

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

DECISION

Student's Name: E.I.

Date of Birth: [redacted]

ODR No. 3304-11-12-AS

OPEN HEARING

Parties to the Hearing:

Representative:

Parent

Robert B. Gidding, Esquire
2 Bala Plaza, Suite 300
Bala Cynwyd PA 19004

School District of Philadelphia
440 North Broad Street, Suite 313
Philadelphia, PA 19130

Judith Baskin, Esquire
Assistant General Counsel
School District of Philadelphia
440 North Broad Street, Suite 313
Philadelphia, PA 19130

Dates of Hearing:

July 19, 2012, July 30, 2012

Record Closed:

August 4, 2012

Date of Decision:

August 8, 2012

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District), and attends a District elementary school. (NT 8.) Student is not identified as a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 8-9.)

In response to a request for a re-evaluation by Student's Mother (Parent), through counsel, the District filed a request for due process, seeking an order establishing that its re-evaluation dated June 18, 2012 is appropriate. (NT 12; J-1 p. 3.)

The hearing was completed in two sessions. I conclude that the District's re-evaluation was appropriate, and I decline to order the private evaluation sought by Parents.

ISSUES

1. Was the District's re-evaluation dated June 18, 2012 appropriate under the IDEA and Chapter 14 of the Pennsylvania regulations?
2. Is the Parent entitled to an IEE at public expense?

FINDINGS OF FACT

1. The District performed an initial evaluation of Student in April 2007, when Student was [preschool] age. The District's evaluation found that the Student was a child with a developmental delay and needed specially designed instruction, noting delays in cognition, communication and fine motor skills. The evaluation recommended that the District provide Student with speech and language therapy and occupational therapy. (NT 8-9; J-15.)
2. In May 2007, the District placed Student in supplemental head start early intervention, included in general education for at least 80% of early intervention hours, with an IEP that noted needs related to vision, hearing and Student's fluency in English, as Student was bi-lingual. The District provided speech therapy and occupational therapy. (NT 9; J-16.)

3. In June 2008, when Student was [redacted] age, the District re-evaluated Student and exited Student from special education, recommending that Student begin kindergarten in September 2008 in regular education, without any special education interventions. (NT 9; J-13.)
4. From kindergarten until third grade, Student was enrolled in three District grade schools; at each of these schools, Student's attendance was very poor, to the point of interfering with Student's ability to make educational progress. (J-5 p. 2.)
5. For third grade, Student was in a school that has a bilingual staff, and these staff made efforts to ensure that Parent was able to participate in meetings and receive notices and required documentation in [another language]. Where forms were available in [that other language], the school personnel made efforts to supply them in [that language]. Where the documents were not available in [that language], school personnel either requested the District to translate them or interpreted them orally to Parent. (NT 28, 60, 80, 86-89, 106, 153-161, 190-193, 197-204; J-8, 12 p. 5.)
6. In Spring 2008, the District re-evaluated Student and found Student ineligible for special education. At that time, Student was functioning in the average range cognitively, with average skills in verbal functioning, nonverbal reasoning and perceptual ability, and low average scores in processing speed. The re-evaluation included evaluations from a speech and language therapist, physical therapist and occupational therapist. (J-5 p. 2.)
7. In May 2012, the District again began to re-evaluate Student, finding Student not to be disabled and therefore to be ineligible for special education. The re-evaluation report was issued in June 2012, after Student had completed third grade. (J-3, 5.)
8. The re-evaluation was based upon a psycho-educational re-evaluation report by a qualified school psychologist with a doctorate in clinical psychology, a masters degree in school psychology, and Pennsylvania certification as a school psychologist. The psychologist has extensive experience in clinical neuropsychology, at least thirteen years of experience as a school psychologist with the District, and teaching experience at the graduate level. (NT 26-28; J-4.)
9. The school psychologist reviewed school records, including grades, attendance and disciplinary records. (J-3.)
10. The school psychologist reviewed two previous re-evaluation reports, including the scores from standardized testing performed in the immediately previous re-evaluation report. (NT 35-36; J-5.)
11. The school psychologist, who is bilingual, interviewed Parent three times in Parent's native language, [redacted]. Parent provided some history and indicated Parent's primary concerns, including Student's behavior at home and not wanting to go to school. Parent also indicated that Student had been diagnosed with attention deficit hyperactivity disorder (ADHD), but the District was unable to corroborate that statement despite multiple attempts and Parent's repeated failures to provide the documents as promised;

Parent signed a release to enable the District to obtain such information from the local human services agency. (NT 28-30, 62-63, 108, 135, 166, 193-196; J-3.)

12. The school psychologist considered and assessed cognitive evaluations in light of a history of exposure to lead. (NT 34; J-3, 5.)
13. The school psychologist considered the history of previous identification with developmental delay, but found current data inconsistent with any continuing developmental delay or cognitive deficits. (NT 35-45; J-5, 15, 16.)
14. The school psychologist considered and ruled out school refusal as a cause of Student's academic weaknesses, because neither structured observations of school performance nor teacher reports nor Student's own self reports raised that as a suspected disability. While habitual lateness did impede Student's academic progress, it did not block Student's access to the curriculum, as indicated in Student's overall passing grades, standardized testing and curriculum based testing. (NT 108-113, 129-130, 162, 177-187; J-3, 5, 8.)
15. Parent, with assistance from [the other language] speaking District employee, returned a behavior inventory that yielded scores of clinical significance or at-risk for a significant number of areas of emotional and behavioral functioning. However, these scores deviated greatly from teacher-returned inventories and the student's own self-report, and the inventory scoring program indicated caution due to questionable accuracy of Parent's answers. These inventory answers were also questionable because the entire inventory questionnaire had been interpreted from English to [the other language] by a bilingual District teacher who is not a qualified interpreter. (NT 55-61; J-3.)
16. The school psychologist observed Student twice in different classroom settings, using a structured time sampling technique, and another District educator observed Student once. Neither the psychologist nor the other observer saw any behavior that would suggest that Student has ADHD. This absence of manifestation in the school setting is inconsistent with a diagnosis of ADHD because this disorder usually manifests in all settings. (NT 61-63; J-3.)
17. The school psychologist received information from Student's third grade teaching staff, including a behavior inventory questionnaire from one teacher and curriculum based testing scores from Student's teachers. (J-3.)
18. The multi-disciplinary team that conducted the re-evaluation obtained and considered standardized cognitive and academic achievement testing, neuropsychological testing for visual motor integration, standardized behavior inventory responses from teacher, Student and Parent, and a separate student self-report inventory addressing emotional needs. The school psychologist also performed additional achievement testing in mathematics. All instruments used were valid and reliable for the purposes for which they were used. (NT 75-78; J-3, J-5.)
19. The multidisciplinary team also obtained and considered classroom based assessments, including the last two quarters of Student's grades in mathematics, reading, science and

social studies, predictive tests and separate assessments of reading achievement and mathematics achievement. (NT 121-123, 128-129; J-3, 5, 6, 8.)

20. There was no indication that Student displayed any functional delays or difficulties. (J-3, 5.)
21. The evaluation report noted areas of strength and weakness. Weaknesses or inconsistency in the data included oral reading fluency, passage comprehension and mathematics calculation. The report concluded that these weaknesses did not interfere with Student's ability to access the curriculum, and that there was not a significant discrepancy between performance and ability in any academic area. (NT 132-133, 136-143; J-5, 6, 7.)
22. The report concluded that Student is not disabled as defined by law. Nevertheless, the report made recommendations to address, through general education interventions, Student's academic weaknesses and environmental barriers to learning, including frequent lateness. (J-3.)
23. The report did not formally assess Student's gross motor, fine motor or sensory functioning. Material from previous assessments of these areas was included in the report due to a programming error in the District's computer program for re-evaluation reports. (NT 95-96,126-127; J-3, 13.)
24. The multidisciplinary team considered whether or not additional data was needed with regard to Student's fine motor functioning, and concluded that there was no data to indicate that this was an area of suspected disability. (NT 53-54, 93-105, 127-128; J-3.)
25. The multidisciplinary team did not find evidence of school refusal to corroborate Parent's report. (NT 129-30.)
26. The re-evaluation report was not provided to Parent in [the other language], although the multidisciplinary team requested a translation of the report for provision to Parent. District staff did interpret the document to Parent orally. (NT 125.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the

finder of fact (which in this matter is the hearing officer).¹ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence² that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, the District requested due process and the burden of proof is allocated to the District. The District bears the burden of persuasion that its re-evaluation was appropriate and that Parent is not entitled to an IEE. If the District fails to produce a preponderance of evidence in support of its claim, or if the evidence is in “equipoise”, then the District cannot prevail under the IDEA.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

In determining whether or not the District’s evaluation was appropriate, one must keep in mind the District’s obligation to evaluate a child in relation to the regulations’ definition of “child with a disability”. The IDEA sets forth two purposes of the required evaluation: to

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

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). Logically, the eligibility determination is the primary purpose of the evaluation, because if the child is not eligible, then there is no IEP for which the evaluation’s conclusions on educational need would be required. See, 34 C.F.R. §300.39(b)(3)(i)(specially designed instruction purpose is to address needs that result from disability). Therefore, the first question is whether or not the District’s evaluation appropriately addressed eligibility as defined under the IDEA.

