

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

ODR No. 3101-1112 AS

Child's Name: S.S.

Date of Birth: [redacted]

Dates of Hearing: 7/25/12, 8/1/12, 8/16/12

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parents

Parent Attorney

Drew Christian, Esquire
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Scranton, PA 18510

Charter School

Bear Creek Community Charter School
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Date Record Closed:

September 9, 2012¹

Date of Decision:

September 16, 2012

Hearing Officer:

Anne L. Carroll, Esq.

¹ Due to serious and unavoidable personal circumstances, the court reporter originally assigned to this case was unable to produce the transcripts of the first two hearing sessions, leading to an unusual and significant delay in production of the complete record until a reporter familiar with the system used by the original reporter was able to locate and transcribe the notes of testimony.

In addition, by agreement of the parties, the transcript of the third hearing session began with page 1,000 in order to assure that page numbers were not duplicated, since the third session was transcribed well before the first two sessions.

INTRODUCTION AND PROCEDURAL HISTORY

Student, enrolled in Bear Creek Community Charter School since kindergarten, was evaluated for special education services after Parents provided the School with a medical diagnosis of visual processing disorder and a privately obtained psycho-educational evaluation report that suggested a possible attention disorder and recommended continued academic support. Beginning in 1st grade, Student received regular education supports via the School's Academic Support Program, with additional reading services added for a brief period early in 2nd grade.

Although the School's evaluation resulted in the conclusion that Student was not IDEA eligible, Student was offered a §504 Service Agreement that included accommodations for the visual processing disorder and incorporated the services in the Academic Support Plan.

After reviewing the School's evaluation report (ER) and comparing it with the results of the private report, Parents requested an independent educational evaluation (IEE), which the School refused, leading to the due process complaint and hearing sessions in July and August 2012. Because of questionable standardized assessment and rating scale results, as well as a flawed evaluation report that failed to address discrepancies in results between Parents' privately obtained evaluation and the School's results on the same assessments, the Charter School is ordered to provide Student with an IEE.

ISSUES

1. Did the Bear Creek Community Charter School conduct an appropriate evaluation of Student, accurately compile and report the results and conclude that Student is not IDEA eligible?
2. If not, is the Charter School required to fund an independent educational evaluation of Student?

FINDINGS OF FACT

1. [Student] is [an elementary school-aged] child, born [redacted]. Student is enrolled in Bear Creek Community Charter School, where [Student] was evaluated and found not eligible for special education services in accordance with the IDEA statute. (N.T. p. 94; P-4 pp. 14, 15)
2. Parents became concerned about Student's academic progress, particularly in reading, at the beginning of first grade. Student was referred to the School's Academic Support Program and was provided with action plans from approximately the middle of first grade. (N.T. p. 1082; S-1, S-2, S-5)
3. The initial action plan provided school-based accommodations to increase independence from the teacher, improve reading fluency and comprehension, provide additional practice with math facts, and provided for an occupational therapy (OT) screening. (S-1)
4. An updated plan, approximately one month later, added chunking of math problems, use of magnetic letters for spelling words and more oral responses. (S-2)
5. Student ended first grade with a C- in reading, C+ in language usage, B in spelling and B- in math. (P-2 p. 1)
6. In August 2011, Student received a medical diagnosis of visual processing disorder. (N.T. p. 1084; S-4 pp. 12-17)
7. After learning of the visual processing issues, Student's 2nd grade teacher requested an Academic Support Program meeting to immediately begin implementing the recommendations to address those issues. (N.T. pp. 130, 131)
8. At the beginning of 2nd grade, Student's action plan included supplemental instruction in reading and math, an after school tutoring program one afternoon/week and the opportunity to take assessments in a separate location. It also provided for use of a reading tracker, graph paper and no deductions for handwriting or reversals. (N.T. pp. 132, 135; S-5)
9. At the end of October of that school year, reading support was discontinued due to reported progress on reading assessments. (N.T. p. 134; S-6)
10. Beginning in April 2012, the Charter School provided Student with a §504 Service Agreement with accommodations to address the effects of the visual processing disorder, such as enlarged text, fewer test items per page, extended time, breaks after intensive reading activities, oral reading of directions and assessment questions when reading was not being assessed, as well as the accommodations provided in the 2nd grade action plan. (P-6, S-5)

