

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

ODR No.

26937-22-23

CLOSED HEARING

Child's Name:

L.M.

Date of Birth:

[redacted]

Guardians:

[redacted]

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

12/29/2022

Introduction

This due process hearing concerns the special education rights of a child (the Student). The Student's public school district (the District) conducted an evaluation to determine if the Student qualified for special education and related services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Through that evaluation, the District determined that the Student is not a child with a disability as defined by the IDEA.

The Student's guardians (the Guardians) requested an Independent Educational Evaluation (IEE) at public expense. The District denied that request. The IDEA obligated the District to request this due process hearing upon denying the Guardian's request. It is the District's obligation to prove that its evaluation was appropriate.

For reasons discussed below, I find that the District's evaluation was appropriate at the time it was conducted. However, I also find that the Guardians provided information to the District after the evaluation that requires further evaluation. Therefore, I order the District to act on the information that it has.

Issue Presented

The single issue presented in this hearing is: Was the District's evaluation of the Student appropriate?

Findings of Fact

I reviewed the record in its entirety but make findings of fact only as necessary to resolve the issue before me. I commend both parties for their efficient presentations. I find as follows:

Background

1. There is no dispute that the District is the Student's Local Educational Agency (LEA) as defined by the IDEA.
2. The Guardians became the Student's legal guardians [redacted] NT 246.
3. The Guardians enrolled the Student in the District for [redacted] in the 2017-18 school year. S-14.

4. While attending the District's [redacted], the Student participated in a program for children who are new to the District. This was a regular education program and not school counseling. NT 157, 205-206, 219, 222.

The 2018-19 and 2019-20 School Years [redacted]

5. During [redacted] grade (2018-19 school year), the Student participated in a school-based grief counseling group. NT 176.
6. During [redacted] grade (2019-20 school year), the Student did not participate in the grief counseling group or any similar groups. See NT 184.
7. In September 2019, the Guardians had a private behavioral health provider evaluate the Student. The provider drafted a report dated September 10, 2019. The report is spartan but concludes that the Student meets diagnostic criteria for Post Traumatic Stress Disorder (PTSD). S-2.
8. The PTSD diagnosis was supported by symptoms listed in the provider's report, none of which specifically relate to school ("argumentativeness, nightmares, crying spells, possible night terrors, and anxiety related to going back with [] mother." S-2 at 6.
9. As part of the private evaluation, the Guardians reported no concerns about learning or peer interactions but did have some concerns about the Student's ability to focus during remote instruction. S-2.
10. The Guardians shared the reasons why they are the Student's guardians with the Student's teacher. The Guardians did not, however, share the private report or the PTSD diagnosis with the District at that time. *Passim* (see, e.g. NT 252, 288).
11. On December 4, 2019, the Guardians signed a release for the District to share information with a therapist who was working with the Student at that time. The Guardians left the form mostly blank, providing no information other than the therapist's name (the Guardians did not say who the person was, or what information could or could not be shared). S-8.
12. I take judicial notice that, on March 13, 2020, Governor Wolf issued an order closing all Pennsylvania schools in response to the COVID-19

pandemic. On April 9, 2020, that order was extended through the end of the 2019-20 school year.

13. During [2018-2019 and 2019-2020 school years], the Guardians and the Student's teacher and guidance counselor were in frequent communication. Regardless of whether the Guardians gave the private evaluation to the District, the District's professional employees understood that the Student had a traumatic past and was receiving outside therapy. *Passim*.

The 2020-21 School Year [redacted]

14. At the start of the 2020-21 school year, the Student's [redacted] grade year, the District educated all students remotely. In October of 2020, the District shifted to hybrid instruction (two days in-person, three days remote). However, during the period of hybrid instruction, there were weeks of remote-only instruction, snow days, illnesses, and the like that caused the Student to receive all instruction remotely during some weeks. *See, e.g.* NT 28; S-4 at 5.
15. The Student received private therapy during [redacted] grade (2020-21 school year). The Guardians did not inform the District that the Student was receiving private therapy at that time. *See* NT 210.
16. In school, the Student participated in a [redacted] group, run by the school counselor. *See, e.g.* NT 188-189. The purpose of that group was to show children the difference between a "fixed" and "growth" mindset, and to encourage the latter. *See id.*
17. On October 13, 2020, the Guardians asked the District to evaluate the Student to determine eligibility for special education. S-3.
18. On October 22, 2020, the District met to discuss the evaluation request. After discussion, the District proposed to not conduct an evaluation but rather provide interventions targeting the Student's reading and work completion skills. The District also proposed to reconvene on December 14, 2020, to determine if a comprehensive evaluation was necessary. S-3.
19. The District then documented its offer in a Notice of Recommended Educational Placement (NOREP). As a practical matter, the District denied the Guardian's request for an evaluation but offered interventions and a planned future meeting. The Guardians approved

