

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

ODR No.

26337-21-22

CLOSED HEARING

Child's Name:

P.D.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Pro Se

Local Education Agency:

Hempfield Area School District
4347 Rout 136
Greensburg, PA 15601

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

05/27/2022

Introduction

This special education due process hearing concerns the educational rights of a student (the Student). The Student's parent (the Parent) asked the student's public school district (the District) to fund an independent educational evaluation (IEE) of the Student. The District denied that request and, as required by law, requested this hearing to defend its own evaluation.

The District's complaint arises under, and is compelled by, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

As explained below, I find that the District's evaluation is appropriate and, therefore, the District is not obligated to fund an IEE.

Issues

The only issues presented for adjudication is whether the District's evaluation of the Student was appropriate.

Findings of Fact

I reviewed the entire record. I make findings of fact, however, only as necessary to resolve the issues presented for adjudication. I find as follows:

1. The Student receives regular education disability accommodations (not special education) through a Section 504 Service Agreement.¹ See, *e.g.* S-1, S-5, S-7.
2. The Parent became concerned that the Student may require special education resulting from diagnoses of anxiety, Attention Deficit Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD), and defiance. See S-1 at 1-2.
3. The District agreed to evaluate the Student and conducted an evaluation. See, *e.g.* S-4. When the evaluation was complete, the District drafted an Evaluation Report dated December 17, 2021 (the ER). S-1.

¹ Section 504 is Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701. In Pennsylvania, Section 504 is implemented in schools through 22 Pa. Code § 15 (Chapter 15). Section 504 Service Agreements or Plans are documents required by Chapter 15 that explain what accommodations a child will receive. Section 504 accommodations are not special education.

4. The ER included information provided by the Parent through a parental questionnaire. S-1 at 1-2.
5. During the testing, the District communicated with the Parent to obtain copies of all outside evaluations. Further, while the form that the District used to obtain the Parent's consent for the evaluation described the evaluation in broad terms, the District communicated with the Parent throughout the testing to provide more specific information about the assessments, their purposes, and their relation to the Student's outside diagnoses. *See, e.g.* S-6.
6. As part of the evaluation, the Parent gave the District a copy of a private evaluation that the Parent obtained in September 2020. The District reviewed and considered the private evaluation as part of its own evaluation and summarized the private evaluation in the ER. S-1 at 2.
7. The Parent obtained the private evaluation due to concerns that the Student was expressing symptoms related to Autism. The private evaluation included a review of the services that the Student was receiving outside of school at that time, parental input, and behavioral rating scales (the BASC-3).² At the time of the private report, the Parent was seeking a different outside evaluation to rule out Autism. It is not clear if the Parent ever obtained an Autism evaluation. The Parent did not provide any such evaluation to the District. S-1 at 2.
8. The District collected written teacher input and included that input in the ER. The teacher described the Student as a bright, attentive, participating student who earns good grades. The teacher noted that the Student displayed some anxiety about unexpected schedule changes or difficult academic concepts. S-1 at 2.
9. The evaluation included an observation of the Student in school. The report of that observation is contained within the ER and is consistent with the teacher's report. S-1 at 2-3.

² The District's ER reports that the private evaluator was concerned that the Parent's validity scale on the BASC-3 was in the "extreme caution" range, which suggests an exaggerated or overly-negative view of the Student's behavioral presentation on the Parent's part.

10. The ER included a report that the Student receives services in school that focus on emotional regulation, and that the Student has anxiety about certain topics. As of the ER, the Student was able to maintain emotional regulation in school, although the Student had some fear of losing control – which had happened at home. S-1 at 3.
11. The ER included an Occupational Therapy (OT) report that was completed in June 2021. The OT report recommended monthly, consultative (not direct) OT, contingent upon a doctor’s prescription and agreement of the Student’s educational team. S-1 at 3-6.
12. The District uses Star reports to monitor students’ progress.³ The District’s ER included a Star Diagnostic Report from December 14, 2021, that placed the Student above benchmark and slightly above grade level in reading. S-1 at 9.
13. The ER included a Star Annual Progress Report for reading, showing benchmark reading data from January 24, 2019, through December 14, 2021. The Student was at or above benchmark during this time. S-1 at 10.
14. The ER included a Star Benchmark Report for math from December 15, 2021. At that time, the Student was at benchmark for math. S-1 at 11.
15. The ER included a Star Annual Progress Report for math, showing benchmark math data from September 25, 2018, through December 15, 2021. The Student was at or above benchmark from September 25, 2018, through January 8, 2020 (5 probes). Then, the Student was tested in the “on watch” range, which is just below benchmark, from September 21, 2020, through April 21, 2021 (3 probes). The Student was tested in the “intervention” range, which is below benchmark, on September 9, 2021, before improving to the above benchmark range on December 15, 2021. Overall, the Student’s math abilities maintained pace with the Student’s peers and continuously trended upward, although not in a perfectly straight line, for the period reported. S-1 at 12.
16. The District’s school psychologist administered the Wechsler Intelligence Scales for Children – Fifth Edition (WISC-V). The WISC-V is accepted as a standardized, normative test of intellectual ability. The Student’s full scale IQ was found to be in the average range. Index

