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Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

ODR No. 28215-22-23

CLOSED HEARING

Child's Name:

A.E.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

11/22/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.E. (Student),¹ is a late elementary school-aged student in the School District of Philadelphia (District). Student has been identified as having a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973.² Student has not been determined to be eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).³

In the summer of 2023, the District filed a Due Process Complaint under the IDEA following a request by the Parents for an independent educational evaluation (IEE) at public expense, seeking to defend its most recent evaluation of Student. The matter proceeded to an efficient due process hearing.⁴

Following review of the record and for all of the reasons set forth below, the District's claim cannot be sustained and must be denied. Accordingly, an IEE at public expense shall be ordered.

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 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

³ 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).

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.), School District Exhibits (S-) followed by the exhibit number, and Parent Exhibits (P-) followed by the exhibit number. References to duplicative exhibits are not necessarily to all.

ISSUES

1. Whether the District's most recent evaluation of Student completed in February 2023 complied with the applicable law; and
2. If the District's February 2023 evaluation was not appropriate under the legal standards, are the Parents and Student entitled to any independent evaluations at District expense?⁵

FINDINGS OF FACT

1. Student is a late elementary school-age student residing and attending school in the District. Student has been determined to be eligible for the protections of Section 504. (N.T. 39-41.)
2. Student has historically had a feeding disorder for which Student has treated with Children's Hospital of Philadelphia. Student was also diagnosed with Generalized Anxiety Disorder in the fall of 2020. (P-2; P-3; S-2; S-3; S-4; S-5.)
3. Since Student's kindergarten year when Student entered the District, the Parents have observed that Student exhibited difficulty with focus and attention, task completion, and finishing homework, as well as social interactions particularly in group settings. Some of those same observations were noted by teachers along with other similar behaviors. The Parents

⁵ The District agreed to an independent Functional Behavior Assessment (N.T. 14, 35).

provided Student with a tutor over that period of time. (N.T. 411-13, 447-48, 465-66; P-14; S-1.)

4. The Parents met several times with Student's teachers and other District professionals over the course of Student's school career to discuss concerns about Student. The Parents asked that Student be evaluated by the District several times over the years. (N.T. 414-24, 428, 430; P-14; P-25.)
5. Student was first provided with a Section 504 Plan in the spring of 2020 based on necessary feeding accommodations and a need for extra time to complete work, possibly related to an anxiety diagnosis. (S-14 at 1; S-16 at 4.)
6. The only Section 504 Plan contained in the record⁶ is dated February 2021. The services in that plan are: additional time for work completion; modified work and homework; ability to complete school work as homework; and allotted time for snacks during the day. (P-23.)
7. The Parents have had Student evaluated privately by several professionals, including a speech/language pathologist in early 2022 due to some speech disfluency including stuttering. Most of those reports were provided or made available to the District, and several included a recommendation for a school evaluation. (N.T. 416, 423-27, 429-35; P-1; S-1; S-2; S-3; S-4; S-5; S-6; S-9.)

2022-23 School Year

8. At the start of the 2022-23 school year, Student's teacher observed Student not to engage with peers socially.

⁶ Counsel confirmed this on the final day of hearing (N.T. 481).

Academically, Student exhibited some weaknesses in mathematics and English/Language Arts. Student also took longer to complete assignments than did peers, and sometimes did not begin tasks or answer questions immediately. (N.T. 382-83, 385-86, 390-91.)

9. Student had a long-term substitute teacher beginning in January of the 2022-23 school year. (N.T. 310, 316-17.)
10. Student's teacher in the second half of the 2022-23 school year noted Student's shyness but noticed that Student began to initiate social interactions with peers that spring. Student's speech also tended to be quiet, and Student needed prompting to participate in class discussions. Other concerns related to concentration/focus, processing information, keeping up and participating commensurate with peers, and taking notes at an expected pace. Student's social skill growth was also noted by the regular teacher who began and ended that school year. (N.T. 319-21, 395, 399, 401-02; P-17 at 10.)
11. Student tended to take much longer with written tasks than did peers, but the handwriting was considered by Student's teacher to be comparable to that of Student's classmates. (N.T. 323-25.)
12. Student received Tier 1 and Tier 2 multi-tiered supports and services (MTSS) in a small group setting the area of mathematics during the 2022-23 school year, and at times also in reading and other subjects as needed. Student was provided the same curriculum as grade peers with Section 504 accommodations. (N.T. 94, 106, 297, 327, 333-34, 343-44, 392-94.)
13. Student's teacher in the spring of 2023 introduced additional accommodations for Student, such as the use of manipulatives.

