

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

Student's Name: B.M.

Date of Birth: [redacted]

ODR No. 3315-11-12-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent

Pro Se

Lower Merion School District
301 East Montgomery Avenue
Ardmore, PA 19003-3338

Amy T. Brooks, Esquire
Wisler Pearlstine, LLP
Blue Bell Executive Campus
460 Norristown Road, Suite 110
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Date of Hearing:

October 24, 2012

Record Closed:

November 14, 2012

Date of Decision:

November 24, 2012

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District), and attends a District middle school¹. (NT 23.) Student is identified as a child with the disabilities Other Health Impairment and Specific Learning Disability, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 23-25; S-24.)

In response to a request for an independent educational evaluation (IEE) by Student's Mother (Parent), the District filed a request for due process, seeking an order establishing that its re-evaluation dated May 31, 2012, revised June 6, 2012 and June 21, 2012, is appropriate. (NT 63-64.)

The hearing was completed in one session. I conclude that the District's re-evaluation was appropriate, and I decline to order an IEE at public expense. Parent retains the right under the IDEA to privately fund any evaluation, and the District is obligated to consider any such evaluation if provided to the District. 34 C.F.R. §300.502(c).

ISSUES

1. Was the District's re-evaluation dated May 31, 2012, revised June 6, 2012 and June 21, 2012, appropriate under the IDEA?²
2. Is the Parent entitled to an IEE at public expense?

FINDINGS OF FACT

1. The May 31 re-evaluation was based upon a psycho-educational re-evaluation report by a qualified school psychologist with a master's degree in school psychology, and Pennsylvania certification as a school psychologist. In addition, the psychologist has

¹ At the time of the evaluation in question, Student was still in elementary school. (NT 47-48.)

² This will be referred to as the May 31 re-evaluation, with the understanding that the later revisions were part of that re-evaluation.

master's and doctorate degrees in clinical psychology, with years of experience in the clinical field. The psychologist also has seven years of experience as a school psychologist in New Jersey, and two years of school psychology experience in Pennsylvania, with the local intermediate unit that serves the District (IU). The psychologist has been an administrator of school psychology and special education services for about five years. The psychologist has substantial teaching experience in clinical and school psychology. At the time of the District's re-evaluation, the psychologist was employed by the local IU. (NT 68-73; S-39.)

2. The school psychologist is trained and experienced in performing the tests and administering the other instruments that were utilized in the re-evaluation. (NT 71-73; S-39.)
3. Suspected disabilities included pervasive developmental disorder, autism spectrum disorder with associated verbal disability, attention deficit hyperactivity disorder with associated executive functioning deficits, problems with emotional and social functioning, and speech or language deficits. (NT 77-79, 81-83.)
4. The school psychologist began the re-evaluation by meeting with Parent in person for over an hour, and obtaining history and Parent's input with regard to the evaluation, including Parent's concerns for Student's strengths and needs. The psychologist also solicited Parent's responses to behavior inventories and rating scales, which Parent returned and which were considered. The psychologist and other participants in the District re-evaluation of Student explained the results to Parent and made changes to the report as requested by Parent at a meeting of the multidisciplinary team. (NT 74, 87, 108-109, 112-119; S-24, 26, 28, 29, 35.)
5. The school psychologist reviewed three previous District evaluations or re-evaluations of Student, private medical evaluations, the current IEP, classroom grades, IEP progress reports and a previous Functional Behavioral Assessment (FBA) and Positive Behavior Support Plan (PBSP). (NT 89-101; S-24, S-13.)
6. The psychologist received and considered classroom observations, input and recommendations from eight of Student's teachers, including regular education and special education teachers. (S-24.)
7. The psychologist observed Student in the classroom twice on separate days; the first observation lasted for about one hour and twenty-five minutes and the second lasted for about one hour and ten minutes. Observations were conducted at different times of day and included different subjects, both regular education and special education classes, and a lunch period. (S-24.)
8. The psychologist reviewed existing test data for Student, which consisted of cognitive and achievement scores, reading and writing assessments that included standardized, functional and curriculum based scores, District-required, classroom and statewide assessments, and progress scores on Student's IEP goals. (NT 100-101; S-24, S-13 p. 7.)

9. The psychologist reviewed cognitive testing with the Wechsler Intelligence Scale for Children edition IV (WISC IV), administered in 2007 and again in 2009. (S-24.)
10. The psychologist selected a cognitive abilities test in response to a concern of Parent; this test, the Kauffman Assessment Battery for Children, second edition (KABC II), is designed to accommodate for verbal disabilities, yet utilizes verbal skills in the child. It is valid and reliable for assessing cognitive ability. This instrument was different from that utilized in previous cognitive testing, measuring cognitive abilities in different ways than the previously administered test. (NT 76-80, 111, 129-131; S-24.)
11. The composite scores on the KABC II were consistent with those derived from administration of the WISC IV. (S-24.)
12. Consistent with the publisher's instructions, the psychologist also administered parts of the Wechsler Individual Achievement Test – III, which is a valid and reliable test of academic achievement. The psychologist used the test to assess Student's achievement in reading, writing and mathematics. (NT 80-81, 124; S-24.)
13. The psychologist obtained and scored responses from Parent and two teachers on an inventory designed to address executive functioning. The psychologist also administered subtests to Student from a battery of neuropsychological tests that can be administered independently of each other; these were selected to address Student's needs regarding attention to task. (NT 81-82, 102-104; S-19 to 21, 24.)
14. The psychologist administered an instrument that helps to assess for emotional functioning, and an inventory based assessment that specifically tests for social skills deficits. Both instruments were based upon inventory responses from Parent, Student and two teachers. In addition, the psychologist administered a neuropsychological subtest in accordance with the publisher's directions that addresses social skills deficits. (NT 82-83, 104-107; S-21 to 24.)
15. The re-evaluation included assessments by qualified occupational therapist and speech and language pathologist to assess for speech and language and fine motor weaknesses that can be associated with the suspected disabilities. (NT 83-85; S-24.)
16. The psychologist scored data from two rating scales that indicate likelihood of autism spectrum disorder, in response to history of previous relevant medical diagnoses and findings. (S-24.)
17. The psychologist utilized tests and inventories that were valid and reliable for the purposes for which they were used, and administered them in accord with the publisher's instructions. The psychologist took into account Student's disabilities when testing Student and accommodated for them where appropriate. The psychologist also considered and rejected the hypothesis that Student's psychological and achievement test scores were a function of deficiencies in educational services previously provided to Student. (NT 81-82, 123, 131, 156-157.)

18. The May 31 re-evaluation concluded that the Student is eligible as a child with the disabilities Other Health Impairment and Specific Learning Disability. The re-evaluation report listed ten educational strengths and seven educational needs. It provided narrative descriptions of the testers' observations and of responses to inventory questionnaires that provided details about Student's cognitive, functional, academic, emotional, behavioral and social functioning in school. (NT 157-177; S-24.)
19. The May 31 re-evaluation report provided analysis and reasons for selecting educational classifications of Other Health Impairment and Specific Learning Disorder in Writing. (S-24.)
20. The psychologist considered the private medical report of possible diagnosis of autistic spectrum disorder as a basis for further testing of Student solely to rule out the need for an educational classification of Autism. The psychologist was aware of Parent's disagreement with the evaluation, but was not aware of all of the circumstances of its creation that led to Parent's objection. (NT 145-155.)
21. The psychologist considered whether or not tic-like behaviors related to possible Tourette Syndrome were interfering with Student's education and concluded based upon observations that no such behaviors were evident, thus no such behaviors were interfering with Student's education; thus, such behaviors did not require classification of Student. (NT 141-144.)
22. The re-evaluation report recommended small group instruction for writing, social and pragmatic skill needs, a behavior plan to address specified behaviors, an assistive technology assessment, and fifteen items of specially designed instruction or program modification. (S-24.)
23. The re-evaluation report provided sufficient information and recommendations to enable the IEP team to write an IEP for Student. (NT 186-191.)
24. The May 31 re-evaluation listed educational needs including structured and contextual presentation of information; accommodations for weakness in executive functions, including inhibition, shifting, initiating tasks, planning and organization; social thinking and conversational skills; written expression; and self-regulation. (S-24.)
25. The District did not promise to Parent that it would provide an independent educational evaluation at public expense if Parent would consent to a District evaluation. (NT 181-182, 194-201; S-15.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).³ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁴ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, the District requested due process and the burden of proof is allocated to the District. The District bears the burden of persuasion that its re-evaluation was appropriate and that Parent is not entitled to an IEE. If the District fails to produce a preponderance of evidence in support of its claim, or if the evidence is in “equipoise”, then the District cannot prevail under the IDEA.

³ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

⁴ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

APPROPRIATENESS OF RE-EVALUATION

In determining whether or not the District's evaluation⁵ was appropriate, one must keep in mind the District's obligation to evaluate a child in relation to the regulations' definition of "child with a disability". 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). Thus, the first question is whether or not the District's evaluation appropriately addressed eligibility as defined under the IDEA.

Eligibility

An eligible child is defined as a "child with a disability": one who has been evaluated to have one of the enumerated disabilities, 34 C.F.R. §300.8(a), "and who, by reason thereof, needs special education and related services." Ibid. Therefore, the law requires the evaluation to address both the child's suspected disabilities and whether or not such disabilities require special education services. Ibid.; 34 C.F.R. §300.301(c)(2)(i). The evaluation must address all areas related to the suspected disability. 34 C.F.R. §300.304(c)(4).

The IDEA regulations prescribe in detail the procedures to be used in order to fulfill this requirement. 34 C.F.R. §§300.301 to 300.311. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002).

These procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" 20

⁵ Under the IDEA regulations, re-evaluations must meet the same standards as evaluations, in terms of both the scope of the re-evaluation and the required procedural standards. 34 C.F.R. §300.303. Therefore, I will apply the standards applicable to evaluations, even though the District action in question was a re-evaluation.

U.S.C. §1414(b)(2)(A), 34 C.F.R. §300.304(b). The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B), 34 C.F.R. §300.304(b)(2). Instruments used in the assessment must be tailored to assess specific areas of need. 34 C.F.R. §300.304(c)(2), including the Student’s present levels of achievement and related developmental needs, 34 C.F.R. §300.305(a)(2)(B)(ii).

Here, the evidence is preponderant that the District’s re-evaluation met the above standards. The re-evaluation addressed all suspected disabilities and all areas related to the suspected disabilities. (FF 3, 10, 12, 13-16, 20, 22-23.) The District’s strategies included a review of documents, interviews with Parent, teachers and Student, observations, standardized testing, curriculum based testing, and behavior inventories. (FF 4-16.) Thus, the District utilized a variety of strategies and assessment tools, did not rely on any one of them, and tailored its approach to delve more deeply into areas of suspected disability such as autistic spectrum disorder, executive functioning difficulties, and social skills deficits.

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i), 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1). The District met these standards. (FF 4, 5, 10, 13, 14, 16, 20, 21.)

Each evaluator must be trained and knowledgeable. 20 U.S.C. §1414(b)(3)(A)(iv), 34 C.F.R. §300.304(c)(1)(iv). The evaluator must use technically sound testing instruments, 20

U.S.C. §1414(b)(2)(C), 34 C.F.R. §300.304(b)(3); all instruments must be valid and reliable for the purpose for which they were used, 20 U.S.C. §1414(b)(3)(A)(iii), 34 C.F.R. §300.304(c)(1)(iii), and all must be administered in accordance with the applicable instructions of the publisher, 20 U.S.C. §1414(b)(3)(A)(v), 34 C.F.R. §300.304(c)(1)(v).⁶ The evidence is preponderant that the District complied with these legal requirements. (FF 1, 2, 10, 12, 14, 17.)

