

*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 Due Process Hearing Officer**

### **Final Decision and Order**

**ODR No. 28511-23-24**

#### **CLOSED HEARING**

**Child's Name:**

J.S.

**Date of Birth:**

[redacted]

**Parent/Guardian:**

[redacted]

**Counsel for Parents:**

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**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

November 17, 2023

## **Introduction**

This special education due process hearing concerns a child with disabilities (the Student). The Student's parent (the Parent) asked the Cumberland Valley School District (the District) to fund an independent educational evaluation (IEE). The District denied that request and, as required by law, initiated this hearing to defend its own evaluation. As discussed below, if the District's evaluation was inappropriate, the Parents are entitled to an IEE at the District's expense.

This matter arises entirely under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

As set forth below, I find in favor of the Parent.

## **Issue Presented**

While the parties phrase the issue slightly differently, those differences are not substantive and only one issue was presented for adjudication: Was the District's Reevaluation Report of March 27, 2023, appropriate?

## **Findings of Fact**

While the parties view the facts differently and draw different conclusions from those facts, no material facts are in dispute. Regardless, I reviewed the record in its entirety, but make findings only as necessary to resolve the issue presented. I find as follows:

### **The 2020-21 School Year**

1. There is no dispute that, at all times pertinent, the Student is and has been a "child with a disability" as defined by the IDEA. *Passim*.<sup>1</sup>
2. The 2020-21 school year was the Student's [redacted] grade year. S-1.
3. The Student enrolled in the District in December 2020. S-1.
4. There is no dispute that the District became the Student's Local Educational Agency (LEA) upon enrollment.<sup>2</sup>

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<sup>1</sup> "Child with a disability" is defined at 20 U.S.C. § 1401(3).

<sup>2</sup> Local Educational Agency is defined at 20 U.S.C. § 1401(19).

5. Just prior to the Student's enrollment, the Student received an Individualized Education Program (IEP) from a prior LEA. P-2. That IEP was not the Student's first IEP. See S-1. When the IEP was developed, the Student had been identified by the prior LEA as a child with an Intellectual Disability and Other Health Impairment (OHI). The OHI determination was based on an Attention Deficit Hyperactivity Disorder (ADHD) diagnosis and symptoms thereof. P-2.
6. The prior LEA's IEP included goals for math computation, math concepts and applications, and reading. The IEP provided specially designed instruction (SDI).<sup>3</sup> P-2. The prior LEA's IEP offered the Student a supplemental learning support placement.<sup>4</sup> P-2 at 22-25.
7. While the prior LEA's IEP does not include Occupational Therapy (OT) as a related service, the parties agree that consultative OT was part of the prior LEA's IEP. *Passim*.
8. Upon enrollment in the District, the Student was placed in a supplemental Life Skills Support program with consultative OT. See S-1.
9. Shortly after the Student's enrollment in the District, the District obtained the Parent's consent to reevaluate the Student (the 2021 RR). S-1.
10. The 2021 RR included medical information provided by the family. This included medical diagnoses of ADHD, Oppositional Defiant Disorder (ODD), Generalized Anxiety Disorder, Learning Disorder, Communication Disorder, and Enuresis. The family also provided information about the Student's medications and the Student's prescription for (but refusal to wear) glasses. S-1 at 1-2.

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<sup>3</sup> The appropriateness of the goals and SDI in the prior LEA's IEP is not at issue in this case, and so I forego a detailed description of the special education that the Student would have received in the prior LEA.

<sup>4</sup> A different section of the IEP describes the Student's placement as a "supplemental full time learning support" placement. P-2 at 12. There is no such thing. In context, this was an obvious error. Learning support is a type of special education placement. "Supplemental" and "full time" describe the amount of time that a child spends receiving instruction from special education personnel. In a supplemental program, students receive special education for more than 20% but less than 80% of the school day. In a full time program, students receive special education for 80% of the school day or more. The "Educational Placement" section of the IEP listed the Student's placement as supplemental learning support. P-2 at 22-23. The "PennData Reporting" section of the IEP calculated the amount of time that the Student would spend inside regular education classrooms at 35% of the school day (consistent with a supplemental placement). P-2 at 24-25.

