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

DECISION

Child's Name: K.G,
Date of Birth: [redacted]

Dates of Hearing: 11/4/2016, 12/8/2016 and 1/5/2017

Closed HEARING

ODR File No. 18241-16-17

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Elizabeth Kapo Esq. 2123 Pinehurst Road Bethlehem, PA 18018 610-758-9800
Local Education Agency Berks County IU/EI Program 1111 Commons Blvd. Reading, PA 19612-6050	LEA Attorney Christina Stephanos Sweet, Stevens, Katz & Williams LLP 331 Butler Avenue New Britain, PA 18601 215-345-9111 x 131

Date Record Closed:	January 5, 2017
Date of Decision:	January 27, 2017
Hearing Officer:	Charles W. Jelley Esq. LL.M.

Background

This case arises from a Complaint filed by the Berks County Intermediate Unit (IU), the Local Education Agency (LEA), to support the appropriateness of its reevaluation of an eligible young Child (Child).[1] The IU's previous evaluation identified the Child as a person with Autism.

In the spring of 2016, the IU reevaluated the Child. After the parties reviewed the reevaluation report (RR), the Grandparents requested an Independent Educational Evaluation (IEE). The request focused on all of the domain areas addressed by the IU evaluation team. In particular, the Grandparents' IEE request focused on the need for an independent Physical Therapy, Occupational Therapy, and an Assistive Technology evaluation. Upon review, the IU filed a timely due process complaint to support the appropriateness of its reevaluation. Shortly after the initial evaluation, the Child began receiving pre-school (ages 3 to 5) special education services from the IU.[2]

Hearing Session - One Procedural Objection

IU contends after hearing the Grandparents' opening statement the Grandparents expanded their IEE request to developmental areas not mentioned in the IEE request.[3] After a careful and thoughtful review of the Grandparents' letter, the IU denial of the IEE request and the IU complaint, I find the Grandparents did clearly express a disagreement with all of the developmental areas assessed by the IU. Assuming IU was somehow prejudiced, the hearing officer offered, and the IU agreed to present rebuttal evidence if necessary after the Grandmother's testimony. The IU called six witnesses, the Grandmother was the only witness for the Child, under these circumstances, I find the rebuttal testimony removed any alleged prejudice. As a

[1] But for the cover page of this Decision, in the interest of confidentiality and privacy, the young Child's name and gender, and other potentially identifiable information are not used in the body of this decision. The same day the Grandparents filed this Complaint, they also filed a second complaint for this Child's sibling. The sibling attends the same preschool, and though they are in different classes, each Child earned virtually the same scores on the same set of assessments.

[2] Commendably, both parties agreed to use the same exhibits in this matter, which avoided an unnecessarily long documentary record. Although there are effectively joint exhibits in this matter, they are designated by the letter "J" followed by the exhibit number. References to the transcript are designated by the letters "NT" followed by the page number. The Grandparent submitted one exhibit; that exhibit is designated as "P#1."

[3] The Child has lived with the Grandparents since birth. The IU, for all times relevant, has always treated the Grandparents as the Child's Parents 34 C.F.R. §300. 30(a)(4)

preliminary matter, I find the LEA, as the moving party, was not prejudiced in presenting their case in chief. Any alleged prejudice was waived once the IU presented the rebuttal evidence.

ISSUE

Did the Intermediate Unit (IU) Early Intervention Program conduct an in-depth, sufficient, appropriate comprehensive evaluation of the Child in all areas of strengths and needs?

If the IU Early Intervention Program did not conduct an appropriate evaluation, should the IU Early Intervention Program be ordered to fund an independent evaluation in one or more developmental areas as requested by the Grandparents?

Findings of Fact

1. The Child is pre-school age, resides within the IU, and is eligible for pre-school special education services (J #3).
2. Previously, in accordance with federal and state standards, the IU identified the Child as a person with a disability, eligible for specially-designed instruction 34 C.F.R. §300.8(a) (1), (c) (1); 22 Pa. Code §§14.101; 14.102 (2) (ii); 14.153 (J#3).
3. The Child receives early intervention services, in a center-based program, four days a week, for a half-day session (NT pp.164-165).
4. On February 6, 2016, the IU sent, and the Grandparents signed a Permission to Reevaluate (PTRE) the Child (J#3).
5. The IU staff testified that the PTRE included an attached list of the specific assessments and the applicable Procedural Safeguards (J#3). After a careful, deliberate, and extensive search, the IU was not able to produce the attachment.
6. As part of the evaluation, the IU school psychologist obtained input about the Child's background, medical/developmental history and concerns about the Child from the Grandparent, as well as information from teachers and service providers with respect to the Child's services/progress, and behaviors of concern (J#3).
7. The IU school psychologist, the classroom teacher, the Occupational Therapist, the Speech Therapist, and the Physical Therapist completed and coordinated assessments in all relevant developmental areas (J#3).

