This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer
Final Decision and Order

Open Hearing

ODR File Number
23937-2021-KE

Child's Name
S.K.

Date of Birth
[redacted]

Parent(s)/Guardian(s)
[redacted]

Counsel for Parents
Pro Se

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Hearing Officer
Brian Jason Ford, JD, CHO

Date of Decision
01/08/2021

Introduction and Procedural History

This special education due process hearing was requested by the Fleetwood School District (the District). The issues, and the parties' positions, evolved over the course of the hearing. Ultimately, this hearing concerns the District's request to reevaluate a student with disabilities (the Student). The District proposed a reevaluation to the Student's parents (the Parents) and sought their consent to reevaluate. The Parents withheld their consent. The District seeks an order enabling it to reevaluate the Student without the Parents' consent.

The parties agree that the District is the Student's Local Educational Agency (LEA) and that the Student is a child with a disability as those terms are defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

On July 17, 2020, the Parents requested an independent educational evaluation (IEE) at the District's expense. The District denied that request. The District was required by the IDEA to request a due process hearing upon denying the Parents' request for an IEE. The District raised two issues in its complaint. First, the District sought a determination that the Parents are not entitled to an IEE at its expense. Second, the District sought a determination that it offered an appropriate special education placement to the Student.

As part of its IEE claim, the District argued that it must have an opportunity to reevaluate the Student before the Parents have an entitlement to an IEE at public expense. In its complaint, the District said that it "should be permitted to pursue its Reevaluation, and only at the end of that process, and if Parents disagree with the conclusions of that Reevaluation, would an IEE request arguably be appropriate."

Acting consistently with its argument, the District formally sought the Parents' consent to evaluate the Student by issuing a Permission to Reevaluate form (PTRE) dated August 20, 2020. As discussed below, the Parents returned the PTRE, withholding consent for the District to evaluate the Student.

As the hearing date approached, the Parents withdrew their request for an IEE at public expense. In response, on October 30, 2020, the District withdrew its demand for a finding that the Parents are not entitled to IEE at public expense. However, the District stated that it was not withdrawing its complaint and was moving forward on its claim that it should be permitted to reevaluate the Student.

In the same email, the District withdrew its demand for a finding that it offered an appropriate special education placement to the Student. For context, the District averred that the Parents had not rejected a Notice of Recommended Educational Placement (NOREP) and was treating the Parents' non-response as acceptance, rendering the issue moot.

In the days and hours before the hearing convened, the Parents raised several objections to the hearing. All of those objections were denied. After the hearing concluded, the Parents continued to raise the same objections and sought clarification as to why I overruled their objections. Arguably, the Parents' post-hearing correspondence could be taken as various motions for reconsideration of threshold objections. To whatever extent the Parents' post-hearing correspondence are motions for reconsideration, those motions are also denied. In deference to the Parents' *pro se* status, however, I have added an appendix to this decision so that they can have a written ruling on their motions for reconsideration.

As discussed below, I hold that the District may reevaluate the Student.

Issue

May the District conduct the evaluation proposed in the August 20, 2020 PTRE without the Parents' consent?

The Parties' Positions

The parties' positions are neither evidence nor argument but contextualize the matter as a whole. It is, therefore, worth noting when parties adopt unusual positions. Both parties adopted unusual positions in this hearing.

Typically, the parties' positions are stated in their pleadings. In this case, the Parents sent many emails but never filed a response to the District's complaint. The District also expressed amenability to relief that is different than its demand as written. Further, although not technically a party to these proceedings, the Student's position is different from the Parents' position in subtle but important ways.

The District's position is that it must be allowed to evaluate the Student to determine an appropriate special education placement for the Student. The District seeks an order permitting it to evaluate the Student in accordance with the PTRE. However, the District is amenable to an order requiring it to add additional evaluations to the PTRE, provided that the District is permitted to evaluate the Student.

The Parents agree that the Student must be reevaluated, although the Parents' reasons for wanting a reevaluation are less clear. Despite this agreement, the Parents rejected the PTRE — writing their reasons for doing so on that document. Generally speaking, the Parents say that they want someone unaffiliated with the District to evaluate the Student and would like an independent evaluator to conduct the same evaluations that the District proposed. However, the Parents withdrew their demand for an IEE at public expense and sent several emails saying that the Student does not require an IEE at this time (at public expense or otherwise). In the end, the Parents have asserted that 1) a reevaluation is necessary, 2) the District should not conduct the reevaluation, and 3) an IEE is not necessary at this time. These positions are contradictory and irreconcilable.[1]

The Student's testimony reveals the clearest position of all. The Student expressed [the student's] position while testifying with poise and maturity. The Student agrees with the District and the Parents that a reevaluation is needed. The Student does not trust the District to conduct the reevaluation and fairly report the results. Therefore, the Student asks for a reevaluation from an independent evaluator. I am grateful that the Student clearly and succinctly told me what the Student wants me to do and why. I admire the Student's candor and forthrightness.