11. As part of the 2021 RR, the District obtained and reviewed prior evaluations/reevaluations of the Student. Those included reevaluation reports from the prior LEA, conducted in 2017, 2018, and 2019. The 2017 and 2019 evaluations were briefly summarized in the 2021 RR. S-1 at 3-4.<sup>5</sup>
12. As part of the 2021 RR, the District solicited parental input, and included the Parent's responses to a questionnaire. S-1 at 4-5.
13. The 2021 RR reported the Student's scores on a WISC-V and WIAT-III that were completed in 2018.<sup>6</sup> The Student's scores on the WISC-V resulted in a standard score of 55 for the Student's "Full Scale IQ" with all other composite scores in the same statistical range. S-1 at 5-6. The Student's scores on the WIAT-III found that the Student's academic achievement was in the "below average" range across all composite scores with almost no variation in sub-tests. S-1 at 6.
14. The 2021 RR reported a summary of a prior administration of the Autism Spectrum Rating Scales (ASRS). It is not clear when the ASRS was administered but, in context, it appears to be connected to the 2018 testing. This report noted a discrepancy between teachers who rated the Student and the Parent's ratings. Teachers rated the Student in the "slightly elevated" range, suggesting a "slight" concern about behaviors associated with Autism. The Parent rated the Student in the "very elevated" range, representing "significant" concerns about Autism. S-1 at 6.
15. The 2021 RR reported the Student's progress towards IEP goals. The Student had not mastered IEP goals at that time. See S-1 at 6-9.
16. The 2021 RR included narrative input from all of the Student's teachers, recommendations from those teachers, and an observations from the District's School Psychologist obtained while testing the Student. S-1 at 9-13.
17. The 2021 RR included an OT screening by an Occupational Therapist. The Occupational Therapist concluded, based on the results of the screening, that additional testing was not required an that school-based OT was not necessary. The Occupational Therapist did, however,

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<sup>5</sup> A complete copy of the 2019 RR is in evidence at P-1.

<sup>6</sup> The WISC-V (Wechsler Intelligence Scale for Children, Fifth Edition) is a standardized, normative intelligence test. The WIAT-III (Wechsler Individual Achievement Test, Third Edition) is a standardized, normative test of academic achievement.

recommend movement breaks and physical activity to help the Student self-regulate. S-1 at 15-16.

18. The 2021 RR included a new administration of the WISC-V. However, this testing was not completed under standardized conditions due to COVID-19 safety protocols in place at the time. Additionally, the School Psychologist noted that the Student's behavior during the testing interfered with the test itself (in general, the Student did not attend to the testing – see S-1 at 11-12). Recognizing these factors, the School Psychologist wrote, "In light of the behaviors observed, scores will be reported; however, analysis will be withheld because of the questionable validity of these results." S-1 at 16.
19. The School Psychologist's words of caution notwithstanding, the Student's composite scores on the WISC-V, as a whole, were not statistically different from the 2018 administration of the same assessment. S-1 at 16-18.
20. The 2021 RR included a new administration of the WIAT-4. The School Psychologist noted some initial reluctance from the Student during the testing, but explained how those issues were addressed and resolved. The School Psychologist determined that the WIAT-4 results were valid for interpretation. See S-1 at 18-19.
21. The Student's scores on the 2021 WIAT-4 were substantively identical to the Student's scores on the same assessment in 2018. S-21.
22. The 2021 RR included an administration of the Adaptive Behavior Assessment System, 3<sup>rd</sup> Edition (ABAS-3). The ABAS-3 is a rating scale completed by the Parent and the Student's Special Education Teacher that assesses the Student's ability to "cope with common life demands" and "meet standards of personal independence that [are] expected of someone in [the Student's] age group." S-1 at 21.
23. The School Psychologist noted differences and similarities between the Parent and Special Education Teacher's ratings on the ABAS-3. Generally, both placed the Student's abilities below that of same-age peers, and both were similar in terms of the Student's social skills. The Parent's ratings, however, showed greater needs than the Special Education Teacher's ratings in terms of the Student's ability to function within the home or school communities, respectively. See S-1 at 23-24.

24. The 2021 RR included an administration of the Behavior Assessment System for Children, Third Edition (BASC-3). The BASC-3 is a wide-ranging measure of the Student's behaviors as observed by different raters. As with the ABAS-3, the Parent and the Special Education Teacher completed the BASC-3. S-1 at 24.
25. The BASC-3 ratings from the Parent and Special Education Teacher were similar to each other. The BASC-3 generates composite scores for Externalizing Problems, Internalizing Problems, and Adaptive Skills for both parent and teacher raters. The Parent and Special Education Teacher's ratings produced similar composite scores. For Externalizing Problems, both were in the "clinically significant" range. For Internalizing problems, the Teacher's rating was in the "average" range while the Parent's rating was in the "at risk" range. However, the Parent's rating produced a composite score of 60 (the very start of the "at risk" range) and the Teacher produced a composite score of 54 (near the end of the "average" range). For Adaptive Skills, both rated the Student in the "clinically significant" range. S-1 at 24-30.
26. The School Psychologist noted an F Index caution for the Special Education Teacher's ratings and a Consistency Index caution for the Parent's ratings on the BASC-3. An F Index caution indicates that the rater may have viewed the Student's behaviors too negatively. A Consistency Index caution indicates that different ratings by the same rater are inconsistent with each other. S-1 at 24.
27. The School Psychologist interpreted the results of the BASC-3 with appropriate caution and provided her analysis of the BASC-3 results. That analysis was detailed and nuanced, highlighting similarities and differences between the raters, and underscoring problems that both raters observed. The School Psychologist's analysis was particularly thoughtful regarding the assessment of Student's adaptive skills. There, the School Psychologist not only broke down how the raters were similar and different but also presented a clear picture of what adaptive skills needed immediate attention (as found by the BASC-3). That information flows from the BASC-3 itself, but is not always provided in such a clear, layman-friendly format. S-1 at 24-30.
28. The School Psychologist concluded that the Student's IDEA eligibility was unchanged. The Student still qualified for special education as a child with an Intellectual Disability and OHI. S-1 at 30-31.
29. The 2021 RR included recommendations from the School Psychologist to the Student's IEP team. Relying on the available information, the

School Psychologist concluded that the Student's functional skills in the school setting were below average, but that those functional skills were not the Student's primary need. Rather, the School Psychologist recommended a focus on the Student's academics and behavioral needs. The School Psychologist also adopted the recommendations from the Occupational Therapist (that the Student would benefit from activity breaks but did not require school-based OT). S-1 at 34.

- 30. The 2021 RR was completed on May 10, 2021. S-1.
- 31. For context, I note that the 2021 RR was used to develop a new IEP for the Student.<sup>7</sup>

### **The 2021-22 School Year**

- 32. On April 19, 2022, the Student's IEP team reconvened and drafted an IEP for the Student (the 2022 IEP).<sup>8</sup> The Student was still attending the District's supplemental Life Skills Support program and, by the date of the meeting, had missed 24 days of school (19 of those excused) with an additional seven late arrivals. These absences interfered with the District's ability to monitor the Student's progress toward IEP goals. P-5 at 7-11.
- 33. The 2022 IEP included two math goals and two reading goals. While there were no behavioral goals, many of the program modifications and SDI were behavioral in nature. Similarly, while the IEP provided no OT, the IEP provided SDI to address the Student's handwriting.<sup>9</sup> P-5.
- 34. The 2022 IEP represented a change in placement for the Student. Previously, the Student was placed in a supplemental Life Skills Support program. The 2022 IEP changed the Student's placement to a

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<sup>7</sup> There is no explicit stipulation as to this point, but there is no dispute about it either. An IEP and Notice of Recommended Educational Placement were issued after the 2021 RR. The parties did not make either of those documents part of the record of this hearing. See, NT at 200. No issues concerning the appropriateness of any of the Student's IEPs are raised in this matter. Findings concerning the content of prior IEPs are provided above only for context and background.

<sup>8</sup> On the record of this case, it is not possible to tell if the 2022 IEP is a new, annual IEP, an update to an existing IEP, or something else. Given the narrow issue presented, the distinction does not make a difference.

