

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
Final Decision and Order

HEARING

ODR File Number:

21895-18-19

Child's Name:

C. C.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

Daniel Cooper Esq.
Law Offices of Kenneth S. Cooper
45 E. City Avenue, #400
Bala Cynwyd, PA 19004

Local Education Agency:

Owen J. Roberts School District
901 Ridge Road
Pottstown, PA 19465

Counsel for the LEA

Sharon Montanye Esq.
Sweet, Stevens, Katz & Williams
PO Box 5069, 331 Butler Avenue
New Britain, PA 18901

Hearing Officer:

Charles Jelley Esq.

Date of Decision:

10/14/2019

BACKGROUND AND PROCEDURAL HISTORY

The Student is a rising ninth grader who resides with the Parents in the School District (District).¹ In September 2017, the District completed an evaluation of the Student's then known unique circumstance. The Parents disagreed with the results of the evaluation and also disagreed with the District's initial offer of a free appropriate public education (FAPE) as defined in the Individuals with Disabilities Education Act (IDEA). In 2019 the Parents requested an independent educational evaluation (IEE) at public expense and the District refused to fund the IEE. In the interim between the Parents' 2017 disagreement over the evaluation and the offer of a FAPE, the Parents filed two different Office of Civil Rights (OCR) complaints. The first OCR complaint was resolved in May 2018, when OCR and the District entered into an OCR Resolution Agreement. As of this date, the second OCR complaint is still under investigation. The District's due process Complaint, at issue here, is related to the Parents' due process complaint, also currently before this hearing officer, at ODR FILE #21838-18-19 KE. Here the Parents contend the District's evaluation of the Student is insufficient, inappropriate and otherwise inadequate. The District, on the other hand, maintains that it

¹ The Parents' claims arise under 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1-300. 818. The applicable Pennsylvania regulations, implementing the IDEA are set forth in 22 Pa. Code §§ 14.101-14.163 (Chapter 14). The Decision Due Date was extended for a good cause, upon written motion of the Parties. References to the record throughout this decision will be to the Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. Due to scheduling conflicts at times witnesses were taken out of order. In distilling the record and before reaching this Decision, due to the manner in which the Parents described the events at issue, across multiple sessions, I found it necessary to review all of the Parents' testimony spanning several sessions. Therefore, I will depart from my usual manner of citation to the record, I will now use N.T. *passim* followed by the witnesses' affiliation, *i.e.* Parents or District, for all subsequent record citations.

complied with all of the IDEA and Chapter 14 reevaluation requirements. For all the reasons set forth below, after reviewing the testimonial and the non-testimonial evidence, I now agree with the District's assertions, the Parents' request is denied, an appropriate Order in favor of the District follows.²

ISSUE

1. Whether the District's evaluation of Student was appropriate and compliant with the requirements in the IDEA and Chapter 14?
2. If the District's evaluation was not appropriate, should the District be ordered to fund an IEE at Public Expense?

FINDINGS OF FACT

The Student's Medical Condition and The District's Provision Of School Health Services

1. The Student has a platelet functioning disorder. The disorder is usually manifested by [symptoms redacted]. The Student's [medical specialty] physician recommended and the District agreed, if [given certain situations] normal first aid would be required (P-1, N.T. *passim*, Parents).
2. In the event the Student should sustain a significant trauma or a significant head trauma, the Student should be transported to the hospital (P-1, N.T. *passim*, Parents).

² After carefully considering the entire testimonial record, including the non-testimonial, extrinsic evidence in the record, in its entirety, and after distilling the record and untangling each Parties' legal argument, I now find that I can draw inferences, make Findings of Fact and Conclusions of Law. Consequently, mindful that this case is related to ODR FILE #21838-18-19 KE. I do not reference portions of the record that are not relevant to the IEE issue(s) in dispute.

3. If [a particular symptom] persists for longer than 15-20 minutes, despite [intervention], the Student's [medical specialty] physician recommended and the District agreed the school nurse would call Children's Hospital of Philadelphia (CHOPs) [specialty] team and call first responders at 911 (P-1, N.T. *passim*, Parents).
4. The Student is currently receiving medical care for a condition related to [redacted] disorder. Since the Student cannot always identify the [physical condition] the Student should be reminded [redacted]. (P-2). CHOP's staff also recommended that the Student [redacted]. (N.T. *passim* Parents).
5. The District and the Parents agree the [medical conditions] are disabilities within the meaning of Section 504 of the Rehabilitation Act and "other health impairments" within the meaning of the IDEA (N.T. *passim* Parents and District).
6. On or about December 21, 2016, the District offered and the Parents agreed to a Section 504 agreement (P-3). The Section 504 Agreement listed 17 accommodations, including limited consultative occupational therapy (OT) support (P-3, N.T. *passim* Parents and District).
7. Along with the Section 504 Agreement, the Parents and the District, in the past, agreed to a one-page Individual Health Plan. The Health Plan noted the Student's medical conditions and includes suggested responses, [redacted]. (P-4, P-5, N.T. *passim*, Mother).
8. [redacted]

The Student Early and Current Educational History

1. On May 8, 2016, and again on June 8, 2016, the Parents consented to a limited multidisciplinary evaluation provided the District would administer limited assessment protocols of working memory, processing speed,

written expression, executive functioning and occupational therapy (S-33 p.131). The Parents expressed specific concerns that the Student's handwriting, written expression, executing functioning were not consistent with the Student's overall ability (S-33 p.137).

2. On June 13, 2016, the District issued prior written notice for an initial evaluation and a request for consent (S-33 pp.133-133).
3. On October 25, 2016, the District provided the Parents with an evaluation report (ER) (S-33 pp.131-167).
4. The ER included Parental input. The ER noted the Student liked school, had multiple medical concerns, [redacted] and was interested in math. The observation of the Student, in a 5th-grade social studies class, described the interactions with peers and adults was appropriate and positive. Staff input noted the Student wanted to succeed, was well-liked by peers, was quick to grasp math concepts, and was polite. The Algebra teacher stated that while the Student performs [well], at the same time, the Student displays a tendency to forget assignments and materials (S-33 pp.131-167, N.T. *passim* Parents and District).
5. Previous normative based ability testing, from 2013, reported the Student earned a full-scale intelligence quotient of 138, in the "Very Superior" range. During the instant assessment using the Processing Speed Index from the Wechsler Intelligence Scale for Children Fifth Edition (WISC-V), the Student earned a standard score (SS) of 100 at the Average range (S-33 pp.131-167, N.T. *passim* District).
6. The evaluation team looking back at achievement data, from 2013, on the Woodcock-Johnston Test of Academic Achievement-III noted the Student earned standard scores (SS) ranging from 112 on Math Fluency in the "High Average" range, to a SS of 135 in Math Calculations Skills, at the "Very Superior" range (S-33 pp.131-167, N.T. *passim* District).

