

*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**  
**Final Decision and Order**

**CLOSED HEARING**  
**ODR File Number: 21452-18-19AS**

**Child's Name:** C. M.

**Date of Birth:** [redacted]

**Parents:**  
[redacted]

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**Hearing Officer:** Cathy A. Skidmore, M.Ed., J.D.

**Date of Decision:** 12/30/2018

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a mid-teenaged student residing in the Fox Chapel Area School District (District) but attending a private school. In the fall of 2018, following receipt of a report of a private psychologist, the District completed a special education evaluation of Student pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parents disagreed with the resulting report and requested an independent educational evaluation at public expense. In response, the District filed a Due Process Complaint to defend its evaluation.

The case proceeded to an efficient, single session due process hearing<sup>3</sup> at which the District sought to establish that its evaluation met all IDEA requirements. For the reasons set forth below, the District's Complaint must be sustained.

### **ISSUES**

1. Whether the District's evaluation of Student in the fall of 2018 was appropriate and compliant with the requirements in the IDEA and Chapter 14?
2. If the District's reevaluation was not appropriate, should the District be ordered to provide an Independent Educational Evaluation at public expense?

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. All personally 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).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14). A related federal provision appears at Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and the applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>3</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), School District Exhibits (S-) followed by the exhibit number, and Parent Exhibits (P-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

## **FINDINGS OF FACT**

1. Student is a mid-teenaged student residing in the District. (N.T. 21.)
2. Student attended school in the District until the end of the 2017-18 school year. For the current school year, Student attends a small private school at the Parents' election. (N.T. 22, 40; S-1 at 6-7.)
3. Student began treating with a private psychiatrist in March 2016 and was diagnosed with Generalized Anxiety Disorder and Major Depressive Disorder. The District was provided with those diagnoses in the summer of 2018, at which time the psychiatrist also noted symptoms of Attention Deficit Disorder and some executive functioning deficits. (P-1 at 19.)
4. Also during the summer of 2018, Student was evaluated by a private psychologist based on the Parents' concerns with maintaining attention and focus. (S-3 at 2.)
5. The private psychologist administered a cognitive assessment, the Woodcock-Johnson Tests of Cognitive Ability – Fourth Edition. Student attained a General Intellectual Ability score solidly in the average range (SS 103), with relative strengths (verbal reasoning, nonverbal reasoning, and fluid reasoning) and weaknesses (working memory and processing speed) on the clusters. (S-3 at 3-5.)
6. The private psychologist also administered subtests from the Woodcock-Johnson Tests of Achievement – Fourth Edition. Student earned average to high average range scores on all of the Reading, Written Expression, and Mathematics subtests and composites with the exception of Math Facts Fluency (just below the below average range). (S-3 at 4, 12.)
7. To assess attention and executive functioning, the private psychologist administered the Delis-Kaplan Executive Function System, the Connors Continuous Performance Test – Third Edition, and the Connors 3 Rating Scale. Results of those instruments suggested Attention Deficit Hyperactivity Disorder (ADHD). (S-3 at 7-9.)
8. Social/emotional/behavioral functioning was also assessed by the private psychologist through the Behavior Assessment System for Children – Third Edition (BASC-3) rating scales completed by the Parents and Student, and the Child Behavior Checklist completed by a teacher. Results were consistent with ADHD with some milder concerns related to anxiety, somatization, social skills, withdrawal, activities of daily living, and depression reflected by at least one rater. (S-3 at 9-11.)
9. The private psychologist made a number of recommendations. Those that were school-based were for Section 504 accommodations or a special education program to include preferential seating, cues and prompts, test and assignment accommodations, restating directions, and check-ins with a school counselor. (S-3 at 13-15.)
10. The Parents shared the private evaluation report with the District, which prompted it to seek their consent to an evaluation in order to determine Student's eligibility for special

education. The proposed assessments to be conducted were of cognitive ability and academic achievement; social/emotional/behavioral functioning including executive functioning and anxiety and depression; a transition assessment; and a review of records and existing evaluations. The Parents provided consent on August 28, 2018. (S-4.)

11. Prior to conducting the evaluation, the Parents, through their counsel, expressed concerns with Student's absences related to anxiety. (P-1 at 1-3.)

