

*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: S. O.

Date of Birth: [redacted]

#### **CLOSED HEARING**

Date of Hearing: 07/26/2017

ODR NO. 19456-1718 AS

Parties to the Hearing:

Parent(s)

Representative:

Jason Fortenberry, Esq.  
Frankel & Kershenbaum, LLC  
1230 County Line Road  
Bryn Mawr, PA 19010

Upper Darby School District  
601 N. Lansdowne Avenue  
Drexel Hill, PA 19026

Scott Gottel, Esq.  
Holsten & Associates  
One Olive Street  
Media, PA 19063

Date of Decision:

August 18, 2017

Hearing Officer:

Charles W. Jelley, Esq. LL.M.

## **Background**

The Student<sup>1</sup> is an elementary-school aged student attending a District school. The Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the current classification of autism. As such, the Student 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.<sup>2</sup>

The District requested this due process hearing when the Parents<sup>3</sup> requested an independent education evaluation (IEE) because of various concerns about reevaluations the District conducted in 2016 and 2017. The District asserts that at all times relevant it complied with all applicable procedural and substantive laws and regulations and that the reevaluations in question were appropriate.

The hearing was completed in one session.<sup>4</sup>

I have determined the credibility and reliability of all witnesses. I have thoughtfully and carefully considered and weighed all of the evidence of record. After reviewing the applicable 2006 IDEA regulations, the District's Complaint, and each of the Parties' contentions/assertions, and hearing all of the evidence and rereading the transcript, I find that the District failed to conduct a comprehensive assessment in all areas of suspected disability and need for specially-designed instruction. Therefore the Student is entitled to an IEE at public expense.

### **Issue**

Were the District's 2016 and 2017 reevaluations appropriate under the IDEA and Chapter 14, and if not, is Student entitled to an IEE at public expense?

<sup>1</sup> In the interest of confidentiality and privacy, Student'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).

<sup>2</sup> 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).

<sup>3</sup> "Parent" or "Family" references the individual who carried out communications with the District and presented the family's point of view at all relevant meetings. "Parents" references both parents.

<sup>4</sup> Rather than submit written closing statements the Parties agreed to make oral closing statements. After the closing statements were concluded, the hearing officer reviewed, and the Parties agreed, to the Exhibits of record. The District proffered three exhibits, and four witnesses, while the Parents proffered fourteen exhibits and one witness, the mother.

## **Findings of Fact**

### **Initial Evaluation in 2011**

1. When the Parents expressed concerns about the Student's functional skills after exiting the [the local] Intermediate Unit (IU) early intervention program, the District agreed to conduct a comprehensive evaluation of the Student's needs. Upon enrollment, the District completed an initial evaluation report (ER).
2. The initial ER included a variety of individually administered, norm referenced assessments of intellectual ability. On the Wechsler Preschool and Primary Scale of Intelligence Third Edition (WPPSI-III), the Student earned a full-scale IQ of 63 (P#3 p.6). On the Leiter-R, an individually administered nonverbal measure of intelligence the Student earned a Brief IQ of 97 (P#3 p.7). Although the Student had a well below average full-scale WPPSI-III IQ of 63 the District did not administer a measure of adaptive behavior (P#3).
3. The initial evaluation also included an assessment of social-emotional functioning, an assessment of executive functioning, an autism rating scale, a social responsiveness scale, an assessment of articulation and language fundamentals, and an Occupational Therapy screening of visual motor integration, and fine-motor skills (P#3 pp.3-17).
4. To assess executive functioning the psychologist used the Behavior Rating Inventory of Executive Functioning (BRIEF), an instrument that is well-researched and recognized in the professional community. The teacher's and the Parent's ratings resulted in significant areas of concern, with the Parent's ratings showing significant elevations in inhibition, self-monitoring, shifting and emotional control (NT 32-33; S-4).
5. After reviewing the ER the District and the Parent agreed that the Student was a person with a disability in need of specially-designed instruction under the classification of autism and speech and language impairment. (P#3, S#1, S#2, S#3).

