



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-004

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Vestal Central School District

Appearances:

Gellen Law PLLC, attorneys for petitioner, by Andrea L. Gellen, Esq.

Ferrara, Fiorenza, P.C., attorneys for respondent, by Wendy K. DeWind, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of an independent educational evaluation (IEE).¹ The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

¹ Petitioner in this matter is the student's legal guardian; therefore, consistent with State regulation the petitioner will be referred to as the "parent" throughout this decision (*see* Tr. pp. 282-88; *see also* 8 NYCRR 200.1[iii][1]).

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail here. Briefly, the CSE convened on May 26, 2022, determined that the student was eligible for special education as a student with an other health-impairment, and formulated an IEP to be implemented beginning June

8, 2022 (see generally Dist. Ex. 30).² By prior written notice dated July 8, 2022, respondent (the district) informed the parent of its obligation to conduct an evaluation of the student "at least once every three years," proposed to conduct a reevaluation of the student, and stated the intent to conduct evaluations in the form of an individual psychological evaluation, an educational evaluation, a social/emotional assessment, and a physical evaluation (Dist. Ex. 32). Also on July 8, 2022, the district requested consent from the parent to conduct the evaluations, which the parent granted on October 8, 2022, and the district conducted a social history with the parent on that day (Dist. Exs. 33; 34).

In a January 3, 2023 prior written notice, the district informed the parent that the CSE proposed to conduct a functional behavioral assessment (FBA) of the student (Dist. Ex. 39; see Parent Ex. 41). By email dated January 15, 2023, the parent made a written request for an IEE in the form of a "comprehensive evaluation" at district expense and informed the district of her disagreement with the results of the "most recent evaluation" completed "Sept/Oct 2019" because it failed to provide the student with a comprehensive evaluation in all suspected areas of disability (Dist. Ex. 42). The parent further noted that the student's "triennial testing . . . was due last fall" but had not yet occurred (id.). In January and February 2023, the district conducted a psychological evaluation of the student (Dist. Ex. 45). On February 5, 2023, the district developed a behavioral intervention plan (BIP) for the student (Dist. Ex. 46). The CSE convened on February 7, 2023, to review the reevaluation results and conduct the student's annual review (see generally Dist. Ex. 47). In a letter dated March 20, 2023, counsel for the parent indicated that the district had already granted the parent's request for an IEE; however, the counsel for the parent disputed the district's policy of a "cap" for the cost of the requested IEE, and informed the district that the parent had scheduled the student for a neuropsychological evaluation with the Yellin Center for the Mind, Brain and Education (Yellin Center) at a specified cost plus travel expenses (Dist. Ex. 61). Over several dates in March and early April 2023, the Yellin Center conducted a comprehensive neurodevelopmental evaluation of the student and developed an undated report (Dist. Ex. 51).

The district filed a due process complaint notice dated April 12, 2023, to seek an order denying the parent's request for an IEE and related travel expenses, as well as an order that the district conducted sufficient evaluations of the student (Dist. Ex. 63 at p. 4). According to the due process complaint notice, the district had an IEE policy limiting the amount to be paid for an evaluation and specifying that evaluations had to be conducted within the county where the student resided or an adjoining county (id. at p. 3). The district asserted that the requested cost for the Yellin Center evaluation exceeded the amount authorized by its IEE policy and took place outside the authorized geographic location (id.). The district further advised that its Board of Education had approved the "denial of the [parent's] evaluation and travel expenses" and the initiation of the district's request for due process (id.).

An impartial hearing convened on September 8, 2023 and concluded on October 6, 2023 after four days of proceedings (Tr. pp. 1-406). In a decision dated November 29, 2023, the IHO determined that the district's 2019 and 2023 evaluations of the student were both comprehensive

² The student's eligibility for special education services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[a][9]; 8NYCRR 200.1[zz][10]).

and appropriate (IHO Decision at pp. 17, 22). The IHO determined that the parent was not entitled to reimbursement for the IEE and denied her request for relief (id. at p. 22).³

IV. Appeal for State-Level Review

The main issue presented on appeal is whether the IHO erred in finding that the parent was not entitled to an IEE at public expense. Additionally, the parent contends that she should not be bound by the district's geographic and monetary cap for the IEE and requests an order for attorneys' fees.⁴

V. Applicable Standards

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).⁵

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain

³ Although the IHO's order upheld the district's denial of reimbursement for the cost of an IEE, in the final paragraphs of the decision, the IHO expressed her "opinion that the following should occur": (1) the district should redevelop a BIP for the student to include more frequent positive rewards; (2) the district should provide instruction in phonics, decoding and math facts as part of the student's resource room services; (3) the district should review and update its list of private evaluators to ensure that it is a current list; and (4) the parent should find incentives to the student to complete work at home (IHO Decision at p. 22).

