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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: TE

Date of Birth: xx/xx/xx

Dates of Hearing:
April 2, 2008; May 6, 2008
CLOSED HEARING
ODR #8498/07-08 KE

Parties to the Hearing:

Mr. and Ms.

Pottsville Area School District
1501 West Laurel Boulevard
Pottsville, PA 17901-1498

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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May 9, 2008

May 24, 2008

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a xx year old resident of the Pottsville Area School District (District), and he is not currently identified as a child with a disability for special education purposes. (NT 10.) The Student is in sixth grade. (P-2.) He has been diagnosed with attention deficit hyperactivity disorder. (P-7 p. 1.) Mr. and Ms. (Parents) request due process, asserting that the District failed to identify the Student as a child with a disability from his kindergarten year until the date of filing for due process, that the District's evaluation of January 2008 was inappropriate, and that the program and placement that the District offered to the Student was and is inadequate. They seek an order for an Independent Educational Evaluation and compensatory education.

The parties agreed and the hearing officer directed that the matter be bifurcated and that the present hearing and decision be limited to the issues surrounding the Parents' request for an independent educational evaluation. (NT 25-26.) The District argued that it had performed a comprehensive evaluation of the disability that the Parents had asked it to address: Other Health Impairment. In addition, the District had performed a less comprehensive evaluation of other possible disabilities in order to "screen" for them, but found no reason to continue with more detailed testing or analysis. Thus, the District argues that its evaluation was appropriate and that the request for independent educational evaluation should be denied.

The Parents requested an evaluation in November 2007, (P-1), and the District completed the evaluation by January 18, 2008, (P-7). The Parents next requested an independent educational evaluation and conveyed this request on or about January 24, 2008. (P-10.) By letter dated January 27, 2008, the Parents requested due process. (P-13.) The hearing was conducted on two days, April 2, 2008 and May 6, 2008. The record closed on May 9, 2008, upon receipt of the last transcript.

ISSUES

1. Was the District's evaluation, as reported in the Evaluation Report dated January 18, 2008, appropriate?
2. Should the hearing officer order an independent educational evaluation at public expense?

FINDINGS OF FACT

STUDENT'S GRADES AND BEHAVIOR

1. The Student's grades were poor in fifth grade during the 2005-2006 school year and he was not promoted. In the 2006-2007 school year, the Student's grades did not improve substantially. In the 2007-2008 school year, the Student's grades declined. (NT 178-179; P-19.)
2. The Student's performance in the PSSA tests in each of his fifth grade years was inconsistent. The District's school psychologist did not attach any significance to the inconsistency. The tests were given in widely varying time frames. (NT 88-89, 366-370; P-7 p. 1.)
3. There was no evidence that the Student did not try to succeed in school. (NT 369-370.)
4. In the 2005-2006, 2006-2007 and 2007-2008 school years, the Student repeatedly exhibited serious disruptive, oppositional and impulsive behavior in school. (P-7, P-20.)
5. In the 2005-2006, 2006-2007 and 2007-2008 school years, the Student was truant or suspended out of school repeatedly and failed repeatedly to complete his homework. (P-7, P-20.)
6. Teachers reported that the Student did not work well in groups, needed to be seated separately from the rest of the class, and was frequently disruptive and discourteous. Some teachers seated the

Student at the front of the class for monitoring purposes. (P-7, P-20.)

7. Teachers reported that the Student was absent frequently, failed to take notes and do classroom assignments, and failed to do homework. (P-7.)