<sup>9</sup> It bears repeating that the appropriateness of the IEPs is not an issue in this case. Information about IEPs is provided for background and context only. Nothing herein is an endorsement or critique of any of the Student's IEPs.

supplemental Learning Support and Life Skills program. See P-5 at 35.<sup>10</sup>

35. Around the same time as the 2022 IEP, the District contracted with a third party to complete a Functional Behavioral Assessment of the Student (the 2022 FBA). S-2.
36. To complete the 2022 FBA, a Board Certified Behavior Analyst observed the Student in school for eight hours total, spread across several days between April 11, 2022 and May 6, 2022. PSSAs were administered in the District for some of that time. S-2.
37. The 2022 FBA targeted two behaviors of concern: "Vocal Disruption" and "Refusal/Protest." Both of those behaviors were operationally defined in the FBA itself and were closely tracked during the observations. For both behaviors, the BCBA was able to identify antecedences and triggering events, hypothesize their functions, make recommendations for replacement behaviors, propose strategies for reinforcing replacement behaviors, and propose strategies for reducing the target behaviors. S-2.
38. The 2022 FBA was reduced to writing and, while the document is not dated, there is no dispute that the parties received the 2022 FBA writeup in May 2022. S-2.
39. The 2022 FBA was the most detailed, comprehensive assessment of the Student's behaviors up to that point in time. However, descriptions of the Student's behaviors in the 2022 FBA are consistent with prior standardized assessments of the Student's behavior and prior unstandardized documentation of the Student's behavior. *C/f S-2, S-1, NT passim.*

### **The 2022-23 School Year**

40. From enrollment through the 2021-22 school year, the Student attended one of the District's elementary schools. Starting with the 2022-23 school year, the Student attended one of the District's middle schools. *Passim, see e.g.* S-3.

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<sup>10</sup> In context, it may be that the parties intended for the Student to complete the 2021-22 school year in the Life Skills program and then start the 2022-23 school year in the Learning Support program. That issue is not before me, but the context may explain an otherwise unusual placement description.

41. In February 2023, the parties agreed to reevaluate the Student. Both parties were concerned about the Student's propensity to get into fights in school and in the community. The Student's emotional state was a primary concern for the Parent, who believed that the Student's aggression might be linked to the Student's medications. *See, e.g.* NT 54, 63, 106-107, 129-130, 155.
42. The District reevaluated the Student and completed a reevaluation report on March 27, 2023 (the 2023 RR). S-3.
43. By the time of the 2023 RR, the Student was attending a supplemental Learning Support program with small group instruction for English Language Arts (ELA), Reading, and Math. According to the 2023 RR, the Student was receiving academic supports and social skills instruction in a special education classroom. S-3 at 2.
44. The 2023 RR begins with a summary of the information reviewed for the assessment. That section includes a brief, accurate summary of the Student's medical and educational history, but also says this under an "Adaptive Behavior" heading: "There are significant adaptive concerns. [Student] needs support navigating the school environment and [Student's] schedule." S-3 at 2.
45. Under different headings in the same section of the 2023 RR, the report notes that the Student had been absent 16.5 days that school year (10.5 excused and 6 unexcused) and had received 12 discipline referrals (10 for inappropriate behavior and two for insubordination). S-3 at 3.
46. The 2023 RR included the results of the 2021 WISC-V, WIAT-4, ABAS-3, and BASC-3. S-3 at 3-8.
47. The 2023 RR included a report of the Student's progress towards current IEP goals. Narrative reports in this section describe the Student as improving while data reported in this section showed that the Student's progress was inconsistent, and that the Student did not master any goal except for some sub-parts of a phonics goal. The same section of the 2023 RR also indicates that the Student's attendance interfered with the District's data collection. S-3 at 8-13.
48. The 2023 RR included behavioral data collected in connection to the Student's Positive Behavior Support Plan (PBSP). Generally, data reported in this section along with narrative comments indicates that the Student had difficulty raising a hand (instead of calling out) and

that the Student's "tendency to be argumentative and disrespectful has severely impacted [Student's] ability to learn and receive appropriate help." S-3 at 13-14.

