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Pennsylvania Special Education Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number:

27438-22-23

Child's Name:

J.S.

Date of Birth:

[redacted]

Guardian:

[redacted]

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Hearing Officer:

Michael J. McElligott, Esquire

Date of Decision:

02/15/2023

Introduction

This special education due process hearing concerns the educational rights of Student, a student who resides in the Philadelphia School District ("District").¹ Under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")², the student is a student potentially eligible for special education.

The District's most recent evaluation found that the student did not have a disability and did not require special education. The student's guardian disagreed and requested an independent educational evaluation ("IEE") at public expense. The District filed the complaint in this matter, seeking to defend its May 2022 evaluation process and report in the face of the IEE request.

For reasons set forth below, I find that the District evaluation process and report, when issued, were both appropriate. The District will, however, be ordered to perform a re-evaluation.

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").

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. An evaluation dated June 2021 contained evaluation data as part of early intervention (“EI”) programming. (Joint Exhibit [“J”]-1).³
2. The June 2021 evaluation report from EI indicated that, at home and at school, the student exhibited slight behavioral episodes including not following directions, tantrums and acting-out behavior when refused, at times becoming “worked up” and “overwhelmed”, in the words of the teacher, and exhibiting difficulty calming after such incidents. The report indicated that calming involved a “high level of teacher support”. (J-1 at pages 5, 11).
3. The June 2021 evaluation report from EI indicated that the student was exhibiting appropriate skill levels across cognitive, communication, physical, and adaptive development. The report indicated that the student was exhibiting delayed skills in social and emotional development. (J-1 at pages 9-13).
4. The June 2021 evaluation report from EI indicated that the student qualified for EI services as a student with a developmental delay. (J-1 at page 15).

³ The dates for requesting/receiving permission to evaluate were in June 2020. (J-1 at page 1). The data and input were generated in June 2020. (J-1 at pages 4, 14). The EI evaluation report, however, was provided to the guardian in June 2021. Because this is the most recent date on the document, the exhibit will be referred to as a “June 2021” evaluation. But, as indicated, the content of the EI evaluation is based on data from June 2020.

5. The June 2021 evaluation report from EI identified needs in increasing tolerance for frustration and improving cooperative play skills with peers. The evaluation report recommended a number of strategies for self-regulation and social skills. (J-1 at page 16).
6. In June 2021, the EI program developed an individualized education plan ("IEP"). (J-2).
7. The June 2021 IEP from the EI program indicated that the student did not exhibit behaviors that impeded the student's learning or the learning of others. (J-2 at page 8).
8. The June 2021 IEP from EI contained three goals, one for employing coping skills, one for persevering with non-preferred activities, and one for social skills (turn-taking with peers). (J-2 at pages 9-15).
9. The June 2021 IEP from EI indicated that the student would receive 45 minutes of specialized support one time per week. (J-2 at page 16, Guardian Exhibit [marked as "P" for parent]- 5).
10. The June 2021 IEP from EI indicated that the IEP team anticipated transition to kindergarten. (J-2 at pages 8, 20).
11. Provider notes from the EI program over the period August 2020 – April 2022 indicated that, occasionally when frustrated, the student would engage in acting-out behavior, including crying, task-resistance and task-avoidance, eloping from the classroom, and grabbing objects from peers. (P-5).
12. In two episodes of tantrum in January 2022, however, one tantrum lasted approximately 30 minutes, including aggression toward staff, and another tantrum included aggression toward peers, destroying property, and overturning furniture. In March 2022, another episode

involved physical aggression (hitting) with peers. (P-5 at pages 6, 7-8).

13. In April 2022, anticipating the student's transition to kindergarten, the District requested and received permission to evaluate the student. (J-3).

14. In May 2022, the District issued its re-evaluation report ("RR") for the student. (J-5).

15. The May 2022 RR contained input from the student's guardian, including behavior rating scales. The behavior rating scales did not indicate any at-risk or clinically-significant scores. (J-5 at pages 2, 9-10).

16. The May 2022 RR contained updated cognitive testing, yielding a full-scale IQ score of 86. (J-5 at pages 6-7, 8-9).

17. The May 2022 RR contained a school-readiness assessment, yielding a comprehensive standardized score of 95, with relative strengths in colors and numbers/counting. (J-5 at pages 7, 9).

18. The May 2022 RR contained input from the student's EI teacher. The teacher identified the student's need in the educational setting is addressing social/emotional behavior. The teacher indicated that the student often exhibits appropriate school behavior, responses to requests, and peer interactions. When frustrated, however, the student can act out and targeted calming strategies are required. These instances were referred to by the teacher as "[student's first name] moments". (J-5 at page 4).

19. The District evaluator made multiple requests for the EI teacher to complete behavior rating scales, but those scales were never completed or returned. (J-17; Notes of Testimony ["NT"] at 12-123).
20. The provider notes for delivery of specialized services to the student in EI were not part of the May 2022 RR.
21. The May 2022 RR contained observations of the student in the EI classroom. The evaluator did not observe any acting-out behavior by the student. (J-5 at pages 3-4).
22. The May 2022 RR concluded that the student did not have a disability and did not qualify for special education services. (J-5 at page 11).
23. The May 2022 RR was not provided to the guardian until September 2022, after the commencement of the school year. (J-14).
24. Over the 2022-2023 school year, the guardian testified credibly that individuals from the District, primarily the student's teacher and classroom aide in the student's classroom, would often contact the guardian about the student's behavior including, at times, putting the student on the phone with the guardian so the student could be calmed. (NT at 129-196).
25. The incidents that led to these contacts revolved around acting-out behaviors and peer relations. (NT at 129-196).
26. In mid-October 2022, curriculum-based assessment of the student's performance in reading and mathematics was at the "emerging kindergarten" level. (P-3, P-4).
27. In late October 2022, the guardian retained counsel, who requested an IEE at public expense. Counsel for each party communicated about

the request, and in late November 2022, the District denied the request. (J-9, J-10, J-11).

28. In early January 2023, the District filed the complaint, seeking to defend its May 2022 evaluation process and report, the complaint which led to these proceedings. (J-12).

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 District's May 2022 RR was appropriate. At the time re-evaluation was undertaken, the evaluator solicited necessary input from both the guardian and the EI teacher. The re-evaluation included observations of the student in the educational setting. The re-evaluation included an updated cognitive assessment and, given the student's age, a school readiness assessment, as well as behavioral ratings. The largest flaw in the re-evaluation was the lack of any behavioral ratings from the EI teacher, but this flaw must be laid at the feet of the EI teacher or program, which ignored repeated requests for the teacher to complete the scales. In sum, in May 2022 the District's re-evaluation process and report were appropriate at that time.

Having found that the District's May 2022 RR was appropriate at the time the evaluation was undertaken and the RR was issued, the order below will direct the District to undertake a re-evaluation process. The tenor of the testimony at the hearing session was amiable between the parties. While there is disagreement between the parties about the student's potential eligibility status, there appears to be no animus toward each other. Thus, it is the considered opinion of this hearing officer that, where almost a year has passed since the prior evaluation, where—critically—the student has now been in District programming for approximately six months, and where there are indications that a re-evaluation may be warranted, a re-evaluation process would be beneficial for both parties to understand the student's strengths and needs and whether the student may be eligible for special education. Indeed, the student's guardian indicated that a re-evaluation by the District would have been welcomed in the fall of 2022 (NT at 146); there is no reason why that should not be the case in the spring of 2023.

Finally, in her response to the District's complaint, the guardian asserted that the District was dilatory in filing a special education due

process complaint in early January 2023 when the guardian's request for an IEE was made in late October 2022. It was the intention of this hearing officer to make this issue a matter of fact-finding and to address the guardian's assertion under the terms of the decision. (See NT at 197-203).

Having considered the record as a whole, however, this hearing officer declines to make the guardian's assertion a matter of fact-finding or any part of the order. There are two reasons for this course of action.

One, in prehearing planning, the parties discussed whether or not the student's teacher should testify. The guardian sought to have the teacher testify, or at least disclosed that she might wish to question the teacher; the District objected to having the teacher testify. It was the procedural decision of this hearing officer not to have her testify, leaving detailed testimony about the 2022-2023 school year outside of this record. During the hearing, though, the guardian testified, tangentially, to purported events in this school year. (NT at 129-196). While the testimony was not extensive, not having an opportunity to present testimony from the student's current teacher might present prejudice to both parties in terms of what that witness might have added to the evidence. Two, the question of the potential eligibility of the student for special education services (or disability-related supports under a potential section 504 plan) is unsettled: The evaluation process and RR in May 2022 was appropriate but subsequent events require that a re-evaluation take place. Where potential child-find issues might implicate fact-finding and remedy-based considerations related to the District's response to the IEE request, issues and considerations which were not fully vetted through the evidence on this record, it appears to be prudent to avoid definitive findings. Accordingly, in the order below, any assertion or claim for remedy made by the guardian related to the District's response to the IEE request will be dismissed without prejudice.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the re-evaluation process and report undertaken/issued by the Philadelphia School District in May 2022 were both appropriate at that time. The District need not fund at public expense an independent educational evaluation of the student.

The District is ordered to undertake a comprehensive re-evaluation of the student. Consent for this comprehensive re-evaluation shall be authorized by this order, with the calculation of the 60-day timeline for completing the re-evaluation (pursuant to 22 PA Code §14.124(b)) to commence on February 16, 2023.

In addition to input from the guardian, the student's teacher, and the classroom aide in the student's classroom, the comprehensive re-evaluation shall include multiple observations on different days and in different educational settings. The comprehensive re-evaluation report shall also include complete assessments in academic achievement, behavior, social functioning, and emotional functioning. The comprehensive re-evaluation need not include cognitive testing, as this was completed in the May 2022 re-evaluation report. The comprehensive re-evaluation need not include a functional behavior assessment. The elements of the comprehensive re-evaluation directed in this order to be part of the re-evaluation shall be considered a floor and not a ceiling— additional data, levels of academic performance, input, observation, and/or assessment may be incorporated

into the re-evaluation as required by IDEIA or Chapter 14 or as the District evaluator may deem appropriate.

Any assertion or claim for remedy made by the guardian related to the District's response to the guardian's request for an independent educational evaluation is not made part of the fact-finding in this decision and is dismissed without prejudice.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

02/15/2023