrates more functional skills at school than at home, or that Student is more or less independent overall, in the school setting as opposed to the home setting⁵.

The District's expert school psychologist explained the structure, development, validation and reliability of the ABAS in great detail during the hearing, and the District introduced into evidence a great deal of professional literature corroborating and expanding upon this testimony. The ABAS is a structured, norm-referenced behavior inventory that elicits data about a child's behavior in a number of domains relevant to a determination of adaptive functioning. The primary use of the instrument is to support an adaptive behavior assessment with which to either corroborate or contradict an IQ score indicating intellectual disability; this is essential to the diagnosis and IDEA classification of intellectual disability. For this purpose, the record is preponderant that the ABAS scores are both valid and reliable; the psychologist not only expressed his uncontradicted opinion in testimony to this effect, but also showed the validation data from the ABAS manual and other sources. Thus, the record is preponderant that the re-evaluation was appropriate with regard to its conclusions about Student's classification under the IDEA.

District's psychologist also testified that there is a secondary use of ABAS scores. Not only does the instrument provide standardized scores for purposes of both IDEA classification and

⁵ I have considered that the language in the re-evaluation report is not clear as to the exact scope of the school psychologist's finding: it recites that the data "suggest" a difference between home and school. The psychologist's testimony was similarly imprecise on this question; the psychologist repeatedly affirmed that he was making a finding of some difference for which intervention would be appropriate; yet, at another point, the psychologist indicated that his finding did not extend to a finding that Student's overall adaptive skills were greater in school than at home, a conclusion that this hearing officer found to be unsupported by the record, at a late point in the hearing. (NT 411-414.) Regardless of the psychologist's testimony, which indicated that his conclusions were limited in scope to the skills itemized in the ABAS protocols, the written re-evaluation report speaks more broadly; moreover, the psychologist repeatedly re-affirmed his conclusion that Student was more independent at school than at home, and I conclude that this concept of independence is broader than the discrete skills itemized in the ABAS protocols. Thus, I must ask whether or not the instrument and data upon which the psychologist based these findings are valid and reliable for the purpose of supporting such conclusions.

identification of a child's educational needs, but also the instrument provides protocols with the specific "items" on which respondents rated the child. These "items" (specific skills observed by the raters, such as the ability to use the bathroom independently, along with ratings of the frequency with which Student demonstrates these behaviors) can be reviewed in order to identify specific basic skills that the child does not demonstrate. The ABAS manual recommends that psychologists utilize these "items" for this purpose. Moreover, the manual indicates that it can be useful to observe differences between the ratings of different respondents in different settings.

The psychologist was frank and clear in testifying that this so-called "item analysis" has not been tested through psychometric procedures to determine either its validity or its reliability. As to reliability, there is some data indicating that parents' ratings tend to be less reliable than teachers' ratings. This does not detract from the psychologist's opinion that an "item analysis" is appropriate and consistent with good practice in the field of psychology. Moreover, it cannot be gainsaid that "item analysis" can lead to valuable insights that can help an IEP team focus its efforts on the areas of greatest need.

Yet the record is preponderant that the psychologist did not utilize "item analysis" for purpose of identifying the areas of greatest need. Rather, the psychologist utilized "item analysis" in order to make a finding of fact that the Student was less skilled and less independent in the home setting. This is what the evaluation report said. This factual finding in the re-evaluation report exceeds what can be derived from the ABAS "item" data.

The psychologist admitted without hesitation that there is no known psychometric validity for drawing such a conclusion from an "item analysis" of the ABAS data. Nevertheless, the psychologist insisted that the manual supports this procedure by encouraging clinicians to draw conclusions about differences in functioning across settings from the different responses of raters

in different settings. The psychologist thus demonstrated preponderantly that the instrument can be used as part of an assessment of differences in a child's functioning in different settings (such as home and school), and that it can be used to indicate a legitimate question as to whether or not a child is demonstrating specific basic skills in different settings.

