

*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:**

File No. 24959-20-21

#### **Child's Name:**

T.J.

#### **Date of Birth:**

[redacted]

#### **Parents:**

[redacted]

#### **Counsel for Parents:**

David G. C. Arnold, Esquire  
2200 Renaissance Boulevard, Suite 270  
King of Prussia, PA 19406

#### **Local Education Agency:**

Colonial School District  
230 Flourtown Road  
Plymouth Meeting, PA 19462

#### **Counsel for LEA:**

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#### **Hearing Officer:**

Cathy A. Skidmore, Esquire

#### **Date of Decision:**

09/16/2021

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student, T.J. (Student),<sup>1</sup> is an early elementary school-aged student in the Colonial School District (District) who currently is identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> based on Other Health Impairment, and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.<sup>3</sup>

Student was initially evaluated by the District in the spring of 2021 when Student was in [redacted]. Student's Parents then sought an independent educational evaluation (IEE). The District declined and filed a Due Process Complaint under the IDEA, seeking to defend its evaluation. The Parents responded and the matter proceeded to an efficient due process hearing.<sup>4</sup> The District sought to establish that its evaluation met IDEA criteria and that an IEE was not warranted, while the Parents challenged that evaluation on the same grounds. For purposes of the hearing, the Parents' contentions were confined to an independent evaluation of occupational therapy and speech/language skills and behavior only.<sup>5</sup> Following review of

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<sup>1</sup> 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).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

<sup>4</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Parent Exhibits (P-) followed by the exhibit number. Citation to duplicate exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

<sup>5</sup> N.T. 14-15; P-2; S-2; Parents' Closing at 2.

the record and for the reasons set forth below, the District's claim will be granted in most but not all respects.

## **ISSUES**

1. Whether the District's evaluation of Student complies with IDEA requirements; and
2. If the District's evaluation does not meet all IDEA standards, whether an IEE at public expense should be awarded?

## **FINDINGS OF FACT**

1. Student is an early elementary school-aged student residing within the District who attended its [redacted] program during the 2020-21 school year. (N.T. 17-18.)
2. Student is identified as eligible under the IDEA and entitled to the protections of Section 504 based on an Other Health Impairment. (N.T. 17-18.)
3. Student was provided private counseling services beginning in 2018 [redacted] and continuing through the time of the due process hearing. Those sessions were provided approximately weekly with some breaks during the calendar year. (N.T. 189-90, 209.)
4. Student was provided weekly private occupational therapy services also beginning in 2018 due to a sensory processing disorder. (N.T. 191-92, 270-71, 275.)

## **2020-21 School Year**

5. Student began the 2020-21 [redacted] school year with all remote learning due to the pandemic; and in October 2020 began a hybrid schedule attending school two days per week and attending remotely the other school days. (N.T. 120, 203-04; S-5 at 6.)
6. Student was evaluated in the spring of 2021 at the request of the Parents who became concerned about Student's behaviors at home, on a daily basis, during remote instruction. Student has from an early age engaged in problematic behavior to a significant degree at home, including elopement, outbursts, and acts of defiance. However, the frequency of those behaviors has not been generally consistent. (N.T. 188-89, 197, 202, 204; S-3.)
7. The Parents' written request for an evaluation by the District specified behaviors at home particularly during remote learning (including with completing tasks, following directions, and exhibiting frustration), some self-help skills, and social and play skills. They also noted the provision of Student's private occupational therapy and counseling services. (P-3; S-3.)
8. The District completed its evaluation with parental consent and issued an Evaluation Report (ER) on March 26, 2021. (P-4; S-4; S-5.)
9. The March 2021 ER included input from the Parents that reflected their concerns with behavior in the home, task completion, compliance with directions, attention to tasks, hyperactivity, impulsivity, social skills, and sensory processing deficits. (S-5 at 1-2.)
10. Teacher observations for the March 2021 ER noted overall appropriate social skills at school, a need for redirection for attention to tasks, and frequent calling out and interrupting during class. Student also

exhibited weaknesses in the classroom with respect to voice modulation and organizational skills. Academically, Student was not meeting expectations in some basic reading and literacy skills but was provided with small group intervention (through a Multi-Tiered System of Support (MTSS)) to focus on weaknesses. Student was demonstrating proficiency with mathematics skills at that time. (N.T. 57-59; S-5 at 2-4, 6.)

