

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

DECISION

Child's Name: D.J.

Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 17110-15-16 KE

Parties to the Hearing:

Representative:

Parents

Parent[s]

Parent Attorney

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Dates of Hearing:

January 11 and February 2, 2016

Date Record Closed:

February 8, 2016

Date of Decision:

February 23, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a middle elementary school-aged student in the Susquehanna Township School District (District), who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² After the family moved into the District, a special education evaluation was conducted. The Parents disagreed with the evaluation and sought an Independent Educational Evaluation (IEE) at public expense. The District thereafter filed a Due Process Complaint seeking to defend its evaluation as compliant with the IDEA.

The case proceeded to a due process hearing convening over two sessions, at which the parties presented evidence in support of their respective positions³ on whether the District's evaluation was appropriate. For the reasons set forth below, I find in favor of the Parents and will award an IEE at public expense.

ISSUE

Whether the District's evaluation of Student was appropriate under applicable law?

FINDINGS OF FACT

1. Student is a middle elementary school-aged student who resides within the District. (N.T. 29-30)
2. Student was diagnosed with Autism Spectrum Disorder (ASD) prior to age three. Student has also been diagnosed with, among others, Attention Deficit Hyperactivity

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

³ References to the record will be to the Notes of Testimony (N.T.), School District Exhibits (S-), and Parent Exhibits (P-). References to duplicate exhibits will be to one or the other, or both. References to Parents in the plural are used where it appears that Student's mother, who was the more active participant in programming decisions and at the due process hearing, was acting on behalf of both.

Disorder (ADHD) and Anxiety Disorder, but some of those evaluators concluded that Student did not meet the criteria for ASD. (N.T. 395-401, 433-38, 440-41; P-17 P-20, P-21, P-22)

3. Student and the family previously resided in another state. Student had an Individualized Education Program (IEP) and then a Section 504 Plan⁴ in public schools in that other state, before the Parents decided to homeschool Student due to Student's anxiety and refusal to attend school. The family moved to Pennsylvania in the spring of 2015. (N.T. 401-02, 439; S-1 p. 4)
4. While Student and the family lived in the other state, Student was admitted to a partial hospitalization program four times, three of which occurred in the fall. Those stays lasted approximately two months. (N.T. 396, 399-400, 438)
5. A developmental evaluation was conducted in the spring of 2010. That report reflected previous diagnoses of Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS) and Sensory Processing Disorder. Assessments administered included cognitive assessment (visual perception, fine motor, and receptive and expressive language; Autism Diagnostic Observation Schedule (ADOS); Behavior Assessment System for Children, Second Edition (BASC-2); and Vineland Adaptive Behavior Scales, Second Edition (Vineland-II). Student scored in the average to above average range cognitively across domains. Student's performance on the ADOS was inconsistent with ASD. The BASC-2 revealed teacher at-risk concerns with hyperactivity, aggression, attention problems, and withdrawal; and parental concerns in the clinically significant range with respect to hyperactivity, aggression, anxiety, attention problems, withdrawal, atypicality, adaptability, and social skills; and in the at-risk range with respect to depression. The Vineland-II reflected concerns only with social skills. The Parents also reported sensory seeking and emotionally reactive behaviors. The evaluating psychologist diagnosed Student with ADHD Combined Type but not ASD. (P-20)
6. Another developmental evaluation was conducted in late 2010. Student reportedly performed in the above average range on cognitive assessment but the results were believed to be an underestimate of Student's ability. The evaluator, who also obtained information via parent interview, observations, and diagnostic play sessions, concluded that Student did not meet the criteria for ASD, but that Anxiety Disorder NOS and Sensory Processing Disorders were indicated. (P-21)
7. A neuropsychological evaluation was conducted in the fall of 2012. At the time, Student was eligible for special education on the basis of an Emotional Disturbance. Results from the Wechsler Intelligence Scales for Children, Fourth Edition (WISC-IV) and Wechsler Individual Achievement Test, Third Edition (WIAT-III) revealed average cognitive and achievement scores with the exception of superior mathematics calculation skills. Student scored in the average range on assessment of visual motor integration, and in the superior or average range on tests of visual perceptual, receptive language, visual

⁴ Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794. In Pennsylvania, the protections afforded to Students under Section 504 are set forth at 22 Pa. Code §§ 15.1 – 15.11.

memory, social perception, and executive functioning. The Childhood Autism Rating Scale – Second Edition, High Functioning Version yielded mild autism symptoms with respect to social interactions, social communication, responses to sensory stimuli, and sensory processing. The neuropsychologist diagnosed Student with PDD NOS/ASD, Oppositional Defiant Disorder, ADHD, and Mood Disorder NOS. (P-22)

8. Student began weekly mental health counseling in late May 2015. Those sessions have addressed goals to decrease anxiety, and to increase compliance, communication including expressing emotions appropriately, social awareness, and appropriate interactions with others particularly family. Student has also treated with a psychiatrist beginning in the summer of 2015. (N.T. 171-74, 178, 182-84, 431, 441; P-14, P-15, P-16)
9. Student was enrolled in the District over the summer of 2015. At the Parents' and Student's request, Student entered the District repeating third grade where Student would be more comfortable. (N.T. 403)
10. Student attended the District's extended school year (ESY) program on five occasions for speech/language therapy. The District school psychologist did not observe Student during ESY. (N.T. 36, 117, 402-03)
11. At a meeting of Student's IEP team in early August 2015, the participants discussed an evaluation. The District issued a Permission to Evaluate form (PTE) at the meeting, stating that the evaluation was at District and Parent request, and the Parents gave their consent. The District school psychologist did not attend that meeting. (N.T. 74, 79, 403-04, 450-51; S-3)
12. The Parents provided input into the IEP by providing a document they drafted that set forth Student's diagnoses and medications, likes and dislikes, strengths and weaknesses, and signs of Student's anxiety or overstimulation. They also shared that Student had been in partial hospitalization programs three years in a row in November, and that the beginning of the school year was a difficult time for Student. (N.T. 444, 454-55; S-4 pp. 6-7)
13. An IEP developed for Student in relation to the August 2015 IEP meeting included the written information provided by the Parents and present levels of academic achievement and functional performance based on the speech/language sessions during ESY. Student had two speech/language goals and a number of program modifications and items of specially designed instruction (SDI), including sensory breaks, notice of schedule changes, opportunities to visit the nurse for a drink, and early entry to and dismissal from the classroom. (S-4)
14. Student's psychiatrist evaluated Student in August 2015 and provided a report for medication management. Diagnoses in that report were ASD and Anxiety Disorder NOS. (P-17)
15. The District school psychologist used the Parent-provided information from Student's IEP as the source of their input into the evaluation report (ER), copying that text verbatim

from the IEP, in addition to what she gleaned from the Parents' completion of rating scales and from various other evaluation reports. Although a Parent Input Form is typically provided to parents with a PTE, because the determination to conduct the evaluation was made at a meeting of the IEP team, Student's evaluation did not follow the usual procedure. (N.T. 36-37, 60-61, 72-74, 78-79, 100-02, 403-04, 454-55; S-1 pp. 1-2, S-4 p. 6)

