

**BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION
STATE OF NEBRASKA**

**OGALLALA PUBLIC SCHOOL
DISTRICT, commonly Known as
OGALLALA PUBLIC SCHOOLS,**

Petitioner,

vs.

Respondent.

CASE NO. 21-01 SE

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

This case was heard on May 17, 2021, at Ogallala Public Schools 801 E. O St, Ogallala, NE 69153. Mona (Molly) Burton, the duly qualified and appointed Fair Hearing Officer, presided. Petitioner, Ogallala Public School District, commonly known as Ogallala Public Schools, was represented by its attorney, Karen Haase. Respondent, _____ was present. The hearing was recorded by Doris Burby, Freelance Court Reporter. The case was adjourned on May 17, 2021, the record closed and the case taken under advisement.

Jurisdiction is premised upon NAC Title 92 Ch. 55, § 005.01, and the Nebraska Special Education Act, *Neb. Rev. Stat. § 79-1110 et. seq.*, which confers on the hearing officer exclusive original jurisdiction of this case.

Petitioner, Ogallala Public Schools (OPS) filed a Petition requesting a due process hearing to determine whether it appropriately denied Respondent's request for an Independent Education Evaluation (IEE) at public expense. (Ex. 2) Respondent answered the Petition. (Ex. 3)

The following witnesses testified at the hearing:

- Respondent and
- Teresa Gotchall, School Psychologist for OPS. Ms. Gotchall has been a school psychologist for 24 years. Ms. Gotchall has a Master's Degree in psychology and an Education Specialist Degree. (9:8-10) Ms. Gotchall has experience in performing psychological testing of students. (11:21-23) Ms. Gotchall has experience working with students diagnosed with Attention Deficit Disorder (ADHD), Autism Spectrum Disorder (ASD) as well as students with executive functioning deficits and behavior/emotional disorders. (12:7-9; 13:2-4; 13:15-17; 14:2-5)
 - BreAhna McConnell, 5th Grade teacher. Ms. McConnell has a Bachelor's Degree in Education and a Master's of Arts in Education with an endorsement in Pre-K through 6 principalship. (55:1-2) Ms. McConnell works with students who have disabilities including ADHD, ASD and behavioral disorders, students with executive function deficits as well as students who do not have disabilities. (55:21-56:13) Ms. McConnell has training to recognize students with ASD, behavior disorder and executive functioning deficits. (68:13-15; 69:5-13)
 - Jacqueline Anderson, Director of Student Services for OPS. Ms. Anderson previously served as school psychologist for ESU 11. (72:10-12) Ms. Anderson has a Bachelor's Degree in Psychology, an Education Specialist Degree, a Master's Degree in Special Education Supervision and an Education Specialist Degree in In-School Superintendent. (72:17-224) Ms. Anderson is also a licensed mental health practitioner. (72:25-73:2) Part of Ms. Anderson's duties is to supervise special education. (71:24-25) In her career, Ms. Anderson has reviewed approximately 2,000 student evaluations. (73:12-17) Ms. Anderson has experience working with students diagnosed with ADHD and ASD as well as students with executive functioning deficits and behavior/emotional disorders. (74:3-14)

Exhibits 1 through 7 and 9 through 18 were received without objection. Exhibit 8 was received over Respondent's objection.

FINDINGS OF FACT

1. Petitioner is a public school district accredited by the Nebraska Department of Education. Pursuant to the Individuals with Disabilities in Education Act (IDEA) and Title 92, Chapter 51 of the Nebraska Administrative Code (Rule 51) and Title 92, Chapter 52 of the Nebraska Administrative Code (Rule 52) Petitioner serves as the Local Education Agency (LEA) for

(Ex. 2)

2. Respondent is _____ (Ex. 2)

3. _____ is a 5th grade student at OPS. (15:6-13)

4. _____ is diagnosed with ADHD, Oppositional Defiant Disorder (ODD), Adjustment Disorder with Mixed Anxiety and Depressed Mood. (15:14-16) (Ex. 4)

5. _____ has a 504 Plan. (16:2-4) (Ex. 16) The 504 Plan notes _____ struggles with concentration and disruptive behaviors. (17:16-19) The plan provides accommodations for _____ including preferential seating, additional time to complete tests/work and reduced work. (17:19-24) (Ex. 16) The accommodations are not considered specialized instruction. (18:7-11)

