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Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING
ODR File Number: 21222-18-19 AS

Child's Name: I.S.

Date of Birth: [redacted]

Parent:
[Parent]

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Hearing Officer: Linda M. Valentini, Psy.D
Certified Hearing Official

Date of Decision: October 25, 2018

Background

The Child¹ is a kindergarten-aged child enrolled in the District. The Child is identified as eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq.* (Chapter 14), as a child with other health impairment. As such, the Child is also regarded as an “individual with a disability” as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and as a “protected handicapped student” under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

The District requested this hearing to defend its speech/language and occupational therapy evaluations in response to the Parent’s request for independent evaluations in these two areas.

In light of the evidence before me I find in favor of the District in part and the Parent in part, and have also fashioned a remedy that I believe is needed to clarify the Child’s special education classification and needs.

Issues

Was the District’s speech/language evaluation of the Child appropriate?

Was the District’s occupational therapy evaluation of the Child appropriate?

Background

Prior to entry into kindergarten the Child received preschool early intervention services beginning about age three. At that time concerns about behavior were predominant and there were also concerns about possible autism. [NT 9]

The District conducted a transition evaluation and found the Child eligible for special education services under the disability classification of other health impairment, primarily based upon behavioral and emotional concerns. [NT 9; S-1]

The Child was not found to meet the criteria for school-based speech/language or occupational therapy services. [NT 9]

The Child was also not found to meet the criteria for autism. [NT 10]

¹ In the interest of confidentiality and privacy, the Child’s name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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).

In late August 2018, the Parent informed the District that she was requesting independent evaluations in speech/language and occupational therapy. The District declined, and initiated this due process hearing. [NT 10]

Findings of Fact

Speech/Language Evaluation

1. The District speech/language therapist who evaluated the Child is qualified by education, training and experience to administer and interpret speech/language assessments. The Parent does not challenge the speech/language therapist's credentials. [NT 26-32]
2. The District's speech/language assessment included multiple data points. The speech/language therapist observed the Child in the preschool setting, solicited written and verbal input from the preschool teacher and the Parent, and consulted with the early intervention speech/language therapist. [NT 32-34]
3. The early intervention Individualized Family Service Plan (IFSP) and the consultation with the early intervention speech/language therapist yielded the information that the Child was achieving/had achieved mastery of IFSP speech goals such that early intervention speech services had been reduced. [NT 36-38; S-3]
4. The speech/language therapist utilized two formal assessment tools: the Preschool Language Skills – Fifth Edition (PLS-5) and the Sampling Utterances and Grammatical Analysis Revised (SUGAR). [NT 34]
5. The speech/language therapist also utilized informal assessments consisting of a brief oral-motor examination and direct observation. [NT 35, 52]
6. Through formal and informal assessments the speech/language therapist collected data on the Child's voice, fluency, and articulation. She evaluated the Child's pragmatic language skills, including social interaction. She evaluated the Child's receptive and expressive language skills. [NT 35]
7. Due to some refusals in cooperate, the Child's PLS-5 scores underestimated the Child's actual level of functioning; direct observation found that skills that were not able to be assessed formally were indeed present. [NT 49]
8. The speech/language therapist informed the Parent that the Child's expressive and receptive language skills were a strength and that speech/language services would not be necessary in kindergarten. [NT 54]
9. The speech/language therapist did recommend that the team monitor the Child to ensure that there was not the need to implement any additional supports should anything arise in the school year once school began. [NT 58]

Occupational Therapy Evaluation

10. The District occupational therapist who evaluated the Child is qualified by education, training and experience to administer and interpret occupational therapy assessments. The Parent does not challenge the occupational therapist's credentials. [NT 124-130]
11. The occupational therapist reviewed the Child's early intervention records, and obtained input from the Parent and the preschool teacher. She did not consult with the early intervention occupational therapist. [NT 131, 190-191]
12. From the early intervention IFSP the occupational therapist gleaned the information that the Child's occupational therapy services had been decreased based upon a goal of manipulating fasteners and she believed the Child's sensory regulation had also improved. [NT 133; S-3]
13. The occupational therapist attempted to administer a formal criterion-referenced assessment instrument, the Learning Accomplishment Profile – Third Edition (LAP-3), but the Child was not adequately cooperative. She then used the LAP-3 as a guide for an observation of the Child in order to obtain a functional assessment and relied on her clinical judgement to determine the Child's abilities. [NT 131-132, 143-146, 154, 169-170, 172]
14. Even though the Child was observed to do tasks assessed by the LAP-3 in the preschool setting the occupational therapist did not use these observations to complete the LAP-3 and derive a score. [NT 148]
15. Although the Child refused some tasks, the Child succeeded on every LAP-3 task attempted. It is "probably" permissible for a child to be credited on the LAP-3 for accomplished tasks that are observed in the classroom but not necessarily done at the table during the LAP-3 administration. The occupational therapist chose not to score the LAP-3. [NT 203-205]
16. The occupational therapist did not reference the LAP-3 in the portion of the evaluation to which she contributed. [NT 172, 178]
17. Although she observed the Child being able to reproduce shapes such as are presented on the Beery Developmental Test of Visual-Motor Integration (Beery VMI), a formal standardized assessment tool, the occupational therapist chose not to administer the Beery due to "the Child's frustration level". [NT 170, 173-174]
18. The occupational therapist assessed the Child's fine motor skills, visual motor /visual perceptual skills and transitioning skills. [NT 132-133]
19. The occupational therapist focused on the Child's skills in accessing fine motor tools, such as scissors, crayons, pencils, and puzzles, as well as on the Child's self-help skills. [NT 140]