⁴ The IDEA does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party, and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; see, e.g., Ivanlee J. v. Wilson Area Sch. Dist., 1997 WL 164272, at *1 [E.D.Pa. 1997] [noting that administrative hearing officers may not award attorney's fees under the fee shifting provisions of the IDEA]. Thus, the parents request for legal fees is premature until the administrative proceeding is complete.

⁵ Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

On appeal, the parent avers that she is entitled to an IEE at public expense because the district failed to conduct a comprehensive evaluation that evaluated the student in all suspected areas of disability. The parent argues that the IHO failed to analyze the district's evaluations for comprehensiveness to determine if the district evaluated the student in all areas of suspected disability, and she alleges that instead of deciding the issues presented, the IHO merely listed the evaluations conducted by the district, considered the accuracy of some of the evaluators' findings, including the private neurodevelopmental evaluators' diagnosis of dyslexia, and discussed whether the student should be classified as a student with a learning disability or other health impairment. There is no allegation on appeal that the district failed to, "without unnecessary delay," initiate the impartial hearing to establish that its evaluation was appropriate. Further, the district does not contend that the parent's disagreement with the district's evaluations was "rendered irrelevant" by a subsequent evaluation. Accordingly, the focus of this appeal is on determining whether the IHO erred in finding the district's evaluations of the student were comprehensive.

To this point, the parent raises four issues on appeal as identified in the parent's memorandum of law summarizing the arguments presented to the IHO during the hearing. Specifically, the parent asserts:

- 1) the testing itself acknowledges that it is insufficient to determine whether [the student's] deficits are the result of a learning disability or his ADHD
- 2) the testing does not evaluate him in area of working memory, despite the fact that this was an area of significant weakness in the prior evaluation and despite the fact the District witnesses testified that working memory is key to success in school
- 3) that the subtests that are skipped by the evaluator are eliminated not because they were not necessary, but because she was having difficulty getting him to engage
- 4) the testing does not explain why his scores dropped between the 2019 and 2023 administration of the testing

(Parent Mem. of Law at pp. 8-9).

Federal and State regulations make clear that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In New York, State regulation specifies that an initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). However, when conducting a mandatory reevaluation, there is no specified assessments that must be conducted, and a CSE is not simply required to conduct all possible evaluations of a student. Instead federal and State regulations explain that the CSE is charged with reviewing existing evaluation data and, "[o]n the basis of that review, and input from the child's parents, identify[ing] what additional data, if any, are needed" to determine if the student remains eligible for special education as a student with a disability, the present levels of performance of the student, and whether any changes to the student's programming and annual goals are warranted to allow the student to access the general education curriculum (34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5][i]-[ii]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5).

Turning to the facts at issue, the district conducted a psychological evaluation of the student in January and February 2023, and assessments administered included the Wechsler Abbreviated Scale of Intelligence, Second Edition (WASI-II), Wechsler Individual Achievement Test, Fourth Edition (WIAT-IV), Behavior Assessment System for Children, Third Edition (BASC-3) Parent and Teacher Forms, an October 2022 social history, and a record review (Dist. Ex. 45 at p. 1).

According to the background information in the psychological evaluation report, the student had lived with the parent since 19 months of age (*id.*). Since 2019, the student had received services through an IEP to address academic deficits and counseling needs, and "community mental health counseling" to "address poor coping and behaviors" related to his "ADHD-Combined Type," Oppositional Defiant Disorder, Adjustment Disorder, and Reactive Attachment Disorder diagnoses (Dist. Exs. 34 at p. 2; 45 at pp. 2-3). According to the psychological evaluation, the student was prescribed medication to address his ADHD; that medication was paused in "October 2022 due to concerns about possible absence seizures/staring off that were observed at home" and "restarted in early January 2023" (Dist. Ex. 45 at p. 2).