PARENTS' REQUEST FOR EVALUATION AND DISTRICT'S RESPONSE

8. The Parents requested a comprehensive evaluation and specifically requested that the District evaluate whether or not the Student's difficulties in school and his behavioral problems were due to Attention Deficit Hyperactivity Disorder (ADHD). The Parents did not request evaluation of any other area of suspected disability, nor did anyone else suggest evaluation of any other area of disability. (NT 324-325; P-1, P-3.)
9. As part of their request, the Parents asked the District to evaluate the Student's history of dysfunctional behavior in school. Their request made it clear that the Student's behavior, along with his precipitous decline in grades, was the primary cause of their concern. (NT 145-148; P-1, P-19.)
10. The District conducted the evaluation in a timely fashion. (P-2, P-7.)
11. In January 2008, the District issued an evaluation report that concluded that the Student was not a child with a disability. (P-7.)
12. In January 2008, the District found that the Student was a Protected Handicapped Child and that his disability of ADHD substantially limited or prohibited the Student's participation in or access to educational programming. (NT 57-58; P-4.) .)

DISTRICT'S METHOD AND INFORMATION RELIED UPON

13. The District School psychologist who performed the evaluation followed a practice in which she comprehensively evaluated the student for the referred disability, and if she discovered data or

information suggesting other possible disabilities, then she would evaluate those disabilities as well. (NT 40-45, 59-65, 268, 325.)

14. The District's evaluation included a review of educational records, consideration of the Parents' evidence of a diagnosis of ADHD, consideration of standardized and curriculum based test results, cognitive and achievement testing on standardized instruments, an organizational survey, an instrument aimed at eliciting vocational interests, classroom observations, observations of behavior during testing, and reports from teachers, Parents and the Student. (NT 114-115, 391, 399-403; P-7.)
15. The District's school psychologist had experience with the Student through teaching Conflict Resolution in his class once per week. (NT 319.)
16. The psychologist gathered behavioral data through the Achenbach behavior inventories, an instrument with good psychometric properties, that was administered to the Student's Mother, the Student, and three teachers. (NT 335-336; P-7.)
17. The psychologist ordinarily uses the instrument to begin an assessment, but the instrument is not adequate to identify or rule out a disability. (NT 334-336, 183-184.)
18. The District's evaluation did not include a functional behavioral assessment. (NT 124, 155-156; P-7.)

BEHAVIOR

19. The school psychologist chose to report individual syndrome scores in a behavior inventory given to teachers, rather than reporting composite scores, for two reasons: first, the composite scores are less descriptive, and second, the clinical thresholds are lower for the composite scores. (NT 65-70; P-7 p. 5.)
20. Of three teachers who responded, two reported rule breaking behavior in the borderline clinically significant range, and one reported aggressive behavior in the borderline clinically significant range. (S-4 p. 3, 9, 14.)

21. The composite scores for externalizing behavior in three teacher reports were scored at clinical significance for two teachers and borderline clinical significance for one teacher. (NT 72-73, 274; S-4 p. 4, 10, 15.)
22. The composite scores for total problems in three teacher reports were scored at borderline clinical significance for two teachers. (NT 72-73; S-4 p. 4, 10, 15.)
23. The teacher report scores disclosed that the Student's level of achievement in the teachers' classes was extremely low, and was clinically significant. His low overall adaptive functioning was also clinically significant. (S-4 p. 2, 8, 18.)
24. The school psychologist gave little weight to behavior inventory scores from teachers that indicated traits suggesting clinical problems, due to the lower psychometric reliability of these scores contrasted with scores reporting behavior. The suggested clinical problems included conduct problems, attention problems and oppositional/defiant problems. Two teachers' reports had scored in the borderline clinically significant range for conduct problems. (NT 81-85; S-2 p. 5, S-4 p. 7, 11, 16.)
25. The school psychologist did not inquire into whether or not an emotional disturbance was one of the causes of the Student's dysfunctional behaviors that interfered with the Student's educational progress. The psychologist noted that there was no evidence of problems in the Student's relationships and that the Student was able to perform well when he made the effort; however, the psychologist concluded that the evidence of inappropriate behavior in normal circumstances was not severe enough to merit further consideration, despite the fact that the teachers cited it as the cause of the Student's poor grades, and the Externalizing score on the Child Behavior Checklist was in the clinically significant range. (NT 327-329, 333-341, 371-372; P-7.)
26. The Child Behavior Checklist composite scores indicated a substantial problem with behavior that should have led to more evaluation. These scores are more reliable and valid than the

syndrome scores. (NT 138-143, 186-189, 220, 235, 241, 261-262, 285, 289, 295-300.)