the NOREP on October 26, 2020, functionally acquiescing to the denial. S-3.

20. To provide and monitor the interventions, the District drafted an "Elementary Student Assistance Plan" (ESAP), which contained reading comprehension and work completion goals. S-4.¹
21. On the reading comprehension goal, progress was updated on December 4, 2020. The Student had mastered the goal. Then, on December 14, 2020, the District updated the goal to track the Student's reading fluency and decoding skills. Progress on the updated goal was reported on February 5, 2021, and June 8, 2021. The Student showed progress and met the goal as well. S-4 at 4-5.
22. The Student's improved reading skills came with additional reading supports. The District provided 30 minutes of additional reading intervention, four days per week. This intervention was part of the District's MTSS (Multi-Tier System of Support) program, which is a general education (not special education) intervention. See S-4.²
23. Progress towards the work completion goal was measured weekly from the week of October 26, 2020, through the week of November 30, 2020. The goal called for the Student to complete 75% of assignments. This goal was administered while the District provided hybrid instruction but focused on the tasks that the Student was to complete at home and during the remote parts of hybrid instruction. NT 40; S-4.
24. The District used an aide to check with the Student to ensure the Student knew what work was to be completed at home. NT 40. Despite this, the Student did not master the goal, reaching a high of only 59% work completion during the week of November 9, 2020. S-4 at 5.
25. On December 14, 2020, the District changed the goal by lowering the target to 60%. The District then monitored the Student's progress during the weeks of January 4, 2021, through February 1, 2021. The

¹ The ESAP document is not an IEP and should not be confused for an IEP. The appropriateness of the goals and progress monitoring in that document are not before me.

² The line between programs like MTSS and special education can be blurry. Questions of whether the District's MTSS program, as applied in this case, was special education by another name are not presented.

Student still did not master the goal, reaching a high of 59% in the week of January 11, 2021. S-4 at 5.³

26. The District also implemented a “check in/check out” system which helped keep the Student on task while working. See S-4 at 2, S-11.
27. The record indicates that the parties communicated with each other during the 2020-21 school year. There is no clear evidence, however, that the parties met as planned on December 14, 2020, to determine the need for a special education evaluation. In the absence of such evidence, I find that the District did not convene that meeting as planned.
28. In January 2021, the Guardians again asked the District to evaluate the Student to determine eligibility for special education. The Guardians were particularly concerned that the Student might have an emotional disability. S-6.
29. The District agreed to evaluate the Student. On January 21, 2021, the District sent an evaluation consent form to the Guardians. The Guardians provided consent the same day, and the District received the signed form on January 26, 2021. S-6.
30. The District evaluated the Student and drafted an Evaluation Report dated March 22, 2021 (the ER). S-7.
31. As part of the evaluation, the District’s school psychologist (the Psychologist) spoke with the Guardian. The Guardian did not disclose the Student’s mental health diagnosis at that time. NT 90. The Guardian did share concerns about the Student’s letter reversals, distractibility, and difficulty completing tasks. S-7 at 2.
32. Based on the conversation with the Guardian and the Guardians’ written input provided for the evaluation, the Psychologist wrote, “[Student] is reported to not currently be on any medications. [Student] does not have any psychiatric or psychological evaluations and has not received any outside therapies.” S-7 at 2.
33. Regarding the Student’s social history, the Psychologist wrote about how the Guardians became the Student’s guardians, providing some

³ The Student reached 73% during the week of January 4, 2021, but the District noted that week was all remote and that the Student’s teacher could not verify the Student’s self-reports of work completion. The District marked the goal as unmet. S-4 at 5.

information [redacted]. However, in the same section, the Psychologist also reported that, according to the Guardians, the Student is outgoing and makes friends easily. S-7 at 2.

34. The Guardians completed an input form as part of the ER. The Guardians reported that the Student had not received a psychological or psychiatric evaluation, did not list agencies or case workers working with the Student, and did not respond to questions about academic or behavioral concerns. In a different section, however, the Guardians reported concerns about the Student's distractibility while doing schoolwork. S-7.
35. The Guardians' response on the input form was consistent with prior registration forms in which the Guardians reported no mental health conditions. S-14.
36. The ER included the Student's educational history with input from teachers. While the teacher input says that the Student resisted constructive feedback, the teachers reported no social concerns. S-7 at 3-4.
37. The Psychologist observed the Student during a remote instruction lesson, and then reported the observation in the ER. While the Student would fidget, the Student remained on task, appropriately responded to the teacher, and read a passage aloud when called on after other students declined to do so. S-7 at 4.
38. The ER included the history and reports of the ESAP plan. S-7 at 5-8.
39. The ER included information from the District's reading specialist, who worked with the Student as part of the MTSS program and gathered data for the ESAP plan reports. This information included reporting from all prior reading evaluations, benchmarks, and ongoing assessments administered either to all students or to the Student as part of the MTSS program (many administered in October 2020 but measured and reassessed on an ongoing basis through December 2020). S-7 at 8-10.
40. The ER included the Student's benchmark and progress scores in math. S-7, 11-12.
41. The ER included the Student's report cards for the first and second trimester of [redacted] grade. S-7 at 12-13.

42. The ER included a psychoeducational evaluation conducted by the Psychologist. That, in turn, included standardized, normative measures of the Student's intellectual ability and academic achievement (WISC-V and WIAT-III), a standardized, broad behavior rating scale (BASC-3), and a standardized behavior rating scale that targets ADHD symptoms (Conners-3). S-7 at 14.
43. The psychoeducational portion of the ER included the Psychologist's observations of the Student during testing. This section also included a note that, due to COVID-19 safety guidelines (masks, distancing, plexiglass shields), testing deviated somewhat from the standard test protocols. The Psychologist determined, however, that the testing results were valid unless explicitly noted in the ER. S-7 at 14.
44. The Student's scores on the WISC-V placed the Student's Full Scale IQ in the average range. The Student's working memory and processing speed were both in the "low average" range, but the Student's General Ability Index (which minimizes the impact of working memory and processing speed) was also in the average range. S-7 at 15.
45. The Student's academic achievement scores on the WIAT-III were all in the average range except for Math Fluency, which was below average.⁴ S-7 at 17.
46. Both the Student's teacher and the Guardian rated the Student's behaviors using the BASC-3. The Guardian's ratings placed the Student in the average range across all index scores.⁵ The teacher's ratings were slightly elevated in comparison to the Guardian's ratings, placing the Student in the "At-Risk" range for both "Internalizing Problems" and "School Problems" (both resulting from elevations into the "At-Risk" range on some ratings within those composites). Both of those ratings were slight elevations above average, however, and both the teacher's and Guardian's ratings produced a Behavioral Symptoms Index and an Adaptive Skills rating in the average range. S-7 at 21-23.

⁴ The other scores, all in the average range, are Total Reading, Basic Reading, Reading Comprehension and Fluency, Written Expression, and Mathematics.

⁵ The Guardian's rating on the "Attention Problems" sub-rating placed the Student in the "at-risk" range for attention problems. That sub-rating is a component of "School Problems" index, which is not rated for individuals who do not see the Student in school. All other index scores and ratings from the Guardian were in the average range across all behavioral domains.

47. Both the Student's teacher and the Guardian rated the Student's behaviors related to ADHD symptoms using the Conners-3. As with the BASC-3, the teacher's ratings were more elevated than the Guardian's ratings. The teacher rated the Student in the "Very Elevated" range for Executive Functioning problems, ADHD Predominately Inattentive Presentation, and Conduct Disorder. None of the Guardian's ratings placed the Student beyond the "Elevated" range in a few domains, representing more concerns than typically reported for peers. Further, despite three "Very Elevated" ratings, the Student "did not meet the symptom count necessary to warrant a diagnosis measured by [the Conners-3]." S-7 at 24-25.
48. The Psychologist considered the results of the BASC-3 and Conners-3, and reached the following conclusion (S-7 at 25):
- Results from the Parent and Teacher BASC-3 and Conners-3 rating scales consistently indicate some concern with regard to [Student's] difficulty remaining focused and attentive and following directions. Slight concerns also have been reported in regard to [Student's] difficulty remaining organized and initiating task. In spite of some noted behavior concerns by both teacher and parent, neither rater's responses yielded any clinically significant concerns on either assessment which would warrant an Attention Deficit Hyperactivity Disorder (ADHD) diagnosis. Moreover, neither rater's responses indicate significant concerns with these behaviors to the degree which they are impacting [Student's] ability to access the learning environment. However, these behaviors should continue to be monitored on a regular basis to ensure they do not begin to impact her in the educational environment.
49. The Psychologist made a few recommendations to help the Student in school. These included behavioral monitoring, extra support to build math facts, and continuation of MTSS supports through the ESAP plan. S-7 at 27.
50. The ER concluded with the District's determination that the Student does not have a disability and, therefore, is not eligible for special education. S-7 at 27.

51. On March 22, 2021, the District issued a NOREP informing the Guardians that it found the Student ineligible for special education. S-8. The Guardians approved the NOREP and voiced no disagreement with the ER at that time. *See, e.g.* S-19 at 35.

The 2021-22 School Year [redacted]

52. On October 2021, the Student participated in school-wide academic benchmark testing and was found to be in the "low risk" range. S-4, S-12.
53. On January 3, 2022, the Guardians withdrew the Student from school and homeschooled the Student. The Guardians homeschooled the Student through March 18, 2022. *See* S-14.
54. There is no dispute that the Guardians requested an IEE at public expense on July 15, 2022.⁶
55. On August 29, 2022, the District filed the complaint initiating these proceedings.

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).

In this case, at a surface level, there is some conflicting testimony about

⁶ There is no dispute about the date of the request, but the only clear documentation of that date comes in the Guardian's response to the District's due process complaint.

when the Guardians shared the Student's PTSD diagnosis with the District. I decline to resolve that conflict because it is not outcome determinative. I find that all witnesses testified credibly and all conflicts between witnesses are attributable to those witnesses remembering facts differently.

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 (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 case, the District is the party seeking relief and must bear the burden of persuasion.

Evaluation Criteria

The IDEA establishes requirements for evaluations. 20 U.S.C. § 1414.

In substance, evaluations 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 for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation 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, under 20 U.S.C. § 1414(b)(3)(A), the District is 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.

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

Independent Educational Evaluation at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

Discussion

The IDEA does not establish a clear timeline for parents/guardians to disagree with an LEA's evaluation and request an IEE at public expense. In this case, the Guardians agreed with the District's evaluation and then, nearly 16 months later, disagreed with it and asked the District to fund an IEE. Even ignoring the Guardians' initial agreement with the ER, 480 days is too long. The IDEA permits the Guardians to request a new evaluation every year. Had the Guardians requested a new evaluation from the District, they would have been entitled to it. Instead, they seek to bypass the District's first bite at the apple and move directly to a District-funded IEE.

I find that the Guardians did not “disagree with an evaluation obtained by the public agency.” Therefore, a threshold condition to their public funding demand is not met. The Guardians are not entitled to demand an IEE at public expense for this reason.

In the alternative, and to answer the question actually presented in this matter, I find that the ER was appropriate. The crux of this case is whether the ER address “all areas of suspected disability.” Setting that requirement aside for the moment, the District has met its burden. The District used multiple measures and assessments to gather functional, developmental, and academic information. The ER included and relied upon information provided by the Guardians. The Psychologist did not use any single measure or assessment as the sole criterion for determining whether the Student is a child with a disability. The Psychologist’s analysis and synthesis of information from multiple sources across multiple measures is seen throughout the ER, but especially in the Psychologist’s consideration of psychometric and behavioral information.

Turning to the heart of the matter, I also find that the ER addressed “all areas of suspected disability.” The Guardians correctly argue that the District must prove that the ER met this requirement. They further argue that the ER fell short of that requirement because the Psychologist did not take the Student’s traumatic past and PTSD diagnosis into consideration as part of the ER. I disagree.

While there is disagreement about the specifics, there is preponderant evidence that the Guardians informed the District about the Student’s traumatic past. The Psychologist is not just charged with constructive knowledge of that information, the Psychologist had that information. The Psychologist explicitly acknowledged the Student’s past in the ER, and then went on to assess the Student through a comprehensive psychoeducational evaluation. That evaluation included a broad-based behavioral assessment designed to catch the behavioral and educational indicia of various mental health conditions. That rating was used in conjunction with another rating that targeted specific areas of concern, information from the teacher and Guardians, observations, and academic assessments to reach conclusions about the Student’s disability status and educational needs.

The Psychologist was aware of, and accounted for, the Student’s traumatic past. It is true, however, that the Psychologist did not know that the Student had a PTSD diagnosis. The Psychologist testified that if she had known about the PTSD diagnosis:

I would have reached back out to [Guardian] to see if [Student] was currently in therapy or see if there were any behaviors being exhibited in the home. I would have gone back to teachers, gone back to [School Counselor] and seen what, if any, behaviors or concerns there were in the school setting that I might have missed or overlooked. I would have gone maybe to the nurse to see if there was a diagnosis on file of PTSD.

NT 117-118.

Those hypotheticals do not render the ER inappropriate. The only evidence in the record about how the ER *might* have changed if the Psychologist knew about the diagnosis is that the Psychologist would have taken a harder look into the Student's therapy and behaviors. But it is not as if the Psychologist ignored those domains. The Psychologist asked the Guardians if the Student was in treatment (they said "no"). The Psychologist also collected information about the Student's behaviors in multiple settings from multiple people.

Additionally, the Guardians argue that the Student's PTSD impairs the Student's executive functioning. The implication is that PTSD is a qualifying disability under the IDEA's definition of Emotional Disturbance, and the Student's executive functioning deficits establish the need for special education. This argument all but ignores the fact that the ER explicitly examined the Student's executive functioning needs, found that those needs were variable depending on whether the Student was working at home or in school, found that those needs did not rise to clinical levels, and found that those needs did not adversely impact the Student's school performance as long as the Student received MTSS supports.

Regarding those MTSS supports, I note that the Student did not master the work completion goals in the ESAP plan. Work completion relates to executive functioning, but the Student's work completion challenges did not hinder the Student's school performance as measured by benchmarks, class performance, and academic achievement testing. The District should carefully monitor the Student's executive functioning going forward.

For all the above reasons, even if the Guardians were entitled to request an IEE at public expense 480 days after agreeing with the ER, I find that the ER was appropriate.

New Information

Discussed above, the Psychologist testified as to what she would have done if she knew about the Student's PTSD diagnosis. I order the District to complete those actions now. The District must ask the Guardians 1) if the Student is in any type of therapy for PTSD, and 2) what concerning behaviors, if any, the Student exhibits at home. The District must also solicit information from the Student's teachers and the school nurse consistent with the Psychologist's testimony quoted above.

I encourage, but cannot require, the Guardians to promptly respond to the District's requests for information and share all information about the Student's mental health with the District contemporaneously and in writing.

After collecting and considering this information, and any additional information that the Guardians share, the District shall consider whether a reevaluation is warranted. The District shall then inform the Guardians of its decision in writing.

Summary and Legal Conclusions

The Guardians did not disagree with the District's ER and, therefore, cannot be entitled to an IEE at public expense. Alternatively, if the Guardians disagreed with the District's ER, I find that the ER was appropriate and that the Guardians are not entitled to an IEE at public expense.

The Psychologist was aware of the Student's trauma but not aware of the Student's PTSD diagnosis. The District must take the actions described above now that it is aware of the diagnosis.

ORDER

Now, December 29, 2022, it is hereby **ORDERED** as follows:

1. The District's Evaluation dated March 22, 2021, was appropriate.
2. Within 30 days of this Order, the District shall collect information described in the accompanying decision and shall inform the Guardians in writing as to its conclusion as to whether a reevaluation is necessary.

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

/s/ Brian Jason Ford
HEARING OFFICER