

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:

26729-22-23

CHILD'S NAME:

A.H.

DATE OF BIRTH:

[redacted]

PARENTS:

[redacted]

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HEARING OFFICER:

Cheryl Cutrona, J.D.

DATE OF DECISION:

August 11, 2022

INTRODUCTION AND PROCEDURAL HISTORY

The Student,¹ an early elementary school-aged student, has resided in and attended school in the School District of Philadelphia (hereinafter “District”) since Kindergarten. Prior to coming to the District, the Student received Early Intervention (EI) services after displaying cognitive, developmental, and speech and language delays (S-1, 8). The Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).²

Following its triennial reevaluation 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 (IEE) at public expense was warranted. The case proceeded to a one-day, closed, due process hearing that was convened via video conference on Zoom. At the end of the hearing, the attorneys presented oral closing statements.

All evidence including the exhibits admitted to the record and transcripts of the testimony was considered by the Hearing Officer. The only findings of fact cited herein are those needed to address the issues resolved. All exhibits and all aspects of each witness’s testimony are not explicitly referenced below.

Following a review of the record and for all of the reasons set forth below, the District’s claim is sustained.

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).

ISSUE

1. Whether the District's reevaluation of the Student comported with all applicable criteria and was appropriate under the law; and
2. If it was not, should the District be ordered to provide an independent educational evaluation of the Student at public expense?

FINDINGS OF FACT

1. The [elementary aged] Student entered the District [redacted] at the beginning of the 2018-2019 school year (S-3 at 1).³
2. The first Reevaluation Report (RR), dated December 10, 2018, was conducted by the District while the Student was in [early elementary school](S-3, 1). A full psycho-educational evaluation was conducted. The Full-scale IQ (FSIQ) listed was 94, which was considered in the "average" range and in the 34th percentile rank. The evaluator ruled out Intellectual Disability (ID) and designated the Student's primary disability as Specific Learning Disability (SLD) (S-3, 9). The RR recommended that the Student receive learning support services in reading, writing, and math; speech and language therapy; and occupational therapy (S-3 at 2).
3. The Student's triennial RR was due to be conducted in December 2021. The District initially issued a Permission to Evaluate on November 23, 2021 (P-1).

³ References to the record throughout this decision will be to the Notes of Testimony (NT), Parents Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all.

4. The RR was issued for the first time on January 14, 2022. It did not include a psychoeducational component or a speech and language evaluation (NT 41). The Parents requested that the District conduct a full psychoeducational evaluation and speech and language testing. The Parents consented to the cognitive testing and the Compliance Monitor notified the School Psychologist on February 2, 2022 (S-2). After the cognitive testing was completed, the RR was amended and reissued to the Parents on March 30, 2022 (NT 47).
5. The School Psychologist, who is well qualified, conducted a Review of Records including previous evaluations and testing, grades and progress data such as the benchmark/STAR data (NT 49) (including key MAP and the Woodcock Reading Mastery testing conducted by the teacher indicating that the Student was struggling in reading and math) (NT 84), a classroom observation in the general education math class (NT-79-80), an observation during testing (NT 80), and gathering data from both the Parents and regular education teachers (NT 50-52). The School Psychologist did not have access to the Student's Early Intervention Individualized Educational Plans (IEP) or testing and did not ask to gain access (NT 146).
6. The cognitive testing by the School Psychologist (NT 57) included the following standardized tests: (1) all seven subtests of the Wechsler Intelligence Scale for Children (WISC-V) (S-6); (2) the Wechsler Individual Achievement Test (WIAT-IV) (S-7); (3) the Vineland-3 Adaptive Behavior Scales (S-8); (4) the Brown Executive Functioning/Attention Scales (S-9); and (5) the short version of the Connors-3 Scales to assess if a student is demonstrating characteristics of ADHD (S-10). All of the cognitive testing was completed on an IPAD, except for WISC coding subtest (S-6, 23), the

WISC symbols subtest (S-6, 24), and the Connors-3, for which a paper version was used (NT 127).

7. The results of the a Speech and Language evaluation indicated that the Student tested within the normal limits for oral motor, hearing, voice and fluency (S-1, 29). The "sounds in words" subtest of the Goldman Fristoe Test of Articulation (FGTA-3) results indicate that the Student's speech intelligibility was judged to be poor when the context of what the Student is speaking about was unknown to the listener (S-1, 30). A new Speech and Language IEE was requested and approved by the District (P-4). On June 1, 2022, the District sent the Parents a NOREP indicating that the Parents declined the Speech and Language RR (P-5). The School Psychologist reviewed the results, but did not speak with the person who conducted the Speech and Language testing that appear in the RR (NT 138).
8. An Occupational Therapy assessment was also conducted in which the Student scored below average in fine motor, visual motor, and visual perceptual skills (S-1, 30). The School Psychologist reviewed the OT assessment but did not speak with the person who conducted it (NT 149-155).
9. The amended RR was issued on March 30, 2022 (S-1, 1). The 2022 RR listed the FSIQ as 65 and considered Significantly Below Average at the first percentile and the Verbal Comprehension Index, was 78 (NT 59, S-1, 11). The School Psychologist noted the difference between the FSIQ in the 2018 RR (94) and the FSIQ in the 2022 RR (65) and explained that sometimes as children get older the gaps between a child's intellectual, and social, and adaptive functioning relative to their peers become more apparent (NT 119). After looking at all the results, and based on the combination of cognitive and adaptive deficits, the School Psychologist determined that the ID category best described

the Student and changed the primary disability from SLD to ID (NT 198) with a secondary disability category of Speech or Language Impairment (S-1, 10).

10. The Parents disagreed with the RR and requested an IEE in an email sent from the Parent's Legal Advocate on May 9, 2022 (P-3). The Parents reported that the Student did not benefit from virtual instruction when the Student's in person learning was disrupted from the mandated COVID-related school closure from March 2020 through June, and again until May of the 2020-2021 school year when in person learning resumed for the Student. The Mother testified that the Student made no progress and experienced some regression during that time (NT-272-275). The Mother was concerned about the RR's "big jump" from SLD to ID (NT 276). The School Psychologist considered the impact of COVID for achievement results, but not cognitive results. The School Psychologist explained that cognitive testing assesses ability, which does not change drastically over time. Whereas, academic skills, achieved through schooling, would be more likely to be adversely impacted during the in-person learning hiatus. The School Psychologist concluded that COVID was not a determining factor on whether or not the Student had significantly subaverage intellectual functioning and significant adaptive skill deficits (NT 196).
11. The proposed IEP (S-11) was revised to include the results of the cognitive testing. The services included Learning Support for 960 minutes per week, Speech and Language Therapy for 30 minutes per week, and Occupational Therapy for 30 minutes per month (S-11, 62). The proposed IEP indicated that the Student needs full-time learning support services (S-11, 63), and that the Student would need to be transferred to a different school (TBA) because the neighborhood

school where the Student was attending could not provide those services (S-11, 64).

12. Several IEP meetings followed with the last proposed draft dated June 6, 2022 (S-11). On June 27, 2022, the Parents sent an email suggesting the name of an evaluator to conduct the IEE (P-6). The District had not received a NOREP signed by the Parents as of that date (NT 248).
13. Eleven days later, on July 6, 2022, the District filed a due process complaint claiming that its denial of the Parent's request for an IEE was appropriate, and seeking a finding that it is not obligated to fund a psychoeducational IEE at public expense (P-7).

District's Claims

The District claims that the Parent's request for an IEE at public expense is not warranted because the RR conducted by the District meets all of the criteria required by the IDEA. 34 CFR 300.304 (b) and (c).

The District argues that generous deference should be given to the School Psychologist, a professional who is qualified, trained, and experienced and has conducted hundreds of evaluations over the last four years of service at the District. The District purports that it is not the role of this forum to second guess the professional judgment of the School Psychologist.

The District claims that the Parents are not eligible for an IEE just because they disagree with the conclusions in the District's RR. The Parents must demonstrate by a preponderance of the evidence that that the District's process or methodology was flawed.

The District acknowledges that COVID disruption has impacted students, and in the School Psychologist's expert opinion that while the disruption may have impacted the Student's achievement level scores, it

would not have impacted the Student's cognitive test scores. And, in School Psychologist's professional judgment, ID was the more appropriate classification because of the combination of the Student's cognitive, adaptive skills, and executive functioning deficits.

The District contends that the Parents' procedural claim that the RR was untimely should be denied. The District argues that there was no undue delay between when the Parents requested an IEE, when the District denied it, and when the District filed the due process complaint. The District maintains that looking at filing dates in isolation is not enough. It is important to look at what is happening in the interim. And where there are ongoing communications, and efforts on the part of the District to resolve the issues raised by the Parents, those factors must be considered when determining whether the District has timely filed.

The District alleges that the Parent's claim regarding the lateness of the triennial evaluation, which was due in December 2021 and completed March 30, 2022, does not hold up because during that time period the District conducted additional testing based on the Parent's request and amended the RR accordingly. If it was late, the proper remedy would be compensatory education ordered as a result of a complaint filed by the Parents, which is not at issue here.

Parents' Claims

The Parents argue that the District's Complaint should be denied because of its procedural violations in submitting the RR and the due process complaint in an untimely manner, and its flawed RR methodology.

The 2018 RR was completed on December 10, 2018, making the triennial RR due December 10, 2022. The District did not complete the first draft of the RR until January 14, 2022, more than a month late and, until the

Parents objected, did not include a psychoeducational component. Thereafter, it took the District until March 30, 2022 to present the final draft of the RR, three months late.

Furthermore, the Parents claim, the District's methodology is flawed for the following reasons: (1) the District conducted its testing in "silos"; the School Psychologist did not talk to the Speech and Language evaluator or the Occupational Therapist, nor did the School Psychologist obtain the Student's early EI testing records; and (2) the School Psychologist conducted most of the testing on the IPAD even though the Student demonstrated deficits in visual spatial processing, executive functioning, and receptive language delays – all of which impede the Student's ability to effectively use the IPAD. An IEE is necessary for an independent evaluator to tie together the data gathered to determine if the Student really has an ID or if the cognitive testing results were flawed because they were adversely impacted due to the adverse impact of the taking the majority of the test on an IPAD despite the Student's deficits in visual perception, receptive language skills, and executive functioning.

Therefore, the Parents posit, the 25-point FSIQ discrepancy between 2018 RR and the 2022 RR is troublesome (S-1, 11 and S-3, 9). The evaluator who conducted the 2018 RR administered two nonverbal tests and explicitly ruled out ID. The School Psychologist did not include nonverbal testing in the 2022 psychological evaluation and concluded that the more appropriate category was ID. This is further evidence that the District's methodology was flawed.

The Parents argue that the School Psychologist erroneously concluded that the Student was making progress because the third-grade testing results indicate that the Student's math and reading levels were at the Kindergarten or below level. That can hardly be considered making progress.

The Parents requested an IEE on May 9, 2022. The District did not respond until June 1, 2022, nearly a month later, and then waited more than another month, until July 6, 2022, to file a Complaint. Both of these procedural violations caused an undue delay.

Therefore, the IEP offered in June 2022, which was based on the flawed RR, is inappropriate.

Based on the District's procedural violations and flawed evaluation methodology, the Parents' request for an IEE should be granted and the District's Complaint denied.

LEGAL PRINCIPLES

Burden of Proof

In general, the burden of proof essentially consists of 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).

The burden of persuasion must be established by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 EL 3097939 (E.D. Pa. October 26, 2006). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called "equipose." On the other hand, whenever the evidence is preponderant (i.e., there is weightier

evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See *Schaffer*, above.

In the present matter, the burden of persuasion rests on the District who filed the complaint that initiated the due process proceeding. If the District fails to produce a preponderance of the evidence in support of its claims, or if the evidence is in "equipoise," the District cannot prevail.

In this case, the District met its burden of persuasion by a preponderance of the evidence.

Credibility Determinations

Special education hearing officers, in the role of fact-finders, are 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 to be generally credible, testifying to the best of their ability and recollection concerning facts necessary to resolve the issues presented. Any conflicting testimony between the witnesses can be attributed to poor recall and differing perspectives.

Evaluation

The IDEA establishes requirements for evaluations that are substantively the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

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).

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained, including the use of a variety of assessment tools for gathering relevant data about the child’s functional, developmental, and academic strengths and weaknesses. 34 C.F.R. §§ 300.304(b); see also 34 C.F.R. § 303(a). 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).

Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parents 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). The U.S. Department of Education has explained that, although “[t]he eligibility group should work toward consensus, under §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability.” 71 *Fed. Reg.* 46661 (August 14, 2006).

Independent Educational Evaluation at Public Expense

When parents disagree with the LEA evaluation, their 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 its 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).

Procedural FAPE

The IDEA directs that an impartial hearing officer's decision must be made on substantive grounds. 20 U.S.C. § 1415(f)(3)(E)(i).

If a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(e)(ii), 34 C.F.R. § 300.513(a)(2).

Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

If a parent disagrees with the LEA’s evaluation and requests an IEE, the LEA may ask for the parents’ reason why they object to the school’s evaluation. However, the LEA may not require the parent to provide an explanation and may not *unreasonably delay* either providing the IEE at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation. 34 CFR 300.502(b)(4).

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); see also 34 CFR § 300.301. 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).

DISCUSSION

Procedural Issues

The procedural deficiencies alleged by the Parents in relation to the timeliness of the RR and the filing of the Complaint denying the Parents’ request for an IEE did not result in a substantive denial of FAPE to the Student nor did they significantly impede the meaningful participation of the Parents.

The initial Permission to Reevaluate was sent to the Parents on November 23, 2021. There is no record as to when the Parent notified the District of their consent. In any case, the first draft of the RR was issued on January 14, 2022, fifty-two (52) calendar days later. After the Parents requested additional testing, the District sent the Parents a new Permission

to Evaluate and they consented to the cognitive testing by email on February 2, 2022. The amended RR was issued on March 30, 2022, 56 calendar days later. Both of those timelines meet the sixty-day requirement in 22 Pa Code §§ 14.123(b), 14.124(b). As such, the Hearing Officer finds no timeliness issue.

In regard to the filing of the complaint, the regulations mandate that the District may not *unreasonably delay* either providing the IEE at public expense or filing a due process complaint. 34 CFR 300.502(b)(4). “Unreasonably delay” is not defined in the regulations so it needs to be interpreted on a case-by-case basis.

The Parents notified the District that it was seeking an IEE on May 9, 2022. The District filed its due process complaint fifty-eight days later on July 6, 2022. During that time, the District was in on-going discussions with the Parents about the IEP hoping to address all of the Parents’ concerns to obviate the need for an IEE. The time the District took before it decided to file a Complaint defending its evaluation of the Student did not constitute an unreasonable delay because productive discussions and changes to the IEP were being made based on the District’s RR.

The Reevaluation Report

The District RR meets all the IDEA evaluation criteria. Each requirement will be discussed below.

The District used a battery of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the Parent and two general education teachers. The RR conducted by the School Psychologist included a record review and observations of the Student in the classroom and during testing. This comprehensive assortment of tests conducted by the School Psychologist to assess the Student includes cognitive (i.e., WISC-V) and

academic assessments (i.e., WIAT-IV), and several rating scales (i.e., Vineland 3, Conners 3, and the Brown Executive Functioning Scales). The instruments used are standardized, normative assessments and they were administered by trained personnel in accordance with the instructions provided for those assessments.

The evaluator did not use a single measure or assessment as the sole criterion for determining the Student's disability classification and special education needs. Rather, multiple assessments and sources of information were used in conjunction with each other.

The Parents argue that the RR was not comprehensive because it did not include nonverbal testing or testing to assess the Student's social and emotional skills. The Hearing Officer finds that the absence of such tests in the RR does not render the RR inappropriate. The Parents' concern that no nonverbal testing was conducted was adequately explained by the School Psychologist who concluded that it was not necessary because a nonverbal score was included in the WISC-V. The Parents' concern that there was no social-emotional testing was adequately addressed by the School Psychologist's explanation that portions of the Vineland-3 and Conners-3 have domains that relate to socialization and emotional needs. The Hearing Officer must defer to the judgment of the professional school psychologist on substantive matters such as what tests are appropriate and whether or not the results are valid. Therefore, the Hearing Officer confines her decision-making to the criteria identified in the IDEA.

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

LEGAL CONCLUSIONS

The timeliness of the District's completion of the Student's triennial RR, its denial of the Parent's request for an IEE, and its filing of the due process complaint did not constitute an unreasonable delay, did not result in a substantive denial of FAPE to the Student, and did not significantly impede the meaningful participation of the Parents. Therefore, no remedy is due based on timeliness issues.

The RR is appropriate because it satisfies the requirements listed in the IDEA. The Parents are certainly free to disagree with the RR and obtain an IEE. That right is codified into the IDEA. However, the Parents' right to public funding for an IEE is predicated on a determination that the RR is inappropriate, which, under the law, it is not. The Parents, therefore, are not entitled to an IEE at public expense.

ORDER

AND NOW, this 11th day of August, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the District's Reevaluation Report dated March 30, 2022, is appropriate under the law and an Independent Educational Evaluation at public expense is not warranted.



Cheryl Cutrona, J.D.
Special Education Hearing Officer

Date of Decision
August 11, 2022
ODR 26729-22-23KE