Yet that is not what the District wrote in its re-evaluation report. The District went significantly farther: It wrote that "a review" of the ABAS item-level analysis "suggests" that Student "demonstrates a bit more independence" in school as "compared to" home. It also wrote that the "[r]esults" of the ABAS "suggest" that Student "demonstrates more functional skills and independence" in school than at home. The evidence before me is preponderant that such a conclusion cannot be stated in a re-evaluation report when it is based solely upon the scores of raters on the ABAS protocols.

There is no validity study or data to support such a conclusion from item analysis. While the manual encourages utilizing such data to assess such differences, it does not state that such data are sufficient to reach a conclusion that a child is more independent at school than at home, and certainly it does not state or imply that one can infer the absence of unspecified skills from the absence of the skills specified in the ABAS protocols.⁶ I am left with the psychologist's opinion, unsupported by specific data or documentary corroboration, that such overall conclusions can be drawn from the items on an ABAS protocol, because such an interpretation of data is consistent with good psychological practice. This is the only evidence of record that the conclusion written in the evaluation report was appropriate.

⁶ It is one thing to find that a child is exhibiting specific behaviors in school and not at home. It is something else to conclude that the child's independence at home is different. To reach such a conclusion, one must infer from differences in specified skills that there also are differences in non-specified additional skills at home and at school. The record shows that the instrument does not assess all possible basic skills of the child in the different settings; on the contrary, the ABAS developers sought to assess only a carefully refined list of basic skills, for validity purposes. Thus, there may be many basic skills that the Student demonstrates at home, undetected by this instrument, that lead Student to be just as independent at home as at school, or even more so.

The IDEA sets a stricter standard for the use of psychological instruments such as the ABAS. Among the procedural requirements of the IDEA for re-evaluations is the requirement that each public agency ensure that assessments and other evaluation materials "are used for purposes for which the assessments or measures are valid and reliable" 20 U.S.C. §1414(b)(3)(A)(iii). These terms, as the record amply demonstrates, are terms of art in psychology⁷. They refer to psychometric qualities that are determined through meticulous development and testing of an instrument before conclusions can be drawn from its scores. In this case, the record is preponderant that the ABAS scores – both the standard scores and the raw scores that the psychologist reviewed pursuant to item analysis – are not valid and reliable for the purpose of showing that a child’s basic skills and independence are lower or higher at home as opposed to school⁸. Thus, the re-evaluation is not in compliance with this requirement of the IDEA, and for this reason I conclude that it is inappropriate⁹.

The IDEA also requires that the agency not use “any single measure or assessment” as a basis for determining ... the appropriate educational program for the child" 20 U.S.C. §1414(b)(2)(B), 34 C.F.R. §300.304(b)(2). In this matter, the District’s re-evaluation has done just that. While the psychologist asserted that his conclusions about Student’s home functioning were based upon all of the evidence, he could point to nothing in the record that addressed home

⁷ In comments to the 2006 final regulations implementing the IDEA, the Department of Education indicated that the term “valid and reliable” refers to the term of art as used in the profession of psychology. 71 Fed. Register No. 156 at 46642 (August 6, 2006)(referring to “valid and reliable” as the product of research).

⁸ Moreover, the record shows preponderantly that a parent’s response on an item of the ABAS is not always correct; there is a substantial proportion of responses that are not accurate, for reasons not fully known. Thus, even regarding the items specified in the ABAS, differences between reported manifestation at home and school do not ineluctably prove that Student lacks the specified skills at home or that Student is less independent at home. For this hearing officer, the evidence raises a concern about the reliability of Parents’ report in the present matter. This adds to the weight of the evidence against the District’s position on appropriateness.

functioning other than some of the “items” as reported by Parent in the ABAS protocol. For this reason, also, the re-evaluation is procedurally inappropriate.

Procedural Requirements – Parental Participation

The IDEA requires that the determination of the child’s educational needs “shall be made by a team of qualified professionals and the parent of the child” 20 U.S.C. §1414(b)(4)(A), 34 C.F.R. §300.304(b)(2). The implementing regulations require that the IEP team, of which the Parent is a member, make the determination as to whether or not additional data is needed in order to determine educational need. 34 C.F.R. §300.305(a). The IDEA also requires the IEP team, including the Parents, to participate in the decision as to whether or not the IEP needs to be modified, 20 U.S.C. §1414(c)(1)(A), (B), 34 C.F.R. §300.305(a)(1), (2).

