

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING
ODR File Number: 19862 17 18

Child's Name: M.J. **Date of Birth:** [redacted]

Dates of Hearing:
11/14/2017 and 11/20/2017

Parent:
[redacted]

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Hearing Officer: Charles W. Jelley, Esquire **Date of Decision:** 12/18/2017

Background

The Student¹ is a high-school aged student attending a District school. The Parties agree the Student is 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 [Redacted.] The Parties disagree about whether the Student is a person with a disability within the meaning of the Individual with Disabilities Education Act (IDEA) 20 USC §1410 *et seq.*

The District requested this due process hearing when the Parent³ requested an independent education evaluation (IEE). 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.⁴ The Parties presented closing arguments by telephone.

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

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

¹ 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).

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 "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. "Parent" here also references mother.

⁴ 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 presented one District witness, while the Parent proffered 15 exhibits and one witness, the mother.

Findings of Fact

1. The Student was previously evaluated for IDEA eligibility in 2011. (S#1 p.5). At that time, the primary concerns were the Student's anxiety and concentration (S#1).
2. Assessed with the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), the Student scored in the Very Superior Range with a Full-Scale IQ of 135 and a Verbal Comprehension Index Score of 140 (S#1). [Redacted.]
3. On January 14, 2017, based on a diagnosis of Severe Anxiety Disorder, Post Traumatic Stress Disorder with Dissociative Symptoms and a Major Depressive Disorder, the District agreed to provide the Student with a Section 504 Service Agreement (S#1 p.2).
4. The January 2017, Service Agreement provided the Student with the following accommodations: (1) when the Student is extremely tired due to lack of sleep caused by the anxiety disorder the Student is permitted to go to the nurse to take a nap; (2) when the Student is extremely anxious, the Student may go to the nurse's office to take a short break; and, (3) the Student has extended time to complete assignments, without penalty, provided that the mother contacts the teacher prior to the completion date to request the extension, at which time the mother and the teacher will set a new due date (S#1 p.7, NT p.11, NT p.145).
5. The Student attended school for four days after the Parties reached an agreement on the Student's Section 504 eligibility (S#1 p.1). When the Student's multiple medical conditions became exacerbated, the Student's psychiatrist provided the District with multiple letters excusing the Student from school attendance in eighth grade (SD #1 pp.2-3).
6. Beginning in First grade and continuing into the present, the Student has missed an exceptional amount of instruction over the years:
 - First Grade 18 absences and 5 tardies;
 - Second Grade 18 absences and 8 tardies;
 - Third Grade 19.5 absences and 1 tardy;
 - Fourth Grade 37.5 absences and 15 tardies;
 - Fifth Grade 18.5 absences and 17 tardies;
 - Sixth Grade 20.5 absences and 8 tardies;
 - Seventh Grade 30.5 absences and 9 tardies; and,
 - Eighth Grade 62 absences, and 10 tardies, before withdrawing on April 21, 2017 (S#1 p.6, NT pp.101-102).
7. Given the increasing concerns about the Student's deteriorating behavioral health, excessive school attendance (issues) and declining grades, on March 6, 2017, the Delaware County Intermediate Unit facilitated an Interagency meeting to discuss the Student's school attendance (S#1 p.1, NT pp.24-26).
8. As a result of the Interagency meeting, the team recommended that the District refer the Student to the Truancy Elimination Program through the Child Guidance Resource Center (S#2 p.19. NT p.76).
9. The Truancy Elimination Program provides home-based behavioral support (NT p.76, NT p.126-127).

