

**Individuals with Disabilities in Education Improvement Act
Before the Local Hearing Officer**

York County School District Two	)	
(Clover) Petitioner,	)	
	)	
vs.	)	
	)	
NW ("Parent") on behalf of	)	Final Order (Amended)
AW ("Student),	)	
	)	
Respondent.	)	
	)	
	)	
	)	

I. Introduction and Summary

This is a review of the District's decision to not pay for an independent educational evaluation ("IEE") requested by the Respondent. In her post-hearing brief, the Respondent contends that her "point is to bring to light the enormous discrepancy between the Petitioner and Respondent's experience with [the Student], and between the Petitioner's own stated experiences this school year." [Resp. Br. at 5]. Although such a discrepancy is undoubtedly frustrating and challenging, its cause is not the issue here. The only issue here is whether the District's educational evaluation of the Student's achievement in the educational setting is correct.

The District's most recent evaluation corroborates the conclusion reached following prior evaluations: the Student does not have an educational disability under the Individuals with Disabilities Education Act ("IDEA") in the classification of either Autism or other health impairment ("OHI") due to the Student's diagnosis of attention deficit hyperactivity

disorder ("ADHD"). The evaluation was thorough and went beyond the minimum requirements of federal and state guidance. Although documentation of the consideration of all records is somewhat lacking, the District still considered all pertinent information and reached a sound conclusion. For these reasons, I find that the District met its burden of showing its evaluation was proper and correct.

II. Procedural Background

Respondent requested an IEE on January 25, 2022. The District denied the request on February 11, 2022. The District then submitted a due process request dated February 17, 2022. The Respondent submitted a response to the due process hearing request on February 24, 2022. I conducted a pre-hearing scheduling call on March 15, 2022. Both parties were represented by counsel. The hearing commenced on April 5, 2022 and concluded on April 6, 2022. The parties requested time to submit post-hearing argument, which both parties have submitted.

III. Facts

A. Background

1. Student's educational and medical history

Student is a third grader who has not been identified as having an educational disability under the IDEA, but he has been provided accommodations under Section 504 of the Rehabilitation Act of 1973 ("Section

504") Plan based on a medical diagnosis of ADHD from 2018. Before this school year, the District has twice evaluated the Student (2018 and 2020) to determine possible eligibility for special education and related services under the IDEA. In both instances, the District's evaluation did not identify an area of educational disability. The Student has been educated in the general education setting. [Ms. D] teaches homeroom, math, and science in the morning.

2. Multi-Tiered System of Support

For all students, the District uses a multi-tiered system of support ("MTSS") under which supports are offered based on a three-tiered system. Level I is general education with no other support. Levels II and III involve various supports necessary to help the student meet academic goals. At all relevant times, the Student received services at Level II, which is defined as "small-group intervention and supports" and possibly a "narrowed focus of instruction."

The MTSS procedural flowchart states that there should be progress monitoring every two to four weeks based on the Student Intervention Team ("SIT") plan.¹ The District witnesses testified that the MTSS group met on November 5 and December 17, 2021.

¹The SIT team, which consists of an interventionist, a special education teacher, and a regular education teacher, met to discuss progress and strategies. They also discuss whether to change tier level based on present levels of performance.

3. Fountas and Pinnell (“F&P”) evaluation

The teacher who provides the Student social studies and English language arts ("ELA") in the afternoon. administered the F&P readiness assessment rated Student at Level N, which is on grade level for the beginning of third grade.

B. Evaluation²

On October 14, 2021, the Respondent submitted a request for an IDEA special education evaluation. On November 2, 2021, the District conducted an evaluation planning meeting. The Respondent executed a consent for the Student to be evaluated in eight areas. The areas correlate to areas of concern in which the Student was to be evaluated, which are Autism and ADHD, which might fall under OHI.³ There were no disagreements noted as to the areas to be evaluated.

² Although the District has performed several evaluations, each is considered an initial evaluation since Student has not been identified as eligible for services under the IDEA.

³ ADHD is in the definition of OHI. 34 C.F.R. § 300.8(c)(9)(i). The SEED provides: In the case of a child with Attention Deficit Hyperactivity Disorder (ADHD), the diagnosis may be made by a licensed physician, a certified school psychologist, licensed psychologist, or a licensed psycho-educational specialist. The term ADHD includes several subtypes. One of those subtypes is “predominantly inattentive type,” formerly described as Attention Deficit Disorder (ADD). While a medical diagnosis is relevant to the inquiry, SEED makes clear that it cannot be determinative:

The medical diagnosis may not be used as the sole criterion for determining eligibility. There must be evidence that the other health impairment adversely affects the child’s educational performance.

The District conducted observations and evaluations on November 8, 2021, (observation); November 17, 2021, (CELF-5, CASL – 2nd, and ABAS-3) [*id.* at 139, 141-42, 144-45]; November 18, 2021 (language) [*id.* at 143]; November 19, 2021 (Conners-3 and observation) [*id.* 150, 155]; December 1, 2021 (observation) [*id.* at 154]; December 3, 2021 (WISC-V and observation) [*id.* at 134, 154-55]; December 7, 2021 (WIAT-4 and observation) [*id.* 137, 154]; December 9, 2021 (ASRS and observation) [*id.* 148, 155]; December 14, 2021 (CARS-2) [*id.* 151-52].

On December 14, 2021, the District finalized the Evaluation Report (“Report”).⁴ The District held a meeting with the Parent two days later to review the Report. The District concluded that the Student does not meet the eligibility criteria under either autism or OHI. The District documented that

⁴ The evaluation document [D1] will be referred to as the “Report” to avoid confusion in the use of the word “evaluation,” which refers to the entire process.

the Student “demonstrates cognitive abilities in the Average range,” that he shows “academic abilities in the Average range, “Average communication abilities,” “Adaptive behavior in the Low range in the home setting,” but “in the Average range in the school setting.” [*Id.*] The District also documented “no concerns with the [Student’s] sensory processing skills within the school setting at this time.” [*Id.*; (eligibility determination), (worksheet)]

C. Other data about performance

The Student took three versions of the i-Ready test: One in August and two in December. The need for two tests in December apparently resulted from indications that the Student may have “clicked through” the exam rather than trying to answer the questions to the best of his ability.

4. Section 504 Information

During the Section 504 review in September, the District documented:

[Student] was evaluated and does meet the criteria for Other Health Impairment. This disability does have an adverse effect on [Student]’s educational performance. The [Student’s] disability often impacts his ability to attend to tasks and instruction in the classroom environment.

Some observations made by the teacher: [Student] stands up & spins during the whole group reading, doesn’t always follow the routines, yells out when he’s done, and turns [and] looks [in] the opposite direction when he should be looking at the board. He isn’t always able to complete his work.

The District then rated the impairment (presumably OHI) as “substantially” limiting learning/academic performance, as extremely limiting in terms of the activity of concentrating, and as a substantial limitation on the activity of working. [Id.]

Eight days earlier, the District documented:

The 504 team proposed to continue to provide these accommodations because [Student] is using them and doing well.

* * * *

Ms. [D] shared that [Student] is doing very well in class and that she is proud of the role he is taking in his academics. Parent shared that she is also pleased and satisfied with the current accommodations, but as [Student] gets older, she wants to make sure his accommodations are still working for him.

The accommodations in place included preferential seating, a visual schedule, extended time for assignments, extended time for tests and quizzes, and frequent breaks to refocus. [Id. at 103].

⁵ The teacher is not identified by name. The general ed teacher on the plan is [Ms. D]. [Id. at 104]. It is not clear, however, whether this statement is attributed to her or whether it was made in a prior school year.

IV. Burden of Proof⁶

The parties agree that the District bears the burden of proof.

V. Issue Presented

Whether District has proven that Respondent is not entitled to an IEE at public expense.⁷