Findings of Fact

Unless stated otherwise, all reports referenced herein include educational recommendations. All references to "private" evaluators, reports, and the like mean that the evaluator is not affiliated with the District (as opposed to the evaluator's form of business). For example, a private evaluator could be a therapist with a private practice or a doctor working for a hospital system.

I find as follows:

1. The District, Parents, and Student all agree that a reevaluation is necessary. *N.T., passim*. In the absence of any dispute on this point, I find as a fact that a reevaluation is necessary.

2. In 2018, the Student was evaluated by a private pediatric neuropsychologist. The neuropsychologist drafted a report of the evaluation dated February 19, 2018. S-2.

[1] It is, of course, possible that the Parents do believe that an IEE is necessary but withdrew their request believing that action would end this hearing. Several emails from the Parents express this belief.

3. At some point between February 19 and March 12, 2018, the District obtained a copy of the private neuropsychological report. The District used that report as part of its own evaluation. *See* S-1.

4. The District drafted an evaluation report for the Student dated March 12, 2018 (the 2018 ER). Therein, the District concluded that the Student has a disability and is in need of specially designed instruction and, therefore, is eligible for special education. S-1.

5. Under the 2018 ER, the Student's primary disability category was traumatic brain injury (TBI) and secondary disability category was emotional disturbance (ED). S-1.

6. A different private neuropsychologist evaluated the Student in April and May 2018. This evaluation started before the District issued the 2018 ER and ended after the District issued the 2018 ER. The second neuropsychologist issued a "School Neuropsychological Evaluation" dated June 26, 2018 (the June 2018 Private Neuropsychological Evaluation). S-3.

7. The June 2018 Private Neuropsychological Evaluation concluded that, for educational purposes, the Student should be considered a child with a primary disability of Autism and secondary disabilities of TBI, ED, and Speech or Language Impairment. S-3.

8. The Student also was evaluated by a private speech-language pathologist, who wrote a report dated July 15, 2018 (July 2018 Private Speech-Language Evaluation). This evaluation also concluded that the Student should be considered a child with a Speech or Language Impairment for educational purposes and also diagnosed the Student with "severe Selective Mutism." S-4.

9. On July 5, 2018, the Parents sent a copy of the June 2018 Private Neuropsychological Evaluation to the District. S-5.

10. On July 23, 2018, the Parents sent a copy of the July 2018 Private Speech-Language Evaluation to the District. S-5.

11. On August 2, 2018, the District drafted an "Addendum to Evaluation Report Dated 3/12/2018" (the 2018 Addendum) S-5. The 2018 Addendum summarizes the June 2018 Private Neuropsychological Evaluation and the July 2018 Private Speech-Language Evaluation. *Id.* Based on the private evaluations, the District changed the Student's

primary disability category to Autism and secondary disability category to TBI and ED. *Id.*

12. On August 14, 2018, the Student was seen by a private, out-of-state doctor. That doctor wrote a letter dated August 20, 2018. The letter states that the doctor diagnosed the Student with Autism Spectrum Disorder, Generalized Anxiety Disorder, Social Anxiety Disorder, Selective Mutism, and Obsessive Compulsive Disorder. All of those diagnoses were made using medical criteria (as opposed to IDEA criteria). The doctor concluded that the Student required "home instruction." The doctor also stated that, "Through intensive behavioral therapy and medication, the goal will be to gradually transition to a small, therapeutic school setting with 1:1 support." S-6.

13. On August 23, 2018, the Student was evaluated at a hospital for PANDAS. The medical record of the visit does not include a PANDAS diagnosis.[2] S-7.

14. The District referred the Student to its Intermediate Unit (IU) for an "Attend Program" evaluation. The reason for the evaluation was that the Student, "will not enter the school building and has been at home refusing any form of education including cyber, private schools, etc." The IU drafted a report of its evaluation, dated September 18, 2018 (the 2018 Attend Evaluation). S-8.

15. With the Attend Evaluation, the IU also issued a Positive Behavior Support Plan (2018 PBSP), targeting the Student's school refusal. S-9.

