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**Pennsylvania Special Education Due Process Hearing Officer**

**Final Decision and Order**

**Closed Hearing**

**ODR File Number:**

22860-1920

**Child's Name**

B. B.

**Date of Birth**

[redacted]

**Parent**

[redacted]

*Counsel for Parent*

Jeffrey Ruder, Esquire  
Leigh Loman, Esquire  
429 Forbes Avenue – Suite 450  
Pittsburgh, PA 15219

**Local Educational Agency**

Big Beaver Falls Area School District  
1503 Eighth Avenue  
Beaver Falls, PA 15010

*Counsel for LEA*

Andrew Evankovich, Esquire  
Angela Giglio, Esquire  
1500 Ardmore Boulevard – Suite 506  
Pittsburgh, PA 15221

**Hearing Officer**

Michael J. McElligott, Esquire

**Date of Decision**

11/29/2019

## **Introduction**

This special education due process hearing concerns the educational rights of Student ("student"), a student who resides in the School District ("District").<sup>1</sup> The student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")<sup>2</sup> as a student with autism, intellectual disability, and speech and language ("S&L") impairment.

The District filed the complaint in this matter, seeking to defend its December 2018 re-evaluation process and report in the face of the request of the parent for an independent educational evaluation ("IEE") at public expense.

For reasons set forth below, I find in favor of the parent, although the order will address the process by which the independent evaluator will be selected.

## **Issue**

1. Must the District provide an IEE at public expense?

## **Procedural History**

- A. In May 2019, the student's parent requested an IEE at public expense.

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<sup>1</sup> The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

<sup>2</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 ("Chapter 14").

- B. The District filed a complaint at ODR file number 22313-1819 (“ODR file 22313”), seeking to defend its re-evaluation process and report.
- C. Following requests to reschedule (one request by each party), the hearing at ODR file 22313 convened on September 9, 2019 and concluded in one session. The undersigned hearing officer presided at the September 9<sup>th</sup> hearing session.
- D. On September 17, 2019, the District filed a motion to dismiss on the basis that four days after the hearing session, on September 13, 2019, the parent withdrew the student from the District and enrolled the student with a new local education agency. Therefore, the District argued that the parent’s claim for an IEE at its expense was mooted by the dis-enrollment.
- E. On September 20, 2019, the parent filed a response to the District’s motion.
- F. On September 30, 2019, the District’s motion was granted, and the case at ODR file 22313 was dismissed.
- G. On October 7, 2019, the student was re-enrolled in the District. Parent again requested an IEE at public expense.
- H. On October 15, 2019, the District filed the complaint which led to these proceedings, seeking to defend its re-evaluation process and report.
- I. On November 4, 2019, given the identical issue presented between the two filings, the parties stipulated to the use of the record created at ODR file 22313 for the decision in the instant matter.

## **Findings of Fact**

All evidence of record was reviewed. The citation to any exhibit or aspect of testimony is to be viewed as the necessary and probative evidence in the mind of the hearing officer.

### **Prior to Enrollment in the District**

1. The student had attended a nearby school district. That school district had performed a re-evaluation of the student in December 2016. (Parent's Exhibit ["P"]-1).
2. The December 2016 re-evaluation report ("RR") issued by the student's prior school district noted that the student was significantly below age/grade expectations in gross motor skills, fine motor skills, self-help skills, S&L, general knowledge, social and emotional development, academic readiness, and academic achievement (reading, writing, and mathematics). (P-1 at page 4).
3. The student's teacher at the time reported that "(the student's) language and communication skills are of the highest concern". (P-1 at page 5).
4. The December 2016 RR did not report any acting-out or oppositional behaviors. (P-1).
5. The December 2016 identified the student with autism, an intellectual disability, and a S&L impairment. (P-1).
6. The student was enrolled in the District in July 2017. (Notes of Testimony ["NT"] at 102-124).

### **2017-2018 School Year**

7. In September 2017, the student's IEP team at the District was developed. (P-2).
8. The present levels of academic and functional performance were included in the September 2017 IEP. The student continued to exhibit significant S&L and occupational therapy deficits. There was no information about the student's present levels of academic performance, although functional literacy and functional mathematics were listed as strengths. (P-2 at pages 5-9).
9. The September 2017 IEP did not report any acting-out or oppositional behaviors. (P-2).
10. In the summer of 2018, the student received extended school year ("ESY") programming. The progress report for the student's ESY mathematics goal noted the following: "(the student) refused to complete the task through the 2017-2018 extended school year summer program". (P-7 at page 3).

### **2018-2019 School Year**

11. In September 2018, the student was required to complete, with the assistance of a teacher, a 9-page student transition survey. The survey was to be completed "prior to the IEP to be used to complete the transition section of the (IEP)". The teacher noted the following on the first page of the survey: "Answered 'yes' or no response or unintelligible response to everything. Stopped survey." (P-10 generally, and at pages 1, 6).

12. In October 2018, the student's IEP team met in its annual meeting to revise the student's IEP. (P-11).
13. The October 2018 IEP contained present levels of functional performance in S&L. This information is largely identical to the present levels of S&L performance in the September 2017 IEP. (P-11 at page 7).
14. The present levels of functional performance in terms of the student navigating a new school environment (high school) indicated that the student "will wander away and needs to be watched closely" and "when out in the community, (the student) does not realize the dangers of walking out into the street or will not follow the street signs". (P-11 at page 8).
15. The October 2018 IEP indicated: "(The student) presents with receptive and expressive language skill deficits, secondary to autism, which adversely impacts (the student's) ability to effectively communicate...wants, needs, and ideas with peers and adults". (P-11 at page 11).
16. The October 2018 IEP, in the present levels of S&L performance, there is mention of an assessment for augmentative and alternative communication ("AAC"), but no AAC evaluation or assessment was included in the IEP. There is brief mention of a picture-based system for instruction but there is no mention of an AAC means/device as part of the specially designed instruction. (P-11 at pages 7-8, 12).
17. In December 2018, the District undertook its biennial re-evaluation of the student and issued a RR. (School District Exhibit ["S"]-1).

18. The December 2018 RR did not contain updated S&L assessment for the re-evaluation process. The RR contained the S&L information which was part of the S&L present levels information in the October 2018 IEP. (S-1 at page 2-3).
19. The December 2018 RR makes no mention of an AAC means/device. (S-1).
20. The teacher input in the December 2018 RR indicated that the student would at times be out of the assigned seat and would exhibit work avoidance during S&L sessions, in addition to difficulty with task-focus and alertness. (S-1 at page 5).
21. The December 2018 RR contained updated cognitive and achievement testing. (S-1 at pages 6-8).
22. The December 2018 RR recommended that the student continue to be identified as a student with autism, intellectual disability, and S&L impairment. (S-1).
23. The District school psychologist and the student's father testified that the student utilizes a picture-based communication system. The student's father testified about the student's confusion in utilizing the system and, ultimately, the inability of the student to communicate effectively. (NT 21-100, 102-124).
24. The student's father testified that his particular concerns were the student's intermittent dis-engagement from task, elopement from a physical environment, and lack of communication skills. (NT at 102-124).

## Discussion

Under the terms of the IDEIA, "(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); 22 PA Code §14.102(a)(2)(xxix)). Upon requesting an IEE at public expense, a school district has one of two choices: the school district must provide the evaluation at public expense, or it must file a special education due process complaint to defend its re-evaluation process and/or report. (34 C.F.R. §300.502(b)(2)(i)-(ii); 22 PA Code §14.102(a)(2)(xxix)).

An evaluation (or re-evaluation, as the evaluation provisions of IDEIA apply equally to re-evaluations as well [34 C.F.R. §§300.15, 300.304-311; 22 PA Code §14.102(a)(2)(iii),(xxv),(xxvi)]), must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining" an understanding of the student's disability and the content of the student's IEP. (34 C.F.R. 300.304(b)(1); 22 PA Code §14.102(a)(2)(xxv)). Furthermore, the school district may not use "any single measure or assessment as the sole criterion for...determining an appropriate educational program for the child". (34 C.F.R. 300.304(b)(2); 22 PA Code §14.102(a)(2)(xxv)).

Here, the December 2018 is prejudicially flawed because the evaluation fails to comprehensively and appropriately evaluate the student's communication needs in expressive, receptive, and pragmatic language, as well as a failure to include necessary occupational therapy assessments.

From early on in the student's education, the student's inability to communicate wants and needs effectively, let alone more enriched communication, has been a constant need. The S&L summary as part of

gauging present levels of functional S&L performance—based on a sole assessment— in the October 2018 IEP is simply insufficient to allow for the student’s multi-disciplinary/IEP team to understand fully the student’s significant needs in expressive, and receptive, language, as well as pragmatic language. Additionally, the District evaluator indicated that the student’s needs include “building social interaction skills” (S-1 at page 8), and assessment in this area—or programming—is not part of the evaluative or educational mosaic for this student.

Furthermore, the data and results of the AAC evaluation are not part of this record, whether as part of the October 2018 IEP or the December 2018 RR. For a student who is minimally verbal, and for whom the extent of the picture-based communication is unclear, this is prejudicially flawed.

Additionally, the occupational therapy input/data in the December 2018 RR is solely oriented toward “fine motor and visual perceptual skills as they pertain to functional writing assignments” (S-1 at page 3). Yet the District evaluator indicated that the student’s needs include “sensory inventory/profile to create sensory diet” and “independence and spatial awareness” (S-1 at page 8). Therefore, an IEE at public expense is warranted for occupational therapy.

The other aspects of the December 2018 RR, while not comprehensive, are not inappropriate. There are teacher input and updated cognitive/achievement assessments. So, at a minimal level, a comprehensive psycho-educational evaluation will not be ordered.

Accordingly, it is the finding of this decision that the student is entitled to an IEE at public expense for S&L and occupational therapy needs.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the Big Beaver Falls Area School District shall fund, at public expense and as set forth below, a comprehensive speech and language evaluation and a comprehensive occupational therapy evaluation, to be performed by independent evaluators of the parent's choosing.

The record review, input, assessments, testing, consultation, scope, details, proposed observations, findings, recommendations, and any other content in the independent speech and language evaluation report, and the independent occupational therapy evaluation report (collectively, "independent evaluation reports"), shall be determined solely by the independent evaluators.

After the independent evaluators have issued the independent evaluation reports, the student's multi-disciplinary team ("MDT") shall meet to consider the findings of the independent evaluation reports ("independent evaluation MDT meeting"). At the independent evaluation MDT meeting, the District shall invite and include the independent evaluators as participants in the independent evaluation MDT meeting, making scheduling accommodations for the participation of the evaluators, in person or by telephone, as necessary. The District shall bear any cost or rate for the participation of the independent evaluators at the independent evaluation MDT meeting. To the extent that two separate independent evaluation MDT meetings are needed as a result of scheduling needs of the independent evaluators, the MDT shall meet twice to consider each independent evaluation report, and this paragraph applies to each of those separate independent evaluation MDT meetings.

The terms of this order regarding the involvement of the independent evaluators shall cease after their attendance at the independent evaluation

MDT meeting(s), although nothing in the order should be read to limit or interfere with the continued involvement of the independent evaluator(s), as both parties may mutually agree, or as one party may make singular arrangements therefor.

Finally, nothing in this order should be read to interfere with or limit the ability of the parties to agree otherwise, so long as such agreement is in writing and specifically references this order.

Any claim not specifically addressed in this decision and order is denied and dismissed.

*s/ Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

11/29/2019