

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

Student's Name: L.P.

Date of Birth: [redacted]

ODR No. 1729-10-11-KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Sandra Wang, Esquire
1709 Benjamin Franklin Parkway, 2d Floor
Philadelphia, PA 19103

Lower Merion School District
301 East Montgomery Avenue
Ardmore, PA 19003-3338

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Date of Hearing:

June 7, 2011

Record Closed:

June 21, 2011

Date of Decision:

July 6, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible resident of the Lower Merion School District (District), and attended elementary school within the District at all relevant times. (1NT 80-82.)¹ Student is identified with Specific Learning Disability and Speech and Language Impairment, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 *et seq.* (IDEA). (1NT 81-83.) The District filed the present due process request under the IDEA to defend its evaluation after the Parents² requested an independent educational evaluation (IEE). The District asserts that it has evaluated Student appropriately, and Parents assert that the evaluation was not appropriate. In addition, the District asserts that Parents did not disagree with the District's evaluation and thus are not entitled to an IEE.

The hearing was conducted in one session and the record closed upon receipt of written summations.³ I conclude that the District's evaluation was appropriate and that Parents are not entitled to an IEE at public expense.

ISSUES

1. Was the District's evaluation of the Student appropriate?
2. Should the hearing officer order the District to provide an independent educational evaluation at public expense?

FINDINGS OF FACT

¹ This matter was heard partially in conjunction with a previous matter, an expedited hearing on issues involving ESY, dated May 4, 2011, and the transcript of that matter is cited here as "1NT". The transcript of the hearing in the present matter is cited as "2NT". The previous transcript of hearing, (1NT), was incorporated by reference. (2NT 12.)

² In this decision, the Student's Mother will be referred to as "Parent" in the singular, as distinguished from "Parents", referring to Student's Father and Mother.

³ All documents cited during the hearing are admitted in evidence.

1. Student attended four schools, both private and public, prior to registering in the District in July 2010 for fifth grade. (S-8 p. 1-2.)
2. The District evaluated Student in 2005 and identified Student with Other Health Impairment, but found Student ineligible because Student did not need special education services at that time. (P-10.)
3. Between August 2010 and May 2011, District personnel engaged in extensive email correspondence with Parents regarding numerous questions that Parents posed concerning Student's education and the District's evaluation. (S-1 p. 539-545.)
4. On September 4, 2011, Parent signed a permission to evaluate form for Student. This was revised and re-signed by Parent on September 16, 2010. (S-4 p. 3, S-5 p. 2.)
5. On November 9, 2010, District personnel provided an evaluation report (ER) to Parents. (S-8.)
6. The evaluation was performed by a Pennsylvania certified school psychologist with a doctorate in school psychology and more than thirteen years' experience. (S-8, 24.)
7. The evaluator obtained Student's developmental and medical history from Parents. Parents reported a history of possible concussion from a fall, and family history of dyslexia. Parent reported diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and indicated a concern about possible Asperger's syndrome and need for vision correction. (S-8, P-1, P-2.)
8. The evaluator reviewed two previous private evaluations in detail; these had been conducted in July and August 2007 and in August 2008 and included both cognitive and achievement test scores. The evaluator reviewed school records from the Student's previous school, including report card and notes of an end of year parent conference that reflected discussion of strengths, weaknesses and educational needs. (S-8)
9. Early evaluations had provided a history of difficulties with behavior control, defiance and social skills, as well as expressive and receptive speech and academic delays. (P-1, 2, 4, 6, 7, 8, 9, 41, 42.)
10. The District evaluator considered Student's history of behavioral issues in conjunction with contemporaneous reports by teachers and the behavior inventory. The evaluator concluded that there was some ongoing atypical behavior and hyperactivity secondary to ADHD and executive functioning problems, as well as Student's speech and language deficits. The evaluator did not consider the data to require further testing or behavior assessment. (2NT 257, 294-298, 319-20, 328-333, 405-406, 411; S-8 p. 11-13.)
11. Previous evaluations had considered and ruled out a diagnosis on the autistic spectrum. The District's evaluator considered Parental input raising this as an issue and concluded that there was no support for such a diagnosis. (2NT 262- 337; S-8.)

12. The evaluator observed Student in the classroom as did the speech/language evaluator who contributed to the evaluation. (S-8.)
13. The evaluator obtained input from Parents and teachers. (2NT 233-236; S-8.)
14. A District reading specialist tested Student, utilizing multiple testing instruments that addressed reading fluency, comprehension, sight word reading and phonemic decoding efficiency, vocabulary, word identification, and word attack. (S-8.)
15. The evaluator conducted psychoeducational testing in three sessions in October 2010. The evaluator conducted cognitive and achievement testing, utilizing instruments that are valid and reliable for testing cognitive functioning, including multiple sub-tests that address specific areas of strength and weakness. All instruments used were technically sound, properly administered, and utilized according to the publishers' instructions. (NT 322-324, 329-330, 335, 393-394; S-8.)
16. The evaluator administered a behavioral rating scale, obtaining completed checklists from Parents, Student and a teacher. This scale addresses adaptive behaviors, and emotional and behavioral disorders in children. The evaluator also utilized a structured interview form intended to address Student's thoughts and perspectives. (NT 329, 333; S-8.)
17. The evaluation included a speech and language evaluation by a state certified speech and language pathologist with over thirty six years of clinical experience. (S-25.)
18. The speech and language evaluation was completed over four sessions and included checklist information obtained from Parents and a teacher, utilizing multiple checklists. The elicited data addressed language fundamentals, speaking skills, reading, writing, listening and auditory processing, attention, memory, vocabulary, semantics, using language, and pragmatic language. (S-8.)
19. The speech and language evaluator administered multiple standardized tests and screening instruments to Student. (S-8.)
20. The evaluation included an occupational therapy evaluation by a qualified occupational therapist. The evaluation addressed fine motor functioning including handwriting and keyboarding, cutting, functional self help skills, visual motor integration, and sensory needs. The occupational therapy evaluator observed Student in the classroom, and interviewed Student's teacher. The occupational therapy evaluator utilized a variety of instruments, including a standardized developmental test instrument and a sensory profile inventory administered to the Student's teacher. (S-8.)
21. The evaluation considered recent vision and hearing screenings. (NT 335-336; S-8.)
22. The ER identified Student with Specific Learning Disorder and Speech or Language Impairment. It recognized the diagnosis of ADHD and educational needs in the areas of reading, reading fluency, written expression, mathematics problem solving, organization,

self-regulation of attention and behavior, auditory discrimination, language organization and word finding. It found no need for direct occupational therapy services. (S-8.)

23. The ER made recommendations for programming to address academics, sensory needs, executive functioning, auditory discrimination, language organization, vocabulary and word finding, auditory overload, and showing mastery of a subject. (S-8.)
24. The District school psychologist offered to meet with Parents to discuss the ER and it was agreed that they would discuss it at an IEP meeting, which was held on November 18, 2010. (2NT 133-134, 251-252, 291-293; S-8, 10, 11.)
25. The speech pathologist evaluator was not present and was unable to answer Parents' questions about the speech and language part of the report until a meeting on November 30, 2011. The evaluator answered questions then and again answered Parents' questions in March and April 2011. (NT 135-136, 362-368.)
26. Parents signed the ER as agreeing and also signed the NOREP issued after a subsequent meeting on November 30, 2010, agreeing with the NOREP. (2NT 245-246; S-8.)
27. Parent felt uncomfortable signing the NOREP, but did so at the advice of the District personnel and Student's Father in order to get services started for the Student. (1NT 165-166.)

DISCUSSION AND 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.⁴ 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

⁴ 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).

relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁵ 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 District, which initiated the due process proceeding. If the District fails to produce a preponderance of the evidence in support of its claim, or if the evidence is in “equipoise”, the District cannot prevail under the IDEA.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The hearing officer must determine whether or not the District’s evaluation was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311. If the District’s evaluation was appropriate, the Parent is not entitled to an independent educational evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

⁵ 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. Dispute Resolution Manual §810.

The IDEA obligates a local educational agency to conduct a “full and individual initial evaluation” 20 U.S.C. §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether 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). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii).

The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs” 34 C.F.R. §300.304(c)(6). Evaluation procedures must be sufficient to “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need” 34 C.F.R. §300.304(c)(2). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii). Selected instruments should “assess the relative contribution of cognitive and behavioral factors” 20 U.S.C. §1414(b)(2)(C).

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. 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). 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 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 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 agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2).

APPROPRIATENESS OF NOVEMBER 2010 EVALUATION

Here, the District complied with the above legal requirements. The District’s school psychologist was very qualified to design the evaluation and to administer the psychological testing instruments selected for the evaluation, and to compile the report and make recommendations. (FF 6.) Three other qualified District professionals contributed parts of the report.⁶ (FF 14, 17, 20.)

The District utilized a variety of tools and strategies to gather relevant information; the District’s determination of eligibility was not based upon any single measure or assessment. (FF 7, 12, 13, 14, 15, 17, 20, 21.) Standardized instruments were administered to elicit information concerning Student’s cognitive functioning and academic achievement. (FF 15.) The evaluator also reviewed state testing and curriculum based measures of achievement, including Student’s report cards from Student’s previous school. (FF 8.) This information was supplemented with the results of extensive testing and evaluation by private evaluators. (FF 7-9.) Test scores were compared with the results of both standardized and non-standardized checklists and inventories, as well as classroom observations by two different evaluators, clinical observations during testing by three different evaluators, and both written and oral input from teachers. (FF 10, 12-

⁶ I find the District witnesses to be credible, based upon demeanor and consistency with the documentary and testimonial record.

16, 18, 20.) The BASC behavioral inventory addressed adaptive, emotional and social functioning, and the evaluator assessed the relative contribution of cognitive and behavioral factors to the Student's challenging behaviors. (FF 10, 11, 16.) All of these strategies derived information relevant to Student's functional, developmental, and academic functioning.

At the same time, many of the standardized instruments were highly specific to areas of cognitive and perceptual functioning. (FF 15, 18-21.) Thus, test scores pointed to specific areas of weakness, and clinical observations supplemented this data. (FF 12, 13, 15, 16, 18, 20, 22.) The instruments used were technically sound, properly administered, and utilized according to the publishers' instructions. (FF 15.)

The parents were consulted appropriately and offered an opportunity to provide input to the evaluation. (FF 3, 4, 7-11, 13, 18, 24, 25.) The report included review of existing evaluation data provided by the parents and teachers, as well as classroom observations. (FF 7-9, 11-13, 16, 18, 21.) Parents participated in the determination of eligibility. (FF 24, 25.)

I conclude that the ER was individualized for the Student and addressed all suspected areas of disability. It was appropriate to determine eligibility, identified Student's educational needs in detail, and was appropriate to serve as a basis for development of an IEP providing meaningful educational benefit in the least restrictive appropriate setting. (FF 22-23.) The evaluation was sufficiently comprehensive to identify all of the Student's special education and related services needs.

Parents argue that the District's evaluator did not consider prior reports provided by Parents. The evidence is preponderant to the contrary. Parents rely upon the evaluator's statement that more recent evaluations were more significant than the various evaluation reports proffered by the Parents that dated back to the Student's pre-school and early elementary school

years. I conclude that there is nothing legally inappropriate in a qualified psychologist weighing the available data and paying more attention to more recent data, especially in light of the psychologist's rationale – that children change as they grow and develop, especially in their younger years. (FF 7, 9-11.)

Parents argued vigorously that the District's evaluation failed to inquire into whether or not the Student suffers from autism. Again, I reach the opposite conclusion, based upon the preponderance of the evidence. The District evaluator testified extensively and credibly that this was considered carefully, in response to Parents' expressed concerns, and in consideration of early evaluation data that seemed to have addressed the issue. (FF 11.) In the end, the evaluator made a judgment that there was insufficient data to justify further inquiry, and that the data pointed strongly in a contrary direction – that the Student's challenging behaviors and academic delays were related to learning disability, diagnosed ADHD, and problems with receptive and expressive speech and executive functioning. (FF 10.) The law requires no more than a professional review of the available data, and a determination as to whether or not the data require further testing. This was done in the present matter. The qualified professional decided against further testing for defensible reasons, based upon professional judgment. The law does not require more in this situation.⁷

