

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:

22834-19-20

Child's Name:

J.Y.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

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Hearing Officer:

James Gerl, CHO

Date of Decision:

January 10, 2020

BACKGROUND

The school district filed a due process complaint alleging that its evaluation of the student on August 23, 2019 was appropriate and contesting the parent's right to independent educational evaluation at public expense. I find that the school district has proven that its August 23, 2019 evaluation of the student was appropriate and that the parent is not entitled to an independent educational evaluation at public expense.

PROCEDURAL HISTORY

The parties compiled an efficient administrative record in this matter. The testimony of seven witnesses was presented in a single hearing session. School district exhibits 1 through 12 were admitted into evidence. Parent exhibits 1, 3 and 4 were admitted into evidence and P-2 was withdrawn. Counsel for the parties also agreed to a number of stipulations of fact which helps explain the efficient presentation of evidence in this case.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that the argument advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUE PRESENTED

Counsel were asked prior to the hearing to provide a bulleted list of issues. Counsel for each party complied. The following single issue was presented by this complaint:

- Whether the school district has proven that its evaluation of the student was appropriate and, therefore, that the parent is not entitled to an independent educational evaluation at public expense?

FINDINGS OF FACT

Based upon the parties' stipulations of fact that were entered into on the record at the due process hearing, the hearing officer makes the following findings of fact.

1. The student's date of birth is [redacted].
2. The student is a resident of the school district.
3. At the time of the due process hearing, the student was in the student's [high school grade].
4. The school district had previously denied a request by the parent for an evaluation of the student by prior written notice dated December 6, 2017.
5. On April 2, 2019, the parent requested an independent educational evaluation, but there was no district evaluation in effect at that time.
6. The school district issued a prior written notice for an initial evaluation of the student on April 12, 2019.
7. The parent signed the prior written notice on April 19, 2019, and the district received the prior written notice signed by the parent on April 22, 2019.

8. The district's evaluation report was completed on August 23, 2019 and it was provided to the parent on the same date.
9. The school district's evaluation included a speech language screener, an occupational therapy screener, and a functional behavioral analyst.
10. On September 5, 2019, the parent disagreed with the school district's evaluation report and requested an independent educational evaluation at public expense.
11. Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:¹
12. The student is a good kid who loves to eat. (NT 281 – 282)
13. The school district's evaluation of the student included a speech language screening which included the Clinical Evaluation of Language Fundamentals Screening Test, Fifth Edition and which was administered by a speech language pathologist with over 25 years of experience. On the CELF-5 test, a student scoring near or below the criterion score of 18 would be recommended for additional testing. The student's score was 27, which exceeds the criterion score. The student's scores were superior. The speech language pathologist did not have any concerns about the student's speech and found no need for further testing. (S-4; S-6; NT 38 – 49)
14. As a part of the school district's evaluation, the student was administered an occupational therapy screening. The screening

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT___").

included the Bruininks–Oseretsky Test of Motor Proficiency and the Wold Sentence Copying assessments. The student scored in the average range on the BOT-2. On the WOLD assessment, the student scored significantly above average. The occupational therapist who conducted the assessments determined that the student was not in need of further occupational therapy assessments or services. (S-3; S-6; NT 75 – 81)

15. The school district evaluation of the student included a functional behavioral analysis conducted by a board certified behavior analyst. The BCBA conducted two direct observations of the student and interviewed the student's parent, as well as school district's staff. The BCBA's observation of the student revealed that the student was on task approximately 85% of the time. This was consistent with information that the BCBA obtained from the guidance counselor and the student's teachers. The student's mother told the BCBA that her primary concern for the student was organization. Observations of the student by the BCBA did not reveal any problems with organization. The student's mother told the BCBA that the student likes to play Xbox and ride bikes with friends. The BCBA concluded that there were no problem behaviors that were impeding the student's learning or the learning of others, and the BCBA concluded that a behavioral intervention plan was not needed for the student. (S-5; S-6; NT 84 – 119)
16. The student's scores on the DIBELS reading tests were among the strongest in the student's reading intervention class. (S-6; NT 124-127)
17. The school district's evaluation was coordinated by a certified school psychologist who is also a board certified behavior analyst. The assessments used by the evaluator involved a cross-battery approach

in order to obtain a deeper understanding of the student's weaknesses and strengths in detail. Among the assessments administered by the school psychologist were the following: the Wechsler Intelligence Scale- 5th ed.; the Developmental Neurological Assessment- 2d ed.; the Woodcock-Johnson Test of Cognitive Abilities- 4th ed.; the Kaufman Test of Achievement- 3d ed.; the Wechsler Individual Achievement Test; the Conners' Behavior Rating Scales; and the Beck Youth Inventories. (S-6; S-10; NT 160-162, 175 – 186)

18. The district's evaluation included assessments of neurological/executive functioning, input from the student's teachers and the parent, an observation by the school psychologist, two observations by the board certified behavior analyst who did the functional behavioral analysis, and information obtained directly from the student. The evaluation reviewed the student's state and local assessments and grades as well as input from the student's teachers, the parent and the student. (S-6; S-5; S-10; NT 87 – 88, 93 – 94, 167, 170 – 174, 174, 183 – 184, 237)

19. The assessments and other instruments used to gather data concerning the student during the evaluation process were reliable and valid and were used for the purposes for which they were designed. (S-6; NT 41 – 42, 77, 87, 92 – 93, 176 - 177, 191 – 193, 198)

20. The school psychologist concluded that the student had low processing speed and attention issues, but found that these issues did not impact the student's cognitive ability to think and learn, which was found to be solidly within the average range. The school psychologist assessed the student's academic achievement using the Kaufman Test of Educational Achievement, Third Edition and the Wechsler Individual Achievement Test, Third Edition. From the cross-

battery of assessments administered, the psychologist concluded that the student was not showing any areas of academic need, and that the student has the ability to learn and had been learning. (S-6; S-10; NT 169, 175 – 191, 189 – 192)

21. The psychologist used rating scales for the parent, teachers and student to determine the student's emotional and behavioral functioning. The ratings by the parent and the teachers showed variability, and the school psychologist looked to the student's self-ratings to find true areas of need, if any. There are psychometric measures contained within the rating scales to reveal when they should be interpreted with caution because of inconsistent or non-truthful responses, and the psychometric measures were not triggered by the student's responses. (S-6; NT 192 – 196, 222-224)
22. The conclusion of the evaluator based upon the results of the evaluation was that the student has a disability but does not require specially designed instruction. Instead, the evaluator determined that the student would benefit from accommodations in the general education setting through a 504 plan, which the evaluator recommended to the team. The team met on September 26, 2019 and agreed with the evaluator and found the student eligible under Section 504 but not under IDEA. The team concluded that the student had an impairment (difficulties with attention) that substantially limits the student's ability to concentrate and learn in the classroom that may be addressed through accommodations but that the student does not require specially designed instruction. The 504 plan specifies a number of accommodations, including a pass to access the counselor when needed, preferential seating, extended time, and visual cues or verbal prompts in the classroom. (S-6; S-7; S-8 at p. 3, NT 169, 200, 214-216, 232-233)

23. On September 26, 2019, previous counsel for the district e-mailed counsel for the parent concerning the parent's September 5, 2019 independent educational evaluation request. The e-mail notes that the school district will not fund the independent educational evaluation and that previous counsel was prepared to file a due process complaint on that day prior to leaving for vacation the next day. The e-mail states that counsel for the parent agreed to hold the independent educational evaluation request in abeyance until the team met on November 4, 2019 to review the student's 504 plan, and that counsel for the district would not file a due process complaint that day. (S-8 at p. 3)
24. On October 8, 2019, counsel for the parent e-mailed the previous lawyer for the school district stating that the parent had problems with the school district's evaluation and renewed the parent's request for an independent educational evaluation. (S-8 at pp. 1 – 2)
25. The school district filed the instant complaint on October 10, 2019 seeking to prove that its evaluation of the student was appropriate and contesting the parent's right to an independent educational evaluation at public expense. (S-8 at p. 1; S-9)
26. The evaluation of the student by the school district on August 23, 2019 was appropriate. (record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as the legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. If a parent disagrees with a school district evaluation, the parent may request an independent educational evaluation at public expense.

IDEA § 615(d)(2)(A); 34 C.F.R. § 300.502(b)(1); PP by Michael P and Rita P v. Westchester Area School District, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009). When a parent requests an independent educational evaluation at public expense, the school district must either pay for the evaluation or else request a due process hearing to show that its evaluation is appropriate. 34 C.F.R. § 300.502(b)(2)

2. In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. It must use technically sound instruments to assess the child. The assessments must be conducted by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer. The child must be assessed in all areas related to the suspected disability on an initial evaluation. The evaluation must be comprehensive. When conducting an evaluation, a school district must review appropriate existing evaluation data, including classroom based assessments and observations by a teacher or related service providers, and on that basis determine whether any additional data are needed to determine whether the student is eligible, as well as to identify the child's special education and related services needs. Perrin ex rel JP v Warrior Run Sch Dist., 66 IDELR 254 (M. D. Penna. 2015); IDEA § 614; 34 C.F.R. §§ 300.301, 300.304 – 300.305; 22 Pa. Code §14-123.
3. For a procedural violation to be actionable under IDEA, the violation must result in a loss of educational opportunity for the student, seriously deprive the parents of their participation rights, or cause a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); IDEA § 615(f)(3)(E); 34 C.F.R. § 300.513(a).

4. The school district's August 23, 2019 evaluation of the student was appropriate and consistent with all legal requirements.
5. The school district has proven that the parent is not entitled to an independent educational evaluation at public expense because the school district has proven that the August 23, 2019 evaluation of the student was appropriate.

DISCUSSION

Has the school district proven that the school district's evaluation of the student was appropriate and, therefore, that the parent is not entitled to an independent educational evaluation at public expense?

In the instant case, the school district has proven that its August 23, 2019 evaluation of the student was appropriate. The record evidence is clear that the school district utilized a variety of assessment tools, strategies and instruments to gather relevant functional, developmental and academic information about the student, including information provided by the parent. The district utilized a cross battery approach to determine the student's cognitive and academic abilities. The instruments utilized include assessments of neuropsychological/executive functioning; input from teachers; input from the parent; a structured observation by the district's school psychologist; two observations by a board certified behavioral analyst and information obtained directly from the student, the parent and teachers. The evaluation reviewed the student's grades and state and local assessments. The evaluation also included a speech language screening by a speech language pathologist, an occupational therapy screening by an occupational therapist and a functional behavioral analysis by a board certified behavior analyst. The evaluators were qualified to administer the instruments and assessments that they administered, and the assessment tools were reliable and valid. The evaluation used technically sound

instruments and they were used for the purposes for which they were designed. The assessments were administered by trained and knowledgeable personnel. The evaluation was sufficiently comprehensive to identify the student's needs.

After the evaluation was completed, the district convened a meeting of a team of qualified professionals, as well as the parent, to discuss the evaluation. The team concluded that the student had a disability but was not eligible for special education because the disability did not cause the student to need specially designed instruction. The team determined that the student was eligible for a 504 plan because the student's disability interfered with a major life activity.

The school district's evaluation met all legal requirements under IDEA for an evaluation. The district has proven that its evaluation of the student on August 23, 2019 was appropriate. Accordingly, the school district has established that the parent is not entitled to an independent educational evaluation at public expense.

To the extent that the testimony of the parent is inconsistent with the testimony of the school district staff, the testimony of the parent is less credible and persuasive than the testimony of school district staff because of the demeanor of the witnesses, as well as the following factor: the student's mother testified at the hearing that the student does not go outside and ride bikes. The mother told the board certified behavioral analyst who conducted the functional behavioral assessment of the student, however, that the student does like to ride bikes with friends. This inconsistency impairs the credibility and persuasiveness of the mother's testimony.

Most of the arguments contained in the parent's post-hearing brief concern whether the school district reached the wrong conclusion with regard to the student's eligibility for special education, particularly arguing

that the student had a specific learning disability or an emotional disturbance. Eligibility, however, is not one of the issues raised by the due process complaint or specified by the lawyers for the parties in the statement of the issues they made prior to the hearing that was confirmed at the beginning of the hearing. IDEA specifically prohibits the consideration of issues that were not raised by a due process complaint. IDEA § 615(f)(3)(B); 34 C.F.R. § 300.511(d). Accordingly, the parent's arguments concerning eligibility were not considered herein because the issue was not raised in the due process complaint.

Another argument raised in the parent's post-hearing brief is that the school district placed too much weight upon student rating scales during the evaluation process. The parent contends that the student is savvy enough to avoid divulging issues to evaluators. The district points out, however, that rating scales used include psychometric measures that will identify to the evaluator if they should be interpreted with caution. The psychometric measures were not elevated for the student's responses, indicating that the student's rating scales were valid. The credible and persuasive evidence in the record indicates that the school district did not place too much emphasis on the student rating scales in completing the evaluation of the student.

The parent also argues that the school psychologist should have obtained input from the student's private counselor. The parent cites no authority for this argument other than the general requirements of the statute pertaining to evaluations. These provisions do not impose a duty upon a school district evaluator to contact a private counselor. Although the district would clearly have been required to consider any provider input given to the school district, the evidence in the record shows that the parent did not provide any information from the private counselor to the school district. The parent has not shown that the school psychologist had an

independent duty to contact the private counselor in order to complete the school district's evaluation. The parent's argument is rejected.

The parent also asserts that the speech language and occupational therapy screenings used by the school district in the evaluation rendered the evaluation inappropriate. The only authority cited by the parent for this proposition is the provision in IDEA that screenings for instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education. The provision cited by the parent does not mean, however, that screenings cannot be used as a portion of a larger series of assessments that constitute an evaluation. Because the provision of the law cited by the parent clearly does not apply, the parent's argument concerning the use of screenings is rejected.

The parent's brief raises an argument that the school district's response to the parent's independent educational evaluation request was inappropriate. An analysis of the facts in the record reveals that the response of the school district to the parent's requests for independent educational evaluations was appropriate. At the time that the parent made the first request for an independent educational evaluation, there was no school district evaluation that the parent disagreed with. The IDEA regulations clearly contemplate that a school district will get the first crack at evaluating the student. *PP ex rel. Michael P and Rita P v. Westchester Area School District*, 585 F.3d 727, 740 (3d Cir. 2009); see *D.Z. v. Bethlehem Area School District*, 2 A.3d 712, 54 IDELR 323 (Pa. Comm. Ct. 2010); *School District of Philadelphia*, 74 IDELR 27 (SEA Penna 2019); 34 C.F.R. § 300.502(b)(1).

Accordingly, the school district was not required to file a due process complaint to prove that its evaluation of the student was appropriate until after it had first evaluated the student. Even assuming, *arguendo*, that the school district committed a procedural violation of IDEA by not responding

sooner to the first independent educational evaluation request, any such violation is clearly a harmless procedural violation because the school district had not yet evaluated the student.

Finally, the parent argues that equity requires the granting of an IEE because the parent is just looking to get help for the student. Although a hearing officer clearly does have broad equitable powers to order relief that is appropriate upon the finding of a violation of IDEA, including ordering an evaluation at public expense wherever appropriate, there must first be a violation of IDEA before any such equitable relief is awarded. The parent has not shown any violation of IDEA by the school district. The argument is rejected.

It is concluded that the school district has proven that its August 23, 2019 evaluation of the student was appropriate. It is concluded further that the school district has proven that the parent is not entitled to an independent educational evaluation at public expense.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that the relief requested in the due process complaint herein is hereby granted. The school district is not required to provide an independent educational evaluation at public expense.

IT IS SO ORDERED.

ENTERED: January 10, 2020

James Gerl

James Gerl, CHO
Hearing Officer