

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: V.D.

Date of Birth: [redacted]

Date of Hearing: April 29, 2011

CLOSED HEARING

ODR No. **1665-1011AS**

Parties to the Hearing:

Parent[s]

Northern Cambria School District
601 Joseph Street
Northern Cambria, PA 15714

Representative:

Charles Steele, Esquire
428 Forbes Avenue, Suite 900
Pittsburgh, PA 15219

Gary Jubas, Esquire
214 North Center Street
Ebensburg, PA 15931

Date Record Closed:

May 7, 2011

Date of Decision:

May 19, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a middle-school-aged student in the above-named school district (hereafter “District”). Student was first evaluated for special education during the 2010-11 school year and determined to be eligible for special education. The Parent requested an independent educational evaluation (IEE), and the District filed a due process complaint on April 4, 2011 asserting that its evaluation of Student was appropriate and that the Parent was not entitled to an IEE at public expense.

A hearing convened in one session on April 29, 2011, at which both parties presented evidence to support their respective positions. For the following reasons, I find in favor of the Parent and order an IEE at public expense.

ISSUES

1. Whether the District’s January 2011 educational evaluation of Student was appropriate; and,
2. If not, is the Parent entitled to an IEE at public expense?

FINDINGS OF FACT

1. Student is a middle-school-aged student who resides within the District with Student’s Parent. (Notes of Testimony (N.T.) 184)
2. Student first attended school in the District in kindergarten and began to experience significant difficulties at school during fourth grade. Student was hospitalized at that time and was diagnosed with Bipolar Disorder and Intermittent Explosive Disorder, and began taking medication. Student has been treating with a psychiatrist since that time. (N.T. 170, 185)
3. In August 2008, the Parent filled out a health history form for the District and noted that Student had been diagnosed with Bipolar Disorder and Intermittent Explosive Disorder. The Parent also stated that Student takes medication every day. (N.T. 113, 170; Parent Exhibit (P) 2)
4. In the summer of 2009, Student was referred by the District for placement in an alternative educational setting (AES) for disciplinary reasons. This referral followed a number of disciplinary referrals in the spring of 2009 that resulted in several detentions and in-school and out-of-school suspensions. (N.T. 56, 58-60, 172-73; P 1)

¹ The name and gender of the child are not used in this decision in order to preserve Student’s privacy.

5. The AES provided a highly structured, supervised setting for Student. (N.T. 100, 155)
6. When Student enrolled in the AES, the Parent provided information to its representatives that Student had been diagnosed with Bipolar Disorder and was taking prescription medication. (N.T. 63, 71-72)
7. Student was involved with juvenile justice authorities during the 2009-10 school year and, in January 2010, an assessment was conducted to determine whether counseling was appropriate for Student. It was recommended that Student participate in group counseling on an outpatient basis. (N.T. 31-35, 43)²
8. While Student attended the AES, Student frequently demonstrated impulsivity and disruptive behavior, talked out often, and exhibited difficulty with following directions and getting along with peers. (N.T. 64, 70, 88-89, 100)
9. The AES program implements a behavior plan based upon accumulated points. Points are earned for appropriate behavior during the school day, with a goal of reaching 300 points over a quarter. A team meeting is held every quarter to review a student's progress and determine whether he or she is ready to return to the public school. (N.T. 64-65, 73, 78-79, 197-98)
10. Five such quarterly meetings were held while Student was in the AES during the 2009-10 and first half of the 2010-11 school years. (N.T. 66-67, 68-69)
11. In the fall of 2010, Student's Parent met with District representatives and discussed returning Student to the District by the end of the first semester of the school year. The parties also agreed to conduct a special education evaluation of Student. The Parent informed the District school psychologist that Student had been diagnosed with Bipolar Disorder and Intermittent Explosive Disorder. The Parent returned a signed Permission to Evaluate form to the District on November 16, 2010. (N.T. 126-27, 134-35, 174, 187)
12. In preparation for the evaluation, the District's school psychologist met with representatives of the AES. This meeting also included a quarterly review, and Student was not recommended for return to the District at that time because Student had not completed the recommended counseling. Student's Parent was not able to attend this meeting. (N.T. 68-70, 127-28, 141, 196-99, 200-01)
13. The District obtained information from the Parent for the evaluation, but the school psychologist did not speak with the Parent. The Parent reported on Student's strengths and needs in the home, with the latter including difficulty focusing and staying directed, tendencies to become frustrated and agitated, impulsivity, failure to comply with adult directives, aggression, and lack of self-control. (N.T. 141; School District Exhibit (S) 3)

² The Parent moved to strike the testimony of a witness who provided information on the juvenile justice system involvement, on the basis that the witness' knowledge was limited to a report that he did not author. (N.T. 48-51) This hearing officer declines to strike the testimony, but considered it in the context of background information only.

