

*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**

**ODR No. 28055-22-23**

#### **CLOSED HEARING**

**Child's Name:**

L.S.

**Date of Birth:**

[redacted]

**Parent(s)/Guardians:**

[redacted]

*Pro Se*

[redacted]

*Pro Se*

**Local Education Agency:**

Rose Tree Media School District  
308 North Olive Street  
Media, PA 19063-2403

**Counsel for the LEA:**

Gabrielle Sereni, Esquire  
19 West Third Street  
Media, PA 19063

**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

06/03/2023

## **Introduction**

This special education due process hearing concerns a child with disabilities (the Student). The Student's parents (Parent 1 and Parent 2) live separately and share educational decision-making rights.<sup>1</sup> The Student's public school district (the District) sought both parents' consent to reevaluate the Student. Parent 1 provided consent, but with conditions discussed below. Parent 2 provided consent with no conditions.

The District take the position that it is not able to reevaluate the Student with Parent 1's conditions. When attempts to find a compromise failed, the District requested this hearing to seek an order allowing it to conduct the proposed evaluation without Parent 1's conditions.

After the District filed its complaint, Parent 1 revoked all consent for the District's proposed evaluation. At the hearing, Parent 1 opposed the evaluation and asked me to prohibit the evaluation. Without amending its complaint, the District sought an order permitting it to evaluate without Parent 1's consent. All three parties understood and consented to the adjudication of this issue. NT at 17-18.

Parent 2 agrees with the District. Parent 2 takes the position that the District's proposed evaluation should proceed. Parent 2's position has been consistent from the moment that Parent 2 provided consent for the proposed evaluation.<sup>2</sup>

This matter arises entirely under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its federal and Pennsylvania implementing regulations.

For reasons discussed below, I find that the District has met its burden to prove that it should conduct the proposed evaluation.

## **Issue**

The two issues presented in this compliant are:

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<sup>1</sup> Pre-hearing correspondence suggests that the parents are divorced. The record of this hearing does not indicate the parents' marital status with any precision other than their separate addresses and shared physical and legal custody of the Student.

<sup>2</sup> The District is not inserting itself into disputes between the Parents. Rather, the District has its own position. One parent joins that position, and the other parent opposes. The District has been scrupulous to not take sides in a family dispute, but rather is only advancing its own position.

1. May the District conduct the proposed reevaluation without Parent 1's conditions?
2. May the District conduct the proposed reevaluation without Parent 1's consent?

### **Findings of Fact**

I reviewed the (comparatively small) record of this matter in its entirety.<sup>3</sup> I find facts only as necessary to resolve the narrow issue before me. I find as follows:

1. There is no dispute that the District is the Student's Local Educational Agency (LEA) as defined by the IDEA.
2. There is no dispute that the Student was previously identified as a child with a disability as defined by the IDEA and receives special education and related services through an Individualized Education Plan (IEP). *Passim*.
3. The Student receives a small amount of special education supports outside of the general education classroom under the Student's current IEP. *See, e.g.* NT at 53-54.
4. The Student's last evaluation was completed in the 2017-18 school year. *See* NT at 28.
5. During the 2021-22 school year, the District sought both Parents' consent to reevaluate the Student. Parent 1 withheld consent and so the District did not reevaluate the Student.<sup>4</sup> *See, e.g.,* S-1 at 2.
6. During the 2022-23 school year, Parent 1 communicated with the District raising concerns about the Student's educational needs. The record suggests there were multiple communications in various forms. The record reveals a specific instance on December 12, 2022, when Parent 1 sent an email to the District expressing concerns about the Student's ADHD diagnosis and possible dyslexia. S-1 at 2.

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<sup>3</sup> Only one document, S-1 (six pages), was admitted into evidence.

<sup>4</sup> It is not clear if the parents were separated at this time. There is some indication in the record that Parent 2 also withheld consent for an evaluation in the 2021-22 school year, but there is no preponderant evidence regarding Parent 2's position at that time. There is no dispute, however, that the District sought consent to evaluate during the 2021-22 school year, did not receive consent, and did not evaluate for that reason.

7. On December 15, 2022, in response to Parent 1's concerns, the District sent a Prior Written Notice for a Reevaluation and Request for Consent Form (commonly a Permission to Reevaluate form or PTRE) to both parents. The PTRE is a standard form in Pennsylvania. S-1.
8. On the PTRE, the District stated that a review of the Student's records (grades, current IEP, prior evaluations, and standardized test scores) and the concerns raised by Parent 1 indicated a need for additional data. S-1 at 1, 2.
9. On the PTRE, the District also stated that a reevaluation was necessary because Student's strong academic performance and progress towards IEP goals raised questions about whether the Student continues to meet the IDEA's definition of a child with a disability and, if so, what disability category the Student falls under and what special education the Student requires (if any). S-1 at 2.
10. The PTRE called for the District to list other options that were considered and rejected. The District stated that it could keep the Student's current IEP in place without a reevaluation, but that the information gained through a reevaluation "would be beneficial to future educational program planning." S-1 at 2.
11. The District also stated the types of data to be collected through the reevaluation. The District listed five broad categories, all relating to the Student's eligibility for special education, determining the Student's disability category, and determining what special education the Student requires if the Student is eligible for special education. S-1 at 2.
12. The District also stated the type of testing that it intends to conduct. Five broad categories are listed: cognitive evaluations, academic achievement testing, ADHD rating scales, social, emotional, and behavioral rating scales, and a review of records. S-1 at 2.
13. The PTRE presents three options for parents to respond: request an informal meeting with the District to discuss the reevaluation, provide consent for the reevaluation, or deny consent for the reevaluation. See S-1 at 3.
14. A copy of the PTRE signed and approved by Parent 2 was not admitted into evidence, but there is no dispute that Parent 2 approved the PTRE so that the proposed evaluation could proceed. *Passim*.

15. Parent 1 did not immediately respond to the PTRE, but continued communications with the District. *See, e.g.* S-1 at 1.
16. Although not admitted into evidence, pre-hearing correspondence indicates that that Parent 1 asked questions about how the proposed evaluation would impact upon Parent 1's right to request evaluations in the future and the District's future obligations in response to any such requests. Pre-hearing correspondence also indicates that a District employee responded to Parent 1 in writing. I cannot and do not rely upon information provided to me outside of the hearing for fact finding. Rather, this information contextualizes Parent 1's response to the PTRE.
17. Parent 1 checked the consent box but modified the text by hand. The original text of the PTRE is: "I give consent to the proposed reevaluation." Next to that, the Parent wrote: "with the understanding that [the District] will retest at any time with my request to do so with the letter dated 4/10/23 signed by [a District employee]." S-1 at 3.
18. Parent 1 then returned the PTRE to the District on April 21, 2023. S-1 at 1.
19. On May 15, 2023, the District requested this hearing.

### **Witness Credibility**

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).

I find that all witnesses testified credibly. Moreover, I find no contradiction between the testimony of any of the witnesses. There are no material facts in dispute. Rather, the District and Parent 1 simply disagree about whether the Student should be reevaluated.

## **Applicable Laws**

### ***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. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3d Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the District is the party seeking relief and must bear the burden of persuasion.

### ***Reevaluations***

The IDEA establishes substantive and procedural requirements for initial special education evaluations. 20 U.S.C. § 1414(b),(c). Those requirements also apply to reevaluations. 20 U.S.C. § 1414(a)(2).

Under the IDEA, LEAs must reevaluate children with disabilities either when they believe that a reevaluation is necessary or upon parental request. 20 U.S.C. § 1414(a)(2)(A). Reevaluations must occur at least once every three years, but not more than once per year. 20 U.S.C. § 1414(a)(2)(B). Parents and schools may agree to evaluate more or less frequently. *Id*

LEAs must try to obtain parental consent before an evaluation or reevaluation. 20 U.S.C. §§ 1414(a)(1)(D), (c)(3).<sup>5</sup> The IDEA sets forth what options are available to LEAs when parents do not provide consent for evaluations at 20 U.S.C. § 1414(a)(1)(D)(ii)(I):

If the parent of such child does not provide consent for an initial evaluation [or reevaluation]<sup>6</sup> under clause (i)(I), or the parent

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<sup>5</sup> § 1414(a)(1)(D) establishes the consent requirements for initial evaluations. § 1414(c)(3) extends the same consent requirements to reevaluations.

<sup>6</sup> See 20 U.S.C. § 1414(c)(3).

fails to respond to a request to provide the consent, the local educational agency may pursue the initial evaluation [or reevaluation] of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.

The reference to "section 1415" is to the IDEA's due process provisions, including special education due process hearings. See 20 U.S.C. § 1415.

## **Discussion**

### ***I. Parent 1's Conditions Do Not Give Rise to Claims Under the IDEA's Parental Consent Override Provision***

As a threshold matter, I find that the question of whether the District may reevaluate the Student without regard to Parent 1's conditions is not moot. By the time of the hearing, Parent 1 had withdrawn consent for the reevaluation. There is a good argument that Parent 1's revocation made Parent 1's conditions on the PTRE irrelevant. Even so, an order permitting the District to reevaluate without Parent 1's consent, but not addressing Parent 1's conditions, might leave all three parties in an ambiguous position. I must address Parent 1's conditions to provide all three parties the finality that they deserve.

The IDEA permits the District to request a hearing when a parent "does not provide consent" for a reevaluation. See 20 U.S.C. § 1414(a)(1)(D)(ii)(I). Parent 1 provided consent, but with conditions. It is not immediately clear if conditional consent equals withheld consent. In the absence of any case on point (to my knowledge), I will resolve the question with a fact-specific analysis. That fact-specific analysis also leads me to conclude that Parent 1's conditions were no impediment to the District's proposed reevaluation and do not give rise to a cause of action under the IDEA's parental consent override clause. Rather, the District must reevaluate the Student because both parents consented to the proposed reevaluation.

The conditions that Parent 1 placed on the evaluation can be seen as both a reservation of rights and the imposition of a future obligation on the District. Seen as a reservation of rights, Parent 1 is simply indicating that consenting to the District's proposed reevaluation does not preclude a request for an additional reevaluation in the future. Described above, this reservation is consistent with Parent 1's statutory rights. Nothing in the IDEA sets a limit on the number of times that a parent can ask a school to reevaluate their child. Through this lens, the comment that Parent 1 added to the PTRE is not a condition or restriction on the District's ability to reevaluate the Student.

As such, the District has no cause of action under 20 U.S.C. § 1414(a)(1)(D)(ii)(I) and the claim should be dismissed. The District has consent from both parents to evaluate and must now do so.

The analysis is different when Parent 1's comments are viewed as the imposition of a future obligation on the District. Seen this way – and the District does see it this way – Parent 1's comments include an agreement that the District must reevaluate the Student at some unknown point in the future at Parent 1's sole discretion. That obligation is an extension of the District's obligations beyond what the IDEA requires. Described above, the District has several options when responding to parental requests for reevaluations, especially if the request comes within a year of the last evaluation. The District is obligated to reevaluate no more than once per year and is obligated to reevaluate only once every three years unless there is a need to reevaluate sooner. A parent's request to evaluate sooner is both contemplated in the statute and triggers a school's obligation to determine if a reevaluation is warranted. But those statutory provisions do not obligate schools to evaluate children "at any time with [a parent's] request to do so." S-1 at 3.

Yet even as seen through as the imposition of a future obligation, Parent 1's conditions do not give rise to a cause of action under 20 U.S.C. § 1414(a)(1)(D)(ii)(I). Parent 1's unilateral, unsolicited comments on the PTRE do not bind the District. A PTRE is a form by which LEAs provide prior written notice and by which parents provide or withhold consent. A PTRE is not a contract, Parent 1's comments do not constitute a counteroffer, and the District cannot be held to have accepted Parent 1's comments if it had proceeded with the evaluation in April 2023. The District's concern about some theoretical acceptance of a non-contract via performance, creating an obligation triggered by condition that may or may not occur in the future, does not give rise to an IDEA claim.

I resolve the narrow question of whether the District may reevaluate the Student "without the condition,"<sup>7</sup> by dismissing that issue. I find that the condition imposed no impediment to the reevaluation, did not alter Parent 1's consent to the reevaluation, and does not create an IDEA cause of action under 20 U.S.C. § 1414(a)(1)(D)(ii)(I). The District must reevaluate the Student because it proposed a reevaluation via a PTRE and both parents provided consent.

## ***II. The District May Evaluate the Student Without Parent 1's Consent***

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<sup>7</sup> *Complaint* at 3.



By the time the hearing convened, Parent 1 had revoked consent for the reevaluation and all three parties understood and consented to my adjudicating the question of whether the District may evaluate the Student without Parent 1's consent. NT 17-18. For this issue, the District's cause of action under 20 U.S.C. § 1414(a)(1)(D)(ii)(I) is unambiguous and ripe.

It is the District's burden to prove that it should conduct the proposed reevaluation. To my knowledge, no court in Pennsylvania or the Third Circuit has considered what the District must prove to satisfy its burden.

During the hearing, all three parties made much of the potential harm – or lack thereof – that would be caused by *not* reevaluating the Student. I find nothing in the IDEA, its regulations, or any case law that support this standard. Rather, at its most fundamental level, the IDEA guarantees a free appropriate public education (FAPE) and so nearly all IDEA disputes are resolved by determining what is educationally appropriate for the Student (the A in FAPE). It is nearly impossible to determine what is appropriate for a student in the absence of an evaluation or reevaluation that complies with 20 U.S.C. § 1414. An appropriate evaluation or reevaluation forms the foundation for the IDEA's most fundamental substantive right. For that reason, I agree with the standard articulated by the Fifth Circuit in one of the few cases on point: if the District "articulates reasonable grounds for its necessity to conduct [the desired evaluation], a lack of parental consent will not bar it from doing so." *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450, 454 (5th Cir. 2006), *cert. denied*, 549 U.S. 1111 (2007).

I find that the District has met the foregoing standard. The record includes preponderant evidence of multiple reasonable grounds for the necessity of the proposed evaluation. First among these are Parent 1's concerns about the Student's ADHD and possible dyslexia. Under the IDEA, such concerns by themselves may indicate a need for a reevaluation. Second, the amount of time that has passed between evaluations supports a need for updated data. If an LEA could rely upon classroom performance alone to make special education programming decisions, much of § 1414 would not exist. Third, the Student's classroom performance is also a reasonable ground for a reevaluation. While the record is spartan, all parties seem to agree that the Student is doing well and may no longer need special education. *See, e.g.* NT 15-16. The proposed reevaluation will enable the Student's IEP team (which includes all three parties) to determine whether the Student continues to qualify for special education. Any of these bases constitute "reasonable grounds" for the reevaluation by themselves. Taken together, the record paints a picture of a Student who must be reevaluated.

There is no dispute that the proposed reevaluation conforms to the procedural and substantive requirements of § 1414. I note, however, that the PTRE itself indicates all the reasons why the reevaluation is necessary and how the reevaluation is responsive to those reasons.

In sum, the District has satisfied its burden of proof under 20 U.S.C. § 1414(a)(1)(D)(ii)(I), which is the IDEA's parental consent override provision for evaluations and reevaluations. The District may reevaluate the Student.

### **Summary and Conclusions of Law**

Two issues were presented: whether the District may reevaluate the Student without regard to conditions that Parent 1 placed on the PTRE, and whether the District may reevaluate the Student without Parent 1's consent.

Parent 1's conditions on the PTRE did not give rise to a cause of action under the IDEA's parental consent override provision, 20 U.S.C. § 1414(a)(1)(D)(ii)(I). Parent 1's handwritten comments on the PTRE do not bind the District. The PTRE constituted Parent 1's consent for the District to reevaluate from the time it was signed until the time it was revoked.

As this matter progressed, Parent 1 revoked consent for the reevaluation. This ripened the District's claim under the IDEA's parental consent override provision. Without guidance from a court closer to home, I am persuaded by the logic of the 5<sup>th</sup> Circuit regarding what the District must prove to proceed with the reevaluation: the District must articulate reasonable grounds for the necessity of the proposed reevaluation. The District has satisfied that burden in several ways, described above.

Finally, because Parent 1 revoked consent, the order below starts the evaluation timeline. Had Parent 1 not changed positions, there is a good argument that the reevaluation timeline started in April 2023. Parent 1's revocation resets the clock. The District's reevaluation timeline runs from the date of my order because my order is what enables the District to conduct the proposed reevaluation.

An appropriate order follows.

### **ORDER**

Now, June 30, 2023, it is hereby **ORDERED** as follows:

1. The District's demand for an order permitting a reevaluation without the condition that Parent 1 wrote onto the PTRE of December 15, 2022, is **DISMISSED** because the condition did not give rise to a cause of action under 20 U.S.C. § 1414(a)(1)(D)(ii)(I).
2. Nothing in this order or the accompanying decision alter either Parent's rights to request reevaluations in the future or the District's obligations in response to such requests.
3. The District demand for an order permitting a reevaluation without Parent 1's consent is **GRANTED** as follows:
  - a. The District shall reevaluate the Student without Parent 1's consent pursuant to 20 U.S.C. § 1414(a)(1)(D)(ii)(I).
  - b. The reevaluation shall conform to all other substantive and procedural requirements of 20 U.S.C. § 1414 and all applicable federal and Pennsylvania regulations.
  - c. The District need not seek further consent from either parent to conduct the reevaluation proposed in the PTRE of December 15, 2022.
  - d. The District's timeline for to conduct the reevaluation proposed in the PTRE of December 15, 2022, runs from the date of this Order.
4. Nothing in this order or the accompanying decision removes any other parental consent requirements under the IDEA or any other law.

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

/s/ Brian Jason Ford  
HEARING OFFICER