

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 Due Process Hearing Officer

Final Decision and Order

ODR No. 27944-22-23

CLOSED HEARING

Child's Name:

A.W.

Date of Birth:

[redacted]

Parents:

[redacted]

Local Education Agency:

School District of Philadelphia
440 North Broad Street, Suite 313
Philadelphia, PA 19145

Counsel for the LEA:

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

06/02/2023

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.W. (Student),¹ is a mid-teenaged student who resides and attends school in the School District of Philadelphia (District). Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the basis of a Specific Learning Disability. In April 2023, the District filed a Due Process Complaint seeking to defend its recent evaluation of Student after the Parents requested an independent educational evaluation. The matter proceeded to an efficient due process hearing.³

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

ISSUES

1. Whether the District's evaluation of Student complied with all legal requirements under the IDEA; and
2. If the District's evaluation of Student did not comply with all legal requirements, should

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.) and , School District Exhibits (S-) followed by the exhibit number. The term Parents is used in the plural where both were involved or it appears that one was acting on behalf of both. The parties were provided with procedural information well in advance of the hearing, and participated in a conference call with this hearing officer prior to the presentation of evidence (N.T. 12-13).

the Parents be awarded an independent educational evaluation at public expense?

FINDINGS OF FACT

1. Student is a mid-teenaged student residing within the District and has been identified as eligible for special education under the IDEA. (S-6.)
2. In October 2022, the Parents made a request for a special education evaluation. A meeting convened with the Parents, the District certified school psychologist, and other District professionals to discuss the request, with parental concerns at that time including reading skills (specifically dyslexia), assignment completion, and Student's motivation. (N.T. 69-71, 94-95; S-1; S-2; S-3.)
3. Following the meeting, on November 9, 2022, the District issued a Permission to Evaluate form to the Parents, who returned the form with their consent by December 9, 2022.⁴ (S-4.)
4. The District conducted an initial evaluation of Student that was completed with an Evaluation Report (ER) on February 9, 2023. The evaluation was conducted by an experienced school psychologist intern under the direction and supervision of an experienced certified school psychologist, with some assessment by the latter. (N.T. 30-35, 38, 63-69; S-6; S-10; S-11.)
5. The District obtained parental input for the ER through conversations. Concerns of the Parents included grades, confidence, and motivation, as well as anxiety, social/emotional functioning, and positive peer relationships. They also noted that Student recently experienced the

⁴ The signature of one of the Parents is dated December 7, 2022; the LEA receipt date is noted as December 8, 2022 and elsewhere documented as December 9, 2022. (S-4; S-5.)

loss of a family member and the sudden deaths of several close friends. (N.T. 39-40, 53-54, 75; S-6 at 1-2.)

6. The District interviewed Student for the ER. On one day when Student was scheduled for testing, Student was not feeling well so none was conducted. (N.T. 42-43, 58-59, 78-79.)
7. The District obtained observations by and input from the reading and mathematics teachers, with those the two areas of academic concern for Student. Those teachers reported that Student performed well when focus and engaged, but that Student at times was unprepared and inattentive. Recent data on assessments in these areas was also provided. (N.T. 40; S-6 at 2.)
8. Cognitive assessment for the February 2023 ER (Wechsler Intelligence Scale for Children – Fifth Edition) was administered twice because of concerns that Student had not put forth sufficient effort into the first attempt, thereby likely not presenting an accurate estimate of cognitive ability. Results of the second administration yielded a full scale IQ score of 76 (5th percentile), with variability among the Composite scores ranging from the 2nd (Processing Speed, Low range) to 34th (Working Memory. Average range) percentiles; the remaining Composite scores were in the Low Average range. These scores were determined to be an under-representation of Student’s ability, particularly because of performance on a second instrument to assess Student’s memory and on other measures. (N.T. 36-38, 44, 48, 57-58, 76; S-6 at 3-5, 8-10.)
9. On assessment of achievement (Wechsler Individual Achievement Test – Fourth Edition), Student earned scores suggesting weaknesses with oral reading fluency, spelling, phonemic proficiency, spelling, and both math problem solving and numerical operations. Reading

comprehension and written expression were noted to be relative strengths for Student. Student's mathematics skills were below expectations reportedly due to a lack of instruction and mastery of basic skills such as mathematics facts, rather than difficulty learning how to solve those types of problems. (N.T. 50; S-6 at 4, 7-8.)

10. On measures of executive functioning for the February 2023 ER, Student exhibited well developed skills that did not indicate areas of deficit. (S-6 at 4-5, 10.)
11. In order to assess social/emotional/behavioral functioning, the Parents and two teachers completed the Behavior Assessment System for Children – Third Edition rating scales. The Parent ratings reflected no concerns; but one or both teachers endorsed concerns with aggression, depression, and attention problems; they also noted lesser concerns with hyperactivity, conduct problems, learning problems, and study skills. Student completed the Minnesota Multiphasic Personality Inventory – Adolescent, in addition to participating in a clinical interview, which yielded results suggesting that anxiety and depression were concerns impacting Student's daily functioning (motivation, effort, attention, concentration). Student expressed worry about self and loved ones and feeling overwhelmed. (N.T. 77-78, 89-90; S-6 at 11, 13.)
12. The February 2023 ER determined that Student was eligible for special education due to a Specific Learning Disability in reading, which also impacted Student's reading comprehension that was a relative strength as was written expression. Recommendations addressed reading weaknesses, a need for mathematics skill review and practice, and a number of accommodations at school; encouragement of developing Student's strengths was also suggested. Student's

emotional presentation did not rise to the level of an Emotional Disturbance, but reportedly may need revisitation in the future. (S-6.)

13. The February 2023 ER included a waiver of the ten day evaluation review for the Parents to consider. (S-6 at 19.)
14. After the ER was completed, the District invited the Parents to a meeting to discuss the evaluation and develop an Individualized Education Program (IEP). (N.T. 95-96; S-7.)
15. The Parents responded to the invitation to the meeting by asking to delay IEP development, and raised several questions/concerns about the ER: the possibility of dyslexia; an analysis of Student's processing speed; a description of the testing environment; and the timeliness of the ER. They also requested an Independent Educational Evaluation (IEE) at public expense. (S-8.)
16. An IEP meeting did convene after the IEE request. (N.T. 97, 112-13.)
17. The District denied the request for the IEE. (S-9.)
18. The Parents' first three concerns/questions were addressed at the due process hearing and helped in their understanding of the ER. (N.T. 101-02, 112.)
19. The Parents have arranged for Student to be provided private tutoring services. (N.T. 103-04, 107-08.)

DISCUSSION AND APPLICATION OF LAW

General Legal Principles

The burden of proof is viewed as comprising two elements: the burden of production and the burden of persuasion. In special education due process, 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 rests with the District as the party initiating this administrative proceeding. 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, who assume roles as fact-finders, are responsible for 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, and the testimony was essentially quite consistent where it overlapped. The weight accorded the evidence, however, was not equally placed. The testimony of the school psychologist intern and the District certified school psychologist was very persuasive on the precise issue presented, while the remaining witnesses’ testimony was helpful in providing context related to the IEE request and District response.

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. 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). 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).

The IDEA sets forth 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).

The term “specific learning disability” is defined as “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. § 1401(30)(A). The term “includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia,” but “does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” 20 U.S.C. §§ 1401(30)(B) and (C). A specific learning disability may be found where a child is not adequately achieving in the areas of oral expression; listening comprehension; written expression; basic reading skill; reading fluency; reading comprehension; mathematics calculation; and mathematics problem solving. 34 C.F.R. § 300.309(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 of Student in February 2023 met all requirements of the IDEA, and that the

Parents are therefore not entitled to an IEE at public expense. As noted, where, as here, a parent seeks public funding of an IEE, the LEA has only two options in response: agree to the request, or file a Complaint. The District elected to pursue the second of these alternatives.

The District's evaluation in February utilized a variety of assessment tools, strategies, and instruments (rather than any single measure) to gather relevant functional, developmental, and academic information about Student, all relating to areas of Student's suspected disabilities. This is precisely what the law requires of LEAs. More specifically, the District incorporated parental input that provided their views on Student's academic and social/behavioral functioning, in addition to Student input and an interview; and also obtained and reported on observations by and information from teachers as well as available relevant data. The February 2023 ER included cognitive assessment that was conducted twice in an effort to ensure that results were representative of Student's ability and was supplemented by another measure of memory; academic achievement testing; executive functioning assessment; and rating scales to evaluate Student's social/emotional functioning. The February 2023 ER summarized and reviewed all data and available information that was gathered, assessed all relevant areas of need, and then proceeded to determine Student's eligibility for special education.

This ER identified a number of Student's areas of strength and weakness, and made recommendations for programming. Viewed as a whole, and according appropriate weight to the testimony of the evaluating professionals, the record evidence is more than preponderant in this particular case that the District's February 2023 ER was sufficiently comprehensive to identify Student's special education and related service needs in all areas of suspected disability. This ER thus served the purposes

of a special education evaluation; and, the District has met its burden of persuasion.

The Parents' main concerns with the District's ER were raised with the IEE request as well as at the hearing, and a brief discussion of those is warranted. First, the Parents did not believe that the ER adequately considered the possibility of dyslexia. As noted above, dyslexia is an example of a specific learning disability and is not itself an eligibility classification; and the testimony of District witnesses clarified those terms (N.T. 60, 82-83) as they related to Student. Thus, this concern does not mean that the ER was in violation of the IDEA. *Crofts v. Issaquah School District No. 411*, 22 F.4th 1048, 1056 (9th Cir. 2022) (concluding that the school district's determination that the student was eligible for special education under the classification of specific learning disability rather than through the term "dyslexia" did not establish that the evaluation was inappropriate under the law.) Second, they sought a better analysis of Student's processing speed, which was described in the ER as well as through testimony as to how that element of Student's functioning was assessed and considered (N.T. 48-49, 57, 75-77). Next, they asked for a description of the testing environments that similarly was addressed in the testimony (N.T. 42). While these concerns are understandable, none of these descriptions and explanations are required, but can typically be part of the discussion to review an evaluation report.

The final concern of the Parents was the timeliness of the ER. It is unclear precisely when the Parents provided consent to the evaluation, but even using the latest date in District records (December 9, 2022), the 60 calendar day timeline ended on February 7, 2023. Therefore, the District did not strictly comply with that state regulation. Nonetheless, this very brief deviation at worst amounted to a minor procedural violation that did not

impact the substance of the ER and, in this hearing officer's perspective, does not render the ER inappropriate such that an IEE would be warranted.

What became quite apparent at the hearing is that, had the District convened a meeting to review and discuss the ER, without automatically assuming that the Parents would agree to development of an IEP at the same time, this proceeding could very likely have been averted entirely. The Parents expressed concerns that the nature of the communications between school and home was inadequate and, while not an issue presented for this hearing officer to decide, the District is now aware of their view on this critical aspect of special education programming. It is this hearing officer's sincere hope that the parties are able to set aside their differences and work together meaningfully and collaboratively as Student continues through high school.

CONCLUSION OF LAW

The District's February 2023 met all requisite criteria in the IDEA and its implementing regulations and, accordingly, there is no basis for an IEE at public expense.

ORDER

AND NOW, this 2nd day of June, 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District's February 2023 ER was appropriate under the applicable law, and its Complaint is SUSTAINED. No further action by the District is ordered.

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. 27944-22-23