16. The Parents provided the District with several previous evaluation reports between 2007 and 2012 that included medical diagnoses. The District school psychologist reviewed those reports in preparing the ER and summarized them, including the 2010 and 2012 evaluations described above. (N.T. 34, 36-42; S-1 pp. 2-3)
17. Student's cognitive ability was assessed using the WISC-IV, and Student performed in the average range across all domains (FSIQ 105). (N.T. 47-48; S-1 pp. 8-9)
18. Student's academic achievement was assessed through administration of the WIAT-III, with Student scoring in the average range on all subtests with the exception of an above average score on pseudoword decoding. (N.T. 49-50; S-1 pp. 9-10)
19. The District school psychologist observed Student in the regular classroom, a special class, a speech/language therapy session, in the cafeteria. She reported few instances of inappropriate or off-task behaviors and noncompliance. She also observed Student during test administration. (N.T. 44-45, 49; S-1 pp. 4-6)
20. The District school psychologist obtained rating scales of Student's social, emotional, and behavioral functioning, including executive functioning and attention, and for autism. On the BASC-2, the teacher scales revealed no concerns, while the Parents' scales reflected a clinically significant concern with aggression and at-risk concerns with hyperactivity, conduct problems, depression, atypicality, and adaptability; Student's self-report revealed no concerns. The Conners Third Edition results suggested average ratings by the teacher, but concerns of the Parents as to hyperactivity, executive functioning, and defiance/aggression. The Autism Spectrum Rating Scales resulted in all average scores by the teacher, but parental concerns in a number of areas that would suggest ASD. The teacher completion of the Behavior Rating Inventory of Executive Functioning (BRIEF) yielded no difficulties at school. (N.T. 50-52; S-1 pp. 10-16)
21. Student's third grade teacher provided input into the ER, including that Student acted silly in class at times but was generally meeting academic, social, and behavioral expectations, and that Student did not always require the SDI in the IEP. Student's curriculum-based assessment results from the beginning of the school year were also reported. (N.T. 262-64, 295-99; S-1 pp. 6-8)
22. The school counselor who saw Student once per cycle due to Student's anxiety, as well as a weekly social skills group, provided input into the ER. The Parents had approved of the counseling and social skills group. (N.T. 145-49, 152-53, 159-60, 419, 453; P-6, P-13; S-1 p. 6)

23. An occupational therapy evaluation was conducted to determine Student's needs in sensory processing; the assessment did not include visual perception or handwriting. The occupational therapist also conducted a classroom observation. She concluded that Student did not exhibit needs with respect to sensory or other occupational therapy needs, but made recommendations for Student to have access to items related to fidgeting behavior and to improve Student's pencil grip. (N.T. 54-55, 77-78, 221-25, 227, 229-30, 236-37, 240-42, 246-48; S-1 pp. 16-18, S-2)
24. A speech/language evaluation was conducted to determine needs with respect to pragmatic language and language processing. The speech/language pathologist who evaluated Student focused on receptive and pragmatic language. She also observed Student in the classroom and on the playground. The speech/language pathologist concluded that Student did not exhibit needs with respect to receptive language, pragmatic language, or social skills. (N.T. 57, 109-12, 113-18, 125-28, 138-39; S-1 pp. 6-7, 18-21)
25. The District school psychologist did not have the August 2015 psychiatric evaluation report by the time the ER was issued; the third grade teacher also had not seen that document. The District school psychologist did seek permission from the Parents to speak with that psychiatrist and Student's mental health counselor, but the Parents declined. (N.T. 87, 96-97, 103-06, 282, 428-30; S-5 p. 1)
26. The ER concluded that Student had a disability but was not eligible for special education. A meeting to discuss the ER convened; although the ER could have been revised if necessary, the District school psychologist did not consider the document to be a draft for discussion. (N.T. 66, 95, 338-339; S-1 p. 24)
27. Student's third grade teacher found Student to be very compliant and to participate in class in all subject areas, performing in the average range academically. She did not believe that Student exhibited behavior different from any other third grade student, including fidgeting or showing anxiety. (N.T. 269-72, 275, 278, 312, 315, 318)
28. Student was able to go to the nurse for a drink at any time as part of a plan to manage Student's anxiety. Student went to the nurse daily at the beginning of the school year, but only rarely by the time of the due process hearing. (N.T. 272-73, 378-80, 392)
29. Student had sensory breaks twice during the school day, one in the morning and one in the afternoon, in a room that is not the classroom. Student typically spent five or fewer minutes on those breaks before asking to return to the classroom. (N.T. 270-71, 327-31, 339-40, 341-42)
30. A paraprofessional or other adult escorted Student to and from the sensory room, and to and from the classroom at the beginning and end of the school day. Student finds the adult escort helpful. (N.T. 287-88, 333, 351, 360-62, 367-69, 413-14)
31. Student takes various medications that help Student function well at school. (N.T. 396, 415, 426, 442, 448)