Parents argue that the evaluator should have done additional testing of Student's challenging behaviors. Specifically, Parents argue that the evaluator should have called for or performed a functional behavior assessment, and the evaluator should have given more weight to

⁷ Parents argue that the existing data, which did not include any history of diagnosis of autism, should have engendered further exploration because of the tendency of practitioners not to diagnose autism for fear of stigmatizing the child. I find this unpersuasive, even though Parents may have been told that. The mere hearsay allegation about tendencies in the profession has no evidentiary weight to show that it is true; moreover, even if it is true, that does not divest the District's professional evaluators from the authority to exercise sound judgment about the implications of the data before them.

prior assessments that indicated a history of problematic behavior. Parents rely upon the IDEA's requirement that agencies not rely upon a single instrument or strategy for identification purposes. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2).

Again, the evidence is preponderant that the evaluator exercised professional judgment in determining that no additional evaluative procedures were necessary to identify the Student or to provide a basis for educational planning. The record shows preponderantly that the evaluator considered the history of behavioral difficulties, and weighed that data, remote in time, against the most recent data from the years before the evaluation, and the current reports of Student's teacher. (FF 7-10.) All of the data, taken together, along with the impression gleaned from preliminary discussions with Parents, indicated that Student's behaviors were not as problematic as in Student's early preschool and school years. (FF 10.) Thus, an applied behavior assessment was not indicated, and the evaluator concluded that the challenging behaviors would be attenuated further by a focus upon Student's problems with attention, learning disability and executive functioning. Similarly, as to social skills deficits, the evaluator concluded that these were related to Student's speech and language deficits, and thus would be ameliorated by addressing these perceptual and cognitive functioning weaknesses. I find nothing in the law that forbids such a judgment – indeed, the law requires such a judgment. 20 U.S.C. §1414(b)(2)(C).

This is not a reliance on a single instrument or strategy for identification and programming. Although the only standardized instrument used by the psychologist to address behavioral and social functioning was the BASC, other instruments were used by the speech

pathologist to address behavior and social functioning. Thus, the District's personnel complied with this legal mandate.⁸

Finally, Parents argue that they were forced into signing in agreement with the evaluation report, because the District scheduled the IEP meeting at the same time as the meeting to review the ER, because the speech pathologist was not present to discuss that portion of the ER, and because the District personnel declined to provide services until the NOREP was signed. Again I find that the record preponderates against these contentions.

District personnel admitted that the one hour allowed for the November 18, 2010, meeting would not have been enough time to discuss the ER and to plan the IEP. However, there were two meetings, and the IEP was discussed on November 30, 2010. (FF 24, 25.) Thus, the evidence preponderates against the suggestion that the one hour time frame on November 18 deprived Parents of a meaningful opportunity to participate in the identification decision, or that the time frame created a coercive effect on Parents.

The speech pathologist was not present at the meeting to discuss the ER on November 18, 2010. Thus, the pathologist was unavailable to answer questions at that time. (FF 25.) Parents argue that this deprived them of the participation guaranteed by law. I conclude that this glitch in planning while it did not meet Parents' considerable need to ask questions, did not contravene the District's legal obligations, especially where the pathologist was available by the end of the month to answer all questions.

Parents argue that they were pressured into assenting to the evaluation because, unless they agreed, the District would not begin services. (FF 26, 27.) I do not find this argument convincing. The District could not start services without parental consent; any pressure this

⁸ Parents also suggested that the evaluation failed to consider speech problems, processing speed and reading. I conclude that the ER itself rebuts those contentions and in itself constitutes a preponderance of evidence in favor of the District with regard to them.

engendered was due to the natural consequences of the Parents' need to have questions answered, and was part of the overall exigent circumstances. It was not something that deprived Parents of their legal rights.

PARENTAL DISAGREEMENT WITH THE EVALUATION

The District argues that the Parents never disagreed with the evaluation, and thus do not qualify for an IEE at public expense. In light of the above conclusions, I do not reach this issue.

CONCLUSION

I conclude that the District's evaluation was appropriate; consequently, Parents are not entitled to an IEE at public expense. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's evaluation of the Student was appropriate.
2. The hearing officer will not order the District to provide an independent educational evaluation at public expense.

William F. Culleton, Jr. Esq.

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

July 6, 2011