16. On November 27 and 28, 2018, the Student was evaluated by a doctor who runs a private treatment organization for individuals with selective mutism and related disorders. The doctor wrote a report of the evaluation which is not dated but logically was written sometime on or after November 28, 2018. The report confirms the Selective Mutism diagnosis. S-10.

17. On January 5, 7, 12, and 14, 2019, the Student was observed at home and in the community by a special education teacher who is not

[2] The document as S-7 was introduced by stipulation without testimony. There is nothing in the record of this case defining PANDAS. However, in my experience, the term PANDAS (in this context) usually refers to Pediatric Autoimmune Neuropsychiatric Disorders Associated with Streptococcal Infections — which is typically characterized by the sudden onset of obsessive compulsive behaviors and/or physical ticks following an infection.

employed by the District. The resulting report describes the observations and sets goals for the Student, but does not contain educational recommendations. S-11, *see* S-16.

18. The Student received treatment for selective mutism from a private licensed professional counselor. On January 14, 2019, that counselor wrote a letter describing the Student's treatment. S-12.

19. A teacher who worked with the Student in the home and community wrote a report about the Student's educational progress and progress towards social goals. This report is a statement of the Student's progress and does not include educational recommendations. This teacher is not employed by the District and is not the same teacher who wrote the November 2019 observation report. S-13, *see* S-16.

20. On January 18, 2019, a private evaluator drafted a Diagnostic Psychiatric Evaluation of the Student. That report is based on an evaluation in August and September 2018 and "collateral phone contacts" with the family in "December 2018 through January 2019." The medical diagnoses in this report confirm prior diagnoses. The report includes a few educational recommendations that are similar to those in prior reports. S-14.

21. On March 5, 2019, the District invited the family to an IEP team meeting. The meeting was scheduled for March 15, 2019. S-15. The record does not reveal whether that meeting convened on March 15, 2019 or another date. The record as a whole supports a conclusion that the parties did meet, and that the Parents provided copies of private evaluation reports to the District during that meeting. *Passim.*

22. The Parents gave copies of the PANDAS evaluation, the letter from the licensed professional counselor, the special education teacher's observations, the other special education teacher's progress notes, the diagnostic psychiatric evaluation, and the two-day selective mutism evaluation to the District. The District summarized these reports in a second "Addendum to Evaluation Report Dated 3/12/2018." The second addendum is dated July 2, 2019, and maintains the Student's eligibility categories. S-16.

23. No preponderant evidence in the record concerns the period of time from July 2, 2019 through June 22, 2020. *Passim.* As a result, I make no findings as to what special education services the Student received – if any – during the 2019-20 school year.

24. On June 22, 2020, the District invited the family to an IEP team meeting. The meeting was scheduled for July 8, 2020. S-17. The record does not reveal whether that meeting convened.

25. On or about July 17, 2020, the Parents requested an IEE at the District's expense. *See* S-18 at 3.

26. On July 22, 2020, the District filed a complaint initiating this matter. *See District's Complaint.*

27. On August 20, 2020, the District issued a "Prior Written Notice for a Reevaluation and Request for Consent Form" to the Parents. Colloquially, this is referred to a Permission to Reevaluate or PTRE form (the 2020 PTRE). S-18.

28. The District used a form promulgated by the Pennsylvania Department of Education for the 2020 PTRE. That form is divided into several sections. *See* S-18.

29. The first section of the 2020 PTRE presents two checkboxes for the "type of action proposed." The District checked a box to indicate it is proposing an evaluation because the Student's IEP team determined that there is a need for additional information. S-18.

30. The next section of the 2020 PTRE calls for the District to write an explanation of why the reevaluation was proposed. The District wrote, "[Student] is due for [Student's] triennial reevaluation in March 2021. The team has decided to complete [Student's] reevaluation at this time." S-18.

31. The next section of the 2020 PTRE calls for the District write a description of the data used as a basis for the proposed reevaluation. The District wrote, "Previous evaluation reports and IEPs." S-18.

32. The next section of the 2020 PTRE calls for the District to list other factors considered relevant to the proposed evaluation. The District wrote, "Use tests or assessment procedures other than those proposed or a complete review of records." S-18.

33. The next section of the 2020 PTRE calls for the District to state "other options" and why those options were rejected. The District wrote, "The proposed tests and assessments are appropriate to enable the multidisciplinary team to determine disability status, present levels of academic and functional performance, or educational need." S-18.

34. The next section of the 2020 PTRE calls for the District to list the domains that the assessments will provide information about. In this section, the District used a standard recitation of broad domains that are consistent with IDEA sections on evaluations and reevaluations. S-18, *see generally* 20 U.S.C. § 1414.

35. The next section of the 2020 PTRE calls for the District to state the types of measures that it may use to conduct the assessment. The District wrote, "Cognitive and achievement assessments, executive functioning assessments/rating scale, social/emotional/behavioral rating scale(s), autism rating scale(s), adaptive behavior rating scale(s), language assessments, occupational therapy assessments." S-18.

36. The next two sections of the 2020 PTRE include standard language explaining that the District is seeking the Parents' consent to conduct the proposed assessments, that the results will be written into a reevaluation report and shared with the Parents, and the statutory evaluation timeline. S-18.

37. The next section of the 2020 PTRE includes checkboxes for the Parents to provide or withhold consent, say what next step they would prefer if they withhold consent, state their objections to the proposed evaluation if any, and sign the document. S-18.

38. The Parents signed the 2020 PTRE on August 31, 2020, withholding consent. The Parents wrote on the document, leaving notes and expressing their disagreement. The Parents also wrote out their objections to the proposed evaluation on a separate document and attached that document to the 2020 PTRE. The Parents then faxed the 2020 PTRE with their objections to the District on September 2, 2020.

39. The Parents' objections to the 2020 PTRE, as written in their attachment to the form, are (in summary and to the best of my understanding):

    a. The Parents object to a statement in the 2020 PTRE that the Student's IEP team decided to reevaluate the Student because they did not consent to the reevaluation and because the 2018 ER was incomplete or flawed.

    b. The Parents object to a statement in the 2020 PTRE that previous evaluation reports and IEPs contain data forming the basis of the proposed reevaluation. The Parents' basis for this objection is that

the District rejected their request for an IEE at public expense and that they did not consent to the proposed evaluation.

c. The Parents object to a statement in the 2020 PTRE that "tests or assessment procedures other than those proposed or a complete review of records" are relevant factors. The Parents claim, generally, that no other District tests or assessments exist.

40. On the 2020 PTRE form, the Parents' comments reiterate their objections in the attachment. In those comments, the Parents also state that a review of records would also be inappropriate, that information from current providers should be considered, and (generally) that the District should not be trusted to reevaluate the Student because the 2018 ER was flawed and incomplete. S-18.

Credibility Determinations

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

Three witnesses testified during this hearing: The District's school psychologist, the Student's Mother, and the Student. I find no credibility issue with the Psychologist and Student's testimony. Both of those witnesses testified honestly and to the best of their abilities. To the small entent that their testimony conflicts each other's, they simply hold different opinions.

The Student's Mother's testimony was hyperbolic to the point that her credibility must be questioned. The Student testified, unprompted, that the Student's mother's testimony included exaggerations. The Student's highly

credible testimony underscores the Student's Mother's credibility problems. I give the Student's Mother's testimony little weight for this reason.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the District is the party seeking relief and must bear the burden of persuasion.

Revaluation Criteria

The IDEA establishes requirements for evaluations. Those requirements are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

Reevaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability and, if so, what must be provided through the child's IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Reevaluations must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the LEAs are obligated to ensure that:

> assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the

> child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, reevaluations must assess "all areas of suspected disability". 20 U.S.C. § 1414(b)(3)(B).

Consent for Reevaluations

The IDEA requires schools to obtain parental consent before reevaluating children with disabilities. The IDEA's consent rules for initial evaluations and reevaluations are identical in the context of this hearing.[3] 20 U.S.C. §§ 1414(a)(1)(D), 1414(c)(3).

When parents withhold consent, schools "may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title [i.e. a due process hearing], except to the extent inconsistent with State law relating to such parental consent." 20 U.S.C. §§ 1414(a)(1)(D)(ii)(I). Federal IDEA regulations extend that right to reevaluations as well. 34 C.F.R. § 300.300(c)(1)(ii). Pennsylvania has no state law altering the IDEA's consent requirements. *See* 22 Pa Code §§ 14.125, 14.125.

Neither the IDEA nor its implementing regulations explicitly say what an LEA must prove when pursuing a reevaluation through a due process hearing after a parent withholds consent. *Id, see also* 34 C.F.R. § 300.300(a)(3). In the absence of statutory and regulatory guidance, I have held in prior cases that LEAs must prove that 1) a reevaluation is necessary to ensure the provision of a free appropriate public education (FAPE) to the student, and 2) the reevaluation that the LEA has proposed is appropriate. *See, e.g. N.M., Cumberland Valley School District*, ODR No. 13612-1213-KE; *J.A., School District of Philadelphia*, ODR No. 19053-1617-KE.

[3] For reevaluations, the LEA may reevaluate without parental consent if the LEA attempts to obtain parental consent and the parents fail to respond. 20 U.S.C. § 1414(c)(3). Those are not the circumstances of this case. Otherwise, the rule for reevaluations simply incorporates the rule for initial evaluations. *Id*.

Discussion and Conclusions of Law

Both parties agree that a reevaluation is necessary. Although not a party to this case, nor an adult for IDEA purposes, I find it significant that the Student also agrees that a reevaluation is necessary. There is simply no dispute that the Student must be reevaluated. No further analysis is needed to conclude what is obvious: a reevaluation is necessary to ensure the provision of a FAPE to the Student.

This case hinges, therefore, on whether the District's proposed evaluation is appropriate. To its credit, the District has invited me to cure any defects in its proposal by adding evaluations to it. Bluntly, the District takes the position that it will do more than it believes is necessary if it is able to evaluate the Student and conclude this dispute. Specifically, in its post-hearing brief, the District acknowledged that the Parents, "did suggest the inclusion of a vision assessment, which the District does not oppose."

Evidence that the proposed reevaluation satisfies all of the IDEA's procedural reevaluation criteria is beyond preponderant. Every procedural component detailed at 20 U.S.C. § 1414(b) is satisfied by the proposed reevaluation.

Evidence that the proposed reevaluation satisfies all of the IDEA's substantive reevaluation criteria is also beyond preponderant. The record of this case establishes that the District must determine the Student's cognitive abilities, academic achievement, executive functioning abilities, social/emotional/behavioral abilities, adaptive abilities, language abilities, and need for occupational therapy. The District must also determine the educational effects of the Student's autism. In fact, the Parents raise no objections to any of these assessments and, again, agree that a reevaluation is necessary. The only change that the Parents propose is including a vision assessment.

There is little evidence that a vision assessment is required. Nevertheless, I will order the District to include a vision assessment in its evaluation. I do this in light of the District's position and in the hope of bringing some finality to both parties.

While the District has satisfied its burden, I acknowledge the Parents' argument and the Student's wishes. As noted above, the Parents' position and their actions cannot be reconciled, so I will focus on what the Student said during the hearing. I believe that the Student's statement is the purest reflection of what the family wants. Said simply, the family wants someone unaffiliated with the District to reevaluate the Student. The record, as a whole, leaves no doubt that the Parents deeply mistrust and, at times, are

hostile towards the District and its personnel. I therefore understand why the Parents would prefer that an independent evaluator conduct the reevaluation. Even so, Parents' dislike and distrust of the District forms no legal basis upon which I can conclude that the proposed reevaluation is inappropriate.

In conclusion, the District's proposed reevaluation is necessary and appropriate. The District may reevaluate the Student.

ORDER

Now, January 8, 2021, it is hereby **ORDERED** that

1. The District may reevaluate the Student consistent with the 2020 PTRE (S-18). However, the reevaluation must also include a vision assessment.

2. The timeline for the District to complete the reevaluation and issue a revelation report shall commence as if the Parents provided consent for the reevaluation as of the date of this Order.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

Appendix
The Parents' Motions for Reconsideration are Denied

Introduction

Before, during, and after the hearing session, the Parents raised several objections to the hearing. My resolutions of those objections are documented in the record of this matter. After the hearing, the Parents filed what could be considered motions for reconsideration. Those motions go to my rulings on threshold issues. This Appendix is my resolution of the Parents' post-hearing, pre-decision motions.

Functionally, the Parents ask me to strike these proceedings in their entirety and restart this matter. Such requests sit more comfortably within an appeal. But the Parents directed their motions to me, and I believe that they are entitled to a written ruling.

The Issue is Properly Pleaded

The Parents claim that this hearing is improper because the District issued the PTRE in question after it filed its complaint. The Parents moved for dismissal on several occasions for this reason, and I denied those motions verbally and in emails.

As noted in the accompanying Due Process Decision, on October 30, 2020, the District withdrew all claims except for a determination that it may evaluate the Student without the Parents' consent. The District's email came in response to an email from the Parents the same day at 2:34 p.m. In their email, the Parents' moved to postpone the hearing so that they could attend a funeral. They also stated their understanding that this hearing was in response to their request for an IEE. The Parents said, "We agree at this time, as I stated before, that [the Student] does not NEED an IEE at this time." The Parents also questioned how the District could obtain a "remedy" if their request for an IEE was no longer pending.

I responded to the Parents' email the same day at 3:11 p.m., granting their request for a continuance. Regarding their statement about the purpose of the hearing and the District's remedies, I wrote (bold added here, not in the original):

> I cannot offer legal advice, but I can give procedural guidance in response to [Parent's] questions below. Federal special education laws require the District to request a hearing

> whenever it rejects a parent's request to pay for an independent educational evaluation. Based on Attorney Conn's prior emails, I understand that the District has maintained its complaint only because the Parents have not formally withdrawn their request for the District to fund an IEE. If the Parents withdraw their request for a District-funded IEE, the District would have no legal obligation to request a hearing and would withdraw its complaint **(Attorney Conn should correct me if I misunderstand the District's position).** That is not a "remedy" because I would not order relief. If the Parents are withdrawing their request for a District-funded IEE, they should put that in writing to the District.

The District, through counsel, responded to my email the same day at 3:49 p.m. In its response, the District did exactly what I invited it to do — it corrected my misunderstanding. The District acknowledged that the Parents had withdrawn their demand for an IEE at public expense but had also withheld consent on the August 20, 2020 PTRE. The District was now moving forward on the issue of whether it may evaluate the Student.

Between October 30, 2020 and December 3, 2020, the parties and I exchanged emails about scheduling, and the Parents copied me on various emails to the District. The Parents also requested technical assistance with exhibits on December 1 and 2, 2020. The Parents did not challenge the District's statement of the issue.

On December 3, at 4:50 p.m., I sent an email to the parties with a links to the video conference for the hearing and the real-time court reporting. The Parents responded to my email on December 4 at 12:27 a.m. In that email, the Parents expressed surprise that the hearing was moving forward, despite the fact that they were asking about how to upload evidence the day before. The Parents asked me to dismiss this case because they were no longer requesting an IEE at public expense.

Given the hour, I did not immediately see the Parents' email. Regardless, I replied at 8:35 a.m., stating that the session would convene as scheduled because the District had claims pending unrelated to the IEE request. The Parents then sent another request for clarification at 8:40 a.m. I did not see that email until after the hearing session, which convened at 9:00 a.m.

During the hearing, I explained that the issue before me was the issue stated by the District on October 30, 2020: whether the District could evaluate the Student in accordance with the PTRE, despite the fact that the Parents rejected the PTRE. During the hearing, and in emails sent on

December 7, 2020, the Parents argued that the hearing was improper because the District issued the PTRE after filing its complaint and, therefore, the PTRE could not be the subject of the hearing. Both during the hearing and now upon reconsideration, I reject the Parents' argument that the issue before me is not properly pleaded.

Special education due process hearings are grounded in equity. As such, strict adherence to procedural rules cannot surmount the need to resolve fundamental questions concerning the Student's right to a free appropriate public education. This, and the fact that no rules of procedure strictly apply to this hearing, is reason enough to deny the Parents' motion. Nevertheless, hearing officers routinely look to procedural rules for guidance, and there are regulations and case law about IDEA pleading requirements. Under those regulations and case law, I deny the Parents' motion for two reasons. First, I find that the issue is set forth within the District's complaint. Second, even if I were to accept the Parents' argument, the result would be the same.

The IDEA's pleading standards are "minimal." *Schaffer v. Weast*, 546 U.S. 49, 54 (2005). While the IDEA requires more than bare notice pleadings, an "exacting, all-inclusive cataloguing of all legal theories and facts that [claimants] intended to invoke at the administrative hearing" is not necessary. *M.S.-G v. Lenape Regional High School Dist. Bd. of Educ.*, 306 Fed. Appx. 772, 1260 (3d. Cir. 2009). Applied in this case, the complaint raises issues regarding the District's effort to reevaluate the student. As noted in the accompanying decision, the District wrote that it "should be permitted to pursue its Reevaluation, and only at the end of that process, and if Parents disagree with the conclusions of that Reevaluation, would an IEE request arguably be appropriate." Under *M.S.-G v. Lenape Regional*, that statement is an inclusion of issues concerning the District's effort to reevaluate the Student.

The Parents are correct that the District had not issued the PTRE discussed in the accompanying decision when it filed the complaint. It may be that the timing of the complaint and the PTRE was off because the District was obligated to file when it rejected the Parents' request for an IEE at public expense. Regardless, a dispute concerning the Student's reevaluation is contained within the four corners of the District's complaint.

IDEA complaints are presumptively sufficient. *See* 20 U.S.C. § 1415(c)(2)(A). The Parents did not file a sufficiency challenge at any point in these proceedings. Consequently, the dispute about the Student's reevaluation is sufficiently pleaded even though the complaint does not include details about that dispute.

The Parents focus their argument on the fact that the District issued the PTRE after filing its complaint. The Parents conclude that the PTRE cannot be the subject of the complaint because it did not exist when the complaint was written. If the issue was about the PTRE itself, the Parents would be correct. But the PTRE document is not the subject of the District's claim. It is not as if the District sought a determination about the propriety of a form. Rather, the issue is about the District's wish to reevaluate the Student. By focusing on the PTRE, the District only narrowed and clarified an issue contained within its complaint.

Alternatively, accepting the Parents' argument that the issue was not properly pleaded because the complaint came before the PTRE yields the same result. In this alternate view (one that I reject), the District expanded its complaint by raising issues concerning the PTRE in its email of October 30, 2020. That expansion would make the email an amendment to the District's complaint. The amendment would have restarted the IDEA's statutory hearing timeline, including the 30-day resolution period. 20 U.S.C. § 1415(f)(1)(B)(I)(ii). The resolution period would have ended on November 29, 2020. The hearing on the amended complaint, therefore, would have convened in accordance with the statutory hearing timeline.

The Parents filed no sufficiency challenge or timely response with objections to what is, under their logic, an amended complaint. The hearing on the amended complaint then convened in accordance with IDEA timelines. The result is, therefore, the same even if I accept the Parents' argument.

I explain the ultimate conclusion of the Parents' argument for their benefit, given their *pro se* status. I must be clear, however, that I do not accept their argument. Rather, I conclude that the issue before me was properly pleaded.

The Parents Were Not Denied an Opportunity to Present Evidence

In post-hearing emails, the Parents claim that they were denied an opportunity to present evidence and ask me to restart the hearing from square one. Their argument takes three forms. First, the Parents claim that I did not permit them to upload their exhibits. Second, the Parents claim that I improperly excluded their evidence. Third, the Parents claim that I did not permit the Student's father to testify.

The Parents Were Not Prohibited From Uploading Exhibits

ODR uses Dropbox so that litigants can submit their exhibits electronically. Digital exhibits are encouraged regardless of whether the hearing convenes

via video conference. I have rarely taken paper copies of evidence during in-person hearings for several years.

Each party receives access to their own exhibit folder and can add documents to their folder. Each party has read-only access to the other party's folder. In this case, I provided Dropbox access to the parties shortly after my assignment. The District uploaded its exhibits on October 28, 2020. The Parents requested information about how to use Dropbox on December 1, 2020. I responded the same day. On December 2, 2020, the Parents confirmed that they had "figured out" Dropbox.

Dropbox generates a record of all folder interactions. Dropbox records show that the Parents added seven files to their exhibit folder on December 1, 2020. The Parents then removed those files from Dropbox on December 2, 2020. Discussed below, the Parents also uploaded many exhibits after the hearing. I reject the Parents' claim that I prohibited them from submitting exhibits on Dropbox.

The Parents' Various Motions for Reconsideration of Rulings Excluding Their Documentary Evidence are Denied

Regarding the Parents' claim that I improperly excluded evidence, the record reveals the opposite. Despite receiving information about the IDEA's disclosure rule at the outset of this hearing, and despite receiving the District's disclosures well in advance of deadline, the Parents failed to disclose any evidence or witnesses. The IDEA's disclosure rule is found at 20 U.S.C. § 1415(f)(2) and is supplemented by Pennsylvania regulations at 22 Pa Code § 14.162(k). These regulations, as written, remove my discretion and give the objecting party near-absolute power to exclude undisclosed evidence and witnesses.

The threshold of what constitutes disclosure in a special education hearing is low. Parties need only send each other a list of potential witnesses and evidence.[4] The Parents sent no such list in this case. Despite that fact, I permitted the Parents to call the Student as a witness over the District's objection. I decided that it was equitable to hear from the Student at the Parents' request, even while acknowledging that my decision to let the Student testify cannot be squared with the rules stated above.

[4] Evidence disclosure and Dropbox access are distinct issues. A party must disclose evidence five business days before the hearing convenes or risk the opposing party's objection. Evidence can be uploaded to Dropbox at any time.

Further, during the hearing, I permitted the Parents to upload exhibits any time on or before December 11, 2020 — giving them a week after the hearing (two weeks beyond the disclosure deadline) to upload exhibits. I explained that the District could review exhibits uploaded by that deadline and then decide whether it objects to any of them (on disclosure or any other grounds). I explained that I would grant disclosure-based objections and admit documents to which the District consented.

The Parents uploaded 26 documents on December 11, 2020.[5] These 26 documents constitute thousands of pages of evidence. The District objected to most of those documents for failure to disclose. The District raised other objections to some of the remaining documents (in whole or in part) and consented to other documents. Initially, I wrote to the parties excluding the Parents' exhibits. Upon reconsideration, I will admit the exhibits or portions of exhibits to which the District raised no objections. I reviewed the Parents' admitted evidence carefully and find that none of it alters the findings in the accompanying decision or outcome of this case.