49. The 2023 RR included a report of the Student's state and local assessments, and report card grades. Grades were variable, but mostly in the 70s by the second marking period (the latest marking period reported in the RR). [redacted] grade PSSA scores were below basic. S-3 at 14.
50. The 2023 RR included a classroom observation from March 14, 2023, by the School Psychologist. The observation is reported as a narrative. The narrative is replete with examples of teachers redirecting the Student when the Student was off task. S-3 at 14-15.
51. The 2023 RR included input from the Student's social skills instructor. At the time, the Student was receiving 60 minutes of small group social skills instruction per six-day cycle. While no data is reported, the teacher commented that the Student would engage with the social skills program but was off-task, distractable, and distracting to others when not interested in the program. See S-3 at 15.
52. The 2023 RR included input from the Student's Social Studies, ELA, Reading, Science, and Math teachers. As a whole, the teachers reported that the Student would participate when interested and motivated, but was frequently defiant, argumentative, off-task, off-topic, and did not complete assignments. S-3 at 15-19.
53. The 2023 RR included a new administration of the WISC-V under standard conditions. The Student's scores on the 2023 WISC-V were not statistically different from the Student's scores on the same test in 2018 and 2021. The Student's FSIQ was found to be 61, with no significant variability in composite scores. The standard score of 61 is than the 55 obtained in 2018 in a literal sense, but not statistically. On the WISC-V, 61 and 55 fall into the same statistical range, same qualitative descriptor, and overlap in the 95% confidence interval. See S-3 at 21.
54. The 2023 RR included a new administration of the ABAS-3. This time, two teachers rated the Student together, and the Parent also rated the Student. As in the 2021 administration, there were some differences between the Parent's rating and the teachers' rating, but those were somewhat fewer and smaller, and the teachers rated a somewhat

higher level of need as compared to the teacher's rating in 2021. See S-3 at 25-27.

55. Summarizing the 2023 ABAS-3, the School Psychologist wrote, "adaptive functioning range[ed] from Extremely Low to Low range. Given [Student's] subaverage cognitive and adaptive functioning, [Student] continues to qualify as a student with an intellectual disability." S-23 at 27.
56. The 2023 RR concluded that the Student remained eligible for special education as a child with an Intellectual Disability and OHI. S-23 at 27.
57. The 2023 RR included a section for recommendations to the IEP team.<sup>11</sup> In total, the 2023 RR included the following in that section:

[Student] continues to qualify for Special Education services. Based on the findings of the present evaluation, a supplemental level of learning support services is recommended. Additionally, the team added the following supports: morning check ins and for the remainder of the 22-23 school year[.] [Student] will be Pass/Fail for Science and Social Studies. For the 23-24 school year, the team recommends adding small group instruction for Science and Social Studies.

58. On April 13, 2023, the Student's IEP team reconvened. The District drafted an IEP that incorporated the 2023 RR. S-4. The substantive content of that IEP is not at issue in this case.
59. On August 29, 2023, the Parents, via legal counsel, requested an IEE at the District's expense. P-27.
60. On September 7, 2023, the District filed a due process complaint initiating these proceedings. *Complaint*.

### **Witness Credibility**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and

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<sup>11</sup> Arguably, some of the teachers' comments in the 2023 RR can be construed as recommendations as well but, as discussed below, cannot be construed as the sort of actionable recommendations that the IDEA requires.

persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) (“[Courts] must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.”). *See also, generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly. To the whatever extent that witnesses contradicted each other (hardly at all in this case), the differences are attributable to genuine differences in recollection or opinion. Moreover, in this case, no material facts were truly in dispute. The parties’ dispute flows from differences in how they view a set of undisputed facts. As a result, the outcome of this case in no way hinges on a credibility determination.

## **Applicable Laws**

### **The Burden of Proof**

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), *citing Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

In this case, the District is the party seeking relief and must bear the burden of persuasion.<sup>12</sup>

### **Evaluation Criteria**

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<sup>12</sup> From a different point of view, the Parent is seeking relief (an IEE at public expense). But the IDEA is clear that the District must prove that its evaluation was appropriate. The burden, therefore, is on the District. *See* 34 C.F.R. § 300.502(b)(4).

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

In substance, evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP for the child to receive a free appropriate public education (FAPE). 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that assessments and other evaluation materials are (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments. 20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

### ***Independent Educational Evaluation at Public Expense***

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

### **Discussion**

The 2023 RR does not satisfy the IDEA's requirements for reevaluations. Everything in the 2023 RR is appropriate under IDEA standards, but the 2023 RR is missing a key component: it fails to make actionable recommendations to the IEP team. Under the circumstances of this case, such recommendations were essential.