11. The Service Agreement also provided for preferential seating to reduce distractions and nonverbal cues to re-direct attention to task. (P-6 p. 1)
12. At the end of 2nd grade, Student's lowest grade was a D in reading. Student received C+ in language arts, B in spelling and C in math. (P-2 p. 2)
13. In January 2012, Parents privately obtained a Developmental Psychoeducational Evaluation, including standardized assessments of cognitive ability and academic achievement, as well as rating scales for social/emotional functioning and attention/concentration.² (P-3 pp. 4—16)
14. The independent evaluator placed Student's intellectual ability in the average to above average range based on a full scale IQ (FSIQ) score of 112 at the 79th percentile. Student's scores on the Verbal Comprehension Index (VCI—121/92nd percentile) and Perceptual Reasoning Index (PRI—115/84th percentile) were in the high average to superior range, while the Working Memory Index (WMI) and Processing Speed Index (PSI) scores (both at 97/42nd percentile) were in the average range. (P-3 pp. 4—6)
15. On the WIAT-II, Student scored in the high average to superior range on the Reading (118/88th percentile) and Math Composites (105/88th percentile), in the average range in Written Language (97/42nd percentile) and in the low average/average range (96/39th percentile) in Oral Language. Student's total academic achievement score was in the average range (105/63rd percentile). (P-3 pp. 6—8)
16. Parent and Student's physical education and library teachers completed the BASC-2 rating scales. Parent's ratings fell into the average range in all areas except learning problems, which fell into At Risk range. The ratings of the physical education teacher were in the At-Risk range with respect to aggression, adaptability, social skills, leadership, functional communication, anger control, developmental social disorders, emotional self control, negative emotionality and resiliency. That teacher's ratings fell into the Clinically Significant range with respect to study skills. The other teacher's ratings were in the average range in all categories. (P-2 p. 2, P-3 pp. 14, 15, 18)
17. Parent and Student's classroom teacher completed the Connors 3 rating scale. Parent's ratings were in the elevated range for executive functioning and the high average range for learning problems. The classroom teacher's ratings were in the very elevated range with respect to defiance/aggression, peer relationships and in the elevated range with respect to learning problems/executive functioning. The teacher also saw Student as exhibiting externalizing behavior symptoms related to rule violation, oppositional/defiant behavior and reduced concentration/attention. (P-3 pp. 16, 18)

² Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV); Wechsler Individual Achievement Test-Second Edition (WIAT-II); Behavior Assessment System for Children-Second Edition (BASC-2); Connors Rating Scales (Connors 3)

18. The independent evaluator concluded that Student has a mild weakness in visual perceptual information processing that affects academic performance but not a learning disability. Although some of the teacher ratings suggested a tendency toward disruptive classroom behaviors, the evaluator found no clear evidence of attention deficit/hyperactivity disorder (ADHD). (P-3 p. 19)
19. The evaluator's recommendations included taking steps to increase on-task performance, compliance with classroom rules, self-confidence and self-esteem and development of social relationships and a behavior plan. The evaluator also recommended continuing with classroom accommodations already in place, as well as continued participation in after school tutoring and occupational therapy. (P-3 p. 19)
20. As soon as Parent provided the School with the February 9, 2012 evaluation report, it requested Parents' permission to conduct its own evaluation (S-8)
21. Although Student was tested in January 2012, the contract school psychologist conducting the School's evaluation re-administered the WISC-IV. She tested Student's academic achievement by means of the WIAT-III and also asked Parent and Student's classroom teacher to complete BASC-2 rating scales. (N.T. pp. 29, 31, 60; P-4 pp. 4—9, 11—13)
22. The school psychologist's WISC-IV results yielded an FSIQ in the average range (97/42nd percentile), with the VCI and PRI at 104 (61st percentile/average), WMI at 80 (9th percentile/low average) and PSI at 94 (34th percentile/average). (P-4 p. 5)
23. Student's WIAT-III scores, measuring academic achievement in the areas of listening comprehension, basic reading, reading comprehension, reading fluency, written expression, math problem-solving, math calculation and math fluency were all in the average range, at 104 (61st percentile) for total reading, 101 (53rd percentile) for mathematics (math problem-solving and numerical operations subtests) and written expression, math fluency 91 (27th percentile) and 110 (75th percentile) for listening comprehension. (P-4 pp. 7-9)
24. Based on an ability/achievement comparison, the school psychologist found no evidence of a learning disability. (P-4 pp. 9, 10)
25. The School's ER reported BASC-2 ratings by Student's classroom teacher in the At Risk or Clinically Significant ranges with respect to learning/attention, adaptive skills, aggression, conduct problems, social skills, depression and withdrawal. Parent's ratings also place Student in the At Risk range for attention problems. (N.T. p. 31; P-4 pp. 11-13)
26. Although the School's ER included a description of the results of Parent's private evaluation, and the school psychologist reviewed those results before beginning her evaluation, the school psychologist was responsible only for reporting the results of and conclusions to be drawn from her own assessments, not summarizing prior information.