8. A Board Certified Behavioral Therapist (BCBA)/school psychologist, assessed the Child's developmental needs and collected data as part of Functional Behavior Assessment (FBA) (J#3 p.23).
9. The FBA was completed to gather specific information/data on the antecedents, behaviors, and consequences supporting the behaviors that interfered with the Child's learning (J#3 p.23). The FBA objectively described the frequency of a series of challenging behaviors like dropping to the floor while walking, scratching others, pulling hair and wandering around the room (J#3 p.17).
10. To assess the Child's cognitive development, the preschool teacher completed the Battelle Developmental Inventory 2nd Edition (BDI-2) (J#3 p.3). In the area of cognitive development, the Child's BDI-2 developmental quotient ranged between 51 and 65, which falls in the significant developmental delay range. Scores in the 51 to 65 age range indicate an age equivalent score of one year to one year and nine months (J#3 p.11). The Child can remain on task for five (5) minutes (J#3 p.11). The Child has a reinforcement schedule of a two (2) which means that that Child requires reinforcement after completing one (1) to four (4) tasks successfully (J#3 p.12). The classroom teacher uses a mix of preferred and non-preferred activities, errorless teaching techniques, uses a mix of 80% hard tasks to 20% easy tasks and opportunities for one-on-one instruction. To address the Child's sensory needs, the teacher uses a bumpy seat and a weighted lap pillow (J#3 pp.11-12).
11. The preschool teacher also administered the Verbal Behavior Milestones Assessment and Placement Program (VB- MAPP) (J#3 p.23). The VB-MAPP assessment contains 170 measurable learning and language milestones. The learning and language milestones are sequenced and balanced across three developmental levels (J#3 p.23). The VB-MAPP also includes the Milestones Assessment in Early Echoic Skills Assessment Subtest. The VB-MAPP also provides an assessment of 24 common learning and language acquisition barriers faced by children with autism or other developmental barriers (J#3 p.23).
12. The VB-MAPP assessment results indicate the Child demonstrates skills in the three to six month range up to the nine to twelve month range (J#3 p. 11, p.12, p.15, p.17).
13. The teacher also administered the VB-MAPP Barriers assessment. The VB-MAPP Barriers assessment was completed to determine what behaviors are influencing the acquisition of new skills. For example, the Child does not label objects, imitate motor patterns, or repeat sounds (J#3 p.17). The RR notes the Child engages in several self-stimulating behaviors, is prompt dependent, displays sensory defensiveness, does not complete simple

puzzles, and at times is hyperactive (J#3 p.17). The BCBA and the teacher report the Child does not make or maintain eye contact, participate in circle time, nest objects, or attend to people (J#3 p.17). The Child enjoys watching videos on the IPad, apples, pretzels, and juice (J#3 pp.11).

14. The Speech Therapist administered the Rossetti Infant-Toddler Language Scale and the Preschool Language Scale-Preschool Language Scale 5th Edition (PLS-5) (J#3 p.14, p.24). On the PLS-5, the Child's Standard Scores were more than 1.5 standard deviations below the mean suggesting a severe expressive and receptive language need (J#3 pp.14-15, pp.23-24). Although the Child is five years old, the assessment reveals the Child's expressive and receptive language skills fall somewhere between three months to twelve months (J#3 pp.14-15).
15. The Speech Therapist used the IU Assistive Technology Needs Assessment Tool to compile information regarding the Child's functional communication system (ATNAT) (J#3 p.15). The RR notes the team discontinued sign language instruction when the Child became resistant to the hand-over-hand prompting (J#3 p.15). To encourage the Child's limited vocalizations, in the specialized preschool classroom, the Child uses a modified version of a picture exchange system (J#3 pp.15-16). The Child's vocalizations are limited and are not functional in nature (J#3 pp.15).
16. The Speech Therapist testified that based on the Child's level of attention and fine motor control it was her opinion that at the current time she would not recommend an Assistive Technology Assessment (NT pp. 132-136).
17. Using the Gross Motor subtest in the Developmental Assessment of Young Children Second Edition (DAYC-2), the classroom teacher administered and the Physical Therapist scored the Child's Gross Motor skills across 87 subskills. A Gross Motor subtest score of 78 or less represents a score that is 1.5 standard deviations below the mean suggesting a Gross Motor need. The Student earned a Standard Score of 81 (J#3 p.24). The Physical Therapist testified that a Standard Score of 81 suggests the Student does not need Physical Therapy (NT p.174; J#3 p.19).
18. The Occupational Therapist also administered the DAYC-2 to assess the Child's self-help skills, toileting, feeding, dressing, and personal responsibility. A Standard Score of 78 or less indicates a 25% delay or 1.5 standard deviations below the mean. The Child earned a Standard Score of less than 50 and a percentile rank of less than one (1) (J#3 p.24).
19. The Occupational Therapist also administered the Peabody Motor Scale. The Peabody is a standardized assessment designed to measure a child's independent functioning in his or her environment. Self-help skills include toileting, feeding, dressing, and personal responsibility. The Child earned a

Fine Motor Quotient Standard Score of 50 and a percentile rank of less than one (1) (J#3 p.24).

20. The Occupational Therapist used the Sensory Processing Measure-Preschool Assessment Tool (SPM-P) to assess the Child's sensory needs (J#3 p.22). The SPM-P is a set of parent and teacher rating questionnaires to assess the Child's sensory processing needs and social participation skill in children between the ages of 2-5. The two questionnaires, when scored, provide a broad perspective of the Child's sensory needs in the preschool classroom and the home. Contrary to test maker's instructions, in this instance, the Occupational Therapist did not give the parent questionnaire to the Grandparent.

