

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING

ODR File Numbers:

20276-17-18

20287-17-18

Child's Name: S. M. **Date of Birth:** [redacted]

Dates of Hearing:

4/9/2018

Parents:

[redacted]

Counsel for Parent

Jonathan D. Steele, Esquire
428 Forbes Avenue, Suite 700
Pittsburgh, PA 15219

Local Education Agency:

Woodland Hills School District
531 Jones Avenue
North Braddock, PA 15104

Counsel for the LEA

John T. Vogel, Esquire
David J. Mongillo, Esquire
1500 One PPG Place
Pittsburgh, PA 15222

Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 4/29/2018

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is an early elementary school-aged student in the Woodland Hills School District (District). After the District conducted a special education evaluation of Student that found Student not eligible for special education, the Mother requested an Independent Educational Evaluation (IEE) at public expense.² The District denied that request, and both parties filed Due Process Complaints to resolve that dispute.³

The case proceeded to a due process hearing that concluded in an efficient single session.⁴ The Mother sought to establish that the District's evaluation of Student was not appropriate under the applicable law, while the District maintained that it complied with all of the IDEA requirements and no remedy was due.

For the reasons set forth below, the District will be ordered to provide an IEE of Student at public expense.

ISSUES

1. Whether the District's evaluation of Student was appropriate and compliant with the requirements in the IDEA and Chapter 14?

¹ In order to provide confidentiality and privacy, Student's name, gender, and other personal information are not used in the body of this decision to the extent possible. All potentially identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² This request was made pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, and its implementing regulations codified in 34 C.F.R. §§ 300.1 – 300.818. The specific provision for an IEE is found at 34 C.F.R. § 300.502. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ Hearing Officer Exhibit (HO)-1 consolidated the Complaints on joint request of the parties. To accommodate scheduling needs, the decision due date on the District Complaint was extended, also on joint request, to coincide with that initially calculated for the Parent-filed Complaint.

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number.

2. If the District's evaluation was not appropriate, should the District be ordered to provide an Independent Educational Evaluation at Public Expense?

FINDINGS OF FACT

1. Student enrolled in the District in September 2016. (N.T. 44, 46)

EDUCATION AND EVALUATION HISTORY

2. Student was privately evaluated in the spring of 2015. A report of that evaluation included information from Student's teachers. (S-24)
3. The private psychologist described Student's limited attention span and impulsivity during testing, but given a distraction-free testing situation, concluded that the results were a fair and accurate representation of Student's functioning. (S-24 pp. 3-4)
4. Cognitive assessment (Woodcock-Johnson Tests of Cognitive Abilities – Third Edition Normative Update) revealed a General Intellectual Ability quotient in the above average range (117) but with “*significant variability*” among the Indices. (S-24 pp. 4-5 (emphasis in original)).
5. Academic achievement (Woodcock-Johnson Tests of Achievement – Third Edition Normative Update) in the private evaluation revealed average to well above average reading skills and well above average overall mathematics skills. (S-24 pp. 5-7)
6. Student's social/emotional/behavioral functioning were assessed for the private evaluation using a variety of rating scales and instruments. The private psychologist determined that Student demonstrated weak attention and executive functioning skills, as well as impulsivity, consistent with an Attention Deficit Hyperactivity Disorder (ADHD) diagnosis. (S-24 pp. 7-18)
7. The private psychologist concluded that Student met criteria for ADHD. He made a number of recommendations for educational programming, including development of an Individualized Education Program (IEP). (S-24 pp. 18-20)
8. [redacted]
9. [redacted]
10. [redacted]
11. [redacted]
12. [redacted]
13. [redacted]

2017 EVALUATION

14. On October 10, 2017, the Mother requested an evaluation of Student for special education services. (S-1)
15. [redacted]
16. Student's Parents were going through a contentious divorce at the time of the District's evaluation. (N.T. 185)
17. The school psychologist who conducted the evaluation has a doctoral degree in school psychology as well as an undergraduate and master's degrees in psychology. She considers parental input to be important, especially with evaluations that were requested by parents. (N.T. 18, 20-21)
18. The District proposed to conduct a review of records, assessment of Student's cognitive ability and academic achievement, and one or more observations; it also sought to obtain parent and school input, behavior rating scales. (S-3)
19. [redacted]
20. When the Parent's request for evaluation was received, the school psychologist compiled packets to send to each Parent that included a permission to evaluate consent form, a parent input form, and the procedural safeguards notice in addition to the BASC-3 Parent Rating Scales. (N.T. 25-26; S-2)
21. Both Parents provided consent to the evaluation. (N.T. 193; S-3)
22. The District sought to obtain Parent Rating Scales from the Behavior Assessment System for Children – Third Edition (BASC-3) from both Parents, in part to consider whether symptoms of other conditions might impact Student at school. (N.T. 22-23)
23. The District's parent input form seeks information on developmental and family history, medical information, and the parents' views of the child's strengths and needs across environments. (N.T. 21)
24. The Father returned the completed forms and BASC-3 Rating Scales on or about November 1, 2017. His input form listed his view of Student's strengths and weaknesses, behavioral and academic input, and answered questions about medical and developmental history. He noted a number of academic and other strengths with reading/English Language Arts as a weakness. There were also spaces for additional comments, and the Father mentioned divorce and custody issues as impacting Student. (N.T. 32-33; S-8; S-11)
25. The Mother returned her completed BASC-3 Parent Rating Scale and input form by dropping them off at the administration building sometime after providing the signed Permission to Evaluate form. (N.T. 193-94)

26. The school psychologist did not receive the Mother's parent input form or BASC-3 Rating Scales. The school psychologist did not notice that the Mother's information was missing until she was writing the report. (N.T. 34, 36, 40-41, 99)
27. The school psychologist believed that the Mother's concerns had been expressed in another meetings, and further that her concerns were similar to those of the Father. (N.T. 100)
28. The school psychologist did not review any previous evaluations, or summaries of previous evaluations, for Student before completing the ER. (N.T. 147-48, 160-61, 173, 180-81)
29. The Father returned the completed forms and Rating Scales on or about November 1, 2017. (N.T. 32-33; S-11)
30. No classroom observation was conducted by the District school psychologist. (N.T. 138-39, 142)
31. The ER is dated December 20, 2017 and the reason for the referral is stated to be a parental request. The ER was provided to the Parents on December 21, 2017. (S-14 p. 1; S-15)
32. The Parent Input section of the ER includes the Father's information, including strengths, areas of need, and social skills. (S-14 p. 2)
33. The ER does not reflect that Mother's input is not provided except that she had completed the BASC-3 rating scales but they had not yet been received. (S-14)
34. The ER notes that Student received early intervention services in speech/language. (S-14 p. 5)
35. The ER summarizes input from Student's general education teacher. Student reportedly demonstrated strengths and needs in different areas of reading and mathematics, exhibiting difficulty with reading fluency, reading comprehension, and reading independently, and in written expression. Another area of concern was Student's attention to details. (S-14 pp. 2-4)
36. Cognitive ability was assessed with the Fifth Edition of the Wechsler Intelligence Scale for Children – fifth Edition (WISC-V). Student's scores were in the average on all composites with a Full Scale IQ (104) average range at the 61st percentile. The results indicated consistent ability across domains, with relative strengths on the visual spatial and processing speed Composites. (S-14 pp. 7-8)
37. On an administration of select subtests of the WIAT-III, Student scored in the average range on all subtests and composites, with the exceptions of the pseudoword decoding subtest where Student scored in the low average range. (S-14 pp. 8-10)

38. The school psychologist concluded that any discrepancies between Student's cognitive ability and academic achievement was not significant. (N.T. 85, 163-71)
39. The ER provided results of the Father's BASC-3 Rating Scales, revealing at-risk concerns with Anxiety and Atypicality. Student's teacher also completed BASC-3 rating scales that reflected no concerns. (S-14 p. 10)
40. The ER provided teacher recommendations on strategies that have been beneficial for Student, including extended wait time, preferential seating, checks for understanding, use of manipulatives, repeated directions and reading, and accommodations for mathematics instruction and assignments. (S-14 p. 4)
41. The ER summarizes Student's developmental and medical background, and indicates that adaptive behavior skills were not noted to be of concern. (S-14 pp. 4-5)
42. Under the section for review of Student's academic records, Student's attendance was noted for more than 25 days of absence during the 2016-17 school year and 5.5 absences through the date of the ER for that school year. There were no disciplinary referrals. No other academic information was included. (S-14 pp. 4-5)
43. On state and local assessments, the ER reflected that Student was near or at grade level in mathematics and reading, with the exception of vocabulary where Student was more than one grade level below expectations. On the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), Student's performance was variable, ranging from well below benchmark on nonsense word fluency to above benchmark on oral reading fluency accuracy. (S-14 pp. 4-6)
44. The ER concluded that Student did not have a disability and was not eligible for special education, including on the basis of a Specific Learning Disability. (S-14 pp. 11-14, 16-20)
45. Upon receipt of the ER, the Parent expressed concern that her input was not included. The school psychologist offered to include a narrative of her input, but that a "final conclusion" had already been reached within the sixty day timeline. (S-28; S-29; S_30)
46. A meeting convened to review the ER. The Father attended the meeting. The Mother did not attend the meeting but had advised that she would not. (N.T. 41-42, 43, 179)
47. The District issued a Notice of Recommended Educational Placement (NOREP) to both Parents on January 26, 2018, recommending general education programming. The Father approved the NOREP. (N.T. 42-43; S-14 pp. 21-26)
48. Following completion of the ER, the Mother requested an IEE at public expense. (N.T. 195)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education cases, the burden of persuasion generally lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). There were two Complaints filed, one filed by each party; this hearing officer assigned the burden of persuasion to the District because, as discussed below, the law imposes an obligation on it to defend its evaluation when it refuses a parents' request for an IEE. It is also important to note that application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise," and the outcome is much more frequently determined by a preponderance of the evidence.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found both of the witnesses to be credible, each testifying to the best of her recollection from her own perspective; in addition, there were few if any real inconsistencies in the testimony. In reviewing the record, all of the testimony and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' closing statements.

IDEA PRINCIPLES: CHILD FIND AND EVALUATION

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all children who qualify for special education services. 20 U.S.C. §1412. The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The statute itself 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 IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a).

In conducting the evaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

(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. §§ 300.304(b). 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). 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). In Pennsylvania, school districts are required to provide a report of an evaluation within sixty days of receipt of consent excluding summers. 22 Pa Code § 14.123(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

When parents disagree with a school district’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). When such a request is made, the LEA 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). Here, the Mother disagreed with the ER and sought an IEE at public expense, and the District refused; thus, the District had the burden of establishing that its evaluation was appropriate.

The ER reflects assessment of Student's cognitive ability and academic achievement. The District school psychologist also considered and summarized the available historical information, as well as input from professionals who worked with Student at school. Nevertheless, there are also flaws. There was no observation of Student conducted. Only summaries of previous outside evaluations were available and therefore the complete contents could not be considered. There are no direct teacher recommendations. The ER as a whole focused on Student's overall good academic performance without any true consideration of how behaviors, such as exhibiting difficulty with attention to detail, could be impacting Student's education. Finally, one of the most critical flaws in the District's ER is that it did not have input from Student's Mother as part of the evaluation process, who made the request in the fall of 2017, and who undoubtedly could have provided significant and useful information about Student's strengths, needs, and abilities. Even the District school psychologist acknowledged the importance of that type of input.

While it is perhaps understandable that the District school psychologist did not realize that the Mother's input had not been received until the ER was nearing completion, it is perplexing that the Mother was effectively discouraged from providing any current information since report was already "final" at that time. Compliance with the sixty calendar day deadline that local educational agencies are required to meet when conducting an evaluation unquestionably elevated form over substance and risked an incomplete, non-comprehensive evaluation.

There can be no question that a major premise of the IDEA is that parents must be permitted to participate meaningfully in making educational decisions about their children, and that they serve "a significant role" in that process. *Schaffer, supra*, at 53. They are also part of

the team that determines eligibility. Thus, ensuring meaningful parent participation in the evaluation process is critical to ensuring compliance with the mandates in the IDEA. Here, the Mother as the Parent who requested the evaluation was effectively denied the opportunity to be part of the team deciding the crucial question of eligibility since that determination had already been made. This flaw is fatal to Student's ER and, accordingly, an IEE must be provided by the District.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, Student must be provided an IEE at public expense.

ORDER

AND NOW, this 29th day of April, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Student must be provided with an Independent Educational Evaluation at public expense.
2. Within ten calendar days of the date of this Order, the District shall provide to both Parents a list of not less than three local qualified individuals to perform an Independent Educational Evaluation.
 - a. Student's Mother shall make the decision on the individual to perform the Independent Educational Evaluation.
 - b. If the Mother does not notify the District, in writing, of her selection within ten calendar days of sending her the list, the District shall make the selection from that same list.
 - c. The selected evaluator shall be given access to Student's education records, and shall determine the scope of the evaluation.
 - d. The selected evaluator shall provide a written report of his or her Independent Educational Evaluation within a reasonable time, not to exceed 45 calendar days from the date of engagement, unless otherwise agreed by the parties. The Independent Educational Evaluation Report shall be provided to both Parents and the District.
 - e. The Independent Educational Evaluation shall be at public expense.

3. Following completion of the Independent Educational Evaluation Report, and within fifteen calendar days of receipt by the District, a meeting shall be scheduled with the Parents to consider the Report and all other relevant information in order to make a determination on eligibility. The meeting shall be held at a time that is mutually agreeable to both Parents.
4. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

ODR File Nos. 20276-1718KE
 20287-1718KE