The evaluation must include a review of classroom based assessments, state assessments and observations of the child, 20 U.S.C. §1414(c)(1)(ii), (iii), 34 C.F.R. §300.305(a)(1), including observations by teachers and related services providers, 20 U.S.C. §1414(c)(1)(A)(iii), 34 C.F.R. §300.305(a)(1)(iii). Again, the evidence is preponderant that the multidisciplinary team considered such data. (FF 5-9, 15, 17.)

Identification of Educational Needs

The second question in assessing the legal sufficiency of an evaluation under the IDEA is whether or not it is sufficiently comprehensive to identify all of the Student's special education and related services needs. 34 C.F.R. §300.301(c)(2)(ii); 34 C.F.R. §300.304(c)(6). Evaluation strategies and instruments must be selected for this purpose. 34 C.F.R. §300.304(c)(7).

The re-evaluation of the Student was sufficiently comprehensive to identify Student's educational needs. The evaluator and the multidisciplinary team considered Student's cognitive functioning, achievement, and emotional and behavioral functioning. (FF 18, 21-24.) The evaluation identified numerous educational needs, and was sufficient to form a basis from which an appropriate Individualized Education Program could be created. (FF 22, 23.)

⁶ The parties raised no issue regarding racial or cultural bias in the instruments used, or utilization of the Student's native language. 34 C.F.R. §300.304(c)(1)(i),(ii).

Parent's Concerns

Parent argues that the District promised to publicly fund an independent educational evaluation if the Parent would agree to a District-conducted re-evaluation. I do not find the Parent's testimony to this effect to be reliable. Given the circumstances of this alleged promise – the consummation of a resolution agreement in which Parent specifically agreed to withdraw a previous request for an IEE and withdraw a due process request, I find it highly unlikely that the District would make such a promise. Rather, based upon Parent's various misunderstandings with regard to the subject matter of the present due process matter – discussed in this decision – it is more likely than not that Parent misconstrued something that was said to Parent at the meeting. District witnesses credibly denied that such a promise was made. I conclude that the record is preponderant that no such promise was made. (FF 25.)

Parent argues that the school psychologist who tested Student was biased by reading private medical evaluations that indicated a possible diagnosis of Pervasive Developmental Disorder or Autism Spectrum Disorder. I conclude to the contrary. The psychologist explained repeatedly that the private medical reports were accepted as the opinions and findings of the authors, but that the psychologist formed the psychologist's own conclusions regarding educational classification. Thus, the psychologist's lack of knowledge of the circumstances of creation of the reports, including whether or not they were produced for forensic purposes or in the context of an adversarial custody litigation, does not impeach the psychologist's ultimate opinion on educational classification. Indeed, the psychologist explicitly ruled out an autism classification based on the psychologist's own testing and evaluation, which was contrary to the conclusions of the private reports that Parent is concerned about. (FF 18, 20.) I find in these facts no reason to conclude that the psychologist was biased by reading the disputed reports.

Parent directly contests the conclusion that Student has a specific learning disability in writing. Parent relies on Parent's own knowledge of Student, but this evidence cannot outweigh the testimony, corroborated by thorough documentation and detailed explanations in the re-evaluation report itself, that a qualified school psychologist found such a disability to exist, based upon appropriate evaluation procedures as required by the IDEA. (FF 18, 19, 22.) Parent offered no expert testimony to contradict the psychologist's findings. Parent offered no evidence to prove Parent's contention that writing samples were altered, and that this somehow rendered the re-evaluation report invalid.⁷ Thus, I find that the District has proved by a preponderance of the evidence that its classification of specific learning disability in writing is appropriate.⁸

Parent raised a concern that Student's cognitive ability was or might be underestimated. I find no evidence that this occurred. The psychologist reviewed cognitive testing with the WISC IV, administered in 2007 and again in 2009. (FF 5, 9.) The psychologist then utilized a different cognitive test, the KABC II. This test adjusts for possible verbal processing difficulties that both the available history and Parent had suggested might be leading to an underestimation of Student's cognitive potential. (FF 4, 10.) The scores on the KABC II were consistent with the scores derived from two previous administrations of the WISC IV. (FF 11.) The psychologist appropriately concluded that the cognitive scores derived from the KABC II, upon which the re-evaluation report relied, were an accurate depiction of Student's cognitive ability. (FF 17.)

⁷ Part of the failure of proof was due to Parent's failure to provide five day notice as required by the IDEA. 34 C.F.R. §300.512(a)(3). This was in context of a delayed initial session and the District's proper insistence that the matter proceed to conclusion. Even if Parent had been able to show that some writing samples were altered, however, it is unlikely that this would have changed the conclusion of the re-evaluation, without expert testimony to show that any such misleading data required reversal of the District's classification.

⁸ Parent expressed concern that the classification itself would detract from Student's ability to be accepted into higher education in the future. While I do not discount that concern, the Parent's request for an independent educational evaluation must be decided on the law, and the IDEA does not authorize me to consider Parent's understandable concern about future consequences for higher education. Parent also expressed concern that Student would miss academic instruction due to the special education services that would follow from the classification; however, this is an issue of services delivery not raised in the present matter. Parent is entitled to raise this in a separate due process hearing if it cannot be resolved between the parties.

Thus, a preponderance of the evidence proves that the re-evaluation was appropriate with regard to Student's cognitive ability.

Parent argues that the re-evaluation results are invalid because Student had been denied reading supports or remediation for over one school year, thus resulting in Student's reading skills being lower than Student's cognitive potential would have produced with appropriate educational services in reading. I find no evidence that Student's reading scores were influenced by a previous lack of special services. Moreover, the school psychologist considered this and reasonably rejected the hypothesis. (FF 17.) Thus, the evidence is preponderant that the District's evaluation of Student's reading skills was appropriate.

Parent raised the concern that District conducted an FBA in 2010 which did not take into consideration tic – like behaviors that had been diagnosed as symptoms of Tourette syndrome. While this raises a valid concern, it does not invalidate the re-evaluation, because the behaviors in question did not interfere with Student's education. The psychologist concluded from all the evidence available, especially the psychologist's personal observation, that the behaviors in question were no longer evident, and concluded reasonably that these behaviors did not require specially designed instruction or special education intervention. (FF 21.) Thus the record is preponderant that any disagreement between the parties about the cause of the behaviors or the appropriate response to them in school is not relevant to the appropriateness of the evaluation. Any such disagreement may pertain to the appropriateness of services offered, but that is not the subject of this due process matter.

The Parent repeatedly testified that the request for an IEE stemmed from Parent's fear that provision of special education services would lead Student down a path to low achievement, based upon low expectations. Parent noted that Student's siblings all were highly intelligent and

high achievers and Parent wants to assure that Student will keep up with Student's siblings in that regard. While these are understandable concerns for a parent, and must be fully respected, they are not pertinent to the issue in this matter – the appropriateness of the District's re-evaluation. The IDEA provides ample protection to parents who want to avoid the inappropriate imposition of special education services upon their children. Parent should consider seeking legal advice regarding this issue. I do not address it here⁹.

CREDIBILITY

The above findings and conclusions do not turn on the credibility and reliability of the witnesses, except with regard to the Parent's allegation that the District promised to fund an IEE if Parent would agree to a re-evaluation, as discussed above. With this exception, I found all witnesses to be credible and reliable, based upon their answers to questions, material consistency with other testimony and the written record, and demeanor.

CONCLUSION

I conclude that the District's re-evaluation of the Student was appropriate, and that there is no legal basis for ordering the District to provide an independent educational evaluation as requested by Parent. Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

⁹ Parent considers the appropriateness of the re-evaluation to be linked to the Parent's concerns regarding the services to be offered, because the re-evaluation is the foundation upon which services are laid. I understand and agree with the theoretical point made in this regard; however, the converse is not true. Parent suggests that the re-evaluation is inappropriate because the services offered were inappropriate. I do not accept this aspect of Parent's reasoning, and decline to make any finding or reach any conclusion about the appropriateness of services previously offered to Student.

ORDER

1. The District's re-evaluation dated was appropriate under the IDEA.
2. The Parent is not entitled to an IEE at public expense.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

November 24, 2012