- The ER included no discussion of the substantial differences in both the ability and achievement results between the two evaluations, including possible reasons for the differences. (N.T. pp. 50, 52, 62—64, 91, 92; P-4 pp. 2, 4—9, 14)
27. The School ER includes no observation of Student’s behaviors during the assessments other than a brief reference to difficulty sustaining attention during three testing sessions. The school psychologist did observe and report to the school team that Student was reluctant to leave regular school activities to participate in her evaluation. (N.T. pp. 64, 65; P-4 p. 14)
 28. The school psychologist believed that Student was capable of better performance than the results of her assessments indicated, and was concerned about the possible inaccuracy of her results due to Student’s behavior that may have impacted performance. The school psychologist considered the assessment results from the private evaluation to be a more accurate representation of Student’s ability and achievement. None of those concerns were discussed or mentioned at all in the ER. (N.T. pp. 64—69, 93; P-4 pp. 1—20)
 29. Since the school psychologist was unaware of the accommodations and supports Student was receiving, Student’s performance in light of those classroom interventions was not considered in reaching her conclusion that Student does not have a disability as defined in the IDEA statute. (N.T. pp. 78—80; P-4 p.15)
 30. After receiving and scoring the classroom teacher’s BASC-2 ratings, the school psychologist contacted the teacher to discuss the results. Based upon her conversation with the teacher, the school psychologist suspected that Student’s behaviors were related to attention issues. She also concluded that Student’s lower than expected scores on benchmark assessments and report card grades resulted from performance deficits, not skill deficits. (N.T. pp. 32—36, 87, 105—107)
 31. The school psychologist further concluded that the teacher’s responses that resulted in the high ratings on aggression and indications of other problem behaviors were isolated incidents that did not constitute a pattern indicating a conduct disorder and casting doubt on the results. The absence of disciplinary referrals for Student confirmed that conclusion for the psychologist. In the ER, the ratings were reported without noting or discussing the school psychologist’s conclusion that the ratings did not indicate a general problem with Student’s behaviors. (N.T. pp. 101—103, 114, 115, 119, 144, 145; P-4 pp. 11-13)
 32. Student’s teacher still noted problems with peer relationships throughout the school year, one to two times monthly. (N.T. pp. 135, 136, 145)
 33. The ER also included a 20 minute classroom observation by a school counselor during reading instruction. The observer reported that Student was re-directed to academic tasks and reminded to follow classroom rules several times during that period. (N.T. pp. ; P-4 pp. 2, 3)

34. The school psychologist recommended a §504 Plan, with consideration given to including her specific recommendations for addressing Student's attention and concentration difficulties in the classroom. (N.T. pp. 30; P-4 pp. 14,16)
35. After completing the evaluation, reviewing the ER and speaking with the classroom teacher, the school psychologist concluded that additional assessments are needed to further explore Student's attention, behavior and social/emotional issues. (N.T. pp. 32, 33, 40, 43, 59, 1043)
36. At the meeting to discuss the ER and proposal for a §504 Plan, the School intended to seek Parent's permission for the additional assessments, but that discussion was not pursued because Parent raised no specific concerns about the ER and made a written request for an IEE at the conclusion of the meeting. (N.T. pp. 40, 43, 1036, 1039—1041; S-10)

DISCUSSION AND CONCLUSIONS OF LAW

To support the appropriateness of its March 2012 evaluation, the Charter School relies primarily upon its compliance with the IDEA procedural requirements relating to evaluations, as well as its intention to request Parents' permission for additional assessments, although the proposal for additional assessments was never actually presented to Parents. (FF 36; Charter School closing argument, N.T. pp. 1100—1102)

Parents contend, however, that the School evaluation was flawed in several respects. (Parents' closing argument, N.T. pp. 1102—1108) Parents point first to the substantial difference between the School's cognitive ability assessment results and the results of their private evaluation on the same measure, the WISC-IV, along with the admission of the School's evaluator that the private evaluation results are likely more accurate. (FF 28) Parents further argue that the school psychologist, in essence, set aside the results of the teacher's ratings on the BASC-2 based upon a subsequent conversation with the teacher, admitting that further assessments are required in order to complete a substantively valid and accurate evaluation of Student. (FF 35)

