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Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

Open Hearing

ODR No. 28332-23-24

Child's Name

B.M.

Date of Birth

[redacted]

Parent

[redacted]

Local Educational Agency

Keystone Central School District
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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

10/09/2023

Introduction

This special education due process hearing concerns the educational rights of B.M. (“student”), a student who resides in the Keystone Central School District (“District”).¹ As a result of an evaluation in May 2023, the student was found by the District not to qualify under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)² as a student with a disability who requires specially-designed instruction.³

The District filed the complaint in this matter, seeking to defend its May 2023 evaluation process and report in the face of the request of the student’s parents for an independent educational evaluation (“IEE”) at District expense.⁴

For reasons set forth below, I find in favor of the parents as to the appropriateness of the May 2023. The District will be ordered to fund an IEE at public expense.

¹ The generic use of “student”, and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 (“Chapter 14”).

³ As set forth more fully below, as part of the evaluation, the District determined that the student has a disability but does not require specially-designed instruction.

⁴ The District filed its complaint in July 2023. In August 2023, the parents filed a complaint at ODR file number 28452-23-24 with various claims of past denial of a free appropriate public education. The two cases were not consolidated, and as of the date of this decision, the file at 28452 is unfolding in a separate process.

Issue

Must the District provide an IEE at public expense?

Findings of Fact

All evidence of record was reviewed. The citation to any exhibit or aspect of testimony is to be viewed as the necessary and probative evidence in the mind of the hearing officer.

1. The student began the 2022-2023 school year without an individualized education program.
2. In December 2022, on a school district school bus during an athletics trip, fellow students on the bus directed physical bullying, including inappropriate contact, toward the student. (Parents Exhibit ["P"]-10).⁵
3. Video cameras of the December 2022 school bus incident recorded the incident. (Notes of Testimony ["NT"] at 265-287).
4. In January 2023, the student's parents requested an evaluation of the student. (P-10).
5. Parents' request, made through counsel, indicated the following:

⁵ While not documented through testimony in any detail on this record, the parties do not dispute that the incident took place.

“(I)t is evident that there is a history of academic and executive functioning concerns, as well as the social and emotional impact on [the student as a result of the December 2022 incident] that clearly establish the need for a comprehensive psychoeducational evaluation....”. (P-10 at page 1).

6. In February 2023, the District requested permission to evaluate the student. (P-11).
7. The permission-to-evaluate form (“PTE”) indicated that the parents had requested the evaluation, as well as a list of the areas where information would be collected as part of the evaluation and a list of the input, tests, and assessments that would be collected. (P-11 at pages 1-3).
8. The PTE contains a section entitled “description of other factors relevant to this proposed initial evaluation”. The District indicated in this section “N/A”. (P-11 at page 2).
9. The District school psychologist who prepared the evaluation did not issue the PTE. The PTE indicated that parents’ consent should be returned to a special education administrator in the District. (P-11 at page 4; Notes of Testimony [“NT”] at 51-200).
10. The school psychologist was informed in a vague way that parents had requested an evaluation and that “an event” had taken

place on a school bus. At some point after the evaluation had begun, but before the evaluation report ("ER") was issued in May 2023, the school psychologist became aware of the details of the school bus incident. (NT at 51-200).

11. The school psychologist did not review the videotape recording of the incident to avoid injecting into her view of the student any biases. (NT at 51-200).

12. The school psychologist did not make the school bus incident any part of her evaluation, and the incident did not inform her approach to understanding the student's potential educational needs. (NT at 51-200).

13. In May 2023, the District issued its ER. (P-12).

14. The May 2023 ER contained parental input. The student's mother reported previous medical diagnoses of attention deficit hyperactivity disorder ("ADHD") and oppositional defiance disorder. (P-12).

15. The testimony of the school psychologist indicated that the December 2022 incident was not part of the parent's input. The testimony of the student's mother indicated that the subject of the incident came up in the interview with the school psychologist but that it was not covered in detail and that the school psychologist commented that "we are not delving into that"; the student's mother assumed that the incident would be made part of the ER from other

sources. The testimony of the student's mother is credited as to how the school psychologist handled parental input vis a vis the school bus incident. (NT at 51-200, 321-349).

16. The May 2023 ER contained an observation of the student in English class. (P-12).

17. The May 2023 ER contained input from six of the student's teachers. Two teachers testified at the hearing (one of whom provided input, one of whom did not). Both teachers testified that the December 2022 incident was the basis of conversation being shared by students in school; one teacher testified that conversations were being shared in front of the student, and the teacher saw a change in affect in the student that he described as "upset" and "embarrassed". (P-12; NT at 206-229, 234-256).

18. The May 2023 ER contained curriculum-based assessments in reading and mathematics. (P-12).

19. The school psychologist indicated during testimony that the student did not share any details or information about the December 2022 school bus incident. The May 2023 ER contains observations of the student during testing/assessment but no direct input from the student about any aspect of the student's education. (P-12; NT at 51-200).

20. The May 2023 ER contains cognitive and achievement testing. (P-12).
21. The May 2023 ER contains the results of state Keystone and PSSA exams, as well as the student's grades. (P-12).
22. The May 2023 ER contains executive functioning assessment by three teachers. On multiple sub-tests and indices, the student was rated with clinically significant scores by multiple teachers, often consistently by two raters, but there is no substantive analysis of these clinically elevated scores. (P-12).
23. The May 2023 ER contains behavior rating scales completed by the student, the student's mother, three teachers, and a self-report by the student. The analysis of the school psychologist centered on sub-tests where all five raters (including the student) reported at-risk or clinically significant scores. The analysis did not account for elevated composite or index scores. (P-12).
24. No sub-test score was rated at those levels by all five raters. All three teachers and the student's mother rated the student with at-risk or clinically-significant scores in somatization ("the tendency to be overly sensitive to and complain about relatively minor physical problems and discomforts"). Two teachers and the student's mother rated the student with at-risk scores in hyperactivity. (P-12)

25. One teacher rated the student as at-risk or clinically-significant in multiple areas, including at-risk scores in the externalizing problems composite, internalizing problems composite, and behavioral symptoms index (all reported but not analyzed). (P-12).
26. The May 2023 ER concluded that as a result of the reported ADHD diagnosis and consistently elevated scores in executive functioning, the student was a student with a disability but that the student did not require specially-designed instruction. (P-12).
27. In June 2023, parents requested an IEE at public expense. (Hearing Officer Exhibit ["HO"] 1 – District complaint).
28. In July 2023, the District declined to provide fund the IEE and filed the complaint which led to these proceedings. (P-14; HO-1).
29. The District school psychologist testified that she was aware of guidance related to trauma-sensitive evaluations by school personnel, but she did not employ these techniques. (P-18 at pages 47-50; NT at 51-200).

Discussion

Under the terms of the IDEA, "(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...." (34 C.F.R. §300.502(b)(1); 22 PA Code §14.102(a)(2)(xxix)). Upon requesting an IEE

at public expense, a school district has one of two choices: the school district must provide the evaluation at public expense, or it must file a special education due process complaint to defend its evaluation process and report. (34 C.F.R. §300.502(b)(2)(i)-(ii); 22 PA Code §14.102(a)(2)(xxix)).

An evaluation must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining” an understanding of the student’s disability and the content of the student’s IEP. (34 C.F.R. 300.304(b)(1); 22 PA Code §14.102(a)(2)(xxv)). Furthermore, the school district may not use “any single measure or assessment as the sole criterion for...determining an appropriate educational program for the child”. (34 C.F.R. 300.304(b)(2); 22 PA Code §14.102(a)(2)(xxv)).

Here, the only question presented is whether the District’s May 2023 ER is appropriate under the terms of the IDEA. The evidence supports a conclusion that the May 2023 was fatally deficient because the District evaluator did not account for the December 2022 school bus behavior incident.

The May 2023 ER contains the typical elements one would expect from a comprehensive evaluation, including parental input, teacher input, curriculum-based results and student grades, and assessments and testing

(including cognitive, achievement, and social/emotional/behavioral assessments). Missing from the May 2023 ER, however, is any information related to the December 2022 school-bus incident.

This incident was the explicit triggering event for the parents' request for an evaluation, yet it was entirely absent from the evaluation process and report.

The District evaluator testified that she did not want to view the videotape of the incident so as not to inject bias into her perception of other elements or results of the evaluation. This is understandable, perhaps, on a certain level, although one wonders whether viewing the videotape of the incident may have been undertaken after all other elements of the evaluation had been completed in draft form. That way, the evaluation could have been completed without any risk of bias as to the already-completed elements, yet the evaluator would be fully informed of the incident from her own perspective to see if additional assessment or elements should have been employed in the evaluation.

Broadly, however, the lack of any approach, assessment, or content regarding the incident is prejudicial. It is as if the December 2022 school bus incident had never happened. Regardless of whether it plays a role in the educational needs of the student—and that is indeterminate at this point—the incident should certainly have been part of the evaluation process.

Beyond the prejudicial absence from the ER of considerations related to the December 2022 incident, there are other aspects of the ER which render it inappropriate. First, the standardized assessment which contains the most consistently elevated or clinically-significant scores is the executive functioning assessment, but only the scores are reported without analysis of the scores and potential implications for the student's learning or affect. Second, all teachers and the parent rated the student as at-risk or clinically-significant for overestimating or over-reporting physical symptomology, yet there is no analysis or follow-up on this feature of the student's presentation; this is especially problematic in light of the potential impact of the December 2022 incident on the student.

In sum, then, the May 2023 ER contains significant flaws which necessitate an IEE at public expense.

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ORDER

In accord with the findings of fact and conclusions of law set forth above, the May 2023 evaluation report issued by the Keystone Central School District, and the evaluation process underpinning the report, both contain prejudicial flaws which necessitate an independent educational evaluation ("IEE") at public expense. Within 30 calendar days of the date of

this order, the parents shall provide the name of the independent evaluator selected to perform the evaluation, along with the evaluator's curriculum vitae, to the school district.

By way of background, training, and experience, the independent evaluator shall be qualified to conduct a comprehensive neuro-psychological evaluation of the student. By way of background, training, and experience, the independent evaluator shall also be familiar with approaches to trauma-sensitive evaluation.

The independent evaluator shall be made to understand that it is hoped, but not required or ordered, that the IEE report can be issued as soon as practicable, but if possible by January 9, 2024, approximately sixty calendar days beyond November 7th, the last day for the identification of an evaluator by the parents.

The independent evaluator shall be informed that he/she is undertaking a comprehensive neuro-psychological evaluation to fully inform the student's multi-disciplinary team as to whether or not the student is (a) a student with a disability who requires specially-designed instruction, (b) a student with a disability who requires specialized programming which is not specially-designed instruction, or (c) is a student with a disability who requires no specialized services. As a factor relevant to the evaluation, the independent evaluator shall be further informed that parents are especially

concerned about potential impacts on the student from a significant behavior incident in December 2022 on a school district school bus where fellow students directed physical bullying, including inappropriate contact, toward the student.

The evaluator shall also be made to understand, but not required or ordered, that should the student be found eligible for services as a student with a disability, potential recommendations, if any, in the IEE report shall be made with a view toward informing the student's education team about necessary or recommended services, if any, in light of the student's disability(-ies).

The record review, materials, artifacts, input, observations, assessments, testing, consultation, scope, details, findings, recommendations, and any other content as part of the IEE, or IEE report, shall be determined solely by the independent evaluator.

The cost of the IEE, and issuance of the IEE report, shall be at the independent evaluator's rate or fee and shall be borne by the District at public expense.

After the independent evaluator has issued the IEE report, the student's multi-disciplinary team shall meet to consider the findings of the IEE report. At the multi-disciplinary meeting, the District shall invite and include the independent evaluator as a participant in the multi-disciplinary

meeting, making scheduling accommodations for the participation of the independent evaluator, in person, by telephone, or by videoconference, as necessary. The District shall bear any cost or rate for the participation of the independent evaluator at the multi-disciplinary meeting.

The terms of this order regarding the involvement of the independent evaluator shall cease after the independent evaluator's attendance at the multi-disciplinary meeting, although nothing in the order should be read to limit or interfere with the continued involvement of the independent evaluator, as both parties may mutually agree, or as one party may make singular arrangements therefor.

Finally, nothing in this order should be read to interfere with or limit the ability of the parties to agree otherwise as to the independent evaluation process, so long as such agreement is in writing and specifically references this order.

Parent's various claims of denial of a free appropriate public education will be heard in the affiliated hearing process at ODR file number 28452-23-24.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

10/09/2023