6. Ms. McConnell utilizes preferential seating and gives _____ more time for homework and tests. (60:10-12)

7. The student assistance team is the first step in assessing whether a child is in need of specialized instruction. (19:14-17). _____ had not been referred to the student assistance team. (18:24-19:2) (77:3-6) Parents can also request testing. (20:4-9)

8. In February of 2020, Respondent requested _____ be evaluated to determine whether _____ was eligible for special education services. Petitioner requested and received consent from Respondent

to conduct the evaluation. (Ex. 2) (Ex. 5) (Ex. 6) (19:23-20:1) The following areas were chosen to be evaluated: academic, intellectual and social/emotional. (Ex. 5)

9. In April 2020, a Multi-Disciplinary Team (MDT) convened for initial evaluation. The MDT included Respondent, Ms. Anderson, Steve Bristol, Principal, Jill Saults, General Education Teacher, John Zilla, Special Education Teacher and Ms. Gotchall. (Ex. 8 at 10) The team considered and utilized the data from the following assessments:

a. observational information regarding functional, behavioral, developmental and academic aptitude in various education settings and contexts, including a report from teacher;

b. observational information regarding functional, developmental and academic aptitude in various settings provided by Respondent;

c. information from previously conducted assessments regarding progress in various settings with supports and services, including data from Measure of Academic Progress (MAP) and results on the Nebraska Student-Centered Assessment System (NSCAS);

d. Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V);

e. Woodcock-Johnson Test of Achievement (4th Edition) (WJ-IV). (Ex. 2)

10. Rule 51 recognizes 13 disability categories. (75:10-11) To receive specialized instruction, a student must verify in one of the 13 categories and the disability must demonstrate an adverse educational impact necessitating special education services.

Observational information regarding functional, behavioral, developmental and academic aptitude in various education settings and contexts, including a report from teacher and Respondent:

11. Due to COVID, Ms. Gotchall was not able to observe in classroom. (24:23-25:1)
Ms. Gotchall learned about classroom performance by reviewing Ms. McConnell's report, behavior reports, grades, as well as a psychological evaluation from Behavioral Medicine Associates. (33:16-34:2) John Zilla observed in the classroom and did not report any concerns with behavior. (25:16-22)
12. Ms. Gotchall noted did not have an excessive number of behavior write-ups indicating inappropriate behavior. (25:8-10)
13. Compared to other students, did not have an excessive amount of behavior write-ups. (34:14-18) number of write-ups is not consistent with a student who has an emotional or behavioral deficit. (34:24-35:1) The write-ups do not indicate is a student with a disability. (40:13-15)
14. Ms. McConnell spends approximately 40 hours a week with (56:19-21)
15. Ms. McConnell reported works on required tasks when asked. works well in group activities when it is a subject of interest and a structured activity. has a tendency to rush through work. typically relates well with peers. functions best in a structured setting. Ms. McConnell sat near her so she could monitor behavior. has trouble sitting still and likes movement. (Ex. 8 at 4) functions pretty successfully in class. (56:22-24) communicates well, gets along with peers and performs at benchmark compared

to other students. (56:23-57:2) is a good communicator and performs as expected. (59:20-22)

16. At times, can be impulsive and easily distracted. When is on medication and in a good routine, is not hindered. (59:23-60:1)

17. Ms. Gotchall did not believe Ms. McConnell's report reflected a need for further evaluation. (26:17-21)

18. did not display signs suffered from a behavior disorder. (69:22-23; 92:14-17)

19. grades indicated was an average student and doing well in school. (26:22-27:1)

20. The MDT reviewed Respondent's report. (24:7-18)

MAP and NCACS Testing:

21. The MDT considered MAP scores. MAP stands for measure of academic progress and is a district wide assessment given three times a year to evaluate a student's academic progress. (32:7-13)

22. MAP scores fell in the average range indicating was performing at grade level and making progress expected of all fifth-grade students nationally. (32:20-24; 58:9-11; 59:13-15)

24. The MDT reviewed scores on the Nebraska Student Centered Assessment (NSCA), a state assessment measuring school performance. (33:1-6) scores indicate is on track and learning what the State of Nebraska has determined fifth grade students should learn. (33:6-9; 59:1-2; 59:9-12)

25. The NSCA indicated was functioning in the average range intellectually and academically and should be able to progress on the general educational curriculum. (36:13-16)

Weschler Intelligence Scale for Children, Fifth Edition:

26. Ms. Gotchall administered the Weschler Intelligence Scale for Children, Fifth Edition (WISC-V). (27:9-12). Ms. Gotchall administered the WISC-V consistent with testing protocols. (28:28:24-29:3)

