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Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

Open Hearing

ODR No. 27226-22-23

Child's Name

S.B.

Date of Birth

[redacted]

Parent

[redacted]

Local Educational Agency

Chichester School District
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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

08/26/2023

Introduction

This special education due process hearing concerns the educational rights of S.B. (“student”), a student who resides in the Chichester School District (“District”).¹ The student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student with specific learning disabilities.

The District filed the complaint in this matter, seeking to defend its April 2022 re-evaluation process and report in the face of the request of the guardian for an independent educational evaluation (“IEE”) at District expense.³

For reasons set forth below, I find in favor of the District as to the appropriateness of the April 2022 when issued.

Issue

Must the District provide an IEE at public expense?

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

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

³ The District filed its complaint in June 2023 soon after parent’s request for an IEE at public expense. Approximately two weeks later, in July 2023, the parent filed a complaint at ODR file number 28279-23-24 with various claims of past denial of a free appropriate public education. The two cases were not consolidated, and as of the date of this decision, the file at 28279-23-24 is unfolding in a separate process.

Findings of Fact

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

1. In December 2014, the student was identified by the District and found eligible for special education as a student with specific learning disabilities. (Parent Exhibit ["P"]-8 at page 2; Notes of Testimony ["NT"] at 26-134).⁴
2. The student was re-evaluated by the District in December 2017 and March 2020. (P-8, *inter alia*, at pages 2-4; NT at 26-134).
3. In April 2022, the student was re-evaluated by the District. (P-8; NT at 26-134).

Prior Evaluations

4. The April 2022 RR contained summaries of, and data from, the prior evaluation reports (2014, 2017, 2020). (P-8 at 2-14).

⁴ The April 2022 re-evaluation report ("RR") was prepared as an exhibit by both parties at P-8 and School District Exhibit ["S"]-8. The two exhibits are identical. For clarity and efficiency, only P-8 will be cited, but the document and exact page citations apply equally to S-8.

Cognitive Testing

5. Cognitive testing in the initial December 2014 evaluation report ("ER") indicated that the student's full-scale IQ was 83. Cognitive testing in the March 2020 RR indicated that the student's full-scale IQ was 76 and general ability index (an "estimate of general intelligence that is less impacted by working memory and processing speed") was 81. (P-8 at pages 4-7, 13-14).

Achievement Testing

6. Achievement testing in the initial December 2014 ER indicated that the student was working at or below the 2nd percentile in early reading skills, word reading, pseudoword decoding, math problem-solving, spelling, and sentence composition. The student was identified with specific learning disabilities in basic reading, reading comprehension, math problem-solving, and written expression. (P-8 at page 14).
7. Achievement testing in the December 2017 RR indicated that the student was working at or below the 2nd percentile in word reading, reading comprehension, and oral reading fluency (including the oral reading accuracy sub-scale). The student showed improvement in pseudoword decoding, math problem-solving, and sentence composition but still scored in the well-below-average range. (P-8 at page 12).

8. Achievement testing in the March 2020 RR indicated that the student was working at the 2nd percentile or below in the reading, basic reading, and mathematics composites (and the 3rd percentile in academic applications), as well as most academic sub-tests. (P-8 at page 8).

Social/Emotional/Behavioral Testing

9. Social/emotional/behavioral assessment by the student's teachers were part of the March 2020 RR (P-8 at pages 8-11).⁵ One teacher completed behavior ratings, rating the student with a clinically-significant adaptive skill in resiliency (the ability to access both internal and external support systems to alleviate stress and overcome adversity), and at-risk in the school-problems and adaptive-skills composites, as well as the attention problems, adaptability, social skills, leadership, and study skills sub-scales. (P-8 at pages 8-10).

10. A second teacher completed attention ratings, rating the student as very elevated for learning problems, and elevated for inattention, and executive functioning. The assessment supported an elevated level of markers for a potential attention deficit hyperactivity disorder (inattentive type) psychological diagnosis. (P-8 at pages 10-11).

⁵ The March 2020 RR content indicates that behavior and attention rating scales were provided to teachers and parent. The content contains no results from parent. The content is silent as to whether parent did not provide rating scales or those scales were simply not reported. (P-8 at pages 8-11).

Affect during Testing

11. The student's affect during testing for the March 2020 re-evaluation included observations that the student was tense or worried at times (potentially impacting self-confidence), responded too quickly at times (potentially impacting care in responding), and attempted responses but gave up easily (potentially impacting responses to difficult tasks). (P-8 at page 4).

April 2022 RR

12. In September 2021, the student sustained a serious leg injury related to a school sports event which limited the student's mobility. (NT at 184-208).
13. In February 2022, the injury necessitated surgery. As a result of the injury and surgery, the student's school attendance was impacted. (NT at 184-208).
14. The April 2022 RR makes no mention of the student's injury or surgery. (P-8).
15. At the outset Cognitive testing in the April 2022 RR indicated a full-scale IQ of 65 and a general ability index of 68, both markedly lower than the cognitive testing in the 2014 and 2020 evaluations

(respectively, 83 FSIQ in 2014 and 76 FSIQ/81 GAI in 2020). (P-8 at pages 21-24).

16. The evaluator noted in the RR, and testified credibly, that the student's affect during the testing sessions led her to conclude that this "measure of cognitive ability is an underrepresentation of (the student's) ability". Affect and engagement that likely impacted the cognitive testing included quick, defensive responses without elaboration, no requests for repetition or clarification, low effort and motivation. The evaluator opined that the student was not putting forth best effort and that "the results...should be considered cautiously". (P-8 at pages 21, 24; NT at 26-134).

17. Achievement testing in the April 2022 RR indicated that the student was working at or below the 2nd percentile in the basic reading, reading fluency, phonological processing, written expression and mathematics composites, as a result of scoring at or below that level on multiple, various subtests. (P-8 at 24-28).

18. While scoring on certain achievement composites and subtests was in the extremely-low range, scores were generally higher in a marked way than the full-scale IQ and general ability index scores on the cognitive testing. The evaluator noted in the RR, and testified credibly, that having addressed the affect of the student during cognitive testing and assuaging potential student concerns in the

assessment process, the student “appeared to relax and... to put in considerably more effort”, asking for repetition/clarification and pausing to marshal thoughts for responses. In the RR, the evaluator opined that “observed attention, effort, and motivation on the academic achievement measure was markedly improved and it is suggested that the academic achievement results are a valid representation of (the student’s) skills”. (P-8 at pages 21, 24-28; NT at 26-134).

19. The student completed a behavior rating self-report. The student’s self-rating indicated a clinically significant score in self-reliance and a very low at-risk score in self-esteem, leading to an at-risk composite in personal adjustment.⁶ (P-8 at pages 29, 31; NT at 26-134, 140-178).

20. Two teachers completed behavior ratings. The first teacher rated the student as clinically-significant in the school-problems composite and the learning problems sub-scale. The teacher rated the student as at-risk in the externalizing problems and adaptive skills composites and the hyperactivity, aggression, conduct problems, and attention problems sub-scales as well as all five adaptive functioning sub-scales

⁶ During the hearing, a neuropsychologist who testified for the parent opined that behavior ratings may have been impacted by the student’s reading level. But the April 2022 RR contained validity scores for the student’s self-report, indicating all measures of validity were acceptable. (P-8 at page 29; NT at 140-178). Also, the clinically-significant rating in self-reliance was mis-reported as at-risk. (P-8 at pages 29, 31).

(adaptability, social skills, leadership, study skills, and functional communication). (P-8 at pages 30-31).

21. The second teacher rated the student as clinically-significant in the school-problems composite and the hyperactivity, somatization, attention problems, atypicality, and study-skills sub-scales. The teacher rated the student as at-risk in the externalizing problems, internalizing problems, behavior symptoms index, and adaptive skills composite and the anxiety, learning problems, and leadership sub-scales. (P-8 at pages 30-31).
22. The April 2022 RR contained the results of a depression inventory. The student's self-rating and both teachers' ratings were in the average range across all composites and sub-scales. The RR did not contain an analysis of the score results. (P-8 at page 30).
23. The April 2022 RR contained the results of a self-rating on a children's anxiety scale. The student self-rated a clinically significant score in defensiveness, "suggesting" in the view of the evaluator, "that (the student) is trying to present in a favorable manner to put (a) best foot forward" (*sic*). (P-8 at page 30-31).
24. The parent was provided with parent forms for the behavior ratings and depression inventory but neither assessment was returned. (P-8 at pages 3, 30; NT at 26-134, 184-208).

25. At the time the April 2022 RR was issued, the student was absent 72 school days (27 excused, 45 unexcused) and was tardy 24 days (all unexcused). (P-8 at page 2).
26. The April 2022 RR contained daily, period-by-period attendance data for 33 school days over the period February – April 2022⁷, from the date the District received permission to evaluate until a week prior to when the RR was issued. Of those 33 school days, the student was entirely absent 7 school days (all unexcused). The student was tardy 13 times (all unexcused). On the 13 school days that the student was tardy, the student remained in school, attending certain classes, being absent from certain classes, and/or arriving late to certain classes. (P-8 at pages 18-19).
27. Input from teachers in the April 2022 RR indicate that the student’s achievement is below age and grade expectations in reading, writing, and mathematics but opined that inconsistent attendance and participation impact that achievement. (P-8 at page 14).
28. The District evaluator could not perform a classroom observation because the student was often absent, or tardy to start the day, during the period the evaluation was being conducted. (P-8 at pages 17-19).

⁷ The data accounts for 38 school days. One of the attendance codes, always registered for the first period of the day, was “ED” for early dismissal. It is unclear what, exactly, this means or how it is accounted for in daily attendance; five of the 38 days are noted as “early dismissal”. Therefore, those five days have been excluded from this finding of fact. See P-8 at pages 18-19.

29. As of the third marking period in the spring of 2022, the student was failing most classes (or earning D-) in most marking periods. (P-8 at pages 14-15).
30. The April 2022 RR contained individualized education program ("IEP") goal progress-monitoring for March 2022. The student showed regression, or minimal progress, on IEP goals as reported in the RR. (P-8 at 15-16).
31. The April 2022 RR contained standardized state assessment testing results for the school years 2015-2016 through 2018-2019, where the student scored in the basic, or below basic, range each year in reading, mathematics, and science. (P-8 at pages 16-17).
32. The April 2022 RR contained standards-aligned state assessment testing results for the 2019-2020 and 2020-2021 school years, where the student scored in the "red" level reading/literacy and mathematics, indicating that the student required intervention to reach grade-level mastery. (P-8 at pages 16-17).
33. The April 2022 RR identified needs in reading, mathematics, and written expression, work completion, and school attendance. The student was identified as a student with specific learning disabilities in reading, mathematics, and written expression. (P-8 at 31-32, 35).
34. The April 2022 RR contained recommendations for consideration by the IEP team. (P-8 at page 36).

35. At the hearing, a neuropsychologist, presented by the parent, testified that she felt the April 2022 RR was deficient. (NT at 140-178).
36. The neuropsychologist testified that these deficiencies included lack of evaluator observation, lack of parental input, the absence of attention, memory, or emotional functioning assessments. (NT at 140-178).
37. The neuropsychologist also questioned the results of the cognitive assessment in the RR, 'impulse control' (in the form of aggression or conduct problems), and the impact of the student's reading ability on the behavioral assessment. (NT at 140-178).
38. The District evaluator's testimony is credited over that of the neuropsychologist in terms of the lack of observation and the lack of parental input given the student's unavailability during the school day and the parent's decision not to provide the assessment input. (NT at 26-134, 140-178).
39. The neuropsychologist's assertion that the April 2022 RR lacked emotional functioning assessment fails under a plain reading of the RR, which included behavior assessment, with concomitant analysis, children's depression and children's anxiety assessments. The April 2022 RR also included the results of prior attention assessment (from the March 2020 RR). (P-8 at pages 30-31).

40. The neuropsychologist's assertion that the cognitive assessment was deficient is discounted because the only alternative offered by the neuropsychologist was administration of a different cognitive assessment without strategies to increase engagement in the assessment. The assertion that 'impulse control' should have been the basis of assessment is also discounted because aggression and conduct issues are not part of this record at any point. (NT at 140-178).
41. The neuropsychologist's assertion that the student's reading ability impacted the behavior assessment fails under a plain reading of the RR which documented that the results of the behavior assessment were valid. (P-8 at page 29; NT at 140-178).
42. One of the key recommendations of the neuropsychologist is that the District evaluator should have performed a functional behavior assessment of the student in the home environment. (NT at 140-178).

Discussion

Under the terms of the IDEIA, "(a) parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...." (34 C.F.R. §300.502(b)(1); 22 PA Code §14.102(a)(2)(xxix)). Upon requesting an IEE at public expense, a school district has one of two choices: the school district

must provide the evaluation at public expense, or it must file a special education due process complaint to defend its re-evaluation process and/or report. (34 C.F.R. §300.502(b)(2)(i)-(ii); 22 PA Code §14.102(a)(2)(xxix)).

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

Here, the only question presented is whether the District’s April 2022 RR, at the time it was issued, is appropriate under the terms of the IDEIA. The evidence shows that it is an appropriate evaluation, at the time it was issued.

The April 2022 RR contains all the elements of an appropriate re-evaluation, including the context of past evaluations, teacher input, the

results of prior assessments and testing, curriculum-based results and student grades, updated assessments and testing (including cognitive, achievement, and social/emotional/behavioral assessments). Where information is missing that might, or should, be included in the RR—specifically, parent input and observations of the student—the evaluator and report document why that information is missing, neither of which can be attributed to flaws in the District’s evaluation.

The most prominent aspect of the student’s education at the time of the re-evaluation is school absence. In the 2021-2022 school year, the amount of absence was excessive. Yet the granular, period-by-period recitation of the student’s absences presents a complex picture of “absence”. Often, the student would be absent to start the day but would be tardy. Then, throughout various school days, the student would attend certain classes and not attend others, or would be late to certain classes. Taken together, a sense of ‘school absence’ for the student in the spring of 2022 has a large degree of multi-layered nuance. This does not render the April 2022 RR inappropriate, and parent’s counsel attempted to bring into the record information related to school absence in the 2022-2023 school year which, of course, could not inform the District’s understanding of the student in April 2022. But it is certainly a salient feature of the student’s educational history at the District, one which has been placed at issue in an affiliated complaint filed by parent.

In sum, though, the April 2022 RR meets the requirements of IDEIA, and the District does not need to provide an IEE at public expense.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the re-evaluation process undertaken in the spring of 2022 and the April 2022 re-evaluation report issued by the Chichester School District is appropriate. The parent is not entitled to an independent educational evaluation at school district expense.

Parent's claims of denial of a free appropriate public education for the 2021-2022 and 2022-2023 school years, and continuing into the upcoming 2023-2024 school year, will be heard in the affiliated hearing process at ODR file number 28279-23-24.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

08/26/2023