

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:

25967-21-22

Child's Name:

A.M.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

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Local Education Agency:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

03/04/2022

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.M. (Student),¹ is an early teenaged student in the East Stroudsburg Area School District (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student currently attends school in a program operated by the local Intermediate Unit (IU).

In mid-January 2022, after the Parent requested an Independent Educational Evaluation (IEE), the District filed a Due Process Complaint seeking to defend its own evaluation under the IDEA. The Parents filed an Answer to the Complaint, and the case proceeded to an efficient single-session due process hearing.³ The District sought to establish that its evaluation of Student complied with all of the requisite criteria, while the Parent countered that its evaluation was deficient and an IEE at public expense should be ordered.

Following review of the record and for all of the reasons set forth below, the claim of the District must be granted.

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).

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent 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. The cooperation of counsel and the parties in producing a concise yet complete record are noted.

ISSUES

1. Whether the District's evaluation of Student in June 2021 as supplemented in November 2021 was appropriate based on all applicable standards; and
2. If the District's evaluation was not appropriate under the law, should the Parent be awarded an IEE at public expense?

FINDINGS OF FACT

1. Student is an early teenaged student residing in the District who is eligible for special education under the disability categories of Autism Spectrum Disorder, Intellectual Disability, Speech/Language Impairment, and Other Health Impairment. (S-1; S-2.)
2. Student has treated with medical professionals since a very young age. (N.T. 132, 150-52, P-14.)
3. During the 2019-20 school year in a school in another state, Student was provided occupational therapy services twice each week, with sensory strategies incorporated throughout the school day. Student also received speech/language therapy in five weekly individual and group sessions, and had a behavior support plan. Student transitioned to remote learning in March 2020 due to the pandemic, and that continued into the 2020-21 school year. (P-1; P-2.)
4. Student and the family moved into the District in April 2021 and Student was enrolled in an IU-operated autistic support program located within the District. (N.T. 29-30.)

5. The Parent provided records to the District at enrollment, including evaluations from 2012 and 2013, the prior school reevaluation report in 2019, and another assessment in the other state. (N.T. 132, 156-57.)

June 2021 Evaluation

6. The District arranged for a qualified IU school psychologist to conduct assessments for its evaluation report (ER) that was issued in June 2021. (N.T. 26-29.)
7. The June 2021 ER included input from the Parent in May of that year. She included family information and a description of Student's self-care skills at home, as well as Student's diagnosis of Autism Spectrum Disorder and current medications. In describing Student's communication skills, the Parent noted that Student is verbal and also uses gestures, pictures, and facial expressions to communicate; however, articulation and intelligibility of speech were concerns. Behaviorally, the Parent reported some disruptive behavior at home and strategies they use to address it. The Parent also described Student's participation in community activities and lack of interest in peers at times. That input also reflected Student's areas of academic strength (mathematics) and weakness (reading and language skills), in addition to speech/language, sensory, and gross motor needs. (S-1 at 1-3.)
8. Summarizing an Individualized Education Program (IEP) from the former state, the June 2021 ER noted Student's then-current out of district placement, diagnoses, and a December 2019 Functional Behavioral Assessment (FBA). The behaviors of concern in the existing behavior plan were identified as mouthing, elopement, pinching, hair-pulling, and non-compliance; the hypothesized functions of those behaviors were to gain attention or avoid/escape a task.

Automatic reinforcement was identified as the function during observation. (S-1 at 3.)

9. The June 2021 ER set forth in detail the results of a November 2019 psychological evaluation. Student's adaptive behavior skills were reportedly overall below the 0.1 percentile, with extremely low range scores across domains (conceptual, social, and practical functioning). (S-1 at 4-5.)
10. Past developmental health information was summarized in the June 2021 ER. Specifically, a medical evaluation in 2012 described Student's developmental delays, speech/language deficits, and behavioral presentation, yielding an Autism diagnosis and suggestions for preschool programming. (S-1 at 5-7.)
11. A psychiatric evaluation from 2013 was also summarized for the June 2021 ER. Diagnoses from that evaluation were Autistic Spectrum Disorder (including cognitive, speech, social skills, and fine motor skill weaknesses), and Attention-Deficit/Hyperactivity Disorder. (S-1 at 7-9.)
12. A December 2019 speech/language sample was also summarized for the June 2021 ER. Student's receptive and expressive language skills were determined to be possibly better developed than the sample reflected. (S-1 at 3-4.)
13. Teacher and related service provider input was included in the June 2021 ER, describing Student's transition and areas of improvement and continued need. Assessment of occupational therapy-related needs was also included. Recommendations included suggestions for specially designed instruction, prompting and cuing, a structured routine, chunking of tasks, direct speech/language and occupational

- therapy services, and consultative physical therapy. (S-1 at 9-10, 11-13.)
14. An observation by the IU school psychologist was conducted for and summarized in detail for the June 2021 ER, reflecting details about Student's responses to a variety of directives and task demands. (N.T. 34-35; S-1 at 10-11.)
 15. Assessment of Student's cognitive functioning (Stanford-Binet Intelligence Scales – Fifth Edition) for the June 2021 ER yielded results in the moderately delayed range across domains and composites, consistent with previous evaluations. That instrument has both verbal and nonverbal components, and involves manipulatives that are considered to be motivating to many students. (N.T. 37; S-1 at 26-29.)
 16. Student's academic skills in reading and mathematics were assessed for the June 2021 ER using the Kaufman Test of Educational Achievement – Third Edition. Student scored in the very low range across composites and subtests. (N.T. 38-40; S-1 at 29-30.)
 17. Assessment of adaptive behavior for the June 2021 ER was conducted using the Vineland Adaptive Behavior Scales – Third Edition completed by the Parent and autistic support teacher. Results of the Parent's scales were in the low range overall and across domains, with maladaptive behavior at an elevated level. The teacher's ratings were similarly in the low range across domains, but with maladaptive behavior at a clinically significant level. Self-care skills were a relative strength compared to the other domains. (N.T. 36; S-1 at 13-16.)
 18. The June 2021 ER included the Gilliam Autism Rating Scale – Third Edition completed by the Parent and autistic support teacher. Both indicated that Autism Spectrum Disorder was a very likely probability,

with the teacher reporting a need for a level of more substantial support than did the Parent. (S-1 at 30-32.)

19. A Verbal Milestone Assessment and Placement Program (VB-MAPP) assessment was completed for the June 2021 ER by the autistic support teacher, and speech/language and occupational therapists. The VB-MAPP is a criterion-referenced instrument that assesses developmental and prerequisite language skill. (N.T. 43-44; S-1 at 16-22.)
20. Speech/language assessment for the June 2021 ER was conducted through a Functional Communication Profile of eleven skill categories. A detailed summary of those results and additional vocabulary skill assessment were incorporated. (S-1 at 22-26.)
21. All assessments by the IU school psychologist were appropriate for Student and were conducted under standardized conditions and in accordance with publisher recommendations. (N.T. 37, 39-42.)
22. The June 2021 ER summarized Student's strengths and needs, with the latter including functional communication skills, pre-academic skills, verbal speech, fine motor skills, self-regulation and self-help skills, and functional skills. (S-1 at 51-53.)
23. The June 2021 ER reached a conclusion that Student was eligible for special education on the bases of Autism as the primary category, and secondary categories of Intellectual Disability, Speech/Language Impairment, and Other Health Impairment. A number of needs were identified, including one-on-one support; occupational therapy and speech/language services; physical therapy consultation; and behavioral support. Educational recommendations addressed needs for a highly structured setting, verbal and behavioral programming, modifications to the general curriculum with specially designed

instruction, communication development, and strategies to assist with task completion, transitions, and engagement. The ER also recommended a new FBA in the fall in addition to a physical therapy evaluation based on new information provided. (S-1.)

24. A meeting convened to review the June 2021 ER. The team determined that it would be appropriate to conduct an FBA in the fall because Student had just transferred into a new school and home environment and there were some changes to the family dynamics at the same time. Student had also just returned to in-person instruction following the move. The team further agreed to conduct a school-based physical therapy and occupational therapy (sensory) assessments at that time. (N.T. 46-48, 50, 89-92.)

November 2021 Reevaluation

25. A reevaluation report (RR) issued in November 2021 following completion of a new assessments. (S-3.)
26. The November 2021 RR incorporated information from and results of the June 2021 ER, updated with fall 2021 information including teacher and related service provider input. (S-3.)
27. Physical therapy evaluation for the November 2021 RR indicated that Student accessed the school environment without any need for physical support other than supervision for safety as provided by a paraprofessional. Continued physical therapy consultation was recommended. (S-3 at 28-29.)
28. A sensory profile was completed by the occupational therapist for the November 2021 RR. Results reflected slight difficulty with sensory seeking and sensory sensitivity, but significant difficulty with sensory registration, particularly with visual input. Student's sensory processing profile suggested a need for sensory activities (a sensory

diet) in school. Direct services for fine motor skill weaknesses and consultation for sensory needs was recommended by the occupational therapist. (S-3 at 29-32.)

29. The FBA was conducted by a qualified Board Certified Behavior Analyst (BCBA) with significant experience with children on the autism spectrum. (N.T. 86-88.)
30. The Parent did not return the form sent by the BCBA for information about behaviors. It is unknown whether the Parent received and completed that input form, although documents were typically exchanged via Student's backpack. (N.T. 95, 139.)
31. The BCBA conducted three observations of Student for the FBA. (N.T. 96-97.)
32. The fall 2021 FBA summarized previous behavioral information. It also identified a number of behaviors of concern staff identified in the school environment: destruction of school property; task-refusal; elopement; and aggression toward self or others. (N.T. 93-94; S-3 at 32-33.)
33. The FBA identified related skill deficits as well as antecedents to and consequences of the behaviors of concern. (S-3 at 33-34.)
34. Direct observations of Student were conducted for the FBA, with data collected by the BCBA, teacher, and personal care assistant (PCA) on frequency, location, and intensity of behaviors. The data was taken during observation in the classroom, in the cafeteria, in the hallway, and exiting the van used for transportation. (N.T. 96-97, 117-18; S-3 at 34-37.)
35. The BCBA analyzed the data collected to determine antecedents to and consequences of the behavior. The hypothesized function of the

behaviors was determined to be to escape demands and gain attention. (S-3 at 36-38.)

36. Needs identified in the November 2021 RR were updated from those in the June 2021 ER, adding reading comprehension, early mathematics calculation skills, functional mobility, and a positive behavior support plan. (S-3 at 39-42.)
37. A meeting convened to review the RR. The Parent did not agree with that reevaluation. (N.T. 99; P-6 at 43A.)
38. The IU psychologist and BCBA did not request or review any medical records of Student. Neither spoke directly with the Parent in order to obtain input. (N.T. 31, 54-55, 74-75, 102, 110, 139.)
39. The Parent has concerns with how Student's program has been implemented since the June 2021 ER and December 2021 RR, and that the District has not fully considered Student's need for consistency or other placement options. (N.T. 129-31, 135-37, 143-44, 148, 151; S-4 at 18.)
40. An IEP was developed following the June 2021 ER, and a new IEP followed the November 2021 RR. (S-2; S-4.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. It should be recognized that 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 filing 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.

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. *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, which were overall not contradictory. The weight accorded the evidence, however, was not equally placed, and the documentary evidence specifically was particularly persuasive in gauging the ER and RR based on the applicable standards.

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

General 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. Where a child with a disabilities moves into another state, the new local education agency (LEA) may decide to conduct an evaluation for the development of a program under applicable federal and state standards. 20 U.S.C. § 1414(d)(2)(C)(i)(II). The process of identifying children who may be eligible for special education is generally through an evaluation.

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). 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).

Finally, 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). Whether or not the LEA funds an IEE, a private evaluation that meets agency criteria and shared with the LEA must be considered. 34 C.F.R. § 300.508(c).

The District's Claim

The District's Complaint seeks to establish that its evaluation and reevaluation of Student in 2021 met all requirements of the IDEA, and that the Parent is not entitled to an IEE at public expense. The Parent disagrees and argues that specific flaws or omissions in those evaluations render them inappropriate. It merits repeating that where, as here, a parent seeks public funding of an IEE, the LEA has only two options: agree to the request, or file a Complaint. The District elected the second of those avenues of response.

The District's evaluations together utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. Foundationally, the District incorporated results of previous evaluations including developmental and psychiatric summaries; included parental input that added details about Student's behavioral, communication, gross motor, and sensory needs; and obtained and reported information from teachers and related service providers. The District school psychologist conducted classroom observations of Student that, in addition to testing observations, provided useful information about Student when presented with directives and task demands.

The ER included cognitive and achievement testing; evaluation by related service providers (occupational and speech/language therapists); and rating scales to evaluate Student's adaptive behavior skills, social/emotional functioning, executive functioning, and characteristics of Autism; and administration of the VB-MAPP to assess Student's prerequisite language skills. The instruments chosen were appropriate for Student and administered according to publisher recommendations. The District's RR broadened understanding of Student with a comprehensive FBA focused on school behaviors; a physical therapy evaluation; and additional occupational therapy (sensory) assessment. Although the Parent did not appear to

challenge the timing of the assessments conducted for the RR, the team had important reasons to defer the FBA to the fall to give Student an opportunity to acclimate to the new school environment and changes at home including the recent move.

Taken together, the ER and RR summarized and reviewed all data and available information that was gathered, assessed all relevant areas of need, and proceeded to determine Student's eligibility for special education, making a number of programming recommendations to address Student's unique and complex profile. All of this evidence more than preponderantly supports the conclusion that the District's ER and RR were sufficiently comprehensive to identify Student's special education and related service needs in all areas of suspected disability. Accordingly, the District has met its burden of establishing that its ER and RR met IDEA criteria and the documents served the purposes of special education evaluation.

The Parent's disagreements with the District's evaluations were raised specifically at the hearing and warrant discussion. First, she contended that the efforts to obtain information about Student's sensory needs were inadequate, and that the District particularly erred in failing to seek to directly obtain medical records or consult with Student's private medical providers. The Parent further suggested that the District could have conducted additional assessments in the area of sensory integration and processing. This contention is based in significant part on a letter from a treating medical professional from February 2022 (P-14), eight months after the ER and three months after the RR. That letter made recommendations for Student that were not consistent with previous programming in the other state, and while certainly a relevant document for the IEP team to consider, cannot serve to defeat the appropriateness of the District's evaluations after the fact. Moreover, the ER and RR summarized available previous evaluations of Student including those of private medical professionals, so

that information was clearly reviewed. While perhaps it would have been helpful for the school psychologist or a District representative to communicate with those individuals, the District's consideration of existing information was not inappropriate for purposes of its evaluations. Moreover, it is always possible that additional assessments could have been conducted or other instruments used to obtain information about a child, but those selected by the District were sufficiently comprehensive to identify Student's disabilities, as well as strengths and needs.

Next, the Parent challenged the FBA as deficient in assessing Student's problem behavior across all environments, pointing to specific incidents of aggression on a late October 2021 day as Student was exiting the van and then in several areas inside the building. However, the FBA was based upon behaviors that were identified as exhibited in the school environment, and the observations and data collection were conducted over time by multiple individuals and in a variety of settings. The absence of data on a specific incident does not establish that the FBA was overall incomplete in the context of the District evaluation.

Finally, the Parent has what she considers to be valid concerns with the content of the IEP, how Student's program is implemented, and the placement. Her testimony was heartfelt and undoubtedly based on her obviously well-informed perspective of Student. However, and while evaluations (including input from parents) certainly are critical to special education program development and placement decisions, the claim presented by the District's Complaint was limited to the discrete issue of compliance with the evaluation criteria in the law. This decision must address only the issue that was properly presented.

For all of these reasons, the District shall not be ordered to provide an IEE at public expense. The Parent is certainly free to obtain an IEE by the proposed private psychologist or anyone else, and the IEP team must

consider private evaluations, but the District cannot be ordered at this time to fund one for Student. This hearing officer does nonetheless sincerely hope that the parties may return to collaborative decision-making about Student's programming and placement needs.

CONCLUSION OF LAW

The District's evaluation of Student was appropriate under applicable standards and the Parent is therefore not entitled to an IEE of Student at public expense.

ORDER

AND NOW, this 4th day of March, 2022, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's evaluations of Student in 2021 were appropriate, and its claim is **GRANTED**. No remedy is ordered.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore, Esquire
HEARING OFFICER
ODR File No. 25967-21-22