



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-075

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Lincoln Square Legal Services, Inc., attorneys for petitioner, by Leah A. Hill, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Chrystal O'Connor, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the evaluations conducted by the respondent's (the district's) Committee on Special Education (CSE) were appropriate and denied her request for certain independent educational evaluations (IEEs) for her daughter. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

With regard to the student's educational history, the student was reportedly born with a cleft palate and cleft lip and has undergone multiple corrective surgeries to address these (Dist. Ex. 2 at p. 2).¹ According to a psychological evaluation conducted in July 2018, the student failed

¹ The hearing record contains several duplicate exhibits; for clarity this decision will cite to the parent's exhibits with one exception. The district's copy of the psychological evaluation at issue in this proceeding was dated and the parent's copy of the evaluation was not; therefore, the district's copy of the evaluation will be cited (compare

her newborn hearing test, but she was not formally diagnosed with hearing loss until she was approximately four years old (Dist. Ex. 2 at p. 2). Additionally, the student had tubes surgically placed due to frequent ear infections, uses orthotics to address balance issues, and takes medication as needed for asthma (id.). She is followed medically by an ENT, cardiologist, neurologist, geneticist, and an orthopedist (id.).

The student has attended a state approved, nonpublic school for the deaf (the NPS) since kindergarten (the 2010-11 school year), and in September 2018, started her seventh-grade year (see Parent Ex. C at p. 2; Dist. Ex. 2 at p. 2; see Tr. p. 20).

The student's previous IEPs from the 2015-16, 2016-17, and 2017-18 school years reflect that the CSE determined the student was eligible for special education services as a student with deafness and that during these years the student was recommended to attend a 6:1+1 special class in the NPS and receive one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy and one 40-minute session per week of individual counseling services (Parent Exs. H at p. 7; I at p. 7; J at p. 7). The IEPs also provided for access to a personal auditory trainer/FM system throughout the school day (Parent Exs. H at p. 7; I at p. 7; J at p. 7).^{2, 3}

Between March 2018 and October 2018, staff at the NPS conducted a series of assessments as part of a reevaluation of the student (Parent Exs. C-F; Dist. Exs. 2-5).⁴ An audiological evaluation was conducted in March 2018 to assess the student's hearing loss; a psychological evaluation was conducted in July 2018 to assess the student's cognitive functioning, visual-motor integration, and social-emotional functioning; a "triennial" evaluation was conducted in September and October 2018 by a teacher of the deaf who previously taught the student, to assess the student's academic achievement; and a speech-language evaluation was conducted in October 2018 to assess the student's auditory functioning, receptive and expressive language, language development (structure), vocal/speech production, and communicative competency (Parent Exs. C, E; Dist. Exs. 2, 3).

Following the completion of the evaluations by the NPS, the CSE met on October 30, 2018 and recommended that the student continue to be found eligible for special education services as a student with deafness (Parent Ex. G at pp. 2, 3). According to the resultant IEP, in terms of

Parent Ex. D with Dist. Ex. 2).

² The student's prior IEPs also recommended that the student receive summer services in a 10:1+1 special class with the same or similar related services (Parent Exs. H at pp. 7-8; I at p. 8; J at p. 8).

³ Each of the student's IEPs were created as the result of annual reviews conducted in the fall, accordingly, they recommended 12-month services that were scheduled to be provided during the summer of the following school year (Parent Exs. H at pp. 7-8; I at p. 8; J at p. 8).

⁴ The parties and evaluators occasionally use the term "triennial" evaluation. However, for purposes of this decision, I will refer to the challenged set of 2018 evaluations as a "reevaluation" as that is the term used in federal and State regulations.

documentation, the CSE relied upon the evaluations conducted by the NPS staff described above as well as a July 2018 counseling progress summary, an October 2018 speech-language progress summary, an October 2018 teacher report, and a July 2018 social history (*id.* at p. 2). The CSE recommended that for the remainder of the 2018-19 school year the student attend a 6:1+1 special class and receive related services of speech-language therapy twice a week, once in a 30-minute individual session, and once in a 30-minute small group (2:1) session (*id.* at p. 8).⁵ The CSE also recommended that the student receive 12-month services (*id.* at p. 8).⁶ The October 2018 IEP continued the student's access to a personal auditory trainer/FM System (*id.*).

In a letter dated March 13, 2019,⁷ to the CSE, the parent, through her attorneys, notified the district that she disagreed with the evaluation of the student that was used to create the student's October 30, 2018 IEP (Parent Ex. A at p. 2). She requested that the district fund independent assistive technology, neuropsychological, speech-language, and occupational therapy (OT) evaluations (IEEs) of the student, to be completed by specified evaluators at their "usual and customary rate" (*id.*). The parent also requested that a sign language interpreter be provided at public expense for each of the evaluations because the student communicates primarily via sign language (*id.*). The parent also requested that the district respond within 10 school days of receipt of the request, as required by the district's policy manual, and send the parent copies of the district's criteria applicable for IEEs (*id.*). The parent further indicated that in the absence of a response from the district, she "would arrange for independent evaluations and seek reimbursement as permitted under [State regulation] (*id.*)."⁸

A. Due Process Complaint Notice

As contemplated by federal and analogous State regulations, the district responded to the parent's request for IEEs at public expense by filing a due process complaint notice dated March 18, 2019,⁹ in which the district requested an impartial hearing, alleging that its psychological,

⁵ The student's eligibility for special education and related services as a student with deafness is not in dispute in this appeal (8 NYCRR 200.1[zz][8]).

⁶ The 12-month services recommended by the CSE continued to provide a 10:1+1 special class placement and individual speech-language therapy one-time per week for 30 minutes and one time per week in a 30-minute small group (2:1) session, but counseling services were not continued during either the 10-month school year or the summer (Parent Ex. G at pp. 8-9).

⁷ The letter contains a typographical error in that it was dated 2018 but should have been 2019, and the parent's response to the due process complaint clarifies that the parent's letter was dated March 13, 2019 (Parent Ex. B at p. 3).

⁸ I note that State regulations do not specify how IEEs at public expense are initially funded, that is prospectively through advanced funding by school districts or as reimbursement of a parent's out-of-pocket expenses, although the U.S. Department of Education has indicated that advanced funding cannot be withheld if it would deny the student a FAPE (Letter to Heldman, 20 IDELR 621 [OSEP 1993]).

⁹ At this type of juncture, a public-school district ultimately has two permissible options, either to grant a parent's request for an IEE at public expense, or initiate a due process proceeding (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

educational, speech and language and audiological evaluations were sufficiently comprehensive to appropriately evaluate the student in her areas of suspected disability (Dist. Ex. 1 at p. 1).

In an undated response, the parent asserted that the district failed to evaluate the student in all areas of suspected disability as evidenced by the gap between the student's reported cognitive abilities as compared to her academic achievement, as well as the student's lack of progress in the "highly specialized environment" at the NPS (Parent Ex. B at pp. 2-4).

B. Impartial Hearing Officer Decision

An impartial hearing was conducted on May 22, 2019 (Tr. pp. 1-207).¹⁰ In a decision dated July 9, 2019, the IHO determined that the evaluations conducted by the NPS were comprehensive and sufficiently identified the student's special needs (IHO Decision at pp. 8-10).¹¹ However, the IHO noted that with respect to the parent's request for an OT IEE and an assistive technology IEE, the question was not whether the existing evaluations were appropriate, as the district did not conduct evaluations in those areas, but whether such evaluations were "needed" in the first instance (id. at pp. 8-9).

With respect to the district's speech-language evaluation, the IHO found that the evaluator, whom the IHO described as experienced with deaf children and who provided speech services to the student over the summer of 2018, used a number of instruments both specific to children with hearing impairments and others normed on the general population (IHO Decision at p. 8). The IHO also found that the evaluator identified the student's weaknesses, especially in articulation and pragmatic language skills, and she described the student's limited scripted language (id.). In contrast, the IHO found that the parent's witness never met the student or spoke to the student's teachers, but nonetheless critiqued the district's evaluation as a "general failure to comprehensively assess [the student's] needs," while focusing her criticism on "missing components" of assistive technology and the district's failure "to fully assess her expressive language capacity" or conduct "a literacy assessment" (id.). Finding the speech-language evaluation to be "comprehensive" and to have "sufficiently identified the student's speech needs," the IHO determined that the parent was not entitled to a speech-language IEE (id.).

With respect to the parent's request for a neuropsychological IEE, the IHO stated that although she was "not comfortable with the concept of not administering the entire WISC-V following the publisher's instructions," she understood the evaluator's reasoning for only administering the non-verbal portion of the WISC-V to the student and moreover, that it was the way the student had been evaluated in the past (id. at p. 10). The IHO further stated that the parent wanted a neuropsychological IEE "to obtain a "diagnosis," but opined that a diagnosis was a

¹⁰ The original transcript of the hearing record received by the OSR, with an OSR date stamp of August 18, 2019, contained multiple printing errors, and a second transcript was requested and received. All transcript cites refer to the new transcript date stamped by the OSR as received on September 9, 2019.