VI. Legal Standards

A. Evaluations at Public Expense

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

⁶ Courts are split on what party bears the burden of proof when an LEA files for due process after a parent disagrees with the LEA's evaluation. Compare *E.P. v. Howard Cty. Pub. Sch. Sys.*, Civil Action No. ELH-15-3725, 2017 U.S. Dist. LEXIS 133780, at *20 (D. Md. Aug. 21, 2017) (Parent bears burden) with *Cobb Cty. Sch. Dist. v. D.B.*, No. 1:14-CV-02794-RWS, 2015 U.S. Dist. LEXIS 129855, at *16 (N.D. Ga. Sep. 28, 2015) (LEA bears burden). There are competing arguments about why each party should bear the burden of proof. From a parent's perspective, an LEA should have to justify its decision and it controls the information on the issues in dispute. From the LEA's perspective, while LEA's are required to file for due process, it is a parent's disagreement and implied claim that the LEA's evaluation is deficient that gives rise to the matter, and the Party making such a claim should bear the burden. The Regulations make clear that parents are not under a burden to disprove the validity of an evaluation or even to explain their arguments prior to a hearing. 34 C.F.R. § 300.502(b)(4). This further suggests that it is not only the District's burden to file, but also to "defend the public evaluation," while the parent has no burden to even articulate an objection pre-hearing.

⁷ This is not a situation in which there are competing evaluations. Even in such a situation, however, the burden is not on an LEA to show that its evaluation is the best, but only whether the LEA's evaluation meets the requirements of the IDEA. *Cobb Cty. Sch. Dist.*, 2015 U.S. Dist. LEXIS 129855, at *24.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either -

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

34 C.F.R. § 300.502(a)-(b).

B. Evaluation Requirements of IDEA

Requirements for evaluations can be found in the IDEA [20 U.S.C. § 1414(b)], its Regulations [34 C.F.R. § 300.304], and the South Carolina Standards for Evaluation and Eligibility Determination (“SEED”) (9/23/11).

1. Statute

The IDEA provides:

(b) Evaluation procedures.

(2) Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

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

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

(3) Additional requirements. Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) Determination of eligibility and educational need. Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 602(3) [20 USCS § 1401(3)] and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination. In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 1208(3) of the Elementary and Secondary Education Act of 1965 [former 20 USCS § 6368(3)], as such section was in effect on the day before the date of enactment of the Every Student Succeeds Act [enacted Dec. 10, 2015]);

(B) lack of instruction in math; or

(C) limited English proficiency.

20 U.S.C. § 1414(b).

2. IDEA Regulations

The IDEA Regulations provide:

(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.

(c) Other evaluation procedures. Each public agency must ensure that

(1) Assessments and other evaluation materials used to assess a child under this part -

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is 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.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304.

Upon completion of the administration of assessments and other evaluation measures—

(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in §300.8, in accordance with paragraph (c) of this section and the educational needs of the child; and

(2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

Id. § 300.306(a).

3. SEED

The SEED requirements largely track the IDEA Regulations, explain the requirements for comprehensive evaluations and eligibility determinations, and they provide specific guidance for various disabilities, including Autism [*id.* at 212-15] and OHI [*id.* at 229-32].

VII. Discussion

Under the IDEA, if a student receives an evaluation with which the parent disagrees, the parent has a right to an independent evaluation at the public's expense unless the public evaluation is shown to be appropriate. 34 C.F.R. § 300.502(b). The IDEA requires that evaluations use a variety of assessment tools and strategies to gather information; not use any single measure in determining an appropriate educational program; use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as

physical and developmental factors; are conducted by trained and knowledgeable personnel; assess the child in all areas of suspected disability; and provide assessment tools and strategies that provide relevant information to assist persons in determining the child's educational needs. 20 U.S.C. § 1414(b).

H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 627 (E.D. Pa. 2012). There are “six typical sources of data: (1) general education curriculum progress; (2) general education interventions; (3) records review; (4) interviews; (5) observations; and (6) tests.”

A. District’s Compliance with SEED Requirements for autism evaluation

Based on input from the Respondent, there were two area of concern evaluated: Autism and ADHD, which is evaluated under the OHI standards. The Respondent raises no specific issues about the evaluation as to OHI/ADHD.⁸

⁸ Even if the Respondent does contest the evaluation finding the Student is not identified in the area of OHI, the Record again supports the District’s conclusion. The SEED provides, and the Record shows:

SEED Requirement	Evaluation Section
In the case of a child with ADHD, [whether] the student is rated within the highest level of significance on a valid and reliable problem behavior rating scale in areas related to the diagnosis of ADHD by both his classroom teacher and parent.	For concerns about ADHD, District administered Conners-3. [<i>Id.</i> at 150].
Documentation [as to whether] the student’s observable school and/or classroom problem behaviors related to ADHD are occurring at a	Five observations are documented in the various settings. [<i>Id.</i> at 154-55].

The Report is in two major sections. The first section [*id.* 116-33] is the planning document. It compiles background/historical information under “PREVIOUSLY REVIEWED INFORMATION.” The remaining pages [*id.* 134-57] contains the results of the evaluation, including the data compiled and results of assessments.

The SEED Requirements are stated in a slightly different context than how they were used by the District here. This caused some confusion at the hearing. The SEED requirements set forth what must be part of any evaluation that identifies a child as having Autism. This is evident from such entries as Requirement 10 and the statement in requirement number 1 that “[t]he documentation **must show** evidence of impairments,” both of which assumes it exists. (Emphasis added). The District used the various “requirements” as a checklist of the tests that should be conducted to determine whether the Student is identified as a child with Autism for educational purposes. The following list edits the ambiguous language in Seed as

significantly different rate, intensity, or duration than the substantial majority of typical school peers.	
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As noted above, District convened a group of “qualified professionals” after the assessments were completed to make the determination in accordance with 34 C.F.R. § 300.6(a).

to put the language in the context of evaluation, and not as to what documentation is necessary to support a finding.

A determination of Autism requires findings that a child exhibits “all three [of the following] characteristics: 1) Impairments in social interaction . . . ; 2) Restricted, repetitive, and stereotyped patterns of behavior, interest, and actions . . . ; and 3) Impairments in communication.”

The following side-by-side reviews compares the SEED requirements with the provision(s) of the Evaluation Report that contain such information:

	SEED Requirement	Evaluation Section
1	“A social and developmental history that includes family background, information on communication, social interaction, play, sensory development, and physical milestones. The documentation must [address any] evidence of impairments in social interaction and restricted, repetitive, and stereotyped patterns of behavior that are significantly different from peers’. . .”	See D1 at 116-17 includes medical and developmental history and background from Respondent.
2	“A diagnostic interview(s) with parent/teachers [regarding any possible] impairments in social interaction, restricted, repetitive, and stereotyped patterns of behavior, and communication that	Discussions with Respondent about social interactions and behaviors are documented in D1, at 116-17; <i>id.</i> at 125 (under Cognitive Processing); <i>id.</i> at 127 (Math); <i>id.</i> at 128 (Writing), <i>id.</i> at 129 (Communication and Adaptive

	SEED Requirement	Evaluation Section
	are significantly different from peers;”	Behavior); <i>id.</i> at 130 (Fine Motor and Sensory); <i>id.</i> at 131 (Social/Emotional/Behavioral); <i>id.</i> at 144 (ABAS-3). Further, District considered Respondent’s prior input in the Conners-3 and BASC-2 assessment done along with the two prior assessments. [<i>id.</i> at 131-32]
3	“A minimum of three thirty-minute direct behavioral observations of the student in at least two environments on two different days by more than one member of the multidisciplinary evaluation team. Observations shall be completed during both structured and unstructured activities. Observations may take place in such settings as the classroom, home, recess, lunch, related arts, small group, large group, and social skills training. The documentation must [address whether there is] evidence of impairments in social interaction, restricted, repetitive, and stereotyped patterns of behavior, and communication that are significantly different from peers.”	Five observations by three people are documented in the various settings. [<i>id.</i> at 154-55].
4	“A standardized instrument designed to measure autistic behavior and characteristics that is administered and interpreted in	For Autism Disorder, District conducted evaluations by licensed school psychologists using Autism Spectrum Rating Scales (ASRS) and

	SEED Requirement	Evaluation Section
	consultation with a professional with experience with autism. The documentation must [address any] evidence of impairments in social interaction, restricted, repetitive, and stereotyped patterns of behavior, and communication that are significantly different from peers'. The consulting professional must be an appropriately certified or highly qualified teacher, a certified school psychologist, licensed psychoeducational specialist, or a licensed psychologist with training in autism."	Childhood Autism Rating Scale – 2 (CARS-2). [<i>Id.</i> at 150-51].
5	"A standardized adaptive behavior scale containing information provided by the parent/caregiver and teachers of the child. The documentation must [address any] evidence that the student's communication and social skills are significantly different from peers'."	District used Adaptive Behavior Scales (ABAS-3). Documentation shows that Respondent's input was solicited and included. [DE 1 at 144].
6	"A current communication evaluation conducted by a speech-language therapist/pathologist. This evaluation should include assessment in the areas of receptive, expressive, pragmatic, and social/functional communication skills. The	District included an evaluation from a certified speech pathologist, as well as a an informal CELF-5 rating from Ms. [D]. [<i>Id.</i> at 139-43]

	SEED Requirement	Evaluation Section
	documentation must [address any] evidence that the student's communication skills are significantly different from peers;"	
7	"A developmental or cognitive assessment that includes both verbal and non-verbal components completed by a certified school psychologist, licensed psychoeducational specialist, or a licensed psychologist with training in autism."	District conducted a Wechsler Intelligence Scale (WISC-V) evaluation by a separate school psychologist than the lead psychologist for the evaluation. [<i>Id.</i> at 134-36].
8	"A measure(s) of academic achievement that provides evidence that the student's disability adversely impacts his/her educational performance. This measure may include standardized achievement measures such as norm-referenced assessments as well as curriculum based measures."	District conducted the Wechsler Individual Achievement Test (WIAT-4). [<i>Id.</i> at 137-38].
9	"Other areas which may yield evidence, but are not required , ⁹ include sensory processing measures, curriculum-based measures, and standardized	

⁹ This is another ambiguity in the SEED. The preface of the list is "The following are required." In paragraph 9, however, the areas of information included "are not required."

	SEED Requirement	Evaluation Section
	achievement measures.” (emphasis added)	
10	“Evidence that the Autistic Disorder has an adverse [e]ffect on the student’s education performance. There must be evidence to link the student’s disability to the difficulties in educational performance.”	District did not include such information because it concluded that Student does not qualify for identification of autism disorder.

Further, the District convened a group of “qualified professionals” after the assessments were completed to make the determination in accordance with 34 C.F.R. § 300.6(a).

4. Respondent’s perceived conflict between Report and 504 proceedings

The Respondent contends there is a contradiction between the Student’s teachers supporting a 504 Plan in the Fall and then claiming that Student “did not have **any** adverse or concerning behaviors” in the Report. [Resp. Br. at 5]. This is a difficult argument to assess. There was very little mention made of this at the hearing of the Section 504 records beyond teacher’s comment that the statements surprised her. In the briefs, the Respondent devotes one sentence to the assertion [Resp. Br. at 5] and the District devotes a single paragraph [Dist. Br. at 11]. Further, the Section 504 records discuss OHI and ADHD while the Respondent does not appear to make any specific challenge

here as to the Report's conclusions about OHI.

While the District is right that a finding under Section 504 is not a form of collateral estoppel or *res judicata*, the facts in those records and assertions of educators as to levels of impairment could be relevant. Although the Section 504 documents raise interesting questions, very little was said about them at the hearing. Without more information or evidence about the information presented to the Section 504 team, it is not possible to find that the statements made undercut the results of the evaluation.

5. Respondent's specific challenges as to SEED requirements

Of the above requirements, the Respondent challenges the second, third, and eighth. [Respondent Brief at 6].

a. Second requirement: Diagnostic interview

The Respondent characterizes the input she provided as "a few brief interactions and phone calls . . . some of which were solely about complaints Respondent had" [Resp. Br. at 6]. A review of the Report, however, undercuts that argument. As noted above, the District obtained information not only about the Respondent's concerns, but also about the medical and social history of Student obtained in 2018. Also as noted above, the Respondent's documented input under Cognitive Processing [D1 at 125],

Communication [*id.* at 129], Sensory [*id.* at 130], and Social/Emotional Behavioral [*id.* 131]. This parental input addresses the very behaviors and issues that are referenced in the second paragraph of the SEED requirements. They cannot be fairly characterized as the product of a “few brief interactions.”

There also was no credible evidence that the Respondent sought to provide information that the District did not consider. Rather, it was the District that sought information to which the Respondent did not respond for reasons that are unclear, at best. Although the Respondent testified that, on calls, the District would cut her off and not let her speak, I did not find this testimony to be credible. Based on my observation of the demeanor of the witnesses, the District personnel were sincere, dedicated, and diligent in carrying out their responsibilities.

b. Third requirement: Three, thirty-minute observations

Although the Respondent recognizes the District completed five, and not merely three, observations, she argues that there is no documentation that each were thirty minutes long. [Resp. Br. 6-7]. Nor is there anything in the Record to show the Respondent questioned this. It makes no sense that the same evaluators that exceeded the requirement for the number of observations would then perform perfunctory observations. Although one of the observers (Philbrick) did not testify, Rhinehart and Dodds both testified

at length. Rhinehart's testimony and demeanor do not support the notion that she was simply going through the motions.¹⁰ Dodds, who is Rhinehart's mentor, participated in the evaluation, and she reviewed the information before the planning meeting.

c. Eighth requirement: A measure of academic achievement

Respondent points to the lack of December 2021 iReady scores and MTSS data, such as the progress monitoring records. [Resp. Br. at 7-9]. The Respondent mixes two issues: The inclusion of information in the Report, and whether the information was considered. The distinction is important. Whether specific information is in the Report is more of a procedural matter. Whether the District ignored the information is far more substantive. While it is certainly fair to argue that the failure to include the information in the report suggests a failure to consider it, the evidence here does not support such a conclusion.

The August iReady scores were discussed and are included in the Report. The December 9th (Math) and 14th (Reading) scores were not included

¹⁰ Rhinehart came across as serious and dedicated. Rhinehart did not flinch in the face of a rigorous cross-examination of her evaluation and documentation. At no point did she become defensive or make excuses. Where, for example, a particular fact was not documented, she simply acknowledged it. Further, her description of the Student and of her interactions with him show that she cared about the function she was performing and took it seriously.

in the Report. The Student's teacher testified, however, that she did not believe these scores reflected the Student's performance, which is corroborated by the F&P scores and the assessments administered during the evaluation.

As to the failure to consider all MTSS and SIT information, the District met its burden of showing academic achievement information was considered, even if not all of it is cited in the Report. The contents of the MTSS/SIT file, including the progress monitoring notes, were not included in full in the background/history portion of the Evaluation Report. Such information, however, was within the personal knowledge of the participants to the evaluation meeting. Further, I credit the testimony that the information was considered. Likewise, the District's argument that such information falls within paragraph 9, which states that referenced data "are not required" has some validity. Finally, even if I concluded that the District somehow disregarded such information, I fail to understand how that would have led to a different result. Much of the information, such as the latest grades, was presented at the hearing. On balance, however, it does not suggest a conclusion that the Report is erroneous. Thus, while the documentation could have been fuller, there are no apparent material or substantive deficiencies that would support a finding that District has not met its burden of proof.

6. Failure to evaluate for SLD

In her post-hearing Brief, the Respondent raises an argument not pressed at hearing or that is documented in the evaluation referral. The Respondent now asserts that Student should have been evaluated for SLD. [Resp. Br. at 9-11]. The IDEA requires that “the child is assessed in all areas of suspected disability.” 20 U.S.C. § 1414(b)(3)(B). Here, there is nothing in the Record stating the Student was suspected of having a specific learning disability.

The evaluation meeting PWN – Eligibility Document states, “[t]he team considered reviewing all 13 categories but proposed that Autism and Other Health Impairment were the most appropriate to consider.” The only documented dissent from the Respondent was her concern that the evaluation was not in a one-on-one setting. [*Id.*]¹¹

The Respondent’s new argument also rests on a faulty premise. Parent essentially contends that the data should have driven District to keep looking for a disability to explain the Student’s poor performance. [Resp. Br. at 10-11]. But District

¹¹ District contends that Rhinehart testified that she considered this issue during the evaluation. [Dist. Br. at 8]. Dodds testified that they looked past the two areas on suspected disability to see if anything else needed to be done. Although District’s recollection of Rhinehart’s testimony may be correct, I make no finding about that because that testimony is not reflected in my notes.

did not find such poor performance. And most of the issues reported by Respondent are behavioral. While those behaviors often attend conditions such as autism, they were not observed at a concerning level in the educational setting, and the achievement tests and teacher feedback do not support the notion that they affect educational performance.

Again, the conclusions reached by District parallel the comments made in both 2018 and in 2020. In the 2018 evaluation report, District documented that both Parent's and school evaluators noted issues with maintaining attention and with impulse control, but that "[r]esults of rating scales indicate that [Student] does not consistently exhibit behaviors that are indicative of an Autism Spectrum Disorder in the school setting." In 2020, District expanded on the dichotomy between its observations and those of Parent:

Additional data also were collected to address [Student]'s behavioral needs. Rating scales related to behaviors characteristic of ADHD document Very Elevated scores on parent/home ratings with an Average rating documented on school/teacher ratings. Based on this, it appears that behaviors exist to a higher level of intensity, duration, and frequency . . . in the home setting only. That is, school ratings describe [Student]'s behaviors as similar to other children his same age. Observations of [Student] in the classroom, depicted an academically engaged student who participated in discussion and provided correct responses.

It also is difficult to imagine that the classroom teachers could teach on any given day if Student was exhibiting the degree of distracting behaviors Parent represents as a constant. There is no conceivable reason why teachers would advocate doing nothing more if such behaviors were present.

I credit the testimony of the social studies and ELA teacher who stated the Student's progress led to a discussion on whether to end Level II MTSS supports. The teacher stated the group decided to maintain the supports, given the Student's absenteeism. It is hard to reconcile this level of caution with the idea that the District was dismissive in looking for issues that could lead to better educational results if the District believed that the Student was not achieving at documented levels.

Likewise, the Respondent's argument that the Report is "confusing, conflicting, or incomplete," is not accurate. [Resp. Br. at 11]. The Report's contents are understandable and consistent. As discussed above, more discussion of the progress monitoring information would have been preferable, but its absence does not create any conflict.

I also consider the fact that the evaluation data is not self-validating. For example, the Student's teacher provided the F&P score, which gives a result consistent with the WIAT-4 results documented by Rhinehart. [D1 at 126, 137]. In terms of behavior and attention, two different school psychologists and an occupational

therapist all documented the same observations. [*Id.* at 154-55]. One of these psychologists (Dodd) reviewed the process at the tie to ensure that Rhinehart included the necessary information.

Granted, there is tension between the assessments and teacher opinions on the one hand and the results of the iReady scores and some test scores on the other hand. Diverging data points are not uncommon, especially at Student's age.¹² Had the District not discussed the "why," Respondent's point would be stronger. But the District documented and discussed the iReady scores, including the weight they should be afforded, and the same teachers who administered the classroom tests provided feedback during the evaluation process and final meeting.¹³

Moreover, it again bears noting that this is the third educational evaluation in a row, conducted by different personnel, that reaches the same conclusion.

¹² Third grade is a challenging transition year for all students. As Dr. Drake noted, for example, students must adjust to multiple classroom teachers.

¹³ The District reasonably contends that the test at the beginning of the year is of less importance because it tests on matters not yet covered. As to the December test, we know also that the Student probably did not give his best effort on this automated test from the way he finished it the first time. The Student also did not perform well on certain tests.

A final caveat: By addressing the Respondent's arguments, I am not suggesting that the Respondent either must prove anything, or that the Respondent must forecast evidence here that another evaluation will lead to a finding of Autism, OHI, or any other disability including SLD. The only issue here is the validity of the District's evaluation. If there was a material issue with the District's evaluation or Report, the result would be an IEE (that may or may not lead to a different conclusion). In other words, nothing in this Order should be read as requiring that the Respondent must prove that a hypothetical IEE would yield different conclusions. The District bore the burden here, and it carried that burden.

VIII. Conclusion

For these reasons, I find the District has proven that its educational evaluation of Student in December 2021 was both properly done and that it reached the correct conclusion.

IX. Notice to Parties of appeal rights

Any party may appeal this ruling. A party seeking to appeal this ruling must do so in **writing and within ten (10) days of** receipt of this Order. The written appeal must be addressed to:

The South Carolina Department of Education
Office of General Counsel
1429 Senate Street
Rutledge Building
Columbia, SC 29201

The parties should note that the Undersigned will not accept, read, or consider any further argument about the merits on this matter unless it is remanded to him by the SRO or the District Court. No email, letter, or other written communication will be construed or considered as either a Motion to Reconsider or as a Motion to Alter or amend this Order. Further, no such communication may toll or extend the time limit set forth above for filing an appeal.



Brian P. Murphy
Local Due Process Hearing Officer

Dated April 15, 2022

Greenville, South Carolina