Legal Standards

A. Evaluations/Reevaluations

The IDEA regulations include specific requirements for evaluations and reevaluations to determine whether a child has a disability that requires specially designed instruction and to determine educational needs. 34 C.F.R. 300.301 *et seq.* The general standards for an appropriate evaluation or re-evaluation are found at 34 C.F.R. §§300.304—300.306, which require an LEA to: 1) “use a variety of assessment tools;” 2) “gather relevant functional, developmental and academic information about the child, including information from the parent;” 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Every reevaluation (and initial evaluations if appropriate) must also include: 1) a review of existing evaluation data, including a) local, state and current classroom-based assessments; b) classroom-based observations by teachers and related service providers; 2) a determination of additional data, if any, necessary to determine a) whether the child has an IDEA-defined disability (in the case of an initial evaluation); b) the child’s educational needs, present levels of academic achievement and related developmental needs; c) whether the child needs/continues to

need specially-designed instruction and related services. 34 C.F.R. 300.305(a)(1), (2). It is the LEA's responsibility to administer all assessments and other measures needed to compile the required evaluation data. 34 C.F.R. 300.305(c).

Once the assessments are completed, a group of qualified LEA professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the LEA is required to: 1) "Draw upon information from a variety of sources," including those required to be part of the assessments, assure that all such information is "documented and carefully considered." 34 C.F.R. §300.306 (c)(1). The LEA must also provide a copy of the evaluation report and documentation of the eligibility determination to the Parents at no cost. 34 C.F.R. §300.306(a)(2).

B. Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof. As Parents noted, in their closing argument, because the Charter School filed the complaint to support the appropriateness of its evaluation upon Parents' request for an IEE, as required by 34 C.F.R. §502(b)(2), it bears the burden of persuasion. As is also usual in civil cases, Pennsylvania federal courts have generally required that the filing party meet that burden by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Why the Charter School's Evaluation Fails to Meet IDEA Standards for an Appropriate Evaluation

The School complied with most, if not all, of the procedural requirements for an IDEA evaluation by including standardized assessments of cognitive ability and academic achievement,

curriculum-based assessments and a well recognized assessment of emotional functioning in the form of BASC-2 rating scales completed by both a Parent and the classroom teacher. (FF 21)

The School's evaluation also included information obtained via a classroom observation, from the Parents' private evaluation and directly from Parents and the teacher. (P-4 pp. 1—13)

Nevertheless, the record in this case establishes that the School's evaluation is actually less than the sum of its parts in that the basis for the School's conclusion that Student is not IDEA eligible is not well-documented. Notably absent from the discussion of the results of various measures in the evaluation report are the observations of Student's test-taking behaviors and conversations with the classroom teacher to which the school psychologist testified at the hearing, and that she herself admitted casts doubt on the results of all of the assessments she administered. (FF 27, 28)

Moreover, the school psychologist did not gather all relevant information about Student before conducting the assessments or even before completing her report, since she was unaware that Student was already receiving significant classroom accommodations. (FF 3, 4, 7, 8, 29)

In addition to the broad and general regulatory requirements for an appropriate IDEA evaluation, Parents also have a right to expect that an evaluation report used to determine whether a child is IDEA eligible and/or to determine a child's educational needs meets the appropriate standards for a complete evaluation report that should be followed by the professional psychologist who conducts the assessments. Those standards are described in Sattler, J. and Hoge, R. *Assessment of Children-Behavioral, Social and Clinical Foundations, Fifth Edition* (2006, Jerome M. Sattler, Publisher, Inc.) Standards particularly applicable in this case include Test Interpretation Considerations relating to (1) adverse effects on scores by factors such as uncooperative behaviors and lack of motivation; (2) evidence indicating whether the evaluation measures have adequate reliability and validity as applied to the situation at hand

and (5) interpreting results from assessments in relation to case history and other behavioral data. (p. 7) Also relevant are several Questions and Topics to Consider in Preparing a Psychological or Psychoeducational Report, Table 25-1, p. 585, Observations During the Assessment, particularly “attention level” and “degree of cooperation.” Moreover, psychologists writing a report are instructed to attempt to account for discrepant information rather than ignore it. (p. 588). Most pointedly, the authors state that “A good report carefully describes the examinee’s behavior during the evaluation...”