¹¹ As noted above, the district reviewed and relied upon evaluations conducted by the NPS for purposes of completing the reevaluation process that is the responsibility of the public school CSE process. For clarity, this decision will refer to the evaluations being challenged by the parent as "NPS" evaluations by NPS evaluators, even though they are ascribed to the CSE in the regulatory sense.

medical conclusion that could be obtained from the student's neurologist (id.). Accordingly, the IHO found that there was no need for the student to undergo a neuropsychological evaluation and the parent was not entitled to a neuropsychological IEE (id.).

With respect to the parent's request for an OT IEE, the IHO found that the parent did not provide any testimony or documentary evidence to establish the student's need for an OT evaluation and denied her request for one (id. at p. 9).

With respect to the issue of an assistive technology IEE, the IHO found that the testimony showed that the student may benefit from the use of assistive technology that could assist the student with her deficits in communication, provide her access to literacy, and provide her with programs designed to assist with reading vocabulary, which was identified as an area of weakness for the student (id. at pp. 9-10). Specifically, the IHO relied on the testimony of the parent's private speech-language evaluator whose "strongest criticism of [the NPS] speech-language evaluation was the lack of an assistive technology assessment" (id.). The IHO ordered that the district provide an assistive technology assessment at public expense; however, given the parent's request for an evaluation at the evaluator's "customary rate" without specifying what that rate was, the IHO declined to order the evaluation at an unknown or unlimited cost (id. at p. 10). Accordingly, the IHO ordered the district to fund the cost of an assistive technology evaluation at its "standard rate" with a sign language interpreter paid for at district expense if the evaluator was unable to communicate with sign language (id.).

Finally, I note that the IHO found the district's audiology evaluation comprehensive, and that it identified the student's strengths and weaknesses with and without using hearing aids (IHO Decision at p. 9). The IHO found the evaluation sufficient to identify the student's needs and denied the parent's request for an audiological IEE (id.).¹²

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in her determinations. The parent specifically asserts that the IHO: 1) incorrectly found that the parent was not entitled to the requested IEE[s]; 2) failed to correctly place the burden of proof on the district to demonstrate that its evaluations were appropriate; 3) incorrectly relied on her own subjective opinions to reach conclusions, and ignored the testimony of experts and non-testimonial evidence; 4) made multiple findings that were completely inconsistent with the hearing record; and, 5) failed to consider the nontestimonial evidence in the hearing record concerning the student's persistent inability to progress, and her difficulty with writing, as evidence of the district's failure to fully assess the student's areas of need.

With respect to the evaluations themselves, the parent alleges that the IHO erred by not considering the district's multiple violations of IDEA procedures governing individual evaluations,

¹² Although the district alleged in its due process complaint notice that the NPS audiological evaluation of the student was appropriate and defended the NPS evaluation at the impartial hearing, the parent never sought an audiological IEE from the district.

including its failure to: 1) conduct a neuropsychological evaluation to assist in explaining the student's lack of progress over several years despite cognitive testing that revealed she is of average intelligence; 2) use abbreviated and outdated assessment tools and generally failing to use tools that provided information relevant to the student's educational needs; 3) use a variety of assessment tools and strategies to gather functional, developmental and academic information, including information provided by the parent, to assist in determining the student's IEP; 4) ensure that assessments not conducted under standard conditions included a description of the extent to which they varied from standard conditions; and 5) provide a copy of the evaluations to the parent in her native language.¹³

The parent requests that the undersigned reverse the IHO and order the district to provide the student with assistive technology, neuropsychological, speech-language, and OT IEEs at public expense and at the evaluators' "usual and customary rate."¹⁴

In its answer, the district generally responds to the parent's allegations with admissions, denials, or various combinations of the same and argues in favor of upholding the IHO's determination. The district argues that the NPS reevaluation was appropriate because it was conducted by a multidisciplinary team of qualified individuals using a variety of tools and assessments primarily chosen based on the student's needs, individually and collectively, the evaluations gathered relevant functional, developmental, and academic information about the student, and was sufficiently comprehensive.

V. Applicable Standards

A. District Evaluation Requirements

Under federal and State regulation, a school district is responsible to conduct a "full and individual initial evaluation" before the initial provision of special education and related services to a student with a disability (34 CFR 300.301[a]; see 8 NYCRR 200.5[b][1]). Under Federal regulation an evaluation must assess the student "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 CFR 300.304[c][4] [emphasis added]). Under State regulation, an initial evaluation must include at least:

- (i) a physical examination . . . ;
- (ii) an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student . . . that further evaluation is unnecessary;

¹³ The parent also asserts that the district failed to "conduct a vocational assessment to determine [the student's] vocational skills, aptitudes and interests." However, the parent did not seek a vocational assessment at district expense in her letter dated March 13, 2019 seeking IEEs (Parent Exhibit A).

¹⁴ Although the IHO ordered the district to fund an assistive technology IEE of the student, she did so at the district's "standard rate" and not at the "usual and customary rate" of the parent's preferred evaluator (IHO Decision at p. 10).

- (iii) a social history;
- (iv) an observation of the student in the student's learning environment (including the regular classroom setting). . . ; and
- (v) other appropriate assessments or evaluations, including a functional behavioral assessment [FBA] for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.

(8 NYCRR 200.4 [b][1]).¹⁵ A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

Under federal and State regulation, a reevaluation of a student with a disability "must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary" 34 CFR 300.303[b][2]; see 8 NYCRR 200.4[b][4]).¹⁶ With respect to reevaluations, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation

¹⁵ Federal requirements do not prescribe specific types of assessments that must be conducted as part of an initial evaluation except that a classroom observation is a federal requirement for students with specific learning disabilities. The terms psychological evaluation, social history and FBA are not defined in federal law or regulation.

¹⁶ Although it may be done without a CSE meeting, as part of a reevaluation (or an initial evaluation if appropriate) a CSE must

- (1) Review existing evaluation data on the child, including—
 - (i) Evaluations and information provided by the parents of the child;
 - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—
 - (i) (A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
 - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
 - (ii) The present levels of academic achievement and related developmental needs of the child;
 - (iii) (A) Whether the child needs special education and related services; or
 - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

(34 CFR 300.305[a]).

more frequently than once per year unless the parent and the district otherwise agree (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]).

Under State regulation, a reevaluation

"shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education. The results of any reevaluations must be addressed by the [CSE] in a meeting to review and, as appropriate, revise the student's IEP. To the extent possible, the school district shall encourage the consolidation of reevaluation meetings for the student and other committee on special education meetings for the student"

(8 NYCRR 200.4[b][4]).

Federal and state evaluation procedures require that any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii] 8 NYCRR 200.4[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Among other federal evaluation procedures, a school district must ensure that "[a]ssessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure) (34 CFR 300.304 [c][3]).¹⁷

Also, under State regulations for evaluation procedures, "if an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions

¹⁷ The corollary procedure in State regulation reads slightly differently, namely that "assessments are selected and administered to ensure that, when an assessment is administered to a student with impaired sensory, manual or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual or speaking skills, except where those skills are factors which the test purports to measure" (8 NYCRR 200.4[b][6][iv]).

(e.g., the qualifications of the person administering the test, or the method of test administration) must be included in the evaluation report" (8 NYCRR 200.4[b][6][ii]).¹⁸

B. Independent Education Evaluations at Public Expense

Parents who express a disagreement with an evaluation conducted by the district have the right to seek an independent educational evaluation (IEE) conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; see also, Lauren W. v. DeFlaminis, 480 F.3d 259, 275 [3d Cir. 2007] [explaining that parents do not have the right to an IEE at public expense where parents actually agreed with the school's evaluation]; Edie F. v. River Falls Sch. Dist., 243 F.3d 329, 335 [7th Cir. 2001] [explaining that parents do not have the right to an IEE at public expense where their disagreement was with the result of the child's IEP not with a particular diagnosis or methodology of evaluation]; M.C. v. Katonah/Lewisboro Union Free Sch. Dist., 2012 WL 834350, at *11–12 [S.D.N.Y. Mar. 5, 2012]; M.V. v. Shenendehowa Cent. Sch. Dist., 2013 WL 936438, at *6 [N.D.N.Y. Mar. 8, 2013]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although the district will not be required to provide it at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; see A. H. by & through K. P. v. Colonial Sch. Dist., 2019 WL 3021232, at *3 [3d Cir. July 10, 2019]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).¹⁹ An IEE must use the same criteria as the public agency's criteria (Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 973–79 [5th Cir. 2016]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an 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 (Letter to Baus, 65 IDELR 81 [OSEP 2015]), however recent caselaw clarifies that parents may not demand a comprehensive IEE at public expense while at the same time refusing to consent to the school district's offer to conduct the same assessments (D.S. by & Through M.S. v. Trumbull Bd. of Educ., 357 F. Supp. 3d 166, 178 [D. Conn. 2019] citing N.D.S. by & Through de Campos Salles v. Acad. for Sci. & Agric. Charter Sch., 2018 WL 6201725, at *5–*7 [D. Minn. 2018] [explaining that where parents request an IEE to challenge an obsolete

¹⁸ Additionally, under the IDEA, in the case of a child who is deaf or hard of hearing, the CSE "must consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs" (20 U.S.C. § 1414 [d][3][B][iv]).

¹⁹ The time period for asserting claims based upon a disagreement with a school district's evaluation can be shorter than the mandatory three-year reevaluation period in some cases (see D.S., 357 F. Supp. 3d at 179).

evaluation, they are entitled to a due process hearing limited only to whether the evaluation was appropriate at the time it was completed; if parents wish for a publicly funded IEE with respect to their child's current condition, then they must allow the school district to conduct a current reevaluation and then request an IEE if they disagree]).

VI. Discussion

In this case the scope of inquiry is rather narrow, namely whether the district's reevaluation of the student was "appropriate." However, while the IDEA and State regulations provide broad guidance in terms of minimum threshold procedures for the initial and reevaluation, those procedures and the decision-making process for precisely how to appropriately assess a student with a disability are interwoven choices that are based more in the expertise and professional judgment of licensed and/or certified educational professionals, who are charged with the responsibility of giving due consideration to parental input and concerns. Thus, while the inquiry undertaken here is narrow it is also permeated with nuances. It can quickly become a fact-intensive inquiry in which some professional disagreements carry more weight than others under the circumstances of a particular case. In this case I will begin that inquiry by reviewing the assessments conducted by the NPS personnel in the 2018 reevaluation under the auspices of the district and then turn to the concerns of the private evaluation experts called by the parent to testify at the impartial hearing. Although I have not considered the audiological evaluation of the student, I have discussed it to the extent relevant in the context of the other evaluations conducted by the NPS.²⁰

A. NPS Evaluation of Academic Achievement

The academic achievement portion of the student's reevaluation, conducted in September and October 2018 by an "educational evaluator" at the NPS,²¹ included the use of three standardized assessment tools: the Kaufman Test of Educational Achievement-Third Edition (KTEA-3), the Test of Mathematical Abilities-Third Edition (TOMA-3) and the Test of Reading Comprehension-Fourth Edition (TORC-4) (Tr. pp. 21-22; Parent Ex. C at p. 2). The educational evaluator reported that the tests were administered to the student using American Sign Language (ASL) and spoken English and that the student typically communicated primarily using spoken English "with some sign language support as needed" (Tr. pp. 22, 41; Parent Ex. C at p. 2). Consistent with state regulation, the evaluation report stated that test results for all of the assessments must be interpreted with caution as the testing instruments were not developed or standardized for use with the Deaf (Parent Ex. C at p. 2; see 8 NYCRR 200.4[b][6][ii]).

The educational evaluator noted that the student was familiar and comfortable with her and that the student's conversation initially appeared coherent and intact (Parent Ex. C at p. 2). However, the educational evaluator also indicated that there were gaps in the student's conversation, that she followed a social script, and that any deviation from that script left the

²⁰ The parent is correct that the IHO made a determination regarding an audiological IEE that they did not request from the district, but the error was harmless.

²¹ The NPS education evaluator was State certified as a Teacher of the Deaf, in Early Childhood Special Education, and as a Teacher of Speech and Hearing Handicapped (Parent Ex. C at p.5).

student confused or answering incorrectly (Parent Ex. C at pp. 2-3). The educational evaluator opined that the social scripts made the student appear more related and linguistically mature than she actually was (Parent Ex. C at p. 3). She noted that during the evaluation, the student presented as focused and diligent, although she worked slowly and requested two breaks (Parent Ex. C at p. 3).

With respect to the TORC-4, the educational evaluator chose to administer three of the five subtests to the student: relational vocabulary, sentence completion, and text comprehension (Tr. p. 31; Parent Ex. C at p. 4).²² The student's performance on the relational vocabulary subtest yielded a percentile rank of 1 and a grade equivalent of <1 (Parent Ex. C at p. 4).²³ The student's performance on the sentence completion subtest yielded a percentile rank of 2 and a grade equivalent of 1.7 (Parent Ex. C at p. 4).²⁴ The third subtest that was attempted was the text comprehension subtest, however, the student refused to complete this portion of the test (Tr. p. 33; Parent Ex. C at p. 4).²⁵

The educational evaluator also assessed the student's skills in literacy, using three subtests of the KTEA-3: letter and word recognition, reading comprehension and reading vocabulary (Tr. p. 23; Parent Ex. C at p. 4). Administration of the letter and word recognition subtest yielded a percentile rank of 0.2 and a grade equivalent of 1.6 (Tr. p. 23; Parent Ex. C at p. 4). In addition, the student's performance on the reading comprehension subtest yielded a percentile rank of 0.5 and a grade equivalent of 1.5 and her performance on the reading vocabulary subtest resulted in a percentile rank of <0.1 and a grade equivalent of <1.0 (Tr. pp. 23-24; Parent Ex. C at p. 4).

To assess the student's mathematical ability, the educational evaluator administered three subtests of the KTEA-3: math concepts and applications, math computations, and math fluency

²² The educational evaluator testified that "they" only administer three subtests because "[w]e've always only given those three" subtests (Tr. pp. 42-43).

²³ Testimony by the educational evaluator confirmed that the relational vocabulary subtest measured the ability to understand relationships between words that share a variety of functional and conceptual relationships (i.e., knowing that the words envelope and stamp share a relationship and knowing what objects the words envelope and stamp refer to) (Tr. pp. 31-32).

²⁴ Testimony by the educational evaluator indicated that the sentence completion subtest involved the student silently reading a sentence that was missing two words, then silently reading a list of word pairs and choosing the word pair that best completed the sentence (Tr. pp. 32-33).

²⁵ According to the educational evaluator, the text comprehension subtest involved the student silently reading a short passage and then answering five multiple choice questions about the passage (Tr. p. 33). With regard to the student's refusal to complete the text comprehension subtest of the TORC-4, the educational evaluator testified that she administered the TORC-4 in the morning (Tr. p. 43). The student had completed the first two sections and the educational evaluator gave her numerous breaks to get water and walk around (Tr. p. 43). When she told the student there was one more section, the student "said no, crossed her arms, and refused to even look at" the evaluator (Tr. p. 43). The educational evaluator further testified that she attempted to cajole the student, offering water and offering to pick her up in the afternoon after lunch and recess and the student absolutely refused to comply stating "no, I'm finished" (Tr. pp. 43-44).

(Parent Ex. C at p. 4). In the area of math concepts and applications the student scored at a 0.3 percentile rank and at a grade equivalent of 1.4 (Tr. p. 23; Parent Ex. C at p. 4). She also scored at the first percentile and with a grade equivalent of 2.3 in math computation and with a percentile rank of 4 and a grade equivalent of 2.11 in math fluency (Tr. pp. 23; Parent Ex. C at p. 4). Additional testing in the area of mathematics was completed using the TOMA-3, with similar outcomes (Parent Ex. C at p. 3). The student's performance on the computation subtest yielded a percentile rank of <1 and a grade equivalent of 1.4 and on the word problems subtest, the student's performance yielded a percentile rank of <1 and a grade equivalent of 1.2 (Parent Ex. C at p. 3).

The academic achievement evaluation report reflected that at the time of testing the student was 12 years 6 months of age and was performing significantly below age and grade levels (Parent Ex. C at pp. 2, 3). The student was offered scrap paper during math testing but did not use it, doing most of the math work in her head and twice using her fingers to complete problems (Parent Ex. C at p. 3). She struggled with word problems, both printed and signed, and the educational evaluator indicated that the specific sentence patterns used in the mathematical word problems presented a challenge to the student (Parent Ex. C at p. 3). The educational evaluator noted that while completing all math work the student talked to herself, repeating the equations out loud, and talking through the process of solving them (Parent Ex. C at p. 3). With regard to literacy, the student demonstrated significant delays in reading comprehension and vocabulary skills (Parent Ex. C at p. 3). According to the educational evaluator, the student utilized phonics skills to sound out unfamiliar words, twice successfully, and was observed using visual phonics cues to assist her in sounding out unfamiliar words (Parent Ex. C at p. 3).

The evaluation report included recommendations for the continuation of previous strategies including exposing the student to activities to build her sight word knowledge; exposure to a whole language environment to expand vocabulary and increase reading levels; utilizing teaching strategies for breaking down mathematical word problems; and continuation of speech and language therapy to maximize the student's communication potential (Parent Ex. C at p. 5). The evaluation report also included a recommendation for targeted practice for listening and responding appropriately to all questions and comments, targeted teaching strategies for breaking down mathematical word problems, and introduction of multiplication and division skills (Parent Ex. C at p. 5).

B. NPS Psychological Evaluation

The psychological evaluation, completed in July 2018 by a psychologist for the approved nonpublic school, included information regarding the student's medical history and hearing loss, as well as her communication in the home environment (Dist. Ex. 2 at pp. 1, 2). According to the report, in the home, spoken Spanish and spoken English were primarily used to communicate with the student, although the student's mother also knew some sign language (Dist. Ex. 2 at p. 2). The student's teacher from the 2017-18 school year (sixth grade) reported that the student liked to learn, although she learned somewhat slowly and required ample repetition (*id.*). The teacher further reported that the student's basic cognitive skills continued to develop within age-expected limits, she exhibited good short and long-term memory skills and a good understanding of temporal relationships such as patterning, sequencing and routines, and had good problem solving and reasoning skills, although she needed adult prompting (*id.*). However, the teacher noted that the student was working at a first-grade level in reading, math, and writing and that results of the

(TORC-4) and (TOMA-3) administered in September 2017 yielded scores in the first and second percentiles (Dist. Ex. 2 at p. 2; see Parent Ex. H at p. 3). According to the evaluation report, the student's teacher indicated that the student was attentive when interested in the topic at hand but became easily distracted by other students when not interested in the material; however, she was easily redirected (Dist. Ex. 2 at p. 2). According to the teacher, the student was said to be generally well behaved in class although at times she talked excessively and distracted others (id.).