In this case, the record is preponderant that the District did not include the Parents in the decisions regarding what additional data might be needed in order to determine whether or not Student’s has fewer basic skills or less independence at home as opposed to at school. It did not involve the Parent in the decision as to what the educational needs of the child may be. I therefore conclude that the re-evaluation was inappropriate for failure to comply with the IDEA’s procedural requirements for parental participation in the determination of educational need¹⁰.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22

¹⁰ The psychologist argued that the two page parental input form that Parents returned, along with the ABAS protocol, constituted participation in the determination of educational need. I conclude to the contrary. The record makes clear that the decision-making process on educational need did not even include a conversation with Parents to review the conclusions and elicit any feedback. I fail to see how any decision making process that does not even include a conversation about proposed listing of educational need can be said to “include” the Parents.

PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I found that all witnesses were credible. I gave particular weight to the testimony of the District's school psychologist due to that witness' professional qualifications regarding the specialized knowledge and information that needed to be weighed in the above findings of fact and conclusions.

Nevertheless, I discounted the weight of the psychologist's testimony about validity of the ABAS "item analysis" for determining that Student's adaptive skills or Student's independence at home was less than at school. The psychologist admitted honestly that his use of that instrument for that purpose was based upon a deduction or inference from the ABAS Manual's general statements about the appropriateness of using its items to determine differences in adaptive skills in different settings. These general statements do not support using the "items" to the extent to which the psychologist used them – to reach the conclusions stated in the evaluation report. The psychologist admitted that there is no psychometric validity for using the "items" for such purposes.

The psychologist appeared to try to bolster the validity of his use of the "items" by referring to three other kinds of validity that do not require actual research or data to establish validity – validity derived from the structure and development of the instrument, the inherent validity of comparing two identical "items" across settings, and validity derived from the effectiveness of interventions upon which the data are based – so called "intervention validity". I gave reduced, and certainly not preponderant, weight to these opinions. I weighed the opinion evidence this way because the record did not provide any data to support these opinions directly, and they came after

the witness' repeated reliance upon the test manual as the source of his reliance on the ABAS for the conclusions at issue here – almost as an afterthought.

There was evidence that the ABAS was developed scientifically, based upon research. However, that evidence did not show that the instrument was developed and structured to provide valid or reliable support for the re-evaluation's conclusions about different levels of adaptive functioning or independence at home as opposed to at school.

The psychologist asserted that direct comparison of “items” reported in different settings is one of the most valid kinds of procedures known. However, the psychologist did not provide any citation to the literature to substantiate this broad statement.

As to “intervention validity”, the psychologist cited one journal article that contends that such a form of validity should be recognized. However, there is no data in the record that the ABAS has led to successful interventions for differences in adaptive skills between home and school. The contention that such a form of validity should be recognized does not logically infer that it is established in this matter.

In sum, I found that the record either failed to support or contradicted the psychologist's opinions as to the validity and reliability of “item analysis” to reach the findings in the re-evaluation report. Thus, while giving due credit to most of the witness' opinions, I give reduced weight to those touching upon validity and reliability.

I gave careful scrutiny to Parent's testimony as well. Taken as a whole, I found it credible. There were some apparent contradictions, which parent explained adequately when confronted. Parent relied upon frankly hearsay statements from unidentified individuals as to the validity of the use of ABAS “items”; I gave these statements no weight and did not rely upon them for the above findings and conclusions.

CONCLUSION

I conclude that the District's re-evaluation is not appropriate. I further conclude, as a matter of law, that the Parent is entitled to an IEE at public expense. I so order.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District's re-evaluation report dated February 21, 2015, was inappropriate under the IDEA.
2. Parents are entitled to an IEE at public expense, and the District shall make funding available for such an IEE pursuant to the procedures for IEE set forth in the IDEA, within ten days of the date of this Order.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

DATED: May 7, 2015