Other accommodations she provided beyond those in the Section 504 Plan included individual and small group instruction; preferential seating; assistance with notetaking; graphic organizers; rubrics, outlines and summaries of lessons; repetition of directions; use of technology for assignment completion; a quiet space for completing work; grades based on knowledge not performance; fidget items; and social skill opportunities. (N.T. 327-30, 332-37; P-17 at 10.)

The District Evaluation

14. The Parents requested that the District evaluate Student in the fall of 2022, and the District convened a meeting with them before agreeing to an evaluation. (N.T. 48-50, 80, 236-37, 267-68, 434-35, 437; P-17 at 1; S-8; S-9; S-10; S-12.)
15. The District's proposed evaluation set forth assessment of behavior, including a Functional Behavior Assessment, in addition to a review of records, based solely on the parental concern with social integration with peers. The Parents provided the requisite consent to proceed. As part of that permission form, a section sought parental input. The Parents noted indicated the following as concerns: keeping up with peers, integrating with groups and socialization, and difficulty learning and retaining concepts. They also noted Student's preference for quiet settings. (S-12.)
16. A special education compliance monitor observed Student in the classroom, cafeteria, and outside playground at some time before completion of the evaluation. Student did not interact with peers during the nonstructured lunch but may have done so during recess. (N.T. 59-62, 78-80.)

17. The District administered an assessment of Student's mathematics skills in late fall 2022 to determine Student's ability to problem-solve and perform computation. This instrument helps to identify areas of strength and weakness. Student's scores were in the average range in most areas, but in the below average range with respect to addition, subtraction, multiplication, division, and operations overall; problem-solving ability was in the above average range. (N.T. 52-56, 90-91, 114; S-18.)

Evaluation Report

18. An evaluation report (ER) was completed in February 2023. The Parents' input from the permission form was included, as was an observation by the District school psychologist during a science lesson. No concerns with Student's participation in class during the observation were noted. (N.T. 246-48; S-16.)
19. Student's then-current grades (all in the A range) were reported for the ER, as were results of the spring 2022 Pennsylvania System of School Assessment (PSSA) with scores in the Proficient (English/Language Arts) and Basic (Mathematics) ranges. On curriculum-based measures, Student scored in the average range in reading, but was in the "on watch" range in mathematics (meaning additional monitoring was needed but not additional intervention). The fall 2022 mathematics assessment was briefly reported but omitted the below average scores. (N.T. 288; S-16 at 3-4, 9.)
20. The ER contained results of a teacher observation and a referral form completed by the long-term substitute teacher. Student's strengths were indicated as phonemic awareness, phonics, and

mathematics calculation; weaknesses were in the areas of vocabulary, comprehension, mathematics problem solving, and socialization with peers. The teacher also noted behaviors occurring often or excessively (without differentiation): attending to and not completing tasks; a preference for solitary activity; difficulty copying from the board; demands for teacher attention; and need for praise and encouragement. Minor concerns with anxiety were also observed. (S-16 at 2-3.)

21. The District school psychologist provided the Childhood Autism Rating Scale – Second Edition (CARS-2) to the Parents as part of the ER, who completed the form including the portion that a psychologist would complete in conjunction with an observation. The results reflected minimal to no symptoms of Autism Spectrum Disorder, but the Parents indicated some concerns with relationships with others, mild to severe sensory sensitivity, and fear or anxiety; some observations of difficulty with communication and changes to routine were also noted. (N.T. 253-55; P-4; S-13.)
22. The ER summarized the Parents' completion of the CARS-2, concluding that the results did not indicate Autism Spectrum Disorder. (S-16 at 8-9.)
23. The Parents completed a Behavior Assessment System for Children – Third Edition (BASC-3) rating scale for the ER. The teacher was not asked to complete a rating scale because few concerns, in the psychologist's view, had been raised about Student's behavior by her. The Parents endorsed scores⁷ in the

⁷ The ER did not report the T-scores for the BASC-3 rating scales but only the percentile ranks.

clinically significant range with respect to anxiety, depression, somatization, attention problems, atypicality, and withdrawal. At-risk range scores were noted for developmental social disorders, emotional self-control, negative emotionality, and resiliency, and several areas of adaptive skills: adaptability, leadership, and activities of daily living; executive functioning was also elevated. The ER described these results as consistent with Student's anxiety diagnosis. (N.T. 276-77; S-16 at 5-8.)