#### DISTRICT EVALUATION

12. The District conducted the evaluation of Student and issued an evaluation report (ER) in October 2018. (N.T. 26.)
13. The District school psychologist who conducted its evaluation of Student has a doctoral degree in school psychology and related undergraduate degrees. He has over ten years' experience as a school psychologist and is a member of a number of professional organizations in the field. (N.T. 24-25.)
14. Direct input from the Parents to the ER reflected their concerns with organization, focus, executive functioning, processing speed, and anxiety and depression. They also indicated that they did not believe Student would successfully attend the District high school. This input was made part of the ER. (S-1 at 2-3; S-3.)
15. Certain educational records from the District were summarized for the ER: Student's attendance record for the 2015-16 through 2017-18 school years (with approximately twenty days absence for each); use of homework intervention due to absences or incomplete submissions; use of Tier 1 interventions (homework and test accommodations and adaptations, organization checks, preferential seating, monitoring of on-task behavior, clear expectations, tutoring, and homework support); attendance for the prior three school years; and notes of communications with the Parents and meetings with the school counselor regarding absences. Results of school-based assessments from the prior three school years were also included, as well as report card grades for the 2017-18 school year. (S-1 at 6-7, 20-22.)
16. Input from Student's teachers at the private school was also contained within the ER. No behavioral concerns were noted, although weaknesses with written expression, notetaking, and completing homework, as well as self-esteem, anxiety, and focus, were indicated in one class or another. At the time, Student had all A and B grades and had only been absent from the private school one day. (S-1 at 4-6, 22.)
17. The District school psychologist did not observe Student in the classroom at the private school because he and its school psychologist, in addition to the head of the private school, agreed that doing so would not be advisable in the very small setting. The private school psychologist conducted an observation of Student that included time on task, but did not provide its results until after the ER was complete. (N.T. 39-40, 42; S-5.)

18. The content of the note from the treating psychiatrist, including the diagnoses of Generalized Anxiety Disorder and Major Depressive Disorder, was included verbatim in the ER. (P-2 at 19; S-1 at 3-4.)
19. The private psychologist's evaluation results were summarized for the ER. (S-1 at 7-10.)
20. It was not necessary to administer a full cognitive assessment of Student for the ER because the private psychologist had very recently done so and the results were considered valid. The District school psychologist did administer the Kaufman Brief Intelligence Test and the results were consistent (IQ Composite score of 115, average range). (N.T. 30, 33-34; S-1 at 10-11.)
21. Academic achievement was assessed for the ER (Wechsler Individual Achievement test – Third Edition) and yielded results similar to those in the private evaluation, with all subtest scores in the average range. (S-1 at 11-12.)
22. Two of the private school teachers completed BASC-3 rating scales for the ER, and Student completed a self-report. Results of the teacher rating scales suggested clinically significant concerns with somatization (one teacher), and at-risk concerns with somatization, anxiety, atypicality, withdrawal, adaptability, social skills, and study skills (each by one teacher). Student's self-report endorsed only at-risk concerns with depression and somatization. (S-1 at 12-15.)
23. The Multidimensional Anxiety Scale for Children – Second Edition completed by Student for the ER did not reflect elevated scores with the exceptions of physical symptoms and panic. (S-1 at 15-16.)
24. Two private school teachers completed the Children's Depression Inventory – Second Edition, and their results yielded no concerns. (S-1 at 16-17.)
25. Two private school teachers and Student also completed the Behavioral Rating Inventory of Executive Functioning (BRIEF) for the ER. A number of clinically significant concerns were noted by one teacher: working memory, planning/organizing, and monitoring, as well as on the Global Executive Composite, with one at-risk concern with initiating. The other teacher's rating scales did not note any concerns. Student's self-report endorsed a clinically significant concern with task completion and at-risk concerns with shifting and working memory. (S-1 at 17-19.)
26. The District school psychologist did not obtain rating scales from the prior year's District teachers because doing so at that time would not have yielded valid results. (N.T. 36, 48.)
27. A transition inventory was completed by Student for the ER wherein Student identified career interests and goal of post-secondary education. (S-1 at 19-20.)
28. The initial steps of conducting a Functional Behavioral Assessment (FBA) with input from the Private School teachers was conducted. However, no behaviors of concern were identified, so the process did not continue. (N.T. 39, 76; S-1 at 19.)

29. The conclusion of the ER was that Student had a disability (anxiety) that limited Student's ability to benefit from education; however, Student was not determined to be eligible for special education under the IDEA because there was no need for specially designed instruction at the time of the evaluation. The ER did recommend Section 504 /Chapter 15 accommodations. (S-1 at 24-25.)
30. The instruments used by the private psychologist were all valid and reliable, and the District school psychologist is trained with each and administered them in accordance with the publisher's instructions. (N.T. 31-32, 46.)
31. All of the instruments administered by the District school psychologist are technically sound. (N.T. 46.)
32. The District ER was provided to the Parents. (N.T. 51.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion 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). Accordingly, the burden of persuasion in this case was borne by the District, the filing party. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of 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 the single witness who testified to be credible, persuasive, and forthright. That testimony, as well as the content of each admitted exhibit, was thoroughly considered in issuing this decision, as were the closing statements made on the record.

IDEA PRINCIPLES: CHILD FIND AND EVALUATION

The IDEA and state and federal regulations obligate local educational agencies (LEAs) 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 an evaluation or reevaluation, 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); *see also* 34 C.F.R. § 303(a). 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). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

When parents disagree with an LEA’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 Parents disagreed with the District’s 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 DISTRICT'S ER

At the outset of this discussion, it is important to recognize that parental disagreement with the conclusions of an LEA evaluation does not, in and of itself, establish that the evaluation is inappropriate. Moreover, whether or not the hearing officer agrees with the results of the evaluation is similarly not the dispositive question. The sole issue when an LEA has denied a parental request for an IEE at public expense is whether its evaluation met the criteria set forth in the IDEA. Here, that question must be answered in the affirmative.

The District's ER utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student in all areas of suspected disability. Specifically, the District conducted assessment of Student's current cognitive ability and academic achievement; summarized available curriculum-based and statewide assessment data from previous District records; obtained and reported input from current teachers at the private school; incorporated results of previous evaluations; obtained and summarized parental input; and provided a variety of rating scales to evaluate Student's social/emotional/behavioral functioning including executive functioning, anxiety, and depression. Steps were taken to conduct an FBA, as proposed in the form seeking consent of the Parents, but were limited when the Private School failed to identify any behaviors of concern.

The District school psychologist responsible for administering the cognitive ability, academic achievement, and related assessments is well qualified and trained in the use of all instruments used. The assessments were technically sound and administered in accordance with the publishers' standards. The results of the ER were compared with other evaluations, and no true discrepancies were found. The specific identified question to be decided by the evaluation, namely Student's eligibility for special education, was answered by the ER. All of this evidence supports the conclusion that the District's ER was sufficiently comprehensive to determine

Student's eligibility for special education and resulting needs in all areas related to suspected disability.

The Parents raised three main concerns with the District's ER. The first is that the evaluation did not seek input from Student's former teachers in the District, particularly to explore the reasons for and consequence of the frequent absences. This omission was very apparent from a review of the ER. However, the law requires LEAs to ascertain whether a child "is" a student with a disability who requires specially designed instruction because of that disability. The use of the present tense strongly suggests that, while historical information is important and must be considered, the critical question surrounds the student's *current* functioning. As the District aptly observed, the IDEA and its implementing regulations require periodic reevaluations of identified students to determine current eligibility and special education needs. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303; 22 Pa. Code § 14.124. Additionally, the District school psychologist provided a persuasive rationale for not obtaining stale information from former teachers based on their memories from some months prior to the evaluation, including the lack of validity of rating scales that would be dependent upon old information. The same is true of attendance; while it was certainly valuable to include such prior years' information in the ER, including the communications with the Parents about Student's absences, the fact that Student was not missing school in the current setting is what was most relevant to determining Student's eligibility as of the fall of 2018.

The second concern is that the District did not complete a full FBA. It is accurate that an FBA was proposed by the initial form seeking the consent of the Parents to evaluate; and it is also true that the Pennsylvania Training and Technical Assistance Network (PaTTAN) has published guidance documents on the process for performing an FBA. Nonetheless, with

disciplinary exceptions not applicable here, Pennsylvania law only requires an FBA to inform a behavior support plan. 22 Pa. Code § 14.133(a). Here, with no behaviors of concern identified or reported, there was no reason to move forward with collecting data on any particular behavior or to create a behavior support plan. Historical data on behavior in a different setting would have been only marginally relevant, if at all, to a current FBA. The failure to continue with an FBA cannot be considered a fatal flaw in this case.

Lastly, the Parents correctly note that the ER did not include an observation by the District school psychologist, and they also contend that the brief report provided by the private school psychologist should be discounted because it was not timely made and further was not made part of the ER. There is nothing in the law or in this record as a whole to suggest that a personal observation by the District school psychologist was necessary to conducting a comprehensive evaluation. The ER does contain information from Student's current teachers that are based in part on observations, and, moreover, there were valid reasons for the District school psychologist not observing Student in the classroom at the private school. Thus, this contention is unavailing.

The Parents also relied on *C.H. v. West Shore School District*, No. 17316-1516 (Jelley, September 1, 2016), for the proposition that the District here failed to consider mitigating measures such as the Student's performance in the small supportive setting that the private school provides. (N.T. 108.) *C.H.*, however, presented a factually distinguishable circumstance where the District failed to adequately assess the Student's disabilities, including anxiety, which is not the case here. Furthermore, the issue presented is not whether the District could or should have suspected a disability when Student was in the District, or even whether in hindsight it might second guess any decisions made during Student's tenure there. Rather, the only question

is whether the District's fall 2018 ER was in compliance with the applicable law. The record is preponderant that the ER met the requisite criteria, and an appropriate order will follow.

### **CONCLUSION**

The District's ER was appropriate and met all requirements in the law; therefore, no remedy is due.

### **ORDER**

AND NOW, this 30<sup>th</sup> day of December, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's October 2018 ER met the requirements for an evaluation under the IDEA. No remedy is due and the District is not ordered to take any action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER  
ODR File No. 21452-1819AS