³ “Star” in this context is a brand-name progress monitoring system.

scores contributing to the FSIQ were all in the average range as well, except for the Visual Spatial Index and the Fluid Reasoning Index, which were both in the "low average" range. S-1 at 13-14.

17. The District's school psychologist administered the Wechsler Individual Achievement Test – Fourth Edition (WIAT-4). The WAIT-4 is accepted as a standardized, normative test of academic achievement. The Student's scores were in the average range for "Word Reading" and in the above average range for "Reading Comprehension." The Student's scores were in the average range for both "Numerical Operations" and "Math Problem Solving." S-1 at 14-15.
18. The Student's WAIT-4 scores are within the range anticipated by the Student's WISC-V scores, showing no discrepancy between intellectual ability and academic achievement, as assessed by these measures. See, e.g. S-1 at 15.
19. The District's evaluation included an administration of the Behavior Assessment System for Children, 3rd Edition (BASC-3). The BASC-3 calls for multiple people to rate the prevalence or frequency of certain behaviors that the Student may exhibit.⁴ S-1 at 15-18.
20. The District had one teacher and the Parent complete the BASC-3.⁵ The Student also completed a self-rating that is part of the BASC-3. S-1 at 15-18.
21. The BASC-3 teacher's rating produced a Behavior Symptoms Index in the average range. That index score is made up of three composite scores: externalizing problems, internalizing problems, and school problems. Externalizing problems and school problems were both in the average range, and internalizing problems was in the "at-risk" range. The "at-risk" range is below clinical significance. The Student's

⁴ The Parent submitted a Vanderbilt Assessment Scale – Teacher Information form. P-2. The Vanderbilt is like the BASC-3 in some ways, and different in others. The form appears to be completed by one of the Student's teachers. This type of form represents the type of raw data that is used by psychologists and other trained individuals to generate reports. This data is intended to be calculated for statistical significance, not presented as is. Discussion of the BASC-3, herein, and the ER itself, demonstrate how data forms like P-2 are appropriately used. Even ignoring several other evidentiary problems with P-2, this exhibit has low probative value in this hearing, and I decline to rely upon it for fact-finding.

⁵ In my experience, schools typically have at least two teachers complete the BASC in addition to a parent to check consistency between ratings of people who observe students in school. Nothing in the record of this case suggests that the District's administration of the BASC-3 is in any way invalid for including only one teacher.

adaptive skills composite score was in the average range as well. S-1 at 15-18.

22. The composite scores on the BASC-3 are functions of several sub-tests scores. On the teacher's rating, all sub-test scores were in the average range except for "somatization" and "leadership" which were both in the at-risk range, and "anxiety," which was in the "clinically significant" range. S-1 at 15-16. The School Psychologist found that the clinically significant anxiety rating was consistent with the Student's anxiety diagnosis.
23. The Parent's rating of the Student on the BASC-3 was very different from the teacher's rating. The Parent's rating placed the student in the clinically significant range in the Behavior Symptoms Index. That score flowed from at-risk ratings in Externalizing Problems and Adaptive Skills, and a clinically significant rating for internalizing problems. S-1 at 16.
24. The Parent's composite scores flow from the Parent's sub-tests scores, which are also very different from the teacher's ratings. The Parent scored the Student in the clinically significant range across nearly 40% of all sub-tests. S-1 at 16-17.
25. As with the private evaluation, the Parent's BASC-3 ratings of the Student triggered warnings that the Parent's F-scores were in the "extreme caution" range. F-scores are a statistical way to measure the validity of individual rater's responses on assessments like the BASC-3. The Parent's F-scores indicated an overly negative response pattern and a need to interpret the Parent's scores with caution. S-1 at 16-17, NT 46, 47.
26. The teacher's BASC-3 rating did not trigger validity warnings. S-1 at 18.
27. On the Student's BASC-3 self-rating, all of the composite scores were in the average range except for Inattention/Hyperactivity and the Emotional Symptoms Index – both of which were in the at-risk range (below clinical significance). S-1 at 17-18.
28. All the BASC-3 self-rating sub-tests scores from which the composite scores are derived were in the average range except for "Senesce of Inadequacy" and "Attention Problems," which were in the at-risk range and "Self-Esteem" which was in the clinically significant range. S-1 at 17-18.

29. The ER included information about the Student's strengths and needs. S-1 at 19-20.
30. The School Psychologist reviewed the evaluation in its entirety and wrote a summary of the results into the ER. That summary is exceedingly well-supported, and I adopt it as if it were a finding of fact (S-1 at 20):

Review of individual assessments indicates that [Student] does have average overall intelligence, no significant processing deficits and no patterns of specific learning disabilities. [Student] does have some strengths in reading comprehension, falling in the high average, as well as cognitive strength in verbal comprehension, falling in the high average range. Behavioral data is consistent with a previous diagnosis of Anxiety Disorder. Data is not significant for any significant patterns of inattention or hyperactivity, as noted by teacher. In addition, most clinical patterns from teacher, and [Student], were not elevated in the areas of depression, or atypical or withdrawn social or emotional skills. Data would suggest that [Student] is appropriately supported by [Student's] 504 Plan, due to [Student's] Anxiety Disorder.

31. The ER concluded that the Student does not have a disability and, therefore, is not eligible for special education. However, the ER also recommended continuation of the Student's Section 504 Plan. S-1 at 20, 24.
32. On December 20, 2021, the District issued a Notice of Recommended Educational Placement (NOREP), confirming that that Student is not eligible for special education, but offering to continue the Student's Section 504 Plan. S-3.
33. Although the record does not reveal an exact date, there is no dispute that the Parent rejected the NOREP and requested an IEE at the District's expense.
34. On April 7, 2022, the District rejected the Parent's request to fund an IEE and, as required by law, requested this due process hearing.

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must 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). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *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).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the District is the party seeking relief and must bear the burden of persuasion.

Evaluation Criteria

The IDEA establishes requirements for evaluations. See 20 U.S.C. § 1414. Evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

Independent Educational Evaluation at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is

appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

“If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.” 34 C.F.R. § 300.502(b)(4).

Discussion

The Parent’s disagreement with the ER is somewhat targeted, but the District’s obligation is to defend the ER in its entirety. I will, therefore, determine whether the ER satisfies all the IDEA’s evaluation criteria. Taking those criteria in order, I find that the ER satisfies all IDEA requirements.

First, the District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. This included Parental input, outside evaluations that the Parent provided, a review of academic records, grades and Star testing, an observation, cognitive and academic assessments, and behavior rating scales.

Second, everything was used for the purpose of determining whether the Student is a child with a disability and, if so, what services the Student would require. Even though the District concluded that the Student is not a child with a disability, the ER includes information the Student’s strengths and needs in a way that can be used to further develop the Student’s Section 504 Plan (accommodations that the District agrees are necessary).

Third, the ER did not use any single measure or assessment as the sole criterion for determining whether the Student requires special education. Rather, multiple assessments and sources of information were used in conjunction with each other. For example, the WISC, WIAT, and the Student’s actual performance in school were used with each other to determine if the Student’s academic achievement was consistent with expectations derived from the Student’s intellectual ability. Similarly, the Student’s outside diagnoses and reports, the BASC-3 (including the Parent’s ratings despite the Parent’s F-score), the observation, and the teacher report were all used with each other to determine if the Student was exhibiting behaviors typically associated with the Student’s various outside diagnoses while in school.

Fourth, the District used technically sound instruments to assess the relative contribution of cognitive and behavioral factors. While this element is not in dispute, the record as a whole supports a finding that the District's assessments were technically sound.

Fifth, all the five factors found at 20 U.S.C. § 1414(b)(3)(A) are satisfied. Some of the Parent's criticism of the ER concerns the fifth of these factors: that the assessments were "administered in accordance with any instructions provided by the producer of such assessments." The Parent correctly notes that the School Psychologist did not administer every sub-test of the WIAT-4. *See, e.g.* NT 53-54. Depending on the child's profile and the purpose of the assessment, the WIAT-4 producer's guidelines permit evaluators to omit various sub-tests. *See, id.* There is no preponderance of evidence in the record of this hearing that the School Psychologist did not administer the WIAT-4 for its intended purpose or in any way that breaks from the test producer's instructions. *Passim.*

Sixth, the record preponderantly establishes that the District assessed all areas of suspected disability. The District was in communication with the Parent to obtain all outside evaluations. The purpose of this effort was to be sure that the ER covered potential educational disabilities discovered by outside evaluators and service providers. At the same time, the District targeted its assessment to the areas of concern identified by the Parent and by the outside evaluation. This purposeful decision-making is seen in the School Psychologist's decision to not use certain WIAT-4 sub-tests. At the time of testing, the Student's math and reading levels were at or above benchmark and grade level, and the Student was doing well academically.⁶ There was no reason to suspect a specific learning disability, but there was a need to confirm that the Student's academic performance was in line with the Student's intellectual ability. The School Psychologist, therefore, tailored the evaluation in such a way to obtain the necessary information while staying within the test publisher's guidelines.

In her written closing statement, the Parent argues that the ER did not include testing to assess the Student's executive functioning or social skills. I find that the absence of such tests in the ER does not render the ER inappropriate. The teacher input, observation, educational records reviewed as part of the ER, the WISC-V, and the BASC-3 all provide information about the Student's executive functioning or social skills. While executive functioning problems are commonly associated with ADHD, there is no

⁶ The Parent's various assertions that the Student math and reading abilities are significantly impaired is not supported by the record of this case.

evidence that the District had reason to include executive functioning problems among the Student's suspected areas of disability at the time of testing or since.

Similarly, both the BASC-3 and teacher input concerning the Student's current social skills support a determination that the Student has anxiety about both social and academic situations. However, nothing in the record of this hearing suggests that additional testing was necessary to gain more information about the Student's social skills abilities or that the Student requires special education (as opposed to Section 504 accommodations) to address social skills weaknesses in school.

For all these reasons, the ER complies with all IDEA criteria.

The Student's Disability

I find that the ER satisfies all IDEA criteria, but I am concerned about the District's determination that the Student does not have a disability.

Entitlement to special education hinges on a two-part test. First, the child must have a disability recognized by the IDEA. Second, by reason thereof, the child must require special education. *See, e.g.* 20 U.S.C. § 1401(3). The District's ER, which is appropriate, supports a determination that the Student does not need special education regardless of any disability.

However, the ER also explicitly finds that the Student continues to require a Section 504 Plan. Further, the ER recognizes the multiple documents, mostly from outside providers, that diagnose the Student with disabilities that either are explicitly recognized by the IDEA or that fall into one or several of the IDEA's disability categories. An anxiety disorder is a disability that, depending on its presentation, could fall into multiple IDEA disability categories.

Although the issue is not before me, I caution the District to carefully consider the difference between finding that a child does not have a disability and finding that a child has a disability but does not require special education.

Applied in this case, the distinction has no difference. Even if the District determined that the Student has a disability but does not require special education, the result for the Student would be the same (continuation of the Section 504 Plan). Regardless, ER satisfied all IDEA requirements and the question of whether the Student has a disability but does not require special education is not before me.

Summary and Legal Conclusions

The Parent is certainly free to disagree with the ER and obtain an IEE. That right is codified into the IDEA. However, the Parent's right to public funding for an IEE is predicated on a determination that the ER is inappropriate. Above, I find that the ER is appropriate because it satisfies the IDEA's substantive and procedural requirements. The Parent, therefore, is not entitled to an IEE at public expense.

ORDER

Now, May 27, 2022, it is hereby **ORDERED** that the District's Evaluation Report of December 17, 2021, is appropriate and that the Parent is not entitled to an Independent Educational Evaluation at public expense.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER