

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Orange Board of Education vs. Student

Appearing on behalf of the Parent: Lawrence Berliner, Esq.
Law Office of Lawrence Berliner, LLC
1720 Post Road East, #214
Westport, CT 06680

Appearing on behalf of the Board: Eric Barba, Esq.
Berchem Moses, P.C.
75 Broad Street
Milford, CT 06460

Appearing before: Patrick L. Kennedy, Esq.

Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Was the District's psychoeducational evaluation appropriate?
2. If not, are the Parents entitled to a psychological independent educational evaluation ("IEE") at public expense?
3. Is the speech and language evaluation appropriate?
4. If not, are the Parents entitled to an independent speech and language evaluation at public expense?
5. Is the District barred from defending its evaluation due to violation of Connecticut Department of Education guidelines?

PROCEDURAL HISTORY:

Case 19-0536 was commenced by the District on May 22, 2019. A prehearing conference was held on May 31, 2019. At the prehearing conference, a hearing date was set for August 2, 2019 and the decision date was determined to be July 5, 2019.

Hearings were held on August 2, 2019; August 22, 2019 and September 17, 2019. Following the hearing, the parties submitted briefs on October 16, 2019. The decision date was extended to August 5, 2019; September 4, 2019; October 4, 2019; November 1, 2019 and December 2, 2019.

Issues 3 and 4 were withdrawn by the Parents prior to the start of the hearing. On August 17, 2019, the undersigned granted the District's motion to dismiss Issue 5 and denied the Parents' motion to dismiss the action. Accordingly, the sole issues for determination are Issues 1 and 2.

The following witness testified on behalf of the District: Dr. Thomas Fahy, evaluator for District

The following witnesses testified on behalf of the Parents: Dr. Robert Kruger, Parents' expert and Mother of Student

Hearing Officer HO-1 was entered as a full exhibit.

Board Exhibits B-1 through B-79 were entered as full exhibits.

Parent Exhibits P-1 through P-7 were entered as full exhibits.

All motions and objections not previously ruled upon, if any, are hereby overruled.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law set forth herein, which reference certain exhibits and witness testimony, and are not meant to exclude other supported evidence in the record. All evidence presented was considered in deciding this matter. To the extent that the summary, procedural history and findings of fact actually represent conclusions of law, they should be so considered and vice versa. *SAS Institute Inc. v. S&H Computer Systems, Inc.*, 605 F.Supp. 816 (M.D.Tenn. 1985); *Bonnie Ann F. v. Calallen Independent School Board*, 835 F.Supp. 340 (S.D. Tex. 1993).

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes (C.G.S.) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedure Act (U.A.P.A.), C.G.S. §§4-176e to 4-178, inclusive, §§4-181a and 4-186.

FINDINGS OF FACT:

After considering all the evidence submitted by the Parties, including documentary evidence and testimony of witnesses, I find the following facts:

1. The Student, whose date of birth is August 26, 2010, is a fourth-grade Student in the District who resides with his Parents within the District. (B-78.)
2. The Student is identified as eligible for special education services with a primary disability of Other Health Impairment—Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (“OHI—ADD/ADHD”). (B-78.)
3. On November 20, 2017, the District requested a Child Study Team (“CST”) meeting based on concerns of “On task behavior/work completion” and “Behavior—emotional/social situations impacting performance.” (B-5.)
4. On December 5, at the CST meeting, the classroom teacher reported “disruptive unpredictable behaviors that interfere with instruction” while the Parents reported “Seeing the same behaviors at home.” (B-8.)
5. Prior to the Student’s determination of eligibility for special education services, he was provided with Tier III behavioral interventions. (B-15, B-29, B-30, B-43.)
6. On April 5, 2018, a Planning and Placement Team (“PPT”) meeting was convened concerning the Student’s potential eligibility for special education services, which recommended an initial evaluation by a multidisciplinary team. (B-25.) The Parents did not sign the consent form at that time. (B-25, B-26.)
7. On February 7, 2019, the Student was again referred for a PPT meeting to determine eligibility for special education based on “behaviors [which] can be explosive and aggressive.” (B-48.)
8. On the basis of the referral, the PPT meeting was held on February 14, 2019. (B-50.) The Parents participated by telephone. (B-52.) Dr. Thomas Fahy, who conducted the evaluation, participated in the PPT. (B-52.) Dr. Fahy had not been listed in the notice of PPT meeting. (B-50.) The recommendation of the PPT was to conduct an initial evaluation. (B-52.)
9. The Parents signed a consent form which included assessments in the areas of behavior; language; reading, writing and math and cognitive/behavioral/adaptive/[illegible]/questionnaires/ASD” as well as a social/developmental history. (B-53.) The illegible portion was ADHD EF (executive functioning). (Testimony of Fahy, 8/22/19.)
10. The test/evaluation procedures included in the “cognitive/behavioral/adaptive/[illegible]/questionnaires/ASD” portion of the consent form were “SRS-2/ADOS/WISCV/Connors/Brief/BASC” and the evaluation was to be conducted by a “psychologist”. (B-53.)
11. In addition to the psychoeducational evaluation which is at issue in the instant case, the District conducted a social and developmental history, an educational evaluation and a speech and language evaluation. (B-56, B-62, B-64.) The

- parental interview contained in the social and developmental history was summarized in the “background information” section of the psychoeducational evaluation. (B-57.)
12. The evaluation was conducted by Dr. Thomas Fahy, who is a clinical psychologist who has been licensed as a psychologist since 2005 in the state of Connecticut. Dr. Fahy serves or has served as a psychological consultant to the Hamden Hall Country Day School, the Early Learning Center at Gateway Community College and The Country School in addition to the District. Dr. Fahy maintains a private practice in addition to serving as a professor at Gateway Community College. Dr. Fahy earned a Ph.D. in Clinical Psychology, Masters in Clinical Psychology and Child Development and a Bachelors in Child Development. (B-79.)
 13. Dr. Fahy administered the Autism Diagnostic Observation Schedule—2nd Edition (ADOS-2), Behavioral Assessment System for Children—3rd Edition (BASC-3), Childhood Autism Rating Scales—2nd Edition (CARS-2), Connor’s 3rd Edition, Social Responsiveness Scale—2nd Edition (SRS-2) and Wechsler Intelligence Scale for Children—5th Edition (WISC-V). (B-57.)
 14. Dr. Fahy did not administer the BRIEF and the Vineland tests. (Testimony of Fahy, 8/22/19).
 15. The BRIEF is redundant to the Connors as both basically obtain the same information. (Testimony of Fahy, 8/22/19; Testimony of Kruger, 8/22/19.)
 16. The Vineland, although not redundant to the ADOS-2 and CARS-2, does cover material similar to those evaluations. (Testimony of Fahy, 8/22/19; Testimony of Kruger, 8/22/19.)
 17. It is undesirable for parents and teachers to fill out more forms or answer more questions than they need to. (Testimony of Fahy, 8/22/19; Testimony of Kruger, 8/22/19.)
 18. Dr. Fahy reviewed educational records of the Student and conducted two observations at his school. (B-57; Testimony of Fahy, 8/2/19.)
 19. The WISC-V is a cognitive assessment which gives scores based on a child’s performance in verbal communication, visual spatial knowledge, fluid reasoning skills, working memory and processing speed skills. The assessment obtains a baseline of a child’s cognitive functioning, awareness of what is expected of him in different settings and performance on tasks, including performance under timed conditions. (Testimony of Fahy, 8/2/19.)
 20. The WISC-V indicated that the Student had a Full Scale Intelligence Score (FSIQ) in the Extremely High range and a General Ability Index (GAI) which was exceptional for his age. The Student’s scores were in the 99th percentile for verbal comprehension, visual spatial ability and fluid reasoning. The Student

- performed in an average range on working memory and processing speed. (B-57; Testimony of Fahy, 8/2/19.)
21. The ADOS-2 is a semi-structured task assessment measure that examines different aspects of behavior associated with autism, including communications skills, social functioning skills and stereotypical behaviors that are associated with a diagnosis of autism. (Testimony of Fahy, 8/2/19.)
 22. The ADOS-2 involved the use of toys, pictures and books to enable conversation and interaction between the evaluator and the student. (B-57; Testimony of Fahy, 8/2/19.)
 23. The Student scored a 5 on the ADOS-2 which was below the threshold for a diagnosis of autism. (B-57; Testimony of Fahy, 8/2/19.)
 24. The CARS-2 is a rating scale that looks at behaviors that are often associated with autistic mannerisms and differentiates between various degrees of autism. (B-57; Testimony of Fahy, 8/2/19.)
 25. The CARS-2 is completed by the examiner based upon his work with the child. (Testimony of Fahy, 8/2/19.)
 26. The Student's score on the CARS-2 was 19, which fell below the cutoff score for a diagnosis of autism; however, the examiner did observe difficulty relating to people and limited social skills. (B-57; Testimony of Fahy, 8/2/19.)
 27. The SRS-2 is a questionnaire administered to parents and teachers that examines social awareness, social cognition, social communication, social motivation and autistic mannerisms. (B-57; Testimony of Fahy, 8/2/19.)
 28. The SRS-2 was completed by the Student's regular education teacher and his Mother. The teacher completing the questionnaire had been able to observe the Student for nearly a year at the time of the evaluation. The Parent and teacher both indicated areas of concern (based on scores of 60 or higher) in social communication, social motivation, autistic mannerisms and overall; the Parent also indicated an area of concern in social awareness. (B-57; Testimony of Fahy, 8/2/19.)
 29. The Conners-3 is a standardized measure that assesses for ADHD and related disorders which is also based on a questionnaire administered to parents and teachers. (B-57; Testimony of Fahy, 8/2/19.)
 30. The Conners-3 was also completed by the Student's regular education teacher and his Mother. Both the Parent and teacher indicated areas of concern (again based on scores of 60 or higher) for inattention, hyperactivity/impulsivity, defiance, executive functioning, peer relations, ADHD global index, DSM/ADHD hyper/impulsive, DSM/conduct disorder (CD) and DSM/oppositional defiant

- disorder (ODD); the teacher also indicated an area of concern for DSM/ADHD inattentive. (B-57; Testimony of Fahy, 8/2/19.)
31. All the scores indicated that the Student was engaging in behaviors inconsistent with a child his age in that he had poor behavioral control, was impulsive and disruptive and struggled to develop and maintain meaningful relationships with peers. (B-57; Testimony of Fahy, 8/2/19.)
 32. The BASC-3 is a parent and teacher questionnaire that examines a range of behaviors including anxiety, depression, autism, attention behaviors and social skills. (Testimony of Fahy, 8/2/19.)
 33. Based on scores of either 60 or more or 40 or less, both the Parent and the teacher had concerns about the Student in the areas of aggression and social skills. (B-57; Testimony of Fahy, 8/2/19.)
 34. The teacher further had concerns about anger control, emotional self-control, depression, hyperactivity, executive functioning, adaptability, emotional communication, externalizing problems, adaptive skills and the overall behavioral index which were not shared by the Parent. (B-57, Testimony of Fahy, 8/2/19.)
 35. The assessments were used for the purposes for which they are valid and reliable. (Testimony of Fahy, 8/2/19.)
 36. The assessments were administered in accordance with the instructions provided by the producers of the assessments. (Testimony of Fahy, 8/2/19.)
 37. The evaluator concluded that the results of the evaluation indicated diagnoses of Disruptive Mood Dysregulation Disorder (“DMDD”) and ADHD (Combined Type). (B-57.)
 38. The evaluator further proposed three family interventions and six educational interventions for the Student. (B-57.)
 39. The criticisms of the evaluation made by Parents’ expert were that the evaluator did not meet with the Parents, did not have a home visit with the Student and did not observe the Student in different settings; that the Vineland, which was not done, would have been useful to administer and that he questioned the diagnosis of DMDD and the ruling out of autism, as the Student was not that far below the autism cutoff. (Testimony of Kroger, 8/22/19.)
 40. After the completion of the evaluation, Dr. Fahy and the Mother had a telephone conversation in which the evaluator discussed his findings and the Mother expressed her disagreement with the diagnostic impressions and recommendations contained therein. (Testimony of Mother, 9/17/19.)
 41. Subsequent to that discussion, a PPT was held on March 27, 2019. Attendees included the Parents, Dr. Fahy and an educational advocate for the Parents. At

that meeting, the advocate, on behalf of the Parents, expressed disagreement with the evaluation and requested an IEE at public expense. The District did not consent to the request and the advocate withdrew the IEE request. (B-61; Testimony of Mother, 9/17/19.)

42. Subsequent to the PPT, the Parents renewed their IEE request. (Testimony of Mother, 9/17/19.)

CONCLUSIONS OF LAW AND DISCUSSION:

1. Was the District’s psychoeducational evaluation appropriate?

34 CFR §300.304(b) provides

Conduct of evaluation. In conducting the evaluation, the public agency must—

- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
 - (i) Whether the child is a child with a disability under §300.8; and
 - (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
- (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
- (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 CFR §300.304(c) provides,

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 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 the child's special education and related service 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.

Applying these standards, the undersigned finds that the psychoeducational evaluation was appropriate. The evaluator used a variety of assessment tools. (Finding of Fact 13.) The evaluator did not use any single measure or assessment as the sole criterion for determining whether the Student had a disability and for determining an appropriate program. (Findings of Fact 11, 13 and 18-34.) The evaluator used technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (Findings of Fact 19, 21, 24, 27, 29 and 32.) The assessments were used for the purposes for which they were valid and reliable. (Finding of Fact 35.) The individual administering the assessments was trained and knowledgeable. (Finding of Fact 12.) The assessments were administered in accordance with the instructions provided by the producer of the assessments. (Finding of Fact 36.) The evaluator used a variety of assessment tools and strategies to gather relevant information about the Student, including information provided by the Parents. (Findings of Fact 11, 28, 30 and 32.)

The primary substantive criticisms of the evaluation itself were that the evaluator did not observe the Student in different settings, did not undertake a home visit, did not interview the Parents and did not administer the Vineland, which Parents' expert considered superior to the assessments that the evaluator used. (Finding of Fact 39.) However, the issue is not whether the methodology of the Parents' expert is preferable, but whether the District's methodology is appropriate. 34 CFR §300.502. As noted above, the evaluator did obtain the information which Parents' expert thought necessary—including substantial parental input—but not in the manner that Parents' expert thought preferable.

The expert also disagreed with the diagnosis and recommendations of the evaluator. However, the ultimate authority on the disability that a child is classified with and the program he receives is the PPT, not the evaluator. Conn. State. Regs. §10-76d-10; *E.P. By & Through J.P. vs. Howard County Public School System*, 2017 WL 3608180, 21 (D.Md.8/21/17). Accordingly, such criticisms have no bearing on the appropriateness of the evaluation.

The Parents also raised the procedural issue that the evaluator did not conduct all assessments for which the Parents gave consent. However, the listing of potential assessments was contained in a consent form, not an IEP. (Findings of Fact 8-11.) It should first be noted that there is no regulation requiring that the district do all evaluations for which consent has been obtained, only that consent must be obtained to perform an evaluation. 34 CFR §300.300; Conn. State Regs. §10-76d-8. Both experts believed that the BRIEF and the Connors assessments were "redundant". (Finding of Fact 15.) Both experts believed there was at least some overlap between the material covered by the Vineland and that covered by the ADOS-2 and CARS-2; from the testimony of Parents' expert, it was not clear that he believed that all three needed to be done, but only that the Vineland was a superior measure to the two used. (Findings of Fact 16 and 39.) Both experts testified that it was undesirable for parents and teachers to fill out more questionnaires than they needed to. (Finding of Fact 17.) Therefore, the purpose of the consent form is clearly to obtain consent for those assessments which

might be done, leaving it to the evaluator to choose which ones to actually use and which to eliminate as unnecessary and duplicative. Accordingly, there was no procedural violation in the evaluator's failure to perform each evaluation to which the Parents gave consent.

2. If not, are the Parents entitled to a psychological independent educational evaluation at public expense?

In light of the conclusion reached on the first issue, the Parents are not entitled to a independent evaluation at public expense.

FINAL DECISION AND ORDER:

The undersigned finds that the District's psychoeducational evaluation was appropriate and therefore that the Parents are not entitled to an independent evaluation at public expense.