To make a clear record, the following documents were admitted as evidence in the absence of an objection:

- P-1 - pages 191-206
- P-2 - all but pages 1-37 (already in evidence as District exhibits)
- P-3 - all PWNs and PTREs
- P-5 - pages 851-914
- P-6 - all but pages 245 and 246
- P-14 - entire document
- P-41 - entire document
- P-42 - all but pages 1-23 and 108-118
- P-43 - entire document
- P-44 - entire document

The Parents' Motion Concerning the Father's Testimony is Denied

The Student's father participated in roughly the first half of the hearing session and then left for work. At no point did the Parents ask me to continue the hearing or adjourn until the Student's father was able to return.

[5] The Parents uploaded an additional 66 documents on December 12, 2020. I will not consider those untimely submissions.

Moreover, the Parents never called the Student's father as a witness, never signaled that they would call the Student's father as a witness until several days after the hearing, never asked to reconvene the hearing so that the Student's father could testify, and never disclosed the Student's father as a witness. Parents' motion regarding the Student's father's testimony is predicated upon claims of actions that did not occur. It is denied.

Summary of Evidentiary Post-Hearing Motions

Bluntly, the record shows that I permitted the Parents to violate evidentiary rules by letting the Student testify, and then further permitted the Parents to present undisclosed evidence after the hearing with the District's consent. The Parents' claim that I denied them a fair opportunity to present evidence is contrary to the record and denied.

The Parents' Other Objections Are Denied

The Parents raised a few other objections to the hearing itself. To the extent that the Parents' post-hearing emails re-raise those other objections as motions for reconsideration, they are addressed in this section.

Several of the Parents' emails indicate their surprise that the hearing was convening, suggesting that they did not receive notice of the hearing session. Notice objections have fundamental due process implications, so I will treat the Parents' emails sent in the moments before the hearing as a notice objection.

As noted above, the hearing session was rescheduled at the Parents' request so that they could attend a funeral. I moved the hearing once more at the District's request to accommodate its schedule.

On November 9, 2020, I notified the parties via email that the hearing would convene on December 4, 2020. I wrote: "Please let this email serve as confirmation until ODR issues a more formal notice." ODR issued a notice on November 11, 2020. I also sent an email confirming the hearing date on November 24. I also corresponded with the Parents about uploading evidence on December 1 and 2.

Even if I were to ignore everything but the official ODR document, the Parents had notice of the hearing session 23 days before the hearing convened. The Parents' notice objection is denied.

In addition to their notice objection, the Parents raised objections to convening via video conference and demanded a hearing in which all

participants would be in the same physical space — national, state, and local COVID-19 mitigation efforts notwithstanding. Those motions were denied both by the hearing officer originally assigned to this case and by me in written pre-hearing orders. The Parents' objection is preserved, and the prior orders speak for themselves. To the extent that the Parents' post-hearing emails are motions for reconsideration, those motions are denied on the same basis.

The Parents aver that the Student's father has a hearing disability and, therefore, could not fully participate in a hearing via video conference. This objection is distinct from the Parents' broader insistence upon an in-person hearing. The Student's father was accommodated by access to a real-time transcription of the hearing. This objection, my ruling, and the Student's father's actual participation in the hearing are documented throughout the transcript. To the extent that the Parents' post-hearing emails are motions for reconsideration, those motions are denied on the same basis.

Finally, the Parents note that I occasionally used the term "evaluation" and "reevaluation" interchangeably. For reasons that are unclear, the Parents aver that my use of the term "evaluation" is objectionable and somehow prejudicial to their case.[6] It is not clear if the Parents raise this argument as an objection on its own, or as an element of other objections. Regardless, as discussed in the accompanying decision, the IDEA sets forth evaluation and reevaluation criteria at 20 U.S.C. § 1414. The issue in this case concerns the Parents' consent to a reevaluation. As applied in this matter, the consent requirements for evaluations and reevaluations are the same. Therefore, the terms are interchangeable in the context of this case and my use of the term "evaluation" is not a basis for an objection.

Conclusion

For reasons stated above, the Parents' various post-hearing motions and motions for reconsideration are all denied.

/s/ Brian Jason Ford
Hearing Officer

[6] The Parents, who are *pro se*, do not actually use the terms "objectionable" or "prejudicial." I interpret their post-hearing emails to include these claims in deference to their *pro se* status.