At the time of the psychological evaluation, the student was in sixth grade at the district's middle school and eligible to receive special education services as a student with an other health-impairment, which included daily, direct consultant teacher services for English language arts (ELA), daily resource room services for ELA, one counseling consult per month, and daily nursing services when the student needed medication administration (Dist. Ex. 45 at p. 3). According to the psychological report, the student's teachers shared that he was able to "communicate and have conversations with adults, and that he [was] personable with the right adult and some peers that [were] willing to see past some of his inappropriate behaviors" (*id.*). In addition, the teachers expressed concerns regarding the student's "anger management issues, poor decision-making skills, and impulsive behaviors" (*id.*). The psychological report indicated that the student's "behaviors escalated around the middle of October (when his medication was discontinued)" and included "leaving class," "sexual comments/gestures, swearing," "staring at others to intimidate, aggression with peers," "using materials inappropriately," and "not attempting tasks/completing work in class" (*id.*). According to the psychological report, the student "responded inconsistently to consequences" implemented by district staff including warnings, detentions, suspensions, and "a positive plan involving earning time with the School Resource Officer" (*id.* at pp. 3-4).

According to the psychological report, the student's second quarter grades included a 57 for ELA, 62 for math, 50 for science, 65 for social studies, 84 for computer studies, 83 for physical education, 78 for reading, and 67 for general music (Dist. Ex. 45 at p. 4). The student's teachers indicated that "his grades were impacted by incomplete assignments, inconsistent effort, and disruptive behavior" (*id.*). The psychological report indicated that an FBA had been completed as part of the reevaluation, and that a BIP was developed that addressed two goals: "[d]ecreasing inappropriate verbals" and "[d]ecreasing not doing his school job" (*id.*).

The school psychologist who completed the psychological evaluation indicated in her reports that the student demonstrated "positive effort" during her testing including "strong levels of motivation and adequate attention" (Dist. Ex. 45 at p. 4). Given this behavior, she indicated that the "results [were] believed to be valid estimates of [the student's] current cognitive functioning" but she also noted "that this positive effort was very different from the behaviors noted when he completed academic testing a few weeks prior" (*id.*).

According to the psychological report, the WASI-II was administered to assess the student's cognitive functioning (Dist. Ex. 45 at p. 5). The student's "overall ability score of 102. . . correspond[ed] to the 55th percentile," which fell in the average range (*id.*). The student's verbal comprehension composite score of 104 corresponded to the 61st percentile, indicating that the student's word knowledge and verbal reasoning skills were in the average range (*id.*). The student's

perceptual reasoning composite score of 100 corresponded to the 50th percentile, indicating that the student's nonverbal reasoning and visual-spatial ability was also in the average range (id. at p. 6).

The student's special education teacher administered the WIAT-IV to assess the student's "academic skills for reading, math, written language, and oral language" (Dist. Ex. 45 at p. 6). According to the psychological report, the student's "effort was inconsistent during testing and therefore may not reflect his best skills" (id.). According to the results, the student demonstrated a strength on measures of oral language skills; he achieved a score of 101 which corresponded to the 53rd percentile and fell in the average range (id. at pp. 6, 7). The student's overall math skills (score of 90, 25th percentile) fell in the average range, and the school psychologist noted that he demonstrated "stronger" skills "for applications" and performed in the low average range "for computation and math fact speed" (id. at p. 7).

While the student's overall WIAT-IV reading composite score of 98 (45th percentile) fell within the average range, the school psychologist reported that his "reading skills varied" (Dist. Ex. 45 at pp. 6, 7). According to the psychological report, the student "performed in the [h]igh [a]verage range for comprehension (reading passages and answering questions) and [a]verage range for oral reading fluency (speed when reading aloud)" (id. at p. 7). The school psychologist indicated that the student "demonstrated some difficulty with word reading and pulling sight words fluently from memory" and that when reading timed and untimed nonsense words, the student "often tried to make the words into real words and therefore did not earn credit" (id.). In addition, the student "demonstrated difficulty with phonemic proficiency" (id.).

The school psychologist reported that the student "had the most difficulty with written expression tasks" (Dist. Ex. 45 at p. 7). The student demonstrated difficulty with "spelling individual words, writing short sentences quickly, writing a paragraph, and writing sentences with proper mechanics" (id.). Within the sentence composition subtest, the student "was more successful on the sentence building portion . . . than sentence combining . . . but he also did not attempt sentences that he thought were too hard" (id. at pp. 7-8).

