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

Student's Name: Y.D.

Date of Birth: [redacted]

ODR Nos. 2568-11-12-AS and 2569-11-12-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Pro Se
Lower Merion School District 301 East Montgomery Avenue Ardmore, PA 19003-3338	Lawrence D. Dodds, Esquire Wisler Pearlstine LLP Office Court at Walton Point 460 Norristown Road, Suite 110 Blue Bell, PA 19422
Dates of Hearing:	January 17, 2012, February 9, 2012
Record Closed:	February 13, 2012
Date of Decision:	February 29, 2012
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District), and attended a District high school, during the time relevant to this matter. (NT 13-20.) Student is identified as a child with Specific Learning Disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 15-19.)

In response to Parents' request for an independent educational evaluation (IEE), the District filed a request for due process, ODR Number 2568-11-12-AS, seeking an order establishing that its re-evaluations dated May 3, 2011 and October 10, 2011, were appropriate. Parents then filed a request for due process, ODR number 2569-11-12-AS, seeking an order for evaluation by a named private provider (Provider), to include administration of an instrument named the Modern Language Aptitude Test (MLAT), review of Student's educational records, and any appropriate additional evaluation that the Provider normally and customarily would perform for any similarly situated student.

At the request of the parties, I determined to hear and decide both cases together. The hearing was concluded in two sessions, and I admitted various documents into evidence.[1] (NT 21.) I conclude that the District's evaluation was appropriate, and I decline to order the private evaluation sought by Parents.

ISSUES

[1] At the end of the hearing, I expressed an intention to take administrative notice of the nature of the MLAT from information on websites accessible through the internet. (NT 321-331.) Upon reflection, I have decided that the parties are correct in that the nature of the test is immaterial to resolving the issues in this matter; therefore, I will not take administrative notice of any information that was not admitted into evidence in due course.

1. Were the District's re-evaluations dated May 3, 2011 and October 10, 2011 appropriate under the IDEA?

2. Are the Parents entitled to an IEE at public expense, including administration of the MLAT, review of Student's educational records, and any appropriate additional evaluation that the independent provider normally and customarily would perform for any similarly situated student?

FINDINGS OF FACT

1. The District identified Student with Specific Learning Disability when Student was in first grade. There was a history of private evaluation findings of difficulties with auditory and language processing. The District recognized disabilities affecting Student's performance in reading, including decoding and encoding, written expression, and Speech and Language. (S-1, 40.)

2. Student received learning support and speech and language support in first grade, and made progress in reading. When Student was in second grade, the District exited Student from learning support at Parents' request, and continued to provide special education supports in the general education setting. Speech and Language support was continued. (S-1.)

3. When Student was in fifth grade, a private evaluator found that Student continued to have an auditory processing disorder and hearing impairment, although Student's auditory processing ability had improved. (S-1, 42.)

4. When Student was in fifth grade, in March 2008, the District issued a re-evaluation report that identified Student with a Specific Learning Disability in written expression. The report noted a history of auditory processing difficulties, and found continued auditory processing difficulties. It also noted working memory difficulties. The evaluation report recommended continued support for both auditory processing and written expression. (S-1.)

5. The IEP team at that time determined that there was a need for additional data. After further standardized testing with the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), additional data indicated significant weaknesses in reading decoding and written expression. However, Student scored within at least the average range in relevant subtests of the WISC-IV, and in the high average range in Verbal Comprehension and Full Scale IQ. (S-1.)

6. In or before 2008, the District administered the Wechsler Individual Achievement Test, Second Edition (WIAT-II); Student scored Average in reading and writing, and High Average in listening comprehension. (S-11 p. 6.)

7. In April 2008, the District and Parent agreed to exit Student from speech and language support and continue Student in itinerant learning support for writing. (S-2, S-9 p. 2.)

8. Student's PSSA scores were Advanced in reading and mathematics for 4th through 8th grades. Student's PSSA scores for writing were Proficient in 5th grade and a separate writing assessment, "ERB", placed Student in the Proficient range in 7th grade. In 8th grade, Student scored Advanced in writing on the PSSA. Degree of Reading Power (DRP) scores were proficient in 2008 and 2009, and Advanced in 2010. (S-9 p. 5, S-26.)

