

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Easthampton Public Schools v. Student**

**BSEA #2203513**

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing was held on March 16 and 17 and April 19, 2022, before Hearing Officer Alina Kantor Nir. Those present for all or part of the proceeding agreed to participate via a remote videoconferencing platform. The following were in attendance for some or all of the proceeding:

Mother

Father

Dr. Robert Kemper

Psycholinguist

Dorothy Parker

Educational Advocate

Ileana Daniels

Spanish Interpreter

Alisia St. Florian

Attorney, Easthampton Public Schools

Sarah Mochak

Director of Special Education, Easthampton Public Schools

Christina Howard

School Psychologist, Easthampton Public Schools

Carey Goldenburg

Occupational Therapist, Easthampton Public Schools

Leida Barman

Speech/Language Pathologist, Easthampton Public Schools

Nancy Psholka

Physical Therapist, Easthampton Public Schools

Heather Cuthbertson

Team Chair, Easthampton Public Schools

Alina Kantor Nir

Hearing Officer

Alex Loos

Court Reporter

The official record of the hearing consists of documents submitted by the Easthampton Public Schools (Easthampton or the District) and marked as Exhibits S-1 to S-19; documents submitted by Parents and marked as Exhibits P-Vol. I PP through WW and P-Vol. II A through S, U through Y, and AA through FF; approximately 20 hours of recorded oral testimony and argument; and a 3-volume transcript produced by a court reporter<sup>1</sup>. Parent and the District made their oral closing arguments on April 19, 2022, and the record closed on that date.

**ISSUES:**

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<sup>1</sup> Closed captioning was provided by the Court Reporter during the hearing at Parents' request. Mother was provided with Spanish interpretation throughout the Hearing. At times, Mother spoke in English and answered questions in English. The Hearing Officer also maintained an audio recording of the proceeding and provided copies thereof to the parties.

As mutually agreed upon by the parties, the issue in this matter is as follows: Whether the psychoeducational, education, speech and language, occupational therapy, and physical therapy evaluations conducted by Easthampton were appropriate under the standards set forth in the IDEA such that Student is not entitled to independent educational evaluations (IEEs) at public expense in those areas<sup>2</sup> or to an IEE in any other area not assessed by the District?

**FACTS:**

1. Student is a fourth-grade student residing in Easthampton, Massachusetts where she attends the Pepin Elementary School. She is eligible for an Individualized Education Program (IEP) under the disability category of Autism. (S-9) Student is an English speaker, who understands Spanish but does not speak it well. (S-19)
2. Student is eligible for free and reduced lunch. (P-Vol. I WW; Mochak<sup>3</sup>)
3. On July 24, 2019, Parents obtained a Psycholinguistic Assessment for Student, performed by Dr. Robert Kemper, at their own expense<sup>4</sup>, which the Team subsequently reviewed on September 24, 2020. (P-Vol. II R)
4. Dr. Kemper has a master's degree in speech and language pathology and a doctorate in psycholinguistics, speech and language pathology and reading. He is licensed as a speech and language pathologist by the American Speech and Hearing Association (ASHA). Although Dr. Kemper first testified that he holds licenses from the Department of Education in Massachusetts and New Hampshire, respectively, he later indicated that he does not hold any licenses from the Massachusetts Department of Education but rather from the Massachusetts Board of Governors. (Kemper)
5. Dr. Kemper has been working as a psycholinguist for 34 years. He has been in private practice since 1992 and has conducted over 100 assessments per year for over 30 years. He worked as a speech and language pathologist in a school setting "20 or 30 years ago" in Michigan. (Kemper)
6. Dr. Kemper testified that he is hired almost exclusively by Parents and not by school districts as he is "not in [the] pockets" of schools. Dr. Kemper has testified in approximately 10 BSEA hearings, always on behalf of parents. (Kemper)
7. Dr. Kemper selects assessment tools based on his experience. He testified that he has been "doing this for over 30 years" and that tests are "designed in a way that there is no redundancy." He explained that he can conduct a psycholinguistic assessment because of his expertise in speech and language pathology, as well as reading and writing, and that he is able to conduct assessments in mathematics because "math is a lot like reading." (Kemper)

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<sup>2</sup> At Hearing, the parties stipulated that although an Assistive Technology Evaluation had also been conducted by the District in April 2021 at Parents' request, Parents were not seeking an IEE in that area.

<sup>3</sup> Ms. Mochak confirmed receipt of Parents' documentation as to Student's eligibility for free and reduced lunch.

<sup>4</sup> Parents had initially sought public funding for Dr. Kemper's 2019 Psycholinguistic Evaluation. At the time, the District informed Dr. Kemper that they would not fund the psycholinguistic assessment and refused to enter into a contract with him. Dr. Kemper proceeded to evaluate Student and requested payment from the District. (Kemper; Mochak) Subsequently, he repeatedly sought payment for the evaluation from the District and even threatened legal action. (Mochak) Dr. Kemper described his communications with the District as "adversarial to say the best." (Kemper)

8. Dr. Kemper generally begins by assessing speech and language skills because “the definition of reading is oral language that’s superimposed on a visual symbol system.” (Kemper)
9. Dr. Kemper’s evaluations last 6 hours and are generally broken up into 2 longer sessions with a break. Shorter breaks are also provided throughout the testing period. He generally diagnoses students after completing his evaluations. (Kemper)
10. According to Dr. Kemper, he “usually” endorses a language-based disability in his evaluations. He opined that his evaluations are very expensive, and parents whose children do not have a reading or speech and language problem do not engage his “very expensive” services. He does not continue to evaluate a student if initial assessment scores are in the average range. (Kemper)
11. At the time of Dr. Kemper’s 2019 Psycholinguistic Evaluation, Student was scheduled to begin second grade. Prior to evaluating Student, Dr. Kemper reviewed “information from the school” that Parents had provided, but he did not request direct input from Student’s then-teacher. (Kemper; P-Vol. II U)
12. To assess Student’s oral language processing and use, Dr. Kemper administered the Peabody Picture Vocabulary Test-Fourth Edition (PPVT-4) Form B, The Expressive Vocabulary Test-Second Edition (EVT-2) Form B, Oral and Written Language Scales (OWLS-II) Listening Comprehension and Oral Expression Scales, Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) Understanding Spoken Paragraphs. To assess Student’s reading and written comprehension, Dr. Kemper administered the Test of Word Reading Efficiency-Second Edition (TOWRE-2), Slosson Oral Reading test (SORT-R3), Gray Oral Reading Tests-Fifth Edition (GORT-5) Form A, Oral and Written Language Scales (OWLS-II) Reading Comprehension and Written Expression Scales, Test of Reading Comprehension-Third Edition (TORC-3) Reading the Directions of School Work, Test of Written Spelling-Fifth Edition (TWS-5). To assess Student’s “underpinning literacy acquisition,” Dr. Kemper administered the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2). (Kemper; P-Vol. II U)
13. Dr. Kemper observed Student during testing and found her to be “highly focused at all times”. However, he noted “definite word retrieval difficulties” in routine communication as well as some “misarticulation errors” with “mild” intelligibility. (Kemper; P-Vol. II U)
14. Student scored in the average range on the PPVT-4 and in the low average range on the EVT-2. However, the difference between the two scores was not significant and was nonindicative of a word retrieval deficit. Student scored in the below average-very poor range of the Understanding Spoken Paragraphs Subtest of the CELF-5, as she struggled to respond to open ended questions. She also struggled to process orally presented information at the narrative level. Dr. Kemper concluded that the “stark difference noted between her ability to process information at the sentence level with her inability to process at the narrative level is indicative of an information processing disorder.” (Kemper; P-Vol. II U)
15. On the TOWRE-2, Student scored in the average range on the subtest for Sight Word Efficiency but in the below average-poor range on the Phonemic Decoding Efficiency Subtest. Student’s Total Word Reading Efficiency was in the low average range. Student scored in the average range for single word recognition/decoding on the Slosson Oral Reading Test, and for oral reading fluency on the GORT-5. On the OWLS-II, Student

received a score in the average range on the Reading Comprehension and Listening Comprehension subtests, but in the below average range on the Written Expression Subtest, the Written Language Composite, the Oral Language Composite, and the Oral Expression Subtest. On the TORC-3, Student scored in the below average range, demonstrating a reduced ability to read and comprehend the words in directions. On the TWS-5, Student also scored in the below-average-very poor range. Student's scores on the CTOPP-2 ranged from average (Rapid Symbolic Naming) to below average (Phonological Awareness and Phonological Memory). Dr. Kemper found the CTOPP scores to be consistent with a phonological processing disorder. (Kemper; P-Vol. II U)

16. At hearing, Dr. Kemper refused to confirm or deny that he follows the scoring instructions of testing manuals. Instead, he referred to findings by psychometrists endorsing an alternative interpretation of scores. (Kemper; P-Vol. II U, p. 21)
17. Dr. Kemper ultimately diagnosed Student with a specific language impairment, receptive and expressive. He recommended Student be educated in a substantially separate program. (Kemper; P-Vol. II U)
18. In October 2019,<sup>5</sup> Parents privately obtained a Neuropsychological and Psychological Evaluation which was administered and completed by Kaitlyn Switalski, Ph.D. of Boston Neuropsychological Services, LLC. At that time, Student was in second grade. Mother sought the evaluation because she “had significant disagreements with [Student’s] school regarding her functioning and the appropriate services to serve her needs” and wanted “an unbiased, comprehensive understanding of [Student].” (S-19, P-Vol 2 AA)
19. Based on Dr. Switalski’s assessment<sup>6</sup>, Student’s cognitive functioning ranged from the low average to the average range. On the NEPSY-2, Student’s language abilities ranged from the average to the high average range. However, there was a significant difference between Student’s semantic and phonemic abilities, suggesting some difficulty with phonological awareness. Student performed in the lower end of average on the Phonological Processing subtest of the NEPSY-2, and low average on the Repetition of Nonsense Words subtest. Student’s WIAT-III scores were average overall for reading skills, however she demonstrated some weaknesses in Early Reading Skills due to “underlying neuropsychological causes.” Student’s Written Expression skills on the WIAT-III fell in the below average range, except that her score on the Sentence Composition subtest was in the average range. Similarly in mathematics, she scored in the below average range. Finally, Student’s teacher did not endorse any significant behavioral, sensory or emotional concerns. (S-19, P-Vol 2 AA)
20. Dr. Switalski diagnosed Student with Autism Spectrum Disorder and an Unspecified Communication Disorder. She also endorsed a diagnosis of Specific Learning Disability (reading and written expression), noting that Student’s “strong memory skills have served

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<sup>5</sup>It is unclear from the record when the Team reviewed this evaluation, but it appears that they did.