21. The Child's SPM-P observation was completed by the teacher and scored by the Occupational Therapist (NT pp.44-45). The SPM-P score is based on response completed by the classroom teacher (NT pp.44-45). The SPM-P choices of responses range from never, occasionally, frequently and always, on 75 questions (J#3 p.22). The evaluator notes the Child resists engaging in hand washing activities and is occasionally distressed by messy play (J#3 p.18-20). The evaluator notes that the Child's sensory processing difference limits purposeful engagement in classroom activities J#3 p.18-20). The Child's distractibility requires consistent prompting to follow direction and engages in tasks (J#3 p.18; p.23). The Occupational Therapist testified that she did not trial any sensory processing equipment (NT pp.47-49). The Occupational Therapist also testified that she was not trained to administer any other Sensory Processing assessments (NT p.181).

22. Information about the Child's gross motor development was obtained through clinical judgment by the Physical Therapist and teacher observation. The teacher's observations were scored and recorded using the Developmental Assessment of Young Children-2nd Edition Gross Motor Subdomain. A Standard Score of 78 corresponds to at least a 1.5 standard deviation below the mean of 100 which indicates a delay (J#3 p.25). The Student earned a Gross Motor Subdomain score of 81 at the 10th percentile (J#3 p.25). The teacher reports the Child toe walks. The teacher and the Grandparent report the Child toe walks up steps placing one foot on each step with a handrail. The teacher and the Grandparents agree the Child descends stairs, toe walking, with verbal and physical prompting, with the use of a handrail, placing one foot on each step (J#3 p.19). The Grandparents and the teachers report the Child falls when walking, and walks down stairs looking upwards (J#3 p.17). The Child demonstrates limited environmental awareness (J#3 p.19).

23. The Physical Therapist testified that although the Child toe walks and earned a borderline standard score of 81, at the 10th percentile, based upon

her clinical judgment and the single DAYC-2 score, the Student did not qualify for physical therapy (NT 179-180; J#3 p.17).

24. The school psychologist formally observed the Child in the classroom (NT pp.65-69). Information compiled from the assessment results, teacher input, therapist, and classroom observations conflicted in some respects with Grandparent reports. The Grandparents report less developed skills and higher rates of problem behaviors at home and in private therapy sessions. The Grandparents' input was included in the RR and considered or known to the evaluation and Individualized Education Program team (J#3).
25. After reviewing the multiple assessement tools, the evaluation team concluded the Child has a developmental delay and is in need of specially-designed instruction (J#3 p.30).
26. The Grandparents presented a one-page exhibit from a private Physical Therapist that reported that the Child was reevaluated in August 2016 (P#1). The private evaluator reported the Child had heel cord tightness, gait abnormality, and decreased coordination (J#1). The report was prepared after the IU evaluation and was not considered at the time of the IU's Physical Therapist evaluation or by the evaluation team.

Applicable Legal Standards

Conclusion of law and burden of proof

The burden of proof is composed of two considerations, the burden of going forward, and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties, must bear the risk of failing to convince the finder of fact. In *Schaffer v. Weast*, 546 U.S. 49, (2005), the court held that the burden of persuasion is on the party that requests relief in an IDEA case. The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer). A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992). This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. *Id.*

Credibility and Persuasiveness of Witness Testimony

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 Pa Code §14.162 (requiring findings of fact); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact).

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony and, accordingly, rendering a decision incorporating findings of fact, discussion, and conclusions of law. In the course of doing so, hearing officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.[4]

Thus, all of the above findings are based on a careful and thoughtful review of the transcripts, a reading of all of the exhibits and a direct observation of each witness; therefore, the decision is based upon a preponderance of the evidence presented. While some of the material evidence is circumstantial, the hearing officer can derive inferences of fact from the witnesses' testimony and the record as a whole is preponderant. On balance, the hearing officer found all of the witnesses' testimony represents their complete recollection and understanding of the events. I conclude, therefore that I can derive inferences of fact from the testimony.

Federal IDEA and State Reevaluation Requirements

The IDEA statute and regulations require an initial evaluation, provided in conformity with statutory and regulatory guidelines, as the necessary first step in determining whether a child is eligible for special education services and in developing an appropriate special education program and placement. 20 U.S.C. §1414; 34 C.F.R. §300.8(a). After a child is determined to be eligible, the IDEA statute and regulations provide for periodic reevaluations, which "may occur not more than once a year unless the parent and public agency agree otherwise; and must occur at least once every three (3) years, unless the parent and the public agency agree that an evaluation is unnecessary". 20 U.S.C. §1414(a)(2)(B)(i), (ii); 34 C.F.R. §300.303(b). LEAs,

---

[4] *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); *Blount v. Lancaster-Lebanon Intermediate Unit,* 2003 LEXIS 21639 at *28 (2003

however, also have an obligation to "ensure that a reevaluation of each child with a disability is conducted" at any time "the public agency determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation"." 20 U.S.C. §1414(a)(2)(A)(i), (ii); 34 C.F.R. §300.303(a).

The standards for an appropriate evaluation are found at 34 C.F.R. §§300.304-300.306. The evaluation standards require the LEA to (1) "use a **variety** of assessment tools; " (2) "gather relevant functional, developmental and academic information about the child, including **information from the parent**;" (3) "Use **technically sound instruments**" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any **single measure** or assessment as the **sole criterion**" for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1-3). (emphasis added).

In addition, the measurement tools used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments. The evaluation must also evaluate the child in all areas related to the suspected disability. The evaluation must be "**sufficiently comprehensive** to identify all of the child's special education, and related service needs", and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii-iv), (2), (4), (6), (7).

The regulations also permit the LEA to pay for certain medical evaluations, when necessary, provided that the evaluations are limited to "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and other services". 34 C.F.R. §300.34 (c)(5). Medical services are required under the IDEA to the extent that they are necessary for diagnostic purposes. Medical services of a licensed physician for other purposes, specifically for medical treatment, are not related services under the IDEA. *Mary Courtney T. v. School Dist. of Philadelphia*, 52 IDELR 211 (3d Cir. 2009).

Once an evaluation or reevaluation is completed, a group of qualified LEA professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the LEA is required to: (1) "Draw upon information from a variety of sources," including those required to be part of the assessments, must assure that all such information is "documented and carefully considered". 34 C.F.R. §300.306 (c)(1).

Independent Educational Evaluations Requirements

The IDEA and the companion state regulations provide that parents have the right to obtain an independent educational evaluation (IEE). At times, if the parents elect to pursue a private evaluation, provided that the private evaluation meets the IEE criteria of the LEA, and parents share it with the LEA, the LEA must consider the IEE in making decisions concerning the child. 34 C.F.R. §§300.502(a)-(b)(3), (c)(1).

Parents have two alternative avenues to obtain a publically paid IEE. First, they can obtain an IEE at public expense if they disagree with an evaluation obtained by the LEA and the LEA agrees to fund the independent evaluation. Second, if the LEA's evaluation is found inappropriate by the decision of a hearing officer after an administrative due process hearing, the hearing officer can order the LEA to fund the costs of the IEE. 34 C.F.R. §300.502(b)(1), (2)(ii).

Once a parent has requested an IEE, the LEA "must, without unnecessary delay", file a due process complaint to show that its evaluation is appropriate or assure that the IEE is provided. 34 C.F.R. §300.502(b)(2)(i), (ii). Next, the LEA must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2); *Letter to Bluhm,* 211 IDELR 2237 (OSEP 1980).) Upon receipt of the request, the LEA must also provide parents with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. *(Letter to Parker,* 41 IDELR 155 (OSEP 2004); 34 C.F.R. §300.502(a)(2)). When the LEA elects to enforce its independent evaluation criteria, the LEA must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. *(Id.)* In summary, under 34 C.F.R. § 300.502(b)(1), a parent has the right to an IEE at public expense, subject to 34 C.F.R. § 300.502(b) through (e). Once the parent requests the IEE, the LEA must either grant the request or initiate a hearing; either way, the LEA must provide the parents with a list of evaluators that meet thee LEA's criteria. *Id.*

Pennsylvania Reevaluation and IEE Requirements

With respect to evaluations of young children, Pennsylvania special education regulations impose additional requirements for procedurally and substantively appropriate evaluations. Generally, and specifically, 22 Pa. Code §14.123 provides as follows:

(a) a group of qualified professionals, which reviews the evaluation materials to determine whether the child is a child with a disability under 34 C.F.R. §300.306 (relating to determination of eligibility), shall include a certified school psychologist when evaluating a child for autism, emotional disturbance, mental retardation, multiple disabilities, other health impairments, specific learning disability or traumatic brain injury.

(b) In addition to the requirements incorporated by reference in 34 C.F.R. §300.301 (relating to initial evaluations), the initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60 calendar days after the agency receives written parental consent for evaluation, except that the calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted.

(c) Parents may request an evaluation at any time, and the request must be in writing. The school entity shall make the permission to evaluate form readily available for that purpose. If a request is made orally to any professional employee or administrator of the school entity, that individual shall provide a copy of the permission to evaluate form to the parents within 10 calendar days of the oral request.

(d) Copies of the evaluation report shall be disseminated to the parents at least 10 school days prior to the meeting of the IEP team unless this requirement is waived by a parent in writing.

The Pennsylvania regulations that relate to providing special education to young children further provide as follows in 22 Pa. Code §14.153: Notwithstanding the requirements in 34 C.F.R. §300.122 (relating to evaluation:

(1) Evaluations shall be conducted by early intervention agencies for children who are thought to be eligible for early intervention and who are referred for evaluation.

(2) Evaluations **shall be sufficient in scope and depth to investigate** information relevant to the young child's suspected disability**, including physical development**, cognitive and **sensory development**, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family's perceived strengths

and needs **which will enhance the child's development**. (emphasis added).

(3) The assessment must include information to assist the group of qualified professionals and parents to determine whether the child has a disability and needs special education and related services.

(4) The following time line applies to the completion of evaluations and reevaluations under this section: (i) Initial evaluation, or reevaluation shall be completed, and a copy of the evaluation report presented to the parents no later than 60 calendar days after the early intervention agency receives written parental consent. (ii) Notwithstanding the requirements incorporated by reference in 34 C.F.R. §300.303 (relating to reevaluations), a reevaluation report shall be provided within 60 calendar days from the date that the parental consent for reevaluation was received. (iii) Reevaluations shall occur at least every 2 years.

