

*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 Hearing Officer Final Decision and Order**

### **Closed Hearing**

#### **ODR File Number:**

22228-18-19

#### **Child's Name:**

L. M.

#### **Date of Birth:**

[redacted]

#### **Parents:**

[redacted]

#### **Counsel for Parent:**

#### **Local Education Agency:**

Pottsgrove School District  
1301 Kauffman Road  
Pottstown, PA 19464-2303

#### **Counsel for LEA:**

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New Britain, PA 18601

#### **Hearing Officer:**

Cathy A. Skidmore, M.Ed., J.D.

#### **Date of Decision:**

07/01/2019

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is an early primary elementary school-aged student in the District (District), who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Following the District's initial special education evaluation of Student in April 2019, the Parents requested an Independent Educational Evaluation (IEE) at public expense as provided by the federal regulations implementing the IDEA. The District denied that request and filed a Due Process Complaint to defend its own evaluation.

The case proceeded to a due process hearing convening over a single efficient hearing session,<sup>3</sup> and the parties presented evidence in support of their respective positions. After careful review of the record and as explained more fully below, the District's claim that its evaluation of Student was appropriate must be sustained; this hearing officer will, nevertheless, order an independent psychoeducational evaluation on other grounds.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information, are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

<sup>3</sup> References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

## **ISSUE**

Whether the District's evaluation with Student complied with all requirements of a comprehensive special education evaluation?

## **FINDINGS OF FACT**

1. Student is early primary elementary school-aged and is a resident of the District. Student is eligible for special education under the IDEA. (N.T. 65-66.)
2. Student entered kindergarten in the District for the 2018-19 school year. The class had approximately eighteen students who were five and six years of age. (N.T. 262-63.)
3. Student started the kindergarten school year adjusting well to the routine, and seldom engaged in problematic behavior. By November, however, Student was demonstrating refusal to complete tasks and non-compliant behavior that was at times physically aggressive and distracting to peers. The teacher and Parents communicated regularly about Student including behavior at school. (N.T. 268-69; S-4 at 2-3; S-10.)
4. On several occasions the Crisis Prevention Team was called to assist with Student regulating behavior. Those incidents were logged and communicated to the Parents. N.T. 272, 277; P-15; S-1.)
5. A meeting of the Parents, a District school psychologist, and other District staff occurred on January 18, 2019, at which time Student was temporarily in a wheelchair due to a recent injury. The Parents had asked to discuss accommodations Student would need such as a

Section 504 Service Agreement,<sup>4</sup> but the District proposed a special education evaluation in part because of Student's behaviors. (N.T. 71, 73-75, 78-79; P-16; S-4 at 2.)

6. At the Parents' request, the District revised its Notice of Recommended Educational Placement (NOREP) seeking their consent to the evaluation. The Parents agreed to the revision on January 30, 2019. (N.T. 81-82; P-16; S-2; S-3.)
7. The District school psychologist who attended the January 18, 2019 meeting began the evaluation of Student in early 2019. (N.T. 71; S-4.)
8. The Parents expressed concern with the evaluation taking place while Student was in the wheelchair, but that occurred only for a short period of time at the beginning of the process. (N.T. 79-80.)
9. Parent input into the ER reflected that Student had not engaged in problematic behavior prior to entering the District to the extent it was exhibited in kindergarten, and that Student was having difficulty adjusting to the structure and routine of kindergarten. They also did not observe the level of problem behavior at home that was reported at school but noted that Student was to begin counseling and did at times have difficulty regulating emotions. (S-4 at 1-4, 44-47.)
10. Input from Student's private social worker indicated that Student had been provided weekly therapy sessions since mid-January 2019 but he had no suspicions of autism; he attributed Student's behavioral and emotional regulation difficulties to limited mobility due to the recent

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<sup>4</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; 22 Pa. Code § 15.7.

injury, and reported that Student was making progress. (S-4 at 13-14 (original at P-17).)

