

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Easthampton Public Schools v. Student**

**BSEA #2203513**

**RULING ON PARENTS' MOTION FOR CLARIFICATION**

This matter comes before the Hearing Officer on the January 13, 2023 *Parent's Motion for Clarification (Motion)*<sup>1</sup> seeking clarification regarding the Easthampton Public Schools' (Easthampton or the District) obligation to fund the psycholinguistic and neuropsychological evaluations ordered in the May 9, 2022 Decision in *In Re: Easthampton Public Schools v. Student* (BSEA #2203513) by the undersigned Hearing Officer (2022 Decision). Specifically, Parents ask the Hearing Officer to find that the District must fund the psycholinguistic evaluation at a rate higher than that proposed by the District and that an observation must be funded as part of the neuropsychological evaluation.<sup>2</sup> Parents argue that because no rates are set by the state for a psycholinguistic evaluation, the District should be responsible for paying the amount charged by the provider to the general public. Parents also assert that because the District has conducted an observation as part of its assessments, it must fund an independent observation as well.

On January 25, 2023,<sup>3</sup> the District responded that the Hearing Officer's May 9, 2022 "Order has been fully complied with." According to the District,

"Relative to the Neuropsychological Evaluation, the District has contracted with an evaluator of [Parents'] choosing and that evaluation is underway to the best of the District's knowledge. Based on the initial email communication with the evaluator, the district believes that academic achievement will be assessed as part of the Neuropsychological Evaluation. However, based on the recent request from [Parents] for an independent academic achievement evaluation, the district has sought out the evaluator for clarity. The evaluator has not responded.... Even if this evaluator is not planning to do academic testing, the District is agreeable to funding an independent academic evaluation at state rate even though not specifically ordered to do so in the May 9 Decision.

There is no specified state rate for a Psycholinguistic Evaluation. Therefore, the District looked at the testing done by Dr. Kemper as part of his Psycholinguistic Evaluation (speech/language, reading and written language), added the state rates for each of these three components and thereby calculated the state rate. This combined rate was communicated to [Parents] but, to date, [Parents have] not indicated that [they have or have] not identified an evaluator to complete the

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<sup>1</sup> Parents did not file a formal motion in accordance with *BSEA Hearing Rule VI(B)*. However, as Parents are *pro se*, I construe her email as a Motion for Clarification.

<sup>2</sup> Initially, Parents also sought clarification regarding whether the neuropsychological evaluation which the 2022 Decision ordered the District to fund at state rate should include academic testing. On January 25, 2023, the District clarified that it does not object to funding independent academic testing for Student at the state rate. Therefore, I do not address this issue in this Ruling.

<sup>3</sup> At District Counsel's request, the District was granted additional time to respond to Parents' email.

Psycholinguistic Evaluation. [Parents] also did not communicate to the District that [they have] been unable to find an evaluator who will accept this rate.”

Moreover, the District asserted<sup>4</sup> that the May 9, 2022 Order “did not order an observation to be conducted at state rate.... Furthermore, an observation is not an evaluation so, in any event, there legally could not be in order to fund an independent observation in any matter. As this is simply about compliance of [the] decision, the question of an observation is not at issue.”

For the reasons set forth below, Parents’ *Motion* in this matter is DENIED.

### **ISSUES:**

At issue in this ruling is 1) whether the District is obligated to fund the psycholinguistic evaluation at the rate charged by the provider to the public, and 2) whether the District is required to fund an observation as part of the independent educational evaluations.

### **RELEVANT FACTS:**

On May 9, 2022, the undersigned Hearing Officer issued a Decision in the above-referenced matter stating, in part, as follows:

“Massachusetts law dictates, pursuant to 603 CMR §28.04(5)(c)(1), that because Student in this matter is eligible for a free and reduced lunch, Parents are entitled to IEEs ‘equivalent to the types of assessments done by the school district.’ Here, based on the evidence presented, I cannot find that Parents sought assessments in areas not covered by the District. As discussed in detail above, Parents could not identify what areas should have been evaluated that were not already assessed by the District. In essence, Parents’ request for neuropsychological and psycholinguistic IEEs was a request for a second opinion in the areas assessed by the District. Based on the record, a neuropsychological evaluation and a psycholinguistic evaluation would be ‘equivalent’ to the sum of the District’s psychoeducational and speech and language evaluations. Dr. Kemper’s Psycholinguistic Evaluation assesses speech, language, and literacy, the same areas assessed by Ms. Barman and Ms. Howard (using, at times, the same assessment tools). Similarly, Dr. Switalski focused on the same areas of suspected disability in her 2019 neuropsychological evaluation as did Ms. Howard in 2021. Therefore, in seeking a neuropsychological assessment and a psycholinguistic evaluation, Parents did not request testing in an area that the District had failed to assess. Rather they are looking for an independent opinion relative to the same areas assessed by the District.

Thus, although the District met its burden to show by a preponderance of the evidence that its educational evaluations were appropriate and comprehensive, Parents are nonetheless entitled to an independent neuropsychological evaluation

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<sup>4</sup> The District submitted this argument via email dated January 26, 2023.

and an independent psycholinguistic evaluation at public expense, as the evaluations sought are equivalent to those performed by the District and Student is eligible for free and reduced lunch.”<sup>5</sup>

The 2022 Decision ordered the District to fund “independent neuropsychological and psycholinguistic evaluations, each at a rate that does not exceed the state rate.”

Based on the 2022 Decision, none of the District’s evaluators (i.e., Ms. Barman and Ms. Howard) nor Parents’ own neuropsychologist, Dr. Switalski, and psycholinguist, Dr. Kemper, conducted formal observations as part of their assessments; instead, they relied on clinical observations during testing. District evaluators also relied on feedback from the classroom teacher regarding Student’s presentation in the classroom.<sup>6</sup>

Following the issuance of the 2022 Decision, the District proposed to fund a neuropsychological evaluation at \$98.95/hour (9 to 24 hours) and a psycholinguistic evaluation, inclusive of speech/language, reading, written language testing, for a total of \$349.54.

#### **LEGAL STANDARDS:**

603 CMR 28.04(5)(1)(a) states that all “independent education evaluations shall be conducted by qualified persons who are registered, certified, licensed or otherwise approved and who abide by the rates set by the state agency responsible for setting such rates. Unique circumstances of the student may justify an individual assessment rate that is higher than that normally allowed.” 101 CMR 330.00 governs “the rates of payment by governmental units for team evaluation services purchased by a governmental unit.”<sup>7</sup> The rates of payment for team evaluation services to which 101 CMR 330.00 applies are “the lower of (a) the eligible provider’s usual charge to the general public for the same or similar services; or (b) the rates of payment listed in 101 CMR 330.04.”<sup>8</sup>

Rates of payment for some services are not included within the scope of 101 CMR 330.00 and instead are governed by other regulations promulgated by the Executive Office of Health and Human Services (EOHHS).<sup>9</sup> For instance, speech pathology evaluations are governed by 101 CMR 339.00. According to 101 CMR 339.03, rates of payment for authorized services to which 101 CMR 339.00 applies are “the lower of (a) the usual fee of the eligible provider of rehabilitation center services or the eligible provider of restorative services to patients other than publicly aided individuals; or (b) the schedule of allowable fees set forth in 101 CMR 339.04.”

101 CMR 330.04 states that evaluation of speech sound production (e.g., articulation, phonological process, apraxia, dysarthria); with evaluation of language comprehension and expression (e.g., receptive and expressive language) (for patients younger than 21 years old) is reimbursable at \$133.99.

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<sup>5</sup> All internal citations have been omitted.

<sup>6</sup> These statements are based on the facts delineated in the 2022 Decision.

<sup>7</sup> 101 CMR 330.01(1).

<sup>8</sup> *Id.*

<sup>9</sup> See 101 CMR 330.01(6).

## APPLICATION OF LEGAL STANDARDS:

Here, Parents argue unpersuasively that because the state has not set a rate for a psycholinguistic evaluation, the District must pay the fee charged to the public. Parents offer no legal basis for their argument. In fact, the regulations governing rate setting consistently refer to reimbursement as the “lower of” the fee charged to the public and the rate set by the regulations.<sup>10</sup>

In the instant matter, because the state has not established a state rate for a psycholinguistic evaluation, I must look to the components of the assessment itself to determine the District’s financial obligation to fund same. As explained in the 2022 Decision, “Based on the record, a neuropsychological evaluation and a psycholinguistic evaluation would be **‘equivalent’ to the sum of the District’s psychoeducational and speech and language evaluations**. Dr. Kemper’s Psycholinguistic Evaluation assesses **speech, language, and literacy**, the same areas assessed by Ms. Barman and Ms. Howard (using, at times, the same assessment tools).” (emphasis added) Therefore, Parent is entitled to funding for a comprehensive neuropsychological assessment, educational testing including literacy, and assessment of Student’s speech and language skills.

There is no argument that a comprehensive neuropsychological assessment is reimbursable at \$98.95/hour (9 to 24 hours).<sup>11</sup> Literacy testing is part of an educational assessment and is reimbursable at \$86.22/hour (up to 7.5 hours),<sup>12</sup> and a speech and language evaluation is reimbursable at \$133.99. These amounts represent “the sum of the District’s psychoeducational and speech and language evaluations.”

The definition of a neuropsychological evaluation in 101 CMR 330.02 fails to include an observation, and Parents’ own prior neuropsychologist did not conduct a formal observation of Student as part of her testing. Nor does the definition of an educational assessment in 101 CMR 330.02 or the definition of a speech and language evaluation in 101 CMR 330.04 include an observation. An observation was also not included in Dr. Kemper’s psycholinguistic evaluation, and the 2022 Decision does not explicitly order that one be funded. In addition, the facts delineated in the 2022 Decision do not specify that a formal observation was conducted by the school psychologist as part of her psychoeducational evaluation. Therefore, the District is not obligated to fund an observation of Student. Nevertheless, if the District’s school psychologist did, in fact, conduct an observation of Student as part of her assessment, beyond a clinical observation during testing administration, the District must fund an observation as part of the independent neuropsychological evaluation at the designated state rate.<sup>13</sup>

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<sup>10</sup> Parents have not asserted, nor do the facts suggest, that “[u]nique circumstances of the student [] justify an individual assessment rate that is higher than that normally allowed.” 603 CMR 28.04(5)(1)(a).

<sup>11</sup> 101 CMR 330.04(2).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *Sch. Bd. Of Manatee Cnty., Fla. v. L.H. ex rel. D.H.*, No. 808-CV-1435-T-33MAP, 2009 WL 3231914, at \*3 (M.D. Fla. Sept. 30, 2009) (finding that regardless of whether the IEE is funded privately by the parents or publicly by the school district, a classroom observation may be necessary where parents invoke their right to an IEE and the evaluation requires observing the student in her educational placement); *Letter to Savit*, 114 LRP 50211 (OSEP 2014) (if an IEE is publicly funded, then the criteria under which the evaluation is obtained must be the same as the criteria the district applies to its own evaluations, and, therefore, districts may not apply stricter criteria to third parties conducting publicly funded IEEs, such as by granting them less time than they grant their own

**ORDER:**

Parents' *Motion* in this matter is DENIED.<sup>14</sup> Specifically, the District must fund a comprehensive neuropsychological assessment at \$98.95/hour (9 to 24 hours), literacy testing as part of an educational assessment<sup>15</sup> at \$86.22/hour (up to 7.5 hours, as determined by the evaluator), and a speech and language evaluation at \$133.99.

So Ordered by the Hearing Officer,

/s/ Alina Kantor Nir

Alina Kantor Nir, Hearing Officer

Dated: January 27, 2023

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evaluators to observe students with disabilities in class); *Letter to Mamas*, 41 IDELR 10 (OSEP 2004) ("if parents invoke their right to an [IEE] of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement"); *Letter to Wessels*, 16 IDELR 735 (OSEP 1990) (if the district's "assessment procedures make it permissible to have in-class observation of a child, the independent evaluator has the right to do so").

<sup>14</sup> Parents' request that the District fund an observation of Student is DENIED except that in the event that the District's school psychologist did, in fact, conduct an observation of Student as part of her assessment, then the District must fund an observation as part of the independent neuropsychological evaluation at the state rate of \$83.86/hour. See 101 CMR 330.04(2).

<sup>15</sup> This literacy testing is exclusive of the District's agreement "to fund[] an independent academic evaluation at state rate" as indicated in its January 25, 2023 letter.