The evaluation report reflected that the student communicated primarily through a total communication approach, incorporating the use of sign language, speech, gesture, pantomime, and pointing (Dist. Ex. 2 at p. 2). Her teacher indicated that she believed the student's receptive language skills were "very good," and that her expressive language was "good" (id.). The report stated that during the evaluation the student used a combination of formal signs and spoken English and that her speech was sometimes intelligible and sometimes not but that, overall, she was able to communicate her point and express her wants and needs (id.).

Other previous test results were also reviewed in the July 2018 psychological evaluation report (Dist. Ex. 2 at p. 3). Specifically, the report reflected that the student's nonverbal cognitive functioning was last evaluated in 2015 using the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), with results placing the student's overall nonverbal intellectual functioning in the "[l]ow [a]verage" range for processing speed tasks and in the "[a]verage" range for perceptual reasoning tasks (id.). Results of previous visual-motor integration and social/emotional functioning testing placed the student in the average range, which at that time, was an improvement for the student (Dist. Ex. 2 at p. 2). According to the NPS psychologist, the student was reported to have made improvements in frustration tolerance and in developing a more regulated temper (Dist. Ex. 2 at p. 3). Consistent with the NPS psychologist's impression that the student presented in a self-assured manner, her teacher at that time commented that the student presented with a strong sense of herself (id.). However, the student was also guarded around others and refused to participate in a projective drawing measure (id.).

With regard to testing, the evaluation report indicated that the student participated willingly, readily attended to tasks and asked for clarification when needed (Dist. Ex. 2 at p. 3). She did not change her work pace despite being told a task was timed and asked to work faster and worked more slowly on tasks requiring a writing component, especially a structured writing component (id.). Despite a history to the contrary, the student was fully cooperative and affable for both testing sessions which was in line with her teacher's impressions regarding the student's good attitude (id.). The report indicated that the results presented appeared to be an accurate assessment of the student's then-current performance levels (Dist. Ex. 2 at p. 3).

The psychological evaluation report advised the reader that consistent with State regulations for limited English proficiency for linguistically and culturally diverse students, they should use caution when interpreting the cognitive test results since measures used for the evaluation were not specifically developed for children who are Deaf (Dist. Ex. 2 at p. 3). The evaluation report further stated that the differences in scores for deaf and hard of hearing students could be attributed to cultural/linguistic bias of the test items, language delays, and accommodations of students with a hearing impairment (id.). In addition, the NPS psychologist indicated that in order to convey task directions in a way that the student was able to comprehend, some standardization procedures were broken in the administration of the test (id.). Instructions

for tasks were conveyed using a total communication approach including ASL, spoken English, pantomime, facial expressions and gestures (id.).

The psychological evaluation report indicated that several nonverbal subtests from the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) were used to assess the student's cognitive functioning in July 2018 (Dist. Ex. 2 at pp. 1, 3). The evaluation report explained that the Nonverbal Index (NVI) of the WISC-V was derived from six subtests that did not require verbal responses but provided a measure of the student's general intellectual functioning that minimized the demand for expressive language (Dist. Ex. 2 at p. 4). As such, the NPS psychologist administered subtests from four of the primary cognitive domains (visual spatial, fluid reasoning, working memory and processing speed) (Dist. Ex. 2 at pp. 3-5). According to the NPS psychologist, the student's overall performance on the NVI fell within the "[a]verage" range suggesting that her innate nonverbal cognitive skills were within age expectations, according to the test's manual (Dist. Ex. 2 at p. 4).²⁶ The NPS psychologist reported that the student's performance on individual subtests fell within the "[a]verage to [h]igh [a]verage" ranges except for the coding subtest which was in the "[v]ery [l]ow" range of functioning and considered a weakness for the student (Dist. Ex. 2 at p. 4). The psychological evaluation report indicated that the abilities measured by the coding subtest included processing speed, nonverbal short-term memory, visual-motor coordination, visual perception, visual scanning, flexibility, attention and motivation with structured writing (Dist. Ex. 2 at p. 5). The evaluation report indicated that copying from the board or from a book would be a time-consuming task for the student (id.). Additionally, the report stated that the results of this evaluation were consistent with the student's previous evaluation results (Dist. Ex. 2 at p. 4).

The psychological evaluation also included an assessment of the student's visual-motor skills (Dist. Ex. 2 at p. 5). Administration of the "Beery VMI-6th Edition" resulted in scores that placed the student's visual motor integration skills within the "[a]verage" range of functioning with a standard score of 96 and a percentile rank of 39 (id.).²⁷ The report noted that these results were similar to the student's previous evaluation results and were consistent with her teacher's impressions of the student's classroom functioning (id.).

With respect to the student's social/emotional functioning, the NPS psychologist reported that the student was assessed through observation, her counselor's and teacher's reports, and projective drawings (Dist. Ex. 2 at p. 5). The NPS psychologist indicated that, according to

²⁶ The report indicated that on the WISC-V scores between 8 and 11 were Average and the student scored with the following scaled scores (SS): Picture Span-ss12, measures nonverbal sequential memory for meaningful objects; Block Design-ss8, measures the ability to analyze and synthesize abstract visual stimuli using manipulatives. It involves nonverbal concept formation, visual perception and organization, simultaneous processing, visual-motor coordination, and learning; Visual Puzzles-ss9, measures visual spatial reasoning without a motor component; Matrix Reasoning-ss10, Fluid reasoning that involves continuous and discrete pattern completion, analogical and serial reasoning, and classification; Figure Weights-8, measures nonverbal quantitative reasoning; Coding-5 Processing speed, nonverbal short-term memory visual-motor coordination, visual perception, visual scanning, flexibility, attention and motivation w/structured writing; Symbol Search-8 Processing speed, short-term visual memory, visual discrimination and concentration (Dist. Ex. 2 at p. 5).

²⁷ It appears that this refers to the Beery-Buktenica Developmental Test of Visual Motor Integration, Sixth Edition (BEERY VMI).

student's counselor, the student initially had no sense of self, could not adequately engage in play, and was known to cry, tantrum, or throw things in response to frustration or when given a limit (*id.*). In addition, the student was disrespectful to adults and thus challenged rules (*id.*). However, the student's frustration tolerance had significantly improved, and the student exhibited growth in her ability to accept limits, criticism, and boundaries (Dist. Ex. 2 at pp. 5, 6). The student was described in the evaluation report as a child who could be engaging, playful, cooperative and focused when necessary (Dist. Ex. 2 at p. 5). The report noted that the student's ability to play creatively had improved and she was slowly making friends (*id.*). The student's teacher reported the student was cooperative, usually had a positive attitude toward learning, got along with peers and overall, had good classroom behavior (*id.*). In addition, when asked to draw a picture of a person she drew a young girl with a happy expression with full detail and explained that it was a picture of herself and that she was a happy and nice girl with a good attitude (Dist. Ex. 2 at pp. 5-6).

The psychological reevaluation included recommendations for the student to continue her placement in a language rich classroom with teachers of the deaf, a visual learning environment and access to communication and learning using spoken English and ASL throughout her day; to continue her counseling services to maintain her improved behavioral self-regulation and social/emotional functioning; to continue to use verbal mediation to talk herself through visual or spatial work; and to continue collaboration and outreach to the student's family to facilitate the development of her cognitive potential, communication development and social/emotional functioning and to continue speech-language services (Dist. Ex. 2 at pp. 6-7). The NPS psychologist also recommended replacing copying from the smart board or books with the provision of copies of notes or assignments and increased time to copy when necessary; breaking down of tasks into manageable units; use of graphic organizers; decreasing the amount of information the student is required to do to show competence; increased time to complete tasks; and individual attention to help develop academic skills (Dist. Ex. 2 at p. 7).

C. NPS Speech and Language Evaluation

The speech-language evaluation completed in October 2018 for the student's reevaluation was conducted by the speech pathologist who provided the student's 2018 summer speech-language services at the NPS (Tr. p. 125).²⁸ In the resultant evaluation report, the speech pathologist initially noted that the tests administered to the student, including the Oral Written Language Scales, Second Edition (OWLS-II), the Auditory Perception Test for the Hearing Impaired (APT-HI), the Rhode Island Test of Language Structure (RITLS), and the Goldman-Fristoe Test of Articulation-3 (GFTA-3), "[do] not adequately consider the bilingual/bicultural background in which [the student] is developing" (Parent Ex. E at p. 2). The evaluation report also noted that the RITLS and the APT-HI "[do] not adequately consider the specific type and extent of [the student's] hearing loss" (Parent Ex. E at p. 2). The evaluation report stated that testing results were presented in descriptive form because, in accordance with the IDEA 2004, the use of standard scores from tests administered to children who are not representative of the normative

²⁸ The student's regular speech-language provider was on an extended leave of absence at the time of the student's triennial review (Parent Ex. E at p. 2).

sample would be inaccurate and misleading (Parent Ex. E at p. 2).²⁹ Furthermore, in addition to direct testing, information regarding the student's functioning was obtained via review of the student's records, and interview with the student's teacher (Parent Ex. E at p. 2).

The background information section of the speech and language evaluation indicated that, according to an audiological evaluation completed in March 2018, the student had bilateral asymmetrical hearing loss with a moderate sensorineural hearing loss rising to normal for the right ear and a profound rising to severe mixed hearing loss for the left ear (Parent Ex. E at pp. 2-3). The student's history of cleft lip and palate and subsequent repair surgeries was also noted (Parent Ex. E at p. 3). The speech and language evaluation report reflected that during the evaluation the student wore hearing aids in both ears (Parent Ex. E at p. 3).³⁰

The speech and language evaluation report reflected that the APT-HI was administered to assess the student's auditory function and her use of amplification (Parent Ex. E at p. 3). The results were provided in the form of a list of skills related to discriminating phonemic differences

²⁹ The explicit mandate is in State regulation rather than IDEA 2004 (see 8 NYCRR 200.4[b][6][ii]). The assessment of public comments to the federal regulations notes that the United States Department of Education did not specify this requirement because it was not necessary.

Comment: Many commenters recommended that the evaluation report include a description of the extent to which an assessment varied from standard conditions because there are few assessments that produce valid and reliable information for English language learners suspected of having a disability. Several commenters stated that it is standard practice for professionals administering assessments to include information in their reports when assessments are conducted using nonstandard conditions. One commenter recommended that the regulations require all evaluation reports to clearly indicate the language or other mode of communication used in assessing a child and a determination of whether using such language or other mode of communication yielded accurate information.

Discussion: As stated by several commenters, it is standard test administration practice to include in the evaluation report the extent to which an assessment varied from standard conditions, including the language or other mode of communication that was used in assessing a child. It is, therefore, unnecessary to include this requirement in the regulations.

(Other Evaluation Procedures, 71 Fed. Reg. 46,643 [Aug. 14, 2006]).

³⁰ The evaluation report indicated that the student wore school hearing aids for the NPS speech and language evaluation because her left personal hearing aid required a new earmold (Parent Ex. E at p. 3). The NPS audiological evaluation, conducted in March 2018, also indicated that the student was not using her left personal hearing aid because she was in the process of obtaining a new earmold (Tr. p. 106; Dist. Ex. 3 at p. 3). For the audiological evaluation, aided testing was conducted using the NPS hearing aids and the student's personal hearing aid for her right ear (Dist. Ex. 3 at p. 3). The NPS audiologist testified that the student had access to an FM unit which was "set up to be coupled with the hearing aids" (Tr. pp. 106-07). He explained that the NPS has "school hearing aids set up and there's an FM on each hearing aid" and that all students in the class had an FM unit (Tr. p. 107). Although similar to eyeglasses, hearing aids are not considered assistive technology devices to be provided at district expense, there is no evidence regarding the overall amount of time that the student has been without her personal left hearing aide or any effect that its absence may be having on the student's educational experience.

that the student had developed, as well as a list of skills that were emerging and those the student had not yet achieved (Parent Ex. E at pp. 3-4).

According to the evaluation report, in order to assess the student's receptive and expressive language skills, the OWLS-II was administered using spoken English and sign support as needed (Parent Ex. E at p. 4). During the listening comprehension portion of the test the student was able to identify pictures using basic nouns, verbs, adjectives and prepositions but had difficulty comprehending subordinating conjunctions such as "before," multiple meaning words such as "crowded," and less common adjectives such as "unequal" (Parent Ex. E at p. 4). The report reflected that the student's comprehension of spatial and temporal concepts was inconsistent and that she was not able to demonstrate understanding of sentences with irregular past tense verbs and those that were inferential in nature (Parent Ex. E at p. 4). The evaluation report indicated that during the expressive portion of the OWLS-II assessment, the student demonstrated the ability to label pictures using basic nouns, verbs, and adjectives, with utterances ranging from one to eight words in length (Parent Ex. E at p. 4). She also showed the emerging ability to use possessive pronouns and the plural -s marker, however, the evaluator noted that these grammatical structures are not present in ASL (Parent Ex. E at p. 4).³¹ The evaluation report noted that the student's inferencing and predicting skills continued to be an area of weakness (Parent Ex. E at p. 4). The evaluation report indicated that overall the student demonstrated difficulty using language that was necessary for Cognitive Academic Language Proficiency (CALP) (Parent Ex. E at p. 4).

According to the speech and language evaluation report, the RITLS was developed in order to provide a measure of language development than could supply significant information regarding a student's level of development and provide assessment data in sufficient depth and range to allow for educational planning (Parent Ex. E at p. 4). The test assesses 50 simple and 50 complex sentences and testing stimuli was presented using Signed Exact English (SEE) (Parent Ex. E at p. 4). The evaluator indicated the student required reminders to attend to her for presentation of the entire structure before choosing a picture (Parent Ex. E at p. 4). The student achieved 85 out of a possible 100 correct items, with a clustered error pattern (3 or more errors) for complex sentence structures including passive reversible (e.g., The boy was chased by the girl) and non-initial subject (e.g., It is the boy who the dog is following) (Parent Ex. E at p. 4).

To assess the student's articulation skills during single word production, the evaluator administered the GFTA-3 sounds-in-words subtest to the student (Parent Ex. E at p. 5). The evaluation report enumerated the specific errors the student exhibited in the initial, medial and final position of words as well as her consonant cluster errors (Parent Ex. E at p. 5). The report also reflected the non-developmental phonological processes that the student presented with including syllable reduction, final consonant deletion, stopping of affricates/fricatives, liquid simplification and cluster reduction (Parent Ex. E at p. 5). It also noted the student's mild-moderate forward carriage of her lingual musculature during production of alveolar and sibilant sounds, which created distortions and her substitution of "schwa" during production of /er/ in the final

³¹ Testimony by the evaluator indicated that ASL has a different grammar and syntax and is a language in and of itself (Tr. p. 127).

positions of words (Parent Ex. E at p. 5). The student's overall intelligibility was rated as fair-good in known contexts with fair-poor in unknown contexts (Parent Ex. E at p. 5).

The speech and language evaluation report also included a section on the student's communicative competency, which the evaluator testified was a summary of the evaluator's observations of the student (Tr. p. 133; Parent Ex. E at p. 5). The evaluator indicated that the student's spontaneous mode of communication was through spoken language which was often accompanied by signs and that she was an active communicator who initiated conversational exchanges (Parent Ex. E at p. 5). The evaluator noted again the student's difficulty using language appropriately, that she often repetitively apologized or had difficulty modifying her language to the context of the situation and would often interrupt or discuss things that were off topic (Parent Ex. E at p. 5). The evaluator indicated the student's speech was characterized by multiple articulation errors and that she presented with both non-developmental phonological processes and vocalic and consonant distortions (Parent Ex. E at p. 5). She further indicated that the student's ability to produce intelligible speech was impacted by her hearing loss and the anatomical variations related to her repaired cleft lip and palate (Parent Ex. E at p. 5). The evaluator noted the student's consistent use of hearing aids and indicated that, when amplified, the student could discriminate words with increasingly discrete variations and that she needs more opportunities for practicing this skill (Parent Ex. E at p. 5). With regard to receptive language, the evaluator indicated that the student's sign vocabulary and recognition of English sentence structures was near or at age level, while her expressive language lacked appropriate sentence structure in either English or ASL (Parent Ex. E at p. 5). The student also demonstrated limited use and understanding of morphological markers (Parent Ex. E at p. 5). The evaluator indicated that the student was able to understand and use language for Basic Interpersonal Communication (BICS) purposes, but she demonstrated difficulty using the language necessary for Cognitive Academic Language Proficiency (CALP) (Parent Ex. E at p. 5; see Tr. pp. 135, 145). The evaluator indicated the student needed more opportunities to make inferences and predictions in order to progress academically within her curriculum (Parent Ex. E at p. 5). Additionally, the evaluation report reflected that the prognosis for further growth in listening and spoken language development should be guarded due to the student's hearing impairment and anatomical variations related to her repaired cleft lip and palate (Parent Ex. E at p. 5).

The evaluation report included recommendations for the student related to comprehension of auditorily presented material of increasing length and complexity; use of the visual phonics method to improve intelligibility; continued development of receptive and expressive vocabulary, comprehension and use of language concepts/structures of increasing complexity for spoken/written English and ASL; and improvement in pragmatic language skills (Parent Ex. E at p. 6).

D. Evidence Favoring Further Evaluation

The parent alleges that the IHO erred by incorrectly finding that she was not entitled to the requested IEEs, with the exception of the assistive technology evaluation, and that the reevaluations conducted by the district were adequate. As further described below, the hearing record demonstrates that although the district made an initial showing of proof that suggested the student was appropriately reevaluated, the testimony of private experts was sufficient in some

respects to overcome the district's proof that the student was sufficiently reevaluated in all areas of need.

As noted above, the student's cognitive skills were assessed using the NVI of the WISC-V (Dist. Ex. 2 at p. 3). The NPS psychologist reported that the administered subtests did not require verbal responses and could provide a measure of the student's general intellectual functioning that minimized the demand for expressive language (Dist. Ex. 2 at p. 4). The psychologist from the NPS was called as a witness during the impartial hearing and testified, via telephone, that she chose not to administer the verbal portion of the WISC-V because although the student had "a lot of words," she was "not really fluent in verbal language" and did not "have in-depth language," so it would be unfair to administer the verbal portion of the test as it would be "assessing [the student's] language rather than her intellectual ability" (Tr. p. 54; see Tr. p. 1).

The parent called as a witness a private teacher of the deaf and hard of hearing who had experience in the area of language and literacy development from birth through high school and the education of deaf and hard of hearing students with a specialty in language development and literacy services (Tr. p. 180). The private teacher of the deaf and hard of hearing had reviewed the student's psychological evaluation, speech and language evaluation, audiological evaluation, and her triennial (academic achievement) evaluation from 2018 and her IEPs from 2015 through 2018 (Tr. p. 181). The parent's expert witness testified, via telephone, that she was surprised that the verbal section was not administered because in her experience, it is absolutely best practice to administer both verbal and nonverbal sections for children who use listening and spoken language and even for students who use sign language (Tr. pp. 170-80, 189; see Tr. pp. 1; 167-68).³² She testified that, while historically, children who are deaf or hard of hearing have a very wide gap between their nonverbal and verbal intelligence, that does not mean they don't have verbal potential, simply because they have not been exposed to language (Tr. p. 188). The parent's expert opined that children should be measured in both areas in order to see the discrepancy, if any, between verbal and nonverbal intelligence and to then look closely at the verbal intelligence to determine what parts are a strength and what parts of it are still a challenge for the student (Tr. pp. 188-89).³³

With regard to the academic achievement testing completed for the student's triennial evaluation, the student was assessed using two of the same tests used the previous year, the TORC-4 and the TOMA-3, with similar results (Parent Exs. G at p. 3; H at p. 3).³⁴ As noted above, the

³² The private teacher of the deaf and hard of hearing testified that she was a doctoral student and held a master's degree in deaf and hard of hearing education and elementary education, as well as a bachelor's in deaf education and English (Tr. p. 168). I specifically reviewed her curriculum vitae (Parent Ex. L) and noted that all of the evaluators and educational professionals who testified were qualified to offer expert testimony. The NPS evaluations described the student's communication approach and the parent's witness provided a description of the various communication approaches used by those who are deaf or hard of hearing (Tr. p. 172).

³³ She testified that "by not [sic] measuring her verbal intelligence we are able to see the discrepancy"; however, I believe that there is either a transcription error or the witness inadvertently misspoke while giving testimony (Tr. p. 189 [emphasis added]).

³⁴ The educational evaluator testified that she did not remember if she consulted the student's prior evaluation scores from the 2017-18 school year (Tr. p. 40).

NPS educational evaluator, who testified via telephone, stated that she administered three of the five possible subtests of the TORC-4 because "[w]e've always only given those three" (Tr. pp. 42-43; see Tr. p. 1, 41). She indicated that she did not know if the three she administered were required or whether the other subtests were optional (Tr. pp. 42-43). That lack of knowledge regarding how the test should have been administered tends to support the parent's request for an IEE. In addition, the NPS educational evaluator acknowledged that the student refused to complete one of the three subtests (Tr. p. 43); however, I am uncertain why the evaluator did not attempt completion of the assessment on another day, given that even the best-behaved children can, at times, become stubbornly uncooperative. The totality of the student's then-current scores for academic achievement, including those from the KTEA-3, indicated that she was significantly delayed in all areas tested, functioning generally at the first and second grade level and at a less than first to fourth percentile rank (Parent Ex. C at pp. 2, 3-4). The parent's expert teacher of the deaf and hard of hearing testified that she reviewed the student's IEPs from 2015 on and noticed the student's academic skills had not progressed over the past three years (Tr. pp. 190-91). She indicated that while low scores were very concerning to her in general, she was most concerned about the student's lack of progress in those three years which she believed pointed to a need to investigate the student's learning profile further (Tr. p. 191). She indicated that to her this "would have signaled the need for further evaluation, whether from a neuropsych or another evaluation or other tests" (Tr. p. 191). While I agree that examining the previous assessment scores of the student is appropriate as it can yield valuable information, consistently low scores alone do not always, as a general rule, lead to an inescapable conclusion that an evaluator must always conduct further assessments. Low scores may also lead to a question of whether the instructional strategies, modifications, or accommodations for the student previously attempted should be modified by the CSE in light of the student's history and the CSE's expectations regarding the student's rate of progress. In this case, the private expert's opinion is slightly more convincing insofar as the NPS evaluator did not remember if she consulted the student's previous scores, (which includes her September 2016 evaluation scores) when conducting her assessment in 2018 (Tr. p. 40), and thus was not in a position to offer an opinion on whether further evaluation would be a productive avenue of inquiry. I have examined the student's test scores recorded in the student's IEPs from the September 2016 administration of the TORC-4 and note that they are notably higher than subsequent administrations of the same test, which without additional explanation from an NPS evaluator that explains the recorded decreases, has given me greater pause with regard to the NPS's assessment of the student's reading comprehension skills (Parent Exs. G at p. 3; H at p. 3; I at pp. 2, 3). In September 2016 the student scored with a percentile rank of 9 in relational vocabulary; a percentile rank of 5 in sentence completion; and a percentile rank of 37 on the text comprehension subtest (Parent Ex. I at p. 2, 3). For the 2017 administration of the TORC-4 the student scored with percentile ranks of 2 in relational vocabulary; 2 in sentence completion, and <1 in text comprehension (Parent Ex. G at p. 3). The student scored with similarly low scores in the 2018 administration, with a percentile rank of 1 in relational vocabulary and a percentile rank of 2 in sentence completion, and she refused to complete the text comprehension subtest (Parent Ex. G at p. 3).

Furthermore, in contrast to the student's poor academic achievement scores, her nonverbal cognitive scores were significantly higher, overall in the average range of functioning (Dist. Ex. 2 at p. 6). The private expert teacher of the deaf and hard of hearing, indicated that the "huge disparities," in her words, between the student's average performance on the nonverbal cognitive assessment and her academic achievement "stood out for [her] as a huge red flag" (Tr. p. 189).

She added that it seemed the student generally had typical intelligence but was not able to translate that into learning in school (Tr. p. 189). In addition, the teacher indicated that the student's very low coding abilities stood out from her other mostly-average scores, which the teacher opined "signaled the need for further evaluation in that area" (Tr. pp. 189-90). The private expert teacher of the deaf and hard of hearing noted that the psychological evaluation suggested the student might have "issues" with processing speed or fine motor tasks (Tr. p. 190). These statements by the witness presented valid questions posed during the impartial hearing in her professional judgement, and they offered sufficient contrast to the district's case-in-chief and I have taken them into serious consideration.³⁵

With regard to the October 2018 NPS speech and language evaluation of the student, the parent presented the testimony of a private expert in the area of speech and language and assistive technology (Tr. pp. 154-55).³⁶ The private speech pathologist, who testified via telephone, initially indicated that after reviewing the NPS's evaluations of the student, she recognized that "there were several missing components to [the student's] testing" and that "overall...there was just a failure to comprehensively assess [the student's] needs" (Tr. pp. 155-56; see Tr. p. 1). Specifically, the private speech pathologist opined that "there was a failure to fully assess her expressive language capacity" (Tr. at p. 158). The private speech pathologist testified that there is a close correlation between the development of literacy skills and language development; however, there was no literacy assessment conducted (Tr. p. 158). She opined that a literacy assessment would "really show [the student's] ability" and provide perspective on the student's grade level for reading, spelling, phonemic awareness –all literacy-based skills that were linked and directly correlated to the student's language development (Tr. p. 158). In addition, the private speech-language pathologist testified that some of the tests that were administered were "not as conclusive or directly related to [the student's] specific needs," for example, she indicated that the auditory test administered to the student was really a test of auditory processing rather than linguistic functioning (Tr. pp. 158-59). She noted that it was important to determine if the student could identify phonemes before testing to see if she could process them auditorily (Tr. p. 159). According to the private speech-language pathologist, "that linguistic piece" was especially important because the student had significant difficulty with spelling (Tr. p. 159). The private speech-language pathologist acknowledged that she had not met the student, visited her school,

³⁵ In denying the request for a neuropsychological IEE, the IHO reasoned that the parent had indicated that she was seeking "to obtain a "diagnosis," and that a diagnosis was a medical conclusion that could be obtained from the student's neurologist (IHO Decision at p. 10), but federal regulation provides that "[i]f a parent requests an IEE, the [school district] may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation" (see Letter to Anonymous, 55 IDELR 106 [OSEP 2010] citing 34 CFR 300.502[b][4]). I do not disagree with the IHO's general conclusion that the absence of a clinical diagnosis does not render a district's evaluation inappropriate, but the parent's disagreement was expanded into other areas of greater consequence though the use of the private expert witnesses during the impartial hearing and the IDEA does not require the parent to specify the areas of disagreement first.

³⁶ The parent's private State-licensed speech-language pathologist testified that she had been working as a speech-language pathologist for "about 15 and a half years" working in a variety of public and private settings and capacities and her resume was included in the hearing record (Tr. pp. 148-52; Parent Ex. K).

spoken with the student's teachers or evaluators, or observed how the school was addressing the student's needs (Tr. pp. 163-64).³⁷

The private speech-language pathologist noted that another piece missing from the student's speech and language evaluation occurred during the NPS evaluator's administration of the OWLS-II (Tr. p. 159; Parent Ex. E at p. 4). Here, the private speech-language pathologist noted that the NPS evaluator only administered the listening comprehension and oral expressive scale of the test and the private speech-language pathologist opined that administration of the written and reading comprehension scales would have been extremely informative, with regard to the student (Tr. pp. 159-60). She explained that the written expression subtest would provide further information regarding which of the student's skills needed to be targeted and whether her conventions or semantics were lacking and the reading comprehension subtest would provide specific information, such as whether the student was failing to understand details or having difficulty making inferences (Tr. p. 160).

The private speech-language pathologist indicated that evaluation of the student should focus more on the linguistic piece and understanding the student's language as a whole (Tr. p. 160). She indicated that the reason further testing was needed was because "a comprehensive understanding of [the student's] needs that are presenting themselves to date is really what is going to help [the student] succeed and to be able to access her language skills...these really truly foundational language and literacy skills that she's lacking" (Tr. pp. 161-62).³⁸

Testimony by the private teacher of the deaf and hard of hearing was consistent with the private speech-language pathologist's view regarding the link between language development and literacy (Tr. pp. 161-62, 181). She testified that she began her review of the student's evaluations with the speech and language evaluation "because a language foundation is so important for

³⁷ The IHO found her failure to meet the student or her teachers problematic (IHO Decision at p. 8), but I do not, especially when she has yet to conduct an assessment. She was presented as a witness to offer another perspective with respect to the formal reevaluation process and personal familiarity is not a compelling factor either way. If personal familiarity was a significant factor, one could just as easily state that the NPS evaluators' familiarity with the student could render them too subjective to offer an appropriate assessment; however, there is nothing more or less valid in this case about the experts' opinions based on their level of personal familiarity with the student. Additionally, the IHO did not explain why her testimony regarding the "failure to fully assess her expressive language capacity and a literacy assessment" was unconvincing (*id.*), when a "Letter to Baus" type of analysis suggests that an IEE is appropriate when it is determined that needed components of an evaluation were not conducted by the school district and, in this case, the IHO did not go on to explain her reasoning regarding why she believed that the district's reevaluation adequately assessed the student's expressive language capacity and literacy skills (65 IDELR 81).

³⁸ During the hearing NPS staff referred to the student as bilingual, meaning that she communicated using both spoken English and sign language (Tr. pp. 41-42, 86). However, the parent's experts raised several issues regarding the NPS evaluations and the student's bilingual status. The private speech-language pathologist noted that the NPS evaluations did not indicate if the student was bilingual because she was exposed to Spanish in the home or because she knew some sign language (Tr. pp. 160-61). In addition, the NPS assessment was not conducted in both languages to determine the student's dominant language (Tr. pp. 161-62). The teacher of the deaf and hard of hearing testified that the student's family used Spanish to speak and that it was unclear from the NPS evaluations whether the student understood or used Spanish (Tr. pp. 193-94). She questioned if the student's home language should have been taken into consideration during testing (Tr. p. 194).

children who are deaf and hard of hearing in order for them to develop academic ...and literacy skills" (Tr. p. 181).

The parent's two private expert witnesses also agreed with regard to the use of standardized scores for tests that are not normed on a particular population. The private speech-language pathologist testified that while it was okay to interpret testing with caution if the test was not normed on a specific population, in order for an evaluator to give perspective they absolutely could include raw scores and percentiles (Tr. p. 161). The private teacher of the deaf and hard of hearing testified that she noticed no standard scores were provided in the speech and language assessment because, as explained by the evaluator, the tests were either normed on students with typical hearing or did not adequately consider the specific type and extent of the student's hearing loss (Tr. 182). However, she noted that the student was described in all of the evaluations as a student who used spoken language with sign support and opined that "in the field of spoken language, it's very, very common for children to be assessed using evaluation tools that were normed on children with typical hearing because we want to be able to compare the child to see whether they...are developing age-appropriate language skills" (Tr. p. 182). She added that the only way to do that is to use the norm-referenced assessments while also always putting in a note of caution that the child is being compared to children with typical hearing and not those with hearing loss (Tr. p. 182). She further indicated that obtaining a standard score allows her to be able to track a child's progress and determine whether the student's performance is below or above average and how many standard deviations they are above or below average (Tr. pp. 186-87). She stated that she has "seen [the use of standard scores] in almost every evaluation of a child who uses spoken language and [it] would have been very helpful here" (Tr. p. 187). The private teacher of the deaf and hard of hearing also testified that without test scores, she found it difficult reading through the narrative, to really get a clear picture of the student's listening and spoken language skills (Tr. pp. 182-83).

The private teacher of the deaf and hard of hearing opined that there were inconsistencies in the narrative in the NPS speech and language evaluation (Tr. pp. 182-83). For example, she noted in the discussion of the results of the RITLS, the NPS speech and language evaluation report reflected that the student demonstrated some basic skills but also had not yet achieved some skills that were "really quite basic," specifically that the student had a clustered error pattern (three or more errors) on her understanding of reversible passive sentence structures, a skill that is typically mastered by children at the age of five to six years (Tr. pp. 182-83; Parent Ex. E at p. 4). Similarly, on the APT-HI, the student had not yet mastered the ability to identify phrases using segmental information, which is another skill that a child coming into elementary school would be expected to have (Tr. p. 184; Parent Ex. E at p. 4). Testimony by the private teacher of the deaf and hard of hearing indicated that while the narrative painted a picture of a child with some significant delays, the speech and language evaluation report also indicated that the student was "at or near age-appropriate in her receptive English syntax" (Tr. p. 183; Parent Ex. E at pp. 4, 5). In addition, the private teacher of the deaf and hard of hearing noted that the narrative indicated the student had at or near age-appropriate sign language vocabulary, however, the report did not provide any evidence that an ASL vocabulary assessment or any other kind of language vocabulary assessment, either in English or sign, had been given (Tr. p. 184). She noted that it was difficult to "evaluate where these...narratives were coming from" without those test results (Tr. p. 184).

With regard to the specific choice of tests that the NPS evaluator used, the private teacher of the deaf and hard of hearing opined that as a professional in listening and spoken language, she had not seen the RITLS widely used currently as it was developed in 1983 and was "very outdated" (Tr. pp. 184-85). She indicated that she would have expected a more current standardized test to assess the student's language structure such as the Clinical Evaluation of Language Fundamentals (CELF), which includes a portion on language structure and could also have been used to more comprehensively test the student's language (Tr. p. 185).

The private speech-language pathologist also opined that the NPS's evaluation should have explored the student's pragmatic language deficits (Tr. p. 162). She noted that several documents referenced the student's fluctuating ability to maintain appropriate pragmatic skills and that the student had "a history of tantruming and disrespectful language and kind of interactions with peers. . . and adults" (Tr. p. 162). She opined that an assessment of the student's pragmatic language skills would lend itself to a more effective plan for the student (Tr. p. 162). In addition, as noted above, the academic achievement evaluation indicated the student followed a social script when it came to conversation and discourse and that any deviation from the script left her confused and unable to answer correctly (Parent Ex. C at pp. 2-3). The academic achievement evaluation also indicated that the social script made the student appear more related and linguistically mature than she was (Parent Ex. C at p. 3). Testimony by the NPS psychologist who completed the student's psychological evaluation also indicated that the student was not fluent in spoken language and used a kind of script where she could do rote language and answer rote, basic, concrete questions but could not have an in-depth conversation that was more abstract (Tr. p. 85).

The private teacher of the deaf and hard of hearing also noted that the NPS speech and language evaluation report stated that the "prognosis for further growth in listening and spoken language development would need to be guarded in light of [the student's] hearing impairment and anatomical variations secondary [to] her repaired cleft lip and palate" (Tr. p. 197; Parent Ex. E at p. 5). However, the teacher of the deaf and hard of hearing testified that she did not see evidence to support that conclusion and it raised questions for her as to what made the evaluator think the student could not make more progress in language (Tr. p. 197). She speculated whether it had to do with scores that weren't reported or perhaps anecdotal evidence from therapy but ultimately indicated that this was "an avenue that really needed to be explored" in terms of evaluation (Tr. p. 197).

The private teacher of the deaf and hard of hearing also testified that the student's reported difficulties attending in the classroom and her need to be redirected during the examination were of concern to her and warranted further testing to determine whether she required remediation or that different strategies be used with her (Tr. pp. 195-96). The evidence shows that the NPS evaluations contain several references to the student's ability to attend. For example, the NPS speech and language evaluation noted the student made frequent verbal interruptions such as laughing, extraneous comments, and apologizing that interrupted the flow of testing, but that the student was able to be redirected with verbal prompts (Parent Ex. E at p. 3). The speech-language evaluator also indicated the student required reminders to attend to the examiner for the presentation of the entire question during the administration of the RITLS (Parent Ex. E at p. 4). The speech-language evaluator also indicated the student often interrupted or discussed things that were off-topic (Parent Ex. E at p. 5). The student's teacher reported that the student was attentive when interested in the topic at hand but that she could easily become distracted by other students

when not interested in the material and that at times she talked excessively and distracted others, however, she was easily redirected when prompted (Dist. Ex. 2 at p. 2). On the other hand, the psychological evaluation reflected the student's low score in the coding subtest which among other things, measured the student's abilities with regard to attention and motivation related to structured writing (Dist. Ex. 2 at p. 5). In addition to the above, when asked what she didn't understand about her daughter that she would like to learn more about, the parent testified that she did not understand what was going on with the student's learning because she had difficulties concentrating and could not pay attention or concentrate on almost anything (Tr. p. 208). In contrast, the academic achievement evaluation indicated that the student was focused and diligent during her testing session (Parent Ex. C at p. 3).