It is quite apparent from examining the school’s ER that there was no description of Student’s assessment behaviors, other than a brief reference to difficulty sustaining attention in each testing session. (FF 29) The testimony of the School’s evaluator, along with the substantially higher scores obtained on the WISC-IV by the Parents’ private evaluator just a few months before the School’s evaluation, strongly suggested that the evaluation results may have been adversely affected by Student’s behaviors and motivation during the testing, and the school psychologist admitted her concern about that. (FF 28) Consequently, omission of a discussion of the evaluator’s observations during the assessments resulted in an evaluation report that provided a less than complete picture of the assessments, and gave no indication that the validity and reliability of the assessment results might have been adversely affected and should be viewed with caution. Although the School’s evaluator testified that she believes that her results underestimate Student’s ability, no one reading the evaluation report could readily discern that important information. (FF 28, P-4) Despite her own misgivings about her results, the School’s evaluator simply reported them in the report, and made no attempt to reconcile her results with the prior evaluation results. (FF 26)

In addition, before commencing the School's evaluation, the school psychologist had access to the results of the BASC-2 and Connors-2 ratings by Student's classroom teacher, other teachers and Parent that indicated some elevated scales. The evaluator did not, however, question Parent, the other teachers or Student's classroom teacher concerning the basis for their ratings on those scales, as she did when the BASC-2 teacher rating obtained from the School's evaluation indicated potential emotional/behavior problems. (FF 30) Attention and social skills issues were already suggested by the Connors 3 ratings completed by the same teacher, by the BASC-2 results from the physical education teacher for the private evaluation and by Parent's responses that placed attention in the At Risk range. (FF 25) That information was available to the school psychologist before she began her evaluation that she testified suggested the need for additional assessments of attention and social/emotional functioning. (FF 35) In addition, according to Student's 2nd grade teacher, Student's peer relationship/social skills issues occurred throughout the school year. (FF 32) Based on readily available information, the school psychologist could have selected more and different assessments before completing her evaluation. Instead, however, she completed her evaluation using two of the same assessments used by Parents' private evaluator, omitted any mention of the prior evaluation results in the discussion of the BASC-2 ratings and inaccurately stated that all of Parent's ratings were in the average range when Parent's ratings included an elevated scale indicating attention problems. (FF 25, 26; P-4 p. 13)

In short, it is impossible to determine from the School's evaluation report whether the conclusion regarding IDEA eligibility is accurate. Just as important, the School acknowledged that Student is entitled to the protections of §504 of the Rehabilitation Act for both the diagnosed visual processing disorder and for attention issues disclosed by its own evaluation by providing a

§504 Plan that addresses Student's need in both areas. (FF 10, 34) Because of the lack of evaluation data that could have been gathered before the School's initial evaluation of Student was completed, it would also be impossible to determine whether the School is meeting Student's needs as adequately as it meets the needs of non-disabled students, the standard for providing FAPE to qualified handicapped students under the federal regulations. *See* 34 C.F.R. §§104.32, 104.33.³

Despite the flaws in the School evaluation and in the ER, it proposed only to complete additional assessments of Student's social and emotional functioning. Although that might add useful information, conducting additional assessments would not repair the District's evaluation report and would not make the evaluation appropriate.⁴

Consequently, the Charter School must fund a comprehensive independent educational evaluation of Student that meets the requirements of 34 C.F.R. §§300.304—306, and if the independent evaluator's review of records and initial assessment results suggest it, the additional evaluation requirements applicable to students suspected of having a learning disability. Unless the School can explicitly justify refusing the evaluator requested by Parents based upon its own inquiry and investigation into the qualifications and expected procedures to be used by such evaluator, the School must honor Parents' choice of an independent evaluator.

³ Pennsylvania regulations governing Charter Schools incorporate federal IDEA and §504 regulations. 22 Pa. Code §711.3(a), (b) (c)(5).

⁴ There is case law suggesting that if a parent challenges an LEA evaluation and the hearing officer concludes that the LEA evaluation is not entirely appropriate, the IDEA regulations require granting Parents' request for an IEE and do not permit allowing the LEA an opportunity to correct the flawed evaluation. *M.Z. v. Bethlehem Area School District*, 2011 WL 2669248 at *2 (E.D. Pa. 2011).

ORDER

In accordance with the foregoing findings of fact and conclusions of law, Bear Creek Community Charter School is hereby **ORDERED** to fund a comprehensive independent educational evaluation of Student [name redacted] as follows:

1. The IEE shall meet the requirements of 34 C.F.R. §§300.304—306, and if the independent evaluator's review of existing records and initial assessment results suggest the need, all additional evaluation requirements applicable to students suspected of having a specific learning disability.
2. Unless the Charter School can explicitly justify refusing the evaluator requested by Parents based upon its own inquiry and investigation into the qualifications and expected procedures such evaluator proposes to use, the School shall fund the evaluation conducted by an independent evaluator chosen by Parents.

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

September 16, 2012

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER