

*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: J.D.

Date of Birth: [redacted]

ODR No. 3296-11-12-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent

Pro Se

Central Bucks School District  
16 Welden Drive  
Doylestown, PA 18901

Scott H. Wolpert, Esquire  
Timoney Knox, LLP  
400 Maryland Drive  
P. O. Box 7544  
Fort Washington, PA 19034

Date of Hearing:

January 4, 2013

Record Closed:

January 8, 2013

Date of Decision:

January 22, 2013

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). (NT 8-9.) Student is not currently enrolled in a District school. (NT 75, 148-149.) Based on the most recent Re-evaluation Report, Student is identified as a child with the disability Other Health Impairment, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 64-65; S-39.)

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 April 9, 2012,<sup>1</sup> is appropriate. (NT 23-24, 27-28.)

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 April 9, 2012, appropriate under the IDEA?
2. Is the Parent entitled to an IEE at public expense?

## FINDINGS OF FACT

1. Student, who is currently elementary school-aged, received early intervention services through an infant/toddler program and then a preschool program. Physical and occupational therapy services were provided at preschool before enrollment in

---

<sup>1</sup> The revised re-evaluation report at S-39 will be considered the April 9, 2012 re-evaluation and the evaluation challenged by the Parent in her request for an IEE. The initial re-evaluation report at S-48, also dated April 9, 2012, will be considered as part of that re-evaluation.

- the District. Student had been classified as a child with developmental delay and pervasive developmental disorder. (S-3.)
2. Student was first evaluated by the District upon Student's transition to school-age, and the District issued a re-evaluation report to Parent in February 2010. At that time, Parent's main concerns were Student's concentration, focus, staying on task, fine and gross motor skills, and visual and auditory processing skills. (S-3.)
  3. As part of that evaluation, the District conducted cognitive and achievement testing. Student's test scores on those assessments were all in the average range with the exception of early mathematics skills and expressive language skills, where Student scored in the below average range. (S-3.)
  4. Other assessments in that evaluation indicated weaknesses with sensory processing and some gross motor skills. A speech/language assessment revealed average skills in those areas. (S-3.)
  5. The February 2010 re-evaluation report concluded that Student was a student with the disability of autism, and included recommendations for occupational and physical therapy to address fine and gross motor needs. (S-3.)
  6. An Individualized Education Program (IEP) was developed in September 2011 at the start of the 2011-12 school year, first grade. Annual goals addressed early mathematics needs and gross and fine motor skills. Student's IEP provided for itinerant support as well as physical and occupational therapy services. (S-28.)
  7. Parent approved the Notice of Recommended Educational Placement (NOREP) following the September 2011 IEP meeting. (S-30.)
  8. Student's IEP was revised in November 2011, adding reading goals and revising the mathematics goals. The level of support was increased to supplemental, with Student receiving reading, mathematics, and writing instruction in the learning support classroom. Parent approved the NOREP recommending these changes. (S-32, S-34.)
  9. A new IEP was developed in February 2012 which included goals for reading, writing, and mathematics as well as occupational and physical therapy. The level of support remained supplemental. (S-36.)
  10. Around the same time as the February 2012 IEP revision, the school psychologist held a meeting with Parent and the District's Supervisor of Special Education to discuss Student's progress and the Parent's concerns about that progress, as well as Student's learning style and visual and auditory processing skills. All of the participants at that meeting agreed that Student should be re-evaluated. (NT 46-47, 61, 78, 80-81, 119-120, 136-137; S-47 pp. 9, 14-16.)
  11. Parent signed a Permission to Evaluate form on February 3, 2012, consenting to the re-evaluation of Student as proposed. The re-evaluation was to include a review of records, individual standardized assessments of cognitive abilities and academic

- achievement, assessment of visual and auditory processing and memory, assessment of social, emotional, and behavioral development, current information from the Occupational and Physical Therapists, and a pragmatic language evaluation. (NT 45-46; S-38.)
12. One of the concerns expressed by Parent as the re-evaluation began was that Student was not interacting with the other children at recess. Another of her concerns was Student's reading skills, particularly Student's reading performance at home compared to that at school. (NT 53-54, 89-90, 111-114; S-39.)
  13. The April 9, 2012 re-evaluation was based upon a psycho-educational evaluation conducted by a qualified school psychologist with certification by the Commonwealth of Pennsylvania. The psychologist has twenty-five years' experience as a school psychologist in public schools in Pennsylvania. Additionally, the psychologist has experience as a school social worker and has had postgraduate training in school neuropsychology. (NT 31-33, 34-35; S-39.)
  14. As part of the re-evaluation, the psychologist reviewed the previous evaluation by the District from February 2010, and all of Student's IEPs. The psychologist also reviewed Student's educational records including available curriculum based assessments and grades; spoke with Student's regular education and special education teachers to get updated information on Student's progress in reading, writing, and mathematics; and obtained input from the Occupational and Physical Therapists. (NT 36-42, 50-51, 58, 72-74; S-39.)
  15. Curriculum based assessments summarized in the re-evaluation report reflected that Student was reading a level 14 text with 96% word accuracy and was meeting the first grade reading benchmark. (S-39.)
  16. The psychologist observed Student on several occasions over the course of the re-evaluation, including three classroom observations, two observations at recess, and one Occupational Therapy session observation. Other District personnel also observed Student at recess. (NT 52-54; S-39.)
  17. Student's assessments by the school psychologist were administered over five sessions of approximately one hour on five different days. Student's motivation, level of attention, and effort indicated to the psychologist that the results of the assessments administered were a valid measure of student's functioning. All of this testing was conducted under standardized conditions and in accordance with each test publisher's instructions. (NT 103; S-39.)
  18. The psychologist administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) to assess Student's cognitive ability, which had not been assessed for several years prior to the re-evaluation. The WISC-IV assessed five composite areas of cognitive functioning: verbal comprehension (expressive vocabulary), perceptual reasoning (visual-spatial understanding), working memory (short term working memory, encoding, sustained attention and concentration, mental control and

- manipulation, ability with rote tasks, and auditory and processing), processing speed (including scanning, sequencing, or discriminating simple visual information, short-term visual memory, attention, and visual-motor coordination), and the full scale IQ. Student scored in the average range in all areas of the WISC-IV, with a relative strength in working memory and a relative weakness in visual processing speed noted. Student's full scale IQ score was in the average range. (NT 55-57; S-39.)
19. Additional cognitive testing was conducted through administration of select subtests of the Developmental Neuropsychological Assessment – Revised (NEPSY-2), including the domains of language, memory and learning, and social perception. The psychologist selected the NEPSY-2 subtests to provide more thorough information about Student's ability to process information. Student scored in the average range on all of the subtests administered. (NT 57-58; S-39.)
  20. The psychologist also administered the Wechsler Individual Achievement Test, Third Edition (WIAT-III). The WIAT-III is a standardized, norm-referenced assessment of achievement. Student scored in the above average range in early reading skills, and in the average range in writing, spelling, phonics, reading comprehension, word reading, sentence structure, mathematics problem solving, and mathematics computation on the WIAT-III. (NT 59-60; S-39.)
  21. To assess Student's social-emotional functioning, several assessments were utilized: the Behavior Assessment System for Children – Second Edition (BASC-2), the Autism Spectrum Rating Scale (ASRS), and the Social Skills Improvement System (SSIS). Both the BASC-2 and the ASRS measure various aspects of emotional and social functioning, including problematic behaviors, adaptive skills, social and emotional reciprocity, atypical language, stereotypical behavior, behavioral rigidity, sensory sensitivity, attention and self-regulation. The SSIS assessed social skills and problematic behaviors. (NT 60-63; S-39.)
  22. The BASC-2 included a Teacher Rating Scale from two teachers, the Parent Rating Scale, and the Student Self-Report. The ASRS and SSIS included both teacher and parent rater observations. (S-39.)
  23. The psychologist considered it significant that across all of the rating scales used to assess social-emotional functioning, there was clear variability among the raters at home and at school. Student's teachers did not report any areas of concern with social skills or problematic behavior, while Parent ratings indicated several areas of concern, particularly with respect to anxiety, depression, and problem behaviors. (NT 64; S-39.)
  24. In each of the recess observations, Student interacted with peers and frequently moved from one activity to another, rather than remaining with one peer or group of children. (S-39.)

25. Student's pragmatic language skills were assessed by a speech/language pathologist using both formal and informal assessments. Student's pragmatic language skills met age level expectations. (S-39.)
26. The original version of the District's re-evaluation report reached the conclusion that Student was not eligible for special education. After Parent provided additional information from Student's pediatrician, a medical report from July 2011 which stated a possible diagnosis of "mild cerebral palsy", the team determined that Student was eligible. (NT 49-50, 66-70, 139-141; S-39 p. 20, S-47 p. 19, S-48.)
27. The revised April 9, 2012 re-evaluation report noted that Student's pragmatic language skills, reading, mathematics, and written language skills, and cognitive abilities were all in the average range, but concluded that Student remains eligible for special education with the disability Other Health Impairment. (NT 64-65; S-39.)
28. During a meeting held on April 26, 2012, and memorialized by a letter of May 1, 2012, the District and Parent agreed that the District would videotape Student reading. That videotaping never occurred, although Parent and the District Supervisor of Special Education together observed Student reading sometime during the spring of 2012. (NT 146-147, 166-169, 188; P-1.)
29. Student's IEP team met to develop a new IEP for Student on June 6, 2012. This IEP contains information from the re-evaluation, and included goals addressing reading, mathematics, writing, and physical and occupational therapy. The level of support decreased from the previous IEP to itinerant. Parent attended that meeting very briefly, leaving soon after the level of support was discussed. (NT 100-101, 117-119, 134, 199; S-43.)
30. The April 9, 2012 re-evaluation report provided sufficient information to enable the IEP team to develop an IEP for Student. (NT 142-143.)
31. By the end of the 2011-12 school year, Student had met grade-level benchmarks for both reading and mathematics. Student's progress in reading was commensurate with the progress expected of first grade students. (NT 114-117, 131-135, 164; S-43.)
32. Student began attending a private school at the start of the 2012-13 school year and did not return to the District. (NT 75, 148-149, 188.)

## 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).<sup>2</sup> 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 evidence<sup>3</sup> 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.

---

<sup>2</sup> 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.

<sup>3</sup> 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 evaluation<sup>4</sup> 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

---

<sup>4</sup> 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 10, 12, 14-25.) The District’s strategies included a review of documents, input from Parent, teachers and Student, observations, standardized testing, curriculum based assessment, and behavior inventories. (FF 14-25.) 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 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 2-5, 10, 11, 12, 16, 21, 22, 23, 26, 27.)

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).<sup>5</sup> The evidence is preponderant that the District complied with these legal requirements. (FF 13, 14, 17, 18, 19, 20, 21, 25.)

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 14, 15, 16, 21, 22, 24, 25.)

#### 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 social, emotional and behavioral functioning. (FF 14-25.) The evaluation identified Student's educational needs, and was sufficient to form a basis from which an appropriate Individualized Education Program could be created. (FF 26, 27, 30.)

---

<sup>5</sup> 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 raises a specific concern with the District's re-evaluation with respect to its reporting of Student's reading ability. (NT 203-04) In essence, she disagrees that Student had made the reading progress described in the re-evaluation report, citing, among other things, the District's apparent failure to videotape Student while reading or to permit her to observe Student reading materials from the beginning of the school year. (FF 28; NT 80-93, 152-158, 161-165, 169-172, 175-181, 183-185.) She also raised a question about Student's need for continued specially designed instruction in mathematics. (NT 94-98, 159-161, 167-168.)