7. In September 2016, on the Wechsler Individual Achievement Test-Third Edition (WIAT-III), Written Expression subtest the Student earned SS ranging from 122 on Sentence Combining at the "Superior" range to a SS of 127, on Sentence Composition also at the "Superior" range (S-33 pp.131-167, N.T. *passim* District).
8. The Student's then-current Fontas and Pinnell reading scores indicated a score of 96% accuracy, with a reading speed of 104 words per minute. The Student's everyday math unit assessment scores ranged from a high of 98% to a low of 93% (S-33 pp.131-167, N.T. *passim* District).
9. The Student's Pennsylvania System of School Assessment (PSSA) scores, on a District-wide standardized test administered to public schools in grades 3-8, in Language Arts and Math scores were in the "Advanced" levels (S-33 pp.131-167, N.T. *passim* District).
10. To assess the Student's executive functioning skills, the Student's mother and teacher completed the Behavior Rating Inventory of Executive Functioning (BRIEF). The BRIEF is a global measure of the neurologically-based skills involving mental control and self-regulation. The Student's Global Executive Composite score of 62 was within the expected range. Likewise, the Student's Behavioral Regulation Index of 48 and Metacognition Index scores of 68 were also in the expected normal limits. The mother's ratings revealed no current executive functioning concerns. All BRIEF scores were determined to be valid and no validity considerations were noted (S-33, N.T. *passim* District).
11. The OT assessment included the Evaluation Tool Of Children's' Handwriting (ETCH-Manuscript). The Student's ETCH-Manuscript scores revealed that for all types of writing tasks, the Student writes with an average of 83% work legibility. Letter formation at times was a noted concern. Clinical Observation during the ETCH-Manuscript noted adequate

hand coordination. On the Development Test of Visual Perception Second Edition (DTVP-2), consisting of a battery of eight (8) measures of different abilities, the Student earned "Above Average" scores (S-33 pp.131-167, N.T. *passim* District).

12. The Student's Sensory needs were assessed using the Sensory Processing Measure (SPM) – Main Classroom Form with input from the music and physical education teacher. The SPM measures suggest that overall, the Student uses sensory input to respond in functional ways in the school. The SPM noted the Student always becomes distracted by visual stimuli like pictures and other children. The SPM further noted mild to moderate difficulties with motor planning, sequencing, and completion of multiple-step tasks. The testing also noted the Student also demonstrates decreased ideation, and/or the ability to construct an original ideal. The OT noted the Student always shows poor organization of material in, or around the Student's desk (S-33 pp.131-167, N.T. *passim* District).
13. The evaluation team, after reviewing the then existing data, concluded that the Student was not otherwise eligible for IDEA services; but could, however, benefit from OT support through a Section 504 Agreement (S-33 pp.131-167).
14. On October 25, 2016, the District issued prior written notice indicating the Student was not otherwise eligible for IDEA services. Although the Parents acknowledged receipt of the Notice and disapproved the proposed action, they did not file a due process complaint, a state department of education complaint, or a complaint to the Office of Civil Rights (OCR) (S-33 pp.168-170, N.T. *passim* District and Parents).
15. On December 21, 2016, the District offered and the Parents accepted a Section 504 Agreement with OT services (S-33 pp.173-175). While the record is unclear, it appears that the Parties never reached any type of

agreement on the essential elements of the individual health plan (N.T. *passim* District and Parents).

16. On February 27, 2017, the nurse emailed the mother about revisions to the Student's health plan (P-15, P-16). The then-current health plan contained four individual topic sections, addressing the [protocols to address four medical conditions/concerns]. (P-16, N.T. *passim* Mother).
17. [One protocol] notation also required that [redacted], the nurse would call the Parents (P-16, N.T. *passim* Parents).
18. On or about March 2, 2017, the Student received treatment from medical staff at CHOPS for a concussion. The CHOPS letter to the school excused the Student from attending school and makes general recommendations about attendance, testing, workload reduction, note-taking, suggested regularly scheduled breaks and limited the Student's participation in physical education (P-11, N.T. *passim* Parents).
19. On March 17, 2017, the Parents provided the District with a short CHOP's note indicating that the Student had a normal cognitive exam, had a normal physical exam, experienced no physical symptoms after a full day at school of cognitive exertion and had no concussions symptoms with physical exertion (P-13, , N.T. *passim* Parents).
20. On April 13, 2017, the mother emailed the District as a follow-up to her verbal request for an evaluation regarding a suspected "other health impairment" (P-14). The mother expressed concerns about brain foginess, an emergency room visit and the loss of instructional time (P-14, N.T. *passim* Parents).
21. On April 10, 2017, the Parents emailed the District expressing concern about the Student's safety and medical history. The Parents were concerned that the substitute school nurse failed to follow the health plan recommendations related to [a disorder] when the Student had a second

concussion. Although the Student went on the scheduled field trip and attended [sports] practice, on the day of the second concussion, by the time the Student returned home, the Student was complaining about pain and swelling developed around one eye (P-20, N.T. *passim* Parents). As a result of the concussion, the Student received medical treatment at CHOPs (N.T. *passim* Parents).

22. Throughout the Spring 2017, the mother and the nurse reviewed and were not able to come to an agreement about updates to the Student's health plan (P-2-, P-21, P-22, N.T. *passim* Parents).

23. On May 11, 2017, the District learned that the Parents accepted in part and rejected in part the District's offer to conduct a comprehensive evaluation. Although the Parents checked the box indicating they wanted a due process hearing, they did not follow through on the request (S-33 pp.188-189, N.T. *passim* District and Parents).

24. On or about May 19, 2017, as part of an inpatient hospitalization, after suffering two concussions, the Student underwent a comprehensive inpatient medical evaluation, including diagnostic imaging of the brain, blood work, a medication review, and a global assessment of behavioral, emotional and social functioning. As part of the workup, the medical staff noted safety, emotional regulation, social, sensory, sleep and recurring tantrums in the home related to calming down after school, denial, refusals, or changes in routines were the primary concerns that caused the hospitalization. The CHOP's report further notes behavioral tantrums can last over an hour and are typically triggered by demands related to activities of daily living and/or hygiene. At times physical restraint is used in the home to manage the Student's emotional dysregulation. During the hospitalization the Student acted out and was restrained when, during a redirection to another activity, the mother took the Student's iPad. The inpatient behavioral observation noted the Student has difficulty

sustaining interactions and conversations. The CHOP's report notes the Student was not able to describe, terms like "sad," "happy," or "mad." The examiner further notes the Student displayed a flat affect, had decreased facial expressions, and when asked rhetorical questions, the Student would respond with concrete inaccurate answers rather than ask for additional information. All otherwise completed diagnostic imaging of the brain was negative for an intracranial mass, midline shift or mass effect. (P-23, N.T. *passim* Parents).

25. As part of the inpatient diagnostic workup, the staff used the Child Behavior Checklist (CBCL) and Teacher's Report Form (TRF) to gauge social and behavioral functioning. The Parents' CBCL ratings expressed concerns related to being anxious, depressed, social problems and rule-breaking related behaviors. The report seems to suggest the teacher's reported borderline concern for thought related problems (P-23, N.T. *passim* Parents).
26. Using comments based on [familial] history, and the Parents' responses to the Social Responsiveness Scale-2 School Age (SRS-2) along with the direct observation by the examiner the CHOP's staff concluded that the Student met criteria for a Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5) diagnosis as a person with high functioning autism spectrum disorder. Upon discharge, the CHOPS staff recommended community based behavioral supports like in-home applied behavioral analysis support, behavioral therapy, therapeutic support staff, and mobile therapy should be explored (P-28).
27. On May 20, 2017, the staff at CHOPs prepared a "To Whom It May Concern" document stating the Student was medically diagnosed with autism, placed on concussion precautions, which recommend that the Student not participate in recess. The document further indicates that the Student had not yet been evaluated by the Sports Medicine team and

thus had not yet been cleared of all concussion precautions. The "To Whom It May Concern" document then goes on to state that during the hospitalization, after suffering two concussions, the Student did not demonstrate headaches, dizziness, or other symptoms associated with a severe concussion. The note then states, "in order to provide [redacted] outlets for emotional stressors, [redacted] should be allowed to participate in recess." Then the note states that if at any time the Student does complain of concussion-related symptoms, like headaches or vision-related problems, the Student should rest. The statement then indicates further testing would be completed at the Concussion Clinic (P-24).