10. On March 6, 2017, the District issued a Permission to Evaluate (PTE) and the Parent consented to an IDEA evaluation (S#3, NT p.4). The PTE notes that the evaluation was proposed based on concerns about the Student's emotional functioning and attendance (S#3). The PTE also notes the Student's current psychiatric diagnoses and a previous letter from a physician noting the Student was diagnosed with Attention Deficit Hyperactivity Disorder-Inattentive Type (S#3).
11. On April 21, 2017, before the evaluation was completed, after missing 62 days of school, the Student withdrew from school with the hope of enrolling in a Home Schooling program (S#1, NT p.104, NT p. 130).
12. The Parent input into the evaluation noted a long history of contact with medical and behavioral health providers. In May 2010, the District had received a letter from the Student's pediatrician stating that the Student was diagnosed with "ADD of the inattentive type." (S#1 p.5). In 2010, Parent gave the District a list of antecedents that contributed to the Student's anxiety; the list included "being beaten up by a peer in pre-school, two car accidents, five moves in four years, [redacted], and separation anxiety [redacted.]" (S#1 p.5).
13. The mother also reported in 2010 that the Student began to take clonidine for a sleep disorder and buspinodone for anxiety (S#1p.5).
14. At the time of the District's 2017 evaluation, the Student was participating in an intensive behavioral health treatment program that included both intensive psychotherapy and medication management (S#1 p.2).
15. The District records note the Student has received multiple concussions. Due to multiple concussions, the Student did not take the mandatory statewide standard assessments in fourth grade, seventh grade or eighth grade (S#1 p.5, NT p.95).
16. At the time of the May 2017 evaluation report, the Student participated in individual counseling sessions up to three times per week with a private outpatient counselor (S#1 pp.6-7).
17. The May 2017 evaluation report includes input about and recommendations from five teachers. All of the teachers acknowledge that the Student is quick to grasp concepts, is extremely intelligent, works well with others and is very creative (S#1 pp.1-4).
18. However, in Eighth grade, the Student's classroom grades went down drastically from the first to the second marking period. For example, in Enhanced Language Arts the Student went from a 94% to 48%, while in Social Studies, the grade went from a 97% to 33% (S#1). In contrast, in Seventh grade, the Student had earned an A+ in 14 out of 14 classes (S#1 pp.8-9).
19. The evaluator noted the Student was highly motivated and generally persistent throughout the testing (S#1 p.11). The evaluator reported however that a pattern emerged in which the Student became reluctant to guess on some of the more difficult items. The Student stated that due to fatigue and concentration the testing was becoming more difficult. To address the Student's fatigue and concentration issues, the evaluator permitted Student to stand up and move around. When that strategy did not work, the evaluator adjusted the order of presentation of the Woodcock-Johnson Test of Achievement-Fourth Edition (WJIV) subtests. The evaluator administered subtests that were more interactive in nature, which at the

- time was successful. However, the testing was halted when the Student became too tired to complete the remaining subtests (S#1 pp.10-11).
20. On the Wechsler Intelligence Scale for Children-Fifth Edition, (WISC-V), a test of overall cognitive ability, the Student earned a Full-Scale IQ score of 132 and a Verbal Comprehension score of 133; both scores are in the Very Superior range (S#1 pp.11-12). The WISC-V Full-Scale IQ score is consistent with previous testing (S#1 p.11).
 21. On the WJIV the Student earned a Standard Score of 116 in Word Identification, a Standard Score of 111 in Passage Comprehension, a score of 121 in Word Attack, a Standard Score of 124 in Oral Reading, a Standard Score of 127 in Sentence Reading, a Standard Score of 125 in Broad Reading, a Standard Score of 119 in Applied Problems and a Standard Score of 98 in Spelling (S#1). The Student's Word Identification, Applied Problems and Passage Completion Standard Scores fall in the High Average Range, the Word Attack, Oral Reading and Sentence Reading Fluency fall in the Superior Range and the Spelling Standard Score fell in the Average Range (S#1 pp13-16).
 22. The evaluator reported that despite multiple attempts to reschedule to complete the WJIV achievement testing the Student was reportedly unable to attend testing due to elevated levels of anxiety and fatigue which were affecting concentration. Due to the Student's exacerbated behavioral health disabilities, the evaluator was not able to administer the Calculation, Writing Sample, Math Fluency or Sentence Writing Fluency WJIV subtests (S#1 p.15).
 23. To assess the Student's social and emotional functioning, the evaluator used the Behavior Assessment System for Children-Second Edition (BASC-2). The results of the BASC-2 scores are reported as T-scores. The respondent is asked to answer *never, sometimes often, or almost always*, to a variety of questions. T-scores of 41-51 are *average*, 60-69 are rated as *at-risk*, and scores above 70 are *clinically significant*. The Student, the mother and the Eighth-grade teachers were asked to complete the checklist. The classroom teachers indicated they could not validly complete the BASC-2 as they had not observed the Student in several months, and before the withdrawal the Student had been absent on numerous occasions. (S#1 pp.16-17).
 24. On the BASC-3, the mother scored the Student's behaviors at the clinically significant level on the scales relating to anxiety, depression, somatization, and withdrawal (S#1 pp.16-17).
 25. The Student was receptive and forthcoming to social and emotional assessments which included a clinical interview and the completion of the BASC-2 (S#1 pp16-18). Unfortunately, given the Student's current emotional state, the Student was not able to complete the BASC-2 (S#1 pp16-17).
 26. During the clinical interview portion of the assessment, the Student reported having PTSD flashbacks and nightmares for more than one year (S#1 p.17). As a result of the nightmares, the Student frequently reports feeling sick to the stomach and headaches. The Student reported post-traumatic stress symptoms of depersonalization (S#1). The Student also reported times when it felt like the Student would be outside of Student's body (NT pp.125-126). Episodes of depersonalization affect concentration, vitality and alertness (NT pp. 125-127).

- The mother was called to the school to take the Student home during one of the episodes (NT pp.135-137).
27. When the team considered the Student's IDEA eligibility as a person with a learning disability, the team concluded "While severe discrepancies were found between [redacted] cognitive abilities in the Very Superior range and [redacted] academic achievement scores, [redacted] does not meet IDEA criteria for a Specific Learning Disability, as all of [Student's] scores [psychological, state/local assessment] are at least adequate for [redacted] age/grade. [Redacted] is also clearly meeting state-approved grade level standards despite missing an exceptional amount of instruction since first grade." (S#1 p.22).
 28. After reviewing the Evaluation Report, the District members of the team concluded that the Student does not meet IDEA eligibility criteria for identification as a person with an Emotional Disturbance or a Learning Disability (S#1). The team concluded that "given the [redacted] performance while in school [e.g., almost exclusively "As" and Advance performance on classroom-based assessment and standardized test scores, [redacted] mental health needs do not adversely affect [redacted] overall educational performance at this time." (S#1 pp.19-20).
 29. The evaluation report recommended, "Should the Student re-enroll with the District and again struggle with attendance; the team should refer [redacted] to the Truancy Elimination Program through the Child Guidance Resource Center." (S#1 p.19).
 30. The District did not evaluate or consider the Student's eligibility for IDEA services as a person with an "Other Health Impairment" (S#1).

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. 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 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 Evaluation Requirements

The 2006 IDEA regulations dramatically changed the informed consent, the evaluation, the reevaluation, and the review of existing data (REED) requirements (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. *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).

The standards for an appropriate evaluation are found at 34 C.F.R. §§300.304-300.306, and require 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 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). 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).

Assessment of Students suspected of having a Learning Disability

Pursuant to 34 CFR 300.309 (a), an eligibility group may determine that a child is eligible for special education under the SLD category, as defined in 34 CFR 300.8 (c)(10), if:

1. The child does not achieve adequately for the child's age or to meet state-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or state-approved grade-level standards:
 - i. Oral expression.
 - ii. Listening comprehension.
 - iii. Written expression.
 - iv. Basic reading skill.
 - v. Reading fluency skills.
 - vi. Reading comprehension.
 - vii. Mathematics calculation.
 - viii. Mathematics problem-solving.

2.
 - i. The child does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the areas identified in 34 CFR 300.309 (a)(1) when using a process based on the child's response to scientific, research-based intervention; or
 - ii. The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of an SLD, using appropriate assessments, consistent with 34 CFR 300.304 and 34 CFR 300.305; and
3. The group determines that its findings under 34 CFR 300.309 (a)(1) and 34 CFR 300.309 (a)(2) of this section are not primarily the result of:
 - i. A visual, hearing, or motor disability;
 - ii. An intellectual disability;
 - iii. Emotional disturbance;
 - iv. Cultural factors;
 - v. Environmental or economic disadvantage; or
 - vi. Limited English proficiency.

[Section redacted]

Assessment of Students suspected of having an Emotional Disturbance

Under the 2006 IDEA Part B regulations, 34 CFR 300.8 (c)(4)(i), "emotional disturbance " means a condition exhibiting one or more of the following characteristics "over a long period of time and to a marked degree that adversely affects a child's educational performance":

- A. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- C. Inappropriate types of behavior or feelings under normal circumstances.
- D. A general pervasive mood of unhappiness or depression.
- E. A tendency to develop physical symptoms or fears associated with personal or school problems.

Under 34 CFR 300.8 (c)(4)(ii), emotional disturbance includes schizophrenia. In *Independent Sch. Dist. No. 284 v. A.C.*, 35 IDELR 59 (8th Cir. 2001) the court held "Read naturally and as a whole, the law and the regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations."

Criteria for Eligibility as a Student with an Emotional Disturbance

A student need not meet all five criteria listed in the definition of an "emotional disturbance" in order to be eligible for special education and related services under the IDEA. The student need only exhibit one of the five criteria of the definition of an emotional disturbance listed in 34 CFR 300.8 (c)(4)(i). *See, e.g., Lapidus v. Coto*, 559 IDELR 387 (N.D. Cal. 1988). The fact that a student receives good grades will not in itself disqualify the student from receiving IDEA services. The district's team also should consider factors such as the student's attendance record, ability to earn required credits, and any changes in grades. In *M.M. and I.F. v. New York City Dep't of Educ.*, 63 IDELR 156 (S.D.N.Y. 2014) the district provided the student with two months of home instruction when student became too fearful to attend school. A student's prolonged absence, coupled with the failure to earn enough credits to move on to the next grade, is a factor that should have prompted the district to find student eligible for special education.

Assessment of Students suspected of having an Other Health Impairment

The IDEA states that an "other health impairment" means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that:

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance. 34 CFR 300.8 (c)(9).

The list of chronic or acute health conditions included in the definition of "other health impairment" at 34 CFR 300.8(c)(9) is illustrative and not exhaustive. *Joint Policy Memorandum*, 18 IDELR 116 (OSERS 1991). To be eligible as a Student with an other health impairment, the impairment, must adversely affect the child's educational performance. *Ms. H. v. Montgomery County Bd. of Educ.*, 56 IDELR 73 (M.D. Ala. 2011); *Mowery and Atwood v. Board of Educ. of the Sch. Dist. of Springfield R-12*, 56 IDELR 126 (W.D. Mo. 2011); *Hansen v. Republic R-III Sch. Dist.*, 56 IDELR 2 (8th Cir. 2011).

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 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 failed to provide a comprehensive evaluation as expected in the applicable IDEA standards. Although the evaluator partially assessed the Student regarding a suspected Learning Disability and Emotional Disturbance, the ER omits any mention or data related to the Student's potential eligibility as a person with an Other Health Impairment. Accordingly, for the reasons set forth below, I will now grant the Parent's request for an IEE.

The District's 2017 Evaluation Report of the Student's intellectual abilities, academic achievement and social/emotional behavior was incomplete and insufficient

The 2017 ER includes individually administered, norm-referenced assessments of intellectual ability, behavior and achievement. On the WISC-V, the Student earned a Full-Scale IQ of 132 (P#3 p.6). [Redacted.] The testing was administered according to the test maker's instruction. The WISC-V scores are consistent with previous evaluation results. Accordingly, I find the assessment of the Student's cognitive ability was appropriate. However, the remainder of the ER is insufficient, inadequate and inappropriate. The District failed to heed OSEP's direction to take precautions [redacted].

First, to assess the Student's achievement, the psychologist administered the WJIV. The WJIV, when administered and scored according to the test maker's instruction is a valid and regularly used assessment of achievement. Here, however, the ER notes that because of the Student's multiple DSM-5 diagnoses the evaluator was not able to assess the Student in all areas of a suspected Specific Learning Disability. Therefore the evaluation is incomplete. The ER states that the evaluator was not able to administer the Calculation, Writing Sample, Math Fluency and Sentence Writing Fluency subtests (S#1). Curiously, although complete assessment data was not collected the District concluded the Student did not qualify as a Student with a Specific Learning Disability. The failure to adequately assess the Student in this area of suspected disability rendered the ER conclusion incomplete and inadequate. See, 34 CFR 300.309 (a); 34 CFR 300.8 (c)(10). Accordingly, the District will be Ordered to fund an IEE to assess the Student's eligibility as a person with a Specific Learning Disability.

Second, to gauge the Student's social, emotional and behavioral needs, the psychologist attempted to administer the Behavior Assessment Scales for Children-Second Edition (BASC-2). Citing a lack of knowledge about the Student, based on the Student's high rate of absences, the teachers refused to complete the teacher version of the BASC-2 profile. Due to anxiety and fatigue, the Student was not able to complete the BASC-2 self-report. The Parent's BASC-2 profile reports clinically significant levels on the scales relating to anxiety, depression, somatization, and withdrawal. Although, the Mother's BASC-2 clinically significant scores resemble the eligibility criteria for emotional disturbance found at 34 CFR 300.8 (c)(4)(i) the District did not consider additional assessments.

Although the Student did not complete the BASC, the Student reported, and the evaluator agreed, that the Student's DSM 5 medical diagnoses of Post-Traumatic Stress Disorder with Dissociative Features, Severe Anxiety and Major Depression interfered with the Student's concentration, alertness, vitality and endurance to the point where the WJIV achievement testing was never completed. During the Student's clinical interview with the District's psychologist, the Student noted times when the Student "felt like because of [redacted] trauma experience, that there were times where [redacted] was sort of outside [redacted] Student's own body looking at what was happening." (NT pp.126-127). Episodes of depersonalization can affect the Student's alertness, concentration and vitality. Faced with a single measure of social, emotional, and behavior skills, favoring

eligibility, the team discounted the Parent's scores and the Student's clinical interview. The District did not cogently or convincingly explain why a variety of additional measures were not employed to explore how or if the Student's behavior, social, or emotional, deficits are adversely affecting the Student's current learning, education and ongoing need for specially-designed instruction.

When discussing the Student's IDEA eligibility [redacted], at the expense of understanding how the DSM-5 medical diagnoses, adversely affected the Student's learning and or education. The overemphasis [redacted] caused the team to minimize the current effect of the DSM-5 disabilities, and to virtually ignore the drastically declining grades in Eighth-grade and the years of excessive absences. The District failed to adequately evaluate or consider a classification of Emotional Disturbance. Accordingly, the District will be Ordered to pay for an IEE to assess the Student's potential eligibility as a person with an Emotional Disturbance.

Third, the testing modifications made during the assessment, all of which go to the Student's inability to attend and concentrate, raise serious concerns that the Student should have received a comprehensive assessment to rule out IDEA eligibility as a person with an Other Health Impairment. The letters from the Student's psychiatrist linked the Student's DSM-5 diagnoses to the inability to concentrate, focus and attend school. The District was on actual notice that Student missed 62 days of school, because of an exacerbation of DSM-5 disabilities, although, the Student clearly wants to attend school (S#1 p.2). Absent comprehensive testing, data collection and consideration of an Other Health Impairment, under these unique facts and circumstance, I find the ER is inappropriate and incomplete. Accordingly, the District is Ordered to pay for an IEE to assess the Student's potential eligibility as a person with an Other Health Impairment.

Conclusion

When the record is reviewed as a whole, the record is preponderant that the District did not compellingly explain why or how the evaluation was an assessment in all areas of suspected disability. Therefore, I find that the District authorities failed to offer a cogent and responsive explanation for their decisions and actions. In light of the existing unique facts and circumstances, I find the evidence does not show the ER is a comprehensive assessment of the Student, in all areas of suspected disability.

Accordingly, the District is ordered to fund a comprehensive IEE. The IEE costs may include any and all observations the evaluator(s), in their sole discretion, deem necessary to prepare their reports. The District will also be ordered to provide the Parent with the District's criteria for the selection of the IEE evaluator(s). The IEE evaluators' costs may also include their review of a new evaluation report and participation in and attendance at conferences to review the evaluation report. The evaluator(s) role will end once the District issues a new Notice of Recommended Education Placement/Prior Written Notice.

The District is ordered to pay the full costs of the evaluator(s)' invoices within 30 days of receipt of the evaluator(s)' billing.

To enable the IEE evaluator(s) to conduct their assessments in a timely fashion, the Parents are ordered to sign whatever releases of information that are necessary to allow the IEE evaluator(s) and the District to confer and exchange records. The District is ordered to provide the IEE evaluator(s) complete access to Student's educational records, including copying and mailing all records to the IEE evaluator(s). The Parent is directed to identify and schedule the IEE evaluator(s) within 30 calendar days of this Order.

Order

It is hereby **Ordered** that:

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

1. Fund a comprehensive evaluation, in all areas of suspected disability, to include assessment of intelligence, academic achievement, adaptive functioning, executive functioning, behavioral/social/emotional functioning and, assessment in any other area, including classroom observation. The IEE evaluator(s) can select additional assessment necessary to inform the team of Student's IDEA eligibility, strength and deficits.
2. The District is directed to provide the Parent with the District's criteria for the selection of the IEE evaluator(s).
3. The Parent may 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 Parent in her sole discretion may select the IEE evaluator, provided, however, the evaluator is located within 150 miles of the District's central office.
4. Upon receipt of parental releases, the District shall provide the IEE evaluator(s) complete access to Student's educational records, including copying and mailing, free of charge, for all records to the IEE evaluator(s).
5. Upon completion of the IEE and transmittal of the IEE report(s) to the District and the Parent, the District is Ordered to pay the full costs of the IEE(s) within 30 days of receipt of the invoices.

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

December 18, 2017

[Charles W. Jelley, Esq. LL.M.](#)

Charles W. Jelley, Esq. LL.M.

HEARING OFFICER

ODR FILE #19862-1718 KE

RIGHT TO APPEAL

This Decision is the final administrative determination. Either party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving this Decision. The complete Notice of Appeal Rights was simultaneously provided along with this Decision to both Parties.