11. Teacher input into the ER reflected that Student was meeting expectations in all academic areas but required support during changes to routine and in regulating emotions. Specifically, Student required frequent prompting and redirection to complete tasks and exhibited frustration at times, and also had difficulty with peer interactions at school. (S-4 at 12-13, 41-43.)
12. A summary of Student's present levels of academic and functional performance for the ER reflected that Student was approaching or meeting grade level standards in most areas with a few weaknesses. Student was at or beyond expectations for all reading skills. (S-4 at 24-25.)
13. The District school psychologist conducted assessment of Student's cognitive ability and academic achievement. Student was reportedly easily redirected when needed during those assessments. Student's cognitive ability (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) reflected an overall average range Full Scale IQ (108, upper end of the average range), with relative strengths on the Verbal Comprehension, Fluid Reasoning, and Visual Spatial Indices. (S-4 at 8, 15-17.)
14. Assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) resulted in average range scores across the Reading, Written Expression, Mathematics, and Oral Language Composites and all subtests. Early reading skills were reportedly at the upper end of the average range. (S-4 at 17-18.)

15. Student's social/emotional/behavioral functioning was assessed in part through rating scales. On the Behavior Assessment System for Children – Third Edition (BASC-3), the Parent's scales revealed no concerns. The teacher's ratings, by contrast, reflected clinically significant concerns with aggression, somatization, and adaptability; and at-risk concerns with hyperactivity and atypicality. On the Emotional Disturbance Decision Tree (EDDT), the Parents endorsed only mild at-risk concerns with inappropriate behaviors or feelings; the teacher endorsed very high or high clinical range scores for all areas (relationships, inappropriate behaviors or feelings, pervasive mood of unhappiness or depression, and fears, as well as on the total score). No rater indicated concerns with anxiety. (S-4 at 18-21.)
16. Student's kindergarten teacher completed the BASC-3 and EDDT rating scales and answered as accurately as possible based on her observations. (N.T. 289-91.)
17. Speech/language assessment for the ER revealed no deficits in expressive or receptive language skills, or with fluency or articulation. Pragmatic language skills were determined to be above average compared to peers, and speech/language services were not recommended. (S-4 at 21-22.)
18. An occupational therapy screening for the ER for sensory processing concerns revealed none in that area, and such services were not recommended. (S-4 at 23.)
19. The ER summarized details of behavioral incidents between November 2018 and March 2019, many of which involved refusal to comply with directives, physical aggression toward others and objects, and/or emotional dysregulation. Also included were communications between

the Parents and teacher involving behavior at school and at home. (S-4 at 2-5.)

20. The District school psychologist conducted observations of Student, one during the time Student was in the wheelchair and one after no mobility device was used. Those were summarized for the ER through anecdotal reporting of the school psychologist's observations. (N.T. 85-86, 134-35, 182-83; S-4 at 6-8.)
21. A Board Certified Behavior Analyst (BCBA) for the District conducted a Functional Behavioral Assessment (FBA) for the ER. That process included interviews with staff working with Student to identify and define the behaviors of concern. The BCBA, teacher, and an instructional assistant then collected data in various environments (including duration and frequency), and developed a hypothesis of the function(s) of each behavior. (N.T. 211, 213-14, 217-18, 223-24, 230, 241-42, 278; S-4 at 8-13, 48.)
22. The FBA identified three targeted behaviors: "meltdowns" defined as physical or verbal aggression, elopement, or property destruction; refusal to comply with directives; and inappropriate peer interactions. Data indicated an increase in those behaviors at the start of the FBA when Student was using a wheelchair, but all continued after that device was no longer used. The hypothesized functions of the behaviors were: to gain attention or escape a demand (meltdowns and refusing to comply with directives); and to gain access to items or attention (inappropriate peer interactions). (S-4 at 26-35.)
23. Although the Parents asked that the FBA not begin until Student was no longer using the wheelchair, it was necessary for data collection for the FBA to take place over a sufficient period of time to develop a full picture of Student's behavior. The FBA was conducted in accordance

with applicable standards for BCBA's and provided information for development of the Individualized Education Program (IEP). (N.T. 217, 230-31, 237, 256-58; P-3.)

24. All assessments for the ER were conducted pursuant to the protocols established by the test publishers. All instruments are reliable and the District school psychologist is qualified to administer those she performed. (N.T. 89.)
25. The District sought permission to conduct additional assessments in order to evaluate Student's social/emotional/ behavioral strengths and needs particularly with respect to characteristics consistent with an Autism Spectrum Disorder. The Parents declined the request to provide consent to those assessments, explaining that other professionals including Student's pediatrician had not indicated suspicion of autism. (N.T. 97-98, 105; P-18; S-3; S-4 at 6.)
26. The Parents told the District psychologist that Student had been evaluated by Children's Hospital of Philadelphia through its Behavioral Health services program but declined to share a report of that evaluation with the District. (N.T. 98-99.)
27. Student was determined to be eligible for special education upon completion of the ER based on an Emotional Disturbance. The ER identified needs for emotional regulation, coping skills, peer interaction/social skills, adjusting to routines, and completing tasks independently. (S-4.)
28. [redacted]
29. The District school psychologist has a master's degree in counseling psychology and is certified as a school psychologist. She had nearly ten years' experience as a school psychologist at the time of Student's ER. (S-12.)



30. The BCBA involved with Student during kindergarten has graduate and undergraduate degrees in education, with the master's degree in special education. She has over twenty years' combined experience as a BCBA, behavior analyst, and special education teacher, and holds certification as a BCBA through 2021. (S-12.)
31. The Parents disagreed with the results of the EDDT and asked that those be removed from the ER, but the District declined to do so. (N.T. 129-30.)
32. The Parents drafted an addendum to the ER which the District agreed to attach to the document in Student's file, but did not incorporate the various requested changes in the ER. The Parents presented the following as their concerns in an email message and the addendum, summarized from their perspective as follows:
  - a. Reasons for the disparity between behavior in kindergarten compared to that at home and in other current previous education- and care-related environments were not fully explored;
  - b. Use of subjective assessment tools for the ER;
  - c. Discrepancies between behavioral data in the ER, and other observational information in the report and in communications with the Parents;
  - d. References to anxiety, which was not assessed;
  - e. Omission of information regarding the Parents' request for a Section 504 Plan;
  - f. Insufficient or inaccurate data in the ER including documentation of Student's level of engagement;

- g. Data collection for the FBA without providing accommodations that were helpful and provided support for Student;
- h. Content of the report that included interpretation by or opinion of the District school psychologist; and
- i. An overall non-objective, biased evaluation of Student.

The Parents also reiterated their reasons for refusing assessments related to Autism.<sup>5</sup>

(N.T. 139-40; P-8; P-9; S-11 at 34-35.)

- 33. The Parents also requested an IEE at public expense, and the District declined that request. (S-6 at 7-10.)
- 34. An IEP was developed in April 2019 for itinerant emotional support with a Positive Behavior Support Plan (PBSP). The Parents approved the NOREP accompanying this IEP. (S-8; S-9.)
- 35. Student made progress in reading skills over the course of the 2018-19 school year, ending at an overall level above expectations for the end of kindergarten. Student was exhibiting mathematics skills in line with kindergarten expectations. Student's kindergarten teacher, with fourteen years of teaching experience, believed that Student was challenged by the work in the classroom. (N.T. 261, 264-68; P-5.)
- 36. It is not uncommon for children to behave differently in diverse environments such as between school and home. (N.T. 117-18, 249.)

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<sup>5</sup> Unrelated to the ER specifically, the Parents additionally challenged the provision of requested education records on an asserted untimely basis pursuant to the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g. (P-8 at 1.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of this discussion, it should be recognized that 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). Accordingly, the burden of persuasion in this case must rest with the District as the party that requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in "equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses who testified to be credible, and the testimony was essentially quite consistent rather than contradictory. What was evident was the parties' differing perceptions of the evidence rather than its truthfulness.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' closing statements.

## IDEA Principles: Child Find and Evaluation

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all children who qualify for special education services. 20 U.S.C. §1412. The IDEA and state and federal regulations obligate local educational agencies (LEAs) to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The statute itself sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a).

As is relevant here, the regulations implementing the IDEA provide the following definitions.

c) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:

1.

- i. *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance. Other characteristics often associated with autism are

engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

- ii. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.
- iii. A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

4.

- i. *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
  - A. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
  - B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
  - C. Inappropriate types of behavior or feelings under normal circumstances.
  - D. A general pervasive mood of unhappiness or depression.
  - E. A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. §§ 300.8(c)(1) and (4). The latter definition makes clear that one or more of the enumerated characteristics are sufficient to establish eligibility under this category if the other criteria are met.

The obligation to identify eligible students is commonly referred to as “child find.” LEAs are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, LEAs such as school districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

In conducting an evaluation or reevaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

- b) Conduct of evaluation. In conducting the evaluation, the public agency must—
  - 1. 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—
    - i. Whether the child is a child with a disability under § 300.8; and
    - ii. The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
  - 2. Not use any single measure or assessment 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;  
and

3. Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b); *see also* 34 C.F.R. § 303(a). The evaluation must assess the child “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[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “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,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a).

In Pennsylvania, LEAs are required to provide a report of an evaluation within sixty calendar days of receipt of consent, excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). Although “[t]he eligibility group should work toward consensus, [ ] under §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability. Parents and school personnel are

encouraged to work together in making the eligibility determination.” 71 Fed. Reg. 46661 (August 14, 2006).

When parents disagree with an LEA’s educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). When such a request is made, the LEA must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, the Parents disagreed with the 2019 ER and sought an IEE at public expense, and the District refused; as noted, the District had the burden of establishing that its evaluation was appropriate. It is important to recognize, though, that parental disagreement with the conclusions of an LEA evaluation does not, in and of itself, establish that the evaluation is inappropriate. The sole issue when an LEA has denied a parental request for an IEE at public expense is whether its evaluation met the standards for appropriateness set forth in the IDEA.

## **The District’s Evaluation**

The District’s ER utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. Specifically, the District conducted assessment of Student’s current cognitive ability and academic achievement; summarized available curriculum-based assessment data; obtained and reported input from the teacher; incorporated results of available information from other providers; obtained and summarized parental input; and provided a variety of rating scales to evaluate Student’s social/emotional/behavioral functioning in addition to an FBA. The District school psychologist responsible for administering the cognitive ability, academic achievement, and related assessments is well qualified and experienced in the assessments administered. Student



cooperated with testing demands. All assessments were administered in accordance with the publishers' standards. The District school psychologist conducted two separate observations of Student, and a BCBA undertook a data-supported FBA process targeting identified problem behavior. Potential speech/language and occupational therapy needs were also screened. Although the District additionally sought further permission to examine Student's social skills, emotional dysregulation, and difficulty with transitions, the Parents declined, and the omission of this relevant information cannot therefore be attributed to the District.<sup>6</sup> The ER synthesized all data gathered, and determined Student's eligibility for special education with recommendations. All of this evidence supports the conclusion that the District's ER was sufficiently comprehensive to identify Student's special education and related service needs in all areas related to suspected disability, as well as identifying relative strengths.

The Parents raised concerns following issuance of the ER and at the hearing in a number of areas that merit discussion. An overarching theme was their apparent alarm that Student was exhibiting behavioral difficulties in kindergarten that had not previously been observed in other settings, and they did not believe that the ER included an adequate investigation into the reasons for the difference. It is unclear how the District might have set out to do that in its educational evaluation here, particularly given the Parents' concerns with what they perceived as non-objectivity in the ER discussed more fully below. Moreover, the District school psychologist and BCBA both provided logical and persuasive testimony that it is not uncommon for children to behave differently across various environments (N.T. 117-18, 249). In any event, the purpose of the ER was to determine whether

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<sup>6</sup> The District could have, but was not under any obligation to, file a Complaint to override the Parents' refusal to consent. See 20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(1)(iii).

Student had a disability and what education-related needs should be addressed in the school environment based on Student's unique presentation. The ER in question did so.