11. Two classroom observations by the District school psychologist were conducted for the March 2021 ER. A description of testing observations indicated good rapport in addition to Student's cooperation and attention, suggesting that the results were valid estimates of Student's skills. (S-5 at 4-6, 9-10.)
12. The District school psychologist detailed in the March 2021 ER how the pandemic restrictions may have impacted assessments and their results throughout the report. However, the safety precautions did not invalidate the evaluation. (N.T. 111-12, 122-23, 170; S-5.)
13. Cognitive assessment for the March 2021 ER (Wechsler Intelligence Scale for Children – Fifth Edition) yielded Index scores that were somewhat discrepant, ranging from the low average (Working Memory and Processing Speed) to high average range (Verbal Comprehension and Fluid Reasoning) with an average range Visual Spatial Index score. Student's full scale IQ and General Ability Index score were both in the average range but the Cognitive Proficiency Index score (based on the Working Memory and Processing Speed scores) was in the low average range. (N.T. 114-15; S-5 at 10-11.)
14. The March 2021 ER results of assessment of academic achievement (Wechsler Individual Achievement Test – Fourth Edition) ranged from

the high average to low average range with many average range scores; the exception was a very low score in phonemic proficiency. Student exhibited areas of strength and weakness, with overall average range scores on the Oral Language, Reading, and Mathematics Composites and a low average range score on the Written Expression Composite. (S-5 at 11-13.)

15. Assessment of social/emotional/behavioral functioning for the March 2021 ER (Behavior Assessment System for Children – Third Edition (BASC-3)) involved rating scales completed by both Parents and the teacher. The Parents' ratings were both noted to be very elevated in reporting maladaptive behaviors overall. (S-5 at 6-7.)
16. Results of the BASC-3 reflected clinically significant concerns of one or both Parents with respect to hyperactivity, aggression, conduct problems, anxiety, depression, atypicality, attention problems, adaptability, activities of daily living, and functional communication; and at-risk concern for somatization, withdrawal, and social skills. By contrast, the teacher's scales yielded scores in the at-risk range with hyperactivity, conduct problems, somatization, and attention problems; and no clinically significant concerns. (S-5 at 6-8.)
17. On BASC-3 measures of executive functioning skills, the Parents and teachers all noted concerns. Specifically, the teacher's scales reflected scores in the elevated range for overall executive functioning, attentional control, and behavioral control. The Parents' scales both reflected extremely elevated scores for attentional control, behavioral control, and emotional control, and in the elevated range for overall executive functioning. (S-5 at 8-9.)

18. The teacher and one of the Parents also completed an Attention-Deficit/Hyperactivity Disorder (ADHD) rating scale that was consistent with a diagnosis of ADHD-Combined Type. (S-5 at 9.)
19. Evaluation by the District occupational therapist involved assessment of gross motor, fine motor, visual motor, sensory processing, and self-help skills. Student did not exhibit any difficulties in these areas at school with the exception of sensory processing, an area of concern for the Parents also. At school, Student's sensory processing weaknesses related to hearing (voice modulation, responses to sounds and speech), balance, and planning/ideas. (N.T. 28-32; S-5 at 13-15.)
20. The District occupational therapist was aware that Student had a history of sensory processing and attention difficulties at the time of the evaluation. (N.T. 33, 65.)
21. The District occupational therapist had a telephone conversation with the private occupational therapist who provided services to Student. The private therapist also had prepared a summary of previous observations in a different school environment that were shared with the District therapist and reflected difficulty with motor planning. The private therapist did not suggest or recommended any specific assessments for Student, but the District therapist conducted a second observation specifically to ensure a full examination of possible motor planning difficulties. (N.T. 36-38, 79, 286-87.)
22. The District occupational therapist did not observe Student to have difficulty with motor planning but did note that Student asked for clarification from peers or the teacher when unsure. That strategy is one taught to District [redacted] students. (N.T. 38-39.)

23. The District occupational therapist did not recommend school-based direct services but made recommendations such as the incorporation of movement into Student's school day to help Student focus and maintain participation and attention. (S-5 at 13-15.)
24. The March 2021 ER reached a conclusion that Student was eligible for special education on the basis of an Other Health Impairment. Student was not, however, identified with a Specific Learning Disability despite a discrepancy between ability and achievement in some language skills because of Student's progress in MTSS; Student's age and brief school-age programming tenure; and the impact of the pandemic on Student's access to instructional programming. Recommendations were provided for the Individualized Education Program (IEP) team to address attention and focus difficulties, memory weaknesses, organizational skills, need for physical movement, and reading support. Behaviors would also be monitored. (S-5.)
25. The District utilizes a discrepancy model for identifying a child with a specific learning disability. (N.T. 113.)
26. The District school psychologist and occupational therapist are qualified and conducted all aspects of the evaluation in accordance with applicable standards. (N.T. 26-27, 64, 86, 102; S-5.)
27. The District met with the Parents to review and discuss the evaluation. (N.T. 60, 129, 176-77; S-9 at 1-2.)
28. The District school psychologist recommended that Student be provided with additional reading supports to address weaknesses, particularly in light of the pandemic and need for remote instruction as



well as Student having only begun school-age programming in the fall of 2020. (N.T. 119-20.)

29. There were no concerns raised during the evaluation process that suggested to the District school psychologist that assessment of speech/language needs was indicated. (N.T. 124.)
30. The District school psychologist understood that Student exhibited inattention and impulsivity in the classroom at the time of the evaluation. Student's behaviors were similar to that of other students but occurred more frequently. (N.T. 146, 174-75, 180.)
31. In early April 2021, Student's treating psychologist authored a letter opining that Student required specially designed instruction for attention, sensory, and fine motor needs, as well as reading and writing skills. She further recommended a Functional Behavioral Assessment (FBA) because she suspected that Student would engage in problematic behavior at school after returning to school full time. The Parents shared that prediction. (P-13; S-8; S-9 at 2.)
32. Student's IEP team met to develop an educational program for Student in April 2021. By that time, Student was approaching benchmark expectations for reading skills for the end of the 2020-21 school year. (N.T. 178-79; P-9; S-8 at 6-7; S-9.)
33. The Parents provided the letter from the treating psychologist just before the spring 2021 IEP meeting and requested that Student be provided with services consistent with the recommendations of that provider. They also expressed concerns with the March 2021 ER. (N.T. 198; S-8 at 8-9; P-13; P-17.)

34. Needs identified in the April 2021 IEP were attention and task initiation, encoding skills, fine motor (writing) skills, and self-regulation. (S-8 at 9.)
35. The April 2021 IEP addressed task initiation, focus and task completion, and encoding; and also included various program modifications and items of specially designed instruction. Student's program was for itinerant learning support. (S-8; S-10.)
36. The Parents approved the Notice of Recommended Educational Placement for itinerant learning support. (S-11.)
37. The private occupational therapy observed Student at school for approximately sixty minutes on June 4, 2021. That therapist noted Student to exhibit sensory-seeking behavior as well as difficulty with organization, task initiation, and inhibition. (N.T. 273-74.)
38. The last day of the 2020-21 school year in the District was June 11, 2021. (N.T. 289-90.)

## **DISCUSSION AND APPLICABLE LAW**

### **General Legal Principles**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise."

Schaffer, *supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts. Discrepancies among witnesses are attributed to lapse in memory or recall, or to differing perspectives, rather than an intention to mislead. The weight accorded the evidence, however, was not equal. The private speech/language pathologist's testimony did not lack credibility but its persuasive value was quite limited in light of her view that a comprehensive speech/language evaluation was necessary for a child she had not met or evaluated (N.T. 245-46, 260); a position that was based on review of only a few documents (N.T. 246-47) and a conversation with one of the Parents after the District evaluation (N.T. 261-62). Significantly, implicit in her testimony was an assumption that Student had exhibited a wide array of language-related deficits at the time of the District's evaluation. The private occupational therapist provided valuable context about Student's needs, but her testimony did not serve to discredit that portion of the District's ER or the persuasive testimony of the District's own occupational therapist.

The findings of fact were made only as necessary to resolve the issues presented; thus, not all of the testimony and exhibits were explicitly cited. Nevertheless, 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 obligation to identify students suspected as having a disability is commonly referred to as “child find.” LEAs are required to fulfill the child find obligation 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). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted). Identification of children with disabilities is conducted through an evaluation process.

### **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 classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

## **The District's Claim**

The District's Complaint and its position at the hearing sought to establish that its evaluation of Student in the spring of 2021 met all requirements of the IDEA and that the Parents not entitled to an IEE at public expense. The hearing focused on the absence of formal assessment of speech/language and behavioral functioning,<sup>6</sup> as well as the breadth of the occupational therapy portion of the ER, all of which the Parents seek to have privately evaluated. These shall be addressed in reverse order.

The Parents sought independent evaluation of Student's occupational therapy deficits, many of which have been and are addressed through the private services provided. Specifically, the Parents challenge the District's conclusion with respect to Student's sensory processing needs in the school environment.

The District occupational therapist was aware of Student's related history at the time of the March 2021 ER, and spoke with the private provider. She assessed Student for the ER in a variety of occupational therapy-related areas including sensory processing, which were manifested at school with respect to hearing, balance, and planning. Her assessments did not indicate a need for direct occupational therapy services but she did make recommendations for addressing these weaknesses at school. Nothing in the private occupational therapist's observations of Student at the end of the school year was inconsistent with the information generated by the District ER, including occupational therapy-related needs. In short, her belief that the District's occupational therapy evaluation was inadequate lacked a true rationale, and was based on her clinical experience and without an understanding of how the District approached this area of assessment.

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<sup>6</sup> The Office of Special Education Programs has opined in guidance that parents may seek independent evaluation of specific areas that were not assessed by the LEA. *Letter to Baus*, 61 IDELR 81 (OSEP 2015).

Viewed within the context of IDEA criteria, this hearing officer cannot conclude that the occupational therapy portion of the March 2021 ER was flawed.

With respect to behavioral functioning, the Parents contest the failure to conduct an FBA. It is true that the Annotated IEP form developed by the Pennsylvania Department of Education (PDE)<sup>7</sup> specifies that an FBA is to be conducted when a student exhibits behaviors that impede learning. That determination is generally made as part of the development of an IEP. The federal and state regulations implementing the IDEA require an FBA under specific circumstances.<sup>8</sup> However, while Student did exhibit some tendencies in the classroom at the time of the March 2021 ER, Student's inattention and similar behaviors were addressed in the classroom with strategies such as redirection, as was the case with classmates. In addition, Student's behavior would be monitored so that the District could respond as needed. Moreover, the basis for the requested FBA is the opinion of the treating psychologist and Parents that Student likely would engage in problematic behaviors with a return to regular in-school learning. The March 2021 ER cannot be deemed to be inadequate because it did not examine behaviors that were not then manifested in the school setting. This hearing officer cannot conclude that the omission of an FBA in the March 2021 ER establishes that IDEA standards were not met.

The absence of a speech/language evaluation, on the other hand, presents a much closer question, but not for the reasons expressed by the Parents' private speech/language therapist. The Parents explicitly reported concerns with Student's social skills and peer interactions in January 2021.

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<sup>7</sup> Available at <https://www.pattan.net/Forms/Annotated-Individualized-Education-Program-wit-2?NodeId=1545294> (last visited September 14, 2021).

<sup>8</sup> 34 C.F.R. § 300.534(f)(related to disciplinary proceedings); 22 Pa. Code § 14.133 (related to development of a behavior support plan).

The BASC-3 rating scales reflected functional communication weaknesses consistent with those concerns. Student also exhibited difficulty with voice modulation in the classroom and other aspects of hearing. Although teachers did not observe difficulty with peer interactions at school, it is important to keep in mind that Student was only attending school two days each five-day school week after a period of full remote learning. While it may be the case that the impact of pandemic restrictions were at least one factor in Student's development of age-appropriate social and functional communication skills, whether or not Student has needs in the area of speech/language cannot be adequately determined without an evaluation by such a professional. Finally on this topic, and although the District contends that the Parents did not contest the District's proposed assessments or ask specifically for a speech/language evaluation, it is not their vigilance that is determinative but that of the LEA. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). On balance, this hearing officer concludes that the Parents are entitled to an independent speech/language evaluation at public expense in order to assess Student's functional and social communication skills.

In all other respects, this hearing officer concludes that the District's March 2021 ER was sufficiently comprehensive in order to identify Student's special education and related services needs. Accordingly, only an independent speech/language evaluation shall be ordered.

### **CONCLUSIONS OF LAW**

1. The District's March 2021 ER was appropriate in all areas with the exception of any speech/language evaluation.



2. The Parents are entitled to an independent evaluation of Student's speech/language skills and abilities focused on functional and social communication.

## **ORDER**

AND NOW, this 16<sup>th</sup> day of September, 2021, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's March 2021 ER was appropriate under the applicable law in all areas with the exception of assessment of Student's functional and social communication skills.
2. The Parents are entitled to an independent speech/language evaluation of Student's functional and social communication skills to be conducted at public expense by a qualified speech/language professional not affiliated with the District.
3. Within seven calendar days of the date of this Order, the District shall provide to the Parents in writing a list of not less than five qualified professionals within the geographic area of the District to conduct the independent speech/language evaluation.
4. Within seven calendar days of receipt of the list of qualified individuals to perform the independent speech/language evaluation, the Parents shall notify the District in writing of their selection. If the Parents fail to make a selection, the District shall identify the professional from the same list.

5. The selected professional shall determine the scope of the speech/language evaluation, including any observations, administration of assessments, and review of records.
6. The arrangements with the selected professional shall include a requirement that he/she provide a written report of the evaluation to the Parents and the District within a reasonable time not to exceed sixty calendar days from the date of engagement.
7. If the Parents decline to consent to or cooperate with any assessments, release of records, or other actions requiring their permission that are recommended by the professional, there shall be no further obligation by the District.
8. Following completion of the IEE and within seven school days of receipt of the report by both parties, Student's IEP team shall convene with a District speech/language pathologist to review its results.
9. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

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Cathy A. Skidmore, Esquire  
HEARING OFFICER  
ODR File No. 24959-20-21