On the parent and teacher rating forms of the BASC-3, which provided information about student behavior at school and home, the student's ratings were designated as "clinically significant" on the following scales: hyperactivity, aggression, conduct problems, and attention problems (Dist. Ex. 45 at pp. 8-9). The teacher rating form indicated a clinically significant rating for learning problems, social skills, and study skills (id.). The parent rating form indicated "at-risk" ratings for depression, activities of daily living, and functional communication (id.). The parent and teacher rating forms indicated "average" ratings for anxiety, somatization, atypicality, withdrawal, adaptability, and leadership (id.).

In the summary of the psychological report, the school psychologist noted the student "ha[d] good potential for learning" based on results of the current cognitive testing (Dist. Ex. 45 at p. 9). Regarding academic testing, the student demonstrated "strengths for [o]ral [l]anguage ([l]istening [c]omprehension and [o]ral [e]xpression) and overall [m]ath skills (stronger problem-solving and more difficulty with computation and math facts)" (id.). The student demonstrated above average reading comprehension and average oral reading fluency; however, the student had difficulty "reading individual words" and "with phonemic proficiency" (id.). The psychological

report indicated the student had difficulty with spelling, writing short sentences and a paragraph, and using proper mechanics when writing sentences (*id.*). The school psychologist reported that "it [was] unclear if these delays [were] due to a potential learning disability or lack of progress due to the impact of his significant attention and behavioral needs" (*id.* at p. 10). The school psychologist recommended that "academic interventions for reading and writing should continue, with re-evaluation of progress (in regard to a possible learning disability) once his behavior ha[d] stabilized" (*id.*). According to the psychological evaluation, results of the updated BASC-3 were consistent with areas of concern noted during the initial evaluation conducted three years prior, and with "the significant behavioral difficulties that [the student] ha[d] been demonstrating at school" (*id.*).

On appeal, the parent argues that the IHO erred by not ruling on the legal arguments the parent made to the IHO in support of her allegation that the district failed to conduct a comprehensive evaluation of the student in all areas of suspected disability and, as noted above, reasserts and summarizes the arguments she made before the IHO. Specifically, the parent alleged in a hearing brief submitted to the IHO that if the student had difficulty decoding words, he could not "be an average reader"; the evaluation did not identify the underlying cause of the student's difficulties; the evaluator did not "look at processing speed or working memory"; and the evaluation did not offer recommendations for programming (Parent Ex. C at pp. 3, 4). As explained more fully below, I am not persuaded by the parent's arguments in her hearing brief as reasons to reverse the IHO's determination that the district conducted a comprehensive evaluation of the student.

Turning to the parent's first concern, review of the 2023 psychological evaluation shows that the school psychologist described the student's performance on all reading subtests administered from the WIAT-IV and noted that the results were "varied" (Dist. Ex. 45 at pp. 6-7, 9-10). The evaluation report included a chart that summarized the student's performance on the WIAT-IV, which indicated a "[q]ualitative [r]ange" of average for the reading composite, then identified the student's qualitative range for the individual subtests that made up the reading composite, which included the following: low average (word reading), high average (reading comprehension), extremely low (pseudoword decoding), average (oral reading fluency), extremely low (decoding fluency), very low (orthographic fluency), and extremely low (phonemic proficiency) (*id.* at pp. 6-7). According to the school psychologist, the special education teacher administered "lots of subtests for a number of different areas in reading," and that by administering all of the reading subtests the special education teacher "went above and beyond what [the district] would often do" regarding fluency and decoding because the district "really wanted to get as much information as [it] could about [the student's] reading" (Tr. pp. 47, 64, 96).

The school psychologist testified that the results of the testing indicated the student "definitely ha[d] some strengths, and there [were] some other areas that [were] more of a challenge for him in the reading domain" (Tr. p. 64). She testified that the student's difficulties with attending and impulsivity affected the outcome of the reading evaluation and "could get in the way there in terms of just being able to show us all the different skills that he ha[d]" (Tr. pp. 64-65). When asked on cross-examination about the student's overall reading composite score in the average range, the school psychologist testified that she explained in her report that the student's "reading skills varied" and that she described "which ones were high, which ones were average[,] and which ones were below" (Tr. p. 93). The school psychologist went on to say that "[w]hen there [is] scatter

like that within anything, you would [not] interpret the overall" score; rather, the "actual specific skills" should be interpreted, which is "why [she] noted that [the reading skills] varied" (Tr. p. 94). Thus, the school psychologist's evaluation report and review of the reading assessment results revealed nuances that did not lead her to conclude that the student was "an average reader" (see Tr. pp. 64-65, 92-94; Dist. Ex. 45 at pp. 6-7, 9).

