

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 Due Process Hearing Officer

Final Decision and Order

**ODR No. 23882-2021-AS
CLOSED HEARING**

Child's Name:

A.R.

Date of Birth:

[redacted]

Parents:

[redacted]

Pro Se

Local Education Agency:

Rose Tree Media School District
308 North Olive Street
Media, PA 19063-2403

Counsel for the LEA:

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

09/23/2020

Introduction and Procedural History

This special education due process hearing concerns the educational rights of a student (the Student).¹ This Student's parents (the Parents) requested this hearing against the Student's school district (the District) to obtain an Independent Educational Evaluation (IEE) at the District's expense.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The District is the Student's Local Educational Agency (LEA).

As explained below, I find that the Parents are not entitled to an IEE at the District's expense. Nothing herein, however, diminishes the Parents' right to obtain an IEE at their own expense pursuant to 34 U.S.C. § 300.502(a), or the District's obligation to consider such an IEE if the Parents obtain one.

Issues

The only issues presented in this matter is: Are the Parents entitled to an IEE at the District's expense.

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 Except for the cover page of this Decision and Order, identifying information is omitted to the extent possible. Citation to the transcript is "NT #" and to the District's exhibits are "S-#." The Parents did not introduce evidence during the hearing session.

1. On November 18, 2019, the Parents sent a letter to the District requesting “comprehensive psychoeducational testing” for the Student. S-9. The Parents requested a broad-based assessment but were particularly concerned about the Student’s performance in math. *Id.* The District received the Parents’ letter on November 19, 2019. *Id.*
2. On December 2, 2019, the District agreed to conduct the Parents’ requested evaluation. The District notified the Parents of its decision by letter. S-9. That letter enclosed a “Prior Written Notice for Initial Evaluation and Request for Consent Form,” more commonly referred to as a Permission to Evaluate form (PTE). S-8.
3. The PTE was dated November 28, 2019, but I find that it was sent with the District’s letter on December 2, 2019. S-8, S-9.
4. According to the PTE, the evaluation was to include a review records, performance analysis on academic tests that all students take, teacher observations and input, and parent input. S-8. However, the evaluation included other testing. The additional testing was conducted with the Parent’s knowledge. *See, e.g.* NT 35-36.
5. The District sent the PTE with behavior rating scales, discussed below, for the Parents to complete and return. S-9.
6. The Parents approved and returned the PTE. The Parents signed the PTE on December 8, 2019. The District received the PTE on December 11, 2019. S-8.

7. The District evaluated the Student and produced an Evaluation Report (ER). S-3.
8. While the ER had several authors, the document's primary author and the District's primary evaluator in this case is a Certified School Psychologist who holds a Ph.D. in Clinical Developmental Psychology, a master's degree in Clinical Developmental Psychology, and a B.S. in Psychology (the Psychologist). The Psychologist has worked as a School Psychologist since 2008. S-12
9. The ER included written input from the Parents. S-3 at 1.
10. The ER included written input from the Student's teacher. S-3 at 1-2.
11. The ER included a "Teacher Observation Rating Scale," which is an informal, subjective assessment of the Student in comparison to peers as rated by the Student's teacher. S-3 at 2
12. The ER included a 25-minute observation of the Student during a math lesson. The ER details the Psychologist's observations of the Student in 30 second intervals and provides a narrative assessment of the observation. The Psychologist observed the Student's math lesson on January 7, 2020. S-3 at 2-3, 5.
13. The ER included a 20-minute observation of the Student during a language arts lesson. The ER details the Psychologist's observations of the Student in 30 second intervals and provides a narrative assessment of the observation. The Psychologist observed the Student's language arts lesson on January 22, 2020. S-3 at 3-5.

14. The ER included recommendations from the Student's teacher (the Teacher). The Teacher noted that the Student required support to improve math problem-solving skills, math fluency, positive thinking, and self-advocacy. S-3 at 5.
15. The ER included a description of the Student's physical condition, social/cultural background, and adaptive behavior. A family history of difficulty focusing is noted in this section. The Student's history of selective mutism is also noted in this section.² S-3 at 5-6.
16. The ER reported the Student's performance on a District-wide math assessment administered on October 1, 2019 and February 1, 2020. S-3 at 6-7.
17. On the October math assessment, the Student scored in the "Basic" range in all assessed domains except for a "Below Basic" score in the "Measurement and Data" domain. The Student's total math score fell into the "Basic" range and the Student placed into the 2nd quartile. S-3 at 6-7.
18. On the February math assessment, the Student scores declined. The Student scored in the "Below Basic" range in all math domains. The Student's total math score fell into the "Below Basic" range and the Student placed into the 1st quartile. S-3 at 6.

² There is no preponderant evidence in the record of this case that the Student exhibited selective mutism in school during the period of time in question.

19. The ER reported the Student's performance on a District-wide English and language arts (ELA) assessment administered on October 1, 2019 and February 1, 2020. S-3 at 6-7.
20. On the October ELA assessment, the Student scored in the "Proficient" range in all assessed domains. The Student's total ELA score fell into the "Proficient" range and the Student placed into the 3rd quartile. S-3 at 6-7.
21. On the February ELA assessment, the Student scored in the "Proficient" range in all assessed domains except for a "Basic" score in the "Reading Literature" domain. The Student's total ELA score remained in the "Proficient" range and the Student again placed into the 3rd quartile. S-3 at 6.
22. The ER reports the Student's scores from the April 15, 2019 PSSA (administered during the prior school year). On the PSSA, the Student's scaled Math score was in the "Basic" range, but there was considerable variability across sub-domains. In ELA, the Student scored in the "Proficient" range with remarkable consistency across sub-domains. S-3 at 7-8.
23. The evaluation included an assessment of the Student's cognitive abilities using the WISC-V.³ The Student's scores on the WISC-V placed the Student's overall cognitive abilities (Full Scale IQ) in the "Average" range. All index scores that contribute the FSIQ were also in the Average range. S-3 at 8.

³ The WISC-V (Wechsler Intelligence Scale for Children, 5th Edition) is a standardized, normative assessment that is often used to assess intellectual abilities.

24. The Student's academic achievement in Math, Reading, and Writing were assessed using the WJ-IV.⁴
25. The Student's Math scores on the WJ-IV placed the Student's overall math ability (the Board Math score) in the "Average" range. However, the Psychologist found inconsistencies in the Student's pattern of performance on the test. Analysis of that pattern and the Student's scores on various sub-domains in math revealed difficulties in arithmetic and applied math. The Student's applied math abilities were below age and grade standards and were statistically discrepant from the Student's intellectual ability. S-3 at 9-10.
26. The Student's Reading and Writing scores on the WJ-IV were in the Average range. S-3 at 10.
27. The ER includes a narrative description of the Student's levels of academic achievement, including a statement about the Student's strengths and needs. S-3 at 10-11.
28. The ER includes the results of an Occupational Therapy (OT) screening, finding that school-based OT was not needed. S-3 at 11.
29. The ER includes what is styled as a Functional Behavioral Assessment (FBA).⁵ In this section of the ER, the Psychologist examined the data reported through the two classroom observations and concluded that

⁴ The WJ-IV (Woodcock-Johnson Test of Achievement, 4th Edition) is a standardized, normative assessment that is often used to assess academic achievement.

⁵ I make no determination as to whether the content of the FBA section of the ER constitutes an FBA. The Parents do not challenge accuracy of the information reported in this section.

the Student does not demonstrate behaviors that impede learning. S-3 at 11-12.

30. The ER includes an assessment of the Student's social and emotional functioning derived from the BASC-3.⁶ The Parents and the Teacher each completed a rating scale, and the Student completed a self-assessment. S-2 at 12.
31. The Parents' ratings of the Student on the BASC-3 resulted in "Clinically Significant" significant scores for Hyperactivity, Anxiety, Attention Problems, and Withdraw. These scores pushed the Student's overall Behavioral Symptoms Index into the Clinically Significant range as well. Scores in the Clinically Significant range suggest a high level of maladjustment. S-3 at 12.
32. The BASC-3 includes multiple validity measures, including a Response Pattern Index. The Parents' Response Pattern Index brought their ratings out of the BASC-3's acceptable validity level. As a result, the evaluator cautioned that the Parents' ratings must be interpreted with caution. S-3 at 12.
33. The Teacher's ratings of the Student on the BASC-3 resulted in a finding that all of the Student's behaviors assessed by that instrument were within normal limits in the school setting. S-3 at 12.
34. The Teacher's ratings were within the BASC-3's acceptable validity level. S-3 at 12.

⁶ The BASC-3 (Behavior Assessment System for Children, 3rd Edition) is a normative behavior rating scale in which multiple raters assess the Student across multiple behavioral, social, and emotional domains. The BASC-3 also includes a self-assessment.

35. The Student's self-ratings on the BASC-3 resulted in Clinically Significant elevations in the "Locus of Control" and "Inadequacy" domains. Ratings in several other domains were also elevated into the "At Risk" range, which is a lower rating than "Clinically Significant." Regardless, the evaluator concluded that sensitivity to the Student's emotional state and perception of challenging events should be monitored and handled with care. S-3 at 12.
36. In addition to the BASC-3, the District administered a Conners-3 as part of the ER.⁷ The Teacher and the Parents each completed the Conners-3 rating scale. As with the BASC-3, the Conners-3 showed a discrepancy between the Parents' and teacher's ratings. The Parents' ratings were elevated but the Teacher's ratings were not. S-3 at 13.
37. Analysis of the scores and Parent/Teacher discrepancy on the Conners-3 prompted the evaluator to conclude that the Student had significant difficulties with attention and executive functioning at home, but that those difficulties were not observed in school. S-3 at 13.
38. The ER includes a Student Interview. Based on the BASC-3, Conners-3, and Student Interview, the evaluator concluded that the District should provide supports and strategies to assist the Student's positive thinking and ability to cope with negative situations. See S-3 at 13.
39. The ER concludes that the Student has a disability and is in need of specially designed instruction (SDI) and, therefore, is eligible for

⁷ Like the BASC-3, the Conners 3rd Edition is a normative rating scale designed to assess behavioral symptoms commonly associated with Attention Deficit Hyperactivity Disorder (ADHD)

special education. Regarding the disability, the ER concluded that the Student is a child with a Specific Learning Disability (SLD) based on the discrepancy between the Student's intellectual ability and actual achievement in math. S-3 at 13-14.

40. The ER includes several recommendations to the Student's IEP team. These included a learning support program of direct instruction in math and multiple recommendations to promote the Student's social and emotional wellbeing, among others. See S-3 at 14.
41. The District presented the ER to the Parents during an MDT meeting. During the meeting, the Parents did not disagree with the ER but requested an IEE at the District's expense. See, e.g. S-3 at 16; NT 135-136.

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. None of the testimony presented in this matter was contradictory. Moreover, the facts detailed above are derived from undisputed evidence.

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 particular case, the Parents are the party seeking relief. However, in IEE cases, the LEA has a burden to establish that its evaluation is appropriate. The basis of that burden is detailed below. As applied to this case, the *District* must prove by preponderant evidence that its evaluation was appropriate despite the fact that it is the respondent in this matter.

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 it's 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).

In this case, the Parents asked the District for an IEE at public expense. The District was, therefore, obligated to either grant that request or request a hearing to defend its ER. The fact that the Parents filed before the District does not change this rule. The issue of the Parent's entitlement to an IEE at public expense is before me. The District must prove that the ER satisfied the IDEA's evaluation criteria.

Evaluation Criteria

The IDEA establishes requirements for evaluations. 20 U.S.C. § 1414. In substance, 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 in order 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 LEAs are 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).

Discussion

As a threshold issue, the Parents must disagree with the District’s ER before requesting an IEE at public expense. There is preponderant evidence in the record that the Parents wanted (and still want) a second opinion. There is no preponderant evidence that the Parents disagree with any of the assessments from which the ER is derived, or the Psychologist’s analysis of those assessments. This, by itself, is outcome determinative – but is not helpful to the parties. Resolving this case without addressing the ER simply kicks the can down the road. That would be disservice not only to the District, but to the Parents and Student as well. Therefore, I examine the ER to determine whether it satisfies the IDEA’s requirements.

The ER satisfies all of the IDEA’s evaluation criteria. Multiple assessment tools were used to gain information in each domain assessed. Individually and collectively, those assessment tools revealed functional, developmental, and academic information, including information provided by the Parents. The Psychologist then applied her professional experience and judgement to analyze and interpret the information both to determine that the Student had a learning disability and required SDI, and to make recommendations to the IEP team.

In the absence of any evidence to the contrary, I find that the component parts of the ER were technically sound. Further, by including and scrutinizing multiple academic and behavioral assessments and an overall statement as to the Student's health and physical development, the ER assessed the relative contribution of cognitive factors, behavioral factors, and physical or developmental factors.

Similarly, I find that the ER satisfied all of the factors listed within 20 U.S.C. § 1414(b)(3)(A). For example, the Psychologist satisfies any definition of "trained and knowledgeable personnel" and the assessments were all used for their intended purposes. This includes assessments like the BASC-3, which require not only statistical analysis but also professional judgment.

The importance of the Psychologist's application of professional judgement is seen throughout the ER, but two examples are worth noting. First, the Psychologist included the Parents' BASC-3 ratings with a cautionary note, despite validity concerns, to derive useful information about the Student's presentation across multiple environments. Second, the Psychologist did not simply compare the Student's FSIU to the Student's Broad Math score, but rather carefully examined both the WISC-V and WJ-IV in their entirety and found discrepancies that were not apparent in top-level scores.

I also find that the ER assessed all suspected areas of disability. When the Parents requested the ER, their primary concern was the Student's math performance. The ER, however, appropriately went beyond assessments of the Student's academic performance and intellectual ability in math. The District obtained a broader picture than those assessments alone would have revealed by including assessments of potential emotional and behavioral

problems that were not readily apparent in school. The resulting ER included recommendations not only to help the Student in math, but also to support the Student's emotional wellbeing.

I agree with the Parents that math performance can be diminished by a learning disability, anxiety, or some combination of both. I also agree with the Parents that the ER does not definitively conclude that the underlying basis of the Student's math performance is the result of a cognitive impairment or anxiety. That does not change the outcome of this case because the District assessed both, found needs in both, and made recommendations about both through the ER to the IEP team.

Similarly, through the ER, the District found the Student eligible for special education as a child with SLD but no secondary disability. In this context, SLD is best thought of as an eligibility category. This is different from a medical diagnosis from which a treatment plan is derived. After a student is found eligible for special education, the LEA must provide an IEP that addresses all of the student's needs regardless of the eligibility category. In this way, the eligibility category neither proscribes nor precludes any particular form of special education. The Student's needs, not the Student's diagnosis, ultimately drive the Student's education. It is entirely appropriate that the ER concluded that the Student's only disability category was SDI, but recommended academic, social, and emotional supports.⁸

⁸ Throughout the hearing, the Parents' disagreement with the ER was ambiguous. A clear disagreement is a threshold prerequisite to requesting an IEE at public expense. Taken as a whole, the Parents' written closing statement indicates a concern that the Student's struggles in math may be more a function of the Student's attentional difficulties than an SLD. However, through the ER, the District evaluated the Student's attention, behavior, and emotional state. Setting aside the fact that the District cannot render a medical diagnosis, the ER ultimately recommends support across academic and emotional domains. The Student's eligibility category, therefore, does not alter the analysis.

In conclusion, the ER procedurally and substantively complies with IDEA requirements. Procedural elements like multiple measures and technically sound instruments were all satisfied. Substantive elements like the application of professional judgement to derive programming recommendations were also all satisfied. As such, the District has established through preponderant evidence that the ER was appropriate. The Parents, therefore, are not entitled to an IEE at public expense.

ORDER

Now, September 23, 2020, it is hereby **ORDERED** as follows:

1. The District's Evaluation Report, dated February 8, 2020, is appropriate.
2. The Parents are not entitled to an IEE at public expense.
3. Nothing herein alters the Parents' right to obtain an IEE at their own expense or the District's obligation to consider any such IEE if the Parents obtain one.

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

/s/ Brian Jason Ford
HEARING OFFICER