In a related concern, the Parents expressed a belief that the behavioral data in the ER was not wholly consistent with other communications between them and the school. Some instruments used for the ER to assess behavioral and emotional functioning did require some subjectivity of the individual raters, but that does not mean that the results are inaccurate, even if there has been other information shared throughout the school year that is not reflective of the same behavioral difficulties. The District did not report that Student is always compliant or is always non-compliant, for example; rather, the ER provided a comprehensive overview of Student's presentation that varied day to day. Similarly, the Parents challenged the description of the school psychologist's observations as subjective and biased toward a finding of disability, apparently since they included descriptions of problematic behavior. It is unclear what the Parents hoped for in more robust recitation of what the school psychologist observed, but this hearing officer cannot conclude that that the report of the school psychologist's observations was overly subjective given that she was reporting what she saw; as such, that this portion of the ER was not inappropriate and was but one consideration in the overall evaluation. Finally in this area, the Parents had concerns that the data for the FBA was collected under circumstances where the difficulties were likely to occur and without providing interventions that had been successful. Again, the purpose of a special education evaluation is to first determine if a child has a disability, and second to ascertain the needs of the child for programming or, in other words, provide guidance to the IEP team. The ER including the FBA included significant information on behaviors including antecedents, and the kindergarten teacher cogently and persuasively testified consistent with

the FBA about antecedents (N.T. 311). It is also important to keep in mind that Student was new to the structured school setting and to the District; and, there was no claim presented that the District should have evaluated Student sooner, or implemented an IEP or any special education support earlier than it did.

Next, the Parents asserted that the results of the WISC-V and WIAT-III may not have been accurate because Student may not have been experiencing the best of days for either assessment. The District school psychologist, however, explained again quite persuasively that there was no reason to suspect that either of those assessments should have been delayed for Student for any reason (N.T. 173, 175-76). There is no reason in this record to doubt the judgment of this well qualified and experienced professional in this regard.

The Parents also challenged the District's efforts to gauge and report on Student's level of engagement in the kindergarten setting, contending that Student was not sufficiently challenged. The kindergarten teacher, who clearly had the best insight into that question, gave very credible testimony that she found Student to be challenged by the curriculum, exhibiting strengths and weaknesses; that testimony was also corroborated by other evidence in the record. [redacted]

Another contention by the Parents is their disagreement with the District's request to add assessments of social/emotional/ behavioral strengths and needs particularly with respect to characteristics consistent with an Autism Spectrum Disorder. The District school psychologist, again quite persuasively, explained the usefulness of this information in order to identify any deficits in social skills, emotional regulation, and adjusting to transitions and changes in routine (N.T. 140). The District was required to evaluate all areas of suspected disability, and its request for these additional assessments was wholly reasonable and compliant with its obligation to

provide a comprehensive evaluation. Special education programming is dictated by the individual needs of a child, not the particular eligibility classification. Whether or not results of those measures would have endorsed characteristics of Autism, they could only have benefitted the IEP team.

Lastly, the Parents asserted that the ER should have provided more detailed information such as the specific reasons that they initially requested accommodations, and to include data that was not available until after it was completed. It is certainly conceivable that any ER might reveal better insight with more detail, more assessments, and more data. However, the law imposes certain requirements on what an ER must contain, and Pennsylvania law requires that it be completed within sixty calendar days. The District cannot be faulted for complying with the timing requirements in producing an ER that contains all of the requisite information the IDEA demands. As such, it has met its burden of persuasion in establishing that its evaluation of Student was appropriate.

The law does not require an IEE at public expense in this circumstance. Nevertheless, after careful reflection and in the exercise of her discretion, this hearing officer will direct the District to provide an IEE at public expense as permitted by 34 C.F.R. § 300.502(d). Though this result may appear to be incongruous in light of the above conclusions, and this hearing officer does consider the remedy to be an extraordinary one, there are several important reasons for finding that an objective evaluation by an impartial qualified school psychologist is necessary at this time. The first is the Student's clearly complex presentation that would be best understood by a complete picture of all strengths and needs, something that has not occurred here because the District has not been privy to all available relevant information from other providers. The second reason is the apparently significant difficulty Student has had adjusting to the structured

school setting, a big step in an educational journey that Student has only just begun. Finally, the Parents expressed throughout the hearing their disagreement with or confusion over some steps the District has and has not taken regarding Student; while this hearing officer does not reach any conclusions on those questions or concerns, their refusal to permit the District to conduct certain assessments will likely have a significant impact on its ability to program appropriately for this child. It is also quite evident that all members of Student's IEP team have worked diligently as a group to understand and address Student's strengths and needs, and neither party can truly dispute that a comprehensive independent psychoeducational evaluation at this time would yield highly useful foundation for making programming decisions in this particular case.

It is very concerning to this hearing officer that one of these critical factors could be easily remedied by the Parents' agreement to share information from other providers. One fundamental premise of the IDEA is the expectation that the parties will collaborate together in developing special education programs. Indeed, the District's inability to access information of other professionals may serve as an impediment to a collaborative IEP process. *See, e.g., Oconee County School District*, 2015 U.S. Dist. LEXIS 85226, 2015 WL 4041297 (M.D. Ga. 2015). On balance, however, it is Student whose "unique circumstances" have not yet been fully explored by the District in this case, irrespective of the reasons therefor. And, quite crucially in this hearing officer's estimation, an IEE will serve the essential functions not only of informing this Student's IEP team, but also "guarantee[ing] meaningful participation [of the Parents] throughout the development of the IEP" and placement decisions. *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 698 (11<sup>th</sup> Cir. 2012); *see also Schaffer, supra*, at 61 (noting that an IEE can afford parents "a realistic

opportunity to access the necessary evidence" and information relating to an appropriate program and placement for their child).

This remedy will provide the parties with objective assessments and recommendations to consider in making a determination of how to meet all of Student's needs appropriately now and into the future, as well as to help foster the new relationship between them that is especially critical given Student's very young age. The IEE will be at public expense, limited to a psychoeducational evaluation to include any assessments recommended by that professional, subject to the condition that the Parents must consent to any and all assessments that are suggested by the selected psychologist as necessary for a comprehensive understanding of Student's unique strengths and needs, as well as to his or her review of any pertinent information including medical and educational records that he or she requests.

## **CONCLUSION**

The District has established that its ER was appropriate under the applicable law; but an IEE will be ordered on other grounds to ensure that the IEP team has a comprehensive picture of Student for educational programming decisions.

## **ORDER**

AND NOW, this 1<sup>st</sup> day of July, 2019, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's 2019 ER met all requisite criteria for a comprehensive special education evaluation under the IDEA and all implementing regulations.
2. Student shall be provided an independent psychoeducational evaluation at public expense to be conducted by a certified school psychologist not affiliated with the District.

- a. Within seven calendar days of the date of this Order, the District shall provide to the Parents in writing a list of not less than three qualified professionals within the geographic area of the District to conduct an independent psychoeducational evaluation.
- b. Within seven calendar days of receipt of the list of qualified individuals to perform the independent psychoeducational evaluation, the Parents shall notify the District in writing of their selection.
- c. The selected school psychologist shall determine the scope of the psychoeducational evaluation, including any observation, administration of assessments, and review of records.
- d. If the selected school psychologist proposes any assessment within the scope of a psychoeducational evaluation that must be referred to another professional to conduct, the selected school psychologist shall choose the professional; and that portion of the IEE shall also be at public expense.
- e. The arrangements with the selected school psychologist shall include a requirement that he/she provide a written report of the IEE to the Parents and the District within a reasonable time not to exceed sixty calendar days from the date of engagement. The arrangements may also provide for status updates by the private school psychologist to both parties if requested by the District.
- f. If the Parents do not make a selection from the list of qualified school psychologists within seven calendar days of receipt, the District need not provide the independent psychoeducational evaluation at public expense.

- g. If the Parents decline to consent to or cooperate with any assessments, release of records, or other actions requiring their permission that are recommended by the selected school psychologist, the evaluation shall be concluded without finalization and without further obligation by the selected school psychologist or the District.
3. Following completion of the IEE and within seven school days of receipt of the report by both parties, Student's IEP team shall meet to review its results. The arrangements with the selected school psychologist shall include up to two hours of attendance at that meeting whether in person or otherwise.
4. If the selected evaluator is unable to complete the IEE, the process set forth above in ¶ 2 shall be repeated to the extent necessary to ensure a final IEE.
5. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

*Cathy A. Skidmore*

Cathy A. Skidmore  
HEARING OFFICER  
ODR File No. 22228-1819AS