<sup>6</sup> Dr. Switalski administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), Wechsler Individual Achievement Test, Third Edition (WIAT-III), NEPSY, Second Edition (NEPSY-2, selected subtests), Conners 3rd Edition (Conners 3, Parent and Teacher Forms), Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2, Parent and Teacher Forms), Behavior Assessment System for Children, Third Edition (BASC-3, Parent and Teacher Forms), Autism Spectrum Rating Scale (ASRS, Parent and Teacher Report Forms), Spence Children’s Anxiety Scale (SCAS, Parent Report Form), Projective Drawings, Sentence Completion, Social Language Development Test -Elementary: Normative Update (SLDT-E:NU), and Autism Diagnostic Observation Schedule, Second Edition (ADOS-2, Module 3). Student’s teacher provided input on the Conners and BASC assessments. (S-19, P-Vol 2 AA)

her thus far in memorizing sight words, and thus it appears that her reading is grade level at times; however, this does not reflect her true deficits in reading.” Dr. Switalski recommended a language-based learning environment, “ideal[ly]” a language-based classroom. (S-19, P-Vol 2 AA)

21. Dr. Switalski did not observe Student in her learning environment for the purpose of her assessment. She did not testify at Hearing regarding her findings.
22. On September 24, 2020, the Team reconvened to review the Psycholinguistic Assessment. Both parties were represented by legal counsel. The Team reviewed Parents’ request to find Student eligible under a specific learning disability category, but the Team determined that Student did not meet the criteria for a specific learning disability. (Mochak; S-5)
23. On September 30, 2020, the District proposed an IEP for the period from 9/24/2020 to 9/23/2021, with goals and services in the areas of speech/language, physical therapy, social skills, language arts, and mathematics. A full inclusion placement was proposed at Pepin Elementary School. (S-9; P-Vol II R and P-Vol II J. 24) On November 12, 2020, Parents partially rejected the IEP and rejected the placement. (S-10)
24. In April 2021, with Parents’ consent, the District conducted a three year re-evaluation.<sup>7</sup> (Mochak; S-18) At that time, Student was in the third grade and had “recently returned” to in-person learning after remote learning since March 2020 due to the COVID-19 pandemic. (S-18) Student’s then-teacher noted that the re-evaluation was stressful for Student. (S-15)
25. Christina Howard administered a psychoeducational evaluation to Student on April 7, 12 and 14, 2021. (S-15; P-Vol II BB) Ms. Howard has a Master’s degree in school psychology and a certificate of advanced graduate study (CAGS) in school psychology. She is licensed by the Department of Elementary and Secondary Education (DESE) as a school psychologist and has 14 years of experience as a school psychologist, 9 of which have been spent in the District. Ms. Howard regularly assesses students in the areas of psychology and education and consults with school staff. She conducts approximately 50 to 100 assessments per year. Ms. Howard has more extensive experience with psychological testing but has been doing academic testing for two years. (Howard)
26. At the time of testing, Ms. Howard was familiar with Student as Student had participated in Ms. Howard’s weekly social skills group in kindergarten, first and second grades. Ms. Howard had also evaluated Student in May, 2018 and April 2019<sup>8</sup> and has been attending her IEP Team meetings since Student was in kindergarten. (Howard; P-Vol II CC)
27. According to Ms. Howard, the purpose of the psychoeducational evaluation was to assess Student’s cognitive, academic, and social/emotional functioning and to provide recommendations for future academic planning. Ms. Howard conducted a “broad cognitive assessment to measure [Student’s] learning style and working memory, processing speed, verbal comprehension, visual spatial skills and fluid reasoning.” She also assessed Student’s executive functioning, inattention, impulsivity and social perception, as well as reading, writing, math, social skills and social-emotional skills. (Howard; S-15; P-Vol II BB)

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<sup>7</sup> Safety precautions (i.e., masks, social distancing) were utilized by District evaluators during the administration of their assessments. These precautions did not impact the validity and reliability of the scores. (Howard; Barman; Bernardi; S-15; S-17; S-16; P-Vol II BB; P-Vol II V)

<sup>8</sup> It is unclear from the record why a psychological evaluation was conducted in 2018 and again in 2019.

28. Ms. Howard administered the following standardized tests: WISC-V, NEPSY-II (selected subtest), Kaufman Test of Educational Achievement – Third Edition (KTEA-3), Behavior Assessment System for Children, Third Edition (BASC-3) Teacher, Social Skills Improvement System, Social-Emotional Learning Edition (SSIS SEL) Teacher. Ms. Howard also conducted a student interview and record review. Student’s third grade teacher completed two social/emotional questionnaires. Ms. Howard did not ask Parent to complete the questionnaire because she was “looking at how [Student was] doing at school.” (Howard; S-15; P-Vol II BB)
29. Ms. Howard testified that the tests she selected are commonly used in psychoeducational assessments of students of similar age and profile as Student. In addition to the “usual” cognitive tests, she administered the NEPSY to assess Student’s executive functioning in order to address a concern noted in Student’s referral, and the SSIS SEL due to concerns regarding Student’s social functioning, and because of the “detail” it offers in assessing skills. (Howard)
30. During testing, Student was personable and cooperative. She engaged in back and forth conversation but also demonstrated perfectionist tendencies (erasing and correcting her responses) and required frequent repetition and clarification<sup>9</sup>. (S-15; P-Vol II BB)
31. Ms. Howard considered the results of her evaluation to be a valid measure of Student’s current skills and consistent with prior testing. (Howard) Student’s cognitive ability was determined to be in the average range (FSIQ 95) on the WISC-V. However, Student’s processing speed was in the very low range, which Ms. Howard opined was likely due to Student’s distractibility.<sup>10</sup> Based on her clinical observations of Student and Student’s overall average scores on other subtests, Ms. Howard explained that she did not have any actual concerns regarding Student’s processing speed. (Howard; S-15; P-Vol II BB) Ms. Howard opined that Student’s FSIQ was valid and consistent with other scaled scores, all of which were in the average range. (Howard, S-15; P-Vol II BB)
32. On the NEPSY-II, which assessed Student’s executive functioning, social perception, attention, memory and learning, Student exhibited difficulty initiating tasks and inconsistent cognitive flexibility and self-monitoring skills. She would also repeat the same mistakes. Ms. Howard felt Student would have done better on this test had she been able to receive certain accommodations which could not be provided given the standardized nature of the test. (Howard, S-15; P-Vol II BB)]
33. Academically, Student scored in the average range in reading and writing but below the average range in mathematics on the KTEA-3 Ms. Howard did not complete additional academic testing because Student’s average performance was confirmed by staff who “actually worked” with Student, and Student’s then-classroom teacher reported that Student presented better in the classroom than she did on these assessments.
34. Ms. Howard found Student’s reading scores to be “pretty strong” as she performed in the average range in her ability to identify lists of letters, their corresponding sounds, high frequency sight words, and decodable words, and in the lower average ability in reading for meaning. These scores were “proportionate to the [classroom teacher’s] assessment of [Student’s] reading level within the classroom.” Student’s writing scores were also consistent with the writing skills she demonstrated in the classroom, as she had an average Written Language Composite score based on her average score on the Spelling

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<sup>9</sup> This was provided only when Ms. Howard could do so in accordance with testing instructions. (Howard)

<sup>10</sup> According to Ms. Howard, Student’s distractibility did not invalidate the entire assessment. (Howard)

subtest and below average score on the Written Expression subtest. Finally, in Math, Student had a below average Math Composite score based on her average score on the Math Computation subtest and below average score on the Math Concepts subtest. However, in the classroom, Student was working at grade level. (Howard; S-15; P-Vol II BB)

35. According to Student's third-grade teacher's responses on the BASC-3, Student struggled with social awareness but demonstrated no symptoms of anxiety. Ms. Howard did not feel further anxiety testing was warranted. (Howard; S-15; P-Vol II BB)
36. Ms. Howard testified that the Team as a whole decides on the most appropriate disability category. She does not "diagnose disabilities." She did not believe her results supported a specific learning disability in reading, although she conceded that a "case" "could be" made for math and "perhaps" writing. Nevertheless, Ms. Howard did not conduct additional testing in these areas because Student's third grade teacher reported that Student performs in the "average" range in those areas within the classroom. (Howard; S-15, P-Vol II BB)
37. Ms. Howard made several recommendations in her report for various supports and classroom accommodations to be provided to Student to assist with organization, task initiation, self-monitoring, self-editing and sustaining focus and effort. (Howard; S-15, P-Vol II BB)
38. Ms. Howard testified that she considered her evaluation to be "fully comprehensive", and "taken as a whole [together with the other evaluations completed by District evaluators], it provided a full picture" of Student. Although there are "dozens of different tests," none "would be more valid." She indicated that in making her conclusions, she relies on the input provided by the people who work with Student, not just the test results, and Student's teacher reported that Student presented better in class than she did in testing. (Howard)
39. According to Ms. Howard, the IEP developed as a result of the Team's review of the assessment results was appropriate, and Student does not require additional testing at this time. (Howard)
40. Leida Barman, MS-CCC/SLP, administered a speech and language evaluation to Student on April 8, 9, 12, 13 and 14, 2021. (S-17, P-Vol II V) Ms. Barman has a Masters in speech and communication disorders. She is licensed by DESE and has a certificate of competence from the American Speech-Language-Hearing Association (ASHA). She has been working as a speech and language pathologist for 15 years, 10 of which have been spent in the District. Her roles and responsibilities include assessment of students and consultation with staff. Since the beginning of her career, she has conducted approximately 45 speech and language evaluations per year. (Barman)
41. Ms. Barman is familiar with Student whom she had previously evaluated and to whom she has been providing weekly direct services since Student began kindergarten. She has also attended all of Student's annual Team meetings and re-evaluation Team meetings. (Barman; S-17; P-Vol II W)

42. Ms. Barman testified that Student has made “excellent progress” since her prior assessment as well as on her IEP goals and objectives.<sup>11</sup> (Barman; S-17; P-Vol II W) (Barman)
43. Ms. Barman testified that she typically assesses receptive and expressive language, vocabulary, articulation, social language, and narrative. In determining what specific tests to utilize, Ms. Barman looks at past testing, but also relies on her “direct experience” with the student and informal consultation with teachers. She may pursue a particular area if a student’s performance suggests a need for additional testing. Although she typically utilizes the CELF-5 to examine expressive and receptive language skills and the CTOPP-2 to assess phonological skills, Ms. Barman chose to administer additional assessment tools based on Student’s specific areas of need that required “closer” examination, and felt these were appropriate assessments given Student’s age and disability. (Barman)
44. Ms. Barman administered the following standardized tests: Comprehensive Test of Phonological Processing-2 (CTOPP-2); Clinical Evaluation of Language Fundamentals-5 (CELF-5); Test of Narrative Language (TNL); Test of Auditory Processing-3<sup>rd</sup> Edition (TAPS-3); Receptive One Word Picture Vocabulary Test, 4<sup>th</sup> Edition (ROWPVT-4); Expressive One Word Picture Vocabulary Test, 4<sup>th</sup> Edition (EOWPVT-4); Social Language Development Test -Elementary (SLDT-E); Comprehensive Assessment of Spoken Language-2<sup>nd</sup> Edition (CASL-2); LinguSystems Articulation Test – Normative Update (LAT-NU). (Barman; S-17; P-Vol II V)
45. As the assessments Ms. Barman used were all standardized, Student was unable to be provided with the accommodations she would have been offered in the classroom. Ms. Barman explained that the tests she administered assessed “discrete skills” and reflected how Student “did in a particular moment.” Thus, when determining Student’s areas of need, Ms. Barman relies not only on assessment scores but also on Student’s presentation during direct instruction and her clinical observation of Student during testing. (Barman)
46. On the CTOPP-2, Student’s scores demonstrated mixed ability, although she scored, overall, in the below average range. Specifically, Student scored in the below average range on the Phonological Awareness Composite and in the poor range on the Rapid Symbolic Naming Composite. However, Ms. Barman did not recommend explicit instruction to address these deficits because Student’s special education teacher reported that Student was able to decode words well when reading. (Barman S-17; P-Vol II V)
47. Ms. Barman did not administer the Non-Word Repetition subtest because of the uncertainty in interpreting Student’s speech sound productions due to Student’s mask. As such, she was unable to report a score for the Phonological Memory Composite on the CTOPP-2. However, based on Student’s poor score on the Memory for Digits Subtest, Ms. Barman determined that phonological memory is a challenging area for Student. Although phonological memory may impact reading, as reading is “made up of many different skills,” Ms. Barman does not feel a low score in this area necessarily translates into reading difficulty. She opined that Student does not struggle to read because she has developed “other strategies.” (Barman S-17; P-Vol II V)
48. On the CELF-5, Student performed below average on the Linguistic Concepts, Recalling Sentences and Understanding Paragraphs Subtests, but average in all other subtests, as

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<sup>11</sup> Student’s progress is not an issue in this hearing. Thus, while I have reviewed the progress reports submitted by Parents, I consider them only to the extent that they provide evidence relevant to the issue for hearing. (P-Vol II Y; P-Vol II DD)

well as on the Receptive Language Index, the Expressive Language Index, the Language Content Index, and the Language Structure Index. In addition, Student's Core Language Score was in the average range. Based on these scores, Ms. Barman concluded that Student possessed the foundational language skills necessary to access grade level curriculum and demonstrate her knowledge. (Barman; S-17; P-Vol II V)

49. On the ROWPVT-4, Student demonstrated average receptive vocabulary skills. On the EOWPVT-4, however, Student demonstrated word retrieval difficulty, scoring in the weak range. Because of the statistically significant difference between Student's receptive and expressive vocabulary scores, Ms. Barman concluded that although Student is able to comprehend vocabulary, she struggles to produce words without a model or answer choices. (Barman; S-17; P-Vol II V)
50. Ms. Barman did not conduct additional testing in every subtest where Student demonstrated "low scores"; she testified that she only conducts additional testing in areas where she needs "additional information". For instance, because of Student's lower expressive vocabulary score, Ms. Barman "wanted to see [whether Student could] use her words to retell a story or to narrate her own story." Thus, she administered the TNL to assess Student's narrative language abilities. Student demonstrated average narrative comprehension and oral narration skills. Ms. Barman concluded that Student had the requisite narrative comprehension and oral expression skills necessary for accessing grade level curriculum. (Barman; S-17; P-Vol II V)
51. With regard to the assessments administered to address Student's specific areas of need, Student scored in the average range on the Auditory Comprehension Subtest, and the below average range on Auditory Reasoning Subtest of the TAPS-3 (measuring how Student processes what she hears), suggesting some difficulty with higher order linguistic processing skills. Student's Cohesion Index was in the average range. Student performed in the very weak ability range on the Making Inferences and Multiple Interpretation Subtests of the SLDT-E<sup>12</sup> (measuring social language skills including non-verbal communication), suggesting difficulty with making inferences and thinking flexibly. Student's scores on the CASL-2 (measuring comprehension, expression and retrieval) ranged from below average to average, suggesting that, overall, Student was able to demonstrate foundational skills in the areas of pragmatic and supralinguistic language. Finally, Student scored in the below average range due to 4 speech sound errors (distortion of /r/ and of /l/) on the LAT-NU (measuring production of consonant sounds and blends). However, Ms. Barman noted that, overall, Student demonstrated good intelligibility, and her voicing and fluency were within functional limits for her age. (Barman; S-17; P-Vol II V)
52. In her report, Ms. Barman recommended accommodations for Student, including in the moment scaffolding in social situations, access to lists, dictionaries, and graphic organizers, and visual references to reinforce recall. (S-17; P-Vol II V)
53. Ms. Barman found her scores to be valid and consistent with the previous results obtained in Student's 2018 speech and language evaluation. (Barman; S-17; P-Vol II V)
54. According to Ms. Barman, Student's weaknesses in language are due to Autism. Although Student has "some good social pragmatic language," she has greater difficulty interpreting social situations and inferencing which is consistent with ASD. She testified that in kindergarten, Student "probably presented with a mixed receptive-expressive

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<sup>12</sup> Not all subtests of this assessment were administered. (S-17; P-Vol II V)

language disorder,” but currently she is presenting with a pragmatic language deficit.<sup>13</sup> (Barman)

55. Lori Bernardi MOT, OTR/L, conducted an occupational therapy evaluation of Student on April 16, 2021. (S-16) Ms. Bernardi did not testify at the Hearing; instead, Carey Goldenberg, OTR/L, testified regarding this report. Ms. Goldenberg has a master’s degree in occupational therapy. She holds licenses in Massachusetts and Washington and is a member of National Board for Certification in Occupational Therapy, Inc (NBCOT). Ms. Goldenberg also has an advanced sensory integration certification. She has been a practicing occupational therapist for 22 years. In Washington, she worked in the Seattle public schools for three years and subsequently served as the clinical director for a multi-disciplinary developmental clinic. Ms. Goldenberg moved to Massachusetts in 2021 and has been working in the Easthampton Public Schools since September. She has conducted approximately 60 evaluations this school year. Ms. Goldenberg does not provide any direct services to Student but supervises the COTA who consults to Student’s Team on a weekly basis. She has never evaluated Student but has observed Student in her classroom and in physical education class where Student appeared to be “do[ing] what her classmates [did].” (Goldenberg)
56. Ms. Goldenberg testified that she was familiar with Ms. Bernardi’s evaluation and that it was of the type that she herself is used to administering in a school setting. According to Ms. Goldenberg, the assessment “cover[ed] all the necessary elements.” Ms. Goldenberg did not endorse any further evaluations for Student. (Goldenberg)
57. Ms. Bernardi administered both standardized assessments and informal testing. She also reviewed Student’s prior testing and spoke with Student’s teachers. Standardized testing included the Beery-Buktenica Test of Visual Motor Integration 6<sup>th</sup> Edition; Beery-Buktenica Test of Motor Coordination, 6<sup>th</sup> Edition; Beery-Buktenica Test of Visual Perception, 6<sup>th</sup> Edition. (Goldenberg; S-16) Informal testing of Student’s visual perceptual skills showed that she understood visual information sufficiently so as to produce legible work. Student also demonstrated intact foundational fine motor skills, motor coordination and manipulation skills to support classwork. Student’s scores on the Visual Motor Integration, Visual Perception and Motor Coordination Tests ranged from average to above average. (Goldenberg; S-16)
58. Ms. Bernardi also administered the Sensory Profile 2: School Companion, to measure Student’s sensory processing abilities. Student’s sensory processing was functional in the 1:1 setting, but results also showed that she may benefit from support in organization of her school materials and verbal and visual cueing. Ms. Bernardi recommended accommodations, such as a slant board and access to sensory-based tools. However, she did not recommend any services because, according to Ms. Goldenberg, “[a]s a practice, the district makes decisions on services as a team.” (Goldenberg; S-16)
59. Nancy M. Psholka assessed Student in the area of physical therapy on April 5 and 12, 2021. (Psholka; S-18) Ms. Psholka has a bachelor’s degree in school-based therapy and 34 years of experience as a physical therapist. Since 2009, the District has been contracting with Ms. Psholka to conduct physical therapy evaluations and to provide

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<sup>13</sup> Because pragmatic use of language was Student’s “greatest area of weakness under the umbrella of speech and language,” Ms. Barman recommended a pragmatics language goal on Student’s subsequent IEP as well as various speech and language accommodations. However, based on Student’s progress and performance on the assessments, she recommended a reduction overall in speech and language services. (Barman)

direct services to students. Ms. Psholka conducts approximately 100 evaluations per year. She has been providing direct services to Student since kindergarten and last evaluated her in 2018. According to Ms. Psholka, Student has done “phenomenally well” in physical therapy and has made tremendous progress on all her goals and objectives. Student’s teacher has not expressed any concerns to Ms. Psholka regarding Student’s gross motor skills. (Psholka; S-18)

60. Ms. Psholka administered the Test of Gross Motor Development, Third Edition to assess Student’s locomotor and object control skills and the Movement Assessment Battery for Children-Second Edition (Movement ABC-2) in the domains of aiming and catching and balance (static and dynamic). Ms. Psholka reviewed Student’s 2018 physical therapy evaluation. She also made clinical observations of Student during therapy and testing. Student was observed to have good posture and endurance but presented with underlying low muscle tone. Student navigates the educational environment independently and has an appropriate running pattern. Although Student scored in the average range in all tested areas, Ms. Psholka recommended continued intervention to improve strength, flexibility, balance, gait and ease of postural maintenance. (Psholka; S-18)
61. According to Ms. Psholka, Student does not require additional evaluations at this time. (Psholka)<sup>14</sup>
62. Sarah Mochak is the Director of Special Education for the District. She has a master’s degree in education with a concentration in intensive special needs, as well as a master’s degree in educational leadership. Ms. Mochak holds licenses from DESE in special education, special education administration and superintendent/assistant superintendent. She has worked in the District in multiple capacities since 1997 and has been in her current role for 8 years. Ms. Mochak has attended Student’s Team meetings for several years. (Mochak)
63. Ms. Mochak never provided Student with direct services nor has she evaluated her formally, but she completed the Educational Assessment: Part A for Student on April 21, 2021. Moriah Sterling, Student’s third grade teacher, completed the Educational Assessment: Part B. She noted that Student was at or above grade level across all areas of the curriculum.<sup>15</sup> (Mochak; S-14, P-Vol II O, P-Vol II P)
64. Rachel Breton is Student’s current fourth grade teacher. She has a Master’s degree in teaching and a CAGS in school administration. Ms. Breton has an elementary teaching license from DESE and has worked in the District as a classroom teacher since 2013. (Breton)

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<sup>14</sup> On May 26, 2021, Parents emailed Ms. Mochak requesting that as part of her physical therapy evaluation, Ms. Psholka conduct “a complementary evaluation called a Dynamic Sensory Orthosis ... in order to provide a comprehensive evaluation in this area and find out about the needs of sensory difficulties that [Student] has.” (P-Vol. I PP) On June 3, 2021, Ms. Psholka responded to Parents explaining that a Dynamic Sensory Orthosis was not an evaluation but rather “something that you wear” and that Parent needed to order it through her insurance. It required a “letter of medical necessity.” (P-Vol. I QQ) On June 4, 2021, the District declined to conduct an evaluation for a Dynamic Sensory Orthosis as it was “not within the educational testing requirements of school districts.” (P-Vol. I RR)

<sup>15</sup> Student participated in District-wide assessments in January 2021. She performed in the average range in math, reading and writing. (P-Vol II G; P-Vol II L; P-Vol II M) Student’s grade 3 MCAS scores show that she was partially meeting expectations in mathematics (489) and in English Language Arts (471). (P-Vol II H; P-Vol II N) Student was also meeting many of the goals on her IEP for the period from 9/24/2020 to 9/23/2021 and was partially proficient on others. (P-Vol II I; P-Vol II Q)

65. As is common practice, prior to the start of the 2021-2022 school year, Ms. Breton consulted with Ms. Sterling, Student's prior teacher. Ms. Sterling did not raise any concerns as to Student's progress from the previous school year. Ms. Sterling described Student as meeting grade level standards in all content areas. (Breton)
66. Ms. Breton testified that she does not have any current concerns regarding Student who is doing "quite well." She works hard and is happy to be in class. She loves to read and write and is an excellent artist. (Breton)
67. Ms. Breton did not believe that Student required any additional testing at this time. (Breton)
68. The District scheduled a Team meeting for the end of June 2021 to review the District assessments and determine continued eligibility for Student. At that time, Parents were represented by legal counsel. All reports were translated into Spanish and sent to the parents in advance of the June meeting to review the assessment. (Mochak; P-Vol. I PP) Ultimately, Parents cancelled the June 2021 Team meeting. (Mochak)
69. On August 20, 2021, Parents informed the District via email that they had "reviewed" the District's assessments and "disagree with the results and diagnoses provided." They requested a "neuropsychological evaluation" at public expense. (S-13, P-Vol. I TT) The District filed a request for a due process hearing with the BSEA to defend its evaluations, and the Parents filed for a due process hearing as well.<sup>16</sup> (Mochak; Vol. I TT )
70. Two Team meetings were scheduled for September 2021, the first to review assessment results and determine eligibility, and the second to develop an IEP. (Mochak; S-11; S-12)
71. In late August, Student was withdrawn from the District and enrolled at Greenfield Commonwealth Virtual School. Subsequently, the District withdrew its due process hearing request and cancelled the September 2021 meetings. One week later, Student was reenrolled in the District, and Ms. Mochak renewed her efforts to schedule the Team meetings. (Mochak)
72. On October 4, 2021, the District issued a Meeting Invitation to Parents for a meeting on October 21, 2022 in order to review the evaluation results and determine eligibility. (Mochak; S-8) Parents did not attend, and the meeting was not held. (Mochak)
73. On October 14, 2021, Parents wrote to Ms. Mochak indicating that they would "not attend meetings before obtaining results from the requested independent Neuropsychological, Psycholinguistic and Dynamic Sensory Orthosis evaluations." (S-6)
74. On October 17, 2021, Ms. Mochak responded that when Parents requested the independent evaluation, the District's attorney had filed a Hearing Request to seek a determination from the BSEA that the District's evaluations were comprehensive and appropriate, but when Parents withdrew Student from the District, the attorney withdrew the Hearing Request. She notified Parents that the District does "not agree to fund these evaluations." Also on October 17, Ms. Mochak tried to re-schedule an IEP Team meeting for November 19, 2021. She notified Parents that if they refused to attend, the meeting would be held without them. (S-6)
75. On October 21, 2021, the District issued a Meeting Invitation to Parents for November 19, 2021 in order to review the evaluation results, determine eligibility and develop and IEP. (Mochak; S-7)
76. On October 29, 2021, Parent responded,

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<sup>16</sup> The record includes no information relative to this filing.

“We have recently discussed [Student’s] performance with [Student’s] teachers, who currently report [she] is performing below her peers in various academic areas. We have also noticed a decline in [Student’s] performance compared to hers at the beginning of her re-enrollment in this school district. We believe that responses to these concerns can best be answered through an Independent Neuropsychological and Psycholinguistic evaluation. These evaluations can help to find or confirm diagnoses that will help us how best to help [Student] academically.”  
(Mochak; S-7; P-Vol. I VV)

77. On November 3, 2021, the District filed a request for a due process hearing to defend the appropriateness and comprehensiveness of the District’s evaluations. (Mochak)
78. On November 19, 2021, the Team met to review the results of the District evaluations. (Mochak; S-7) Ms. Mochak chaired the meeting. Ms. Howard, Ms. Barman, and Ms. Psholka attended the meeting, reported on their evaluations, and made recommendations for Student. (Howard; Barman; Psholka; Mochak) Ms. Goldenberg attended the meeting and reported on the occupational therapy evaluation. (Goldenberg) Additionally, Student’s fourth grade teacher attended to report on Student’s progress. (Breton; Mochak)
79. At the Team meeting, Parents were given the opportunity to ask questions of the evaluators. Parents shared their concern regarding Student’s literacy skills. The Team then re-determined eligibility, under the disability category of Autism. Parents requested that the District consider whether Student qualified under a specific learning disability, but, because the 2021 evaluation results demonstrated that Student was approaching or working at grade level, the Team continued to determine that Student did not present with a specific learning disability. (Mochak; Howard; Mother; S-5)
80. Ms. Mochak testified in her capacity as Team chair that Student’s evaluations were appropriate and comprehensive and enabled the Team to develop an IEP that meets Student’s needs. (Mochak)
81. The Team met again on December 17, 2021 and developed an IEP with goals and services in the areas of Pragmatics, Social Skills, Reading, Written Language, Mathematics, and Physical Therapy, and a full inclusion placement at Pepin Elementary School. (S-3; P-Vol II J)
82. Dorothy Parker testified on behalf of Parents. Ms. Parker is a retired teacher with a master’s degree in educational psychology and social foundations, with a focus on teaching “behaviorally-impaired students.” She has held teaching licenses in Nebraska, South Dakota and Massachusetts. Ms. Parker last taught 5 years ago at White Oak School in Massachusetts. During her professional career, Ms. Parker administered standardized academic testing to students of varying disabilities. During the last three years, Ms. Parker has been assisting Parents in interpreting evaluation results and understanding progress reports and IEPs. (Parker)
83. Ms. Parker observed Student in her school setting over four multi-hour sessions in the latter part of the 2018-2019 school year. She has observed Student in her home on many occasions. She has never evaluated Student nor provided her with any direct services. Ms. Parker reviewed the 2021 evaluations. She testified that the evaluations were “pretty good” but noted discrepancies with prior private evaluations. According to Ms. Parker, the District’s evaluators assessed many areas “but not in depth.” In addition, they failed to explore further those areas in which Student scored in the below average range. Ms.

Parker opined that phonology, processing speed and word retrieval required additional analysis. (Parker)

84. According to Ms. Parker, the District's reports were less "detailed" than the previous private evaluations and focused exclusively on Student's Autism diagnosis rather than "investigat[ing] more the possibility to either rule in or rule out a learning disability." They failed to explain "the discrepancy" between Student's progress reports and her MCAS scores.<sup>17</sup> Ms. Parker testified that the "main difference" between the District's evaluations and the private evaluations was "the interpretation of the scores, what they mean[t] and how [they] applied to [Student] and her learning." She would have liked to see "more in-depth explanations and recommendations." (Parker)
85. Dr. Kemper reviewed Student's 2021 assessments and progress reports prior to Hearing. According to Dr. Kemper, Student's school-based testing was inconsistent with his 2019 assessment of Student. (Kemper)
86. Dr. Kemper testified that the District's speech and language assessment was "very good" and that Ms. Barman "gave a lot of tests." However, she did not give any literacy tests because she is not a psycholinguist. (Kemper)
87. Dr. Kemper opined that as a speech and language pathologist, Ms. Barman should have been able to conduct the Non-Word Repetition subtest and provide a score for the Phonological Memory Composite of the CTOPP-2 because speech and language pathologists are "supposed to be able to understand what anybody says." (Kemper)
88. Dr. Kemper testified that phonological memory "has to do with spelling." According to Dr. Kemper, the 2021 "KTEA [may have] said her spelling was average," but it was "below average in [Dr. Kemper's] testing." Dr. Kemper "doubt[ed] very much that [Student's] spelling ha[d] changed so much" since then, "but it [might] have." However, he conceded that if Student presented with average spelling abilities in 2021, then the fact that a score could not be obtained for the Non-Word Repetition subtest and for the Phonological Memory Composite of the CTOPP-2 had no substantive impact on Student's educational programming. (Kemper)
89. Dr. Kemper testified that the results of the Non-Word Repetition subtest of the CTOPP-2 demonstrate that Student is reading by memorizing words. He explained that Student "reads okay" because she has "memorized real words", but she "does not have the underpinning skills to be able to recognize or decode a word that she has never seen before." (Kemper)
90. According to Dr. Kemper, although the Understanding Paragraphs Subtest tested Student's receptive language skills, it also assessed her expressive language skills because Student was asked to express her answers. Dr. Kemper testified that Student had "difficulty answering questions all over the place." He opined that Student scored in the below average range because she has both receptive and expressive language skill deficits, and Ms. Barman should have investigated this further through "additional tests." (Kemper)
91. Dr. Kemper observed that he utilizes the Peabody Picture Vocabulary Test (PPVT) and the Expressive Vocabulary Test (EVT), rather than the ROWPVT-4 and EOWPVT-4, because the PPVT and the EEVT are normed on the same population and can be compared. He explained that students with dyslexia often score higher on the PPVT than on the EVT. Although in his 2019 assessment of Student, her scores on the ROWPVT-4

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<sup>17</sup> Ms. Parker did not offer any clarification on the "discrepancy" she observed.

and EOWPVT-4 did not demonstrate a significant discrepancy between the scores, on Ms. Barman's vocabulary assessment using the PVT and EVT, Student's receptive vocabulary score was significantly higher than her expressive vocabulary score. According to Dr. Kemper, although this significant discrepancy was noted by Ms. Barman in her report, she failed to conduct additional assessments for dyslexia, as he would have done. (Kemper)

92. Dr. Kemper did not find Ms. Barman's testing to be comprehensive because "a lot of language areas" were "missing" from her evaluation, including reading, spelling, and writing. He explained that "reading is language." In addition, in her report Ms. Barman did not propose interventions, only accommodations for Student. According to Dr. Kemper, an accommodation is "when you do something that is an excuse for a person," but it does not "teach anything." Dr. Kemper also was concerned that Ms. Barman did not propose any "remediation," and he felt her interpretation of Student's scores was "ok" but not "the best." (Kemper)
93. In Dr. Kemper's opinion, Ms. Howard's psychological testing was also "not good." Although Dr. Kemper has never taught elementary school students he administers the KTEA-3, which he considers to be a "general education test" for "general education" students, approximately 12 times a year. Dr. Kemper has never administered the WISC-V. (Kemper)<sup>18</sup>
94. Dr. Kemper testified that he would have conducted additional academic testing (i.e., Gray Oral Reading Test, Test of Reading Efficiency) because, based on his 2019 testing of Student, she cannot read or spell. Dr. Kemper could not explain why his 2019 testing was more representative of Student's abilities than the District's 2021 testing. He testified that he could not say whether the 2021 scores are valid as he was not present during the administration of the tests. When questioned by the Hearing Officer, Dr. Kemper conceded that it was possible that Student's reading had improved over two years so as to account for the improved scores, but he could not be certain whether she did, in fact, make such progress. (Kemper)
95. Dr. Kemper also disagreed with Student's ratings on the KTEA-3, suggesting that her standard score of 86 was actually "below average", not "low average", while her standard score of 90 is "low average," not "average". He conceded, however, that the assessment tool instructions indicate how to score the test, and that according to the KTEA a score between 85 to 115 is deemed average. He explained, though, that "we are talking about language on one hand and numbers on the other hand," and "psychometrists have said 90 to 110 is average." Dr. Kemper also noted that there is a "big difference" between a child who scores 85 and one who scores 110." (Kemper; P-Vol. II U, p. 21)
96. Dr. Kemper has not seen or evaluated Student since 2019. Although he believes that "maybe he did and maybe he didn't" attended an IEP meeting for Student in the past

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<sup>18</sup> Dr. Kemper refused to confirm or deny whether he has had any training in administering the WISC-V but testified that it could be "administered by anyone on the street with proper training." To interpret the WISC-V, one would need a "couple of courses in psychology which [he] has had," since he has doctorate in psycholinguistics. In addition, Parent asked Dr. Kemper to compare Student's performance on the District's evaluations to Student's performance on the MCAS. Dr. Kemper testified that he was very familiar with the MCAS because he has "tested many students who have taken the MCAS." He claimed to be knowledgeable about which skills the MCAS assesses because the MCAS manual details such information. (Kemper) Based on this testimony, the Hearing Officer did not find that Dr. Kemper was sufficiently familiar with the MCAS so as to allow him to testify about the correlation, or lack thereof, between the standardized tests used by District evaluators and the MCAS.

year, he could not identify when he had done so.<sup>19</sup> According to Dr. Kemper, Student requires additional testing. An elementary school student should be evaluated every 3 years. He testified that Student’s current performance in school “maybe ... is and maybe ... [is] not” relevant to his analysis of whether additional testing is needed. (Kemper)

97. Mother believes there is a “disconnect” between Student’s observed performance at home and that reported by school staff, based on Parents’ observation of Student during remote learning when schools were shut down for COVID-19. Student struggled during that time and required one-to-one support to complete her asynchronous work. Mother does not believe that the 2021 evaluations captured Student’s abilities accurately. The District’s evaluations “excused” scores rather than addressed the “reasons” behind them and the root of her difficulties. Mother testified that what the reports indicate Student is able to do is “not accurate.” According to Mother, Student’s MCAS scores do not demonstrate the level of academic achievement reported by the 2021 evaluations. (Mother; P-Vol II S)
98. Mother testified that the District’s evaluations provided no diagnoses or recommendations for Student. The reports were in a “format” that did not allow Parents “to access information” regarding Student’s abilities. In addition, the evaluators provided information verbally at Team meetings that they did not put into their reports. In contrast, Student’s prior private evaluations affirmed Mother’s concerns and made several diagnoses and extensive recommendations. Mother wants to find out where Student “truly” is academically. (Mother; (P-Vol II S)

## LEGAL STANDARDS:

### 1. Free Appropriate Public Education and the Individualized Education Program

The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education” (FAPE).<sup>20</sup> To provide a student with a FAPE, a school district must follow identification, evaluation, program design, and implementation practices that ensure that each student with a disability receives an Individualized Education Program (IEP) that is: custom tailored to the student’s unique learning needs; “reasonably calculated to confer a meaningful educational benefit”; and ensures access to and participation in the general education setting and curriculum as appropriate for that student so as “to enable the student to progress effectively in the content areas of the general curriculum.”<sup>21</sup> The development and implementation of the IEP is the IDEA’s most “important mechanism.”<sup>22</sup> The IEP must be individually tailored for the student for whom it is created.<sup>23</sup> When developing the IEP, the Team must consider parental concerns, strengths, disability related

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<sup>19</sup> The available documentary evidence includes no record of Dr. Kemper’s attendance at Student’s IEP Team meetings from September 2020 until December 2021.

<sup>20</sup> Individuals with Disabilities Education Act (IDEA), 20 USC §1400 (d)(1)(A).

<sup>21</sup> See 20 USC §1401 (9), (26), (29); 603 CMR 28.05(4)(b); *Sebastian M. v. King Philip Reg’l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012); *C.D. by & through M.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621, 629 (1st Cir. 2019); *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F. 3d 18, 27 (1st Cir. 2008); *In Re: Chicopee Pub. Sch.*, BSEA # 1307346, 19 MSER 224 (Byrne, 2013).

<sup>22</sup> *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 818 (9th Cir. 2007).

<sup>23</sup> *Andrew F. v. Douglas Cty. Reg’l Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

needs, recent evaluations, present level of achievement, academic, developmental and functional needs.<sup>24</sup>

## 2. Legal Standard for Determining the Appropriateness of an Evaluation

In determining whether an evaluation conducted by a school district is appropriate, a hearing officer must apply the legal requirements set forth in the IDEA and its implementing regulations.<sup>25</sup> If the district's evaluation was inappropriate, the parent is entitled to an independent educational evaluation at public expense.<sup>26</sup>

### *a. Re-Evaluations*

The IDEA requires Districts to re-evaluate eligible students at least once every three years, unless the parent and public agency agree it is unnecessary.<sup>27</sup> A re-evaluation must be individualized, take into account the student's then-current needs and help determine whether the child continues to meet eligibility for special education and related services.<sup>28</sup> As part of any re-evaluation, the IEP Team and appropriate professionals, with "input from the child's parents," must "identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ...."<sup>29</sup> To reassess a student, a school district must provide proper notice to the student and her parents.<sup>30</sup>

The IDEA and its regulations require school districts to utilize assessment tools and strategies aimed at enabling the student to participate in the "general education curriculum" and "determining an appropriate educational program" for the student by obtaining "accurate information on what the child knows and can do academically, developmentally and functionally ...."<sup>31</sup> Therefore, school districts must provide assessments and other evaluation materials in the student's native language in the way that is most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally.<sup>32</sup>

Both federal and Massachusetts regulations further require school districts to ensure that appropriately credentialed and trained specialists administer all assessments.<sup>33</sup> Decisions regarding the areas to be assessed are made based on the suspected needs of the child,<sup>34</sup> and the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs ...."<sup>35</sup> Hence, the student must be assessed in all areas of suspected

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<sup>24</sup> 34 CFR 300.324(a)(i-v); *Andrew F.*, 137 S. Ct. at 999; *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

<sup>25</sup> 20 USC §1414; 34 CFR §300.15; 34 CFR §§300.301 through 311.

<sup>26</sup> 34 C.F.R. §300.502(b)(2)(i); 34 CFR §300.502(b)(3).

<sup>27</sup> 34 CFR 300.303(b).

<sup>28</sup> 34 CFR §300.305(a)(2).

<sup>29</sup> 20 USC §1414(c)(1)(B)(ii); 34 CFR §300.305(a)(2).

<sup>30</sup> See 20 USC §1414(b)(1).

<sup>31</sup> 20 USC §1414(b)(3)(A)(ii); see 34 CFR §300.304(b)(1).

<sup>32</sup> 34 CFR §300.304(c)(1)(ii).

<sup>33</sup> See 34 CFR §300.304(c)(1)(iv) and 603 CMR §28.04(2).

<sup>34</sup> See Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006).

<sup>35</sup> 34 CFR §300.304(c)(6).

disability, whether or not commonly linked to the disability category in which the child has been classified,<sup>36</sup> including "social and emotional status."<sup>37</sup> The IDEA requires the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information ... ." <sup>38</sup> A school may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child.<sup>39</sup> All evaluation requirements found in 34 CFR §300.304 apply equally to initial and subsequent evaluations.

Moreover, the IDEA does not require a school to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information.<sup>40</sup> Instead, an evaluation must "use technically sound testing instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors."<sup>41</sup> All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher.<sup>42</sup> Districts must select and administer assessments and evaluation materials in a way that does not discriminate based on race or culture.<sup>43</sup> Furthermore, Massachusetts regulations state that each

"person conducting an assessment shall summarize in writing the procedures employed, the results, and the diagnostic impression, and shall define in detail and in educationally relevant and common terms, the student's needs, offering explicit means of meeting them. The assessor may recommend appropriate types of placements, but shall not recommend specific classrooms or schools. Summaries of assessments shall be completed prior to discussion by the Team and, upon request, shall be made available to the parents at least two days in advance of the Team discussion at the meeting occurring pursuant to 603 CMR §28.05(1)."<sup>44</sup>

*b. Independent Educational Evaluations Pursuant to the IDEA*

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<sup>36</sup> See 20 USC §1414(b)(3)(B); 34 CFR § 300.304(c)(2) and (6).

<sup>37</sup> 34 CFR § 300.304(c)(4); see *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1121 (9th Cir. 2016) (finding that the informed suspicions of a consulted outside expert whose report stated that the student displayed autistic behavior established the statutory requirement of suspicion thus necessitating a full assessment for autism); *Dublin Unified Sch. Dist.*, N 2007100454, 108 LRP 32921 (SEA CA, 2008) (where parents did not request an occupational therapy assessment and the district did not have notice of any concerns from the teachers in the areas of occupational therapy or sensory processing, the District had no obligation to conduct an occupational therapy assessment).

<sup>38</sup> 20 USC §1414(b)(2)(A); 34 CFR § 300.304(b).

<sup>39</sup> 20 USC §1414(b)(2)(B); 34 CFR § 300.304(b)(2).

<sup>40</sup> See, e.g., *Letter to Unnerstall*, 68 IDELR 22 (OSEP 2016); *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); *Letter to Anonymous*, 20 IDELR 542 (OSEP 1993) ("[S]election of particular testing or evaluation instruments is left to the discretion of State and local educational authorities").

<sup>41</sup> 20 USC § 1414(b)(2)(C); 34 CFR § 300.304(b)(3).

<sup>42</sup> 20 USC § 1414(b)(3)(A); 34 CFR § 300.304(c)(1); see 603 CMR 28.04(2) ("the school district must "ensure that appropriately credentialed and trained specialists administer all assessments").

<sup>43</sup> 34 CFR § 300.304 (c)(1)(i).

<sup>44</sup> 603 CMR §28.04(2)(c); 20 USC §1414(b)(4); 34 CFR §300.306(c)(1).

Parents of a child with a disability are entitled to participate in the process used to develop the educational plan for their student.<sup>45</sup> To that end, 20 U.S.C. §1415 provides for an “opportunity for parents of a child with a disability to ... obtain an independent educational evaluation of the child...” An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the school district responsible for the student’s education.<sup>46</sup> Massachusetts regulations further state that “[a]ll independent education evaluations shall be conducted by qualified persons who are registered, certified, licensed or otherwise approved and who abide by the rates set by the state agency responsible for setting such rates. Unique circumstances of the student may justify an individual assessment rate that is higher than that normally allowed.”<sup>47</sup> In addition, 34 CFR §300.502(b) provides, in pertinent part, that:

“(1) 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, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent education 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 its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.”

*c. Independent Evaluations in Massachusetts*

Similar to the IDEA, Massachusetts law states that “[u]pon receipt of evaluation results, if a parent disagrees with an initial evaluation or reevaluation completed by the school district, then the parent may request an independent education evaluation.”<sup>48</sup> However, in contrast to federal law, Massachusetts does not require a showing of appropriateness and comprehensiveness if the student is eligible for free or reduced cost lunch; in such cases the school district must “provide, at full public expense, an independent education evaluation that is equivalent to the types of assessments done by the school district. No additional documentation of family financial status is required from the parent.”<sup>49</sup> However, if the parent is requesting an independent evaluation in an area that was not assessed by the school, 603 CMR §28.04(5)(d) provides:

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<sup>45</sup> See 20 USC §1415(b)(1).

<sup>46</sup> See 34 CFR §300.502(b).

<sup>47</sup> 603 CMR §28.04(5)(a). Although there are special circumstances that allow for evaluations at a rate that exceeds the state rate, no such circumstances were asserted in the present matter. As such, this is not an issue before me. See *id.* (“Unique circumstances of the student may justify an individual assessment rate that is higher than that normally allowed”).

<sup>48</sup> 603 CMR §28.04(5)(d).

<sup>49</sup> See 603 CMR §28.04(5)(c)(1). In cases where “the sliding scale” may apply, a district is not excused from compliance with the five-day rule; a district may either receive income information from parents within the five-day period and determine eligibility during that time, or request a BSEA hearing within the five days, and then withdraw the request if the parent demonstrates eligibility for full or partial funding of the IEE. See *In re: Framingham Pub. Sch.*, BSEA #11-1276 (Berman, 2011).

“If the parent is requesting an independent education evaluation in an area not assessed by the school district, the student does not meet income eligibility standards, or the family chooses not to provide financial documentation to the district establishing family income level, the school district shall respond in accordance with the requirements of federal law. Within five school days, the district shall either agree to pay for the independent education evaluation or proceed to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate. If the Bureau of Special Education Appeals finds that the school district’s evaluation was comprehensive and appropriate, then the school district shall not be obligated to pay for the independent education evaluation requested by the parent.”

In other words, when an evaluation is conducted in accordance with 34 CFR §§300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability, and the nature and extent of the special education and related services that child needs.<sup>50</sup> Nevertheless, a school-based evaluation is a pre-requisite to a publicly-funded IEE since a parent’s right to a publicly-funded IEE stems from the parent’s disagreement with the results of the school-based evaluation, or from the parent’s belief that a different area must be evaluated.<sup>51</sup> A parent is only entitled to one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees.<sup>52</sup>

### 3. Burden of Persuasion

In a due process proceeding, the burden of persuasion is on the moving party that is seeking relief. If the evidence is closely balanced, the moving party will not prevail.<sup>53</sup>

### **APPLICATION OF LEGAL STANDARDS AND CONCLUSION:**

In the instant case, it is undisputed that Student is a student with a disability entitled to special education and related services.<sup>54</sup> It is also undisputed that Student is eligible for free or reduced

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<sup>50</sup> See *Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015); see also *Administrative Advisory SPED 2004-1: Independent Educational Evaluations*, [https://www.doe.mass.edu/sped/advisories/04\\_1.html](https://www.doe.mass.edu/sped/advisories/04_1.html) (DESE 2003).

<sup>51</sup> See *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 740 (3d Cir. 2009) (finding an IEE was not reimbursable because the parents had already made an appointment for the IEE when they requested the District evaluation and, as such, parents were not challenging the District's evaluation); *R.L. ex rel. Mr. L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222, 234 (D. Conn. 2005) (although an independent evaluation may have been useful to the parents, the district was not required to fund the evaluation because “there was no disagreement between the parties over any existing evaluation” when the parents requested the IEE); *In Re: Eleanor and Pembroke Pub. Sch.*, BSEA # 15-03787 (Reichbach, 2015) (“Both Massachusetts and federal special education regulations focus on independent educational evaluations as a tool for parents, subject to certain conditions, to obtain additional information about their children when they *disagree* with an evaluation obtained by a local educational agency”) (emphasis added); *In Re: Easthampton Pub. Sch.*, BSEA # 1911816, 25 MSER 143 (Figueroa, 2019); see also *In Re: Abington Pub. Sch.*, BSEA No. 04-3493 (Figueroa 2004).

<sup>52</sup> See 34 CFR 300.502(b)(5).

<sup>53</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

<sup>54</sup> M.G.L. c. 71B, § 3.; 603 CMR §28.03(1)(e)

school lunch. The issue here is thus, a very narrow one, that is, whether the neuropsychological and psycholinguistic evaluations sought by Parents are equivalent to those performed by the District in 2021,<sup>55</sup> or whether they are evaluations in areas not assessed by the District. Here, the District bears the burden of persuasion that those evaluations requested by Parents are not equivalent to those done by the District, and, if it meets that burden, then it must still demonstrate that its assessments were appropriate and comprehensive and that Easthampton assessed Student in every area of suspected disability.<sup>56</sup>

After careful consideration of the totality the evidence presented at the hearing, and of the arguments of the District's counsel and Parents, I find that although the District clearly carried its burden of showing that its evaluations were appropriate and comprehensive, it failed to demonstrate that the requested neuropsychological and psycholinguistic evaluations are not "equivalent to the types of assessments done by the school district."<sup>57</sup> Therefore, given that Student is eligible for free or reduced lunch, Parents are entitled to the requested IEEs at public expense. My reasoning follows:

I note at the outset that, based on the overwhelming evidence, the District's evaluations were comprehensive and appropriate.<sup>58</sup> A review of the testimony and the documentary evidence

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<sup>55</sup> At Hearing, the parties stipulated that although an Assistive Technology Evaluation had also been conducted by the District in April 2021 at Parents' request, Parents had no disagreement with said assessment.

<sup>56</sup> See *Schaffer*, 546 U.S. at 62.

<sup>57</sup> See 603 CMR 28.04(5)(c)(1).

<sup>58</sup> Dr. Kemper's testimony was unpersuasive. Overall, I did not find him to be a credible witness. Dr. Kemper struggled to answer questions on both direct and cross examination. His answers were vague, unresponsive, and often irrelevant. For instance, Dr. Kemper refused to answer whether he had been trained to administer the WISC-V. He also testified that "maybe" Student's current performance in school is relevant but "maybe it is not". In addition, Dr. Kemper expressed a general bias against school districts, noting he has always testified on behalf of parents, as well as specific bias against the Easthampton Public Schools due to a dispute over payment for his 2019 private evaluation of Student. (Kemper; Mochak)

Most relevant to his credibility (or lack thereof) is Dr. Kemper's lack of current knowledge of Student. Although Dr. Kemper was certain that he had attended a Team meeting for Student, he could not identify when he had done so, and the available documentary evidence includes no record of his attendance. Moreover, Dr. Kemper last assessed Student in 2019. Even then, though, he had neither solicited teacher input nor observed Student in the school setting. (Kemper; P-Vol 2 U) In addition, in his testimony, Dr. Kemper made sweeping, general statements about Student's abilities that were not grounded in fact. For instance, he testified that Student has a "writing problem" and that her teachers "admit to that," when, to the contrary, Ms. Breton testified that Student's writing was a strength. (Kemper; Breton) Similarly, Dr. Kemper asserted that "Student cannot read" but then admitted that he has no current knowledge of Student's reading abilities. (Kemper)

Also concerning was Dr. Kemper's interpretation of standardized scores. For instance, he testified that he considered a score of 86 on the KTEA-3 to be "below average" not "average" which is in direct contradiction to the scoring manual of the KTEA-3 that defines a score between 85 to 115 as average. (Kemper; Howard; P-Vol. II U, p. 21; S-15) Dr. Kemper offered no credible explanation for digressing from standard scoring practices. Moreover, this testimony calls his own assessment results and interpretation thereof into question. (Kemper; P-Vol. II U, p. 21)

I also place little weight on Ms. Parker's testimony regarding Student's educational presentation. Although Ms. Parker has an extensive history as an educator, she has never worked with or assessed Student. (Parker) Moreover, despite being a former educator, she lacks expertise in school psychology, speech and language therapy, occupational therapy, and physical therapy.

clearly demonstrates that the District’s evaluations were conducted by qualified persons.<sup>59</sup> The evidence also shows that the District’s evaluators used a variety of tools and strategies in assessing Student.<sup>60</sup> The uncontroverted evidence shows that the District’s re-evaluation included a review of relevant information regarding Student’s current functioning and the assessment of Student’s functional, developmental, and academic skills.<sup>61</sup> The record further supports the conclusion that each member of the multi-disciplinary team used technically sound instruments.<sup>62</sup> Ms. Howard, Ms. Barman, Ms. Psholka, and Ms. Goldenberg testified the tests were used only for their intended purpose, and Ms. Howard, Ms. Barman, and Ms. Psholka testified that the tests were administered according to the instructions provided by the producer of the assessments.<sup>63</sup>

I also note that I find persuasive the individual opinions of the District’s evaluators that their respective assessments were comprehensive; that they evaluated Student in all areas of suspected disability; that they identified all of Student’s special education and related service needs; and that Student does not require additional testing at this time.<sup>64</sup>

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<sup>59</sup> See 34 CFR 300.304(c)(1)(iv). Specifically, Ms. Howard, Ms. Barman, and Ms. Psholka are licensed professionals in their fields with extensive education, training, and experience in administering and interpreting the types of assessments that they administered to Student. In addition, they testified credibly to having significant experience assessing students of a similar profile to Student. (Howard; Barman; Psholka) Ms. Bernardi did not testify at Hearing, and no evidence was presented regarding her education, training, and experience. Ms. Goldenberg, however, testified that the testing instruments selected by Ms. Bernardi were appropriate and of the type she herself would have administered under the same circumstances. (Goldenberg)

<sup>60</sup> See 34 C.F.R. §300.304(b).

<sup>61</sup> See 34 CFR §300.304(b)(1). Ms. Howard assessed Student’s cognitive, academic, and social/emotional abilities. She further explored Student’s executive function skills, memory, attention, and social perception as well as her academic strengths and weaknesses in the areas of mathematics, reading and writing. Ms. Barman examined Student’s receptive and expressive language, vocabulary, articulation, social language, and narrative skills. Ms. Bernardi evaluated Student’s visual perception, motor coordination, and sensory processing abilities. Ms. Psholka assessed Student’s ability to navigate the school environment as well as her gross motor skills. (Howard; Barman; Psholka; Goldenberg; S-15; P-Vol. II BB; S-17; P-Vol. II V; S-18)

<sup>62</sup> See 34 CFR §300.304(b)(3). All assessments were provided and administered in the student’s primary language, English and otherwise complied with the federal regulations governing chosen testing instruments. (Howard; Barman; Psholka; Goldenberg; S-15; P-Vol. II BB; S-17; P-Vol. II V; S-18) No evidence was offered to suggest that the testing instruments were not “technically sound”. To the contrary, Parents’ expert, Dr. Kemper, testified to utilizing many of those chosen by the District in his own evaluations, and, in 2019, Dr. Switalski had administered many of the same assessment tools. Moreover, Ms. Howard, Ms. Barman and Ms. Psholka explained why they selected and administered each specific testing instrument and testified that the tools were appropriate to be used on a student with Student’s profile. Ms. Goldenberg also testified that the instruments chosen by Ms. Bernardi were “commonly” used to test a student of Student’s age and profile. (Howard; Barman; Psholka; Goldenberg; Kemper; P-Vol 2 AA; P-Vol. II BB; P-Vol. II U; P-Vol. II V; S-15; S-17; S-18; S-19)

<sup>63</sup> See 34 CFR §300.304(c)(1); see also 603 CMR §28.04(2). Ms. Howard and Ms. Barman aptly explained minor deviations in the administration of the testing instruments due to the COVID-19 safety protocols that were in place during testing (i.e., Student and evaluator wore masks and were socially distancing). (Howard; Barman; S-15; S-17) I note that there was no evidence offered to contest that the tests were not administered according to the instructions provided by the producer of the assessments. Dr. Kemper testified that he could not assert that the assessments were improperly administered. (Kemper; Howard; Barman; Psholka; Goldenberg; S-15; P-Vol. II BB; S-17; P-Vol. II V; S-18)

<sup>64</sup> See 34 C.F.R. §300.304(c)(4). As noted above, Ms. Howard, Ms. Barman, and Ms. Psholka were persuasive because they had either worked with Student in the past or were still working with Student at the time of the 2021 re-evaluation. In addition, they had an opportunity to observe Student in the classroom or in the school environment and to confirm with other school staff whether the results of their assessments were consistent with Student’s

Nor were Parents persuasive in arguing that the District failed to assess Student in all areas of suspected disability.<sup>65</sup> Specifically, Parents asserted that the District’s assessments focused on Student’s Autism diagnosis and ignored her other learning challenges, such as a potential language-based disability. (Kemper; Mother; Parker; S-19; P-Vol 2 U) However, the evidence shows that the District assessed Student’s reading, writing and math ability, as well as her phonological processing, but the results did not endorse a specific learning disability.<sup>66</sup>

Nonetheless, despite the fact that my analysis pursuant to the federal special education statute concludes here with a finding that the District’s evaluations were appropriate and comprehensive, for the reasons that follow, this is not controlling with respect to my ultimate order in this matter.

Massachusetts law dictates, pursuant to 603 CMR §28.04(5)(c)(1), that because Student in this matter is eligible for a free and reduced lunch, Parents are entitled to IEEs “equivalent to the types of assessments done by the school district.”<sup>67</sup> (P-Vol. I WW) Here, based on the evidence presented, I cannot find that Parents sought assessments in areas not covered by the District.<sup>68</sup> As discussed in detail above, Parents could not identify what areas should have been evaluated that were not already assessed by the District. In essence, Parents’ request for neuropsychological

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classroom performance. (Howard; Barman; Bernardi; Psholka; Goldenberg; S-15; P-Vol. II BB; S-17; P-Vol. II V; S-18)

<sup>65</sup> See 34 C.F.R. §300.304(c)(4).

<sup>66</sup> Ms. Howard administered standardized cognitive (i.e., WISC-V, NEPSY-II) and academic tests (i.e., KTEA-3). (Howard; S-15; P-Vol. II BB) She testified that based on her standardized testing, as well as reports from the classroom teacher and a review of prior assessments, there was no evidence to support a specific learning disability in reading, which was why she did not conduct any additional testing to probe the possible existence of one. Although standardized testing showed some deficits in writing and math, Student’s then-current classroom teacher, Ms. Sterling, informed Ms. Howard that, to the contrary, Student was performing at grade level in both areas in class. (Howard; S-15; P-Vol. II BB) This is further supported by the District’s prior testing in 2018, and by Ms. Breton’s current observations of Student’s performance in the classroom. (Breton; S-14; P-Vol. II O; P-Vol. II P; P-Vol. II G; P-Vol. II L; P-Vol. II M; P. Vol. II H; P-Vol. II N, P-Vol. II Q) Similarly, Ms. Barman administered the CTOPP-2 to assess Student’s phonological skills. Although deficits in phonological memory were noted, Ms. Barman concluded, based on her work with Student and the classroom teacher’s observations, that these deficits did not interfere with Student’s ability to read or access grade level curriculum. In other words, the skill deficits identified by the standardized assessments had no educational impact. (Barman) The record is devoid of any evidence to support Parents’ contentions that the District had educational concerns it failed to address in evaluating Student or that Parents’ concerns were not addressed by the testing.

<sup>67</sup> M.G.L. ch. 71B §3; 603 CMR §28.04(5)(c)(1). The right to these publicly funded independent education evaluations under 603 CMR 28.04(5)(c) continues for 16 months from the date of the evaluations with which the parent disagrees. See 603 CMR §28.04(5)(c)(6); *In Re: Shrewsbury Public Schools and Yandel*, BSEA # 15008106 (Byrne, 2015) (“if an income-eligible parent requests a publicly funded IEE within 16 months of the school’s evaluation the school must automatically and without delay arrange for the IEE at public expense”); *In re: Framingham Public Schools*, BSEA #11-1276 (Berman, 2011) (“To comply with the five-day rule in cases where the sliding scale may apply, a district may either receive income information from parents within the five-day period and determine eligibility during that time, or request a BSEA hearing within the five days, and then withdraw the request if the parent demonstrates eligibility for full or partial funding of the IEE (assuming, of course, that a parent in this situation is satisfied with partial funding)”) (internal citations omitted).

<sup>68</sup> See *In Re: Newton Public Schools*, BSEA No. 1300077 (Berman 2013) (“whether or not psychological and neuropsychological evaluations are ‘equivalent,’ and cover the same areas of disability is a question of fact in any given case. It is precisely such factual issues that are to be addressed in a hearing to determine if a school’s evaluation was ‘comprehensive and appropriate’”).

and psycholinguistic IEEs was a request for a second opinion in the areas assessed by the District. (Mother; Parker; S-7; P-Vol. I VV) Based on the record, a neuropsychological evaluation and a psycholinguistic evaluation would be “equivalent” to the sum of the District’s psychoeducational and speech and language evaluations. (Kemper; Barman; Howard; S-15; S-17; S-19; P-Vol II BB; P-Vol. II U; P-Vol II V) Dr. Kemper’s Psycholinguistic Evaluation assesses speech, language, and literacy, the same areas assessed by Ms. Barman and Ms. Howard (using, at times, the same assessment tools). (P-Vol. II U; S-15; S-17) Similarly, Dr. Switalski focused on the same areas of suspected disability in her 2019 neuropsychological evaluation as did Ms. Howard in 2021. (S-19; S-15) Therefore, in seeking a neuropsychological assessment and a psycholinguistic evaluation, Parents did not request testing in an area that the District had failed to assess. Rather they are looking for an independent opinion relative to the same areas assessed by the District.

Thus, although the District met its burden to show by a preponderance of the evidence that its educational evaluations were appropriate and comprehensive, Parents are nonetheless entitled to an independent neuropsychological evaluation and an independent psycholinguistic evaluation at public expense, as the evaluations sought are equivalent to those performed by the District and Student is eligible for free and reduced lunch.<sup>69</sup>

I note that while the District has no input into whom parents choose to administer their independent evaluations (provided that Parents’ chosen independent evaluators are “qualified persons who are registered, certified, licensed or otherwise approved ... who abide by the rates set by the state agency responsible for setting such rates,”<sup>70</sup>), the credibility of each evaluator may impact the weight that the Team gives to their recommendations when it reconvenes to consider such evaluation(s).

**ORDER:**

Given that Student is eligible for free and reduced lunch, and that the evaluations sought are equivalent to those performed by the District, Parents are entitled to publicly funded independent neuropsychological and psycholinguistic evaluations, each at a rate that does not exceed the state rate.

So Ordered by the Hearing Officer,

/s/ Alina Kantor Nir  
Hearing Officer  
Dated: May 9, 2022

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<sup>69</sup> See 603 CMR §28.04(5)(c)(1).

<sup>70</sup> 603 CMR §28.04(5)(a).

COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

**Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment**

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly, the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of—the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” while a judicial appeal of the Bureau decision is pending, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.”

Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1<sup>st</sup> Cir. 1983).

**Compliance**

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the

facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

### **Rights of Appeal**

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

### **Confidentiality**

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove\_School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

### **Record of the Hearing**

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.