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| **Before The****State Of Wisconsin****DIVISION OF HEARINGS AND APPEALS** |

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| In the Matter of [Student]v.[School District] | DHA Case No. DPI-16-0015DPI Case No. LEA-16-0009 |

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 16, 2016, the Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stat. Chapter 115, Subchapter V, and the Individuals with Disabilities Education Act (IDEA). The request was filed on behalf of (the Student), by Attorney David C. Schoenberger. The DPI referred the matter to the Division of Hearings and Appeals for hearing.

A due process hearing was conducted in Prescott, Wisconsin on December 13 and 14, 2016. The parties filed post-hearing briefs. The briefing was completed on April 3, 2017. The deadline for issuing a decision in this matter was extended to May 4, 2017

The PARTIES to this proceeding are certified as follows:

[Student], by

[District], by

Issues

1. Whether the [the district] denied [the student] a free and appropriate public education (FAPE) for the 2015-16 school year by determining he was not a “child with a disability” as defined at Wis. Stat. § 115.76(5)(a).
2. Whether [the student’s] request for reimbursement for private school placement falls within the exception at 20 U.S. Code § 1412(a)(10(C)(iv) and is, therefore, not limited.
3. If it is found that the [district] did deny [the student] a FAPE, what is the appropriate remedy.

Burden of Proof

The party seeking relief at a due process hearing bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The assignment of the burden of proof to the party seeking relief has expressly been extended to parents challenging a school district’s eligibility determination. see Antoine M. v. Chester Upland Sch. Dist., 420 F. Supp. 2d 396 (E.D. Pa. 2006).

FINDINGS OF FACT

1. At the time of the hearing, (the Student) was a thirteen year old boy (date of birth: XX/XX/XXXX). The Student resides with his Parents, (the Parents), in the attendance area of the (School District).

 2 The Student has a diagnosis of Dystonia, a neurological movement disorder. The Student also has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).

 3. The Dystonia, along with ADHD, has presented significant challenges for the Student in school. These challenges include seizure like episodes in the classroom which interfere with the Student’s ability to learn, write, and talk. The episodes also sometimes make it difficult for the Student to move between classrooms and make him the target of mocking and bullying by other students. Episodes outside the classroom can leave the Student fatigued which makes it difficult for him to focus during the school day and also resulted in an excessive number of excused absences.

 4. The Student attended [an elementary school within the district]. Despite his Dystonia, the Student did not receive special education services. He was referred to the Student Support Team and received some interventions to improve his mathematics skills (exh. 38). For the 2014-15 school year, the Student advanced from [a district] Elementary School to [a district] Middle School. During the summer of 2014, the Parents attempted to take proactive steps to ensure a smooth transition for the Student to the Middle School. The Parents sent a letter addressed to the teachers and staff of the Middle School (exh. 24). The letter informed the teachers and staff that the Student suffered from Dystonia and educated them regarding the characteristics of Dystonia, the side effects of the medications the Student was taking for Dystonia, and some insights into the Student’s behavior.

 5. Despite their efforts to ensure a smooth transition, the Parents became concerned with the Student’s 6th grade experience. Particularly concerning was their perception that he was being disciplined for some of his behaviors that were caused by his Dystonia, rather than receiving appropriate interventions. The School District’s responses to the Student’s behaviors included the imposition of a point system (*e.g*. exh. 25), sending him out of the classrooms into the hallway, and seating him in the front of the classroom.

6. Upon the advice of the one of the Student’s physicians, the Parents began requesting the School District evaluate for special education. The Parents initial requests were informal. In an email to the principal of [the middle school]dated January 26, 2015, [the parent] requested an Individualized Educational Program (IEP) for the Student or to be advised what the Parents needed to do to request an IEP and “get that started.” In response, [the principal] stated he would refer the request to the School District’s school psychologist (exh. 29). [The school psychologist] completed a Referral Form Special Education and Related Service (form R-1). On the R-1 form, [the school psychologist indicated that the date of the receipt of the referral was February 27, 2015 (exh. 1). It is not clear in the record how the referral date was determined.

