

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: A.B.

Date of Birth: [redacted]

Dates of Hearing: January 15, 2014

CLOSED HEARING

ODR File No. 14522-1314KE

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Council Rock School District
The Chancellor Center
30 North Chancellor Street
Newton, PA 18940

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Date Record Closed:

January 16, 2014

Date of Decision:

January 27, 2014

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

The student¹ (hereafter Student) is an elementary school-aged student in the Council Rock School District (hereafter District). Student was previously identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² The District filed a due process complaint against the Parents to defend its most recent Occupational Therapy evaluation of Student after the Parents requested an independent educational evaluation (IEE).

The case proceeded to a due process hearing which convened in one session. The Parents did not attend the hearing;³ however, the District did present evidence in support of its position.

For the reasons set forth below, I find in favor of the District.

ISSUE

Whether the District's Occupational Therapy evaluation of Student in November 2013 is appropriate.

FINDINGS OF FACT

1. Student is an elementary school-aged student residing in the District. (School District Exhibit (S-) 1 p. 1, S-9 p. 1)
2. Student was first evaluated in November 2008 when Student was in kindergarten, at the request of the Parents. Student's articulation was noted to be of concern, and a speech/language evaluation performed with parental consent confirmed articulation to be a need for Student. Following completion of that evaluation, Student was determined to be eligible for speech/language services. (Notes of Testimony (N.T.) 22-23; S-1)
3. An Individualized Education Program (IEP) was developed for Student following the November 2008 evaluation to address Student's speech/language needs. (N.T. 24)

¹ In the interest of confidentiality and privacy, Student's name (which appears on the cover page only) and gender are not used in the body of this decision. The redacted version of this decision made available pursuant to 20 U.S.C. §§ 1415(h)(4) and 1427(c), and 34 C.F.R. § 300.513(d), will not include Student's name or other personally-identifiable information.

² 20 U.S.C. §§ 1400-1482.

³ The hearing was closed to the public and the identity of those present for the hearing were noted on the record. Telephone calls to the Parents after the hearing was scheduled to convene went unanswered and were noted on the record. (Notes of Testimony (N.T.) 6-8) The various written communications to the Parents about this hearing from this hearing officer and the District, including the notice of the January 15, 2014 hearing date, were marked collectively as Hearing Officer Exhibit (HO-) 1, and a copy of that document was sent to the Parents by first class mail the day after the hearing. HO-1 is hereby admitted into the record.

4. A new IEP was developed for Student in November 2009 for the 2009-10 school year (first grade) to address Student's speech/language needs. In the fall of 2009, Student was referred for an Occupational Therapy (OT) evaluation and the referral was sent to the local Intermediate Unit (IU). (N.T. 23-26; S-2, S-3)
5. The IU conducted the requested OT evaluation in March 2010. This evaluation included a review of records, an observation, and assessments including the Bruininks-Oseretsky Test of Motor Proficiency 2 (BOT2) and the Motor-Free Visual Perception Test – Revised. Fine motor skill difficulties noted were writing and copying speed, and assessments indicated needs in visual-perceptual and fine motor skills. This evaluation report recommended OT for Student, and Student's IEP was revised to include OT as a related service. (N.T. 24-28; S-2, S-4)
6. Student's IEP developed in November 2010 included consultative speech/language therapy and OT as related services. (N.T. 28-30; S-5)
7. The District conducted a re-evaluation in the spring of 2011. A Re-evaluation Report (RR) dated April 7, 2011 included input from the Parents and Student's teacher and speech/language therapist; cognitive assessment (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)); achievement testing (Wechsler Individual Achievement Test Third Edition (WIAT-III): a Qualitative Reading Inventory (QRI); and behavior rating scales (Behavior Assessment System for Children, Second Edition (BASC-2)). (N.T. 30-32; S-6)
8. The April 2011 RR reflected that Student's general cognitive ability based on the WISC-IV was in the high average range (FSIQ=117). Student performed slightly better on verbal tasks than on nonverbal tasks. All composite scores were within the high average or average range. (S-6 pp. 5-6)
9. On the WIAT-III as reported in April 2011, Student scored in or above the average range on all reading, mathematics, and written expression subtests. Student's Math Fluency composite score was above average while the Basic Reading and Mathematics composite scores were in the average range. (S-6 pp. 8-9)
10. The QRI reported in April 2011 revealed that Student was instructional at the second grade level (Student's grade level) in vocabulary and word recognition, fluency, and comprehension. (S-6 p. 7)
11. Results of the BASC-2 scales in the spring of 2011 reflected parental concerns in the clinically significant range on the Clinical Scales in the areas of Hyperactivity, Anxiety, and Atypicality, and teacher concerns in the clinically significant range in the areas of Hyperactivity, Anxiety, and Attention Problems. There were some at-risk scores on each Scale, but no clinically significant scores on any of the Composite Scales or on the Adaptive Scales. (SD-6 pp. 9-11)
12. The April 2011 RR recommended that Student be exited from Speech and Language Support, and concluded that Student was not a child with a disability and was not

eligible for special education.⁴ However, the RR did recommend evaluation for a determination of Student's eligibility under Section 504.⁵ (S-6 pp. 11-12)

13. Student was again referred for an OT evaluation in the fall of 2013, and the Parents provided consent. As in 2010, this referral was directed to the local IU to conduct the evaluation. (N.T. 25, 33-34, 42; S-8)
14. The occupational therapist who conducted the November 2013 OT evaluation has a Master's degree in occupational therapy and a post-professional degree in sensory integration. She has been employed by the IU as an occupational therapist for twelve years. (N.T. 40-41)
15. The resulting OT Evaluation Report includes a review of records, a telephone interview with one of the Parents, input from Student's teachers, and an interview with and observations of Student, in addition to formal assessment. (N.T. 34-35, 42-44, 49-50; S-10)
16. Parent input into the 2013 OT evaluation reflected concerns with Student's assignment completion particularly with written work, as well as with attention, sensory sensitivity, anxiety, and behaviors exhibited at home. The Parents did request that the OT evaluation include a Sensory Integration and Praxis Test (SIPT). (N.T. 42-43, 46-47, 50; S-10 pp. 1-2)
17. Teacher input into the 2013 OT evaluation did not reveal any OT concerns, although distractibility requiring redirection was noted. Teachers did not report a concern with Student's anxiety. (N.T. 43-44, 50; S-10 pp. 1-2)
18. In Student's interview with the OT evaluator for the 2013 evaluation, Student reported that writing was a least preferred activity because Student had difficulty deciding what to write about or remembering what Student planned to write. (S-10 p. 2)
19. The OT evaluator's observations of Student in a classroom, at lunch, and at recess in the fall of 2013 did not reveal any OT concerns, although Student did exhibit difficulty staying on task at times. Among other things, during the observations Student was able to complete a written worksheet, engage in gross motor activities with other students, and open packaging and eat Student's lunch, in addition to engaging in social interactions with peers. (N.T. 45-46; S-10 p. 2)
20. Formal OT assessment for the 2013 evaluation consisted of a Clinical Observation of Motor and Postural Skills (COMPS), the Fine Motor Control section of the BOT2, the Beery-Buktenica Visual-Motor Integration Test of Visual Perception (Beery VMI), and a Sensory Processing Measure Questionnaire. These instruments are

⁴ The District on several occasions sent to the Parents a Notice of Recommended Educational Placement (NOREP), but the record does not establish that the Parents ever signed and returned that NOREP. (N.T. 32-33; S-7)

⁵ 29 U.S.C. § 794. The District did subsequently conduct such an evaluation (N.T. 32) but the resulting report was not made part of the record.

appropriate measures for a student of Student's age in the school setting. (N.T. 48-50, 52-53; S-10)

21. The 2013 COMPS assessment revealed good postural and head control, appropriate balance and reflexes, average muscle tone, above average flexibility in both hands, and functional gross motor skills and neuromuscular status. (S-10 pp. 2-3)
22. Student's performance on the BOT2 in the fall of 2013 reflected good bilateral coordination, and Student scored in the average range on fine motor precision and fine motor integration components. Student demonstrated an ability to produce two legible writing samples and was fluent in forming letters and spaces between words, exhibiting functional fine motor skills. (S-10 p. 3)
23. Student scored in the 63rd percentile on the Beery VMI in the fall of 2013, exhibiting good visual discrimination, form-constancy, and figure-ground perception. Student's visual-motor and visual-perceptual skills were age-appropriate. (S-10 p. 3)
24. The occupational therapist who conducted the 2013 OT evaluation did not administer the SIPT, although she is certified to do so, because Student was outside of the age range for the instrument, and also because she did not believe it would sufficiently assess Student's functional performance in the educational environment. The evaluator instead used other measures to assess Student's sensory functioning. (N.T. 46-48, 52)
25. Student's teacher completed the Sensory Processing Measure Questionnaire for the 2013 OT evaluation, which includes a number of component areas (social participation, vision, hearing, touch, taste and smell, body awareness, balance and motion, and planning and ideas) and provides an overall score. Student's score was typical in all component areas except for some difficulty in the areas of planning and ideas which was deemed "not significant" (S-10 p. 4), and overall sensory processing and integration was commensurate with that of typical peers. (NT. 44; S-10 pp. 3-4)
26. Student's problem solving and independent self-care skills were also determined to be age-appropriate in the fall of 2013. (S-10 p. 4)
27. Based on all of the information obtained through the OT evaluation, the evaluator concluded that Student did not demonstrate a need for OT services, including any need with respect to sensory processing and sensory regulation. The Parents were provided with a copy of the 2013 OT evaluation report. (N.T. 53-55; S-10 p. 4)
28. Sometime after receiving the 2013 OT evaluation, the Parents requested an IEE with respect to that evaluation. The District denied that request and filed a due process complaint. (N.T. 22, 35, 38-39)
29. The District drafted a Section 504 Service Agreement in November 2013 following the OT evaluation, and that document was provided to the Parents. As of the date of this hearing, the Parents had not approved that Agreement. (N.T. 36-37; SD-9)

30. At some point, the Parents requested another evaluation under the IDEA, which the District was in the process of conducting at the time of the due process hearing. That evaluation will include another OT evaluation. (N.T. 37)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, 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.⁶ Accordingly, the burden of persuasion in this case rests with the District which requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence.⁷ Nevertheless, application of these principles 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 are also charged with the responsibility of making credibility determinations of the witnesses who testify.⁸ This hearing officer found the two witnesses who testified in this hearing to be credible.

⁶ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

⁷ *See Ramsey*, *supra* note 6.

⁸ *J. P. v. County Sch. Bd.*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley Sch. Dist.*, 2014 U.S. Dist. LEXIS 1471 *11 (M.D. Pa. 2014) (observing that hearing officers have the discretion to weigh the testimony of witnesses); *J.E. v. Boyertown Area Sch. Dist.*, 834 F.Supp.2d 240, 253 (E.D. Pa. 2011) (explaining that courts will defer to the hearing officer on credibility determinations, since the hearing officer “is in the best position to observe the witness.”)

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.” 34 C.F.R. § 300.304(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. §§ 300.304(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 reevaluation was appropriate. (Finding of Fact (FF) 28)

The District's November 2013 OT Evaluation

The record establishes that the District utilized a variety of assessment instruments, as well as observations and input from Student, the Parents, and teachers, in gathering information about Student's OT performance and in making the determination of Student's eligibility for those services. (FF 15-26) Each instrument was carefully chosen and administered by an evaluator who is trained and knowledgeable in the field and qualified to administer them. (FF 14, 20, 24) The OT evaluation included tools designed to evaluate Student's gross and fine motor skills, sensory processing and regulation functioning, visual-motor and visual-perceptual skills, and self-care and problem solving abilities. (FF 19-26) All of the concerns expressed by the Parents with respect to OT were explored in the November 2013 evaluation. (FF 16, 19-26)

The evaluator testified, quite credibly, how and why she chose the specific sensory assessments she utilized rather than the Parent-requested SIPT. (N.T. 47-49, 52) She also persuasively testified that she did not discern a need for any further assessment for OT needs and believed the evaluation to be sufficiently thorough to reach her conclusions. (N.T. 53-54) All of the foregoing reasons lead this hearing officer to conclude that the District performed a comprehensive and appropriate OT evaluation of Student.⁹

This hearing officer was not made aware of the reasons for the Parents' dissatisfaction with the OT evaluation. It may be that, and would be understandable if, the Parents disagree

⁹ The record is unclear whether a separate meeting convened to discuss and determine Student's eligibility for OT services. (N.T. 35) In any event, the parties' respective positions on Student's eligibility for OT services is apparent from the record as a whole, and it merits repeating that the District is currently conducting an evaluation of Student under the IDEA, which has or will include another OT evaluation. (FF 30)

with the evaluator's conclusion that Student does not demonstrate a need for OT in the school environment. However, the standard for determining whether an evaluation is appropriate is not whether everyone agrees with its conclusions. As explained above, the District's OT evaluation meets the criteria specified in the law and, therefore, this hearing officer finds that there is no basis on which to order an independent OT evaluation at public expense.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's November 2013 OT evaluation of Student was appropriate. Accordingly, there will be no award for an IEE at public expense.

ORDER

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

1. The District's November 2013 OT evaluation was appropriate.
2. The District need take no further action.

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: January 27, 2014