The core of the District's argument is that it knows the Student well, has a good handle on the Student's needs, and those needs have been consistent over a long period of time. I agree with that argument. The history of the Student's evaluations paints a clear, unchanging picture of a child with significant academic and behavioral needs. However, information about what a child's needs are, and recommendations about how to address those needs, are different things.

The substantive appropriateness of the special education that the District provided to the Student is not an issue in this case. Even so, every reevaluation included information about the Student's academics, behaviors, and progress towards IEP goals. By the time of the 2023 RR, every teacher was reporting academic and behavioral problems, and progress towards IEP and PBSP goals was variable at best. The Student's needs were clear, but it was not clear that the District's program was working. The whole point of the 2023 RR, therefore, was to provide actionable recommendations to the IEP team, so that the IEP team could craft an appropriate program.

The IDEA itself is unequivocal regarding the ultimate function of evaluations, which are the same for reevaluations. All evaluations serve two functions: First, the evaluation must determine whether the student is a child with a disability. 20 U.S.C. § 1414(b)(2)(A)(i). Second, all evaluations must "assist in determining ... the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities." 20 U.S.C. § 1415(b)(2)(A)(ii).

Regarding that second requirement (IEP content), reevaluations must determine if additional data is necessary to determine “whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.” 20 U.S.C. § 1414(c)(1)(B)(iv). Applied to this case, the District determined that additional data was needed in the 2023 RR. The purpose of collecting that data (new administrations of the WISC-V and ABAS-3) was to enable informed IEP team decision-making. The IDEA’s federal implementing regulations specify that those tools must be used “provide relevant information that directly assists persons in determining the educational needs of the child are provided.” 34 C.F.R. § 300.304. In practice, the “persons” who endure that the “educational needs of the child are provided” is the IEP team. An evaluation that does not send sufficient, actionable recommendations to the IEP team falls short of this standard.

Substantively, the 2023 RR gathered information concerning the Student’s strengths, needs, and eligibility for special education. There is a disconnect between the type of new evaluations that the District conducted and the concerns that prompted the 2023 RR. At the time, the Parent’s primary concerns were behavioral and emotional. The 2023 RR had very little new testing in that regard, made no reference to the 2022 FBA, and did not include a new FBA or BASC. However, the 2023 RR included significant behavioral information both from teacher input and new observations. That, in combination with prior testing and the District’s experience with the Student – captured in the 2023 RR itself – provided robust information about the Student’s needs.

Unfortunately, the 2023 RR accomplished only half of its task. Through both collection and reporting of existing information, and through new observations and testing, the District collected data as required by the IDEA. But the IDEA does not permit the District to pass that data off to the IEP team and call it a day. Rather, as part of the reevaluation, the IDEA requires the District to analyze the data that it collects and make recommendations to the IEP team. Those recommendations must enable the IEP team to determine how the Student’s IEP should be changed (if at all) so that the Student derives meaningful educational benefit from the IEP.

None of the above suggests that IEP teams are bound to recommendations in reevaluations. Rather, reevaluations are a starting point for IEP team discussions. Under the IDEA, that starting point must include recommendations to help the IEP team craft a special education program. The recommendations in the 2023 IEP fall short of that standard.

The recommendations in the 2023 RR are quoted above. I do not judge those recommendations on the amount of paper they fill, but on their substantive content. In substance, nearly all the recommendations are not recommendations, but rather are statements of actions that had already been taken. Only a sentence is truly a recommendation in substance: “For the 23-24 school year, the team recommends adding small group instruction for Science and Social Studies.” It is not clear from the 2023 RR itself what “the team” is, or how that recommendation was derived, or what special education the Student should receive in Science and Social Studies, if any. Nothing in the 2023 RR gives guidance to the IEP team about what type or amount of special education (SDI, modifications, and/or related services) the Student should receive, either in those classes or in general. The “recommendation” is a description of a placement. A placement, by itself, is not special education. Special education is the services that the District will provide to the Student within a placement. See, e.g. 20 U.S.C. § 1401(29).

In sum, the 2023 RR collects and recites robust information about the Student’s educational needs – both academic and behavioral. In contrast, the 2023 RR is nearly silent about what the IEP team should do to address those needs. As a result, the 2023 RR falls short of IDEA standards and is inappropriate for that reason.