24. The ER reached the conclusion that Student had a disability based on an Other Health Impairment, but did not need specially designed instruction. Recommendations for Student's Section 504 Plan were for test and assignment accommodations (extra time, reduced number of problems, distraction-free testing); breaks as needed; encouragement to work with peers in groups and engage socially in unstructured times; continuation of the current accommodations; and specific provisions for mathematics: an explicit, systematic, multisensory approach to instruction. Encouragement to read problems twice and Tier 2 and Tier 3 MTSS interventions were also suggested. (P-18; S-16 at 13-14.)
25. A Functional Behavior Assessment (FBA) was also completed in February 2023. The identified behaviors of concern were difficulty with academic task completion and with social interactions (described as poor), with the latter impacted by the former. Several observations were summarized for the FBA. The hypothesized function of the task completion behavior was to escape a task or gain adult attention; the hypothesized function of the social interaction behavior was to escape emotional

- discomfort. A Positive Behavior Support Plan was recommended. (P-12.)
26. A second FBA was completed in April 2023 that was essentially identical to the February 2023 version with no new observations. (P-24.)
 27. A meeting convened in late February 2023 to review the ER, and that meeting was difficult from the District's perspective. Some new parental concerns were also raised at that meeting. They indicated their disagreement with the ER in early March 2023, expressing their belief that the evaluation did not assess all areas relating to Student's disabilities and seeking an IEE. (N.T. 64-65, 235-36, 264-67; S-19; S-20.)
 28. A District speech/language pathologist attended the ER review meeting. (N.T. 124-25, 446.)
 29. The District formally denied the IEE request on May 31, 2023. (S-21.)
 30. An occupational therapist reviewed a handwriting sample from Student after the ER meeting. The occupational therapist noted some of the writing went below the line, and some letter sizing was immature for Student's age, but those did not rise to a level of concern with handwriting ability in her view. No other available information on related weaknesses suggested such an evaluation to the occupational therapist. (N.T. 185-90, 193, 198-200, 206-07; S-22.)
 31. As of the end of the third quarter of the 2022-23 school year, Student's grades were all in the A to B range, with reading the sole B grade. (S-1 at 1.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof encompasses two discrete components: 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). Accordingly, the burden of persuasion in this case must rest with the District because it filed for this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The District also accepted the burden of production.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify before them. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible as to the facts as they recalled them; the testimony was more consistent than not where it overlapped. In the relatively few instances that some discrepancies occurred, those are attributed to lapses in memory or recall, or to differing perspectives, rather than to any intention to mislead. The weight accorded the evidence, however, was not equally placed; the documentary evidence specifically was quite probative and persuasive on the appropriateness of the District’s ER, both in terms of what the record contains and what it does not.

The findings of fact were made as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

Basic IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. The IDEA applies to a "child with a disability." 20 U.S.C. § 1415(k); 34 C.F.R. § 300.530(a). The definition of a "child with a disability" is two-pronged: having one of certain enumerated conditions and, by reason thereof, needing special education and related services. 20 U.S.C. § 1401(3); *see also* 34 C.F.R. § 300.8. "Specially designed instruction" is adapting the content, methodology, or delivery of instruction as appropriate to a child with a disability to meet educational needs and to provide for access to the general education curriculum. 34 C.F.R. § 300.39(b)(3). The process of identifying children who may be eligible for special education is generally through an evaluation by the local education agency (LEA).

Evaluation Requirements

Substantively, the IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child[.]" 20 U.S.C. §1414(a)(1)(C)(i). The IDEA explicitly identifies the following qualifying disabilities: "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance[], orthopedic impairments, autism, traumatic brain injury, other health impairments,

[and] specific learning disabilities.” 20 U.S.C. § 1401(3); *see also* 34 C.F.R. § 300.8(a).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are appropriately examined.

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and

emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); see *also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see *also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to available assessments and observations. 34 C.F.R. § 300.305(a).

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). 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).

When parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). In such a circumstance, the LEA “must, without unnecessary delay,” file a due process complaint to defend its evaluation, or ensure the provision of an IEE at public expense. 34 C.F.R. § 300.502(b)(2).

The District’s Claim

The District’s ER did utilize multiple assessment tools, strategies, and instruments, rather than any single measure, to gather information about Student. More specifically, the District conducted a record review; incorporated parental input that provided their views on Student’s academic

and social/behavioral functioning as well as two different rating scales; and obtained and reported on observations by and information from teachers and the District psychologist. Student's performance on curriculum-based measures and the PSSA along with Student's grades were similarly included.

However, at the time of the ER, several concerns by either the Parents or teacher, or both, had been raised. Those involved keeping up with peers, socialization and integrating with peers, and Student's preference for quiet settings and solitary activity; behaviors such as lack of focus/attention and difficulty with task completion; weaknesses with vocabulary, comprehension, and mathematics problem solving; and difficulty learning and retaining concepts. Of those, Student's social skills had reportedly improved at school over the course of the 2022-23 school year. Yet, the evaluation sought to consider only interaction with peers.

It is, of course, not necessary to suspect a disability merely because a student exhibits relative strengths and weaknesses, including in academics. The District did examine Student's mathematics skills for the ER. It is, however, concerning that the District school psychologist who administered assessments for the evaluation described it as "[not] really a psychoeducational evaluation. It was just looking at some behaviors and doing behavior observation" (N.T. 233-35). This characterization strongly suggests that behavioral presentation was the focus, particularly relating to Student's reported difficulty with peer interactions. Still, with respect to social/emotional/behavioral functioning, the ER did not meaningfully examine Student's behaviors at school despite teacher reporting that several problematic manifestations were often or excessively exhibited. Surprisingly, the ER did not seek a BASC-3 rating scale from the teacher, a form that is available and commonly completed along with ratings from parents, because the teacher's concerns were somehow considered to be

few.⁸ It therefore remains unknown how the teacher viewed Student's social interactions in the school environment, or any other behaviors as would be reflected in an instrument such as the BASC-3.

Even more perplexing is the assumption throughout the ER, as well as at the hearing, that Student's anxiety was the likely cause of Student's communication difficulties, attention problems, and social skills weaknesses (N.T. 145-47, 158, 171, 248-49, 257, 294; S-16). While this may ultimately be true, the law requires that the evaluation assess in all areas of suspected disability, which was not done in this case. Rather than explore and/or rule out deficits that may have contributed to Student's various weaknesses and challenges, the District declined to investigate further in favor of making assumptions. Moreover, and critically, it is plain that the District was providing Student with accommodations that went far and beyond the only Section 504 Plan in the record. As such, the ER could not objectively and accurately evaluate Student's unique education-related strengths and needs. Additionally, the provision of an explicit, systematic, multisensory approach to mathematics instruction suggests that Student received specially designed instruction, an intervention that is ordinarily found in an Individualized Education Program rather than a Section 504 Plan.

The Parents additionally focused on their concerns with Student's speech/language and occupational therapy-related weaknesses, contending that independent evaluations in those areas were warranted in the spring of 2023. The record does not, however, support their contentions that private evaluations of these related service areas should be ordered at this time.

Viewed as a whole, the record evidence is not preponderant in this case that the District's evaluation of Student was sufficiently comprehensive under the law to identify Student's special education and related service

⁸ As the Parents observed, the actual teacher input form was not made part of the record.

needs in all areas of suspected disability. Accordingly, the District having failed to establish that its ER met IDEA criteria, the Parents are entitled to an IEE at public expense. The attached order provides the procedures to be followed as a remedy with the selected private evaluator determining the scope of the IEE including any related service areas.

CONCLUSION OF LAW

The District's evaluation of Student in the spring of 2023 was not sufficiently comprehensive under the applicable law, and the Parents must be afforded an IEE of Student at public expense.

ORDER

AND NOW, this 22nd day of November, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within six calendar days of the date of this Order, the District shall provide to the Parents not less than three (3) qualified individuals to conduct an independent psychoeducational evaluation. Within three (3) calendar days of the date of this Order, the Parents shall provide notice to the District of the selected professional. In the event that the Parents do not timely provide their selection, the District shall promptly choose the evaluator from the same list.
2. The chosen psychoeducational evaluator shall determine the scope of the IEE including all psychoeducational assessments and the involvement of other professionals for the IEE. The selection of those additional professionals, if any, shall be left to the psychoeducational evaluator, and may include District personnel.

The psychoeducational evaluator shall determine who, if anyone, may be consulted in those decisions.

3. The District may share all available information requested by the evaluators without express consent of the Parents, who must comply with all reasonable requests of the evaluators to complete the IEE.
4. Following completion of the ordered IEE and issuance of the report(s), which shall be provided as soon as practicable, the District shall convene a meeting with the Parents and the psychoeducational evaluator to review the results. The participation by the psychoeducational evaluator at the meeting shall be at public expense.
5. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 28215-22-23