ATTENTION

27. All three teachers' reports scored within normal limits for both attention problems and symptoms of Attention Deficit Hyperactivity Disorder. The Student's Mother and the Student both rated his behaviors and symptoms related to attention in the borderline and clinical ranges. (S-2 p. 3, 5, S-3 p. 3, 5, S-4 p. 3, 5, 9, 11.)
28. The District's evaluation included an informal reading inventory to assess the Student's reading abilities. The evaluation found no reading problems. (P-7.)

SPECIFIC LEARNING DISABILITY

29. The school psychologist relied upon the discrepancy model to rule out a learning disability, and was unaware of literature criticizing this approach. (NT 85-88, 190-198; P-7 p. 6.)
30. The psychologist concluded that the Student's reading achievement was average, despite scores showing difficulties in fluency. The psychologist was not aware of the fluency levels of typical students in 6th grade, where the Student was assigned. (NT 90-93; P-7 p. 4, 6.)
31. The District's evaluation found no evidence of attention problems in the school setting, and found no discrepancy between expected and actual school performance that would indicate a specific learning disability. (P-7.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.¹ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence² to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail.

In the present matter, the hearing officer assigned the burden of persuasion to the Parents. (NT 26-30.) In doing so, the hearing officer followed Weast closely, because, ordinarily, the local education agency bears the burden of proving the adequacy of its evaluation. See e.g., Warren G. v. Cumberland County School District, 190 F.3d 80 (3rd Cir. 1999); 34 C.F.R. §300.502(b)(2)(i). However, here, the District did not have an

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

² 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. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

opportunity to request due process to test the adequacy of its evaluation; rather, the Parents requested due process immediately and challenged the appropriateness of the District's evaluation. The hearing officer found this fact to be determinative of the proper allocation of the burden of proof pursuant to Weast. Thus, if the evidence is in " equipoise", the Parents will not prevail.

EVALUATION

Regardless of who filed first, the hearing officer must determine whether or not the District's evaluation as reported in November 2007 was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311. If the District's evaluation was inappropriate, the Parent is entitled to an independent educational evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

The IDEA obligates a local educational agency to conduct a "full and individual initial evaluation" 20 U.S.C §1414(a)(1)(A). The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes "social and emotional status" 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must "include those tailored to assess specific areas of educational need" 34 C.F.R. §300.304(c)(2).

The Act sets forth two purposes of the required evaluation: to determine whether 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). It requires the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors" 20 U.S.C. §1414(b)(2)(C). The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally" 20 U.S.C. §1414(b)(3)(A)(ii).

Further, the regulations require that the evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs” 34 C.F.R. §300.304(c)(6). At least one federal court has interpreted the IDEA to require that the evaluation be “sufficient to develop an appropriate IEP” Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2). The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The agency must utilize information provided by the parent that may assist in the evaluation. Ibid. This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2).

The District argues that its obligation is limited to evaluating the child for the “suspected disability.” 34 C.F.R. §300.304(c)(4). The District interprets that language in the regulation to mean that it must evaluate only the legally defined “disability” that is suspected; in this matter, that would be Other Health Impairment. Since it evaluated for OHI, the District argues that it had no obligation to evaluate for any other disability.

The hearing officer finds this reading of the law to be too cramped. In effect, the argument would require parents (in the absence of referral from teachers or other educational staff) to know the legal definitions of the thirteen categories of disability set forth in the IDEA, and to specify them when they request an evaluation. The hearing officer thinks that this interpretation goes too far.

Rather, the hearing officer reads the law to require local educational agencies to address the problems that the parent brings to them, and if these problems are not expressed in terms of the legal categories of disability, the agency should make a reasonable judgment as to what categories are implicated. In this case, the Parents clearly indicated that they wanted an evaluation of the Student's behavior and his plummeting grades. The fact that they specified ADHD does not limit the District's responsibility to evaluate only for OHI, in this hearing officer's view. Here, the District failed to adequately evaluate the causes of the behavior – disruption, aggression and failure to perform class work and home-work, as well as excessive absences – that was causing him to fail in school. (FF .)

In the hearing, the District's school psychologist testified twice in support of her evaluation. She was called first by the Parents, and then by the District at the close of the Parents' case. The Parents also presented the testimony of an expert witness who criticized the evaluation. The Parents criticized the evaluation on three grounds. (NT 213-16.) First, they argued that the evaluation failed to properly assess the Student's behavioral problems at school, which they had believed to be a product of his Attention Deficit Hyperactivity Disorder, and which they alleged might be the product of a Serious Emotional Disorder. Ibid. Second, they argued that the District failed to assess the Student properly for Other Health Impairment, specifically for deficits in attention associated with Attention Deficit Hyperactivity Disorder. Ibid. Third, they argued that the District failed to assess the Student properly for Specific Learning Disability. Ibid.

BEHAVIOR AND EMOTIONAL DISTURBANCE

The Parent specifically asked the District to evaluate the Student with regard to his history of dysfunctional behavior in school. (FF 8, 9.) Indeed, this was central to their concern, along with the Student's precipitous drop in performance in fifth grade. (FF 9.) The Student had exhibited an escalation

of negative behavior for at least two and one half years, including excessive talking and disruptive classroom behavior, defiance of authority, irritating and arguing with peers, throwing objects at peers, and substantial absences, lateness and truancy. (FF 1-7.) At one point he was disciplined for disrupting the class by singing. (P-20 p. 11.) On another occasion, the Student had his face marked with a pink magic marker. (P-20 p. 12.) The Student was suspended for being disruptive and defiant, and the teacher indicated that the Student's behavior was slowing the progress of the class. (P-20 p. 16.)

The record shows that the District's psychologist did consider the Student's behavior as part of her evaluation. (FF 13, 16.) She solicited reports from teachers, which are reflected in the Evaluation Report. Ibid. Teachers reported that the Student did not work well in groups and had to be seated separately in some of his classes. (FF 6.) They reported substantial, repeated disruptive behavior, failure to work in class and failure to complete homework assignments. (FF 6.) The psychologist reported that she considered the Student's substantial record of absences and lateness, including truancy. (FF 13.)

The psychologist also considered two observations by her own Director of Special Education. (FF 14.) These were reported in the ER, but the Director did not testify in the due process hearing. The ER reports these observations as "uneventful." The observations could have been affected by the fact that the Student was on medication at the time of the observations, but this was not discussed in the ER and there is no evidence of how it factored into the weight given to the observations. (NT 75-78.) The psychologist also had experience with the Student through teaching Conflict Resolution in his class once per week. (FF 15.)

The psychologist utilized one normed instrument in considering the Student's behavioral educational needs. This was a behavior inventory, which she called the Achenbach, after its creator, which consisted of a Child Behavior Checklist, Teacher Report Forms and a Youth Self Report. (FF 16.) This instrument is psychometrically reliable. (FF 16.) However, it is not adequate to rule out any educational classification. (FF 17.) It is most useful as a screening instrument to uncover areas in which further assessment or programming is needed. (FF 17.) In the present matter, the District's psychologist should have responded to the scores it revealed by conducting further assessment. (FF 26.)

The Mother's checklist indicated that she viewed the Student as exhibiting clinically significant problems with rule breaking, aggression and attention. (S-2 p. 1.) The Student rated himself with symptoms of attention-Deficit Hyperactivity Disorder, and concerns on the Competence scale. (S-3 p. 1.) The teacher scores reinforced, rather than negating, the Mother's and the Student's scores. Two teachers reported borderline significant rule breaking behavior, and one reported borderline significant aggression. (FF 20.) The composite of these two scores was Externalizing, and the scores were clinically significant in this composite for two teachers, and borderline significant for one. (FF 21, 22.) The Parents' expert described these scores as a "red light." (NT 235.)

The checklist scores also revealed that the Student's overall adaptive functioning was extremely low. (FF 23.) All three teachers reported this in the clinically significant range, and two of three reported his academic performance in the clinically significant range. (FF 23.) These findings were not mentioned in the Evaluation Report.

The District's psychologist discounted these scores. (FF 19, 24, 25.) Her testimony demonstrates that she gave no consideration to the borderline scores, and she did not even report the composite scores. She explained her decision not to report the composite scores as based upon two reasons. First, she testified that that these scores are not as "descriptive" as the syndrome scores such as rule breaking and aggression. (FF 19.) Second, she discounted the composite scores because they have a lower threshold. (FF 19.) Similarly, the psychologist completely ignored several high syndrome scores in the teacher report forms because they are based upon DSM-IV TR criteria, and she considers them to be less reliable psychometrically. (FF 24.) These scores pointed to a possible conduct disorder, oppositional-defiant disorder, and attention problems. (FF 24.)

The hearing officer notes with concern that the scores the psychologist chose not to report were the most indicative of a possible behavioral or emotional disorder, whereas the scores that she did report were less indicative. Moreover, the record is clear that the psychologist not only chose not to report these scores, but also decided not to act further upon them. (FF 26.) While the decision not to report is significant, it is the decision not to follow up on the scores that the hearing officer finds determinative. While the testimony about these scores was couched in the

context of non-reporting, the psychologist's reasons also were the basis for not following up.

The hearing officer is not persuaded by the reasons given for not at least following up on the scores from the Achenbach checklists. The first rationale – that the syndrome scores are not descriptive, bears little logical relationship to the purpose for their use, which is to identify problems that rise to the level of an educational disability. The test under the IDEA is in many respects quantitative. It makes little sense to forego scores that would indicate the magnitude of disability because they are less descriptive of how that disability manifests itself. This seems to the hearing officer to be putting the cart before the horse.

The second rationale, that the composite scores have a lower threshold, seems to this hearing officer to be a circular argument. The question is why higher scores were discounted, and the answer is that they were higher scores. The psychologist did not suggest that this threshold is incorrect; indeed, she could not, because the composite scores are considered stronger psychometrically. (FF 21, 26.) The rationale seems to be that the scores contradicted the psychologist's subjective impression.

The Parents' expert criticized the District psychologist's failure to follow up on these scores on the Achenbach checklists. He was careful to caution that the scores in themselves are not sufficient to make an identification. (FF 17.) However, he found them to indicate the need for more data. (FF 26.)

The hearing officer finds that the psychologist was heavily influenced by the fact that her Director had not observed any untoward behavior or evidence of attention difficulties on the two occasions that she observed in the classroom. (FF 14.) In addition, the psychologist was influenced by her own experience of teaching the Student's class, and the fact that she had not observed any dysfunctional behavior by the Student. (FF 15.)

The District's school psychologist labored to explain why she discounted the substantial evidence of record that the Student's frequent inappropriate behavior was interfering with his performance in school. (FF 1-7, 9-12.) In her initial testimony on behalf of the Parent, the psychologist indicated that she did not feel that the evidence rose to a level of seriousness warranting intervention. In her second testimony on behalf of the District,

she elaborated that she had given the data serious consideration before she reached that conclusion. In contrast, the Evaluation Report does not mention this process of serious consideration at all. (NT 391-392; P-7.)

There was extensive evidence that the Student's teachers had reported serious behavior problems with the Student that interfered with his education. (FF 1-7.) He was suspended several times and received numerous detentions for truancy and aggressive behavior. The teachers reported these behavioral difficulties on separate notes sent to the Parents; one of these notes stated that the Student's behavior had caused the entire class to advance slower than all other classes. The teachers also reported these behaviors on the Student's report cards on a quarterly basis. In response to the Psychologist's Child Behavior Checklist inquiries, all of the teachers who responded stated in writing that the Student's potential could not be determined because of the interference of his bad behaviors. (P-7.)

The psychologist testified that she had spoken to the teachers and they had all told her that the Student's disruptive and defiant behaviors were not a serious impediment to his learning – that the real problem was his failure to do school work. This simply is not plausible, given the documentary record. The hearing officer finds that this testimony was not credible. On the contrary, the teachers repeatedly reported a serious behavioral problem with this Student, and indicated in writing in their responses to the psychologist's inquiries that this behavior made it impossible for them to assess his academic abilities. (FF 25.) The record as a whole shows that there was no explanation for the Student's bad behavior and academic failure. Yet this is the question to be answered by the ER.

The psychologist relied entirely upon her flawed interpretation of the Achenbach scores. She did not call for a functional behavior assessment. (FF 18.) She did not utilize any tests of personality or projective tests addressing emotional needs. There was no behavior support plan. While the psychologist seemed to argue that she corroborated her interpretation of the Achenbach scores through teacher feedback, this testimony is not credible in view of the record. While she relied upon the classroom observations of her supervisor, these simply cannot credibly outweigh the documentary record of serious behavior and learning problems in this matter.

Thus, the District, in concluding that the Student's behaviors were not an educational need, violated two requirements of the IDEA. First, it relied

upon a single instrument for the identification decision, contrary to the IDEA's mandate that an agency not rely upon a single instrument in determining whether a child is a child with a disability. 20 U.S.C. §1414(b)(B). Second, it relied upon an instrument not designed to be the sole criterion for identification, thus violating the requirement that instruments be used for purposes for which they are valid and reliable. 20 U.S.C. §1414(b)(3)(iii). Here, the admittedly valid and reliable instrument became the basis for identification; yet the record is clear that it cannot be used as the basis for the ultimate question of identification. (FF 17.)

In contrast, the hearing officer gives credence and weight to the testimony of the Parents' expert witness with regard to the proper use of the Achenbach instrument. While this expert had not evaluated the Student, and had not spoken to the psychologist or teachers, he was very familiar with the Achenbach checklists from personal use, and he was able to provide norms of practice that the hearing officer found helpful in drawing inferences from the record. The Parents' expert readily admitted the severe limitations of the evidence before him, and in most instances offered only opinions that could be justified by his own knowledge. His demeanor and approach to testifying led to the hearing officer's conclusion that he was credible in his testimony concerning the evaluation of the Student's dysfunctional behavior.

OTHER HEALTH IMPAIRMENT

The District's ER found that the Student's diagnosed Attention Deficit Hyperactivity Disorder was not interfering with his progress at school.³ The District's psychologist based this finding entirely upon the Achenbach Teacher Report scores. (FF 27.) The teachers' scores were all in the normal range for both the behavioral and the DSM-oriented responses for attention-related problems. (FF 27.) However, both the Mother's scores and the Student's scores were in the clinical range for attention-related behaviors and symptoms, with the exception of the Mother's score in the borderline range for ADHD symptoms. (FF 27.) The ER did not attempt to harmonize these conflicting scores, nor did it explain why they should be discounted.

³ The District assumed that the Student was properly diagnosed with ADHD. (NT 78, 415).

The ER also failed to take into account the Student's dysfunctional behaviors, which clearly impeded his educational progress and that of others. Since these behaviors remain unexplained, the hearing officer must ask whether or not they are related to attention difficulties, which the Student clearly reports subjectively. (NT 153-156.) The report does not answer this question. It also fails to account for the Student's plummeting grades and his failure to perform at all in school, as well as his inconsistent PSSA scores. (NT 146-148.) It seems to conclude that the Student simply was not trying hard enough, but without any assessment of the Student's effort or cognitive functioning, beyond the Stanford Binet factor index scores. There is no factual basis for such a conclusion. (FF 3.) The hearing officer finds that the ER's finding regarding that the Student's ADHD is not affecting his education is inappropriate because it fails to address the causes of the Student's behavior, and whether or not this behavior is related to the ADHD.

In addition, the report is inappropriate because it relies solely upon the Achenbach teacher scores to rule out an identification of ADHD. This again violates the two requirements of the IDEA set forth above: that the decision on identification not be based upon a single instrument; and that the instrument be used for a purpose for which it is valid and reliable. 20 U.S.C. §1414(b)(B); 20 U.S.C. §1414(b)(3)(iii). See, e.g., In re Educational Assignment of C.R., Spec. Educ. Op. 1770 at 5-6 (September 25, 2006)(inadequate test battery).

SPECIFIC LEARNING DISABILITY

The Parents argued that the District should have done further testing to rule out a specific learning disability. However, the District's psychologist testified that she had specifically ruled out SLD, based upon a discrepancy analysis. (FF 29.) The ER reported this at the time. The Parents' psychologist indicated that, despite the literature criticizing discrepancy analysis, the technique is acceptable professionally. (FF 29.) Moreover, the District's psychologist found corroboration in the documentary record for her rule out of SLD. (FF 30, 31.) Since the Parents' expert was not in a position to contradict the psychologist's findings, because he had not evaluated the Student, the preponderance of the evidence supports the adequacy of the District's ruling out of SLD.

In this regard, the Parents' expert made much of the Student's inconsistent performance on the PSSA tests in two successive years. He assumed that the Student had made similar effort in all the PSSA tests – for mathematics, reading and writing. He concluded that the Student's inconsistent performance was likely to have been caused by a learning disability. However, this is a slender reed upon which to criticize the District's psychologist's ruling out of SLD. The evidence showed that the PSSA's were given at different times. (FF 2.) There is no basis to assume that the Student's variable performance was not related to that fact. Therefore, these test scores do not prove by a preponderance that the District's psychologist's rule out of SLD was inappropriate.

The Parent argued that the evaluation was inadequate because the Student's reading fluency scores were low. The Parents' expert indicated that this was a problem and should be explored further. However, the District's psychologist responded that she had considered the Student's reading by administering a test of reading achievement that indicated that the Student's comprehension was above grade level and that therefore the fluency problem was not an educational impediment. (FF 28, 30.) The hearing officer finds that the District's psychologist performed adequate testing in the area of reading and that the parents' expert was not in a position to criticize the District's psychologist's interpretation of the data. Thus, the preponderance of the evidence supports the adequacy of the District's evaluation with regard to Specific Learning Disability.

EVALUATION THROUGH RESIDENTIAL PLACEMENT BY THE COURT

The District argues that the Student's court-ordered placement at a diagnostic program not affiliated with the District was itself an independent educational evaluation at public expense. The hearing officer does not accept this argument. The record simply does not support it. There was no witness from the placement to describe the evaluation being done. The District's psychologist testified generally to her knowledge of the placement's evaluations, but it was clear that she was speculating as to the elements of any such evaluation. The record does not support a finding that the placement's evaluation is an independent evaluation at public expense within the meaning of the IDEA.

CONCLUSION

The hearing officer finds that the District's evaluation was not appropriate, because it failed to adequately assess the causes of the Student's dysfunctional behavior in school. Because it failed to address this issue, it also failed to adequately address the question whether the Student's ADHD was interfering with his educational progress, in the face of over two years of failure in school. In addition, the evaluation inappropriately utilized the Achenbach checklists as the sole basis for ruling out Other Health Impairment and Serious Emotional Disability. The evaluation was adequate with regard to its determination that the Student is not a child with Specific Learning Disorder. Accordingly, the hearing officer will order an Independent Educational Evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

ORDER

1. The District's evaluation, as reported in the Evaluation Report dated January 18, 2008, was not appropriate.
2. Within fifteen days of the date of this order, the District shall make available to the Parent all information concerning its criteria for evaluations pursuant to 34 C.F.R. §300.502(a)(2) and §300.502(e). The District shall fund an independent educational evaluation at public expense by an evaluator chosen by the Parent, consistent with agency criteria as set forth by law. The evaluation shall be comprehensive in nature, taking into account the Student's cognitive, emotional, social and behavioral manifestations.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

May 24, 2008