I find that the District witnesses who testified to Student's progress toward reading and mathematics benchmarks were credible, and that their descriptions of Student's progress in those areas was reliable, was consistent with each other's testimony, and was corroborated by the documentary evidence including the June 2012 IEP. (FF 15, 29, 31; NT 125-133.) The evidence is preponderant that, by the end of the 2011-12 school year, Student had met grade-level benchmarks for both reading and mathematics. (Ibid.) Additionally, Student's progress in reading was not unusual for a first grade student. (Ibid.) There was also no contrary evidence presented which would lead me to question the accuracy of the information about Student's abilities and achievement in the District's re-evaluation report. To the extent that a videotaping of Student while reading might have alleviated Parent's concerns, the record fails to demonstrate that Student cannot read at the levels reported by the District. Thus, despite Parent's concern that Student does not always perform at the grade-appropriate benchmarks reported in the District's re-evaluation and subsequent IEP, the evidence does not support a conclusion that that re-evaluation was incomplete or misleading in that respect.

Parent also raised a question about incorrect dates that appeared in the re-evaluation report. (NT 78-79.) However, the school psychologist explained the reason for that inaccuracy, and also testified that she sent an amended report to Parent with the dates corrected. (NT 79-80.) Parent does not dispute this testimony, and this minor error does not render the re-evaluation substantively inappropriate.

Another concern raised by Parent at the hearing was that, at the meeting to discuss the re-evaluation, the school psychologist did not have the actual assessments available during that meeting. (NT 90-91.) The response of the District was to make the test protocols available for Parent's inspection at a later date, but Parent did not arrange to review them. (NT 91-93.) Parent's failure to avail herself of this opportunity similarly does not mean that the re-evaluation was inappropriate on this basis.

Parent further challenged the District's determination that Student did not require the same level of special education after the re-evaluation was completed. (NT 169-175, 198-199.) She noted that Student had accommodations in IEPs that Student could have test questions read aloud in certain circumstances. (Ibid.) However, the issue before me is whether the District's re-evaluation was appropriate for Student under the law, as set forth above. I cannot conclude that the inclusion of specific accommodations and specially designed instruction in previous or subsequent IEPs as part of Student's special education program renders the information obtained through the District's re-evaluation flawed in this case.

Lastly, Parent expressed concerns over the District's revisions to the re-evaluation, having first concluded that Student was no longer eligible and then changing its position to conclude that Student remained eligible, and she points to a statement made by one of Student's teachers that suggested she understood Parent's concerns about the opposite conclusions. (NT

190-199.) Although the re-evaluation process in this case may have been somewhat confusing to Parent, the issue is whether the District's final re-evaluation, including its recommendations and conclusions, was appropriate in identifying Student's eligibility and need for special education as required by the law. I conclude that it was.

In sum, the District has met its burden of establishing that its re-evaluation was appropriate, and therefore there is no basis to award an IEE at public expense.<sup>6</sup>

## CREDIBILITY

The above findings and conclusions do not turn on the credibility and reliability of the witnesses, except with regard to the explanation of Student's progress toward grade-level benchmarks in reading and mathematics. I find the testimony of the District witnesses on that subject to be credible, as discussed above. In general, I found all of the witnesses to be credible and reliable, based upon their answers to questions, material consistency with other testimony and the written record, and demeanor. However, I gave less weight to Parent's testimony, because her concerns with the District's re-evaluation did not address its obligations under the IDEA and implementing regulations. Instead, her testimony appeared to relate to her beliefs on the adequacy of the regular and special education programming offered and provided to Student, rather than the narrow issue presented in this hearing, namely whether the District's evaluation was appropriate under the law. Accordingly, while I did not discount her testimony as incredible, I accorded it less significance than the evidence which was related to the issue presented.

---

<sup>6</sup> Having reached this conclusion, there is no need to address the District's secondary argument that an IEE is not legally required in this case. (NT 26, 214-218.)

## 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.

## ORDER

1. The District's re-evaluation dated April 9, 2012, 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

January 22, 2013