 7. In response to the Parents’ request, an administrative assistant for the School District, sent the Parents an IE-1 form (exh. 1) and a pamphlet titled Special Education Procedural Safeguards, Rights for Parents and Children (exh. 53). The IE-1 form acknowledged the request for an evaluation of the Student. On March 19, 2015, [the administrative assistant] sent the Parents an IE-3 form (exh. 28). The Parents were required to indicate their consent for the School District to evaluate the Student on the IE-3 form. The School District did not immediately receive the signed consent form from the Parents and followed up with telephone calls. On April 13, 2015, [the administrative assistant] sent the Parents an updated IE-3 form (exh. 30). The School District received the updated consent form signed by the Parents on April 24, 2015.

8. The School District assembled an IEP team for the Student to consider whether he met the definitions of a “child with a disability” for special education purposes and was eligible for an IEP. Evaluations of the Student were conducted. Specifically, the School District’s occupational therapist, administered the Bruininks-Oseretsky Test of Motor Proficiency (BOT2) and the Sensory Profile School Companion 2 tests. [A] physical therapist contracted by the School District, also administered the BOT2 test and conducted a School Function Assessment evaluation of the Student (exh. 17). ([The occupational therapist evaluated the Student’s fine motor skills using the BOT2 and the physical therapist evaluated his gross motor skills using the same test.) Additionally, the occupational therapist and a special education teacher, observed the Student in the classroom. The physical therapist observed the Student moving between classrooms (exh. 40).

 9. The School District conducted an IEP meeting for the Student on June 2, 2015. Present at the meeting were the Parents accompanied by a grandparent. School District staff attending the IEP meeting were a regular education teacher, a special education teacher, [the principal], as the LEA representative, [the school psychologist], [the school physical therapist], [the school occupational therapist], guidance counselor, and another special education teacher.

 10. In order to be identified as a child with a disability under the IDEA, an IEP team must determine whether the child meets a two-prong eligibility standard. A child qualifies for special education and related services if: (1) the child is determined to be a child with a disability within one of the listed categories of impairment, and (2) if, by reason of the identified impairment, the child needs special education and related services. Wis. Stat. § 115.76(5)(a)

11. According to the referral forms, the Parents requested that the Student be evaluated under the Other Health Impairment (OHI) criteria (exhs. 26 and 27). In determining whether the Student met the OHI criteria, the IEP team utilized the OHI eligibility checklist that was developed by the DPI (see exh. 40). The checklist contains the following four questions that must be answered affirmatively by the IEP team for a child to be identified as having an OHI: (1) Does the student have a health problem? (2) Is the health problem chronic or acute? (3) Does the student’s health problem result in limited strength, vitality, or alertness? And (4) Is the student’s educational performance in one or more of the following areas adversely affected as a result? The performance areas to consider are: pre-academic or academic achievement, behavioral, communication, social/emotional functioning, adaptive behavior, classroom performance, motor skills, vocational skills, and other.

 12. During the IEP meeting the IEP team considered the members’ reports and evaluations. The IEP team also considered information from the parents, including a neuropsychological evaluation (exh. 31) and assessments of the Student’s academic performance, including the Wisconsin Knowledge and Concepts Examination. Based on these reports, evaluations, and assessments, the IEP team concluded that the Student met the criteria for Other Health Impairment (OHI). The IEP then considered whether due to his impairment the Student needed special education. The team concluded that the Student did not have needs that could not be met in regular education. Accordingly, the IEP team determined that the Student was not a “child with a disability” as defined at Wis. Stat. § 115.76(5)(a). The IEP teams’ determination was set forth in a document titled Evaluation Report and IEP Cover Sheet (exh. 40). A copy of the report was mailed to the Parent. The IEP team’s evaluation complied with the procedures set forth in state and federal special education laws and regulations. (*see* 20 USC §§ 1414(b), 1415; 34 CFR § 300.304; and Wis. Stat. § 115.782).