28. On or about May 21, 2017, the Director of the Trisomy 21 Program, after reviewing the diagnostic workup and upon completing her own exam, confirmed the findings in the Student's chart related to the autism diagnosis (P-25).

29. On or about May 24, 2017, during the school day, the Student suffered another- third- concussion (P-26, P-27, and P-25).

30. On May 26, 2017, the staff at CHOPs prepared another "To Whom It May Concern" note indicating the Student required one-on-one supervision with an aide in all unsupervised, unstructured settings, by an adult, in close proximity. Despite the third concussion, the Student was permitted to attend school; however, the Student's cognitive workload was restricted to passive listening with little to no cognitive workload. With less than two weeks remaining in the school year, the CHOPs staff recommended that non-essential work be eliminated and only work necessary to advance to the next year, be presented. The CHOP's staff note restricted the Student from gym class, recess and all field trips. Computer time was restricted to 30-minute intervals, followed by a 5-

minute break. The note also stated that the Student would need the following supports upon return to school:

- a. A hallway buddy to walk to all classes;
- b. Pre-printed teacher notes instead of note-taking;
- c. Books on tape to minimize reading;
- d. If reading was required, staff should enlarge all print to 18 point font;
- e. Verbal testing should be provided for all tests to advance to next grade; and,
- f. The Student should be permitted to take a ten minute break if Student complains of fatigue and a ten minute break every two hours (P-29, N.T. *passim* Parents).

31. On May 30, 2017, reacting to the Parents' request for an evaluation, the District issued prior written notice proposing to conduct a reevaluation. The Parents agreed to the evaluation on the condition that the District would not conduct cognitive or achievement testing as per CHOP's recommendation (S-33 p.181-183, N.T. *passim* District and Parents).

32. On or about May 31, 2017, the teaching staff and the Parents meet to discuss the Student's transition to the Middle school (P-33).

33. On June 2, 2017, CHOP staff prepared a note excusing the Student from school and directing that "Neuropsychological testing is not appropriate for a student who is being treated for a concussion." The note went on to repeat the academic work recommendations in the CHOP's May 26, 2017, "To Whom it May Concern" note (P-34, N.T. *passim* Parents).

34. In June 2017, the OT prepared a progress report addressing sensory and organizational concerns. The progress report notes that the Student continues to need visual and verbal organizational cues. The progress

report further notes sensory issues have not yet been noted in the school (P-36). Thereafter on June 7, 2017, the mother, in an email, stated that she was "extremely offended" by the OT's lack of communication and her failure to "capture the entirety of the severity of the [redacted] needs" (P-37).

35. The OT opined that based on data from the School Companion Sensory Profile -2, for children ages 3 to 14 years and 11 months old, the Student was eligible for OT for consultative OT services with the teaching staff for 15 minutes a month (S-33).

36. On or about June 19, 2017, the staff at CHOPs prepared a treatment protocol to address occurrences of "[medical emergency situation]." The treatment protocol notes the Student is at a high risk of a severe [redacted] reaction, which requires treatment [redacted]. (P-39, N.T. *passim* Parents).

37. On or about July 7, 2017, the District rejected the Parents' request for homebound instruction during the summer months (P-41).

38. On August 3, 2017, the District, at the Parent's request, completed the RR. The RR contains upwards of six pages of Parental input describing the Student's then-current medical conditions (S-33 pp.195-201).

39. The ER summarized the Student's progress and testing history from 2nd grade through the present, including but not limited to the Section 504 Agreement, the then-current medical conditions based on the "To Whom It May Concern" letters/notes, and the DSM-5 diagnosis of Autism. On June 5, 2017, the District psychologist observed the Student in a general education writing class (S-33).

40. The psychologist's direct observation of the Student notes the Student was on tasks and engaged in small group activities for the duration of observation. Teacher input noted numerous strengths, a positive attitude,

and stressed the Student was otherwise well behaved, well mannered, polite and cooperative in class (S-33, N.T. *passim* District).

41. The RR included a detailed summary of the Student's previous norm-based ability and achievement scores, which ranged from the "Superior" to "Very Superior" range (S-33, N.T. *passim* District).
42. The RR test summary noted WIAT and Woodcock-III achievement scores along with scores from a 2015 Receptive Expressive Social Communication Assessment-Elementary (RESCA-E Assessment 2015). Standard scores of 100 are considered average. The Student's WIAT and Woodcock-III SS ranged from a low of 88 to a high of 110; for the most part, taking into account the standard error of measurement, all of the Student's SS were in the "Average" range (S-33, N.T. *passim* District).
43. The ER included both teacher's and the mother's ratings on the Social Communication Inventory. Although the specific SS are not described, the speech therapist opined that due to the Student's in class social language difficulties in functional situations, the Student then displayed subtle social language deficits and behavioral concerns that rose to the level of IDEA eligibility for speech and language supports. The speech therapist, after reviewing the RESCA and the Social Communication scores, recommended the Student receive expressive and receptive social language supports (S-33, N.T. *passim* District).
44. The 2017 RR also included the results of the Autism Spectrum Rating Scale (ASRS). The ASRS is a rating scale designed to measure behaviors of children and youth ages 2 through 18, who display behaviors typically associated with an autism spectrum disorder. The mother's ASRS ratings indicated 10 "Very Elevated" scores, two "Elevated" scores and one "Slightly Elevated" score. The sixth-grade teachers reported 12 "Average" scores and one "Slightly Elevated" score (S-33, N.T. *passim* District).

45. On the Conners-Third Edition, an assessment tool designed to assess attention disorders, the teachers endorsed "Average" ratings on 18 subscales and one "Elevated" score for Peer Relations. The mother, on the other hand, endorsed "Very Elevated" scores for hyperactivity/impulsivity, executive functioning, defiance and peer relations. The mother endorsed "Average" ratings for inattention and learning problems (S-33, N.T. *passim* District).
46. On the DSM-5, ADHD subtest scales, "Very Elevated" scores were endorsed for ADHD, predominately inattentive and oppositional defiant disorder. The mother's DSM-5 scores suggest the Student can be moody, emotional, restless, impulsive and inattentive at home (S-33, N.T. *passim* District).
47. The 6th-grade teachers and the mother also completed the Behavior Rating Inventory of Executive Functioning Second Edition (BRIEF-2). The teachers' endorsed ratings noted concerns with some aspects of executive functioning. In particular, the teachers noted difficulty with the ability to sustain working memory and keep materials organized. The teachers did not endorse ratings indicating behavioral or problem-solving behaviors. The mother's ratings like the teachers', did not appear to be overly negative. The mother's ratings noted impulse control concerns, functioning in social situations, adjusting well to changes in the environment and people, and staying organized as areas of concern (S-33 p.288, N.T. *passim* District).
48. The teachers and the mother also completed a Behavior Assessment System for Children Second Edition (BASC-2) scales checklist assessment of adaptive and problem behaviors in the home and the school. A score falling in the clinically significant range indicates a high level of maladjustment. Scores in the at-risk range show behaviors not severe enough to merit treatment. Validity Index ranges for the teachers'

endorsement indicate acceptable ratings. The Parent's "F-Scale" score, a built-in measure to ensure the rater is not overly negative, was somewhat elevated. The "F-Scale" indicated that the mother's scores occur in less than 5% of the children in the general population. While the mother's elevated "F-Scale" score did not invalidate the BASC-2 ratings, as per the test makers' protocol, it did become a factor in the interpretation of the overall results (S-33, N.T. *passim* District and Parents).