9. Student attained grades in a foreign language of "B" in 7th grade and "C" in 8th grade. (S-3.)

10. As of March 2011, Student's grade in foreign language was a failure. Student was in the basic class for this foreign language, which repeated much of the curriculum that the District had provided to Student during several years of foreign language in grade school. While Student's homework and quiz averages were in the range of "C" to "B", Student's mid-term examination score was a failure. Student did participate in class in the foreign language, and appeared to be motivated and working adequately. Student received accommodations in class including preferential seating, frequent checks for understanding of new material, re-studying material and re-taking tests and quizzes. By May 2011, Student's grade had risen to "C". By June 2011, the grade had fallen to "D+", but Student finished the year with a grade of "C". (S-3, S-9, S-11, S-20, S-23, S-43, S-44, S-46.)

11. Student participated orally in foreign language class in eighth grade, and performed at a passing level with extraordinary support from the teacher in the form of daily guidance with homework and provision of word banks for quizzes. Student performed better on quizzes than on tests. (NT 169-174, 184-186.)

12. Student demonstrated some learning in the foreign language curriculum. (NT 169-174, 191-201.)

13. District personnel recommended that Student begin 9th grade in an intermediate class in the same foreign language, but Parents inquired about having Student placed in the "beginner" level foreign language class. The team decided to place Student in the "beginner" level class. (NT 175-176, 182-183, 191, 251, 286; S-11, 23.)

14. Student's grades for the first marking period Student's ninth grade year included five grades of "A", one grade of "B" and one grade of "C" (in geometry). Student was in several advanced level courses, but transferred from an Honors level mathematics class to an average level class, still on grade level, due to difficulties Student was experiencing. In written expression and reading, Student performed within proficient to advanced levels during the relevant time. (NT 101-103, 258-259; S-38.)

15. Student received an "A" in the "beginner" class for the foreign language, but continued to struggle with new material. (NT 286-287; S-38.) .)

16. In January 2011, the District requested that Parents sign a Permission to Re-Evaluate (PTR) after Student's IEP team recommended that additional data was needed with regard to achievement and auditory processing. The recommendation included both cognitive testing and auditory processing assessment. (S-5.)

17. In January 2011, the District suspected only one area of disability: specific learning disability in written expression. By October 2011, the areas of suspected disability included two other areas pursuant to Parents' request: central auditory processing and reading. (NT 68, 77-78, 160; S-30.)

18. In February 2011, Parents requested that the District perform a central auditory processing evaluation as part of the re-evaluation, and the District complied by offering a Permission to Evaluate form for that purpose. (NT 68-69; S-7.)

19. The District issued a re-evaluation report in March 2011, calling for additional data concerning whether or not Student continues to qualify for Specially Designed Instruction in writing. The RR also called for an auditory processing re-evaluation at Parents' request. (S-9.)

20. In March, Parents requested a reading evaluation, and the District added this to the areas to be evaluated. (NT 77-79, 91-92; S-12, 20.)

21. In March 2011, the District re-issued the PTR twice, amending it to specify that it agreed to provide a central auditory processing evaluation as part of a comprehensive re-evaluation, and adding a reading assessment at Parents' request. (NT 76, 78; S-7, 12.)

22. Parents returned the PTR twice, signed, with added conditions that the evaluation include "an auditory processing reading test and the Modern Language Aptitude Test" requested in March 2012. (S-7, 12, 15.)

23. In March 2011, the District offered an IEP that provided for monitoring of academic performance across all subjects and direct teaching in areas needing remediation, to be delivered by the learning support teacher, preferential seating in all classes, as well as visual and oral directions. The IEP provided for support to all of Student's teachers by the learning support teacher. (S-11.)

24. In May 2011, a private provider selected by the District issued an auditory processing evaluation, which found that Student experiences some difficulty in processing complex auditory information. The report specified difficulties with auditory closure and sequencing, and interhemispheric transfer skills. The report indicated that these deficits result in difficulty utilizing the suprasementals of speech, including stress, pitch and rate. The report indicated that these difficulties are consistent with the Student's difficulty in acquiring proficiency in foreign language, which relies upon rate and stress-pitch variables. The report recommended various strategies to be considered in educational planning for Student, including ways of presenting foreign language curriculum. (S-15.)

25. The District considered the private auditory processing evaluation, along with Parents' objections to the evaluation, as part of the re-evaluation of the Student. (NT 78-79, 82-83; S-15, 20.)

26. In June 2011, Parent wrote to the District, criticizing the private auditory processing report on a number of grounds, including the failure of the report to provide specific recommendations individualized to the Student, and the manner of presentation of findings. (S-24.)

27. The District issued a re-evaluation report in May 2011, calling for additional data concerning whether or not Student continues to qualify for Specially Designed Instruction in writing. The RR also called for testing of Student's reading proficiency at Parents' request. (S-20.)

28. The District agreed to pay for administration of the MLAT by a private provider selected by the Parents, with a cap on cost to permit only administration of the MLAT. The District also agreed to release educational records to the private provider. (S-25, 34.)

29. The District consistently maintained that it considered it unnecessary to administer the MLAT as part of the re-evaluation of the Student. At the same time, it consistently offered to pay for the MLAT alone, solely because the Parents had requested that the test be done. (NT 264; S-14, 19, 22, 25, 28, 32, 34.)

30. The District's Director of Special Education directed its group of qualified professionals not to discuss with Parents the Parents' requests for evaluation by a private evaluator, including the request for administration of the MLAT. (NT 115-116; S-47, 48.)

31. The Parents indicated in a letter dated August 4, 2011 that they desired a more complete evaluation by the private provider, rather than administration of a single test in isolation. (S-27.)

32. There was no data available to District evaluators to indicate a disability with regard to mathematics, executive functions, social and emotional functioning or functional skills. (NT 106-108.)

33. In October 2011, the District issued a re-evaluation report, in which Student's performance in foreign language was reported to be average for the first few weeks of the year, with a grade of "A", class participation and without special education accommodations. Writing was on grade level and proficient. The evaluating team concluded, over Parents' objections, that Student was not a child with a disability as defined in the IDEA, due to proficient grade level performance. The team did recommend provision of a section 504 service agreement due to Student's continued difficulties with auditory discrimination. (S-30.)

34. Appended to the October re-evaluation report, the District provided additional assessment of reading by administering the Wechsler Individual Achievement Test,

Third Edition (WIAT-III) and specific reading tests in addition to those already reflected in the record and in addition to the Student's grades. (NT 92, 157-158; S-30.)

35. The District's school psychologist, who performed the psychological evaluation that was part of the re-evaluation of Student, possessed a doctoral degree in school psychology, was state certified in school psychology and had about eight years of experience performing psychological evaluations for public schools. The psychologist was appropriately trained and knowledgeable with regard to all instruments that the psychologist administered. All other District personnel who administered testing instruments or assessments were appropriately trained and knowledgeable with regard to the instruments or assessments that they administered. (NT 63-67, 97-104, 158-159, 213-214; S-30.)

36. The District utilized a variety of assessment instruments which were nationally normed or otherwise standardized, technically sound and valid and reliable for their intended purposes. (NT 97-104, 155, 215, 220-225; S-30.)

37. The District's group of qualified professionals solicited Parental input during the evaluation process. (S-45, 48, 49.)

38. The District's group of qualified professionals obtained teacher input with regard to Student's performance in foreign language. (S-43, 45, 48, 49, 50.)

39. The District's school psychologist reviewed Student's educational records, including records provided to the District by the Parents. (NT 69-71, 131-132.)

40. The District's team of qualified professionals who performed the re-evaluation considered state and local assessments as part of the re-evaluation, including assessments of Student's performance and achievement in reading, mathematics and writing. (NT 70-71, 95; S-9, 30.)

41. The team considered Student's grades in all subjects. (NT 95, 131-132; S-9, 30.)

42. The team considered Student's performance in all classes, through grades and teacher reports, including reports from teachers in the beginning of Student's ninth grade year. (NT 71, 93-95, 101; S-9, 30.)

43. The District's school psychologist observed Student in the classroom. (NT 93, 96-97.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).[2] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[3] that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, both parties requested due process and thus, both are requesting intervention by the hearing officer. In this case, the burden of proof is allocated to both parties for parts of the requested relief. Thus, the District bears the burden of persuasion that its evaluations were appropriate and that Parents are not entitled to an IEE. If the hearing officer determines that the evaluation was inappropriate and that an IEE should be ordered, the burden

[2] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

[3] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

of persuasion shifts to the Parents to prove that the hearing officer should include in that order the MLAT, documents review and any other evaluations deemed appropriate by the private evaluator. If the District fails to produce a preponderance of evidence in support of its claim, or if the evidence is in "equipoise", then the District cannot prevail under the IDEA. Similarly, if Parents fail to meet their burden, they cannot prevail.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The issue to be decided here is not narrowly limited to whether or not the District's evaluation adequately considered Student's difficulties in foreign language classes; rather, it goes to the heart of the definition of Specific Learning Disability, which the IDEA regulations define as "a disorder in one or more of the basic psychological processes involved in understanding or in using language … ." 34 C.F.R. §300.8(c)(10). Parents indeed asked the District to consider a narrower area of concern, asserting suspicion of what they called "foreign language disability", and initially asked the District to pay for a single test of foreign language aptitude, the MLAT. (FF 22.) Nevertheless, the Parents' opening statement made it clear that their concern encompasses a more fundamental area of functioning. (NT 39-59.) They expressed this variously as "language acquisition" and "auditory processing." Ibid. Although their Complaint Notice pointed to this more fundamental concern only obliquely, I determined to allow testimony and evidence going beyond the realm of foreign languages. (NT 59-63.) Therefore, I consider whether or not the District's evaluation addressed the broader question of whether Student evidenced a disorder in a psychological process involved in understanding or using language. 34 C.F.R. §300.8(c)(10).

Considering the Parents' claim thus broadly, however, the IDEA regulations require more to establish eligibility for special education services, whether these are construed as services directed to learning foreign languages, or services directed more broadly to overcoming a disorder in learning and using language that becomes a barrier to the learning of foreign language, reading skills, written expression skills or mathematics skills. In determining whether or not the District's evaluation was appropriate, one must keep in mind the District's obligation to evaluate a child in relation to the regulations' definition of "child with a disability".

The IDEA sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to "determine the educational needs of such child … ." 20 U.S.C. §1414(a)(1)(C)(i). Logically, the eligibility determination is the primary purpose of the evaluation, because if the child is not eligible, then there is no IEP for which the evaluation's conclusions on educational need would be required. See, 34 C.F.R. §300.39(b)(3)(i)(specially designed instruction purpose is to address needs that result from disability). Therefore, the first question is whether or not the District's evaluation appropriately addressed eligibility as defined under the IDEA.

An eligible child is defined as a "child with a disability": one who has been evaluated to have one of the enumerated disabilities, 34 C.F.R. §300.8(a), "and who, by reason thereof, needs special education and related services." Ibid. Thus it is necessary but not sufficient that a child exhibit an enumerated disability; to be eligible for special education the child also must "nee[d] special education and related services." Ibid.

The obligation to evaluate the child's need for special education requires a determination of whether or not the child needs services in order to access the general curriculum and meet the agency's educational standards. Special education is defined as "specially designed instruction

…", 34 C.F.R. §300.39(a). "[S]pecially designed instruction" is defined as "adapting … instruction", to address the unique needs of the child, 34 C.F.R. §300.39(b)(3)(i), and "[t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children", 34 C.F.R. §300.39(b)(3)(ii).

These definitions are consistent with the fundamental purpose of the IDEA, which is to provide a free appropriate public education (FAPE) to children with disabilities. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE consists of those services that are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). Thus, special education services are those that provide a "basic floor of opportunity" – not the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 251 (3d Cir. 2009); Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

In sum, the District's obligation in this matter was to determine (assuming that the Student has a disability cognizable under the IDEA) whether or not the Student needed special education services in order to be able to access the District's curriculum sufficiently to receive meaningful educational benefit. The question before me is whether or not the District conducted an appropriate re-evaluation for that purpose. I must therefore determine, in light of the above standards, whether or not the District's re-evaluation was "sufficiently comprehensive to identify all of the child's special education and related services needs … ." 34 C.F.R. §300.304(c)(6). This does not mean every educational need no matter what its nature; it does not mean all

educational needs for service to enable the child to maximize potential. It means all needs that rise to the level needing special education and related services in order to access the curriculum.

The IDEA regulations prescribe in detail the procedures to be used in order to fulfill this requirement. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002). These procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information … ." 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2).

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(ii), (iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel

and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

I conclude that the District's re-evaluation meets the above standards[4]. The re-evaluation of the Student was sufficiently comprehensive to identify all of the Student's special education and related services needs. It also met the IDEA's procedural requirements. Therefore, I conclude that the District's evaluation was appropriate, and I decline to order the evaluation sought by Parents.

The scope of the evaluation was sufficiently comprehensive. While the Student had a history of speech or language impairment, this had resolved early in Student's life to the point that no special education or related services were required to address it. (FF 1-8.) The only remaining suspected disability was a specific learning disability in writing. (FF 17.) When the District set out to re-evaluate for this suspected disability, Parents requested additional evaluation of suspected disabilities in auditory processing and reading. (FF 18.) Due to delays in the signing of the required permission forms (occasioned by negotiations between the parties over the scope and methods of the evaluation), the re-evaluation not only extended over many months, but also was expressed in multiple re-evaluation reports. (FF 16- 34.)

As it thus evolved over time, the re-evaluation addressed broad areas of the Student's functioning. The District assessed Student's hearing, auditory processing, memory functioning, reading phonetics, comprehension and fluency, and written expression. (FF 16-20, 24-27, 33, 34.) A preponderance of the evidence proves that the District thoroughly evaluated the Student's psychological processes involved in understanding and using language – which is the definition of "specific learning disability". 34 C.F.R. §300.8(10). Thus, it comprehensively evaluated

[4] Under the IDEA regulations, re-evaluations must meet the same standards as evaluations, in terms of both the scope of the re-evaluation and the required procedural standards. 34 C.F.R. §300.303. Therefore, I will apply the standards applicable to evaluations, even though the District action in question was a re-evaluation.

Student for suspected specific learning disability. This fulfilled the District's obligation to comprehensively identify all of Student's needs arising from the disabilities enumerated in the IDEA. There is no claim or evidence[5] that the Student suffered from any other enumerated disability. (FF 32.)

Parents claim that the District failed to explore appropriately the question they posed: whether or not the Student was suffering from a "foreign language disability." This argument must fail for three reasons. First, the IDEA does not recognize a separate disability called a "foreign language disability." Such a legally defined entity is nowhere touched upon in the law or its regulations. Second, such a disability, if it exists as a medical entity, can only be a species of specific learning disability – no party has suggested any other applicable category; as stated above, I conclude that the District appropriately re-evaluated for specific learning disability. Third, the District did offer to test for "foreign language disability"; the Parents have yet to accept the District's offer, so that area of functioning is yet to be assessed through a standardized test, although the District's evaluators did consider a great deal of information about Student's struggles in foreign language, such as grades and teacher reports. (FF 28, 31.) In short, the District did address what the law requires, except for the MLAT, which is still the subject of negotiation between the parties.

The Parents argued that the District's offer to obtain MLAT testing was disingenuous, because the District placed such stringent limits on the testing as to preclude a meaningful evaluation. This argument is unavailing, because the test results could have been assessed and further refined through the re-evaluation process already in motion through the District itself. It is not unusual for a local education agency doing an evaluation to contract out for specific

[5] Parents pointed to some difficulty that Student experienced with geometry in ninth grade. (FF 14.) Considered with all of the evidence, this evidence does not rise to the level of an indicator of learning disability. (FF 32.)

testing, and then incorporate the results into a full educational evaluation performed by its own staff. Indeed, this was done with the auditory processing evaluation that the District obtained at Parents' request. (FF 24, 25.) Therefore, the fact that the private provider would not have been allowed to use the results of the MLAT as a stepping off point for further testing and evaluation does not mean that the District could not have done so. The District's offer to purchase testing was on the assumption that the results would then be considered by the group of professionals and the Parent performing the District's re-evaluation. (FF 28, 29.) Nothing in this plan contradicts either the good faith of the offer or the obligations of the District under the law.

Parents argued strenuously that the auditory processing evaluation, obtained from a private provider, was inadequate and unprofessional. On the contrary, the evidence shows by a preponderance that the report was consistent with the customary practice in the field. It was performed by a well qualified audiologist. (NT 213-214.) Its results were reported in a form that was intelligible and useful. (NT 215-246.) The evidence shows that certain of the recommendations that the evaluator made were rejected by the group of professionals who reviewed it as part of the Student's re-evaluation (either because they disagreed, or in one instance, because they did not understand the recommendation); however, this fact does not outweigh the report itself or the testimony indicating that the report was consistent with standard practice in the field.

In reviewing the auditory processing evaluation, I noted that the evaluation devoted considerable attention to the relationship between Student's auditory processing deficits and the Student's struggles with foreign language. (S-15.) The report confirms that such a relationship is likely, although it does not prove such a relationship to the exclusion of all other possible causal factors (such as Student's motivation to complete homework, which was called into

question by one of Student's teachers). Because it addressed Student's auditory processing in relation to Student's foreign language difficulties, this report contributes substantial weight to the evidence that the District's re-evaluation was sufficiently comprehensive to address whether or not the Student was suffering from a specific learning disability that affected Student's foreign language performance. (FF 25.)

At the hearing, Parents re-characterized Student's learning disability as a difficulty in language acquisition, and asserted that the District's group of professionals did not look at that part of the process of learning. The weight of the evidence is to the contrary, for two reasons. First, as noted above, the re-evaluation did appropriately address Student's auditory processing, addressing Student's ability to listen and respond to directions, recognize words, perform word decoding and word attack, and utilize the suprasegmentals of speech. (FF 24, 25, 33.) Second, the evidence is preponderant that Student did not display a generalized difficulty with acquisition of language to the point of needing special education and related services in order to access the grade level curriculum. Student's performance in reading and mathematics was average to above average by all measures. (FF 8, 9, 14.) Student's only area of poor performance was in foreign language – even in that area, Student had managed to pass Student's courses, (NT 9-13, 15); this poor performance in foreign language does not outweigh the evidence that Student was able to access the curriculum in all other areas, and was able to do so in foreign language also, with admittedly poor results.

As noted above, the IDEA regulations establish procedural requirements for re-evaluations; the evidence is preponderant that the District's evaluators complied with these requirements. The evaluators utilized a variety of assessment tools and strategies, including review of cognitive testing, auditory processing testing by an audiologist, achievement testing,

standardized reading testing, curriculum based test scores, teacher reports, Parent reports, state-wide achievement tests, District-wide tests, progress reports on IEP goals, and review of educational and medical records; the evaluators relied upon no single measure or test in reaching their conclusions. (FF 16-25, 27-29, 33, 34, 36, 38-42.) Evaluators reviewed evaluations proffered by Parents and responded to parental input. (FF 3, 4, 18-21, 25, 28, 33, 37.) The record is preponderant that all instruments and tests used by the evaluators were technically sound and were used as directed by the publishers. (FF 36.) All personnel and contractors who administered tests and instruments were appropriately qualified and trained. (FF 35.) The evaluation included classroom observation. (FF 43.)

Parents argue that the District personnel did not allow full participation by Parents. The preponderance of the evidence is to the contrary. The District's evaluators met with Parents and discussed the re-evaluation during those meetings; evaluators discussed the auditory processing evaluation that Parents criticized at one of these meetings. (FF 21, 23, 25, 26, 33, 37, 39.) Re-evaluation reports reflect that evaluators considered Parents' private evaluation reports regarding Student's auditory processing, (FF 39), as noted above. The record also reflects extensive correspondence between Parents and the District's Director of Student Services, in which Parents argued for expanded testing, and criticized the auditory processing evaluation performed as part of the re-evaluation. (FF 16-22, 25, 26, 28, 29, 31.) The record shows that the Director spoke to Parents directly and responded in writing in detail to Parents' requests and criticisms. (FF 29.) Therefore, the Parents' argument regarding participation is not supported by the evidence.

Parents argue that their communications with the Director of Student Services were not the kind of participation that the regulations require, because the IEP team was not allowed to discuss those matters with Parents. The District's Director of Student Services did forbid its IEP

team to discuss Parents' request that the District engage a private agency to administer the MLAT, a records review, and any additional testing that the private agency should determine to be appropriate. (FF 30.) However, this did not preclude the IEP team from full discussion of every other aspect of the re-evaluation. Moreover, the IDEA regulations do not require everything about a re-evaluation to be discussed at an IEP meeting, as the Parents seem to argue.

The IDEA regulations require that an Individualized Education Plan (IEP) team produce the IEP for each identified student. 34 C.F.R. §300.324. However, the regulations do not make the IEP team responsible for evaluation or re-evaluation. Rather, the regulations require the "public agency" – here, the District – to conduct the evaluation or re-evaluation. 34 C.F.R. §300.301; 34 C.F.R. §303. Moreover, the eligibility determination must be made by "a group of qualified professionals and the parent … ." 34 C.F.R. §300.306(a)(1). Thus, it is clear that the regulations contemplate that evaluations and re-evaluations are to be conducted by the agency, not the IEP team, subject to discussions with and participation by the parents. There is no provision for making determinations pertinent to evaluations and re-evaluations at or during IEP team meetings.

There is one exception to this general rule. The regulations do require the IEP team, with input from the parents, to determine whether or not additional data are required to determine eligibility or educational needs. 34 C.F.R. §300.305. This determination may be made without a meeting. 34 C.F.R. §300.305(b). Parents' argument raises the question whether, by forbidding the IEP team to discuss the requested MLAT, record review and additional private testing, the District contravened the above regulations by preventing the IEP team from determining whether or not additional data was needed. I conclude that this administrative curb of IEP team discussion with the Parents did not violate the regulations. The record is clear that the team did

not recommend either administration of the MLAT, private record review or private additional testing. (FF 28, 29.) Indeed, the team repeatedly recommended additional testing for auditory processing and reading, but never recommended the MLAT. (FF 18-22.) Since the regulations do not require the team to meet in order to recommend additional data, they do not require discussion in the team meeting setting, which is what the District forbade, and which is what the Parents are urging as a requirement of law. I conclude that, in this instance, the District did not violate the regulations by placing an administrative curb on discussion of matters that were the subject of ongoing negotiations outside of the IEP team. While this administrative action certainly ran against the grain of IDEA policy in favor of full and open discussion with parents, it did not violate the positive prescription of the law.

CREDIBILITY

The above findings and conclusions do not turn on the credibility and reliability of the witnesses. I found all witnesses to be credible and reliable, based upon their answers to questions, material consistency with other testimony and the written record, and demeanor.

CONCLUSION

I conclude that the District's evaluation of the Student was appropriate, and that there is no legal basis for ordering the District to provide an independent educational evaluation as requested by Parents. Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's re-evaluations dated May 3, 2011 and October 10, 2011 were appropriate under the IDEA.

2. The Parents are not entitled to an IEE at public expense, and are not entitled to an order that the District provide at public expense the private administration of the MLAT, review of Student's educational records, and any appropriate additional evaluation that the private provider normally and customarily would perform for any similarly situated student.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

February 29, 2012