Regarding the parent's next concern related to the evaluation not identifying the underlying cause of the student's difficulties, the school psychologist included in her report that due to the student's "inconsistent effort on testing, and ongoing behavioral difficulties in the classroom" which affected "his ability to take in instruction," practice skills, and complete work, it was "unclear" if the student's difficulties were "due to a potential learning disability or "due to the impact of his significant attention and behavioral needs" (Dist. Ex. 45 at pp. 9-10). The school psychologist indicated in her report that the student's behavioral concerns as rated on the BASC-3 were "similar to those noted during his initial evaluation three years ago, and also consistent with the significant behavioral difficulties that [the student] ha[d] been demonstrating at school" (id. at p. 10). In addition, she noted that the student's behaviors "increased when he was not taking medication from mid-October to early January" (id.).

When asked her professional opinion as to what was the "primary impediment to [the student] making academic progress," the school psychologist testified that based on discussion with others and observation, her primary concern was that the student's attention, impulsivity, and behavior impacted his ability to "take in the instruction" and practice what he was being taught (Tr. p. 79). She indicated that this was "true of both the primary instruction from the classroom teacher as well as even during resource [room]" where he was taught "in a really small group" (id.). The school psychologist testified that this would have "a huge impact" that prevented growth (id.). She went on to say that the student "absolutely" had academic weaknesses, but the extent of the student's behavior across all environments indicated she could not "just ignore that" (Tr. p. 80). Therefore, contrary to the parent's assertion on appeal, the school psychologist did opine with regard to factors that contributed to the student's difficulties.

Moreover, the CSE's reevaluation of a student with a disability "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]), and not necessarily to identify the "underlying cause" of the student's special education needs. Federal and State regulations do not require a CSE to identify or focus on specific diagnoses when developing an IEP; "rather, they require the [CSE] to 'gather relevant functional, developmental and academic information ... that may assist in determining whether the student is a student with a disability and the content of the student's individualized education program.'" (see M.N. v. Katonah Lewisboro Sch. Dist., 2020 WL 7496435 at *14 [S.D.N.Y. Dec. 21, 2020] citing 8 NYCRR 200.4[b][1], 34 CFR 300.304[b][1]). "[T]he IDEA mandates services tailored to a child's individual needs, not dictated by a particular diagnosis or classification." K.H. v. N.Y.C. Dep't of Educ., 2014 WL 3866430 at *19 (E.D.N.Y. Aug. 6, 2014). Thus, while understandable that a parent seeks information about the "underlying cause" of the student's special education needs, it is not the district's obligation as part of the evaluation process to identify specific diagnoses or the "underlying cause" of the student's disability.

Next, the parent argues that the 2023 psychological evaluation was insufficient due to the lack of updated testing to assess the student's processing speed and working memory. However, the 2023 psychological report contained the results of the student's initial evaluation in 2019, including cognitive testing as measured by the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) (Dist. Ex. 45 at pp. 2-3). Specifically, the 2023 psychological report indicated that in 2019 the student's processing speed score of 103 was in the average range, and his working memory score of 82 was in the low average range (id.).

Upon review of the student's social history, the school psychologist testified that there was a question from the parent about the student's potentially "lower IQ," which she indicated "was another piece that [she] wanted to look at" during the psychological evaluation (Tr. pp. 59-60; see Dist. Ex. 34 at p. 2). According to the school psychologist, "the last time [the student] was tested" he did not exhibit a "low IQ" but "just to make sure that [the district] really cleared that question for [the student], [she] chose to do an abbreviated cognitive test," the WASI-II (Tr. p. 60; Dist. Ex. 45 at pp. 1, 5-6, 9). The school psychologist testified that she chose to administer an "abbreviated cognitive test" because it was unclear at that time whether or not the student was taking his medicine day-to-day or at all, and she felt she could "get the information" she "needed without extraneous factors" (Tr. p. 60). She went on to testify that "the last time [the student] was tested, they did look at memory and processing speed"; however, at the time the school psychologist conducted her evaluation, the student "was having so much trouble attending" that she was not sure that the results of those subtests "would be relevant and accurate" (see Tr. pp. 60-61). She testified that results from the WASI-II indicated "that there was not a question of low IQ" for the student (Tr. p. 91).