49. The ER included a summary of the Student's then-current performance on District-wide tests and classroom grades. The Student's regular education classroom grades indicated an overall strong, consistent high performance across all quarters, prior to and after the concussions. Likewise, the Student's report card also noted the Student earned a 93% in the fourth quarter, after the third concussion, in Accelerated Algebra 1 class, taught at the Middle school. When all of the math grades were averaged for the year, the Student earned an overall final grade of 90 %, in the Algebra 1 class, for the entire year (S-33).

50. After reviewing, interpreting and analyzing the then-existing norm-referenced and classroom testing data and factoring in the validating concerns and the CHOP's "To Whom It May Concern" concussion letters and the CHOP's medical finding of autism, the ability testing, the OT testing and the achievement testing the team narrowed the Student's IDEA diagnosis down to either a Social (Pragmatic) Language Disorder or Autism. After comparing the DSM-5 Autism criteria with the IDEA autism eligibility criteria and contrasting the Social (Pragmatic) Language criteria, with the autism criteria, while noting a concern that the autism diagnosis is usually made prior to age three, during the expected developmental period, the team concluded that the Student's need for social pragmatic language instruction and social skills instruction favored

a finding of IDEA eligibility as a person with autism. The team also concluded the Student's multiple medical conditions met the IDEA eligibility criteria for an "other health impairment." Finally, [redacted] (S-33 pp. 228-247). Although the team agreed with the CHOP's autism finding, the mother disagreed with the team's statements about the "F-Scale," the Social (Pragmatic) language disorder and the team's IDEA-DSM-5 analysis that formed the basis of the autism recommendation (S-33 pp.246). The RR signature page notes the mother "disagreed" with the RR team's autism recommendation (N.T. *passim* District and Parents, S-33).

51. On August 7, 2017, the mother emailed the director of special education while acknowledging receipt of the IEP, noted her disagreement with the OT assessment, the autism conclusion, the pragmatic language disorder discussions and her disagreement with the inclusion of the "F-Scale" data and the Parental input (P-46, , N.T. *passim* Parents).
52. On August 17, 2017, the staff at CHOP's provided school health recommendations about how to respond to the Student's [medical conditions] (P-47, P-48, N.T. *passim* District).
53. On August 23, 2017, the staff at CHOP's sent another updated "To Whom It May Concern" letter describing the Student's health conditions, autism spectrum disorder, the three concussions and the escalation in Student's overall level of agitation and behavioral changes. The update notes the Student's concussion exam was normal, but with increased exposure to both cognitive and physical demands, the Student can become agitated. The report also notes that prior to the concussion, the Student had changes in behavior, signs of overstimulation/sensory regulation and sensory aversion. The CHOP's examiner then states that "after the 3 concussions, these behaviors [overstimulation/sensory regulation and sensory aversion] escalated, it is likely the concussions unmasked these

underlying behaviors.” The report, like previous CHOP’s accounts, repeats previous recommendations about generalized concussion awareness, cautions the staff to be on the lookout for concussion-related symptomology. The update then goes on to make a series of academic recommendations like rest and academic supports, 18 point font enlargement for all reading materials, minimal/no homework, reduced academic expectations and extended time for completing testing (P-59, N.T. *passim* Parents).

54. On August 23, 2017, the District issued an invitation to participate in an IEP conference (P-58).

55. On August 24, 2017, the parties exchanged email correspondences about setting up a one-to-one meeting between the mother and the psychologist to review the ER (P-50, P-51, P-52, P-53,). The one-on-one meeting never occurred (N.T. *passim* District and Parents).

56. On August 25, 2017, a clinical psychologist at CHOPs sent a “To Whom It May Concern” letter repeating the previous finding that the Student was diagnosed with autism (P-59). The examiner recommended that any IEP offered should encourage the development of social skills, social interactions, and social communications. The examiner also suggested the development of executive functioning skills and strategies to work through situations when the Student had difficulty with rule-following and transitions. Finally, the examiner recommended self-help and daily-living skill development (P- 59, N.T. *passim* Parents).

57. On August 28, 2017, the District proposed and the Parents rejected updates to the individual health plan (P-60).

58. On August 28, 2017, the mother sent an email to the special education supervisor expressing her disagreement about a three-hour meeting on

August 16, 2017, about the Student's autism diagnosis, the OT supports, and the "F-Scale" comments in the ER (P-61, N.T. *passim* Parents).³

59. On August 30, 2017, the mother emailed the special education supervisor commenting about a different meeting, which she described as "exceptional" and "positive" approach to developing the Student's Daily Plan. The Daily Plan scheduled four different checks in times, during the school day, the Student would meet with the nurse for daily checks, including [redacted] (P-61).
60. On August 24, 2017, the parties exchanged email correspondences about setting up a one-to-one meeting between the mother and the psychologist to review her concerns about the ER (P-50, P-51, P-52, and P-53). The Parties could not agree on a meeting date; therefore, the meeting never occurred (N.T. *passim* Parents, S-33-S-34).
61. On September 7, 2017, the Parties participated in an IDEA based IEP conference to review the ER and develop the Student's specialized-instruction (P-76). [The appropriateness of the IEP is at issue in the companion action at CC ODR FILE #21838-18-19 KE. The record in that action is not yet closed; therefore, I will not include any findings of fact, discussion of the IEP and/or conclusions of law regarding the IEP here. Findings of fact and conclusions of law about the IEP and/or Section 504 Agreement are found at CC ODR FILE #21838-18-19 KE].

³ It is clear to this hearing officer that the inclusion of the F-Scale data into the RR offended the Parents and was a factor that divided the Parties. It is also clear to this hearing officer, after listening to the Parents' testimony, that the ratings were genuine observations of how the Student's medical conditions were affecting the Family.

APPLICABLE LEGAL STANDARDS

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the 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. In *Schaffer v. Weast*, 546 U.S. 49 (2005), the court held that the burden of persuasion is on the party that requests relief in an IDEA case. 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 the facts (which in this matter is the hearing officer). 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. See, *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992).

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. *Id.*

Credibility and Persuasiveness Of The Witnesses' Testimony

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony and, accordingly, rendering a decision incorporating findings of fact, discussion, and conclusions of law. In the course of doing so, hearing officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.⁴

⁴ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014) (it is within the

Thus, all of the above findings are based on a careful and thoughtful review of the transcripts, the non-testimonial evidence, a reading of all of the exhibits and a direct observation of each witness; therefore, these factual decisions are based upon a preponderance of the testimonial and non-testimonial presented. While some of the material evidence is circumstantial, this hearing officer can derive inferences of fact from the witnesses' testimony and the record as a whole is preponderant. On balance, the hearing officer found all of the witnesses' testimony represents their complete recollection and understanding of the events. This hearing officer further found all of the witnesses who testified to be credible. Each witness testified to the best of his or her recollection from his or her perspective about the actions taken or not taken by the team in evaluating, instructing and designing the Student's program. That said, I will, however, as explained below when and if necessary, give more or less persuasive weight to the testimony of certain witnesses when the witness either failed to or in the alternative provided a clear, cogent and convincing explanation of how he/she evaluated the Student's eligibility, designed, observed the Student, provided input into the evaluation, commented on the evaluation and/or participated the preparation of the prior written notice, or the proposed actions, inactions or refusals set forth in each NOREP.