27. The WISC-V was administered in person during the COVID pandemic. (29:4-11) Respondent was given the option to revoke consent for the evaluation, but chose to continue with the testing. (29:11-15) Both Ms. Gotchall and [redacted] wore masks. Ms. Gotchall did not believe the masks impacted test reliability. (29:18-21)

28. The results revealed [redacted] has average intellectual ability. (27:14-15) [redacted] scored in the average range in all five indexes and scored an overall average IQ of 102. (27:22-28:23)

29. The WISC-V indexes including fluid reasoning and working memory utilize executive functions. However, executive functions are necessary to be successful on all WISC-V subtests. (47:1-18)

30. [redacted] performance on the WISC-V did not indicate a further need to evaluate executive functioning. (47:25-48:3) [redacted] did not display signs of executive functioning deficits. (69:8-10; 92:10-13)

Woodcock-Johnson Test of Achievement (4th Edition) (WJ-IV)

31. [redacted] evaluation included an academic assessment. John Zilla measured [redacted] academic assessment by administering the WJ-IV test. (29:22-30:11)

32. [redacted] scored in the average range in the following areas: basic reading, reading fluency, reading comprehension, math calculation and written expression. (31:12-32:3) (Ex. 8 at 7)

[redacted] scored in the low-average range for problem solving. (31:24-32:2) (Ex. 8 at 7)

33. [redacted] test scores indicated [redacted] should be successful in school. (32:4-6)

Additional Facts:

34. The MDT considered diagnoses of ADHD, ODD and Adjustment Disorder, but determined the diagnoses did not significantly impact academically or socially in the school setting as required for an IEP under the IDEA. (36:18-37:4)

35. The MDT determined did not meet the criteria for verification as a student in need of special educational services. (Ex. 8 at 3)

36. All MDT members including Respondent agreed with the decision. (37:14-17)

37. Prior written notice was sent to Respondent informing did not qualify for special education services. (89:6-19) (Ex. 6)

38. Respondent subsequently requested an IEE (Ex. 11) Respondent does not believe the evaluation adequately addressed executive function skills, possible ASD diagnosis and behaviors. (Ex. 11)

39. OPS did not grant Respondent's request for an IEE. (Ex. 18)

40. School psychologists cannot diagnose ASD, but can identify indicators using the State's Disability Category for Autism. (40:20-41:7) (Ex. 15)

41. did not exhibit any of the indicators associated with ASD. (42:15-17; 92:7-9)

42. To be verified as a student with autism, the student must exhibit atypical behavior in: social competence, communication and interest in patterns of behavior. (43:23-44:9) (Ex. 15 at 3)

did not display any signs of these atypical behaviors. (44:2-10; 68:24-69:1)

43. did not display any additional indicators associated with ASD including: repetitive responses to sensory stimuli, differences in rates of cognitive skill development, uneven rate or out of sequence skill development, extreme or dysregulated behavioral characteristics, difficulties with judgment and difficulties with abstract thinking. (44:15-23) (Ex. 15 at 4)

44. Executive functioning deficit is not a verifiable category under Rule 51. (46:9-11)

45. Executive functioning deficit can be a symptom of a verifiable category. (46:12-14)

CONTESTED ISSUES

Respondent contends OPS's evaluation did not adequately address: executive functioning, possible ASD diagnosis and behaviors.

CONCLUSIONS OF LAW

BURDEN OF PROOF:

46. IDEA and Rule 51 of the Nebraska Department of Education allow for publicly funded IEEs if the parent disagrees with an evaluation obtained by the school district, unless (1) the district demonstrates in a due process hearing that its own evaluation of the child was appropriate; or (2) the district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. 92 NAC § 51 006.07(D).

47. The burden of proof in a due process hearing routinely rests on the Petitioner. Accordingly, the burden in this case is on OPS to show by a preponderance of the evidence, that it's evaluation of satisfied IDEA's requirements and procedures. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005).

48. If the school district successfully proves its own evaluation was appropriate, a parent is not entitled to an IEE at public expense. 34 C.F.R. § 300.502(b)(3).

REGULATIONS REGARDING VERIFICATION CRITERIA AND PROCEDURES:

49. School districts and approved cooperatives must ensure a variety of assessment tools and strategies are used to gather relevant functional, developmental and academic information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general education curriculum. 92 NAC 51 § 006.02C5.

50. School districts and approved cooperatives must ensure the child is assessed in all areas related to the *suspected* disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 92 NAC 51 § 006.02C10 (emphasis provided).

51. School districts and approved cooperatives must ensure no single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 92 NAC 51 § 006.02C9.

52. School districts and approved cooperatives must ensure tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. 92 NAC 51 § 006.02C7.

53. School districts and approved cooperatives must ensure in evaluating each child with a disability under Section 006, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 92 NAC 51 § 006.02C11.

54. The school district or approved cooperative must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 92 NAC 51 § 006.02C12.

55. The school district or approved cooperative must use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. 92 NAC 51 § 006.02C13.

56. In interpreting evaluation data for the purpose of determining if a child is a child with a disability and the educational needs of the child, each school district or approved cooperative shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests,

parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. 92 NAC 51 § 006.02C14a. (2) Ensure that information obtained from all of these sources is documented and carefully considered. 92 NAC 51 § 006.02C14b.

57. Child with a disability means a child who has been verified as a child with autism, a behavior disorder (herein referred to as emotional disturbance), deaf-blindness, a developmental delay, a hearing impairment including deafness, an intellectual disability, multiple impairment, an orthopedic impairment, another health impairment, a specific learning disability, a speech-language impairment, a traumatic brain injury or a visual impairment including blindness, *who because of this impairment needs special education and related services*. 92 NAC 51 § 003.08 (emphasis provided). *See also*, 20 U.S.C. § 1401 (3)(A).

CONTESTED ISSUES:

- 1. WHETHER OPS'S EVALUATION APPROPRIATELY CONSIDERED A POSSIBLE ASD DIAGNOSIS.**
- 2. WHETHER OPS'S EVALUATION APPROPRIATELY CONSIDERED BEHAVIORS.**
- 3. WHETHER OPS'S EVALUATION APPROPRIATELY ASSESSED EXECUTIVE FUNCTIONING SKILLS.**

WHETHER OPS'S EVALUATION APPROPRIATELY CONSIDERED A POSSIBLE ASD DIAGNOSIS.

58. School psychologists cannot diagnose ASD, but can identify indicators using the State's Disability Category for Autism.

59. did not exhibit any of the indicators associated with ASD.

60. To be verified as a student with autism, the student must exhibit atypical behavior in: social competence, communication and interest in patterns of behavior. did not display any signs of these atypical behaviors.

61. did not display any additional indicators associated with ASD including: repetitive responses to sensory stimuli, differences in rates of cognitive skill development, uneven rate or out of sequence skill development, extreme or dysregulated behavioral characteristics, difficulties with judgment and difficulties with abstract thinking.

62. Respondent had evaluated for possible ASD after the MDT meeting. The evaluator determined did not have ASD. (103:4-9)

63. As to Autism Spectrum Disorder, is not a child with a disability under 92 NAC 51 § 003.08. has not been verified as a child with autism.

64. Respondent requested the MDT evaluation because of need for medications to address ADHD as well as behavior diagnoses of ODD and Adjustment Disorder. (103:1-3) (Ex. 4)

65. At the time of the MDT evaluation, ASD was not a suspected disability.

66. OPS's witnesses opined the evaluation complied with 92 NAC 51 §§ 006.02C5, 006.02C10, 006.02C9, 006.02C7, .006.02C11, .006.02C12. .006.02C13, .006.02C14 a and b. (48:4-10; 69:24-70:2; 99:19-23) (48:19-21; 70:12-15; 100:11-13) (48:15-18; 70:8-11; 100:7-10) (48:11-14; 70:3-

7) (48:22-25; 100:14-17) (49:6-9; 100:23-101:1) (49:6-9; 100:23-101:1) (49:10-13; 101:2-6) (49:14-16)

67. This testimony was credible.

68. OPS's witnesses testified its evaluation was appropriate. (49:21-23; 70:16-18; 101:7-9)

69. Likewise, this testimony was credible.

70. Accordingly, OPS met its burden establishing it appropriately assessed in all areas of suspected disability.

WHETHER OPS'S EVALUATION APPROPRIATELY CONSIDERED BEHAVIORS

71. Child with a disability means a child who has been verified as a child with autism, a behavior disorder (herein referred to as emotional disturbance), deaf-blindness, a developmental delay, a hearing impairment including deafness, an intellectual disability, multiple impairment, an orthopedic impairment, another health impairment, a specific learning disability, a speech-language impairment, a traumatic brain injury or a visual impairment including blindness, *who because of this impairment needs special education and related services*. 92 NAC 51 § 003.08 (emphasis provided).

72. The MDT considered diagnoses of ADHD, ODD and Adjustment Disorder, but determined the diagnoses did not significantly impact academically or socially in the school setting as required for an IEP under the IDEA.

73. Classroom observations did not indicate behaviors associated with a student with a behavior disorder. works on required tasks when asked. works well in group activities when it is a subject of interest and a structured activity. typically relates well with peers. has trouble sitting still and likes movement. communicates well, gets along with peers and

performs at benchmark compared to other students. At times, [redacted] can be impulsive and easily distracted. However, *when [redacted] is on medication and in a good routine, [redacted] is not hindered.* (emphasis provided).

74. [redacted] did not have an excessive number of behavior write-ups indicating inappropriate behavior. Compared to other students, [redacted] did not have an excessive amount of behavior write-ups.

75. [redacted] number of write-ups is not consistent with a student who has an emotional or behavioral deficit. The write-ups do not indicate [redacted] is student with a disability.

76. [redacted] behavior diagnoses did not have an adverse impact on [redacted] grades and academic performance as [redacted] test scores indicate [redacted] is an average student and should be successful in school.

77. While [redacted] has behavior disorder diagnoses, under 92 NAC 51 § 003.08, the diagnosis must impair [redacted] functioning in the school to the point special education services are needed. [redacted] did not display signs [redacted] suffered from a behavior disorder in the school setting.

78. Accordingly, [redacted] is not a child with a disability under 92 NAC 51 § 003.08.

79. OPS's witnesses opined the evaluation complied with 92 NAC 51 §§ 006.02C5, 006.02C10, 006.02C9, 006.02C7, .006.02C11, .006.02C12. .006.02C13, .006.02C14 a and b. (48:4-10; 69:24-70:2; 99:19-23) (48:19-21; 70:12-15; 100:11-13) (48:15-18; 70:8-11; 100:7-10) (48:11-14; 70:3-7) (48:22-25; 100:14-17) (49:6-9; 100:23-101:1) (49:6-9; 100:23-101:1) (49:10-13; 101:2-6) (49:14-16)

80. This testimony was credible.

81. OPS's witnesses testified its evaluation was appropriate. (49:21-23; 70:16-18; 101:7-9)

82. Likewise, this testimony was credible.

83. Accordingly, OPS met its burden establishing it appropriately assessed in all areas of suspected disability including diagnosed behavior disorders.

WHETHER OPS'S EVALUATION APPROPRIATELY ASSESSED EXECUTIVE FUNCTIONING SKILLS.

84. Executive functioning deficit is not a verifiable category under Rule 51. However, executive functioning deficit can be a symptom of a verifiable category.

85. executive functioning skills were assessed with the WISC-V.

86. performance on the WISC-V did not indicate a further need to evaluate executive functioning.

87. Further, did not display signs of executive functioning deficits.

88. Assuming arguendo the testing had showed executive functioning deficits, did not meet criteria for verification as a student in need of special education services as does not have a diagnosis of ASD and diagnoses of ADHD and ODD and Adjustment Disorder are successfully managed with medication and 504 Plan accommodations.

89. OPS's witnesses opined the evaluation complied with 92 NAC 51 §§ 006.02C5, 006.02C10, 006.02C9, 006.02C7, .006.02C11, .006.02C12, .006.02C13, .006.02C14 a and b. (48:4-10; 69:24-70:2; 99:19-23) (48:19-21; 70:12-15; 100:11-13) (48:15-18; 70:8-11; 100:7-10) (48:11-14; 70:3-7) (48:22-25; 100:14-17) (49:6-9; 100:23-101:1) (49:6-9; 100:23-101:1) (49:10-13; 101:2-6) (49:14-16)

90. This testimony was credible.

91. OPS's witnesses testified its evaluation was appropriate. (49:21-23; 70:16-18; 101:7-9)

92. Likewise, this testimony was credible.

93. Accordingly, OPS met its burden establishing it appropriately assessed executive functioning skills.

CONCLUSION

94. OPS met its burden establishing its evaluation of was appropriate. Respondent is not entitled to an IEE at public expense.

IT IS, THEREFORE, ORDERED, AS FOLLOWS:

1. Petitioner's special education petition is sustained.
2. Petitioner is not obligated to grant Respondent's request for an Independent Education Evaluation at public expense.

DATED June 17, 2021

By:



Mona (Molly) L. Burton, #21696 Hearing Officer

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the above and foregoing was duly served via certified mail return receipt requested on the 17th day of June 2021.

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