An eligible child is defined as a “child with a disability”: one who has been evaluated to have one of the enumerated disabilities, 34 C.F.R. §300.8(a), “and who, by reason thereof, needs special education and related services.” Ibid. Thus it is necessary (but not sufficient³) that a child exhibit an enumerated disability. Ibid.

APPROPRIATENESS OF THE JUNE 2012 EVALUATION

The IDEA regulations prescribe in detail the procedures to be used in order to fulfill this requirement. 34 C.F.R. §§300.301 to 300.311.⁴ Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002).

These procedures must include the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information” 20 U.S.C. §1414(b)(2)(A), 34 C.F.R. §300.304(b). The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program

³To be eligible for special education the child also must “nee[d] special education and related services.” Ibid.

⁴ Under the IDEA regulations, re-evaluations must meet the same standards as evaluations, in terms of both the scope of the re-evaluation and the required procedural standards. 34 C.F.R. §300.303. Therefore, I will apply the standards applicable to evaluations, even though the District action in question was a re-evaluation.

for the child. 20 U.S.C. §1414(b)(2)(B), 34 C.F.R. §300.304(b)(2). Here, the evidence is preponderant that this standard has been met. The District's strategies included review of documents, interviews with Parent, teachers and Student, observations, standardized testing, curriculum based testing, and behavior inventories. (FF 9-13, 15-19.)

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i), 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

Here, the District enabled parent to participate to the extent Parent was able to do so. The school psychologist was bilingual and conducted three interviews with Parent, two before reaching conclusions, and one to read and explain the report to Parent. (FF 11.) These interviews elicited history and the Parent's concerns and suspected disabilities. Ibid. The multidisciplinary team also considered the results of a structured behavior inventory parent form that the parent filled out and returned. (FF 15, 18.) The District also made repeated efforts to obtain documentation of a medical diagnosis that Parent asserted, although the Parent repeatedly reneged on promises to provide the documents requested by District evaluators. (FF 11.) Invitations to meetings and meetings were customarily and repeatedly translated or interpreted into [the other language]. (FF 5.)

The District complied with the legal requirement that the agency review classroom based assessments, state assessments and observations of the child, 20 U.S.C. §1414(c)(1)(ii), (iii), 34 C.F.R. §300.305(a)(1), including observations of teachers and related services providers,

20 U.S.C. §1414(c)(1)(A)(iii), 34 C.F.R. §300.305(a)(1)(iii). The multidisciplinary team considered classroom based assessments, (FF 19), and three separate observations of Student, at least two of which were in different classroom settings, (FF 16). There was no evidence that statewide assessments were available for this third grade student.

The agency used technically sound testing instruments, 20 U.S.C. §1414(b)(2)(C), 34 C.F.R. §300.304(b)(3); all instruments used were valid and reliable for the purpose for which they were used, 20 U.S.C. §1414(b)(3)(A)(iii), 34 C.F.R. §300.304(c)(1)(iii), and all were administered in accordance with the applicable instructions of the publisher, 20 U.S.C. §1414(b)(3)(A)(v), 34 C.F.R. §300.304(c)(1)(v). (FF 18.) The evaluator was trained and knowledgeable. 20 U.S.C. §1414(b)(3)(A)(iv), 34 C.F.R. §300.304(c)(1)(iv).

The re-evaluation of the Student was sufficiently comprehensive to determine whether or not Student suffered from a disability as defined in the law. The evaluator and the multidisciplinary team considered Student's cognitive functioning, achievement, and emotional and behavioral functioning. (FF 12, 13, 15, 17, 18, 19, 21.) By a preponderance of the evidence, I conclude that the evaluator and multidisciplinary team addressed all areas of suspected disability, 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4).

Parent argues that the evaluation was inappropriate because the District failed to investigate sufficiently several areas of suspected disability. Parent argues that the District did not adequately pursue investigation of the Parent's report that Student was diagnosed with ADHD and was being medicated for ADHD. However, the evidence is preponderant that the District made reasonable and repeated efforts to obtain medical documentation of this asserted disability. (FF 11.) Moreover, the evidence shows that the District reasonably questioned the accuracy of this assertion, for four reasons. First, the Parent repeatedly failed to provide

promised documentation of this asserted disability. Second, the District's teachers reported no behavior⁵ consistent with ADHD. (FF 17.) Third, the District's observations, using structured time sampling methodology, failed to detect any behaviors that would be consistent with ADHD. (FF 16.) Fourth, the school psychologist was of the opinion that ADHD was unlikely at the time of the evaluation, because it is usually manifest across all settings, so its emergence only at home was unlikely. (FF 16.) I conclude that these conclusions were a reasonable exercise of psychological and educational judgment to which I must defer. See, Leighty v. Laurel School Dist., 457 F.Supp.2d 546 (W.D. Pa. 2006) (IDEA does not deprive educators of the right to apply their professional judgment). In sum, I conclude that the District did reasonably and appropriately follow up on Parent's assertions.

Parent argues that the District inappropriately failed to pursue evaluations for fine motor skills as applied to handwriting. It is true that the District did not seek an occupational therapy evaluation. (FF 23.) However, the preponderance of the evidence (in the absence of parental testimony to the contrary) is that the District appropriately ruled out fine motor skill deficits as a cause of Student's poor handwriting. The record is clear that the District's school psychologist considered and ruled out fine motor skill as a disability. (FF 23.) This decision was based upon an adequate factual foundation. The Student had received an occupational therapy evaluation previously and had been exited from special education. (FF 1-3, 13.) Thus, fine motor could have been a problem only if the previous evaluation were incorrect or a fine motor disability had arisen in third grade. The District's school psychologist concluded that the previous evaluation

⁵ Joint Exhibit 11 is documentation from the District's regular education intervention program that lists some unwanted behaviors in the first half of the third grade school year. While these notations raise an inference contrary to the District witnesses' suggestion that there were no inappropriate behaviors rising to the level of a red flag, the Parent did not testify or appear, and there was no testimony indicating that these documents were evidence of behavior associated with ADHD. Therefore, this document alone is insufficient to create a preponderance of the evidence, when weighed against the extensive, well documented expert testimony that behaviors consistent with ADHD were not seen in school.

had been appropriate and reliable for the psychologist's purposes. In addition, the psychologist utilized a second evaluative strategy by performing an assessment of visual motor integration, which clinically yielded evidence that Student's fine motor functioning was within normal limits. (FF 18.) Based on these historical and current test data, the record is preponderant, in the face of no contrary evidence on the part of the Parent, that the District appropriately considered and ruled out a fine motor disability.

The Parent argued that the District failed to conduct a functional behavioral assessment of Student's behavior that led to chronic lateness. However, there was no evidence in the record that Student was afraid of school to the point of school avoidance.⁶ (FF 14-17.) Therefore, I conclude that a preponderance of the evidence supports the District's position that no behavioral assessment was indicated, and that the Student's lateness was due to factors other than Student's behavior.

Parent argues that the District failed to appropriately assess the Student for Specific Learning Disability (SLD) in reading and mathematics, citing Student's weaknesses and lower grade level achievement in those areas. On the contrary, I conclude by a preponderance of the evidence that the District considered SLD thoroughly and appropriately ruled it out. (FF 18-21.) The District's cognitive and achievement testing was based upon multiple well known and reliable standardized tests, in addition to curriculum based assessments. (FF 18.)

Parents argue that the District failed to apply discrete parts of the analysis required by the IDEA for determining SLD, including determination of whether poor performance was due to

⁶ Again, J-11 does contain notations suggesting that Student was avoidant of work, anxious and victimized by bullying during the first half of third grade. However, as noted above, there was no evidence indicating how this evidence bore on the question of whether or not school avoidance was a behavior that was leading Student to be late to school. There was contrary evidence that indicated that the reason for Student's lateness was Parent's inability to get Student to school on time – some of the notations in J-11 itself raise that inference. As with the question of behaviors suggesting ADHD, there simply is not enough persuasive evidence in J-11 to outweigh that presented by the District that the Student was avoiding going to school. (FF 25.)

extraneous factors such as lack of appropriate instruction in academic areas, 34 C.F.R. §300.306(b). However, these required considerations are relevant only if the evaluation finds a severe discrepancy between performance and ability, or a failure to respond to research based teaching, documented in progress data. I conclude that any failure to conduct and document findings regarding the appropriateness of instruction did not render the evaluation inappropriate. If the District had considered that inappropriate instruction had affected Student's low performance in certain academic areas, such a finding would have proven that the Student's performance was not due to SLD, and that therefore, Student was not eligible for special education.

Parent argues that the District failed to fill out a portion of the state form for evaluations specifically for determining whether or not there is an SLD. I conclude that this omission was not inappropriate in that there was no data indicating an SLD; moreover, failure to fill out this part of the form did not render the evaluation inappropriate.

CREDIBILITY

The above findings and conclusions do not turn on the credibility and reliability of the witnesses. I found all witnesses to be credible and reliable, based upon their answers to questions, material consistency with other testimony and the written record, and demeanor.

CONCLUSION

I conclude that the District's re-evaluation of the Student was appropriate, and that there is no legal basis for ordering the District to provide an independent educational evaluation as

requested by Parent. Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's re-evaluation dated June 18, 2012 was appropriate under the IDEA and Chapter 14 of the Pennsylvania regulations.
2. The Parent is not entitled to an IEE at public expense.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

August 8, 2012