For all the reasons that follow, at times, I found the testimony of some witnesses to be more cogent and persuasive than others. The Parents elicited the testimony of an expert who opined after reviewing one exhibit, the District's 2017 reevaluation report, that the assessment and conclusions therein were insufficient, inadequate and otherwise lacking. In support of her

province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact); 22 Pa Code §14.162 (requiring findings of fact).

testimony, the expert stated that in her opinion, additional assessments should have been administered to either rule in or rule out additional disabilities. While the expert's credentials and experience in public schools is substantial, her failure to observe the Student in school, test the Student, discuss the Student with the Parents, discuss the Student with the District or the Student's third-parity medical staff or review all of the then existing school records, data, emails and documents otherwise available and known to the evaluation team, at the time they made the decisions at issue here, makes her opinions/testimony less persuasive, cogent and weighty when compared and contrasted with the District's staff testimony about the Student. Therefore, when the record is viewed as a whole, I now conclude, that I can derive facts and inferences of fact from the testimony needed to make an impartial decision.⁵

The District's Child Find Duty

School Districts have a "continuing obligation...to identify and evaluate all students who are reasonably suspected of having a disability under the

⁵ In particular, this hearing officer gave persuasive weight to the testimony of the certain individuals who demonstrated the ability to cogently and clearly describe Student specific facts across school years like:

1. The witness's understanding of the Student's educational, health, behavioral, academic needs, present levels and the then current and available data profile/sets;
2. The witness's understanding of the Student's intertwined behavioral, attention, self-regulation, health and social skills needs, circumstances and deficits;
3. The witness's understanding of the Student's then current behavioral, academic and integrated health related circumstances all of which impact the Student's then current IDEA disabilities;
4. The Student's behavior in the school, the home and the community;
5. The Student's testing, assessment and behavioral health profile/data, and
6. Any individual Student specific circumstances discussed herein like the Student's responses to sensory, medical, behavioral school health and medical related circumstances prior to the concussions and return to the District after each health care visit.

statute." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012) (citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010); 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c). Even if parents do not cooperate fully with a district's efforts to identify a student, districts still have a responsibility to identify students who are in need of IDEA protections. *Taylor*, 737 F. Supp. at 484. The IDEA child find duty does not demand that schools conduct a formal evaluation of every struggling student. A school's failure to identify a disability at the earliest possible moment is not *per se* actionable. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). However, once school districts have a "reasonable suspicion" the student is otherwise IDEA eligible, the district is required to fulfill their child find obligation within a "reasonable time." *Id.* Failure to conduct a sufficiently comprehensive evaluation is a procedural and substantive violation of the district's "child find" obligation. Substantive child find violations can cause a denial of a FAPE. *D.K.*, 696 F.3d at 250 (a poorly designed and ineffective evaluation does not satisfy "child find" obligations); *H.D. v. Kennett Consol. Sch. Dist.*, No. 18-3345, 2019 U.S. Dist. LEXIS 173481 (E.D. Pa. Oct. 4, 2019). The IDEA's child find provision requires states to ensure that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated." 20 U.S.C. 1412(a)(3). This provision places upon school districts the "continuing obligation...to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009); see also 20 U.S.C. § 1412(a)(3). The evaluation of children who are suspected to be disabled must take place within a reasonable period of time after the school is on notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of*

Educ. v. N.E., 172 F.3d 238, 250 (3d Cir. 1999). The failure of a school district to timely evaluate a child who it should reasonably suspect of having a disability constitutes a violation of the IDEA, and a denial of access to a "free and appropriate public education" (FAPE). 20 U.S.C. § 1400. Pursuant to Pennsylvania administrative code, a reevaluation of a student with disabilities shall be completed and presented to the student's parents no later than sixty days after the school district receives written parental consent for evaluation. See, 22 Pa. Code § 14.124(b). Assuming the student is determined IDEA eligible, an IEP must be implemented as soon as possible but no later than ten days after it is developed. See 20 U.S.C. § 14.131(a)(6). These provisions demonstrate that the School District is entitled to a reasonable period of time in which to complete the evaluation, create and implement an IEP. Therefore, an evaluation, when offered and completed, must be sufficiently comprehensive to assess all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6). Simply stated, the child find trigger or starting point occurs when the school district has a reasonable suspicion that the child may be eligible under the IDEA. Once the child find duty is triggered, the district must initiate a comprehensive evaluation of the child within a reasonable period of time.

In Pennsylvania, LEAs are required to provide a report of an initial evaluation or a reevaluation within sixty calendar days of receipt of consent excluding summers. 22 Pa Code §§ 14.123(b), 14.124(b). Upon completion of all appropriate assessments, "[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child." 34 C.F.R. § 300.306(a)(1).

Although "[t]he eligibility group should work toward consensus," under §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability. Parents and school personnel

are encouraged to work together in making the eligibility determination.” 71 Fed. Reg. 156 at 46661 (August 14, 2006).

With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction, which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). More specifically, specially-designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction (i) To address the unique needs of the child that result from the child’s disability; and (ii) To 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).

Assuming a student is a person with a disability, the IDEA requires the states to provide a FAPE to all children who qualify for special education services. 20 U.S.C. §1412. The IDEA and state and federal regulations obligate school district – *a.k.a.* local educational agencies (LEAs) – to locate, identify and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125.

The statute itself sets forth two purposes of the required evaluation/reevaluation:

1. Determine whether or not a child is a child with a disability as defined in the law, and
2. “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.”

20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). In combination, these well-established criteria have the effect of ensuring the evaluation either confirms or rules out the student's potential disabilities, identifies the student's individual circumstances and examines whether the child is in need of specially-designed instruction.

IDEA Eligibility Criteria and Assessment Process

The IDEA sets forth three broad criteria that the local educational agency must meet when evaluating a child's eligibility for services under the IDEA. First, evaluators must "use a variety of assessment tools and strategies" to determine "whether the child is a child with a disability." Second, the district "[may] not use any single measure or assessment as the sole criterion" for determining either whether the child is a child with a disability or the educational needs of the child. *Id.* § 1414(b)(2)(B). And third, the district 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)(C).

The intertwined subparts of the IDEA regulations impose additional criteria that school officials must meet when evaluating a child to determine if the child has a disability. A child's initial evaluation or reevaluation consists of two steps. First, the child's evaluators must "review existing evaluation data on the child," including any evaluations and information provided by the child's parents, current assessments and classroom-based observations, and observations by teachers and other service providers. 34 C.F.R. § 300.305(a)(1). Second, based on their review of that existing data, including input from the child's parents, the evaluation team must "identify what additional data, if any, are needed" to assess whether the child has a qualifying disability and, if so, "administer such assessments and other evaluation measures as may be needed." *Id.* § 300.305(a)(2)(c).

Under the first step of the analysis, the district is required to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent." *See id.* § 300.304(b). All the assessment methods, protocols and materials used must be "valid and reliable" and "administered by trained and knowledgeable personnel." *Id.* § 300.304(c)(1).

Under the IDEA, a school district "shall conduct a full and individual initial evaluation...before the initial provision of special education and related services to a child with a disability." 20 U.S.C. § 1414(a)(1)(A). A full individual initial evaluation (FIE) or reevaluation must consist of procedures "to determine whether a child is a child with a disability [as defined by the IDEA]" and "to determine the educational needs of such child." 20 U.S.C. § 1414(a)(1)(C). IDEA eligibility is a two-pronged inquiry, first does the child have a qualifying disability, and (2) whether, by reason of that disability, that child needs specially-designed instruction. 20 U.S.C. §§ 1401(3), §1414(d)(2)(A).⁶

In making its eligibility determination, the evaluation team must "[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." 34 C.F.R. § 300.306(c)(1)(i). Thus,

⁶ The Chapter 14 evaluation/reevaluation criteria mirror the requirements of the IDEA. A "qualifying disability" (first prong) is defined to include any one of 13 different IDEA identified conditions. The applicable regulations elaborate that each condition must not only be diagnosed, but also must "adversely affect a child's educational performance." 34 C.F.R. § 300.8(c).

since it is a two-part test, merely having a disability does not automatically mean that a child is IDEA eligible.

When “appropriate,” as part of the evaluation or a reevaluation, the school district is required to perform a “[r]eview of existing evaluation data” 20 U.S.C. § 1414(c)(1). The review of the existing data must include all existing “evaluations and information provided by the parents,” “current classroom-based, local, or State assessments, and classroom-based observations,” and “observations by teachers and related services providers.” *Id.* “Upon completion of the administration of assessments and other evaluation measures[,] the determination of whether the child is a child with a disability...and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child.” 20 U.S.C. § 1414(b)(4).

Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); see also 20 U.S.C. § 1414(b)(3).

Autism Is an IDEA Disability

The IDEA defines autism as “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3 that adversely affects a child’s educational performance.” 34 C.F.R. §300.8(c)(1)(i). Other characteristics of autism include “engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” 34 C.F.R. §300.8(c)(1)(i). A student does

not qualify as a child with autism if his or her educational performance is adversely affected primarily because the child has an emotional disturbance. 34 C.F.R. §300.8(c)(1)(ii). At times IEP and evaluation teams are called upon to make difficult judgments as to which circumstance, conditions and diagnoses are IDEA disabilities.⁷ Parents and districts oftentimes need to be reminded that a medical diagnosis of autism will not in itself entitle a student to receive special education and related services.⁸ To meet the IDEA's definition of autism, the student's disability must have an adverse effect on his/her educational performance.⁹ When it comes to the speech and language prongs, not every child who has difficulties with communication, social interaction, or change will be eligible for IDEA services as a child with autism.

Numerous hearing officers have upheld determinations that behaviors such as throwing tantrums, refusing to listen to instructions, and speaking frequently about a particular subject are not always indicative of a finding of autism. *See, e.g., Newark Unified Sch. Dist.*, 48 IDELR 171 (SEA CA 2007)

⁷ *See, e.g., Joanna S. v. South Kingstown Pub. Sch. Dist.*, 69 IDELR 179 (D.R.I. 2017) (upholding an IEP team's determination that the student's severe anxiety was his most significant disability). At the same time, a district should consider the student's autism-related needs when developing his IEP. *See, e.g., D.L. v. St. Louis City Pub. Sch. Dist.*, 118 LRP 28132 (E.D. Mo. 07/02/18) (holding that a Missouri district denied FAPE to a fourth-grader with an emotional disturbance when it developed an IEP that failed to address his autism-related sensory needs).

⁸ A physician, or professional evaluator, may not simply prescribe special education; the eligibility team must consider all of the relevant factors. A physician, of course, can supply useful information concerning the nature of a student's disability to the eligibility team, but Student cannot simply prescribe specially-designed instruction. *Marshall Joint School District No. 2 v. CD by Brian and Traci D.*, 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010); *District of Columbia Public Schools*, 111 L.R.P. 76506 (SEA D.C. 2011).

⁹ *See, e.g., In re: Student with a Disability*, 114 LRP 43641 (SEA IL 08/04/14); *District of Columbia Pub. Schs.* 12 ECLPR 69 (SEA DC 2014); *Victoria Indep. Sch. Dist.*, 10 ECLPR 12 (SEA TX 2012); and *In re: Student with a Disability*, 58 IDELR 85 (SEA WV 2011).

(finding that a 4-year-old boy who had tantrums, spoke in a loud voice, and had some difficulties playing with other children was exhibiting behavior that was typical of children his age); *Los Altos Sch. Dist.*, 48 IDELR 25 (SEA CA 2007) (determining that a preschooler's behavior and social interaction were fairly typical for a child his age); and *In re: Student with a Disability*, 58 IDELR 85 (SEA WV 2011) (holding that although the student exhibited some behavioral problems in school, those behaviors were not markedly different from those of his peers).

A student does not qualify as a child with autism for purposes of the IDEA simply because he/she exhibits some traits of autism outside of the educational setting. *See, e.g., Vista Unified School District*, 10 ECLPR 70 (SEA CA 2013); *Arlington Indep. Sch. Dist.*, 60 IDELR 267 (SEA TX 2012); *Pickerington Local Sch. Dist.*, 10 ECLPR 72 (SEA OH 2012); *La Mesa-Spring Valley Sch. Dist.*, 109 LRP 54643 (SEA CA 08/20/09); and *Clear Creek Indep. Sch. Dist.*, 6 ECLPR 46 (SEA TX 2008).

Recognizing the difficult task that evaluation and IEP teams face, teams should not ignore behaviors suggesting that a child has autism. Districts have an affirmative duty to locate, identify, and evaluate children suspected of having disabilities identified in the IDEA -- including autism. 34 C.F.R. §300.111(c)(1). If a district suspects a child has an autism spectrum disorder and needs special education, it should seek consent for an evaluation. The failure to evaluate the child properly and in a timely manner may amount to a denial of FAPE.¹⁰

¹⁰ *See, e.g., Orange Unified Sch. Dist. v. C.K.*, 59 IDELR 74 (C.D. Cal. 2012) (A preschooler's unresponsiveness and need for frequent prompting during a speech and language assessment as well as reports that he was not toilet-trained, did not make eye contact, and had a vocabulary of zero to three words should have prompted a California district to evaluate the child for autism).

Other Health Impairments Are an IDEA Disability

Students with an OHI can be identified as IDEA eligible, provided that they have limited strength, vitality, or alertness. Some students may have a heightened alertness to environmental stimuli. In either case, the OHI must adversely affect the child's educational performance. 34 C.F.R. § 300.8(c)(9), See, *In re: Student with a Disability*, 119 LRP 18518 (SEA MO 05/03/19) (finding that the student's behavior was typical of kindergartners and did not impact his educational performance; hence the child was ineligible under the IDEA).

Traumatic Brain Injury Is an IDEA Disability

A student with a brain injury may qualify for special education services under the disability category traumatic brain injury (TBI). The IDEA outlines the conditions that fall within this classification, formally defining TBI as “an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child’s educational performance.” The definition continues to specify, “Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.” At times the above traits can lead to some unique educational challenges, such as; difficulty taking tests and exams, problems with following complex directions, or difficulty learning new skills. 34 C.F.R. §300.308(c).

Independent Educational Evaluations

An IEE is defined as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student in question. A parent may request an IEE at public expense if the parent disagrees with the evaluation completed by the district. In the alternative, parents are free, at any time, to obtain an IEE at the parent's own expense. If the parent requests an IEE at public expense, the district, without unnecessary delay, shall either provide the IEE at public expense or file a due process complaint and prove that the district's evaluation was appropriate. Regardless if the IEE is publically or privately funded, the results of an IEE must be considered by the district, in any decision regarding that student's FAPE. Districts are permitted to establish policies and procedures for requesting and funding IEEs. District policies for IEEs, at public expense, must provide polices that described the criteria under which the IEE evaluation is obtained, including the location of the evaluation and the qualifications of the examiner.¹¹ A district's local IEE criteria may:

1. Limit the parents to a comprehensive list of local or statewide evaluators,
2. Require IEE evaluators to follow the criteria established by the producer /maker of the evaluation instrument(s),
3. Impose a mileage/travel limits on the IEE, and
4. Require the IEE examiner to hold a particular license when the district requires the same for its personnel who conduct corresponding evaluations. 34 C.F.R. § 300.502 *et seq.*

¹¹ 34 C.F.R. § 300.502 *et seq.*; Letter to Wessels, 16 EHLR 735 (OSEP 1989), Letter to Smith, 16 EHLR 1080 (OSERS 1990); Letter to Bartlett, 16 EHLR 292 (OSERS 1989).