20. The occupational therapist determined that the Child was not eligible for occupational therapy services because the Child displayed to her all the “necessary fine motor skills, visual motor skills, and perceptual skills to access the kindergarten curriculum”. [NT 158]
21. Although the occupational therapist testified she assessed attention skills she did not do so in any formal objective manner. [NT 140, 179]
22. The occupational therapist testified that she assessed the Child’s sensory issues, but aside from personally observing that there seemed to be no sensitivity to the noise in the preschool environment during the two hours she was there, it is unclear what other sensory concerns, if any, were assessed given that she testified that she did not observe any sensory deficits. [NT 132-133, 142, 153]
23. Although she could have used the Sensory Processing Measure – Preschool, a norm-referenced assessment of sensory integration and sensory processing that was available to her and used in the District when an autism diagnosis is suspected, the occupational therapist did not use this instrument to assess the Child’s sensory processing. Using this tool, she could have formally assessed the Child’s social participation, five sensory systems, and motor planning. [NT 187-188]
24. The occupational therapist could also have used but did not use the Sensory Profile Assessment, a teacher checklist instrument that identifies a child’s deficits and yields a score without depending on a child’s cooperation in an assessment. [NT 188-189]
25. The occupational therapist reviewed the Parent Input Form which conveyed the information that the Child is “overwhelmed by stimulating situations where there is too much noise, too many people in a small space, etc. This overstimulation changes [the Child’s] behavior in a negative way, and [the Child] is much more likely to behave inappropriately”. [S-6]
26. The Parent also wrote that, the Child has a “strong preference for silence in the home (no music or dancing allowed!), dislikes live performance. [The Child] has an incredible memory and has memorized dozens of books”. [S-6]
27. Input from the preschool teacher who works with the Child three days per week included the information that the Child struggles with loud noise, such as rolling wheels in the gym, crying or screaming children, as well as loud bangs. [NT 164; S-1]
28. The preschool teacher utilized strategies including calm-down techniques, avoiding noise triggers, wearing headphones, and taking a break to assist the Child in dealing with sensitivity to auditory over-stimulation. [NT 165; S-1]
29. The preschool teacher noted that on a bad day the Child usually reacted negatively to a change in routine, and reacted to children getting too close, and that typical reactions to these sensory triggers were the Child’s screaming or growling. [NT 167-168; S-1]

Possible Autism Spectrum Disorder

30. Although the Child was “developmentally advanced with regard to [the Child’s] language skills”, at approximately age 2, the mother noted, “in hindsight [the Child] appeared to be less engaged with [the Child’s] parents than most other 1-2 year old children typically are with their parents”. [S-1]
31. In addition to sensory processing issues (loud noise, certain other noises, crowds and close physical contact with peers), the Parent notes that the Child “is primarily interested in mechanical systems, biological phenomena, robots, solar systems ... how things work, NOT interested in games, competition of any kind (emphasis in the original).” [S-6]
32. The Child’s mother noted that the Child “clearly views the world as a series of “scripts” and if these “scripts” (or rules) are deviated from [the Child] gets angry”. [S-1]
33. The District’s Reevaluation Report notes, “[the Child’s] teacher has expressed concerns that [the Child] uses scripted language out of context², shows little interest in engaging with peers, and that [the Child] has physical reactions when overwhelmed such as throwing [] self onto a student upset that its (sic) not [the Child’s] turn, runs across the room when the noise level is increased”. [S-1]
34. The Child communicates well with adults but not with peers. [S-1]
35. On the Social Responsiveness Scale (SSR-2) completed by the Parent the Child’s Total T-Score was 66, in the Mild/Moderate Range. Four of the six T-scores on the SRS-2 were in the Mild, the Mild/Moderate, or the Moderate range with only two T-scores being in the normal range (Social Awkwardness and Social Motivation). [S-1]
36. On the Social Responsiveness Scale (SSR-2) completed by the Teacher the Child’s Total T-Score was 98, in the Moderate Range. Four of the six T-Scores were in the Moderate Range with two T-sores being Normal (again, Social Awkwardness and Social Motivation). [S-1]
37. Overall the Teacher ratings reflected higher ranges of dysfunction than the Parent ratings. [S-1]
38. On the Social Communication Questionnaire – Lifetime (SCQ) the Parent’s ratings yielded a Total Raw Score of 11 (Normal) where the cut-off score was 15 or higher. [S-1]
39. On the Social Communication Questionnaire – Lifetime (SCQ) the Teacher’s ratings yielded a Total Raw Score of 13 (Normal) where the cut-off score was 15 or higher. [S-1]

² At various points in the District’s speech/language therapist’s testimony she stated the preschool teacher reported that these scripted comments were in an appropriate context. This contradiction was not picked up during the hearing by either attorney or the hearing officer.

40. Again the Teacher ratings reflected a higher level of concerns than the Parent ratings. [S-1]
41. The District psychologist utilized the Childhood Autism Rating Scale – High Functioning Version. The Child’s Total Raw Score was 18.5 (Minimal Symptoms) where 0-14 represents No symptoms, 15-27.5 represents Minimal symptoms, 28-33.5 represents Mild to Moderate symptoms and 34 or higher represents Severe symptoms. [S-1]
42. On the Behavior Assessment Scale for Children – Third Edition (BASC-3) responses were consistent across Parent and Teacher ratings, again with Teacher ratings reflecting higher levels of concern. The Teacher Behavioral Symptom Index was at the 95th percentile while the Parent Behavioral Symptom Index was at the 80th percentile. [S-1]
43. The District psychologist noted in the Reevaluation Report, “Diagnostic formulation of the current test data was unable to provide a definitive diagnosis of Autism due to [the Child’s] highly significant and overarching social-emotional deficits specific to Anxiety, Depression and Disruptive Mood Dysregulation Disorder. Therefore while [the Child] does present with some mild behavioral features which are typical of students diagnosed with Autism [the Child] does not meet all diagnostic criteria for Autism”. [S-1]
44. The District psychologist recommended that, “[the Child’s] parent may also wish to seek out a more comprehensive evaluation which seeks to establish a differential diagnosis (of Autism) for the purposes of home-based intervention”.
45. The District psychologist also noted possible symptoms of a Sensory Processing Disorder and/or sensory sensitivity and in addition to suggesting that the team consult with the occupational therapist, also suggested that the “parents may, once again, wish to seek a differential diagnosis with regard to [the Child’s] reported sensory sensitivity in order to determine whether such sensitivities are neurologically or emotionally based. This differentiation is key in determining appropriate intervention.”

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the District asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of

judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also* generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). None of the three witnesses presented credibility issues. Each appeared to be testifying candidly and were cooperative with both counsel.

FAPE: The Child is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). ‘Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26. FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982).

IDEA Comprehensive Assessment Criteria and Standards: The IDEA sets forth three broad criteria that the local educational agency must meet when evaluating a child's eligibility for services under the IDEA. First evaluators must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[may] not use any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. *Id.* § 1414(b)(2)(B). And third, the district must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." *Id.* § 1414(b)(2)(C).

The intertwined subparts of the IDEA regulations impose additional criteria that school officials must meet when evaluating a child to determine if the child has a disability. A child's initial evaluation or reevaluation consists of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments and classroom based observations, and observations by teachers and other service providers. 34 C.F.R. § 300.305(a)(1). Second, based on their review of that existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." *Id.* §

300.305(a)(2)(c). Under the first step of the analysis, the district is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." *See id.* § 300.304(b). All the assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1). In combination, these well-established criteria have the effect of ensuring the evaluation either confirms or rules out the student's potential disabilities, identifies the student's individual circumstances and examines whether the child is in need of specially-designed instruction.

Discussion

Speech/Language: As the facts enumerated above show, the speech/language evaluator utilized multiple assessment criteria including record review, teacher input, early intervention speech/language therapist input, parent input, direct observation, and formal assessment. Her thorough evaluation met all applicable criteria for an evaluation and the results were consistent with input from the teacher and the Parent, both of whom have prolonged contact with the Child. Her prudent foresight in recommending that the IEP team monitor the Child's speech/language needs on an ongoing basis reflected appropriate caution and, frankly, refreshing professional humility in the case of a very young child transitioning to a considerably different environment. The District's speech/language evaluation was appropriate and there are no grounds upon which I can order an IEE in this area.

