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

DUE PROCESS HEARING

Name of Child:
C.C.

Date of Birth:
[redacted]

CLOSED HEARING
ODR File 19454 17 18

Date of Hearing:
8/28/17

Parent(s):
[redacted]

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Counsel for Parents

School District:
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Date of Decision:
9/16/17

Hearing Officer:
Linda M. Valentini, Psy.D. Certified Hearing Official

Background

The Child[1] is currently a preschool-age child who received Early Intervention Services from the Intermediate Unit (IU) and who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the current classification of developmental delay. As such, the Child is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. §794 and a protected handicapped student under Pennsylvania Chapter 15.[2]

In preparation for the Child's transition from Early Intervention Services to Preschool Services the IU conducted a multidisciplinary evaluation which it completed on May 24, 2017 and issued to the Parents on or about May 26, 2017. On June 20, 2017 the Parents requested an independent educational evaluation (IEE) at public expense. The IU requested this hearing in response to the Parents' request because it believes that its evaluation of the Child is appropriate.

For the reasons put forth below I find in favor of the Intermediate Unit.

Issue

Was the Intermediate Unit's May 24, 2017 evaluation of the Child appropriate?

Findings of Fact

Request for an Independent Educational Evaluation

1. In preparation for the Child's transition from Early Intervention Services to Preschool Services the IU conducted a multidisciplinary evaluation which it completed on May 24, 2017 and issued to the Parents on or about May 26, 2017. [S-9][3]

2. The evaluation was conducted in 'combination format'. Typically when the IU has a child who has multiple disabilities and concerns in a number of domains, the evaluators for all the domains are present assessing the child's skills. [NT 80, 101]

3. Following the evaluation the speech/language evaluator asked the Parents if the Child's behavior presented a good picture of the child. The Parents said that it was a pretty

[1] In the interest of confidentiality and privacy, the child's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

[2] 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

[3] The IU's exhibits are marked as "S", the Parents' as "P" and the Hearing Officer Exhibit as "HO".

typical day, except that the Child actually attended better than the Child usually does. [NT 113]

4. At a meeting on June 7, 2017[4] the parties discussed the evaluation findings; when asked if they had any concerns about the evaluation the Parents said that they did not and that the needs the IU identified were needs that they felt the Child had. [NT 83-84, 87, 113, 162, 193, 249, 259-260, 280]

5. The IEP discussion that had been planned for a June 20, 2017 meeting did not go forward. On this date the Parents were accompanied by a lay advocate who told the IU that the Parents believed the IU evaluation was not thorough enough to capture all the Child's skills, questioned why the IU did not administer an 'intelligence test', specifically the Wechsler Preschool and Primary Scale of Intelligence (WPPSI), and questioned why measures for autism[5] were not administered. [NT 83, 85-86, 114, 163-164; S-5]

6. The advocate handed the LEA representative a letter criticizing the IU evaluation and requesting an IEE. The letter was prepared by the lay advocate. The letter contained glaring substantive errors. The letter faulted the IU for not observing the Child in the preschool setting, but the Child did not attend preschool. It alleged the IU did not consider the Child's medical conditions although there was reference to the medical conditions in the report. It alleged that the IU did not assess the Child's communication needs although the evaluation contained a complete speech/language assessment. It alleged that the IU did not assess the Child's behavior, although the IU had a school psychologist observe the Child and had a Board Certified Behavior Analyst (BCBA) conduct part of the evaluation, including an observation in the home. It included information about another child, stating "[Redacted Name]'s social and emotional development results were spoiled" while the social and emotional development assessments of the Child were not "spoiled". The IU disagreed with the Parents' viewpoint, denied their request for an IEE, and filed its request for a due process hearing on July 5, 2017. [NT 78-86, 116-118, 148-151, 163-164, 170-171, 193-196, 242-247, 263, 273-276; S-2, S-3, S-5, P-2]

7. The Parents engaged the lay advocate at some point in June 2017 to make sure they had someone to "navigate the ship" given the Child's rare condition and their desire to make sure that they were doing everything possible for their child. [NT 268, 273]

8. The Parents contacted a private speech/language therapist and a private practitioner who specializes in children with chromosomal disorders because they wanted to make sure they weren't missing anything, that there wasn't any more testing that needed to be done. Because of their child's rare condition, they wanted to cover all their bases. [NT 267, 287]

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[4] A witness incorrectly stated the date of this meeting as June 1st and this was later corrected. [NT 87]

[5] The IU team did not suspect autism, and the Parents' expert who opined about the IU evaluation in detail after spending considerable time with the Child saw no indications and had no suspicions that autism was an issue. [NT 39, 86]

The Intermediate Unit's Evaluation

9. The Child was age 2 years 11 months when the IU conducted its evaluation. On April 14, 2017 the Child had been diagnosed with a rare chromosomal disorder, microdeletion 2q23.1. [NT 31; S-9, S-11]

10. The Child was evaluated by an experienced and appropriately credentialed school psychologist who reviewed the Child's Birth to Three records as well as medical records the Parents provided, interviewed and administered a behavior rating inventory to a parent, reviewed results of a developmental assessment administered by another team member, and conducted an observation of the Child's mood, skill development in relation to typical age peers, and relationships with a parent and with unfamiliar persons. [NT 62-63, 65-66, 73, 81, 89; S-11, S-14, S-15, S-19]

11. The school psychologist observed the Child between 75 and 90 minutes, a standard and acceptable observation length in the field. Initially the Child appeared anxious, and did display more anxiety than the typical almost-three-year-old. The Child needed some redirection back to task throughout but was able to work with an evaluator for about forty minutes, a significant amount of time for that age. Although there were moments of distress, for the most part the Child engaged well and was able to interact appropriately with the evaluators. [NT 69-72, 91]

12. The school psychologist utilized the Behavior Assessment Scales for Children (BASC) to obtain data from a parent's viewpoint about the presence or absence of various behaviors. The BASC is an accepted assessment instrument in the profession and is considered valid and reliable. [NT 73-74]

13. The Parent's responses were considered "acceptable", that is there were no questionable patterns of response that could invalidate or otherwise impact negatively on the usefulness of the results. [NT 75; S-10]

14. The BASC results indicated that the Child was having some difficulties in regulating behaviors and emotions in the home/community setting. [NT 75]

15. The school psychologist concluded that the Child was eligible for Preschool special education services. [S-9]

16. The Child was evaluated by an experienced and appropriately licensed and credentialed speech/language pathologist. The Parents indicated to the speech/language pathologist that their primary concern was the Child's communication, and they also had concerns about the Child's attention. The Child uses a combination of words, gestures, signs and pictures to communicate wants and needs. [NT 35, 100]

17. The speech/language pathologist reviewed the Child's Birth to Three records including the Individual Family Service Plan (IFSP) as well as medical records the Parents provided, interviewed the Parents, and interviewed and reviewed the treatment records of

the speech/language therapist who had been working with the Child in the Birth to Three program. [NT 96-97, 99; S-11, S-14, S-15, S-23]

18. The speech/language pathologist also administered the cognitive section of the Battelle, a standardized test used with preschool children that looks at the domains of development which could indicate a child's eligibility for special education services. The cognitive section has three subtests: attention and memory skills, reasoning and academic skills, and perception and concept skills. The evaluator has training and experience in administering this test. [NT 102]

19. The Child was cooperative during the Battelle administration, and the evaluator determined that neither anxiety nor behaviors interfered with performance. Results showed overall needs in the area of cognitive development. Significant needs were noted in the area of attention, correlating with concerns the Parents had expressed. The Child also showed some needs in the area of reasoning and academics, although that was somewhat better than the attention score. The perception and concepts subtest also showed some needs. [NT 105, 116]

20. Observing the Child during this portion of the assessment, the father remarked that the Child's ability to attend and participate for the extended period of time was not typical, in that the Child usually needs more breaks and leaves the area more frequently. [NT 105-106]

21. On the social and emotional domain of the Battelle, based on reports of the Parents there were no needs in that area. However, since the Child had no preschool experience, ongoing assessment would be conducted in that area when the Child is in a preschool setting. [NT 106-107]

22. The speech/language pathologist also administered the Preschool Language Scales-5, a standardized test that assesses language in children from birth to seven. There are two subtests: auditory comprehension which assesses a child's understanding of language; and expressive language that assesses a child's expressive language skills. The evaluator has training and experience in administering this test. [NT 108]

23. On the receptive language assessment the Child achieved a standard score of 85, with the average range being 85 to 115. The expressive language score was a 77, below the average range. [NT 110]

24. No language sample was taken because the Child produced approximately five or six words on the day of the evaluation. However, in her section of the report the speech/language evaluator included the list of frequently noted vocabulary that the Birth to Three speech therapist had reported to her. The Parents reported that the Child has an expressive vocabulary of approximately twenty words. [NT 115, 128, 130]

25. The speech/language pathologist did not administer an articulation test since the Child did not consistently label pictures upon request or consistently repeat words, activities

that are typically required for a formal articulation test. Further, the concern at this time is language development rather than speech articulation. She found the Child eligible for Speech/Language services. [NT 110, 135; S-9]

26. After reviewing the criticism of the IU evaluation, the speech/language evaluator did some research on specific best practices for evaluating a barely verbal child according to her professional organization, the American Speech and Hearing Association (ASHA). She reviewed best practice for doing this type of evaluations and assessments, and believes that best practice was followed[6]. [NT 116]

27. The speech/language pathologist recommended a SETT (Student, Environment, Tasks and Tools) evaluation to consider whether assistive technology would be appropriate and if so, what type of technology. A SETT evaluation is not typically done at the same time as the multidisciplinary evaluation; Student's SETT process was completed on July 25, 2017 and the use of an iPad was recommended. [NT 111, 171-173; S-1]

28. As part of the evaluation the Child was assessed by an experienced and appropriately credentialed board certified behavior analyst (BCBA) who conducted a Functional Behavioral Assessment (FBA). [NT 137-138; S-21]

29. The behavior analyst reviewed child's Birth to Three records and other documents that were in the child's file, communicated with the Child's current speech/language therapist, interviewed the mother by telephone, and observed the Child in the home during a speech therapy session. [NT 140-142]

30. The BCBA did not observe any inappropriate behaviors on the Child's part during the therapy session, however when the grandmother entered at the end of the session the Child did display some behaviors. The BCBA did not observe any behavior indicating the child was experiencing anxiety at that time. [NT 142-143]

31. The BCBA also observed the child during the evaluation at the intermediate unit. She observed behaviors typical of a not quite three-year-old child and was not surprised that the Child did display some anxiety during that session as opposed to showing no anxiety in the home setting. [NT 143-144]

32. The BCBA spoke with the mother following the FBA. The mother had no concerns about the FBA except noting that the Child had not exhibited some of the more difficult behaviors such as eloping in the BCBA's presence. [NT 146, 150]

33. The BCBA hypothesized that the child's behaviors were a function of seeking attention (home) as well as escaping or avoiding demands (home and evaluation setting). She also hypothesized that in a preschool setting these behaviors could potentially affect the child's learning. For this reason she recommended that the Child receive Behavior Specialist Consultation once attending a preschool setting. [NT 144-145; S-9]

[6] The reader should note however that in judging an LEA's services to a disabled child the standard is appropriateness, not best practice.

34. The Child was evaluated by an experienced and appropriately licensed and credentialed physical therapist who holds a doctorate in physical therapy as well as a pediatric clinical specialist certification and has completed a certificate in advanced pediatrics. [NT 182-183; S-18]

35. The physical therapist reviewed the Child's Birth to Three records and spoke to the physical therapist for the Birth to Three services, reviewed the medical records the Parents supplied, summarized the medical records and spoke with the mother to ensure accuracy of the information. [NT 184, 186; S-11, S-14, S-15]

36. The Child was cooperative, and the physical therapist performed a clinical observation and administered the gross motor portion of a standardized test, the Peabody Developmental Motor Scales-2, to assess the Child's gross motor skills - ambulation, steps, strength, mobility, tone, balance, ball skills, and playground skills. [NT 186-187, 191]

37. Even though the Child's score on the Peabody was outside the area of eligibility for physical therapy, the physical therapist considered the child's risk for regression in light of the medical issues and recommended that the Child be identified as eligible for Physical Therapy services. [NT 190; S-9]

38. The Child was seen by an occupational therapist who is experienced in his profession and holds a Pennsylvania license. He holds an additional credential in the area of neurodevelopmental therapy addressing children with motor issues. [NT 234-235]

39. The occupational therapist reviewed the Child's file including records from the Birth to Three program and parental input. He spoke with the Parents about the child's activities of daily living (ADLs) and self-help skills. [NT 238; S-11, S-14, S-15]

40. Through interview with the Parents and observation during the evaluation the occupational therapist identified the Child's tendency towards over reactivity to environmental noise and the Child's tendency to engage in frequent movement, issues that could affect learning. [NT 243-244]

41. The occupational therapist administered the fine motor section of the Peabody Developmental Motor Scales-2, looking at grasping and visual motor integration. The Child was able to cooperate with the tasks presented through this evaluation. [NT 238]

42. Even though the Child's skills were adequate in the areas tested, they were on the lower side of average and the occupational therapist recommended that the Child receive Occupational Therapy services. [NT 240-242]

43. The occupational therapist also utilized the adaptive functioning section of the Battelle that addressed self-care and personal responsibility skills. The Child's scores on these

dimensions were low, reinforcing the recommendation for Occupational Therapy particularly in the self-care area. [NT 242-243; S-9]

44. Discussion among the psychologist, speech pathologist, behavior specialist, physical therapist and occupational therapist yielded the consistent finding that the Child was eligible for preschool special education services as a child with developmental delays. Needs were identified in the cognitive, speech/language, behavioral, gross motor, fine motor, and self-help areas. The Child did not show needs in the social domain, although monitoring once the Child begins preschool will be necessary. [NT 76-77]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the IU asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to 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); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014);.*see also* generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist*., No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). I found the mother and the IU witnesses to be credible. I found that the two experts who testified on behalf of the Parents did not provide additional credible probative information and I could not rely on their testimony in addressing the issue in the hearing.

One of the Parents' expert witnesses holds a degree in special education and has a "boutique specialty practice" [NT 26] outside Pennsylvania that sees children with rare chromosomal disorders, including the disorder with which the Child has been diagnosed [resume at P-16]. While she has considerable experience in her field of specialization, she is not licensed or otherwise credentialed as a psychologist in any state, nor does she hold any certification related to public school education in any state [NT 30]. While I appreciate her expertise in her specialty

area, she did not provide reasons why the multiple areas of the Child's needs the parties have already identified manifest so differently or need to be addressed so uniquely such that an evaluation by her practice, in addition to the three hours she already spent with the Child [NT 37], is necessary in order for the educational agency to design an individualized program that offers FAPE to this Child [NT 54]. When going over the list of tests she was recommending this witness's testimony was scattered and she inaccurately characterized the limits of one of the tests, the Beery[7]; surprisingly she listed and proposed repeating tests the IU had already given. [NT 42-46; P-17] The witness also went beyond her scope of knowledge when without having the benefit of the additional testing she was advocating she concluded that the services being offered to the Child in a proposed IEP (that was not an issue in this hearing) were insufficient [NT 54].

The specific faults this witness found with the IU evaluation were: the father was present in the evaluation room, potentially triggering separation anxiety regarding the mother who is the primary caregiver; multiple professionals were in the room evaluating the Child at the same time, potentially creating anxiety in the Child; having multiple professionals conducting the evaluation limited the time available for rapport-building with any one of the evaluators; the Child's variability in level of comfort over time could have caused some evaluators to get more valid information than others. I gave this witness's testimony in this area little weight because her criticisms of the IU's evaluation procedures, which she did not observe herself, were speculative and she seemed to be "reaching" to find fault. The IU routinely conducts its multidisciplinary evaluations of young children in accord with the practice of other agencies who assess young children, and the evaluators have considerable experience in sorting out variables that can adversely affect a testing outcome and ascertaining whether the Child was reacting very differently from the scores of other same-age children they had assessed in this format and therefore needed another assessment methodology. In addition, although she generalized that "anxiety always impacts on testing in little kids", the witness did not take into account whether some, most or all the IU evaluators have particular skill in relating to young children and take anxiety, if present, into account.[8] This witness also "did not feel like that some of the assessments that could have been done, were done; and those that should have been done, were not also done in all the areas" [NT 34].

The Parents' other witness, a speech/language therapist licensed in Pennsylvania [resume at P-15] testified that her only criticism of the IU's speech language therapist's use of the PLS-5 was that it was not conducted in a separate room. She also criticized the IU for not using additional assessment instruments or all the parts of the assessment tools selected and her testimony centered around the additional speech/language assessments she believes the Child should have been given [P-7]. Interestingly, in the hour she spent with the Child she carried out much of the assessment she says will be needed in an independent evaluation [P-3]; when asked what would be different then, if she conducted part of the requested IEE, she responded that she would go into more depth [NT 231].

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[7] See HO-1

[8] Strictly and directly related to the assessment of the credibility of this witness, it is noted that this hearing officer practiced psychology for many years, with a subspecialty in evaluating and treating children ages birth through age seven.

Because of the similarity of the issue, a very recent case in a neighboring state is instructive with regard to both witnesses' beliefs that more instruments were needed. In *E.P. v. Howard County Pub. Sch. Sys.*, 117 LRP 34947 (D. MD. 08/21/17) the parents criticized the evaluators' failure to administer certain subtests but the court observed that evaluators often need to use their professional judgment deciding which assessments to administer and which types of information to collect and therefore denied the request for an IEE noting, "[The evaluator's] exercise of professional judgment in deciding not to administer additional subtests was entitled to substantial deference by the ALJ and by this court."

Independent Educational Evaluation: 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 its 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 the LEA files for a hearing and the LEA's evaluation is found inappropriate by the decision of a hearing officer the hearing officer can order the LEA to fund the costs of the IEE. 34 C.F.R. §300.502(b)(1), (2)(ii).

Standards for Evaluations: The purpose of an initial evaluation is to determine whether the child meets any of the criteria for identification as a "child with a disability" as that term is defined in 34 C.F.R. §300.8, as well as, if the child is found to be eligible, to provide a basis for the contents of the child's IEP, including a determination of the extent to which the child can make appropriate progress "in the general education curriculum." C.F.R. §§300.8, 300.304(b)(1)(i), (ii).

The general standards for an appropriate evaluation/reevaluation are found at 34 C.F.R. §§300.304—300.306. The public agency is required 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). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; 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). An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom–based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child's educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2).

Ultimately in most cases the label assigned to a particular assessment is less important than the skill areas the assessment evaluates. Therefore, the focus of the inquiry in an IEE dispute is whether the district appropriately assessed the student in all areas of suspected disability. *See, e.g., Avila v. Spokane Sch. Dist. 81*, 69 IDELR 204 (9th Cir. 2017, *unpublished*)

Discussion

Before discussing the reasons for my findings it is important to understand that parental disagreement with an evaluation's conclusions is not evidence that an evaluation is inappropriate; parental disagreement with supported conclusions is irrelevant to the inquiry. If this were not the case, parents could defeat any school district's defense of its own evaluation by simply disagreeing with the outcome. Further, the inquiry is not even whether or not a hearing officer agrees with a school district's evaluation results. Provided that a district conducted its evaluation under IDEA standards and supported its conclusions with data derived from properly administered assessments the evaluation must be deemed appropriate. An IEE at public expense is also not a vehicle for a second opinion, nor for a more in-depth exploration of an area of deficit once the LEA's evaluation has documented the area of need and has provided sufficient information for the IEP team to program to address the need. The inquiry when the hearing issue is an LEA's denial of a parental request for an independent educational evaluation at public expense is whether the LEA's evaluation met the standards for appropriateness set forth in the IDEA.

In challenging an evaluation, courts have found that a parent "cannot simply argue that the evaluation was inappropriate because they disagree with its findings. The key is in the methodology. The conclusions, or lack thereof, cannot be inadequate unless the methodology is inadequate, because that is the only provision in the law." *L.S. ex rel. K.S. v. Abington Sch. Dist.*, No. 06-5172, 2007 U.S. Dist. LEXIS 73047, 2007 WL 2851268, at *12 (E.D. Pa. Sept. 28, 2007).

In their opening statement the Parents argue that the IU "cannot prove that it conducted its evaluation in accordance with the regulations". First, they vigorously argue that the IU's evaluation results are suspect because the testing protocols were not produced [NT 131-132]. They believe that it is necessary, and their right, to check the evaluators' scoring for any errors and that in the absence of the protocols the evaluation is *de facto* inappropriate. Second, the Parents contend that in several areas the evaluators did not conduct a thorough enough assessment, and produced two private practitioners who posited that the IU should have added additional tests and procedures to more precisely describe the Child's functioning.

The IU's evaluators transfer data from their evaluation protocols (test forms) to their portions of the written evaluation report, keep the protocols for a short period of time (30 days in some cases), and then destroy them. [NT 91-92, 119-121, 124, 199, 248] While it is unfortunate and far from a good idea that the IU evaluators' practice is to destroy their protocols, I hold that parents are not entitled to an IEE simply because they cannot examine the protocols for errors. Had the results of the segments of the evaluation been widely divergent from one another, leaving a real question about eligibility or the need for certain services, I may have considered ordering an independent assessment of those specific areas. In this case, the evaluation results form a consistent picture of the Child's strengths and needs, viewed through the lenses of well-credentialed and experienced

professionals in their particular field of expertise.

There is an array of testing instruments in each discipline from which an evaluator may choose when planning an assessment. In choosing the testing battery for each individual, evaluators use the instruments with which they are familiar and experienced because over the course of testing many individuals they understand both the results and how these results can be affected by intervening variables. When an individual requires a specific type of test not in the usual battery, experienced evaluators then select appropriate additional instruments that they are qualified to use. Evaluators may and do differ in their choice of assessment instruments available in their particular discipline; the essential thing is that the instruments they choose provide the information needed to investigate whether the individual has needs in that area, and to identify what the needs are and how they may be addressed.

When asked specifically what the Parents thought was wrong with the IU evaluation results, e.g. did it overestimate the Child's abilities or underestimate them, the mother could not provide a specific answer. It is possible also that the Parents were buoyed by their expert's opinion that the IU evaluation "may have been a gross underestimation of [the Child's] capabilities based on what [she knows] about rare genetic disorders [NT 48]". No doubt as the Child gains some preschool experience and reaps the benefits of the related services being offered the IU team will have the opportunity to conduct ongoing assessments and adjust their approaches accordingly if the Child's abilities were initially underestimated. On the other hand the Parents may simply want to gather every available piece of data in order to begin to understand their Child's newly discovered diagnosis. I understand that these loving and concerned Parents are appropriately worried, and I sympathize with their desire to seek out persons who can add as much additional information as possible, leaving no stone unturned. However, the LEA simply carries the (weighty) obligation to identify the Child's educational needs and to design an appropriate educational program to address those needs as they presented at the time they were identified. This the IU has accomplished through its thorough multidisciplinary evaluation. There is more than sufficient information in the IU evaluation for the Parents and the Child's future teachers and related services providers to use in programming for the Child at age three in all the areas of the Child's need.

Although the IDEA and its implementing regulations are, and certainly should be, silent on the use of specific tests, the IDEA and its regulations are clear and specific about the requirements placed on an LEA when gathering comprehensive and relevant functional, developmental and academic information about the child in all areas of suspected disability. The LEA's evaluators must not use any single measure or assessment as the sole criterion for a determination of disability or an appropriate program. The evaluators must use a variety of assessment tools selected and administered so as not to be discriminatory on a racial or cultural basis. The assessment tools must be technically sound instruments that are both valid and reliable and used for the purposes for which they were devised. The testing instruments must be administered by trained personnel in accordance with the instructions provided for the assessments, and in the language and form most likely to yield accurate information on what the child knows and can do unless it is not feasible to so administer.

The testimony and evidence provided by the IU is preponderant and the IU has thus successfully carried its burden of proof that its evaluation of the Child was appropriate.

Dicta: I strongly urge the IU to consider requiring its employees and independent contracted evaluators to retain test protocols, ideally in a central IU location, so that they can be examined if the need arises. I make this suggestion not only because retention of protocols will avoid parents' suspicions about possible erroneous scoring but because it is particularly helpful when conducting reevaluations of young children to be able to compare the child's specific responses and response patterns over time from one test administration to another.

Order

It is hereby ordered that:

> The Intermediate Unit's May 24, 2017 evaluation of the Child was appropriate and therefore the Parents' request for an Independent Educational Evaluation at public expense is denied.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

September 16, 2017

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official