32. The Parents are concerned that Student has difficulty with self-regulation, anxiety, and ability to interact and get along with family and peers. They believe that Student is more comfortable when Student is prepared for the day, and that Student finds the sensory breaks at school to be helpful. They are also concerned that Student is embarrassed about the sensory breaks because peers are aware that Student takes those, and is also troubled whenever a teacher redirects or corrects Student. (N.T. 405-11, 416-17, 422-23)
33. The Parent requested an IEE at public expense in writing on October 23, 2015, seeking an independent psychoeducational evaluation as well as an independent occupational therapy evaluation. (P-3)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize 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 rests with the District as the party requesting this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as 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 to be credible, and the testimony overall was rather consistent. It should also be noted that the Parents are clearly devoted advocates for their child who exhibits more

significant challenges at home than at school; and, all of the District personnel presented as dedicated and qualified professionals.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as well as the parties' arguments.

IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all children who qualify for special education services. 20 U.S.C. §1412. The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The IDEA sets forth two purposes of the required 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).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a).

In conducting the evaluation, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) 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—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child’s IEP, including information related to

enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(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).

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). In interpreting evaluation data and making these determinations on eligibility and educational needs, the team must:

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

34 CFR 300.306(c). School districts are responsible for conducting the required assessments, and also must provide a copy of the evaluation report and documentation of the eligibility determination to parents at no cost. 34 C.F.R. §§ 300.305(c) and 300.306(a)(2).

When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); 20 U.S.C. § 1415(b)(1). When a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). In this case, the District filed a request for due process seeking a determination that its evaluation was appropriate.

The District's Evaluation

There are a number of aspects of the ER that appear to be wholly appropriate. The ER reflects assessment of Student's cognitive ability and academic achievement, and includes a number of observations of Student by the District school psychologist in a variety of settings. Student's social/emotional/behavioral functioning was assessed through rating scales from multiple informants. Speech/language and occupational therapy needs were examined through evaluation of Student's functioning in those areas. The District school psychologist also considered and summarized the historical information made available from the Parents, as well as input from the various professionals who worked with Student at school. Nevertheless, the initial flaw in the District's evaluation is that it did not seek specific input from the Parents as part of the evaluation process; and, because it is unknown what information may have been provided that could have impacted the substance of that evaluation, that flaw must be considered fatal in this case.

Here, the Parents provided to the IEP team a written document that they created,

summarizing what they believed were important factors for the IEP meeting participants to consider. However, that document was not drafted in response to any District questionnaire or request for any specific type of information; thus, that writing merely conveyed basic information that the Parents alone determined should be shared with the team. The District school psychologist did not attend the IEP meeting, or otherwise speak directly with the Parents, to determine what their concerns were about Student's functioning for the ER. Moreover, evaluations and IEPs serve two entirely different functions; indeed, the District typically sends parents a specific form to be used in the evaluation process, but neglected to take that step in this case. It is thus reasonable to expect that the Parents would have shared different information for the ER than they provided at the IEP meeting, had they been given the opportunity to do so, particularly since the PTE states that both District and Parents requested the evaluation. While it is true that the Parents did complete rating scales that were also used as their input into the ER, filling out rating forms such as the BASC-2 and BRIEF cannot substitute for more global information about Student that is uniquely within the Parents' knowledge and experience. Additionally, Student was new to the District at the beginning of the 2015-16 school year, and the Parents were without a doubt the best source for identifying Student's functioning, strengths, and needs as those might impact Student in the educational setting.

There can be no question that a major premise of the IDEA is that parents must be permitted to participate meaningfully in making educational decisions about their children, and that they serve "a significant role in the IEP process." *Schaffer, supra*, at 53. As noted above, the special education evaluation provides the very foundation for developing a child's IEP; and, parent input is a required consideration. Meaningful parent participation in the evaluation process is therefore critical to ensuring compliance with the mandates in the IDEA.

For all of these reasons, I conclude that the failure to seek specific parental input into the ER renders any decision about whether the ER was sufficiently comprehensive to assess all areas of suspected disability, and to identify all of Student's special education and related service needs, impossible to gauge. Accordingly, the Parents and Student are entitled to an IEE at public expense to include psychoeducational and occupational therapy assessments, together with any additional assessments that the private evaluators shall determine are necessary to provide a comprehensive picture of Student for purposes of educational programming.

The District cited *Q.W. v. Board of Education of Fayette County*, 66 IDELR 212 (6th Cir. 2015 (unpublished)), and *Perrin v. Warrior Run School District*, 66 IDELR 225 (M.D. Pa. 2015) (unpublished), in support of the argument that its evaluation was appropriate. I cannot conclude that these cases, both of which involved parental disagreement with evaluation results and conclusions rather than on the manner in which the evaluation was conducted, to compel a contrary result. Here, it is part of the process of conducting the evaluation that supports the Parents' request to pursue an IEE at public expense.

It is quite fortunate that, from the District's perspective, Student appears to be functioning quite well at school this school year. Nevertheless, Student is also a child who has historically presented with significant difficulties that required periods of partial hospitalization, apparently directly related to Student's anxiety about school. It is crucial for the District to have a firm understanding of that aspect of Student's developmental history to guide programming decisions and to be prepared should the pattern continue. And, while there is no reason to suspect that the District would fail to respond appropriately should Student's presentation at school begin to change, I conclude that providing an IEE is a proper remedy at this time.

On a related matter, it is also critical for the District to have the ability to communicate

with Student's mental health providers, and this hearing officer respectfully suggests to the Parents that they provide permission for it to do so going forward. The proposal that the District can develop an adequate understanding of Student's social, emotional, and behavioral functioning through some form of written communications with those professionals, passed along via the Parents, is very likely an inefficient means of ensuring the sharing of information among professionals involved with Student. Any concerns regarding confidentiality should be alleviated through a discussion of the various safeguards that District professionals would observe to guard Student's privacy. Ideally, consent will be given to allow the independent psychoeducational evaluator to engage in those communications as well.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, I conclude that the Parents and Student shall be provided an IEE, in the areas they requested, at public expense.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within ten calendar days of the date of this Order, the District shall notify the Parents whether the evaluators proposed by them (P-3) meet its criteria as provided by 34 C.F.R. § 300.502(3).
2. If either evaluator proposed by the Parents does not meet the District criteria, the District shall at the same time provide to the Parents a list of not less than three qualified individuals to perform an Independent Psychoeducational Evaluation, and/or a list of not less than three qualified individuals to perform an Independent Occupational Therapy Evaluation, of Student.
 - a. If the District responds with any list of qualified individuals, and the Parents do not notify the District, in writing, of their selection within ten calendar days of sending such list or lists, the District shall make the selection(s).

- b. The selected evaluators shall be given access to Student's education records, and shall determine the scope of the evaluations.
 - c. The selected evaluators shall each provide a written report of his or her Independent Evaluation within a reasonable time, not to exceed 45 calendar days from the date of engagement, unless otherwise agreed by the parties.
 - d. The Independent Psychoeducational and Occupational Therapy Evaluations shall be at public expense. Any additional evaluations deemed by the independent psychoeducational evaluator to be necessary to educational programming decisions shall also be at public expense.
3. Following completion of the Independent Evaluation Reports, and within 15 calendar days of receipt of those reports, Student's IEP team shall meet to consider the Reports and all other relevant information and develop a new educational program.
 4. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: February 23, 2016