14. The District's evaluation did not include a functional behavioral assessment (FBA). (N.T. 143-44)
15. The District issued the Evaluation Report (ER) on January 14, 2011. There was no meeting to discuss the results of the ER. (N.T. 128-29, 141; S 3)
16. The ER included information from the teachers at the AES. Student reportedly was performing adequately in Reading, Math, Written Language/Spelling, and Science/Social Studies. Behaviorally, the teachers reported that Student participated in class, completed required assignments, and worked well independently; however, Student also rushed to complete work, required frequent redirection to task, was impulsive, and talked out during class throughout the school day. Time-out was the intervention used to address Student's behaviors, and Student would go to the time-out room at Student's own initiative as a calming technique or at the direction of a teacher. Student also attended three hours of individual or group therapy each week. (S 3)
17. The school psychologist observed Student in a Science class at the AES. Student reportedly was not disruptive and completed the assignment during that class period. (S 3)
18. The school psychologist also interviewed Student, who reported difficulty with Math. Student also described getting into trouble at school for talking out, disrupting others, and failing to follow directions. At home, Student reported difficulty getting along with family members which sometimes involved Student's physical aggression. (S 3)
19. The ER contained information gleaned from a psychological evaluation conducted in September 2010 which noted Student's diagnoses of Bipolar Disorder, Intermittent Explosive Disorder, and Conduct Disorder, as well as treatment recommendations. (S 3)
20. The District administered the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), which reflected a Full Scale IQ in the average range. Student's Verbal Comprehension Index was in the high average range, and all of the other Index scores were in the average range. (S 3)
21. The Wechsler Individual Achievement Test – Third Edition (WIAT-III) was also administered. Student scored in the average to high average range on the Reading subtests, and in the average range on the Mathematics and Spelling subtests. Student also produced a writing sample with appropriate sentence structure, grammar and mechanics, organized thoughts, and average to high average vocabulary. (S 3)
22. The ER also reported on previous group achievement tests, including the Group Reading Assessment and Diagnostic Evaluation (GRADE), Group Mathematics Assessment and Diagnostic Evaluation (G-MADE), and the Pennsylvania System of State Assessment (PSSA). Student's scores were in the average to above average range on the GRADE in 2010, and were inconsistent over two administrations of the G-MADE in 2010. On the PSSA, Student's Reading score went from the proficient level in third through fifth grade to the basic level in sixth and seventh grade; and in Math, Student's score went from the

advanced range in third, fifth, and sixth grade to the below basic level in seventh grade. (S 3)

23. For input on Student's behavior, the school psychologist used the Achenbach System of Empirically Based Assessment (ASEBA): the Child Behavior Checklist (CBCL) completed by the Parent; the Teacher's Report Form (TRF) completed by two of the teachers at the AES and one of its administrators; and the Youth Self-Report (YSR). This instrument measures internalizing and externalizing problems and provides DSM-oriented scales. On the TRF, teacher/administrator ratings were in the clinically significant range in the areas of Social Problems and Aggressive Behavior, and borderline significant in the areas of Thought Problems and Rule-Breaking Behavior. The CBCL reflected parental ratings in the clinically significant range in the same four areas identified by the AES personnel. Student's own YSR revealed ratings in the clinically significant range in six of the eight areas or syndromes: Anxious/Depressed, Somatic Complaints, Social Problems, Thought Problems, Attention Problems, and Aggressive Behaviors. Student also provided a score in the borderline range in Rule-Breaking Behavior. (S 3)
24. The ER concluded that Student was eligible for special education based upon an emotional disturbance, demonstrating a need for emotional support and psychological counseling, an individualized behavior support plan, and consistent adult supervision and monitoring. (S 3)
25. Student's teachers at the AES recommended that Student not return to public school at the time the evaluation was completed, but that Student be reconsidered to return to the District at the end of the third marking period. The ER stated that Student would not be considered for transition back to the District until Student "shows consistency with [] behavior" (S 3 at 8) at the AES. (S 3)
26. The District met with the Parent in February 2011 and the parties agreed to return Student to the District. The team also developed an Individualized Education Program (IEP) for Student which included a plan for transition back to the District as well as a behavior support plan. Student returned to the District school on February 22, 2011 and the District began to implement the IEP which was approved by the Parent, although she did not participate in the development of that IEP. (N.T. 130-32, 137, 155-56, 158-60)
27. Student experienced behavioral difficulties upon returning to the District and was subject to disciplinary action on several occasions for taking markers from a teacher, forging the Parents' name on a permission slip, engaging in physical and verbal confrontations, and having a cell phone. The behaviors described at the AES (talking out in and disrupting classes, failing to comply with directions) also continued. (N.T. 151-53, 156-57, 163-65, 167, 179-80)
28. Student has two half-time aides who direct Student to stay on task, help with organization, and answer questions or provide clarification for Student when necessary. (N.T. 158, 163-64, 167-68, 181)

29. The District began to conduct an FBA after the ER issued, targeting the behaviors of talking out and not following adult directives. Student's aides and teachers are collecting data on these behaviors. The FBA was not complete as of the date of the due process hearing. (N.T. 143-44, 153-57, 160)
30. As of the date of the due process hearing, the Parent had not been involved in the FBA. (N.T. 143-44, 153-54, 178-79)
31. The following exhibits were admitted at the due process hearing: S 1, S 2, S 3, P 1, P 2 (N.T. 211-12)

DISCUSSION AND CONCLUSIONS OF LAW

Generally speaking, the burden of proof consists of two elements: the burden of production, and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion in an administrative hearing such as this lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);³ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the District which requested the hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible, and the testimony as a whole was more consistent than not. Credibility of specific witnesses is discussed further in this decision as necessary.

The Individuals with Disabilities Education Act (IDEA)⁴ ensures, *inter alia*, that all children with disabilities are provided with a free, appropriate public education (FAPE) to meet their individual needs. Local education agencies, including school districts, are required under the IDEA to conduct a "full and initial individual evaluation" of a student before it provides special education and related services to that child. 20 U.S.C. § 1414(a)(1)(A); *see also* 34 C.F.R. § 300.301(a). In conducting an evaluation, a local education agency must ensure that it uses procedures to determine whether the child has a disability and to determine the child's educational needs. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c)(2). Evaluation procedures include adherence to time limitations which, in Pennsylvania, mandate that evaluations be completed within 60 calendar days following receipt of parental consent. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); 22 Pa. Code §§ 14.123(b) and 14.124(b).

³ The burden of production, "*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

⁴ 20 U.S.C. §§ 1401 *et seq.*

The child must be assessed “in all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(B); *see also* 34 C.F.R. § 300.304(c)(4). The IDEA regulations provide further guidance for conducting the evaluation or re-evaluation.

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the Parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) 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 (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. § 304(b); *see also* 20 U.S.C. § 1414(b)(2). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Assessments must be administered in a manner which is nondiscriminatory, in a form designed to yield accurate information, and for the purpose for which the assessments were designed, by a trained professional, and in accordance with the test maker’s instructions. 20 U.S.C. § 1414(b)(3); 34 C.F.R. § 300.304(c)(1). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Further, the team must ensure that it considers existing information about the child through the following.

(a) *Review of existing evaluation data.*

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—

(1) Review existing evaluation data on the child, including—

(i) Evaluations and information provided by the Parents of the child;

- (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child's Parents, identify what additional data, if any, are needed to determine—
- (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
 - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
 - (ii) The present levels of academic achievement and related developmental needs of the child;
 - (iii)(A) Whether the child needs special education and related services; or
 - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

34 C.F.R. § 305(a); *see also* 20 U.S.C. § 1414(c)(1).

The IEP team, which includes qualified professionals and the child's parent(s), makes the determination of, *inter alia*, whether the student is a child with a disability and in need of special education. 20 U.S.C. § 1414(c)(1)(B); 34 C.F.R. § 300.306(a)(1). In making these determinations, the local education agency must “[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior” and further “[e]nsure that information obtained from all of these sources is documented and carefully considered.” 34 C.F.R. § 300.306(c).

When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); *see also* 20 U.S.C. § 1415(b)(1). When a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). In this case, the Parent requested an IEE, and District filed a due process complaint seeking a determination that its evaluation was appropriate.

Careful review of the ER reveals that the District's evaluation included functional, developmental, and academic information from a variety of sources about Student. Specifically, the evaluation included a review of information, as well as input from the Parent, Student, and the AES. (Findings of Fact (FF) 13, 16, 18) The school psychologist administered both cognitive and achievement testing using appropriate norm-referenced, technically sound instruments. (FF 20, 21) The ASEBA was used to collect information about Student's adaptive

functioning, revealing clinically significant scores in many of the areas it assesses. (FF 23) All of this information was summarized in the ER.

The question, thus, is whether the evaluation provided sufficient information about Student to enable the team to make an informed determination of Student's disability, as well as "the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education." 34 C.F.R. § 304(b).

School districts as local education agencies are required to conduct a functional behavioral assessment under certain circumstances, such as when a child engages in conduct which, through the process of providing the IDEA's disciplinary protections, is determined to be a manifestation of the child's disability and there is no behavioral intervention plan. 34 C.F.R. § 300.530(f). Furthermore, "[b]ehavior support programs and plans must be based on a functional assessment of behavior." 22 Pa. Code § 14.133; *see also* 22 Pa. Code § 14.132. Accordingly, in Pennsylvania, an FBA is required before development of a behavior support plan.

The District in this case had a great deal of information about Student's behavioral difficulties, including input from the Student and parent, Student's conduct and resulting discipline in the spring of 2009 while Student was at the District, as well as Student's continuing challenging behaviors at the AES. (FF 3, 4, 11, 12, 13, 16, 17, 18, 19, 23, 25) The school psychologist also compiled the results of the ASEBA rating scales which reflected clinically significant scores in most of the areas of problematic behavior that it assesses. (FF 23) Although the school psychologist testified, credibly, that she did not begin to conduct an FBA until after Student returned to the District because that setting was quite dissimilar from the AES and Student's behaviors would likely also differ significantly (N.T. 155-56), it is also apparent that the District had made no firm commitment in the fall of 2010 on when it would agree to return Student to its school. (N.T. 139-40; FF 25) Additionally, the AES personnel were recommending that that determination not be made until after the third marking period of the 2010-11 school year. (FF 25) Student remained in the AES until the end of February 2011, more than a month after the ER issued (FF 15, 26), and it could hardly have been unexpected that Student would continue to demonstrate challenging behaviors in the District placement and would require behavioral intervention and supports. Even if the District and AES settings were markedly different, Student's behaviors across educational placements was well documented (FF 2, 4, 16, 27), and it was critical to determine the functions of those behaviors in order to address them at the time that Student returned to the District. And, although the IEP team did develop and implement a behavior plan for Student upon Student's return (FF 24, 26), that plan was not based upon an FBA as required in Pennsylvania. 22 Pa. Code § 14.133.

Careful review of the ER reveals little analysis or discussion of how Student's significant behavioral challenges impact Student's learning. Beyond noting that Student "need[s] significant levels of intervention and monitoring" (S 3 at 8), the ER fails to provide adequate guidance to the IEP team on the content of Student's program, including a positive behavior support plan, to address Student's known significant behavioral needs. The decision to conduct the FBA after the ER cannot rectify the failure to satisfactorily assess Student's behavior, including its functions, prior to Student's return to the District. It is also quite troublesome that the FBA process did not include the Parent (FF 30), an important and necessary member of

Student's IEP team. 34 C.F.R. § 300.321(a). The efforts to complete the FBA, however well-intentioned, do not outweigh the flaws in the process in this case.

For all of these reasons, this hearing officer concludes that the District's evaluation of Student was not sufficiently comprehensive to address Student's behavioral difficulties such that the IEP team had adequate relevant information to develop the content of Student's educational program including participation in the regular education curriculum.⁵ 34 C.F.R. § 304(b)(a). Having found that the District's evaluation was not appropriate, it will be ordered to provide an IEE at public expense.

CONCLUSION

The District's evaluation of Student failed to adequately assess Student in all areas of suspected disability, and the Parent's request for an IEE at public expense will be granted.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District provide an IEE of Student at public expense. The IEE shall assess Student in all areas of suspected disability and shall include an FBA. The IEE shall be conducted as soon as reasonably practicable and shall be used to inform the decision in the companion case filed at ODR File No. 01971-1011AS.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: May 19, 2011

⁵ One other concern of the Parent is Student's declining PSSA scores. (FF 22) The school psychologist testified, credibly, that she considered Student's performance on the WIAT-III to be a much stronger indicator of Student's strengths and weaknesses. (N.T. 146-49) While the reasons for the downward trend in Student's PSSA scores clearly merits attention, this hearing officer found the school psychologist's explanation on this topic to be persuasive, and cannot conclude that the ER was deficient on the basis that it failed to explore this discrepancy further. Nevertheless, the evaluator who conducts IEE will have the opportunity to consider Student's academic achievement.