With these firm black letter principles in mind, I will now turn to an analysis of the facts, circumstances and applicable law.

ANALYSIS AND CONCLUSIONS OF LAW

The Claims, Contentions and Assertions

Although the Parents disagreed with the 2017 RR, at the time it was offered, they waited until 2019 to request the IEE at public expense. Therefore, any new developments in the Student's medical condition or present levels that occurred after the District offered the Student a FAPE in 2017 will not relate back to the time of the 2017 fact-based eligibility "snapshot" about the appropriateness of the evaluation.¹²

The Parents presented a series of discrete contentions that the evaluation team's recommendation that the Student is a person with autism is fundamentally flawed. In particular, they now assert because the examiner failed to use a variety of preferred or additional autism-related additional tests and/or failed to interview the father, the RR at issue is insufficient. Next, they assert the District erred when it relied upon a "single measure or assessment as the sole criterion" in determining whether the child is a child with autism. Finally, they assert the alleged errors prevented

¹² This hearing officer must center every step of the analysis on the facts known at the time rather than what is known now. Although I may consider later-acquired evidence, such evidence "should be used . . . only in assessing the reasonableness of the district's initial decisions regarding a particular IEP or the provision of special education services at all." *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995). Critically, and for good reason, in analyzing whether a particular student was denied his or her right to a FAPE, the inquiry is not one grounded in hindsight and retrospect but instead in review of the school district's decisions at the time they were made; indeed, the Third Circuit has expressly proscribed "Monday Morning Quarterbacking" in IDEA cases. See *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1991) ("[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.").

the team from understanding the Student's IDEA based disabilities and/or educational needs. 20 U.S.C. § 1414(b)(2)(B). For all of the following reasons, based upon a preponderance of the evidence, each of the Parents' contention as it relates to the identification of the Student as a person with autism is rejected.

The District's Autism Assessment Was Appropriate

It is important to recognize that parental disagreement with the conclusions of an LEA's evaluation does not, in and of itself, establish that the evaluation is inappropriate. A special education evaluation doesn't have to be perfect to be "appropriate" under the IDEA for purposes of a request for an IEE. As long as the district uses qualified evaluators, who administer technically sound instruments and assess all areas of suspected disability, in a reasonable time, a district will otherwise meet its IDEA duty.¹³ Furthermore, a parent's disagreement with an evaluator's findings or his/her belief that the evaluator could have done more does not, in and of itself, generally clear the way for the parent to receive a publicly-funded IDEA IEE. Recently in *A. H. v. Colonial Sch. Dist.*, No. 18-2698, 2019 U.S. App. LEXIS 20489 (3d Cir. July 10, 2019, *unpublished*) the panel concluded that a district does not have to conduct every test available when evaluating a student for special education and related services.

¹³ See, e.g., *B.G. v. Board of Educ. of the City of Chicago*, 72 IDELR 231 (7th Cir. 2018) (Neither a school psychologist's failure to explain certain scores on one assessment nor her failure to consider the results of a behavioral rating scale invalidated an Illinois district's reevaluation of a bilingual seventh-grader with a specific learning disability and emotional disturbance.); and *E.P. v. Howard County Pub. Sch. Sys.*, 72 IDELR 114 (4th Cir. 2018, *unpublished*) (Neither a Maryland district's failure to administer certain subtests when evaluating a 12-year-old boy with ADHD nor its use of a "pattern of strengths and weaknesses" model when testing the student for SLD entitled the parents to an IEE at public expense).

In *A.H.* the court held the “focus was not, nor should it have been, on whether the “Evaluation Summary Report” explored all facets of Student's disabilities”; rather the proper focus was on whether the district's evaluation, absent the preferred testing, assessed and identified the student's special education needs and circumstances. Simply stated, the naked contention by a private evaluator that they would have done more will not generally open the door for the parent to receive a publicly-funded IEE under the IDEA.¹⁴ In this instance, the selection of a variety of otherwise valid assessment tools was limited by multiple undisputed central factual circumstances.

First, the Parents, on multiple occasions, during the 2016-2017 and the 2017-2018 school years, refused to consent to a comprehensive evaluation of the Student in all areas of suspected disability. Second, beginning in 2017 and continuing to the present the Parents have withheld consent to release of Student's third party medical and behavioral health providers' diagnostic conclusions, recommendations and impressions. Third, beginning in 2017 and continuing to the present, the Parents refused to allow the third-party medical and behavioral providers to talk to the District staff about the Student's medical and/or behavioral health. Fourth, as a consequence of the Student's concussions and behavioral dysregulation, the Student's treating physicians, in 2017, limited all forms of cognitive testing, cognitive and/or physical exertion. Therefore, in light of these uncommon circumstances, it is axiomatic that the ER team had limited choices in selecting or administering a wide variety of assessment options.

¹⁴ See also *Fulton County Sch. Dist.*, 9 GASLD 9, 115 LRP 51672 (SEA GA 2015) (Although the father expressed that the district evaluator could have done more during her evaluation of the middle schooler with articulation issues, the ALJ concluded that the district's evaluation complied with the IDEA.)

Faced with these quirky externally and internally imposed limitations, the District did, however, manage to complete a comprehensive review of the then existing data and analysis of the Student in all areas of suspected disability, educational needs, circumstances and intellectual ability.

First, all of the test instruments, administered and referenced in the ER, were technically sound and otherwise valid for their intended use. Second, the ER contained an in-depth historical summary of the variety of ability and achievement test data [WISC, WIAT and Woodcock], all of which confirmed the Student's superior achievement/performance. While the most recent data, due to the above consent issues, is limited in scope, the data, when compared to previous data, was useful in determining the Student's eligibility and educational needs. Second, all of the ability and achievement testing was completed by properly credentialed and trained staff and administered according to the test makers' instructions. Third, the OT over time administered several different sensory assessment tools [SPM and School Companion Sensory Profile -2]. The OT data detected subtle changes in the Student's level of sensory sensitivity and at the same time confirmed organizational concerns. Fourth, to measure the Student's executive functioning skill set, [pre and post-concussion] the evaluation team, administered the BRIEF. While, the teachers and the mother's 2016 pre-concussion and 2017 post-concussion BRIEF data identified slight changes in executive functioning, the entire data set, across the three BRIEF assessment domains, did not indicate the Student's executive functioning was otherwise adversely affected. Fifth, contrary to the Parents' assertions, the team relied upon a variety of assessments and circumstances in reaching the autism diagnosis. The convergence of data from the ASRS and SRS when combined with the BASC, the Conners, the DSM-5 ADHD subtest scales, the CHOP's CBCL, the speech therapist's RESCA speech data, the OT testing, the OT progress monitoring data, the SPM, the School Companion Sensory

Profile -2, the DSM-5 Autism criteria, the Social (Pragmatic) Language data and the Parental input in many of the assessment rating scales created a variety of sources to reach final eligibility decision. Granted, while the mother and the father's SRS ratings differ, the overall data profile, supports the autism diagnosis. Simply stated a variety of sources filled in the blanks between the mother's and the father's SRS ratings.¹⁵ Sixth, while the Parents now contend that the District improperly designated the mother's statements in an email to the principal as the Parents' input into the RR the record does not fully support this position. The record is however preponderant that the District offered and the Parents passed on the opportunity to either amend, substitute, or clarify their input. Seventh, the Parents' contention that the District's failure to interview the father invalidates the RR data set is equally misplaced. Neither the IDEA nor Chapter 14 requires the District to interview both Parents. When the testimonial and non-testimonial evidence is viewed as a whole, the record is preponderant the District used a variety of instruments to assess the Student's eligibility as a person with autism. Hence under these circumstances, the Parent's request for an IEE and associated contentions are rejected. This conclusion does not end the analysis of the Parents' claims and the District's duties.

The Parents' Traumatic Brain Injury Claim

The Parents next challenge the omission of any norm-referenced testing data targeting the Student's alleged TBI disability. In support of the Student's TBI eligibility, the Parents point to a history of three concussions, along with the changes in behavior at home and when arriving at school as

¹⁵ The TBI evaluation contentions here arise under the IDEA and Chapter 14.

obvious indicators of a TBI.¹⁶ When the testimonial and non-testimonial evidence are reviewed as an integrated whole, the record is preponderant that the Parents' TBI child find claims are misplaced.

On or about March 2, 2017, after receiving treatment for a concussion from CHOPS, the CHOP's staff sent a note to the school excusing the Student from regular attendance. The CHOP's note made general recommendations about attendance, testing considerations, workload reduction strategies, note-taking, suggested regularly scheduled breaks and limited the Student's participation in physical education. The March 2, 2017, note did not diagnose the Student with a TBI or identify any of the common characteristics of a person with an IDEA TBI disability. On March 17, 2017, CHOP's staff sent a second communication to the school stating the Student had a normal cognitive and physical exam. In fact, on March 17, 2019, the CHOP's staff stated, in a letter, the Student showed no signs of concussion-related physical symptoms, like memory issues, after a full day of cognitive and physical exertion.

Then on May 19, 2017, after undergoing a comprehensive inpatient medical evaluation, the CHOP's staff sent a third letter, including diagnostic imaging of the brain, blood work, a medication review, and a global assessment of behavioral, emotional and social functioning. The May 19, 2017, letter reported a positive sign that the diagnostic imaging of the Student's brain was negative for an intracranial mass, midline shift, or mass effect. In short, the Student at that time did not have a closed head injury or evidence of a brain bleed. On May 20, 2017, the staff at CHOPs reported that the Student was medically diagnosed as a person with autism; it is no

¹⁶ See, *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). In *D.K.* the panel held once the district has a "reasonable suspicion" a student may be disabled, they then have reasonable period of time in which to complete the evaluation.

curious coincidence that the report makes no mention of a TBI. Instead, the CHOP's letter recommended that the Student continue to receive previously identified concussion precautions and restricted the Student's recess time.

The May 20, 2019, CHOP's note goes on to state that during the hospitalization, after suffering multiple concussions, the Student did not demonstrate any of the telltale signs of a TBI or concussion-like headaches, dizziness or other symptoms.

When the Student returned to school, following the CHOP's hospitalization, although the autism-like tantrums and agitation continued at home and during a drop off at school, the Student did not complain, and the record does not support a finding that the Student displayed any of the hallmark signs of a person with a TBI, like mental fogginess, or memory issues in school. Instead, the instant dispute resembles the fact pattern in *Warrior Run Sch. Dist.*, 64 IDELR 260 (SEA PA 2014), *aff'd*, 66 IDELR 254 (M.D. Pa. 2015). In *Warrior Run*, the district court upheld the hearing officer's determination that a high school student, receiving good grades after experiencing two consecutive concussions did not qualify as a person with a TBI.

Assuming *arguendo*, the Student was diagnosed with a TBI, the record here is preponderant, that despite the presumed TBI disability, the Student did not show any signs that a TBI or a concussion adversely affected the Student's academic performance. The Student passed all classes, was promoted to the next grade and earned superior grades in all regular education classes, including accelerated math at the middle school.¹⁷

¹⁷ Generally, when students' academics do not decline, as is the case here that consistency is usually found to signal that their disability does not adversely affect their educational performance, including their ability to access their education. *See, e.g., Mr. N.C. v. Bedford Cent. Sch. Dist.*, 300 F. App'x 11, 13 (2d Cir. 2008) (finding that, even assuming the student was emotionally disturbed, that his disability still did not affect his educational

Accordingly, when all of the then-existing medical documentation from CHOPs is reviewed, in conjunction with the RR data the record is preponderant the then existing data does not create a reasonable suspicion establishing that an "open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical functions; information processing; and speech" otherwise existed. See 34 CFR §300.8 (c). *H.D. v. Kennett Consol. Sch. Dist.*, No. 18-3345, 2019 U.S. Dist. LEXIS 173481 (E.D. Pa. Oct. 4, 2019). Therefore, in light of the autism diagnosis, I now find the factual record does not support a finding that the District had a "reasonable suspicion," in September 2017, to believe the Student was a person with a TBI.

SUMMARY

The testimonial and non-testimonial record clearly supports a finding that the District, under these circumstances, completed a comprehensive assessment of the Student in all areas of suspected disability. The record is also preponderant that the decision to identify the Student as a person with autism was made after collecting data from a variety of otherwise valid assessment tools. Likewise, based upon a review of the existing data and

performance because his GPA only declined by nine points during the relevant time period); *Lincoln-Sudbury Reg'l Sch. Dist. v. W.*, No. 16-10724, 2018 U.S. Dist. LEXIS 11920, 2018 WL 563147, at *20 (D. Mass. Jan. 25, 2018) ("[B]ecause Wallis's grades declined only slightly between her freshman and sophomore years and remained average or above-average, her failure to achieve even higher grades does not establish the existence of a disability."); *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 311 (E.D.N.Y. 2010) (concluding that a student's Asperger's syndrome did not adversely affect his educational performance because he was "performing at average to above average levels in the classroom and was progressing academically").

circumstances, the Parents' request to identify the Student as a person with a TBI is denied.¹⁸ Simply stated, the District did not know, and need not have known, that the Student was otherwise suspected of having a TBI or in need of specially-designed instruction. The failure to consent to a comprehensive evaluation is unnecessarily delaying the IDEA FAPE process. Accordingly, I now find that the District, based upon the then-existing data, completed a comprehensive and appropriate evaluation of the Student in all areas of suspected disability. An appropriate Order in favor of the District follows.

ORDER

And now, this 14th of October 2019, it is hereby **ORDERED** as follows:

I now find in favor of the District and against the Parents on all IDEA IEE claims.

All other claims for violations of the IDEA and requests for appropriate relief, including any other affirmative defenses are dismissed with prejudice.

Date: October 14, 2019

s/ Charles W. Jelley, Esq. LL.M.

ODR FILE #21895-18-19

¹⁸ Because the right to an IEE at public expense is conditioned on a parent's disagreement with an evaluation conducted by the district, at times parents may forfeit their right to an IEE by failing to give consent for a district assessment. A parent's imposition of restrictions on a district evaluation may be viewed as a denial of consent. *See G.J. v. Muscogee County Sch. Dist.*, 58 IDELR 61 (11th Cir. 2012). *See also Department of Educ., State of Hawaii*, 63 IDELR 209 (SEA HI 2013) (A parent's refusal to authorize a district's evaluation erases her entitlement to a publicly funded IEE, as the district's evaluation is predicate to the parental right to an IEE at public expense).