Having found that the 2023 RR was inappropriate, I turn to remedies and, in doing so, consider the Parent’s arguments. The Parent argues that the 2023 RR failed to assess all of the Student’s suspected disabilities. Specifically, the Parent argues that a new FBA, an assessment of the Student’s executive functioning and attention, new academic achievement testing, an OT assessment, and a speech/language assessment were all necessary-but-missing components of the 2023 RR. The appropriate remedies, the Parent argues, are independent neuropsychological, speech/language, and OT evaluations, and an independent FBA.<sup>13</sup>

Above, I agree with the District’s general proposition that it had a good understanding of the Student’s needs. I found that the 2023 RR was inappropriate for its failure to turn the District’s knowledge into something useful for the IEP team. But, under current case law, an evaluation’s appropriateness is binary: an evaluation is either appropriate or it is not; and the proper remedy for an inappropriate evaluation is an IEE at public expense. See, e.g. *W. Chester Area Sch. Dist. v. G.D.*, No. 16-4471, 2017 U.S. Dist. LEXIS 10132 (E.D. Pa. Jan. 25, 2017).

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<sup>13</sup> Regarding the FBA, the Parent argues that the 2022 FBA was inappropriate and outdated by the time of the 2023 RR, and that the 2023 RR fails to reference the 2022 FBA at all.

The Parent is entitled to an IEE at public expense because the 2023 RR was inappropriate. The question, therefore, shifts to the specific IEEs that the Parent demands. There is some ambiguity as to which party must prove that the IEEs in question are, or are not, an appropriate remedy but, in this case, that burden is not outcome determinative because the evidence does not rest in equipoise. *See Schaffer v. Weast, supra*. Evidence that the Student has significant educational needs across academic and behavioral domains is beyond preponderant. An independent neuropsychological evaluation and an independent FBA will yield the recommendations that are missing from the 2023 RR. The record is less robust in terms of OT and speech/language assessments. However, the Parent correctly argues that sensory needs were noted in the 2021 evaluation and communication needs were noted in the 2023 RR (especially in the ABAS-3). These factors constitute a preponderance of evidence that independent OT and speech/language evaluations will examine areas of need that were known to the District, but for which no recommendations were made.

The Parent is awarded independent neuropsychological, speech/language, and OT evaluations, and an independent FBA. That award comes with some limitations that are imposed by the IDEA's implementing regulations. Those regulations establish "agency criteria." 34 C.F.R. § 300.502(e)(1). The District has no obligation to fund an IEE that does not satisfy agency criteria. 34 C.F.R. § 200.502(b)(2)(ii). The District may, therefore, provide a list of qualified evaluators for the Parent's consideration. The Parent need not choose from that list and is free to select evaluators unilaterally. If the Parent chooses an evaluator that the District has not already qualified, the parties must ensure that the evaluator meets agency criteria as defined by the regulation before the evaluation starts. The District may not, however, use a qualification process to delay the IEEs, and may not disqualify an evaluator for failing to meet qualifications beyond "agency criteria" as defined at 34 C.F.R. § 300.502(e)(1).

### **Summary and Conclusions**

At the time of the 2023 RR, the District had significant information about the Student's needs. The District also correctly determined that more information was needed and conducted new testing. The District failed, however, to use the information that it had and the new information that it generated to make recommendations to the IEP team. Such recommendations were necessary so that the team could determine what changes to the Student's special education, if any, were necessary to ensure the provision of a FAPE to the Student. Unfortunately, the 2023 RR provides no recommendations about what special education the Student should

receive beyond placement itself. This falls short of IDEA mandates for reevaluations, set forth above.

The Parent is entitled to an IEE at public expense because the 2023 RR fell short of IDEA mandates. There is preponderant evidence in the record that the specific IEEs that the Parents demand are appropriate remedies. The Parent may unilaterally select the evaluators, but the evaluators must satisfy "agency criteria," as described above.

An appropriate order follows.

### **ORDER**

Now, November 17, 2023, it is hereby **ORDERED** as follows:

1. The District did not prove that the Reevaluation Report of March 27, 2023, was appropriate.
2. The Parent is awarded independent neuropsychological, speech/language, and occupational therapy evaluations, and an independent functional behavioral assessment.
3. The Parent may unilaterally select the evaluators for the awarded assessments, provided that the evaluators satisfy agency criteria, as described above.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER