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.C.

Date of Birth: [redacted]

ODR No. 16713-15-16-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Jennifer Lukach Bradley, Esquire McAndrews Law Offices 30 Cassatt Avenue Berwyn, PA 19312
Fleetwood Area School District 801 North Richmond Street Fleetwood, PA 19522-1031	David F. Conn, Esquire Sweet, Stevens, Katz and Williams, LLP 331 East Butler Avenue New Britain, PA 18901
Date of Hearing:	September 29, 2015
Record Closed:	October 13, 2015
Date of Decision:	October 24, 2015
Hearing Officer:	William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)[1] is a resident of the District named in this matter (District), and began ninth grade this year at a District high school. Student's mother (Parent) filed this due process request, asking only that the hearing officer determine that Student is eligible for special education services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). The District asserts that Student, while admittedly diagnosed with and experiencing the symptoms of Attention Deficit Hyperactivity Disorder (ADHD), is not in need of special education because Student's disability does not adversely impact Student's access to the curriculum.

The hearing was completed in one session. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that Parent has not proven by a preponderance of the evidence that Student is an eligible child with a disability as defined by the IDEA. Therefore, I decline to enter the order that Parent seeks.

ISSUES

1. Is Student an eligible child with a disability as defined by the IDEA?

FINDINGS OF FACT

1. Student is diagnosed with attention deficit hyperactivity disorder and displays symptoms of poor attention, impulsivity and hyperactivity in all settings. (NT 131; S 1, 3; P 1.)
2. Student has been enrolled in the District during Student's entire academic career. (S 1, 3.)
3. The District has evaluated Student three times, in first grade, third grade and eighth grade. Each evaluation concluded that the Student was not a child with a disability as defined in the IDEA. (S 3.)

[1] Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

4. The District's most recent evaluation report was produced on October 7, 2014. Student was in eighth grade.

5. The October 2014 evaluation report concluded that Student was not a child with a disability as defined in the IDEA. The evaluation report concluded that Student exhibited symptoms of inattention, hyperactivity and impulsivity sufficient to meet the definition of a child with ADHD. Nevertheless, the evaluation concluded that Student's successful performance in school demonstrated that Student did not need specially designed instruction or related services. (S 3.)

6. The October 2014 evaluation report ruled out a specific learning disability in mathematics problem solving, despite a significant and rare discrepancy between Student's cognitive potential and Student's academic achievement score in standardized achievement testing. The evaluation based this ruling-out of specific learning disability upon a conclusion that Student's performance in the standardized achievement testing may have been affected by Student's difficulties with attention, or other factors introducing error in the scores. (NT 174-183, 195, 205-209; S 3.)

7. Parent reported to District personnel that Student sometimes "falls apart when [Student] gets home." Neither Parent nor Student reported to District personnel regarding difficulties completing homework or extraordinarily lengthy homework sessions, or Parent re-teaching of curriculum. (NT 30-31, 53, 55, 64-65, 70-77, 79-81, 124-125, 186, 195-198, 236; S 1, 3; P 8.)

8. Student's grades, state testing and classroom performance in regular education curriculum and classes did not indicate any significant academic difficulty or difficulty in mathematics or reading achievement. Student is taking advanced classes in high school. (NT 63-64, 129-130, 178-181, 184-185, 199-202, 212, 221, 231-232, 235-238, 245-246; S 2, 3; P 3.)

9. The District's evaluator did not base on grades alone her conclusions ruling out specific learning disability and other health impairment. (NT 127-132, 137; 184-193, 207-211; S 3; P 3.)

10. Grades in regular education are a composite of various scores, including class performance, in-class quizzes, chapter tests and classroom assignments; homework and at-home study alone do not determine the grade in Student's classes. (NT 220, 223-224, 241-243; P 3.)

11. Student did not evidence any academic, behavioral or social difficulties requiring special education intervention during Student's first month in ninth grade social studies, English and mathematics classes. (NT 212-216, 227-229, 235-238.)

12. The evaluation included administration of behavior inventories to Parent and teachers. Although Parent consistently rated Student's emotional and behavioral and social functioning as problematic, teacher scores with regard to Student's behavior and social skills were inconsistent. On a general screening inventory, teacher responses did not indicate that Student was at risk for clinically significant problems in areas other than attention and distractibility. However, on an inventory more specifically directed to symptoms associated with ADHD, teachers reported at risk and clinically significant scores in the areas of behavior and social relationships. (NT 184-193; S 3.)

13. Student's report cards and disciplinary records did not document persistent behavioral or social concerns. (NT 131; S 3, 5-8; P 4.)

14. Student's teachers did not observe persistent difficulties or concerns with Student's behavior or social skills in the school setting, except for Student's difficulties with attention and some impulsivity. (NT 214-216; S 3; P 2, 3.)

15. Classroom observation did not reveal any behavior that was extraordinary for a child with ADHD. (NT 155-157; S 3.)

16. Student did not have attendance problems. (S 5-8.)

17. Student manifested relatively low scores for working memory, but these scores were nevertheless in the average range and did not indicate a disorder of cognitive functioning. Student's relative weakness in working memory did not interfere with Student's access to the curriculum. (NT 140-141, 167-174, 201; S 3.)

18. In October 2014, after producing the evaluation report, the District initiated an evaluation of Student for occupational therapy needs. The resulting evaluation report, dated December 10, 2014, found mild sensory processing needs and recommended a section 504 service agreement. (NT 60-61; P 1, 2.)

19. The section 504 service agreement listed accommodations that would also address some of Student's educational needs arising from Student's ADHD, including preferential seating (recommended by several of Student's teachers); breaks for movement (also recommended by teachers); and use of a fidget toy to promote better attention. (NT 231; P 1, 3, 6.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward 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.[2] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief

[2] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

in an IDEA case. Thus, the moving party must produce a preponderance of evidence[3] that the moving party is entitled to the relief requested in the Complaint Notice. 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 of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claim, or if the evidence is in "equipoise", the Parent cannot prevail under the IDEA.

IDEA ELIGIBILITY

As a condition of the receipt of federal funding, the IDEA requires states to make available a "free appropriate public education" (FAPE) to eligible children with disabilities. 20 U.S.C. §1412(a)(1)(A); see 22 Pa. Code §14.104. A local educational agency is thus required to offer a FAPE to any "child with a disability" within its jurisdiction who is within certain age ranges as defined in the IDEA. 20 U.S.C. §1412(a)(1)(B); see 22 Pa. Code §14.104. The IDEA defines "child with a disability" as a child with certain defined disabilities who "by reason [of such disabilities] needs special education and related services". 20 U.S.C. §1401(3)(A)(ii); 34 C.F.R.

[3]A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

§300.8(a); see 22 Pa. Code §14.101(defining "Student with a disability" by reference to 34 C.F.R. §300.8).

The only issue in this case is whether or not Student "needs special education and related services" within the meaning of the above sections of the IDEA and its federal implementing regulations. The parties agree that Student is diagnosed with ADHD and exhibits the symptoms of ADHD in school. However, Parent asserts that Student needs specially designed instruction because of those symptoms, and the District disagrees.

A child's "need" for special education must be determined through an evaluation conducted in accordance with the procedural and substantive requirements of the IDEA. 34 C.F.R. §300.8 (definition of child with a disability includes evaluation according to the IDEA). Thus, in reaching a decision in this matter, I have considered whether or not the District evaluated Student appropriately according to the standards of the IDEA.

In addition, in determining whether or not Student "needs" specially designed instruction, I am mindful of the IDEA's mandate that states provide a FAPE to all children with disabilities within certain age ranges. In a decision that continues to address the upper limit of states' obligations under the IDEA[4], the United States Supreme Court interpreted the meaning of the states' statutory duty to provide a FAPE to children with disabilities. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690, 1982 U.S. LEXIS 10, 50 U.S.L.W. 4925 (U.S. 1982).

In Rowley, the Court held that a state's obligation under the IDEA is limited to providing an eligible child with some educational benefit – that is, educational benefit that is more than

[4] The Court construed the predecessor of the IDEA, then entitled the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U. S. C. § 1401 et seq. (1976 ed. and Supp. IV). The Court of Appeals for the Third Circuit has applied the Rowley standard to cases arising under the amended IDEA. Ridley Sch. Dist. v. M.R., 680 F.3d 260, (3d Cir. 2012).

"trivial", but less than that which would be needed to maximize the child's potential, Bd. of Educ. v. Rowley, 458 U.S. 176, 189-190, 197 n. 21, 198-204, 102 S. Ct. 3034, 73 L. Ed. 2d 690, 1982 U.S. LEXIS 10, 50 U.S.L.W. 4925 (U.S. 1982). The Third Circuit has further interpreted the Rowley standard to require states to make available an education that provides "meaningful benefit". Ridley Sch. Dist. v. M.R., 680 F.3d 260, 268-269 (3d Cir. 2012). Therefore, the IDEA does not require a state to provide more than meaningful educational benefit to any child within its jurisdiction.

The IDEA does not require a school district to provide the best possible program to a student, or to maximize the student's potential. Ridley Sch. Dist. v. MR, 680 F.3d at 269 (3d Cir. 2012). Therefore, I conclude that, in determining "need" for special education, a district is not required to provide special education if the child is receiving meaningful educational benefit without special education services.

THE DISTRICT'S EVALUATION WAS APPROPRIATE

Comprehensive

The IDEA sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child … ." 20 U.S.C. §1414(a)(1)(C)(i). The evaluation must address all "areas related to the suspected disability", 20 U.S.C. §1414(b)(3)(B), 34 C.F.R. §300.304(c)(4), and must be "sufficiently comprehensive to identify all of the child's special education and related services needs … ."

The record shows that the District performed at least three evaluations of Student, at Parent's request. Two of these evaluations were performed before Student's fourth grade year; even if the

evidence should show that either of these early evaluations was inappropriate, such a finding would not bear upon the issue at hand in this matter, because the issue is whether or not Student is presently in need of special education services. Therefore, I focus upon the appropriateness of the most recent evaluation, reported on October 7, 2014.

Parent asserts that the District's evaluation in this matter was insufficiently comprehensive and failed to identify all of Student's needs for special education services. I conclude that the Parent's evidence failed to prove this assertion by a preponderance of the evidence.

The October 2014 evaluation consisted of a review of educational records, including past evaluation reports that included the history of Student's struggles in the early grades; a review of Parent's written "input"; a review of teachers' written responses to District-created "input" forms, and a classroom observation. Based upon this information, the school psychologist administered cognitive and achievement testing; a wide-scope behavior inventory that essentially screens for a broad array of emotional and behavioral concerns; and a more specific behavior inventory that focuses upon behaviors specific to ADHD. The evaluator considered suspected disabilities of Other Health Impairment due to ADHD and Specific Learning Disability, ruling out both classifications based upon reasoning disclosed in the evaluation report.

I am satisfied that these procedures, taken as a whole, were sufficiently comprehensive to assess Student in all areas related to the suspected disabilities, 34 C.F.R. §300.304(c)(4). Through these procedures, the psychologist considered extensive longitudinal evidence of Student's ADHD and its effect upon Student's academic performance. These procedures also brought to light Student's difficulties in the areas of emotional functioning, as well as Student's social functioning and behavior, in both the home and school settings. Cognitive and achievement testing raised the question of Specific Learning Disorder in both reading and mathematics, and the school

psychologist addressed these questions explicitly. The report considered also the absence of any indication of physical impediments to learning and school functioning. Given the breadth of the evaluation, I also conclude that it was sufficiently comprehensive to uncover any of Student's needs for special education and related services, 34 C.F.R. §300.304(c)(6).

Parent's case in chief consisted of her own testimony and that of the District's supervisor of special education, examined as on cross-examination. Parent's testimony failed to establish that the evaluation was not comprehensive, and the supervisor had little knowledge and therefore did not support Parent's assertions.

In order to show that the evaluation had left unexamined a serious educational need of the Student, Parent depicted difficult interactions between Parent and the Student after school with regard to Student's homework assignments. Parent testified credibly that, at home, Student was disorganized and resistant to Parent's attempts to get Student to do homework. Parent further testified that the Student exhibited anxiety to such a degree as to require therapy and medication, although Student had been discharged from therapy within the last two school years. Parent thus seemed to assert that all of this was caused by the nature and amount of homework that District regular education teachers were assigning.

Even if the evidence established these assertions, I would be hard pressed on this record to conclude that such difficulties established a need for special education. The purpose of special education is to enable a child to receive educational benefit, as discussed above, yet on this record, without special education, Student has obtained substantial – and much more than "meaningful" -- educational benefit, and is reasonably likely to continue to obtain such benefit. Student has received consistently good grades. Student has advanced from grade to grade. Student's performance in ninth grade baseline probes shows appropriate academic achievement. Student

qualified for two accelerated academic classes. Student has shown no signs of failure to advance in emotional and behavioral maturation, or in social skill development.

Moreover, I conclude that Parent's evidence did not preponderantly prove that Student currently experiences such severe struggles with homework assignments as to raise a suspicion that Student's disabilities are interfering – or are reasonably likely to interfere - with Student's ability to receive meaningful benefit from the regular education curriculum. It is apparent from Parent's testimony that many of the difficult homework interactions described by Parent occurred much earlier in Student's school career, during the years between kindergarten and third grade. Indeed, the exhibits admitted into evidence corroborated Student's serious difficulties in school with inattention, impulsivity and hyperactivity, in Student's early grades. However, Parent's testimony does not establish preponderantly that Student currently struggles with homework to the degree depicted by Parent for the early years.

I give little weight – certainly not preponderant weight – to the remote history of Student's initial struggles in school. Student is now in ninth grade and Student's teachers for eighth grade reported consistently that Student was a good student and was progressing through the grade-level curriculum successfully. Similarly, Student's ninth grade teachers reported no apparent difficulties, aside from attention issues that were easily obviated through redirection. On this record, there is no basis to draw an inference that Student's more prominent struggles in the early years at school continued into the present; on the contrary, the evidence is preponderant that Student was not exhibiting in eighth and ninth grade the kinds of profound dysfunction recorded in kindergarten through third grade.

Parent's testimony seemed to imply that Student's homework difficulties were continuing, and that she conveyed this to District personnel, but her testimony is general as to time and place

– as well as to exactly what may have been said to District personnel. It is insufficiently convincing on that critical question. At one point in her testimony, Parent stated generally that she had orally told the school counselor about some of Student's difficulties with homework, but it was not clear or explicit that these communications were about either the last academic year or the present one.

Parent did recount one relatively contemporaneous incident in which she became aware that Student claimed to have banged Student's head against a wall in school, but this testimony was double hearsay, and one of the declarants was unidentified. The record does not corroborate this hearsay; therefore I deem it unreliable and decline to give it weight. Even if a District employee knew about it, such an incident did not put the District on notice that Student had been struggling with Student's homework.

In the face of this unconvincing testimony, the District produced witnesses who testified that Parent never raised this issue with them. These included teachers and the school psychologist who conducted the evaluation in question. In addition, I scoured the documentary record – and especially the written statement that constituted Parent's "input" for the evaluation - for any evidence that Parent had complained about the intense homework struggles that her testimony depicted during the last school year; I found no documentary evidence of such disclosure.

In particular, then, Parent failed to prove preponderantly that the District was aware of Student's asserted struggles at home with homework. More broadly, I conclude that the Parent failed to prove that such struggles were occurring contemporaneously at a level that would raise any question of educational need. Therefore, I cannot find, on this record, that the District's evaluation was not comprehensive within the meaning of the IDEA requirements.

Procedural Requirements

The IDEA regulations prescribe in detail the procedures to be used in evaluations. 34 C.F.R. §300.301 to 300.311. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002). The record shows by a preponderance of the evidence that the October 2014 evaluation complied with IDEA procedures.

These procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information … ." 20 U.S.C. §1414(b)(2)(A), 34 C.F.R. §300.304(b). The evidence is preponderant that this standard has been met.

The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B), 34 C.F.R. §300.304(b)(2). The District complied with this requirement. Indeed, Parent complained that one measure – the more specific behavior inventory directed at behaviors associated with ADHD – showed teacher observations of problem behaviors in school, including oppositional and defiant behaviors. However, the psychologist rightly pointed to this regulation and showed that such a conclusion would amount to reliance upon a single instrument contrary to this requirement. Substantively, moreover, the psychologist credibly demonstrated that the concerning behavior inventory scores were inconsistent with repeated reports of teachers, and thus not an appropriate basis from which to conclude that Student needs special education.

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i), 34 C.F.R.

§300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1). The record is preponderant that the District's evaluator solicited and obtained parental input through a written statement that Parent selected to serve as her input. Therefore, the District complied with this requirement.

The evaluator must be trained and knowledgeable. 20 U.S.C. §1414(b)(3)(A)(iv), 34 C.F.R. §300.304(c)(1)(iv). The District complied with this procedural requirement. The school psychologist was certified and had completed more than a score of evaluations while serving with the District; she had completed several scores of evaluations by the time of hearing. Her testimony revealed sound methodology and good knowledge of the instruments and their interpretation.

The evaluation must utilize testing instruments that are valid and reliable for the purposes for which they are utilized. 20 U.S.C. §1414(b)(3)(A)(iii), 34 C.F.R. §300.304(c)(1)(iii), and all tests must be administered in accordance with the applicable instructions of the publisher, 20 U.S.C. §1414(b)(3)(A)(v), 34 C.F.R. §300.304(c)(1)(v). The District has met its burden to show that these requirements were met; indeed, Parent did not challenge the evaluation on such grounds.

THE DISTRICT PROPERLY RELIED UPON STUDENT'S GOOD GRADES

Parent argues that the District ruled out need for special education solely on grounds that the Student had attained good grades. I do not find this argument to be persuasive, for two reasons. First, contrary to Parent's argument, I conclude that, in the appropriate circumstances, grades can be reliable evidence regarding a child's need for special education. Second, in this matter, there was preponderant evidence that the District did not base its conclusion on grades alone.

Grades and progress within the regular education curriculum are appropriate evidence that bears upon a child's "need" for special education. The Supreme Court in Rowley indicated that an appropriate consideration in determining whether or not a child is receiving educational benefit is "the grading and advancement system" of the "regular education classrooms of the public school system … ." Bd. of Educ. v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690, 1982 U.S. LEXIS 10, 50 U.S.L.W. 4925 (U.S. 1982). It noted that the "achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." Bd. of Educ. v. Rowley, 458 U.S. 176, 207 n. 28, 102 S. Ct. 3034, 73 L. Ed. 2d 690, 1982 U.S. LEXIS 10, 50 U.S.L.W. 4925 (U.S. 1982). While this cannot be the only consideration when a child is in special education (where test performance is often supported especially for the child), id. at 203 n. 25, D.S. v. Bayonne Bd. Of Ed., 602 F.3d 553, 567 (3d Cir. 2010)(grades in special education accorded less weight), there is no authority for the proposition, advanced by Parent, that grades and advancement in the curriculum may never be the basis for determining that a student is not in "need" of special education.

In this matter, moreover, the District did not rely upon grades alone. Exhibits showed that teachers' reports included data based upon classroom performance, including Student's participation in classroom discussions, and quizzes or other probes that could not be influenced by Student's preparation at home, and were not supported or accommodated in a way that differed from the support and accommodation offered to all other students in the class. These teacher reports were consistent with the results of cognitive testing that indicated no less than average or better cognitive functioning, despite some significant differences in cognitive scores.

The psychologist explained one anomaly in the data on Student's performance, a below-average achievement score in current testing that created a significant and rare disparity between

cognitive ability scores and scores for academic achievement in mathematics. The psychologist credibly and persuasively explained that she discounted this disparity because it was inconsistent with most of the other data in Student's presentation, and because reliance on this one score would be inappropriate reliance upon a single measure to determine eligibility, contrary to the IDEA, 34 C.F.R. §300.304(b)(2).

The psychologist offered the plausible explanation that Student's low score on this test was due to interference in test-taking due to Student's ADHD. Although Parent suggests that this score shows that Student's ADHD interfered with Student's achievement in mathematics, all available data contradicts this theory, and the psychologist's logical conclusion was that ADHD may have interfered with Student's performance in the standardized achievement test, thus obscuring Student's true level of achievement in mathematics.

CONCLUSION

In sum, I find that the District determined appropriately that Student is not eligible for special education and that Parent failed to introduce a preponderance of evidence to the contrary. Therefore, I decline to declare Student to be eligible for special education.

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ORDER

In accordance with the foregoing findings of fact and conclusions of law, the request for relief is hereby DENIED and DISMISSED. 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.

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

October 24, 2015