The discussion above regarding the testimony of the private experts highlights a number of areas that, from an evidentiary perspective, called for a counter-response from the NPS experts to explain why further assessments through a neuropsychological IEE and a speech-language IEE were not necessary. This is because, as noted above, federal regulations require that "[a]ssessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure) (34 CFR 300.304[c][3] [emphasis added]). In this case the testimony of the private experts successfully tipped the scale in the parent's favor regarding whether the assessments selected and administered by the NPS would best ensure that the assessment results accurately reflected this particular student's aptitude or skill level with respect to literacy skills (reading, spelling, phonemic awareness), expressive and spoken language, pragmatic language, and attending. While there was neither an invitation from the IHO, nor a request from the district to present a rebuttal case, it would ultimately fall upon the district to make such a request in order to tip the scales back again and the hearing representative did not do so. Based upon the evidence I am persuaded that the district did not prevail in showing that the NPS reevaluation was appropriate and I will grant the parent's request for a neuropsychological IEE and speech-language IEE at public expense.

Although I have decided to grant these aspects of the parents' request, I note that I did not find all of the private experts' opinions persuasive. The private teacher of the deaf and hard of hearing also indicated that for the formal assessments that she conducts, she often uses the Woodcock-Johnson Test of Achievement-Fourth Edition to look at academics; the Peabody Picture Vocabulary Test to look at a student's vocabulary; and the Cottage Acquisition Scales for Listening, Language, and Speech to assess language (Tr. p. 173). While the additional testing might be beneficial in the expert's professional opinion, she did not explain why the NPS evaluation was deficient or improperly administered in the absence of these particular assessments.

An additional criticism of the NPS reevaluation by the private speech-language pathologist that I did not share was with respect to any asserted absence of a recommendation for services by the NPS evaluators. The private speech-language pathologist testified that in the NPS speech and language evaluation, "there really were no specific recommendations for a provision of service based on how [the student] performed" (Tr. p. 162). She further testified that "specific short and long-term objectives yielded directly from the evaluation were absent" and that a comprehensive evaluation generally gives the evaluator direct information and helps really shape a clinician

program for a student who has deficits across domains (Tr. p. 163). However, I found this opinion testimony unpersuasive because it is the CSE that ultimate bears the responsibility to weigh the options and recommend appropriate services in an IEP, including related services. Thus, the decision regarding the extent to recommend services in an evaluation, if at all, is left to the sound discretion of the professional evaluator's judgement, especially if the report is being submitted to a CSE for consideration. It is a reasonable subject to discuss during a CSE meeting if the evaluator chooses not to do so in the evaluation report, and in some circumstances, that may be the better course.

Turning to the parent's request for an occupational therapy IEE, the parent's post-hearing brief indicates that her request was based on the student's reported difficulty with writing coupled with her low score on the coding subtest of the WISC-V (Parent's Post-Hr'g Br. at p. 10).³⁹ The parent opined that OT testing would help to explain whether the student's low score on the coding subtest was related to an issue with motor coordination, which she maintains is an area that was not isolated during the student's testing (Parent's Post-Hr'g Br. at p. 10). Similarly, the private teacher of the deaf and hearing impaired testified that she believed the student's very low coding abilities on the WISC-V stood out from her other generally average scores and "signaled the need for further evaluation in that area," and that she would have "sought to contact an occupational therapist" or it could also signal a need for a neuropsychological evaluation (Tr. pp. 188-90).

In contrast to the student's low score on the coding subtest of the WISC-V and the evaluating psychologist's note that this weakness would make copying from the board or from a book a "time-consuming task" for the student, the student scored in the average range on the visual motor integration subtest of the BEERY VMI (Parent Ex. D at p. 5; see Tr. pp. 74, 76-77).⁴⁰ The psychological evaluation report reflected that, on this measure, the student was asked to copy designs from pictured models that increased in complexity (Dist. Ex. 2 at p. 5). The report further indicated that the student performed with good effort, and that her visual motor integration skills fell within the average range of functioning, with a standard score of 96 and a percentile rank of 39 (Dist. Ex. 2 at p. 5). In addition, the report indicated that these results were similar to the student's previous evaluation and were consistent with her teacher's impressions of her functioning in the classroom (Dist. Ex. 2 at p. 5; see also Tr. p. 44). During testimony the evaluating psychologist acknowledged that the student had a slow work pace, particularly when a precise motor component was involved, and that she had worked more slowly on the coding subtest and "the VMI" (Tr. pp. 74-75; see Parent Ex. D at p. 6). The psychologist confirmed that she did not indicate in her report how long it took for the student to complete the BEERY VMI subtest (Tr. pp. 78-79). Unlike the evidence regarding the neuropsychological and speech-language IEE requests, the vague criticism of the NPS reevaluation in this regard is essentially that an OT IEE

³⁹ The parent's post-hearing brief was not paginated and citation to the brief is made with the page number as that page naturally appears in order.

⁴⁰ Testimony by the psychologist who administered the BEERY VMI indicated that visual motor integration refers to the ability to use our hands and eyes in a coordinated way (Tr. p. 77). The psychologist testified that the BEERY VMI also included an optional visual-perception subtest that provides information on how the brain makes sense of what the eyes see and a motor coordination subtest that isolates and measures fine motor skills, neither of which the psychologist administered to the student (Tr. pp. 77-78).

might provide even greater clarity regarding an area that was assessed on the WISC-V. However, while the private expert explained how she might have gone further, she did not adequately expose a flaw in the NPS reevaluation. Accordingly, there is insufficient basis to overturn the IHO's determination to deny the parent's request for an OT IEE.⁴¹

E. Independent Educational Evaluation Costs

In this case parents sought all of the requested IEEs at public expense and at the "usual and customary rates" of the specified independent evaluators. As I have determined above that the parent is entitled to both neuropsychological and speech-language IEEs at public expense, I must also examine the IHO's refusal to order assistive technology IEE due to discomfort with the notion that it would be at "unknown and unlimited cost" (see IHO Decision at p. 10).

When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). Upon request, the district is required to provide the parents with information regarding where IEEs may be obtained, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the district's list of independent evaluators (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In this case, the evidence shows that the parent explicitly requested that the district provide the parent with the district's criteria applicable to IEEs, and she specified that she was seeking the IEEs at the evaluator's "usual and customary rate" (Parent Ex. A at p. 2). At the point that the district initiated the impartial hearing, the district was sufficiently on notice that the parent had asked for the district's criteria—which would include any cost containment criteria such as reimbursement rates that are specifically applicable to IEEs. However, the district did not submit any evidence regarding cost containment criteria applicable to the requested IEEs, nor did it assert in its due process complaint that the cost containment criteria was an issue for the case. The parent

⁴¹ I agree that the IHO used language that effectively placed the burden of proof on the parent which was an error, but in contrast to the IHO, upon my independent review, I find that the parent did not successfully overcome the district's proof showing that the NPS reevaluation was sufficiently comprehensive such that an additional OT IEE was not required.

is not required in this instance to face further potential delay if the district does, in fact, have a "standard rate" as the IHO suggested in the order of relief (IHO Decision at p. 10). There is no evidence of the district's "standard rate" in this case, and that is not the type of fact of which one may take judicial notice, especially when the parent must be given the opportunity to challenge cost containment policies as applicable to IEEs of a particular child. Although I share the IHO's dissatisfaction with the parents overly vague "usual and customary rate" language, I will not deny the parent's request solely on that basis in this particular instance.

However, the parent's request for sign language interpretation should be addressed by the respective independent evaluators themselves and, if necessary, it is the responsibility of the independent evaluator to make provision for the appropriate communication modalities during any evaluation. Notwithstanding this determination, if the district and the independent evaluators are both amenable to using district-provided sign language interpreters, I see no reason in this case to disallow such cooperation.

Lastly, at a minimum, the results of the IEEs at public expense must be provided to the parents in their native language or mode of communication in accordance with state policy regarding the results of evaluations (8 NYCRR 200.4[b][6][xii]).

VII. Conclusion

In accordance with the forgoing I will grant the parent's request for neuropsychological and speech-language IEEs, however, there is no basis for overturning the IHO's decision to deny the parent's request for an OT IEE.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the IHO dated July 9, 2019 is modified by reversing those portions which denied the parent's request for neuropsychological and speech-language IEEs and limited the cost of the assistive technology IEE to the district's standard rate; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, the decision of the IHO dated July 9, 2019 is modified to require that the independent evaluators shall be responsible to make provision of any necessary sign language interpretation in connection with the conduct of an IEE, provided however, the costs of any necessary sign language interpretation shall be recoverable from the district as part of the IEEs.

Dated: Albany, New York
September 20, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER