

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:

26041-21-22

Child's Name:

C.K.

Date of Birth:

[redacted]

Parent:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

04/21/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, C.K. (Student),¹ is an early elementary school-aged student who resides in and attends school in the Reading School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).²

Following its initial evaluation of Student, with which the Parent disagreed, the District filed a Due Process Complaint to establish that its evaluation was appropriate under the law. The Parent countered that it was not adequate and that an independent educational evaluation at public expense was warranted. The case proceeded to a very efficient due process hearing.³

Following review of the record and for all of the reasons set forth below, the claim of the District must be sustained.

ISSUES

1. Whether the District's evaluation of Student comported with all applicable criteria and was appropriate under the law; and

¹ In the interest of confidentiality and privacy, Student's name, 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).

² 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).

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.) and School District Exhibits (S-) with the exhibit number, although the District exhibits were considered to be jointly offered (N.T. 6-7).

2. If it was not, should the District be ordered to provide an independent educational evaluation of Student at public expense?

FINDINGS OF FACT

1. Student is an early elementary school-aged student residing in the District. Student has been identified as eligible for special education. (N.T. 30-31.)
2. Student entered [school] in a neighboring school district in the fall of 2020. Student enrolled in the District in November 2020, and experienced some anxiety and signs of depression following the family's move and Student's need to acclimate to new environments. (N.T. 234, 248; S-2; S-3; S-4.)
3. Student began to demonstrate behavioral difficulties at home and in a daycare setting following a traumatic experience in the summer of 2021. Those behaviors included elopement, physical aggression, and distractibility, with parental concerns with anxiety, depression, and dysregulated mood. (N.T. 240, 244-47, 249; S-11.)
4. At the beginning of the 2021-22 school year, Student engaged in some concerning behaviors at school, including physical aggression toward others, self-injurious behavior, property destruction, task refusal with disruption, and throwing items. Student's behaviors during that time period were at times dangerous to others, with one incident ending in a crisis center intervention; and a number of disciplinary referrals resulted including a few out of school suspension. (N.T. 169-71, 178, 262-63; S-7; S-8; S-10; S-14; S-15; S-17; S-18; S-19; S-21; S-22; S-24; S-26; S-30; S-31; S-34; S-35; S-39.)

5. The District attempted a number of interventions at the start of the 2021-22 school year to address Student's difficult behaviors, including a token reward system, a visual schedule, and social skills instruction. (N.T. 178-79, 217-18; S-33.)
6. The District issued a Permission to Evaluate form to the Parent in early September 2021 due to the concerns with behavioral functioning, as well as to consider academic performance and autism. There were no concerns raised regarding Student's speech/language skills at that time. Both the Parent and District agreed that an evaluation was appropriate due to behaviors, and the Parent provided consent. (N.T. 42, 44, 73, 163-64; S-9; S-45 at 1.)
7. The Parent obtained a mental health assessment of Student in mid-September of 2021 by a community agency that provides school-based services in the District's schools. The agency identified Student's preliminary diagnoses as Attention-Deficit/Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder; also noted was suicidal ideation in the past year and a history of anxiety. Student thereafter participated in school-based mental health services. A psychiatrist subsequently prescribed a medication for Student's ADHD, and Student's behaviors gradually and significantly improved after these interventions. (N.T. 53-54, 258-59, 279-80, 284-85; S-11; S-45 at 3.)

Evaluation Report

8. Parent input into the ER indicated that Student's communication and self-regulation skills were of concern; she also noted Student's regression over the summer. Although not included in her input, the Parent also was unhappy with Student's reading skills at home. (N.T. 253-54; S-45.)