Turning to the parent's assertion that the 2023 psychological evaluation report did not offer recommendations for programming (Parent Ex. C at p. 4), it is the CSE, not the evaluator, who is tasked with considering evaluative and other relevant information and then making a recommendation to the school board and student's parent about an appropriate special education program and placement for a student with a disability (see Educ. Law § 4402[3][b]). In developing such recommendations, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulation (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Review of the 2023 psychological report noted in the summary that the CSE would consider the information from the report "along with additional documentation, when determining the appropriate educational supports" (Dist. Ex. 45 at p. 10).⁶ The psychological report further indicated the school psychologist included a review of the 2019 evaluation results which were "consistent" with the 2023 results (id. at pp. 2-3, 9-10). In this instance, the February 2023 CSE reviewed the results from the student's prior 2019 evaluation, including a September 2019 OT evaluation, a September 2019 sensory processing measure, a September 2019 administration of the WISC-V, a September 2019 administration of WIAT-III, the scores from a September 2019

⁶ Although the school psychologist did not make specific recommendations the psychologist noted that because of the student's behavior in the classroom and during academic testing, "academic interventions for reading and writing should continue" and recommended that "once [the student's] behavior ha[d] stabilized" that his progress should be reevaluated (Dist. Ex. 45 at p. 10).

Conners Parent Rating Scale and an October 2019 Conners Teaching Rating Scale, as well as the results from the 2023 psychological evaluation report and other evaluations, including an FBA, an October 2022 social history update, the student's current grades at the end of the second semester, reading assessments including a Star reading assessment and the student's Fountas and Pinnell reading levels, and reports from the student's teachers and providers (Dist. Ex. 47 at pp. 2-11).⁷ Accordingly, it was reasonable for the evaluator who conducted the 2023 psychological evaluation to defer to the CSE for a recommendation based on all of the information before it.

Based on the above, I find no reason to disturb the IHO's findings that the district conducted a sufficiently comprehensive evaluation (see Dist. Ex. 47 at pp. 8, 13-15). The evidence in the hearing record shows that the district's 2023 reevaluation of the student, particularly the completion of the 2023 psychological evaluation, included a battery of assessments and strategies to gather relevant functional, developmental, and academic information about the student. For the reasons set forth above, the district reevaluation was sufficiently comprehensive so that additional information was not required in order to develop an IEP for the student, and the district was not required to show that it had exhaustively performed every assessment that the parent or her experts could point to in order to prevail. Accordingly, because I find the district's evaluation was appropriate, the parent is not entitled to an IEE at public expense. Although the parent is not unreasonable in desiring further information about the student, including the underlying causes of the student's disability, the parent still has the right to an IEE, but not at public expense (34 CFR 300.502 [b][3]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district's evaluations were comprehensive and appropriate, the necessary inquiry is at an end and there is no need to reach the issue of whether the district's cost and

⁷ The parent asserted that the student's grade level score of 3.4 on the Star reading assessment should have caused the district to question the student's scores in reading on the WIAT-IV (Parent Ex. C at p. 3; see Dist. Ex. 47 at p. 8). However, this discrepancy is not showing an area of need that was not evaluated by the district, rather, it is showing that the February 2023 CSE had multiple sources of information regarding the student's abilities in reading and the CSE was tasked with considering that information in identifying the student's special education and related services needs and designing an educational program to address those needs. The assertion as raised by the parent goes more towards whether the CSE, in assessing the evaluative information before it, should have relied more on the student's performance on the WIAT-IV or on the student's in-school performance reflected on the Star reading assessment, Fountas and Pinnell reading levels, or in the student's grades. Accordingly, the parent's argument goes more to the substantive adequacy of the CSE's recommendations, which is not a part of this hearing, than to the sufficiency of the evaluative information.

geographic controls on the conduct of an IEE applied to the parent.⁸

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 1, 2024**

**STEVEN KROLAK
STATE REVIEW OFFICER**

⁸ Although it is not necessary to reach the issue, it is worth noting that when enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (34 CFR 300.502[a][2]; [e]; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). In this instance, the IHO found that the evidence that the providers on the district's list of evaluators available for conducting IEEs were not practicing in the area or were not evaluating students was "neither proven nor disproven" during the impartial hearing (IHO Decision at p. 18). However, in review of the hearing record, the parent presented evidence showing that she informed the district she contacted each of the providers on the district's list of providers and none were available to conduct the requested IEE of the student and that it was "unclear" that there were any providers capable of performing the IEE at the district's capped rate (Dist. Ex. 61). As the district did not present evidence disputing the parent's presented evidence, in light of the district's burden, the IHO appears to have erred on this point.