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Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

25004-20-21

Child's Name

B.L.

Date of Birth

[redacted]

Parents

[redacted]

Pro se

Local Educational Agency

Owen J. Roberts School District
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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

08/16/2021

Introduction

This special education due process hearing concerns the educational rights of B.L. ("student"), a student who resides in the Owen J. Robers School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student with an intellectual disability and autism. The parties disagree over a re-evaluation report ("RR") issued by the District in April 2021.

The student's parent disagreed with certain aspects of the April 2021 RR and requested, as remedy, that this hearing officer "strike the re-evaluation report".³ The District counters that the April 2021 RR, and the re-evaluation process that led to the report, are both appropriate. The hearing officer informed the parent that he did not have the authority to "strike" the April 2021 RR: "I do not have the authority to "strike" the school district's evaluation, as requested by the parent....It is a document which has been produced and considered by the student's IEP [individualized education program] team, and the school districts stands by the evaluation process and the content of the report." But the parties were informed that the hearing would proceed in light of the parent's disagreement with aspects of the April 2021 RR.⁴

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

² 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").

³ School District Exhibit ["S"] – 8.

⁴ Hearing Officer Exhibit – 1 (bracketed material not contained in the original).

Issue

Are the April 2021 RR, and the re-evaluation process which led to the issuance of the report, appropriate?

Findings of Fact

All evidence in the record, both exhibits and testimony, were considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The student has been long-identified as a student eligible for special education and has resided in the District since 2012. (S-6 at page 1).
2. In November 2020, the District contacted the parent to conduct the biennial re-evaluation process. (S-1; Notes of Testimony ["NT"] at 55-56).
3. Due to the impact of the COVID-19 pandemic, the parent indicated that he wished to postpone the evaluation process. In part, he indicated "I will provide parent input for re-evaluation in March or April." (S-2; NT at 13-14, 55-56).
4. The District responded to the parent's indication by "honor(ing) your request to postpone the re-evaluation until April". (S-2; NT at 55-56).

5. In January 2021, the student's IEP was due for its annual revision. The student's IEP team met to revise that document even though the biennial re-evaluation had been postponed at the parent's request. (Parent's Exhibit ["P"]-7; NT at 27-30).
6. In March 2021, the District undertook the re-evaluation process by updating the student's then-current goal progress and soliciting updated input from the student's related services providers (S-6 at pages 20-23; NT at 17-18).
7. In March 2021, the District evaluator twice observed the student in the student's educational placement. (S-6 at pages 23-24).
8. In April 2021, the District solicited the parent's input for the re-evaluation. (S-2, S-5).
9. In April 2021, the District issued the RR. (S-6).
10. The April 2021 RR included background information for the student. (S-6 at page 1).
11. The April 2021 included cognitive, achievement, and autism testing results, as well as adaptive functioning, attention, social/emotional/behavioral assessments, from prior re-evaluations (2004, 2009, 2015, 2016, and 2019). (P-1 at pages 3-28; S-6 at pages 2-17; NT at 17, 19-22, 66-67).
12. The April 2021 included extensive occupational therapy ("OT") and speech and language ("S&L") assessment results from the 2019 re-evaluation. (P-1 at pages 29-32; S-6 at pages 17-20).

13. Given extensive and consistent assessment data from the prior re-evaluations, the re-evaluation process did not include cognitive testing. (S-4; NT 14-16, 51-52, 56-59).
14. The April 2021 RR included the student's then-current goal progress. (P-2; S-6 at pages 20-21; NT at 24, 67-69).
15. The April 2021 RR included updated input from the student's OT and S&L providers (P-2; S-6 at pages 21-23; NT at 24, 36-39).
16. The April 2021 RR included observations by the District evaluator in the student's educational placement in various vocational and educational settings at the student's educational placement. These observations also included input from staff at the educational placement. (S-6 at pages 23-24; NT at 24-27).
17. The April 2021 RR included input from the student's parent obtained both in January 2021, as part of the IEP meeting, and in April 2021, as part of the re-evaluation. (S-5, S-6 at page 2; NT at pages 23-24, 49-51, 67-69).
18. The April 2021 RR contained extensive content from the January 2021 IEP, content provided by staff at the student's educational placement, including the student's strengths and needs, transition planning (vocational and activities of daily living), OT and S&L recommendations, and parent concerns. (P-3, P-4; S-6 at pages 25-28; NT at 36-39, 42-43, 45-46, 67-69).

19. The April 2021 RR recommended that the student continue to be identified as a student with an intellectual disability and autism. (S-6 at page 25).
20. The student's IEP team met in May 2021 to consider the IEP in light of the April 2021 RR. (S-7).
21. In June 2021, the parent filed the complaint which led to these proceedings. (S-8).
22. The parent's predominant concern is that the District did not conduct any updated assessments and did not communicate clearly, in the parent's mind, about that fact. (NT at 69-70).

Witness Credibility

All witnesses testified credibly and a similar degree of weight was accorded to each witness's testimony.

Discussion

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives a free appropriate public education (34 C.F.R. §300.17), a student must be regularly re-evaluated to ensure that the student's IEP team continues to understand the student's strengths/needs and that the student's educational programming continues to build on those strengths and continues to address those needs. (34 C.F.R. §300.303(b)(2) ; 22 PA Code §14.124(c))

A re-evaluation (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)).

Furthermore, a re-evaluation must be based on parental input, a review of prior evaluations, school-based assessments, and observations of the student by educators and related service providers, with the IEP team at that point determining whether additional data needs to be collected to gauge the need for “additions or modifications to the special education and related services...needed to enable the child to meet the measurable annual goals set out in the IEP of the child”. (34 C.F.R. §300.305(a), generally, and specifically at §300.305(a)(2)(iv); 22 PA Code §14.102(a)(2)(xxv)). If the IEP team determines that additional data are not required, the school district must inform the parents of the reason(s) for that decision and advise the parents that they may request that additional data be gathered; but the school district is not required to gather such additional data unless parents specifically make that request. (34 C.F.R. §300.305(d); 22 PA Code §14.102(a)(2)(xxv)).

Here, the April 2021 RR is appropriate. The content of the report is comprehensive and the District's perspective on the re-evaluation of the student, in terms of new data-collection, is defensible. This is a student who has been with the District for many years and has been in the same educational placement, outside the District, for the same amount of time. The strengths and needs of the student are known and, indeed, are addressed in a lengthy and detailed IEP.

The April 2021 RR, and the process for developing it, addressed input from the parent, from educators, from related service providers, and included information from the IEP team at its January 2021 meeting, including the student's performance. In that regard, it is complete and appropriate. And, importantly, nothing in the record indicates that over the period November 2020 – April 2021, when the re-evaluation process (including an IEP team meeting) was unfolding, is there any indication that the parent, or any other member of the IEP team felt, that additional data-reporting was necessary. Therefore, the District proceeded with its re-evaluation, with the view that it comprehensively understood this student from an evaluation perspective, and additional data-collection was not an issue that it felt was necessary. Again, this position is defensible and was undertaken in good faith.

Parent evidently held a different view. With the issuance of the April 2021 RR, parent felt that there should have been additional data-collection. This record is silent, even through parent's testimony, as to what that data-collection should have been. But parent feels that the basis of the April 2021 RR should have included something more. And as a matter of procedure, strictly the parent is correct—if there was to be no deepening of data-collection as part of the re-evaluation, the

parent needed to be informed of that, and the reasons for it, with an opportunity to request that additional data-collection be part of the re-evaluation. The record cannot support a definitive finding that the parent was offered that information, and clearly the parent feels he was not.

In sum, then, on this record the April 2021 RR, and the process which led to its issuance, are both appropriate. What additional data the parent feels may be necessary is unclear; it appears that parent simply disagrees with the way the District handled things procedurally.⁵ Even so, the record is not dispositive that the District clearly communicated to the parent that it was proceeding without

⁵ In testimony at the hearing, and in the documentary evidence, there is no indication that parent disagreed with the student's areas of suspected disability. Indeed, those identifications—intellectual disability and autism—have been long-established. In closing argument, however, parent asserts that he is concerned with a suspected disability of some other sort ("Also, the evaluator did not assess the student's all 'suspected disabilities'. Parent's concern is a suspected disability" [HO-2 at page 2]). Aside from these two lines in the closing statement, the entire record, and the rest of the closing statement itself, centers on procedural elements, not substantive elements, of the re-evaluation process. Parent also argues, both through testimony and in the closing statement, that his consent was required for an observation of the student, citing 34 C.F.R. §300.310(b)(2). This provision, however, does not require parental consent for observations as part of a re-evaluation. Instead, the provision applies only to evaluations where a student is suspected of having a specific learning disability and the reference to "consent" is consent for the evaluation or re-evaluation process itself, not consent for the observation of the student: "The (school district) must ensure that the child is observed in the child's learning environment....(so that) [a group of qualified professionals and the parent], in determining whether a child has a specific learning disability, must decide to...have at least one member [of the group of qualified professionals] conduct an observation of the child's academic performance in the regular education classroom, after the child has been referred for an evaluation (or-re-evaluation) and parental consent, **consistent with §300.300(a)**, is obtained." (34 C.F.R. §300.310(a),(b)(2); bracketed material references §300.306(a)(1), the group responsible for identifying a specific learning disability; emphasis added).

The consent referenced in §300.300(a), then, is general consent to conduct the re-evaluation (adopted through §300.300(c)(1)), not consent for the observation. The terms of §300.310(b)(2) mandate that any observation of the student's academic performance in regular education classrooms, where a specific learning disability is suspected, take place after parents have consented to the evaluation process, not to that observation itself. It does not stand for the proposition that parents must consent to an observation of the student as part of an evaluation or re-evaluation.

additional data-collection. It is the considered opinion of this hearing officer that both parties proceeded in good faith, with each party not realizing that its position vis a vis additional data-collection was misunderstood by the other party.

Accordingly, the order below will make clear that the District's evaluation process and April 2021 RR were both appropriate. But under a hearing officer's authority to order an independent evaluation, a process to obtain such a re-evaluation will be put in place, ostensibly the final re-evaluation of the student prior to the student aging-out of educational system and moving beyond the umbrella of IDEIA at the conclusion of the upcoming 2021-2022 school year.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Owen J. Roberts School District met its obligations to the student in the issuance and content of the April 2021 re-evaluation report, and in the re-evaluation process which led to that report.

Additionally, under the authority granted to a hearing officer by 34 C.F.R. §300.502(d)/22 PA Code §14.102(a)(2)(xxix) and for the reasons stated above, the District shall fund a comprehensive independent re-evaluation, each under the terms that follow.

On or before August 26th, a District special education administrator shall provide, through e-mail communication to the parent, the names and curricula

vitae/resumes, of at least three (but no maximum number) independent evaluators experienced in conducting comprehensive re-evaluations for educational programming ("independent evaluator"), who will make themselves available to conduct this independent re-evaluation.

On or before September 7th, the student's parent, to the extent he wishes, may select the independent evaluator from the individuals identified by the District to conduct the independent re-evaluation ("selected independent evaluator"), indicating his selection by email communication to the District special education administrator who provided the curriculum vitae/resumes to the parent. As the parent considers which independent evaluator he might choose to conduct the independent re-evaluation, there shall be no contact by the parent with the potential evaluators. The parent's consideration shall be made only upon review of the evaluators' curriculum vitae/resumes.

When the parent has indicated the selected independent evaluator he has chosen, the cost of the independent evaluation shall be at the selected independent evaluator's rate or fee and shall be borne by the District at public expense. As those arrangements are made, the selected independent evaluator shall be made to understand that it is hoped, but not required or ordered, that the independent re-evaluation report can be issued as soon as practicable, but no later than November 21st, sixty calendar days beyond September 7th, the last day for the selection of an evaluator by the parent.

The record review, input, observations, assessments, testing, consultation, scope, details, findings, recommendations, and any other content in the independent re-evaluation report, shall be determined at the sole discretion of the

selected independent evaluator, as the selected independent evaluator feels is necessary.

If by September 7th, the student's parent does not wish to select the independent evaluator, or he has not indicated by email his selection to the District special education administrator, the District may consider this lack of choice and/or communication by the parent to place in the hands of the District the selection of the independent evaluator from the list it provided to the parent. The same timelines for the suggested completion and issuance of the independent re-evaluation report apply where the District has selected the independent evaluator.

After the issuance of the independent re-evaluation report, the student's IEP team shall meet to consider the independent re-evaluation report to see what, if any, changes may be necessary for the student's educational programming.

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

08/16/2021