

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Trumbull Board of Education

Appearing on behalf of the Student: Attorney Mark Sargent
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Appearing on behalf of the Board: Attorney Christine Sullivan
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Appearing before: Melinda A. Powell, Esq.
Hearing Officer

ISSUES¹:

1. Whether the Student is entitled to a comprehensive FBA by a Board Certified Behavioral Analyst (“BCBA”) who would also develop an appropriate BIP;²
2. Whether the Student is entitled to a comprehensive psychoeducational evaluation by an evaluator trained in concussions and other brain injuries and is otherwise qualified to address possible cognitive impairment of the Student as a result of his head banging;
3. Whether the Student is entitled to a comprehensive occupational therapy evaluation;
4. Whether the Student is entitled to a comprehensive speech & language evaluation;
5. Whether the Student is entitled to a comprehensive physical therapy evaluation;
6. Whether the Student is entitled to a comprehensive central auditory processing disorder evaluation; and
7. Whether the Student is entitled to a comprehensive assistive technology evaluation?

PROCEDURAL HISTORY:

¹ The issues are based on the Parent’s request for the enumerated evaluations to be provided at public expense as Independent Educational Evaluations (“IEE”).

² An “FBA” is a Functional Behavior Assessment, and a “BIP” is a Behavior Intervention Plan. (B-20).

The Student initiated this special education due process matter, Case No. 18-0100, on August 26, 2017. The case was assigned to Impartial Hearing Officer Kelly Moyher.

The Student filed a Motion to Consolidate Case No. 18-0100 with another special education due process case that was initiated by the Board and assigned for hearing before this Hearing Officer, Case No. 17-0609. The Motion to Consolidate was granted on September 5, 2017, and this case was transferred to this Hearing Officer.

A Prehearing Conference was convened on September 8, 2017. The issues for the hearing were identified by the Hearing Officer and no objections were raised by the parties. The initial mailing date was set to November 9, 2017. Shortly thereafter, this Hearing Officer dismissed Case No. 17-0609, as it was withdrawn by the Board. *See*, Final Decision and Order, Case No. 17-0609. Hearings for Case No. 18-0100 were held on the following dates: October 4, 10, 17 and 23, 2017. The mailing date was extended, upon request of the parties, to allow receipt of the hearing transcripts and submission of briefs.

Parent Exhibits 1-172 were entered as full exhibits. Board Exhibits 1-70 were entered as full exhibits; however, the audio tape of the 5/15/17 PPT meeting (B-55) was not considered by the Hearing Officer because a transcript was not provided. The Due Process Request for Case No. 18-0100 was entered as a Hearing Officer exhibit HO-1. The following witnesses testified: Trumbull Board of Education Coordinator of Special Education Services (“Coordinator”), the Unit Director for Emotional Disabilities of Cooperative Education Services (“CES Unit Dir.”), the Student’s Occupational Therapist (“OT”), a CES staff school social worker (“LCSW”), the School Nurse (“Nurse”), the Student’s Speech and Language Pathologist (“SLP”), the Trumbull Board of Education School Psychologist (“Psychologist”)³, CES paraprofessional (“Para”), the Student’s Mother (“Parent”) and the Student’s Grandmother (“Grandmother”).

The Board and Parent filed cross-briefs on November 30, 2017 and cross-replies on December 4, 2017.

The Board argues that the Parent is only entitled to the IEE for a FBA with a BCBA trained evaluator, to develop a BIP. The Board takes the position that a publicly funded IEE must meet the contours of an evaluation that the Board has completed within the last two years, or (at the least) a connection to one that was already done by the Board within the last two years. Because the Board ultimately granted the Parent’s IEE FBA request, the Board argues the case is moot. Alternatively, the Board argues that where a triennial review has been planned but not completed, the Parent must wait until the triennial evaluations are complete, and then may request an IEE to challenge a completed evaluation or request a different evaluation to be paid at public expense in an area not assessed.

³ The Psychologist testified that she only served on the PPT in a clerical capacity. (Psychologist Test. 10/17/17). Therefore, the Hearing Officer finds her testimony not probative of the issues, and does not further make mention of this witness hereinafter.

The Parent argues that the scope of an IEE under the IDEA, and a Parent's entitlement thereto, is unlimited.

All motions and objections not previously ruled upon, if any, are hereby denied and/ or overruled. To the extent there was conflicting testimony, the Hearing Officer finds the testimony of the witnesses cited herein more credible than witness testimony not relied upon.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340 (S.D. Tex. 1993); *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985).

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") Sections 1400 *et seq.* and related regulations, Connecticut General Statutes ("C.G.S.") Section 10-76h and related regulations, and in accordance with the Connecticut Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. Sections 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

FINDINGS OF FACT:

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

1. The Student is eligible for special education and related services under the IDEA, under the category Multiple Disabilities. (B-36). During the 2016-2017 school year, the Student was in the eighth grade. (Id.) At the time of the hearing, the Student was fifteen years old. (Id.)
2. During the 2015-2016 and 2016-2017 school years, the Student attended Cooperative Educational Services Therapeutic Day Program ("CES"). (Id.)
3. A PPT meeting was held on October 14, 2016. (P-13). PPT members reported that they had "observed an increase in the Student's dysregulation." (Id.) The Student's teacher explained that the Student required frequent sensory breaks and had the most difficulty during transitions. (Id.) The team also reported that "it [was] difficult to identify triggers." Therefore, another FBA was to be conducted and then reviewed at the March 2017 PPT meeting. At that time, the Student's IEP provided for special education instruction in behavior and academics and related services in occupational therapy (2x/ week for 30 min), speech/ language pathology (2x/ week for 30 min) and counseling (2x/ week for 30 min).
4. Among the actions proposed at the October 14, 2016 PPT were to "conduct a reevaluation" and "conduct FBA and BASC for review at Annual Review." (Id.)

5. Parental consent was obtained in October 2016 for the March 2017 Functional Behavior Assessment (“FBA”) evaluation and a behavior rating scales (“BASC”). (B-28). The parties do not dispute that this FBA was an evaluation which triggered a Parental right to an IEE.
6. A FBA was completed by CES in March 2017, but the BASC was not. (B-34). A different rating scale was used. (Id.)
7. At a March 16, 2017 PPT meeting, the Team planned for the Student’s triennial evaluation, which was due in October 2017. The Parental Consent form for a Reevaluation identifies the test/ evaluation procedure”, the “area of assessment” and the “evaluator”. (B-38.) The PPT proposed the following, for which the Parent gave consent: “individual/ standardized” testing in the area of cognitive functioning; “individual rater input (teacher, parent, self)” for social emotional / behavior scales; “individual rater input” for “autism specific/ adaptive skills”, “individual/ standardized” testing for “language assessment”, “observation/ data collection” for an FBA/ BIP, and “individual” testing in the area of “visual motor/ sensory profile.” (Id.)
8. Thereafter, in May 2017, the Parent requested a PPT meeting and made requests(s) for an IEE in areas which are the subject of the issues in this case. (P-16). At the May 15, 2017 PPT meeting, the Parent objected to the FBA, through a parent advocate that attended the meeting, who indicated that the FBA that had been performed did not meet State guidelines. (Coordinator Test. 10/4/17)
9. All the IEE requests were denied at the May 15, 2017 PPT meeting. (B-43, Parent Test., Coordinator Test.). The Team then added additional areas and evaluations to the scope of the triennial evaluation, but the Parent did not give consent to those additions. (Id., P-164). Areas which were recommended to be added to the triennial testing included central auditory processing, Autism Diagnostic Observation Schedule 2, fine motor, gross motor, and assistive technology. (Coordinator Test., B-43, B-50)
10. On August 28, 2017, a letter was sent to the Parent granting an IEE for an FBA with a BCBA, signed by the Director of Special Education. (B-50)
11. The Student began treatment with a different psychiatrist during the 2016-2017 school year. Medication changes were implemented thereafter. Even with the medication changes, the Student continued to struggle. (Test. Nurse, 10/17/17, LCSW Test. 10/23/17)
12. Behaviors that the Student exhibited included breaking pencils, foul language, sleeping in class, minor to moderate aggression, emotional dysregulation, yelling and screaming. (OT Test., 10/17/17). He also showed anxiety and seemed to be showing “crawling out of his skin” types of behavior. (Id.) He would frequently bang his fists in the hallway, against a door, door frame, or slam his fists on the table. (Id.) The records indicated that attempts at a formal OT evaluation were attempted but not completed, presumably because of the Student’s behavior. (Id.)
13. CES staff had no concerns regarding the Student which would implicate a need for physical therapy as a related service. (Id.)

14. The OT testified that sensory needs impact the student's behavior. (OT Test.) The OT did not have a role in the completion of the FBA or BIP of the student. (Id.)
15. The March 2017 FBA was completed by the school social worker. (LCSW Test.). An FBA consists of the specific target behaviors that a student is exhibiting throughout the school day and what might be precipitating those behaviors and the student gains from the behavior, also known as the "function" of that behavior. (Id.)
16. The school social worker testified that the Student is a very complicated student. (Id.) She described the Student as having a very low frustration tolerance, has trouble expressing emotions, was low cognitively all of which made a complex profile. She opined that the Student would engage in behaviors in response to nonpreferred activities and fatigue, and believed medications were contributors. (Id.) She did not ask for any evaluations, however, to address potential causes of behavior not related to medication. (Id.) In using the FBA, there was an underlying assumption that the cause of the Student's behaviors had a temporal connection to the behaviors themselves. (Id.) For example, she opined that behaviors were caused by, *e.g.*, the student making a mistake and being upset about the mistake, or the Student did not "like" the topic contained in an assignment. (Id.)
17. Part of the FBA included a rating scale, the Social Skills Improvement System (SSiS). The result placed the Student in the 98th percentile with concerns in areas including "autism spectrum." (B-34) Similarly, autism spectrum concerns were previously identified in the 2016 FBA. (P-147)
18. Parental input of a formal nature was not solicited for the FBA. (Parent Test., LCSW Test.) An SSiS was completed by the Student's teacher. There was no parental component to the SSiS used as part of the FBA in which to receive the Parent's input on the Student's functioning. (B-34)
19. The Parent and Grandmother testified that the Student's behavior and functioning raise the question in their minds that the Student's disabilities may include an autism spectrum disorder. (Parent Test., Grandmother Test.)
20. There were multiple occasions when CES employees were unsuccessful in completing various assessments, stating that the Student became frustrated and refused. *See, e.g.*, (OT Test. 10/17/17)(Board could not complete OT assessment of [Student]); (SLP Test. 10/17/17) (prior speech & language provider could not evaluate [Student]); Parent Test. 10/23/17); (Unit Dir. Test. 10/10/17).
21. The Student exhibits fidgety, anxious behavior. (Para Test. 10/17/17). His behavior affected his ability to access his academic instruction; strategies used included allowing the Student to leave the classroom, run errands or join another gym class. (Id.) The Para had not witnessed head banging behavior during the prior school year (2016-2017). (Id.)

22. The Student's OT observed instances of emotional dysregulation, minor to moderate physical aggression and yelling. (OT Test.) The Student cannot tie his shoes, but prior to May 2017, that concern had not been raised by the Parent. (Id.) The Student's OT was unaware of whether the Student could use utensils; the issue had also not been raised by the Parent in the past. (Id.) The OT had concerns about vestibular and tactile deficits. (Id.) However, the sensory techniques used during OT were not included in the Student's BIP.
23. Despite the Student having been prescribed stimulant medication, the Nurse did not observe any better focus, attention or increased ability to perform school work and learn as would be expected when this medication is administered. (Nurse Test.)
24. The evidence concerning the Student's use of assistive technology was primarily presented by the Parent and Grandmother, which consisted of relaying that the Student enjoyed the use of an iPad. (Parent Test., Grandmother Test.). There was no evidence presented to make a connection between the inappropriateness of the FBA evaluation and an Assistive Technology evaluation.
25. In the 2013-2014 school year, the school nurse contacted the Parent with concerns that the Student's head banging caused a concussion. She was unable to perform a pupil dilation test because the Student's pupil response was affected by medication. The Parent took the Student to his pediatrician, who examined the student for possible concussive symptoms. According to the Parent, the Student was "cleared" by the pediatrician. (Parent Test., Nurse Test., CES Unit Dir. Test.)
26. The Coordinator testified that the Parent's request as to an FBA with a BCBA who would also develop a BIP was granted. (Test. Coordinator). There was no indication from any of the witnesses that the Board intends to renege on its agreement to pay for an independent FBA with a BCBA.
27. An independent evaluator such as a psychologist could diagnose whether the Student had autism. (CES Unit Dir. Test.)
28. CES has a separate program for severe developmental disabilities which serves students with autism. (CES Unit Dir. Test.). CES has staff in that program that are qualified to diagnose autism. (Id.) Those staff members were not involved on the Student's PPT team. (P-12, P-13, P-14, P-15, P-16)
29. The CES Unit Director also testified that there is a lot of overlap, in the context of behavior, between students with autism and students with emotional-behavioral disabilities. (Id.)
30. The Student's functioning was highly variable on a day to day basis. On some days, situations which could be perceived as minor, such as getting a red pencil instead of a blue pencil when reaching into the box, would cause the Student distress. On other days, such inconveniences could be tolerated. (Id.)

31. The SLP credibly testified that she did not observe articulation deficits in the Student, and that no evaluation was needed in that area. In addition, any auditory processing concern was addressed by breaking up directions given to the student. The SLP did not offer testimony that any additional evaluation in that area was needed or was related to the Student' behavior. (SLP Test., 10/17/17).

CONCLUSIONS OF LAW:

1. The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. See Honig v. Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) ("Congress repeatedly emphasized . . . the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness."). Without public financing of an IEE, a class of parents would be unable to afford an IEE and their children would not receive, as the IDEA intended, "a free and appropriate public education" as the result of a cooperative process that protects the rights of parents. There is "nothing in the statute to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate." Phillip C. v. Jefferson County Board of Education, 701 F.3d 691, 694, (11th Cir. 2012), *citing*, Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (internal quotations omitted).

2. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur during a student's education. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).

3. Congress included the right to an IEE at public expense as one of the IDEA's essential procedural safeguards:

School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them.... [Parents] have the right to an independent educational evaluation of the[ir] child. The regulations clarify this entitlement by providing that 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. IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Schaffer ex. rel. Schaffer v. Weast, 546 U.S. 49, 60-61, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) (citations and quotations omitted).

4. The IDEA provides for reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. 20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b).
5. The school district must also conduct a reevaluation if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reevaluation. 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1). A school district must also conduct a reevaluation upon the request of the child's parent or teacher.⁴ 20 U.S.C. § 1414 (a)(2)(A)(ii); 34 C.F.R. § 300.303(a)(2).
6. An evaluation under 34 C.F.R. § 300.304 refers to the processes and procedures used to “gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining... (ii) The content of the child's IEP, which includes the use of “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.”
7. A parental right to request for an IEE at public expense accrues when an evaluation has been completed by the Board, and the parent disagrees with that evaluation. 34 C.F.R. § 300.502(b)(1); OSERS *Letter to Baus*, February 23, 2015 (“a parent of a child with a disability is entitled to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency.”). *See also, Dubois v. Connecticut State Board of Educ.*, 727 F.2d 44, 48 (2d Cir. 1984).
8. In 2009, OSERS issued a Q&A guidance document which addressed FBAs and IEEs. Therein, OSERS opined that a parent who disagrees with an FBA (used to plan an IEP) should be entitled to request an IEE at public expense. *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).
9. OSEP has also opined that when an FBA is performed to guide special education programming, the FBA is no different than evaluations under Part B that requires prior written notice. *Letter to Anonymous*, 59 IDELR 14 (OSEP 2012).
10. In an IEE case, the Board has the burden to show that its evaluation was appropriate. *See*, 34 C.F.R. Section 302.502(b)(2) (“If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—) 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); Conn. Agencies Regs. § 10-76d-9(c)(2).
11. In determining the appropriateness of the Board's evaluation, a multiplicity of factors should be considered, including whether the evaluation: (1) used a variety of essential tools; (2)

⁴ Thus, an IEE request is not the only procedure available for a Parent to obtain an evaluation or reevaluation of a student.

was administered by trained, knowledgeable, and qualified personnel; (3) was administered and conducted under standard conditions and in accordance with instructions provided by the producer of the assessments; (4) incorporated information from various sources such as classroom observations and review of existing data; and (5) whether the independent evaluation would provide any new or additional information. *Warren G. v. Cumberland County School District*, 190 F.3d 80, 87 (3rd Cir. 1999).

12. The Parties do not dispute, and the Hearing Officer finds, that the FBA performed in March 2017 was an “evaluation” which triggers the right of the Parent to request an IEE. The Parent also disagreed with the FBA at the May 15, 2017 PPT meeting. *See, Genn v. New Haven Board of Education*, 219 F. Supp. 3d 296, 317 (D. Conn. 2016)(a parent is not required to express disagreement in any formalistic manner).

13. The Coordinator testified that the Parent’s request as to an independent FBA was granted via letter. (Coord. Test., B-50). There was no evidence presented that makes the Hearing Officer concerned that the Board intends to renege on its agreement to pay for an independent FBA with a BCBA. Therefore, the Parent’s request for an independent, comprehensive FBA by a BCBA who would also develop a BIP is moot.

14. However, the FBA that was conducted was insufficient to understand the nature or causes of the Student’s behaviors, which according to the record, were significant and chronic. Formal parental input was not considered by the LCSW in the behavior analysis. The FBA process was not sufficiently comprehensive, and was based on an assumed contemporaneous relationship between the Student’s behavior and its antecedent. This simplistic approach failed to account for the Student’s undisputed complex profile. Neither did the LCSW give import to the Student’s documented sensory deficits; the OT’s input was not solicited for the FBA. Finally, the rating scale for which consent was given, the BASC, was not performed. Instead, the SSiS was used for which consent had not been received. There is a question of an autism spectrum disorder which may be a contributor to the Student’s behavior, which question was both raised by the Parent, and by the SSiS. Therefore, the FBA was not appropriate. Consequently, an IEE to rule out autism spectrum disorder must be provided at public expense. The Parent’s IEE request for a psychoeducational evaluation to determine this unresolved question is granted. (*See, e.g.*, Final Decision and Order 07-086 (finding comprehensive evaluation requested by District was needed to address variable behaviors and possible sensory processing disorder, even where behavior intervention and management had been implemented with variable success.) In addition, the Parent is entitled to an independent BASC as part of this IEE, as requested in her request for relief. The IEE must comply with the IEE criteria of the Board.

15. The Parent relies on evidence of head banging during the 2013-14 school year (P-40, P-51, P-52, P-55; Nurse Test.) for the IEE request to have a comprehensive neuropsychological evaluation with an evaluator trained in concussions and traumatic brain injury. There is insufficient evidence of a suspected brain injury as a current concern. The Student was cleared by his pediatrician and the school nurse credibly testified that such injury is not a current concern. The Hearing Officer accepts the Board’s argument that on these facts, there should be a connection between the type of IEE requested and the evaluation that has been conducted. The Parent disagreed with the FBA, which is an evaluation of behavior. The Hearing Officer rejects

the Parent's argument that the Board's completion of a FBA opens the door to parental entitlement for *any* evaluation a parent may request. Otherwise, the regulations which allow a Parent to request that the *Board* perform an evaluation, and the regulations concerning triennial reviews, which mandate that the Board perform updated evaluations, would be rendered superfluous. *See*, 20 U.S.C. § 1414 (a)(2)(A)(ii); 34 C.F.R. § 300.303(a)(2).

16. Because a comprehensive neuropsychological evaluation to investigate cognitive deficits due to concussion or brain injury is not connected to the area of behavior, the Parent is not entitled to a comprehensive neuropsychological IEE with an evaluator trained in concussions and traumatic brain injury.

17. An assistive technology evaluation is not connected to the area of behavior for which an FBA is used. Therefore, the Parent is not entitled to this IEE.

18. Likewise, a physical therapy evaluation is not connected to the area of behavior. Therefore, the Parent is not entitled to this IEE.

19. A speech and language evaluation, which the evidence suggested was requested to address specific articulation deficits, is not connected to the area of behavior. Therefore, the Parent is not entitled to this IEE.

20. A central auditory processing evaluation, is not connected to the area of behavior. Therefore, the Parent is not entitled to this IEE

ORDERS:

1. The Parent's IEE request for a comprehensive FBA by a BCBA to develop a BIP is denied as moot.
2. The Parent's IEE request for a psychoeducational evaluation to assess an autism spectrum disorder is granted, and must include administration of the BASC.
3. The Parent's IEE request for a comprehensive psychoeducational evaluation by an evaluator trained in concussions and other brain injuries and is otherwise qualified to address possible cognitive impairment of the Student as a result of head banging is denied.
4. The Parent's IEE request for a comprehensive physical therapy evaluation is denied.
5. The Parent's IEE request for a comprehensive assistive technology evaluation is denied.
6. The Parent's IEE request for a comprehensive speech & language evaluation is denied.
7. The Parent's IEE request for a comprehensive occupational therapy evaluation is denied.
8. The Parent's IEE request for a central auditory processing evaluation is denied.