(5) Each eligible young child shall be evaluated by an MDT, to make a determination of continued eligibility for early intervention services and to develop an evaluation report in accordance with the requirements concerning evaluation under §14.123 (relating to evaluation), excluding the provision to include a certified school psychologist where appropriate under §14.123(a).

The Pennsylvania regulations provide greater specificity not otherwise found in the federal regulations. The Pennsylvania regulations unlike the IDEA regulations, require that "evaluations shall be sufficient in **scope and depth** to investigate information relevant to the young child's suspected disability, including physical development, cognitive and sensory development, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family's perceived strengths and needs which will enhance the child's development". 22 Pa Code §14.153(2) (emphasis added).

Application of Applicable Legal Principles

Is the IU's evaluation sufficient in scope and depth to investigate and enhance the child's development in all areas of unique need?

Any analysis of the Child's RR requires a review if the IU assessed the Child in all developmental areas. Next, like the IDEA regulations, the assessment protocols used must be "technically sound instruments" used "to determine factors such as cognitive, behavioral, physical, and developmental factors which contribute to the disability determination". The federal and state regulations require the evaluation team to refrain from using "any **single** measure or assessment as the **sole** criterion" to determine a disability or an appropriate program. 34 C.F.R. §300.304(b)(1-3).(emphasis added).

Each witness testified that the standardized assessment tools administered during the evaluation are generally accepted and at times were administered in accordance with the test makers' directions. The witnesses also testified that the assessment tools are commonly used to evaluate the development of young children. The psychologist and the preschool teacher used a variety of measures to evaluate the child. Therefore, I find the IU's evaluation of the Child's cognitive development, adaptive development, social and emotional needs was appropriate. To assess the Child's cognitive development, adaptive development, social and emotional needs, the IU staff used multiple overlapping measures. I also find the Speech evaluation, Occupational Therapy, and Physical Therapy evaluation was partially appropriate and partially inappropriate. For the following reasons, the IU is directed to publically fund the following evaluations: (1) a Physical Therapy evaluation, (2) an Occupational Therapy Sensory Processing evaluation, and, an Assistive Technology.

The Cognitive and Behavioral assessments are sufficient

The IU presented convincing and preponderant evidence that the VB-MAPP, the Rossetti Infant-Toddler Language Scale, the Preschool Language Scale 5th Edition (PLS-5), the Assistive Technology Needs Assessment Tool and the Battelle Developmental Scale are valid and reliable assessment tools. The multiple assessments here are sufficient in scope and depth to assess the Child's cognitive development, adaptive development, social and emotional needs. The multiple assessments, in these domain areas, are also sufficient in scope and depth, such that the team could determine the Child's eligibility and provide updated information about the Child's ongoing cognitive development, adaptive development, social and emotional unique needs.

In several of the mandated evaluation domain areas, the IU used multiple overlapping standardized assessment tools to complete the assessment of the Child's cognitive functioning, social skills, play skills, interfering behaviors, and communications skills. For example, the IU psychologist, the Speech Therapist, and the preschool teacher used the VB-MAPP and the BDI-2 to assess the Child's cognitive and language development. The psychologist, who is also a BCBA, used the VB-MAPP and the FBA to evaluate how the Child's behaviors interfere with learning.

In each of these developmental areas, the record is preponderant; the IU met its burden of proof that the Child's cognitive and behavioral assessments were sufficient in scope and depth to evaluate the Child's eligibility and unique needs. The record is preponderant the IU assessments were administered by professionals trained in the specialized areas that were assessed. Equally true; however, the record is preponderant that the IU did not meet its burden that the Sensory Processing assessment completed by the Occupational Therapist, the Assistive Technology, or the Physical Therapist evaluation met the applicable state and federal minimum appropriate, scope and depth threshold requirements.

The Occupational Therapy evaluation is not sufficient or in-depth

The Occupational Therapist used the DAYC-2 and the Peabody to evaluate the Child's independent functioning in the environment and self-help skills. The DAYC-2 and the Peabody Motor included multiple assessments of the Child's self-help skill levels. The DAYC-2 and the Peabody assessment tools are valid, widely used, and reliable. Trained personnel, in accordance with the instructions provided for the assessments, administered the DAYC-2 and the Peabody assessment tools. Each of the assessments related to the Child's suspected disability and needs. Each of the assessments were sufficiently comprehensive to identify all of the Child's fine motor and self help specially-designed instruction and related service needs. Each assessment provides "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii-iv), (2), (4), (6), (7). Therefore, I find the assessment of the Child's fine motor and self-help skills was sufficient in scope and depth to enable the team to understand the Child's eligibility and programing needs. However, I also find the Sensory Processing assessment, as administered, was insufficient, inadequate, and inappropriate.

The Occupational Therapist relied upon the "Sensory Processing Measure Preschool" as the single solitary assessment technique and sole criteria to evaluate the Child's sensory processing eligibility and needs. The Sensory Processing Measure (SPM-P) is a parent and teacher questionnaire, which the parties complete, to learn how the Child reacts in response to a variety of sensory experiences.

The Grandmother and the staff agree the Child engages in challenging behaviors that are frequent and changing. For example, the RR describes how the Child "walks on tip toe," "scratches," "pulls hair" and "drops to the floor" (J#3 p.18). The Occupational Therapist's report further provides, "[redacted] sensory processing may be impacted in [redacted] ability to attend to activities and learn in an educational environment" (J#3 pp.18). These uncontested statements highlight the need for multiple valid and reliable assessment criteria that are sufficient and in-depth. While the Child scored in the "Definite Dysfunction" range indicating eligibility and need, the use of the SPM-P as the 'single measure' and "the sole criterion" for a determination of this Child's disability and need, in this instance, is disfavored. 34 C.F.R. §300.304(b)(1-3).

The Occupational Therapist testified that she was not trained to administer other sensory processing measures (NT pp.179-181). The therapist also testified that she did not trial any sensory processing equipment or review the need for a sensory diet (NT p.47). An evaluation can only be as good as the information/data that the evaluator collects and knows about the Student. In this case, the Occupational Therapist while recognizing that the Child's sensory processing needs, at times, contribute to challenging behaviors, the evaluation stopped short. The team will never know what the uncollected data, otherwise available from a trained person using a variety of valid assessments, would suggest about the Child's sensory or behavioral needs "in all areas of disability" 20 U.S.C. § 1414(b)(3)(B). The Child is approaching school age; the frequency, topography, and severity of the Child's challenging behaviors require a sufficient in-depth evaluation. Therefore, I find the use of a single sensory processing measurement criterion, under these circumstances, falls far short of the requirement that all evaluations are "sufficient in scope and depth to investigate" the Child's need for specially-designed instruction, or to gauge "… the family's perceived strengths and needs which will enhance the child's development" 22 Pa Code 14.153; 22 Pa Code 14.123.

The SPM-Preschool Home and School Questionnaire

The Occupational Therapist also testified that while she and the teacher completed the SPM-P school questionnaire, she did not give the Grandparents the home SPM-P home questionnaire (NT pp.44-48). The SPM-P identifies sensory

processing difficulties in children as young as 2 years of age. The SPM-P edition is part of the Sensory Processing Measure, for older students. The Sensory Processing measure provides data about the Child's overall sensory functioning as well as specific vulnerabilities that can affect learning.[5] The SPM-P provides the Parties with a direct comparison of sensory functioning at home and in the preschool. The maker of the test reports:

> The SPM-P includes both a Home Form, completed by the parent and a School Form, completed by the preschool teacher or care provider. Each form is composed of 75 items that are rated according to the frequency of easily observable behaviors. When used together, the two forms provide a comprehensive overview of sensory processing, and they allow you to quickly compare the child's functioning across settings. *Id.* (emphasis added).

The SPM-P test generates a T-score for each SPM-P scale and characterizes the child's status in descriptive terms as well (Typical, Some Problems or Definite Dysfunction). An Environment Difference score alerts you to discrepancies in sensory functioning between home and preschool setting.

The maker goes on to state:

> Clinicians are enthusiastic about the SPM-P not only because it generates useful information, but also because it provides that information in a way that parents can understand. Scale names are comprehensible; results are visually summarized, and interpretation is clear-cut. These features make it easier for therapists to explain test results and engage parents in the treatment process." *Ibid.* Finally, "Because the SPM-P is based on the same scale structure and theory as the SPM, you can monitor a child's sensory development from preschool all the way to age 12 years. This kind of continuity is important when you're treating children who require long-term follow-up.

[5] Sensory Processing Measure –Preschool (SMP-P) http://www.therapro.com/Browse-Category/Sensory-Processing/Sensory-Processing-Measure-Preschool-SPM-P.html.

Finally, both the SPM and SPM-P can be used for evidence-based practice, scientific-based research, differentiated instruction, and progress monitoring.[6]

The published scientific research-based benefits of the SPM-P are tangible and can have long-term implications for measuring the Child's educational needs. The completion of the SPM-P home and school questionnaire, for this Child, can have long-term implications for accessing eligibility, developing appropriate goals, and assist in measuring meaningful progress. The SPM-P home and school questionnaires when combined provide an in-depth, sufficient, and comprehensive sensory profile that affects this Child's equal access to the IDEA's twin promise of a full educational opportunity goal and a free appropriate public education. 34 C.F.R. §300.109; 20 U.S.C. §1412(a)(2).

The failure to provide the Grandparent with the home questionnaire denied the Grandparents the equal opportunity to participate in the development of the RR 34 CFR §300.322.[7] The failure to provide the home questionnaire also denied the other members of the team the opportunity to fully participate in the reevaluation. The failure to provide the Grandparent with the home questionnaire skewed the data. As administered and scored, the SPM-P did not provide a comprehensive, sufficient, in-depth assessment of the "family's perceived strengths and needs" 22 Pa Code §14.153. These fundamental errors combined to substantially interfere with the Grandparents' procedural rights.

Accordingly, I find the omission of the SPM-P Home Occupational Therapy questionnaire significantly impeded the Grandparents' procedural right to participate in the evaluation and decision making process. I also find the omissions of the Home Questionnaire lead to an insufficient, inappropriate, and inadequate evaluation of the Child's Sensory Processing needs. 20 USC §1415(f)(3)(E)(ii).

The Physical Therapy Evaluation was insufficient

The Physical Therapy, like the Occupational Therapy evaluation, conflicted with the state and the federal prohibitions about the "sufficiency", "comprehensiveness", and being an "in-depth" report of the Child's disability related needs. The Physical Therapist used the DAYC-2 Gross Motor subtest as the "single

---

[6] Sensory Processing Measure - Preschool (SPM-P) http://www.pearsonclinical.co.uk/AlliedHealth/PaediatricAssessments/Sensory/SPM-P/sensory-processing-measure-preschool.aspx

[7] *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012); Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1415(f)(3)(E)(ii) (2006).

criterion" to determine need. To assess the Child's gross motor skills, the Physical Therapist used the Gross Motor subtest of the DAYC-2 (J#3). The DAYC-2 is an individually administered, norm-referenced measure of global early childhood development for children from birth through age five years and eleven months. The DAYC-2 assesses the Child's cognition, communication, adaptive behavior, social-emotional behavior, and physical development. Each subtest takes between 10-20 minutes. Each separate domain area is measured and scored independently yielding a standard score, with a mean of 100 and a standard deviation of 15, in each domain. The DAYC-2 Physical Development domain score is made up of the child's combined performance on the gross and fine motor sub-domains. The Physical Development domain assessment includes 87 items measuring two subdomains: Gross Motor (54 items) and Fine Motor (33 items) *ibid*. The narrative portion of the Child's RR reports the Child's overall performance using the single Gross Motor subtest score from the DAYC-2 as the sole basis for the decision (J#3).

Although the evaluator testified that she also relied on "clinical judgment" as an additional assessment technique, I do not find "clinical judgment" in this instance is a sufficient valid assessment tool. Clinical judgement, as applied here, is not a "technically sound instrument(s)" 34 C.F.R. §300.304(b)(1-3).[8] The IDEA prohibits the use of any single measure or assessment as the sole criterion for a determination of disability or an appropriate program 34 C.F.R. §300.304(b)(1-3). While "clinical judgment" is a factor in assessing a child, peer reviewed research-based assessment practices now cast doubts on the use of "clinical judgment" as an objective source of evaluating a preschool child's eligibility or needs. *id.* In this instance, the Physical Therapist's "clinical judgment" confirmed the results of an insufficient assessment. I find the therapist's use of a single gross motor subtest, administered in 10-20 minutes, by the teacher and then scored by the Physical Therapist was not an in-depth assessment.

When the Physical Therapist's "clinical judgment" is contrasted and compared to the stark reality that the Child will need to undergo surgery for the medical complications arising from toe walking, I do not find the Physical Therapist testimony persuasive 34 C.F.R. §§300.301-306; 22 Pa Code §14.123; 22 Pa Code §14.153. While

---

[8] Bagnato S. J., McKeating-Esterle E., Fevola A., Bortolamasi P., Neisworth J. T. (2008). *Valid use of clinical judgment (informed opinion) for early intervention eligibility: Evidence base and practice characteristics*. Infants & Young Children, 21, 334-349); *Authentic Assessment for Early Childhood Intervention*, Stephen J. Bagnato, Guilford Press New York 2007, *Can Clinical Judgments Guide Parent-Professional Team Decision Making for early Intervention?* (pp. 142-174); *Research Foundations for Using Clinical Judgment (Informed Opinion) for Early Invention Eligibility Determination*, Stephen J Bagnato, Janell Smit-Jones Margaret Matesa, Eileen MCKeating-Esterle, Practice-Based Research *Syntheses of Child Find, Referral, Early Identification, and Eligibility Practices and Models*, Volume Two, Number Three (November 2006).

I acknowledge the difference between physical therapy for educational purposes physical therapy for medical purposes as a direct service, the team, in this instance, failed to collect in-depth data about the Child's gross motor/physical therapy needs. The IU evaluation here was insufficient when the therapist reached the eligibility/need conclusion, without consulting with the private evaluator or having the Child undergo a related services physical therapy medical evaluation as part of the RR. Had the IU sought the advice of a medical professional or consulted with the outside Physical Therapy provider, the results here might well have been different. Aware of the fact that the Child was receiving private physical therapy, the team failed to weigh or discuss the conflicting view points. Instead, the team erred when they relied on a borderline score, on one subtest amassed in less than 20 minute assessment. See, 34 C.F.R. §300.34(c)(5); *Mary Courtney T. v. School Dist. of Philadelphia*, 52 IDELR 211 (3d Cir. 2009). 34 C.F.R. §300.34 (c)(5).

Even assuming arguendo, that "clinical judgment" is a valid technically sound instrument or assessment tool, I find the use of a single gross motor subtest measure coupled with "clinical judgment" to assess the Child's gross motor needs was not in-depth, sufficient, or adequate. I also find the reevaluation did not include **an assessment of the family's perceived strengths and needs which will enhance the child's development."** 22 Pa Code §14.153; 34 C.F.R. §§300.301-306. (emphasis added). Accordingly, the IU is directed to fund a Physical Therapy IEE.

Conclusion

The 2016 reevaluation of the Child's cognitive, academic, and behavioral, expressive language and receptive language eligibility and needs was comprehensive. The Occupational Therapy evaluation of the Child's self-help skills was also comprehensive. The IU is Ordered to fund the cost of an IEE of the Child's Sensory Processing, Assistive Technology, and Physical Therapy needs. The IU's reevaluation assessments of the Child's Sensory Processing and Physical Therapy eligibility and needs failed to clarify the depth of the Child's needs and strengths. The reevaluation assessments of the Child's Sensory Processing, Assistive Technology, and Physical Therapy eligibility and needs failed to provide sufficient updated data about the Child's functional performance, in all areas of disability-related needs.

Consistent with the LEA's published IEE requirements, the LEA may limit the cost of the reevaluation(s) provided, however, the LEA limits may not prevent the Grandparents from obtaining an independent assessment. In the unlikely event there is a disagreement the Grandparents must be given the opportunity to demonstrate exceptional circumstances that would justify an IEE cost in excess of the established IEE cap.[9]

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The IU is directed to provide an independent educational evaluation, at public expense, of the Child's Sensory Processing needs by an Occupational Therapist.

2. The IU is directed to provide an independent educational evaluation, at public expense, of the Child's Physical Therapy needs by a Physical Therapist.

3. The IU is directed to provide an independent educational evaluation, at public expense, of the Child's Assistive Technology needs.

4. Within two business days from the date of this Order, pursuant to 34 C.F.R. §300.502(e)(1), the IU is directed to provide the Grandparents with the criteria under which the IEE evaluation is obtained, including the location of the evaluators, cost limits and the qualifications of the evaluators.

5. The IU is directed to pay the costs of the evaluation(s), and any observation(s) of the Child in the preschool and/or the home.

---

[9] *See*, 34 CFR §300.502 (a)(3)(i); *Letter to Anonymous*, 56 IDELR 175 (OSEP 2010); *Letter to Anonymous*, 20 IDELR 1219 (OSEP 1993)(districts must give parents the opportunity to prove extraordinary circumstances warranting an IEE at public expense that doesn't meet district criteria). LEA's refusal to waive certain evaluation criteria in light of extraordinary circumstances violates the IDEA. *See, e.g., Dover City Schs.*, 57 IDELR 208 (SEA OH 2011) (IEE cost exception granted noting that three of five evaluators on district's list of approved examiners practiced outside of 30-mile radius district imposed and charged more than the $1,000 district had authorized); and *Cincinnati Pub. Schs.,* 115 LRP 27909 (SEA OH 05/15/15) (student's unique needs warranted pushing up cap on district's IEE policy limits).

6. In the event the Grandparents are required to transport the Child to and from the evaluation, the IU is directed to reimburse the Grandparents for any out-of-pocket costs they incur in obtaining any and all of the evaluations.

7. Once the IU presents the Grandparents with the list of the 34 C.F.R. §300.502(e)(1) evaluators, the Grandparents are directed to select the IEE evaluator(s) within 15 business days. Once the evaluator has agreed to conduct the evaluation, the Grandparents shall notify the IU of the date and time of the evaluation. The Grandparents are directed to sign a release of information to allow the IU to discuss the Child and make any and all necessary arrangements to comply with this Order. The Grandparents are directed to sign a release of information to allow the IEE evaluator(s) to discuss the Child with all public and private providers.

8. If none of the evaluators listed by IU is willing or available to conduct the evaluation, the Grandparents must notify the IU, within two (2) business days, after such notice the Grandparents can then select an evaluator(s) of their choice. Within 24 hours of selecting the evaluator(s), the Grandparents must notify the IU and provide all relevant contact information.

9. The IEE evaluator(s) in their sole discretion shall select the assessment(s) protocols and the scope of the evaluation. The IEE evaluator(s) shall prepare a written report detailing the findings, results, conclusions, and recommendations from the independent evaluation. If the evaluator(s) determines that the Child needs any further evaluation(s), not described herein, the IEE evaluator(s) should immediately inform the Grandparents and the Intermediate Unit about the suggestions for further consideration. Notwithstanding the provisions of this paragraph, any observation by the IEE evaluator may, in the sole discretion of the IEE evaluator(s), take place in the home, and or the preschool. After the IEE evaluator(s) has issued the independent evaluation report, the IU shall within five (5) business days hold a meeting to review the report.

10. The IU is directed to pay the costs for the IEE evaluator(s) to participate by phone, video conference or in person in any meeting(s) to review the report. The decision to participate and the manner of participation, in either the IEE review meeting or the IEP meeting, is best left to the sole discretions of the IEE evaluator(s).

11. The IU is directed to pay the costs for the IEE evaluator(s) to participate by phone, video conference or in person in any meeting, with the Grandparents, when the IEE is reviewed or discussed. The decision to participate and the manner of participation, in either the IEE review meeting or the IEP meeting, is best left to the sole discretions of the IEE evaluator(s).

12. The terms of this Order regarding the involvement of and payment for the IEE evaluator(s) services will terminate after the IEE evaluator(s) has: (1) participated as a member of the Child's evaluation team meeting(s) and the IEP team meeting(s); and, (2) after the IU presents the Grandparents with a Notice of Recommended Educational Placement and an Individualized Education Program, reviewing the results of the IEE.

13. Nothing in this order should be read to limit, or interfere with, the continued involvement of the IEE evaluator(s), once the duties herein are discharged so long as the Parties mutually agree to such continued involvement.

14. If the Parties agree in writing, the timelines to complete the evaluations herein are subject to modifications.

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

s/ Charles W. Jelley, Esq. LL.M.
Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer

January 27, 2017