 13. After concluding that the Student was not a child with a disability for purposes of receiving special education, the IEP team then determined that he needed a 504 plan to address his Dystonia and ADHD. The IEP proceeded to consider what accommodations should be included in a 504 plan. The accommodations include preferential seating, help breaking down tasks into smaller and more manageable segments, the option to complete assignments and tests in a quiet environment, extended time to complete tests as needed, ability to take movement breaks, a physical therapist consultation, teacher education on dystonia, use of a water bottle at school, extended time when transitioning between classes, copies of teachers’ notes when needed, and encouragement to participate in an ADHD group. The School District’s Director of Pupil Services, subsequently drafted a 504 plan for the Student based on the [school psychologist’s] notes from the IEP meeting (exh. 41). [The district’s Director of Pupil Services] directed [an administrative assistant] to mail the 504 plan to the Parents.

 14. The Parents were dissatisfied with the outcome of the IEP meeting. Their impression was nothing had been done and the Student’s needs would not be reconsidered until the next school year. The Parents testified that they did not understand that a 504 plan had been prepared during the IEP meeting and they did not receive the copy that was mailed to them. Based on their dissatisfaction, the Parents removed the Student from [the middle school] for the 2015-16 school year and enrolled him in [a private school].

 15. The Student attended the [private school] for seventh grade without an IEP. (It should be noted that the Student missed a substantial amount of school time during the 2015-16 school year due to a medical procedure.) The [school district where the private school was located] prepared an IEP for the Student for the 2016-17 school year.

 16. On May 16, 2016, the Parents filed a due process hearing request. The due process hearing request alleged that the School District denied the Student a FAPE based on the School District’s determination that he did not meet the statutory definition of a “child with a disability.” The Parents are requesting to be reimbursed for the tuition paid to the [private school] and counseling for the Student for the harm inflicted on him by the School District during the 2014-15 school year and additional remedies.

Discussion

 The issues that need to be decided are whether the School District’s determination that the Student is not a “child with a disability” pursuant to the definition at Wis. Stat. § 115.76(5)(a) was incorrect and if, so, what is the appropriate remedy for the School District’s failure to make that determination. The Student has the burden of proof. The IDEA and state special education laws set forth the procedures a school district must follow when evaluating a student for special education. 20 USC §§ 1414(b), 1415; 34 CFR § 300.304; Wis. Stat. § 115.782.

When conducting an evaluation in Wisconsin, an IEP team must: (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parents and information that is related to enabling the child to be involved in and progress in the general curriculum; (2) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; (3) use assessments and other evaluation materials for the purposes for which they are valid and reliable, administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessment materials; (4) assess the child in all areas of suspected disability; and (5) use tools and strategies that directly assist persons in determining the educational needs of the child. Wis. Stat. § 115.782(2).

 In addition, Wisconsin law requires an IEP team to review existing evaluation data on the child, including evaluations and information provided by the parents, previous interventions and the effects of those interventions, current classroom-based, local, or state assessments, classroom-based observations, and observations by teachers and related services providers. *Id.* The IEP team is also required to generate assessment and other evaluation measures to produce information related to the student’s present level of academic achievement and developmental needs of the child. *Id.*

 In the instant case, the School District appointed an IEP team for the Student that met the requirements of Wis. Stat. § 115.782(1). The Student’s IEP team used a variety of technically sound and commonly accepted assessment tools that were administered by trained personnel for valid and reliable purposes. There is no persuasive evidence on the record that the IEP team failed to assess the Student in all areas of suspected disability. Moreover, the IEP team reviewed a variety of data about the Student, including information provided by the Parents and the Student’s medical providers.

 In reviewing an IEP team’s determination, the focus is whether the IEP team complied with the required methodology. It is not the role of the reviewer to second guess the conclusions made by educational professionals.

The key to an educational evaluation is the methodology employed. *See* [*L.S. v. Abington Sch. Dist.,* Civ. A. No. 06–5172, 2007 WL 2851268, 12 (E.D.Pa. Sept. 28, 2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013372764&pubNum=0000999&originatingDoc=I7365a2e0839311e59a139b8f80c70067&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) (“The parents here simply cannot argue that the evaluation is inappropriate because they disagree with its findings. The key is in the methodology. The conclusions, or lack thereof, cannot be inadequate unless the methodology is inadequate, because that is the only provision in the law.”) Moreover, IDEA evaluations depend upon the exercise of professional judgment, which is entitled to a reasonable degree of deference. [*County Sch. Bd. of Henrico County v. Z.P.,* 399 F.3d 298, 307 (4th Cir.2005)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006209624&pubNum=0000506&originatingDoc=I7365a2e0839311e59a139b8f80c70067&refType=RP&fi=co_pp_sp_506_307&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_307) (“We recognize, of course, that at all levels of an IDEA proceeding, the opinions of the professional educators are entitled to respect.”) For that reason, a plaintiff challenging the conclusions reached by professionals administering an educational evaluation must prove that the exercise of professional judgment was actually wrong, and not simply a matter of doubt. *See* [*L.S.,* 2007 WL 2851268, 12](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013372764&pubNum=0000999&originatingDoc=I7365a2e0839311e59a139b8f80c70067&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); *see also* [*Alex R. v. Forrestville Val. Comm. Unit Sch. Dist.,* 375 F.3d 603, 614 (7th Cir.2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004700138&pubNum=0000506&originatingDoc=I7365a2e0839311e59a139b8f80c70067&refType=RP&fi=co_pp_sp_506_614&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_614). Thus, plaintiffs challenging adverse child-evaluations must show that the evaluation itself was flawed through an inappropriate process, meaning one that failed to comply with regulatory requirements, and, therefore, failed to find clear disabilities or failed to investigate sufficiently suspected areas of disabilities, without justification. [*Bd. of Educ. of Fayette County v. L.M.,* 478 F.3d 307, 313 (6th Cir. 2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011582071&pubNum=0000506&originatingDoc=I7365a2e0839311e59a139b8f80c70067&refType=RP&fi=co_pp_sp_506_313&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_313).

In this case, the Plaintiff has failed to demonstrate that the methodology employed by the District was flawed, and instead merely highlights instances of disagreement with the District's evaluations and ultimate determination. Thus, the Parent has not persuasively argued or explained how the evaluation that was conducted was inadequate or why the conclusions reached from that evaluation should be set aside

*Brenda Perrin, on behalf of J.P., v. The Warrior Run School District*, 2015 WL 6746306.

In the instant case, the testimony of the School District’s witnesses regarding their evaluations of the Student and the IEP’s determination that he was not a “child with a disability’ is uncontroverted. During cross-examination, the attorney for the Student questioned the School District’s witnesses on matters such as whether his excessive absences during the 2014-15 school year were considered and on why the Student was not evaluated under the criteria for Emotional Behavior Disorder (EBD).[[1]](#footnote-1) With respect to the Student’s excessive absences the School District’s witnesses explained that the Student’s absences were excused. The lost school time could be addressed with accommodations not special education or related services. At the hearing, the Student attempted to cast doubt on the School District’s determination, but did not present evidence that a different determination was more appropriate.

Ultimately, this case comes down to whether the items the IEP team decided the Student needed to be successful in a school setting are accommodations or special education services. The School District’s Director of Pupil Services testified as to the difference between an accommodation and a special education service:

[A]n accommodation is something that can be provided within the regular ed setting, typically delivered by regular education teachers, school counselors, the regular education team. When we get to talking about an IEP, that is really specialized instruction, specialized programming. It’s related to a special education teacher, delivered by a special education teacher, and that’s the difference between the two.

(Tr. December 13, 2016, p. 173)

There is not a bright line between accommodations and special education services; however, the IEP team made a reasoned decision that in the Student’s situation the items to be provided were more appropriately done so in a 504 plan, not an IEP. The testimony of the IEP team members is uncontroverted. The only evidence presented by the Student regarding what items were necessary for him to successful in a school setting was the neuropsychological evaluation (exh. 31). The School District’s witnesses testified that all the recommendations in the report were either in the Student’s 504 plan or were available to all students in the district. The Student did not provide evidence that any of the recommended items in the neuropsychological evaluation could only be provided in an IEP. To the contrary, the recommendation in the neuropsychological evaluation expressly states that the items recommended should be provided to the Student in an IEP or a 504 plan.

 One gray area is whether the School District met the statutory deadlines. Wis. Stat. § 115.777(3)(e), requires a school district to send a request for consent to evaluate form to parents within fifteen business days of receipt of a referral for a determination of whether a student qualifies for special education. In this case, the School District indicates that the date of the referral is February 27, 2015, but does not explain how this date was determined. If the date of the referral was February 27, 2015, the School District sent the request for consent forms to the Parents by the statutory deadline. The Student complained that the School District was slow in responding to the Parents’ request for an IEP, but did not provide evidence of an earlier date for the referral. Moreover, since the School District’s determination that the Student was not a “child with a disability” is correct, even if the School District was late in requesting consent to evaluate from the Parents, that missed deadline is harmless.

 Another concern is the numerous documents that the School District mailed to the parents, but the Parents allege they never received. The testimony of [the administrative assistant], regarding her rigid system for ensuring that all required documents were mailed and were mailed timely was credible. No explanation for the Parents’ failure to receive some documents was presented; however, the applicable requirement is that the School District provide the document, not that the Parents receive them. The School District provided credible testimony that the documents were mailed to the Parents. Despite the finding that the School District’s evidence that the documents were in fact provided to the Parents, the allegation of the Parents remains troubling. A recurring theme in this case is miscommunication. One wonders whether if the Parents had received a copy of the evaluation and the 504 plan they would have made the same decision to enroll the Student in a private school.

 The other issues in this matter relate to the appropriate remedy if the School District failed to provide the Student a FAPE. The Parents have not sustained their burden to show that the District has failed to provide FAPE to the Student during the 2015-16 school year. Because the School District did not err in determining that the Student is not a “child with a disability,” the remedy for the School District’s failure to provide a FAPE need not be considered.

CONCLUSIONS OF LAW

 1. The School District used February 27, 2015, as the date that the Student was referred to it for an evaluation as a possible “child with a disability.” Pursuant to Wis. Stat. § 115.777(3)(e), the School District was required to send a request for consent to evaluate form to the Parents within fifteen business days of receipt of the referral. The School District sent the consent form to the Parents on March 19, 2015. The School District send a request for consent to evaluate form to the Parents within fifteen business days of receipt of a referral in compliance with Wis. Stat. § 115.777(3)(e).

2 In response to the referral, the School District assembled an IEP team for the Student that included the persons required by Wis. Stat. § 115.78(1m).

 3. The Parents executed and returned the consent form to the School District on April 27, 2015. The School District scheduled and conducted an IEP meeting to consider whether the Student was a “child with a disability” on June 2, 2015. The School District determined whether the Student was a “child with a disability” within sixty days of the after it received parental consent to evaluate the Student in compliance with by Wis. Stat. § 115.78(3).

 4. At the IEP meeting, the IEP team considered the reports submitted by the professionals that evaluated the Student as well as medical records supplied by the Parents. The IEP team, using the DPI checklist, properly concluded that the Student met the criteria for OHI. However, the IEP also properly concluded that the Student did not need special education or related services. Accordingly, the Student was not a “child with a disability” as defined at Wis. Stat. § 115.76(5)(a).

 6. The Parents have not met their burden of proof to show that the School District erred in concluding that the Student was not a “child with a disability” as defined at Wis. Stat. § 115.76(5)(a).

ORDER

 For the reasons stated above, IT IS HEREBY ORDERED that the Student’s request for relief is denied and the due process request is dismissed.

Dated at Madison, Wisconsin on May 4, 2017.

 STATE OF WISCONSIN

 DIVISION OF HEARINGS AND APPEALS

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 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Mark F. Kaiser

 Administrative Law Judge

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| **NOTICE OF APPEAL RIGHTS** |
| APPEAL TO COURT: Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.A copy of the appeal should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400. **The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 30 days of the date the Division of Hearings and Appeals receives the appeal.** |

1. In post-hearing briefs, the attorney also contended that the Student met the criteria for EBD. The attorney never explained the significance of this contention. Since the School District determined that the Student met the criteria for OHI and the only reason he was not found to be a “child with a disability” was because it was determined to not need special education or related services, a finding that he had another or different impairment is immaterial. [↑](#footnote-ref-1)