Occupational Therapy: The facts enumerated above show that the occupational therapist relied heavily on her own clinical judgment, which is an important tool in any evaluator's set of resources. Her conclusions were not supported, however, by other confirming data. In reviewing the early intervention record, she did not speak with the Child's then-current treating occupational therapist. She did not derive any formal scores for the Child: She did not attempt scoring of the LAP-3, even though she admitted that she "probably" could have obtained a score; she did not attempt to administer the Beery, even though she observed the Child completing tasks identical to items on the Beery; she did not utilize an instrument that did not depend at all on the Child's cooperation but rather could have gathered data from the teacher. Of most consequence, she did not give evidence of seriously considering the teacher's and Parent's input regarding noise sensitivity, but rather relied on her own 2-hour observation of the Child's response to noise on what was likely one of the Child's "good days". Further, she did not attempt to explore sensory processing / sensory sensitivity in any other of the five senses.

In compiling the reevaluation report the District's psychologist reported the Child's sensory sensitivity and acknowledged "possible symptoms of a Sensory Processing Disorder and/or sensory sensitivity" and suggested that the IEP team consult with the occupational therapist. He also suggested that the "parents may...wish to seek a differential diagnosis with regard to [the Child's] reported sensory sensitivity in order to determine whether such sensitivities are neurologically or emotionally based. This differentiation is key in determining appropriate intervention." If a determination of whether or not the Child has a sensory processing disorder is "key" to planning "appropriate intervention" it is the District, and not the Parent, who is responsible for obtaining further diagnostic information. The District's occupational therapy evaluation was inappropriate and the District will be ordered to fund an IEE in this area.

Possible Autism Spectrum Disorder: The record contains a number of red flags that require a more thorough exploration of a possible classification of autism. The Parent noted concerns about early attachment/relationships to the Parents. There were references to concerns about autism at the time of early intervention. The Parent Input form contains a number of characteristics commonly observed in children with an autism spectrum disorder: primarily interested in mechanical systems, biological phenomena, robots, solar systems, how things work; not interested in games or competition of any kind; views the world as a series of “scripts” and if these “scripts” (or rules) are deviated from [the Child] gets angry”. The Child tends to prefer playing alone in the preschool classroom. Both the teacher and the Parent note considerable sensitivity to noise. The teacher and the Parent completed survey questionnaires that closely approached, but did not quite reach, threshold criteria for an autism classification.

After reporting the results of his exploration of a possible autism classification, the psychologist concluded that the Child does not meet the criteria for an autism classification, but recommended that, “[the Child’s] parent may also wish to seek out a more comprehensive evaluation which seeks to establish a differential diagnosis (of Autism) for the purposes of home-based intervention”. If the Child has autism spectrum disorder issues will be present in the school setting as well as at home, and the IEP team is required to consider school-based interventions. Again, it is the responsibility of the District, and not the Parent, to provide a comprehensive assessment of a child’s disabilities for purposes of educational planning.

The “gold standard” for diagnosing autism is the ADOS-2. This is an instrument that is well researched, and evaluators undergo extensive training in its administration and interpretation. I will order that the Child receive an ADOS-2 evaluation. If the District has a properly credentialed individual who can provide this evaluation, the District may use this person (See <https://cnbd.umn.edu/sites/cnbd.umn.edu/files/ados-2-training-and-reliability-process.pdf>. Last visited on October 25, 2018). If the District does not have a properly credentialed individual the Parent may obtain an ADOS-2 at the District’s expense.

Order

It is hereby ordered that:

1. The District’s speech/language evaluation of the Child was appropriate.
2. The District’s occupational therapy evaluation of the Child was not appropriate.
3. The District shall fund an independent occupational therapy evaluation centered on sensory integration/sensory processing issues. The evaluator may not be the individual who previously conducted the behavioral evaluation. The evaluation must be completed and a report submitted to the Parent and the District within 60 calendar days of the date of this decision. The District shall pay the independent evaluator for attendance at one MDT or IEP team meeting for purposes of discussing the evaluation results.

4. Because the question of the Child's disability is not settled, the District is ordered, and has agreed, to conduct an Autism Diagnostic Observation Schedule – Second Edition (ADOS-2). If the District does not have an evaluator specifically trained in administering the ADOS-2, the District shall fund an independent ADOS-2 evaluation administered by an evaluator of the Parent's choosing. The evaluation must be completed and a report submitted to the Parent and the District within 60 calendar days of the date of this decision. If the evaluator is not a District evaluator, the District shall pay the independent evaluator for attendance at one MDT or IEP team meeting for purposes of discussing the evaluation results.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

October 25, 2018

Linda M. Valentini, Psy.D. CHO
Special Education Hearing Officer
NAHO Certified Hearing Official