9. Teacher input into the ER reflected that Student had grade-appropriate skills across academic areas, but exhibited some social and behavioral deficits. (S-45 at 2.)
10. The ER summarized Student's performance on an early literacy skill benchmark reading assessment, which at that time indicated that Student was at the upper end of the at-risk range on that measure. Student reportedly ended the [school] year at approximately the same position. (S-45 at 4.)
11. The ER summarized the report of the September 2021 mental health assessment that reflected Student's impulsivity, mood dysregulation, and depression, as well as provision of school-based services related to those needs. (N.T. 54-55; S-45 at 3.)
12. The District school psychologist, who is well qualified, conducted an observation of Student in the classroom for the ER. She collected time-on-task data during that observation, with Student exhibiting less time on task (65%) compared to a peer (100%) during whole group instruction. (N.T. 50-52; S-45 at 2-3; S-71.)
13. A Functional Behavioral Assessment (FBA) was conducted as part of the ER process, with the target behaviors identified as property destruction and physical contact with force. Observations by the District school psychologist and the classroom teacher were made for the FBA. The hypothesized functions of those behaviors were to gain attention, avoid or delay demands, and access preferred activities. (N.T. 52, 76; S-41; S-45 at 11-12.)
14. The ER noted that, due to COVID-19 protocols, some departure from standardization in directly administered assessments was necessary, including use of face masks. The results were to be interpreted with caution because the impact of these practices are unknown. The

school psychologist did not use an instrument that the publisher directs cannot be conducted with protocols such as face masks. (N.T. 141-42; S-45 at 4-5.)

15. Assessment of Student's cognitive functioning for the ER was obtained through the Comprehensive Test of Nonverbal Intelligence – Second Edition, chosen in part because Student initially engaged in very limited verbal interaction with the school psychologist. This instrument is valid for the purpose for which it was used. Results were average range scores overall and across Composites. (N.T. 57-60; S-45 at 5-6.)⁴
16. For assessment of academic achievement for the ER, the District school psychologist selected the Kaufman Test of Educational Achievement based on Student's age and grade level including its method of assessing written expression skills. Student earned scores that were somewhat variable among subtests, but the Composite scores were all in the low average (Reading and Decoding Composites) to average (Math and Comprehension Composites) range. Student exhibited relative weaknesses with respect to nonsense word decoding and word reading fluency, but there was not a significant discrepancy between ability and achievement. (N.T. 62-63; S-45 at 6-7, 17.)
17. The Vineland Adaptive Behavior Scales – Third Edition were completed for the ER by the Parent and Student's teacher. Overall, both raters determined that Student's adaptive functioning was within the normal range, including communication skills, but there were some areas of relative weakness (socialization, coping skills, maladaptive behaviors). (N.T. 72-75; S-45 at 9-10.)

⁴ There is a typographical error in the ER relating to a description of the significance of differences between certain scores. (N.T. 108-09.)

18. Rating scales to assess Student's behavioral functioning (Conners Comprehensive Behavior Rating Scales) were completed for the ER by the Parent and Student's teacher. Both indicated very elevated ratings with respect to defiant/aggressive behavior. The teacher also provided very elevated ratings in the areas of hyperactivity, social problems, and violence potential; and further identified some characteristics of autism. The Parent's ratings were either not of concern or less elevated in each of those additional areas. (S-45 at 7-8.)
19. The District school psychologist administered select subtests of a neuropsychological assessment instrument to consider some typical characteristics of autism. Student did not exhibit any weaknesses in those areas on that measure. (S-45 at 10-11.)
20. Another set of rating scales for executive functioning and attention were completed for the ER. Student's teacher's ratings were generally more indicative of executive functioning deficits, but both the teacher and Parent scales suggested concerns with those skills. (S-45 at 8-9.)
21. The conclusion of the ER was that Student was a child with a disability under the Emotional Disturbance and Other Health Impairment categories. The former was based on a history of mood dysregulation, problematic behaviors displayed since the summer of 2021, and the report of past suicidal ideation; the latter was due to ADHD and attention/executive functioning deficits across settings. Student was determined to not meet criteria for an Autism disability category. (S-45.)
22. A number of recommendations were provided in the ER, including a possible occupational therapy screening, behavioral supports including coping and self-regulation skills, mental and emotional health support,

and suggestions for improving attention and other executive functioning weaknesses. (S-45.)

23. A meeting convened to review the ER, which was issued in October 2021. The Parent expressed disagreement with the Emotional Disturbance disability category but not with Other Health Impairment. (N.T. 38, 40, 127-28, 186; S-42.)
24. An Individualized Education Program (IEP) was also developed in October 2021. The IEP proposed annual goals addressing reading fluency and use of coping and self-regulation skills. (S-46.)⁵
25. A Notice of Recommended Educational Placement (NOREP) provided for a program of itinerant emotional support at the neighborhood school. The Parent returned the NOREP approving the recommendation, but included a number of comments explaining her stated disagreement with the Emotional Disturbance eligibility category. Those included her belief that Student's behavior had not been demonstrated for a sufficient length of time and was explained by ADHD; the District's "rush[] to judgement" (S-56 at 4, ¶ 3); bias on the part of the District school psychologist because a state agency was contacted at some point in the fall of 2021; the District's full knowledge of and reliance on the initial mental health assessment;⁶ and the availability of interventions that she believed were not implemented at the start of the school year. (N.T. 271; S-56.)
26. The District school psychologist who conducted the ER agreed to review the disability categories for Student after the meeting, but did

⁵ The IEP was subsequently revised in January 2022. (N.T. 187-88; S-61.)

⁶ The Parent consented to the disclosure of the initial mental health assessment (S-45 at 3). It is unknown why the District was only provided with one of apparently four pages of the late October 2021 mental health agency (psychiatric) evaluation (S-49), but it was issued a week after the ER.

not consent at that time to change it. She then determined after review that the original disability categories in the ER should remain. (N.T. 38-39.)

27. An occupational therapy screening following the ER did not reveal concerns warranting a full evaluation in that domain. Strategies and accommodations for the classroom including sensory support were provided by the occupational therapist and implemented at school. (N.T. 226-27; S-58.)
28. As of April 1, 2022, Student was performing as expected with respect to literacy and speech/language skills as well as all areas of academics. (N.T. 182, 185, 189.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as comprising two elements: the burden of production and the burden of persuasion. 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 must rest with the District, which for this administrative hearing. Nonetheless, 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.

Special education hearing officers, who serve in the role of fact-finders, are charged with the responsibility of making credibility determinations of the witnesses who testify at the hearing. 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 each of the witnesses who testified to be generally credible as to the facts, which were only contradictory in minor respects; any such inconsistency is attributed to differing perspectives rather than deceit. The weight accorded the evidence, however, was not equally placed. The documentary evidence specifically was essential to gauging the ER under the applicable standards. In addition, the testimony of the District school psychologist was particularly persuasive in explaining her choices of assessment instruments and the process of considering the various disability categories, as is further noted below.

The findings of fact were made only as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles

Child Find

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. The law further obligate local education 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 obligation to identify students suspected as having a disability is commonly referred to as "Child Find." LEAs are required to fulfill the child find mandate within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). More specifically, LEAs are required to consider evaluation for special education services within a reasonable time after notice of behavior that

suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012).

Evaluation Requirements

Substantively, the IDEA sets forth two purposes of a special education 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). Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are appropriately examined.

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) 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—

(i) whether the child is a child with a disability; and

(ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) 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

(C) 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); *see also* 34 C.F.R. §§ 300.303(a), 304(b). 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 observations and available assessments. 34 C.F.R. § 300.305(a).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1).

Finally, 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). In such a circumstance, the LEA “must, without unnecessary delay,” file a due process complaint to defend its evaluation, or ensure the provision of an IEE at public expense. 34 C.F.R. §

300.502(b)(2). Whether or not the LEA funds an IEE, a private evaluation that meets agency criteria and shared with the LEA must be considered. 34 C.F.R. § 300.508(c).

The District's Claim

The District's Complaint seeks to establish that its evaluation of Student in 2021 met all requirements of the IDEA, and that the Parent is not entitled to an IEE at public expense. The Parent disagrees and argues that specific flaws or omissions in the evaluation render it inappropriate. It merits repeating that where, as here, a parent seeks public funding of an IEE, the LEA has only two choices in response: agree to the request, or file a Complaint. The District elected the second of those options.

The District's evaluation utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. First, the District incorporated a summary of a previous mental health assessment; included parental input; and obtained and reported information from Student's teacher including results of a benchmark assessment. The District school psychologist, who is clearly qualified, conducted classroom observations of Student that contributed to an FBA.

Next, the ER included cognitive and achievement testing and several rating scales to evaluate Student's adaptive behavior skills, social/emotional functioning, executive functioning, and characteristics of Autism. It should be noted here that the testimony of the District school psychologist provided a cogent and convincing rationale on the decisions made in selecting assessment instruments (N.T. 57-62, 113-14, 117, 120-21, 148-50, 152-53). Thus, the instruments chosen were appropriate for Student; and, they were administered with necessary adjustments to standardization based on COVID-19 precautions.

Finally, after assessment of all relevant areas of suspected disability, the ER went on to summarize and review all data and information that was gathered, and proceeded to determination of Student's eligibility for special education. Once again the District's school psychologist's detailed explanations of the processes of considering various disability categories were persuasive, including Specific Learning Disability (N.T. 64-66, 76-78, 114-19); Emotional Disturbance (N.T. 79-80, 83-84); and Autism Spectrum Disorder (N.T. 69-71, 84, 123-25); and no conclusion was based on a single measure. The ER went on to several programming recommendations to address Student's individual profile.

All of this evidence preponderantly supports the conclusion that the District's ER was sufficiently comprehensive to identify Student's special education and related service needs. Accordingly, the District has met its burden of establishing that its ER met IDEA criteria and served the purposes of a special education evaluation.

The Parent's disagreements with the District's evaluation were raised specifically at the hearing and in her closing statement, and warrant brief discussion. The first is that the Parent needed to involve an outside agency for a mental health assessment rather than the District conducting a psychiatric evaluation. However, for purposes of the ER, the areas of concern and suspected disability, while including problematic behavior, did not suggest that a psychiatric evaluation was a necessary element. Rather, the initial assessment by the outside agency was for the purpose of quickly determining whether its school-based services should be promptly provided to Student. The District did not rely on, nor even indicate that it needed, the later psychiatric evaluation in order to complete the ER. There is no evidence in this case from which to conclude that the District's ER was insufficient on this basis.

Next, the Parent points to the below benchmark reading assessment score as in conflict with all of the other information obtained that Student was performing as expected in all academic areas. She also suggests that the District school psychologist did not adequately consider a Specific Learning Disability in reading. This contention is belied by the persuasive and contrary evidence in the ER and in the testimony of the District school psychologist. Attaining a score that is not at the expected benchmark on a single instrument administered to all students does not, and particularly in this case is insufficient to, overcome all other related data. In addition, the related concern that the District school psychologist may have been biased is wholly unsubstantiated.

The Parent also challenges the District school psychologist's decision on testing instruments, whose rationale has already been accepted above. Moreover, the assertion that an evaluator could have administered more subtests from a specific assessment, or utilized alternative instruments, could be raised in any case where an LEA evaluation is challenged. Here, the District has preponderantly established that its ER met IDEA criteria, and this contention must be rejected.

Lastly, the Parent raises again her disagreement with the disability categories under which Student was determined to be eligible. This contention is related to the Parent's concerns regarding certain aspects of Student's program as originally proposed, and her testimony was heartfelt and undoubtedly genuine. However, as noted above, the record supports the conclusions drawn by the District on Student's eligibility for the reasons that have been provided. Furthermore, once a student is determined to be in need of special education, the LEA is obligated to provide appropriate services that meet the student's unique needs, not those that might be typical of an individual within any particular disability category. Moreover, disability needs and categories may change over time, and identification at

this early stage of Student's educational career does not necessarily mean that Student will retain the same special education designation until Student graduates or turns age 21. In any event, the claim presented by the District's Complaint was limited to the discrete issue of compliance with the evaluation criteria in the law, and not programming. This decision must address only the issue that was properly presented.

For all of these reasons, the District shall not be ordered to provide an IEE at public expense. The Parent is certainly free to obtain an IEE, and the IEP team must consider private evaluations, but the District shall not be ordered at this time to fund one for Student. Moving forward, it is this hearing officer's sincere hope that the parties work cooperatively together for Student. They should also bear in mind that a collaborative IEP process includes the sharing of relevant information, which can be critical to decision making. *See, e.g., Oconee County School District*, 2015 U.S. Dist. LEXIS 85226, 2015 WL 4041297 (M.D. Ga. 2015).

CONCLUSIONS OF LAW

The District's evaluation of Student in the fall of 2021 was appropriate under the relevant law.

ORDER

AND NOW, this 21st day of April, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's evaluation in the fall of 2021 was appropriate for Student and conducted in accordance with all applicable criteria. The District's claim is hereby GRANTED and it 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.

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 26041-21-22