

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:

20277-17-18

20286-17-18

Child's Name: J. M.

Date of Birth: [redacted]

Date of Hearing:

4/9/2018

Parents:

[redacted]

Counsel for Parent

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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 a mid-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)

EVALUATION AND EDUCATIONAL HISTORY

1. Student was privately evaluated in the spring of 2013. A report of that evaluation included information from Student's teachers from the fall of 2013. (S-21)
2. 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-21 pp. 3-4)
3. Cognitive assessment (Woodcock-Johnson Tests of Cognitive Abilities – Third Edition Normative Update) for the private evaluation revealed a General Intellectual Ability quotient in the average range (96) but with “*significant* variability” among the Indices. (S-20 pp. 4-5 (emphasis in original)).
4. Academic achievement (Woodcock-Johnson Tests of Achievement – Third Edition Normative Update) in the private evaluation revealed overall below average reading skills and average overall mathematics skills. (S-21 pp. 6-7)
5. Student's social/emotional/behavioral functioning was 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-21 pp. 7-19)
6. The private psychologist concluded that Student exhibited a Reading Disorder in addition to ADHD. He made a number of recommendations for educational programming, including development of an Individualized Education Program (IEP). (S-21 pp. 19-21)
7. [redacted]
8. [redacted]
9. [redacted]
10. [redacted]

11. [redacted]
12. [redacted]
13. The District developed a Section 504/Chapter 15 Service Agreement for Student in January 2017 to address Student's ADHD and reported Dyslexia. The accommodations were for: small group reading instruction; re-reading content with explanation provided; multi-sensory approaches with visual and manipulative materials; assignment accommodations; differentiated instruction; and small group and open-ended problem solving activities. The Parent requested a number of additional accommodations. (S-22)

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 are requested by parents. (N.T. 18, 20-21)
18. The District proposed to conduct a review of records to include academic performance, state and local assessments, parent and school input, and previous evaluations, as well as assessment of Student's cognitive ability and academic achievement; it also sought to obtain behavior rating scales and one or more observations. (S-5)
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 Behavior Assessment System for Children – Third Edition (BASC-3) Parent Rating Scales. (N.T. 25-26; S-2)
21. Both Parents provided consent to the evaluation. (N.T. 193; S-5)
22. The District sought to obtain Parent Rating Scales from the 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 his completed form 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-7; S-10)
25. The Mother returned her completed BASC-3 Rating Scales 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 reviewed summaries of previous evaluations for Student before completing the ER. (N.T. 96, 147, 154, 180-81)
29. At a meeting of Student's Service Agreement team on October 23, 2017, the participants including both Parents decided to postpone the evaluation so that cognitive testing (the Fifth Edition of the WISC (WISC-V)) could be repeated, having last been done in December 2016. The school psychologist preferred to re-administer the WISC-V rather than a different cognitive instrument. (N.T. 26-29, 182-83; P-1; S-5)
30. No classroom observation was conducted by the District school psychologist. (N.T. 138-39, 142, 160)
31. The ER is dated December 23, 2017 and the reason for the referral is stated to be a request of the Mother. The ER was provided to the Parents on December 23, 2017. (S-13 p. 1; S-17)
32. The Parent Input section of the ER includes the Father's information, including strengths, areas of need, and social skills. Input into a previous evaluation from both Parents is also included. (S-13 pp. 2-3)
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-13)

34. The ER mentions that Student was previously evaluated outside of the District and notes diagnoses of Dyslexia and ADHD. That evaluator had reported average cognitive ability with some variability among subtests. (S-13 pp. 1, 3, 4, 7)
35. The ER summarizes results of a previous District evaluation, including the cognitive and achievement testing that had been conducted. (S-13 p. 7)
36. The ER summarizes input from Student's general education teacher. Student reportedly demonstrated difficulty with reading comprehension but a relative strength in mathematics; attention to details were a concern. (S-13 p. 3)
37. Cognitive ability was assessed for the ER with the WISC-V. Student's scores were in the average on all composites with the exception of an above average score in Processing Speed. The Full Scale IQ (103) was average at the 58th percentile. The results indicated that processing speed was a relative strength for Student. (S-13 pp. 8-9)
38. 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; on several subtests in the Math Fluency Composite, Student attained scores in above average range that also yielded an above average Composite score. (S-13 pp. 9-10)
39. Student exhibited preoccupation during the testing with the District school psychologist. (N.T. 152)
40. The school psychologist did not assess Student's executive functioning skills, attributing any such difficulties to Student's ADHD that were addressed by the Service Agreement. (N.T. 152-56)
41. The ER provided results of the Father's BASC-3 rating scales, revealing clinically significant concerns with Anxiety, and at-risk concerns with Withdrawal, Hyperactivity, and Conduct Problems. Student's teacher also completed BASC-3 rating scales that reflected at-risk concerns with Learning Problems, Depression/Aggression, Hyperactivity, and Adaptability, but due to inconsistency, those teacher results were interpreted with caution. (S-13 p. 11-12)
42. The BASC-3 Teacher Rating Scale revealed inconsistencies in the results. (N.T. 157-59)
43. There are no teacher recommendations in the ER, but the document gleans from their input that Student should continue to receive the accommodations in the Service Agreement and should improve reading comprehension. (S-13 p. 3)
44. The ER summarizes Student's developmental and medical background, and indicates that Student receives medication for ADHD symptoms. Adaptive behavior skills were not noted to be of concern. (S-13 pp. 3)

45. The ER summarizes portions of Student's academic records, setting forth the accommodations in the Service Agreement. Student's attendance was noted for more than 23 days of absence during the 2016-17 school year and 4 absences through the date of the ER for that school year. There were no disciplinary referrals. (S-13 pp. 4-5)
46. On state and local assessments, the ER reflected that Student was near or at grade level in mathematics but well below grade level in reading. However, on the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), Student was at or above benchmark on oral reading fluency. Student had scored in the proficient range on the Pennsylvania System of School Assessment the prior school year. (S-13 pp. 5-7)
47. The school psychologist concluded that any discrepancies between Student's cognitive ability and academic achievement was not significant. (N.T. 75-76, 149-51)
48. The ER concluded that Student had a disability but did not need specially designed instruction and was therefore not eligible for special education, including on the basis of a Specific Learning Disability. (S-13 pp. 13-15, 17-21)
49. 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)
50. 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. 41-43, 179)
51. 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-13 pp. 22-27)
52. 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 appropriate academic performance without any true consideration of how behaviors, such as exhibiting difficulty with attention to detail, could be impacting Student’s education. No assessment of Student’s executive functioning was conducted, despite

indications in a previous evaluation of such needs. 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. 20277-1718KE
 20286-1718KE