### **The 2013 Reevaluation**

6. In 2013, when the Student was in First Grade, the District completed its first RR. The 2013 RR relied upon a review of existing data and therefore did not include any individually administered norm referenced assessments of intelligence, achievement, speech/language, social, behavioral, emotional/social/behavioral functioning or gross/fine motor skills (S#3 pp1.10).
7. The 2013 RR included progress monitoring data such as Aimsweb data, a Phonological/Phonemic Awareness assessment, a CORE Phonics Survey, the Test of Early Reading Abilities, the Test of Early Mathematics Ability, and classroom

assessments such as Macmillan/McGraw-Hill Math and Reading (S#3 pp. 10-23). Although the RR included two observations, the RR omitted written input from the speech therapist, the occupational therapist, and the Parent's written input and the Parent's observation called for in the District's PTRE (S#3).

8. The 2013 RR omitted input and participation of a school psychologist (S#3 p.21).
9. The 2013 RR does not describe when or how the IEP team met to review the existing data, what data was reviewed, who reviewed the data and how the District communicated the review of the existing data to the Parents or how the District provided the Parents their procedural safeguards (S#3).

### **The January 2016 PTRE and the April 2016 Reevaluation Report**

10. On January 20, 2016, the special education teacher sent the Parent Prior Written Notice for a Reevaluation and Request for Consent (P#8). The Prior Written Notice explained that the District would not conduct any individual assessments. Instead, the District's IEP team members were proposing to conduct the 2016 reevaluation solely based on a review of the existing data. The Prior Written Notice included a teacher observation and a parent observation (P#8 p.1).
11. The Prior Written Notice did not describe who would participate in the review of the existing data or when the review would occur (P#8). The Prior Written Notice did not describe when the IEP team would meet to review the existing data, what data would be reviewed, or how the District would communicate to the Parents that they could disagree and ask for additional assessment(s) (P#8).
12. The Prior Written Notice stated that the reevaluation would include new data from curriculum based measures such as DIBELS probes, the Qualitative Reading Inventory, the Test of Mathematical Abilities and the Measure of Academic Progress. The PTRE also noted the IEP team's decision to include additional written data from the teacher, written parent input, a teacher observation, a parent observation, occupational therapy screenings and speech/language screenings (P#8 p.2).
13. On or about March 1, 2016, the District issued a draft RR which included curriculum based reading data, math data, and measures of writing strategies and conventions (S#2 pp.3-4). The Student scored Below Basic in each curriculum based assessment in the areas of writing, grammar, spelling, math and reading fluency (S#2 p.3).
14. The RR reports the Student's Dynamic Indicators of Basic Early Learning Skills (DIBELS) scores are below basic (NT p.81).<sup>5</sup>

<sup>5</sup> The Dynamic Indicators of Basic Early Literacy Skills (DIBELS) are a set of procedures and measures for assessing the acquisition of early literacy skills from kindergarten through sixth grade.

<https://dibels.uoregon.edu/assessment/dibels>

15. The RR does not include any nationally norm-referenced academic achievement assessments of reading, math, or writing, or any norm-referenced assessments of behavior, social or emotional skill levels (NT p.87).
16. The RR notes the Student's report card grade in math for the first quarter of 2016-2017 school year was 42%. The RR notes the Student's report card grade in math for the second quarter of 2016-2017 school year was 21% (NT p.89).
17. The progress monitoring reported in the RR did not include any data on the Student's math, occupational therapy, or social goals listed in the IEP (NT pp.90-91; S#2 p.4).
18. The progress monitoring in the RR notes the Student's writing skills are Below Basic (NT pp.90-91; S#2 p.4).
19. The RR notes the Student's PSSA objective numeric scores declined from third to fourth grade (NT pp.107-108).
20. The March 1, 2016, RR did include updated speech and language test results from the Oral and Written Language Scales (OWLS) and the Goldman-Fristoe Test of Articulation (S#2 p.2). The evaluator noted, in the RR, that the Student's articulation errors affected speech intelligibility (S#2 p.10).
21. The OWLS testing included three (3) probe question focusing on pragmatic language (NT pp.166-167). Based on the three (3) OWLS probe questions the evaluator did not conduct further assessments of pragmatic language. The RR notes the Student's OWLS standard scores are not within normal limits (S#2 p.10).
22. The Student's difficulties with oral expression, as assessed on the OWLS, are related to syntax deficits and difficulty constructing sentences correctly. The Student's oral expression deficits have a negative impact on the Student's academic performance (S#2 p.10).
23. The Student's oral and written language deficits adversely affect listening comprehension, academic performance in comprehending inferences, idioms, function words such as either/or, unless, neither/nor (NT pp.166-167, NT pp. 176-181, S#2p.10). The Student's oral and written language deficits adversely affect the Student's performance in math language, when using or reading words such as divide and minus (NT pp.166-167, S#2p.10). The Student's oral and written language deficits adversely affect comprehending differences in meaning when verb tenses change, or other inflections are used (NT pp.166-167, S#2p.10).

24. The March 1, 2016, RR included input from the occupational therapist (S#2 p.7). The Student's Visual Motor, Visual Perception, and Motor Coordination scores are in the "Very Low" range (S#2 p.7). The occupational therapist reported that the Student's WOLD<sup>6</sup> Sentence Copying Test scores (WOLD) reflected poor letter formation and included several letter reversals (S#2 p.7).
25. In April 2016, the Parents contacted the District and requested that the District conduct additional assessments, in particular, the Wechsler Intelligence Scale for Children Fifth Edition (WISC-V) (S#1). On April 26, 2016, the District issued and the Parents consented to a Permission to Reevaluate (PTRE) for the WISC-V (P#16). The PTRE noted that the Student was in 4<sup>th</sup> Grade and has not had updated individual norm referenced testing since entering kindergarten (P#16 p.2).

### **The April 2016 PTRE and the September 2016 RR**

26. The WISC-V testing was administered by a psychology practicum student who was supervised by a doctoral level Pennsylvania certified school psychologist (S#1 p.8).
27. The testifying psychologist, who supervised the practicum student did not observe the Student in the classroom. The testifying psychologist did not participate in the previous school year IEP meetings and did not participate in either of the two previous RRs (S#1, S#2, S#3, P#1).
28. On the WISC-V the Student's full-scale IQ was 82, in the low average range (S#1 p.9). The Student scored in the Extremely Low range in Vocabulary, Information, Visual Puzzles, Fluid Reasoning, Picture Concepts and Picture Span (S#1 pp.9-10). The Student earned Average scores in Symbol Search, Processing Speed, Figure Weights and Similarities (S#1 p.90). The Student scored Above Average in Visual Spatial and Below Average in Working Memory (S#1 p.10). The evaluator noted the Student's behavior affected many of the WISC-V subtest scores (S#1 p.11, NT p.119).
29. The testifying psychologist also noted, during testimony and in the RR, that the Student's autistic-like fixations and perseverations affected the Student's

<sup>6</sup> WOLD Sentence Copying Test "This test evaluates the handwriting of students in grades 2 through 8 when copying in print or manuscript. The test involves copying a sentence with 110 letters on the test paper while being timed. This assesses a mix of motor visual perceptual skills along with cognitive skills. The student may print or use cursive. Timing begins as soon as the test-taker starts to write. The student is to write the sentence carefully, but as fast as he/she can as it is a timed test. Maximum time allowed is 3 minutes. The evaluator observes the pencil grip, posture, sub-vocalization, loss of place, copying style, and letter/word reversal. The time is recorded in minutes and seconds. Letters copied per minute can then be calculated with Grade Equivalents (GE). The test evaluates Rate of Handwriting, Posture, Number of Fixations, Spacing, Vocalization, Concentration, Formation, and Frustration Level." <http://www.concordspedpac.org/TypesTests.html#WOLD>

performance, test scores and test results (NT p.120). During the testing, the Student became preoccupied with the evaluator's iPad screen to the point that the Student needed to be redirected on multiple occasions (NT p.121).<sup>7</sup>

30. Neither the testifying psychologist nor the practicum student conducted an observation of the Student in the classroom. The testifying psychologist was not aware that when the Student became frustrated, in class, the Student engaged in self-hair pulling or hand flapping (NT p.127-128).
31. The Student receives community-based behavioral health services in school from a third party to address hand flapping, impulsivity, hyperactivity, difficulty reading social cues, shouting out, and pulling out hair when anxious (P#6 p.1, P#9 p.1). The community-based behavioral health specialist's reports indicate, and the teachers agree, that the Student perseverates on ideas and when speaking in class brings up topics out of context, and whines and tantrums during the unstructured time at school during recess and lunch (P#6 p.1, NT pp.329-331). Overall, the Student lacks nuanced response to language-based interactions with peers and adults (S#6 p.1). The Student's perseverations indicate a lack of focus (NT pp.120-121).
32. The September 2013 RR, the March 2016 RR and the April 2017 RR did not include the Parents' written input or the Parents' observation as noticed as a need for additional data in the PTRE (S#2, S#1, P#1).<sup>8</sup>
33. Unlike the 2013 RR and the March 2016 RR the testifying psychologist participated in the review of the WISC-V data and development of the March 2017 RR (S#1 p.17).

## **General Applicable Legal Principles and Framework**

### **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.*

<sup>7</sup> The testifying psychologist affirmed that she was present when the doctoral level practicum student administered the WISC-V (NT p. 122).

<sup>8</sup> The teacher testified that she sent the Parent Input form home with the Prior Written Notice; the mother testified that the Parent input form was not in the brown envelope from the school. Although this is a fact in dispute, I do not need to resolve the dispute about whether the Input form was sent home. The PTRE, as prepared by the IEP team, stated that the IEP team needed the additional data. Curiously, the District staff did not explain, when they realized that the Parents did not provide input, why they did not reissue the Input Form when they reissued the April PTRE.

*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 (3<sup>rd</sup> Cir. 2012). In this case, the District asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced, the *Schaffer* analysis was not critical to the determination.

## **Credibility**

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing the 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. “*See, Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); *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). All witnesses were judged to be credible.

## **Federal IDEA and State Reevaluation Requirements**

The 2006 IDEA regulations dramatically changed the informed consent, the evaluation, the reevaluation, and the review of existing data (REED) requirements at issue here (1) Initial evaluations, 34 CFR §300.301, (2) Evaluation procedures, 34 CFR §300.304, (3) Determination of needed evaluation data, 34 CFR §300.305, (4) Determination of eligibility, 34 CFR §300.306 (a)-(b), (5) Procedures for determining eligibility and placement, 34 CFR §300.306 (c), and (6) Reevaluations 34 CFR §300.303 and 34 CFR §300.305 all apply. At times, these regulations also require analysis and application of the informed consent requirements at 34 CFR §300.300 (a)(1)(i) and the notice of procedural safeguards provisions at 34 CFR §300.500 *et seq.* *See also, Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11) and 22 Pa Code Chapter §14.121-124.

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, however, also have the 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, requires LEAs 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; and, (4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an the need for or the type of specially designed instruction necessary to receive an appropriate education. C.F.R. §300.304(b)(1-3).

In addition, the measurement or assessment tools 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 related to the 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).

The IDEA’s requirements for reevaluations are similar, although a reevaluation may not necessarily be as extensive as an initial evaluation. Once an evaluation or reevaluation is completed, a group of qualified 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 “Draw upon information from a variety of sources,” including those required to be part of the assessments, assure that all such information is “documented and carefully considered.” 34 C.F.R. §300.306 (c)(1).

## **Independent Educational Evaluations Principles and Criteria**

Parents have two avenues to obtain an 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 Blum*, 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), *Letter to Blum*, 211 IDELR 2237 (OSEP 1980), 34 CFR §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 CFR § 300.502(b)(1), a parent has the right to an IEE at public expense, subject to 34 CFR § 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 the LEA's criteria. *Id.*

If a parent disagrees with an evaluation because a specific area of the child's needs was not assessed, the parent has a right to request an IEE at public expense to fill the gap in the district's evaluation. In *Letter to Baus*, 65 IDELR 81 (OSEP 2015) OSEP Director Melody Musgrove wrote "When an evaluation is conducted in accordance with 34 CFR §300.304 through 34 CFR §300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs." Subsequently, in *Letter to Carroll*, 68 IDELR 279 (OSEP 2016), OSEP reinforced the earlier position in *Letter to Baus*, that the right to seek an IEE to make up for a missing assessment is not extinguished even if the district responds by conducting the missing assessments.

OSEP Acting Director Ruth E. Ryder commented "Therefore, it would be inconsistent with the provisions of 34 CFR 300.502 to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents' request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate," Accordingly, as it stands now, there is no third option that allows the district to simply conduct the missing assessments. *See, Letter to Baus*, 65 IDELR 81 (OSEP 2015) *Letter to Carroll*, 68 IDELR 279 (OSEP 2016). In the end, 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 of Applicable Legal Principles**

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, absent a finding the ER or RR does not meet the IDEA standards. If this were not the case, parents could defeat any school district's defense of its 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 collected, reviewed and analyzed after administering a variety of instruments that assess the Student in all areas of suspected disability and those assessments assist in developing the specially-designed instruction, the evaluation must be deemed appropriate.

Based on the testimony, the exhibits and a careful and thoughtful review of the record, when viewed as a whole, I now conclude that the District's two RRs failed to provide a comprehensive reevaluation as expected in the applicable IDEA standards. I also conclude that the District's evaluators, in several instances, relied upon a single measurement criterion to support their conclusions although the data derived was from otherwise properly administered assessments. I also find the S/L assessment was fundamentally flawed. Accordingly, for the reasons set forth below, I will now grant the Parent's request for an IEE.

### **The missing Parent Input and the failure to schedule the Parent Observation interfered with the Parents' participation in the RR**

The District's March 2016 and April 2017 PTREs included a requirement that the Parents observe the Student in class and provide written Parent input. The IEP team, in reviewing the existing data concluded that the RR should include a "parent observation." When the RR was completed, the RR team omitted the Parents' observation and also omitted the Parents' written input. The District witnesses did not persuasively explain why the District failed to schedule the observation and why the RR omitted the observation data.

The District's witnesses also could not explain why no one reached out to the Parent to collect the missing written parental input and to schedule the parental in-school observation. In January 2016, the IEP team in reviewing the existing data concluded that the Parent's observations and written input were necessary data needed to complete a comprehensive evaluation of the Student's needs; when the District failed to collect and analyze the additional data they failed to assess the Student's unique needs. The team will never know what the uncollected data otherwise would suggest about the Student's social, emotional or behavioral needs in all areas of disability.

The District's failure to obtain and therefore to consider the Parents' written input and its failure to arrange for the Parent's classroom observation to collect additional data about the Student, substantially interfered with the Parents' participation in the preparation of the RR. When these two errors, are viewed as a whole the violations are substantive. The violations either individually or collectively, significantly impeded the Parents' opportunity to participate in the preparation of the RRs and the subsequent provision of FAPE to the child.<sup>9</sup> Accordingly, I now find that the District failed to gather and "draw upon information from a variety of sources," failed to use a variety of assessments and also failed to document and carefully consider all relevant data minimally required by 34 C.F.R. §§300.301-306 and 34 C.F.R. §300.502.

<sup>9</sup> A decision made by a hearing officer "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child's right to a FAPE; 2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE to the child; or 3) caused a deprivation of educational benefits. However, nothing shall be construed to preclude a hearing officer from ordering an LEA to comply with the procedural requirements. 34 C.F.R. § 300.513.

## **The assessment of the Student's intellectual abilities and cognitive achievement was incomplete and insufficient**

The initial ER in 2011 included a variety of individually administered, norm referenced assessments of intellectual ability. On the Wechsler Preschool and Primary Scale of Intelligence Third Edition (WPPSI-III), the Student earned a full-scale IQ of 63 (P#3 p.6). On the Leiter-R, an individually administered nonverbal measure of intelligence the Student earned a Brief IQ of 97 (P#3 p.7). Although the Student had a below average full-scale IQ of 63, the team did not administer a measure of adaptive behavior (P#3).

In 2017, the Student's WISC-V full-scale IQ of 82 is still in the low average range, yet the psychologist did not administer an assessment of adaptive behavior or functional skills given Student's previous very low IQ score, the currently below basic DIBELS reading score, and Student's current starkly failing math grades (S#1 p.9).

While the Student earned Average scores in Symbol Search, Processing Speed, Figure Weights and Similarities (S#1 p.90) and even an Above Average score in Visual Spatial, the Student was Below Average in Working Memory (S#1 p.10) and in the Extremely Low range in Vocabulary, Information, Visual Puzzles, Fluid Reasoning, Picture Concepts and Picture Span (S#1 pp.9-10). Curiously, the evaluator noted the Student's behavior affected many of the WISC-V subtest scores, yet failed to conduct additional assessments to explore the affected areas. Therefore, I find the subtest scores and WISC-V results are inconclusive (S#1 p.11). While recognizing the Student's behaviors affected the Student's performance, the evaluator could not convincingly explain why no other norm referenced individual assessments of cognitive ability were suggested.

Rather than use a variety of standardized assessments, like those used in the initial ER to assess verbal and nonverbal intelligence, the psychologist relied on a single measurement criteria, to determine the Student's cognitive ability. While the assessment tool, i.e. the WISC-V, is free of cultural bias, and is a reliable, valid, technically sound, research-based and well-respected assessment instrument, its results, due to extreme score variability without a clear explanation of the implications of Student's deficits and strengths, do not provide the IEP team with information about the type of specially-designed instruction necessary to provide benefit in the grade level curriculum.

The March 2016 and April 2017 RRs did not include any updated norm referenced standardized academic or achievement testing to assess the Student's acquisition, organization, retention, understanding or use of verbal or nonverbal information, in the core subjects of reading, math, math fluency and written expression skills. Neither the narrative statements in the four corners of the RRs nor the testimony justified the fact that the Student's level of academic achievement or adaptive behavior have never been assessed with robust norm-referenced standardized instruments.

The March 2016 and April 2017 RRs failed to reassess the Student's executive functioning skills or deficits. Unlike the 2011 ER, the March 2016 and April 2017 RRs did not include an assessment of social/emotional/behavioral needs such as the previously

used Behavior Assessment Scales for Children – Third Edition (BASC-3), a research-based and well-regarded rating inventory. The March 2016 and April 2017 RRs did not include an updated assessment of executive functioning needs such as the data previously collected on the Behavior Rating Inventory of Executive Functioning (BRIEF), a research-based and recognized rating inventory. The March 2016 and April 2017 RRs did not include a variety of assessments of the Student’s pragmatic language skills. Additionally, the District did not explain why a variety of measures were not employed to explore how or if the Student’s behavior, social, emotional, or executive functioning skills or deficits are adversely affecting the Student’s current learning, education and ongoing need for specially-designed instruction. When the record is reviewed as a whole, the record is preponderant that no one testifying on behalf of the District could compellingly explain why, contrary to the applicable state regulations, the 2013 RR and the March 2016 RR failed to include a psychologist who was knowledgeable about assessment tools used to identify the Student’s unique needs (S#1 p.17). The omission of a person with knowledge of the assessments, in this instance, impeded the child’s right to a FAPE.

### **The Speech Therapist relied upon a single criteria**

In general, it must be noted that the speech therapist failed to “use a variety of assessment tools in reaching her conclusions” in the suspected area of disability. *See*, 34 C.F.R. §§300.304-300.306. The reliance on a “single measure or assessment as the sole criteria” for a determination of disability or the need for, or the type of, specially designed instruction necessary to receive an appropriate education runs contrary to the minimum threshold standards set forth at 34 C.F.R. §§300.304-300.306 (emphasis added). In addition, the speech therapist failed to “gather relevant functional, developmental and academic information” from a “variety of sources” about the child, including information from the parent. *Id.* Accordingly, the speech and language evaluation is fundamentally flawed.

The March 1, 2016, RR included speech articulation data from the Goldman-Fristoe Test of Articulation (S#2 p.2). The evaluator noted that the Student’s articulation errors affect speech intelligibility (S#2 p.10).

The March 1, 2016 RR also purported to provide data on Student’s pragmatic language. Although the speech therapist utilized the Oral and Written Language Scales (OWLS), she administered *only three probe questions* from that instrument and testified that based on the single criteria from those three probe questions she decided not to conduct any further assessment(s) of pragmatic language (NT pp.166-167). The speech therapist did not reconcile the conclusion not to conduct further assessments of pragmatic language with the RR statements that the Student’s OWLS test scores were not within normal limits (S#2 p.10).

As set forth in the Findings of Fact above, the Student’s oral expression deficits have a negative impact on the Student’s academic performance (S#2 p.10). The Student’s oral and written language deficits adversely affect listening comprehension which in turn

affects academic performance in comprehending inferences, idioms, function words such as either/or, unless, neither/nor. In math, the Student's oral and written language deficits adversely affect the Student's comprehension of words such as divide and minus. The Student's oral and written language deficits also adversely affect comprehending differences in word meanings when verb tenses change, or other inflections are used (NT pp.166-167, S#2p.10). Despite, these significant impacts on Student's learning the speech/language evaluator did not thoroughly assess the Student's pragmatic language skill deficits. The speech/language evaluator's reliance on three responses from a single assessment protocol criteria, the OWLS, to assess the Student's pragmatic language skills was an insufficient, inadequate and inappropriate assessment.

## **Conclusion**

The March 2016 and April 2017 RRs were insufficient, inadequate and inappropriate. The RRs as a whole failed to provide a comprehensive assessment of all of the child's special education and related service needs. The RRs failed to provide relevant functional, developmental and academic information about the child that would directly assist the IEP team in determining the child's educational needs and unique circumstances and characteristics.

The District has not met its burden of proof in this matter and therefore will be ordered to fund a comprehensive independent speech/language evaluation. The District will also be ordered to fund an independent psychological evaluation of the Student's cognitive abilities including verbal and non-verbal skills, adaptive behavior, academic achievement, executive functioning, and behavioral/social/emotional functioning.

The IEE costs may include any and all in-school observations the evaluators, in their sole discretion, deem necessary to prepare their reports. The District will also be ordered to provide the Parents with the District's criteria for the selection of the IEE evaluators. The evaluators' costs may also include their participation in the review of the new RR and participation in IEP conferences until such time as the District issues a revised RR, IEP, and NOREP.

The IEE evaluators are directed to read this Decision and Order prior to conducting their evaluations.

## **Order**

It is hereby **Ordered** that:

The District's March 2016 and April 2017 reevaluations of Student were inappropriate, inadequate and insufficient.

To remedy the IDEA violations the District is Ordered to do the following:

1. Fund a comprehensive independent Speech and Language evaluation to include assessment of receptive language, expressive language and

pragmatic language skills as well as assessment in any other area, including classroom observation, the evaluator deems necessary to inform the IEP team of Student's speech/language strengths and deficits.

2. Fund a comprehensive Psychological evaluation to include assessment of verbal and nonverbal intelligence, academic achievement, adaptive functioning, executive functioning, behavioral/social/emotional functioning, and assessment in any other area, including classroom observation, the psychologist deems necessary to inform the IEP team of Student's strength and deficits.
3. Provide the Parents with the District's criteria for the selection of the IEE evaluators.
4. Allow the Parents to select each IEE evaluator provided that the evaluator meets the District's published and Board approved IEE evaluator criteria. In the event, the District does not have published, and Board approved IEE evaluator criteria, the Parents in their sole discretion may select the IEE evaluator, provided, however, the evaluator is located within 150 miles of the District's central office.
5. Upon receipt of parental releases, provide the IEE evaluators complete access to Student's educational records, including copying and mailing, free of charge, for all records to the IEE evaluators.
6. Upon completion of the IEEs and transmittal of the evaluation reports to the District and the Parents, pay the full costs of the IEEs within 30 days of receipt of the evaluators' invoices.
7. Pay the evaluators' costs, to the extent, the evaluators deem necessary, for their participation in the RR review meeting, and IEP team meetings until such time as the District issues a revised RR, IEP, and NOREP.
8. The Parents are Ordered to sign whatever releases of information that are necessary to allow the IEE evaluators and the District to confer and exchange records.

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

August 18, 2017

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HEARING OFFICER  
ODR FILE #19456-1617 AS

## **Right to Appeal ODR File #19456-1718 AS**

This Decision is the final administrative determination. Either party has the right to appeal this Decision to a court of competent jurisdiction. The complete Notice of Appeal Rights was simultaneously provided along with this Decision to both Parties.