Before the
Administrative Hearing Commission
State of Missouri

LIBERTY 53 SCHOOL DISTRICT, Petitioner, v. AND , in the interest of , Respondent.	)	No. 18-0357

DECISION

We grant Liberty 53 School District's (District) request for a consent override.

Procedure

On May 23, 2018, the District filed a due process complaint naming and (Parents).[1] On June 14, 2018, the District filed an amended pre-hearing conference statement. On June 15, 2018, (Mother) filed a pre-hearing conference statement. On June 27, 2018, the District filed a motion to strike additional issues listed in Mother's amended pre-hearing conference statement. On June 28, 2018, we held a pre-hearing conference for the purposes of taking up the motion and to discuss scheduling of this case. By order dated June 28, 2018, we granted District's motion to strike.

[1] The District named both parents in its due process complaint, but only has been active in this case. Despite our reference to "Mother," we acknowledge that both parents are parties and subject to this decision.

On July 10, 2018, we held a hearing on the complaint. The District appeared by Ryan T. Fry of Guin Mundorf, LLC. Mother appeared *pro se*. The matter became ready for decision on July 25, 2018, when the simultaneous reply briefs were due.

Findings of Fact

1. (Student) is years old and is in the 5th grade at Kelleybrook Elementary School within the District. Student has an Individualized Education Plan (IEP) with educational diagnoses of speech impairment and a sound system disorder.

2. In February 2016, at Parents' request, the District re-evaluated Student in the areas of Communication Skills, Speech; Communication Skills, Language; General Intelligence; Academic; and Classroom Observation. Student had last been evaluated in February 2014.

3. In the February 2016 evaluation, Student was evaluated using a Wechsler Intelligence Scale for Children – 5th Edition ("WISC"). Student obtained a full scale general intelligence test[2] score of 85 with a 95% Confidence Interval of 80-91 or low average. The results were considered to be valid and appeared to accurately reflect Student's current level of intellectual functioning. According to the evaluation, "the confidence intervals listed above provide a range in which the child's 'true' IQ is likely to fall. It allows for the assumption that one's 'true score' may not be exactly the same as the score that was obtained on a particular occasion." Ex. A at 8.

4. The IEP team reviewed the evaluation and developed an IEP dated February 26, 2016. The Student was already eligible for special education due to a disability in Language Impairment. Student received 90 minutes of special education services in speech, 23 minutes in language, and 120 minutes in basic reading. As a result of the re-evaluation, the IEP team concluded:

> [Student] met eligibility criteria in speech impaired, sound system disorder, based on a significant discrepancy between her

[2] The phrases "general intelligence test" and "IQ test" are used interchangeably throughout this decision.

> intellectual functioning and scores obtained on an articulation test. [Student's] speech impairment affects her ability to sequence sounds and form syllables into meaningful, multi-syllabic words. [Student's] speech impairment adversely impacts her educational performance and she requires specially designed instruction in speech and related services in reading decoding and language in order to access the general education curriculum.

Ex. B at 3. Specific, measurable goals were set in the areas of language, speech, basic reading skills, and reading comprehension. Accommodations included extended time for completing tests, tests in an alternative setting, close proximity to the teacher for spelling tests, and facing teacher during instruction so that Student could see the teacher's mouth.

5. IEP goals are set for a special education student to measure that student's progress on a quarterly basis in meeting the IEP goals. The student's progress toward the IEP goals translates into growth or progress for a student.

6. While making progress on her IEP goals, from Mother's perspective, Student was struggling with the continued difficulty in reading. Student's reading was below grade level and continued to remain below grade level.

7. On October 18, 2017, Mother had Student evaluated at Children's Mercy Hospital ("Mercy"). Chris Scranton, M.A., CCC-SLP, a Master's level speech language pathologist at Mercy, performed what was titled a "Comprehensive Speech & Language Eval" (Scranton evaluation). Ex. D. It included a Test of Nonverbal Intelligence-4 ("TONI") on Student. Other speech, reading, and language tests were performed.

8. The goal of a TONI is to "assess intelligence without the effects of a person's linguistic or motor skills confounding the results and yielding a potentially inaccurate assessment of cognitive ability." Ex. D at 44.

9. A TONI can be administered in 20 minutes or less and can provide a snapshot of an individual's cognitive abilities. Intelligence tests that are more comprehensive generally take an hour or more to complete.

10. Student obtained a score of 106 on the TONI. According to the Scranton evaluation, "scores between 90-110 are considered to be average."

11. Scranton's impressions identified discrepancies between the TONI and the speech and language tests that were performed. The overall impression included the specific learning impairment of dyslexia. His impressions also were that the Student had the characteristics of "Childhood Apraxia of Speech." Scranton had additional impressions as to Phonological Processing, mild to moderate disorders of various speech and language, severe phonological awareness deficit, and multiple reading impressions identified as impaired. Scranton specifically suggested various speech and language recommendations, multisensory education, and other resources that were available for assistance. In giving his recommendations, Scranton specifically stated: "The family was informed that in order for intervention services to be provided through the school district the student does have to qualify based on state guidelines. Determination of qualification for services is done through the school district." Ex. D at 45. Various accommodations were suggested as possibilities. Scranton specifically recommended followup at the District, a trained reading tutor, and Mercy speech clinic.

12. Mother provided the Scranton evaluation to the District. As a result, the District set an IEP meeting for October 31, 2017, for the purpose of reviewing the test results and to review/revise the IEP. The meeting was not held because it was cancelled by Parents. A subsequent meeting was scheduled for November 7, 2017. The meeting was not held because it was rescheduled to allow the District to obtain additional information about the multi-sensory reading program that was an issue Mother wanted to be discussed at the meeting. The meeting was reset for November 15, 2017.

13. On November 15, 2017, the District held an IEP meeting with Mother and discussed the Scranton evaluation, and how it could be used to develop a new IEP for Student or to amend the current IEP.

14. The IEP team modified Student's IEP to include a phonological awareness goal and some additional accommodations and modifications. The IEP team also discussed using a structured reading instruction program. The IEP team did not change Student's educational diagnosis.

15. Veronica Brackman, the District's school psychologist, attended the November 15, 2018 IEP meeting. Brackman attended graduate school[3] and has been a licensed professional counselor for 22 years. Brackman has been a school psychologist at the District for 17 years. Brackman's current job duties include evaluating students, identifying learning difficulties, assisting teachers in the development of behavior plans and intervention strategies for working with students.

16. Mother requested that the IEP team re-evaluate Student at the November 15, 2017 meeting.

17. At the IEP meeting, Brackman agreed that re-evaluation was necessary primarily because of the much higher IQ score in the Scranton evaluation. She explained that in order to determine if an IEP should be changed, data was needed to provide a true evaluation of Student's needs for academic, functional performance, and to update Student's strengths and weaknesses. Without updated information, it is difficult to make sure that an IEP is right for a student.

18. Dr. Jake Boswell is a special education process coordinator with the District. He has held this role for four years. As a process coordinator, Boswell coordinates evaluations, answers

[3] At the hearing, Brackman did not indicate where she obtained her education and what fields her degrees were in.

questions for parents and teachers about the referral process, and conducts re-evaluations. Boswell has a B.A. in history from Lincoln University, a master's degree in curriculum instruction from the University of Missouri-Kansas City, an education specialist degree in educational leadership, and a doctorate degree in educational leadership. Boswell came to Kellybrook at the beginning of the 2017-18 school year and began working with Student in October 2017.

19. On November 17, 2017, Boswell called Mother and told her that based upon the November 15, 2017 IEP meeting, Student would be re-evaluated soon after her IEP was finalized.

20. On November 20, 2017, Mother advised in an e-mail to Jeremy Tucker, Superintendent of the District, that all communication from the District should be in writing and that she was no longer accepting phone calls. Other concerns regarding the curriculum and re-evaluation were also mentioned in her e-mail, including: Mother expected to have Scranton's recommendations and suggestions put into place immediately by the District, Mother wanted Student re-evaluated immediately, Mother requested the opportunity to interview Student's 4th grade teachers in order to determine whether they would make the Student a priority, Mother requested a trained dyslexic tutor from a particular therapy center, that a particular school employee be fired, and reimbursement for the Scranton evaluation and other private tutoring expenses.

21. The District responded to Mother's concerns in a follow up e-mail on December 14, 2017, and reiterated that the District would undertake a re-evaluation as well as implement some changes to the IEP based on the Scranton evaluation, including using the District's multisensory approach to reading instruction for Student.

22. On December 15, 2017, Boswell sent Mother a notification of meeting to review existing data ("RED") for Student's re-evaluation. The meeting was scheduled for January 9, 2018. Soon after receiving this notification, Boswell spoke with Mother by phone, and she stated her intentions not to attend the January 9, 2018 meeting, and that any further communication must be in writing.

23. Parents declined to meet on January 9, 2018, and Mother requested that the District submit its re-evaluation plan in writing.

24. On January 8, 2018, Boswell provided a Notice of Action (NOA) to re-evaluation and the District's proposed re-evaluation plan to Parents.

25. On January 17, 2018, the District sent Mother another notification of meeting in order to RED for Student, and scheduled it for January 23, 2018.

26. On January 23, 2018, the IEP held the RED meeting. The IEP team determined that Student should be re-evaluated. Mother attended the RED meeting.

27. On January 23, 2018, the District sent Mother an NOA, which requested Mother's consent in order to conduct a re-evaluation of Student based upon Student's current IEP, current diagnostic data, teacher records and reports, and the RED. The District also sent a notification of meeting to be held on March 20, 2018, to determine initial or continued eligibility. The meeting and notification was given in advance for the review of the evaluation results.

28. The NOA set forth a description of the areas to be assessed and the known tests to be used and sought consent for the areas to be assessed. It included:

- Vision: Vision Screening
- Hearing: Hearing Screening
- Communication Skills, Speech: Speech Sample
- Communication Skills, Language: Expressive language assessments
- General Intelligence: A measure of [Student's] general cognitive ability and intellectual functioning (Wechsler Nonverbal Scale or Ability and/or Universal Nonverbal Intelligence Test-2)

- Academic: Information regarding [Student's] academic achievement in the areas of basic reading skills, reading fluency, reading comprehension, written expression, mathematics calculation, and mathematics problem solving (selected portions of the Woodcock Johnson IV Tests of Achievement and related assessments as deemed necessary).
- Observation: Classroom Observation

Ex. M at 7.

29. On January 30, 2018, Mother signed the NOA, consenting to the re-evaluation. On that same day, Mother sent a letter[4] to Superintendent Tucker that stated that she revoked consent for a general intelligence test to be administered to Student. Mother agreed to all other parts[5] of the District's NOA.

30. When a parent consents to an NOA, the District evaluation team is allowed to assess a student in all areas that were agreed upon with the parent. When a parent rejects a part of the NOA, the entire plan for re-evaluation is deemed to be rejected, and the District cannot go forward with the re-evaluation.

31. Kris Ann Martin is the director for special education and special services for the District. Some of her duties include overseeing special education services and programing, special education teachers, and planning for professional development. Martin had been employed by the District for over 13 years. Martin has a B.A. in psychology from the University of Missouri, a Master's degree and a specialist degree from the University of Missouri and the College of William and Mary. Martin also has an educational specialist degree and a doctorate in educational leadership from St. Louis University.

[4] Mother's letter revoking consent was misdated July 30, 2018. The letter was sent on January 30, 2018.

[5] In Mother's January 30, 2018 revocation letter to the District, she added another area for re-evaluation (social/emotional) that was not agreed upon by the District at the January 23, 2018 meeting. In written argument, the District asserted that Mother added three additional areas of assessment. However, at the hearing, Boswell asserted that the only area that Mother added in her revocation letter that the District did not agree to reevaluating B.G. on was that of "social emotional." Tr. 38.

32. Dyslexia is a specific type of learning disability. To qualify for special education for the learning disability of dyslexia in the State Plan, there must be a discrepancy between achievement and intellectual ability of at least 1.5 standard deviations. Each area of disability eligibility has specific requirements, and the measurement of the IQ is integral to determine specific eligibility.

33. Assessment information from re-evaluations is used to see if the categories of special education need modification or need to be expanded to include other areas of eligibility under the State plan. The eligibility determines what types of services can be used to meet each student's unique learning needs.

34. The reason that the District could not use the TONI score is because when there are two IQ test results that are so different, the validity and reliability of the scores becomes questionable. It is possible to get a false high or a false low on an IQ test. Although there can be minor fluctuations between general intelligence tests administered within a couple years of one another, it is "statistically very rare"[6] to have a 21 point discrepancy between two general intelligence tests. Tr. 126. A third IQ test would help to determine which score should be relied upon in order to make a decision of eligibility for particular educational diagnoses under the State plan.

35. The Weschler non-verbal IQ test proposed by the IEP team would provide a comprehensive measure that takes into account what a student can achieve and help determine the relative strengths and weaknesses of a student.

36. A third IQ test would provide information to make sure that the IEP is meeting the Student's needs and that the school can provide a free appropriate public education (FAPE) to Student.

[6] Brackman characterized the difference in this way.

37. On February 14, 2018, Martin contacted Mother about her letter to Tucker and told her that the District needed her consent to the general intelligence test in order to complete Student's re-evaluation, and that Mother could always have an Independent Educational Evaluation (IEE) of Student completed if Mother did not agree with the results of the District's evaluation. Martin explained that the IQ assessment was needed due to the discrepancy between the 2016 IQ test and the Scranton IQ testing. Mother wanted the District to rely on the Scranton IQ testing, and she believed that the District wanted to find that Student was not disabled. Following the call from Martin, Mother requested in an e-mail that all communication be in writing. On March 7, 2018, Martin sent a letter and an NOA to Mother that explained the federal and state requirements for an evaluation, and that the District could not proceed with a re-evaluation of Student due to Mother's refusal to consent.

38. On March 13, 2018, Mother sent another e-mail and advised that she had also sent a letter consenting to all of the testing for the evaluation except for the IQ testing. In the letter, Mother stated:

> There seems to be some confusion as to the areas of consent in regards to [Student]. Pursuant to my letter in regards to the Areas of Consent, I agreed to the areas discussed during the Review of Existing Data meeting except the IQ test. I never gave Liberty Public Schools consent to test [Student's] IQ. As I stated before, [Student] has a current and valid IQ test from Children's Mercy Hospital. There is no need to put [Student] through another IQ test. Consider this my parental signature date. I expect the testing that I consented to be completed.

Ex. T. Mother included AIMSweb information, information from the Educational Therapy Center stating that Student would benefit from the Orton-Gillinghmam Approach, one-on-one tutoring and reading comprehension and vocabulary work, and a Marian Hope Center for Children's Therapy evaluation dated February 6, 2018, regarding an assessment of language and

pragmatics with a diagnosis of dyslexia, apraxia, phonological processing impairment, and specific language impairment.

39. On March 19, 2018, Boswell sent an e-mail to Mother about setting up another IEP meeting on April 5, 2018 to discuss new information Mother provided the District regarding Student's reading and language skills. Boswell also informed Mother that the IEP meeting originally scheduled for March 20, 2018 was cancelled due to Mother's refusal to consent to Student being re-evaluated. Martin suggested that if Mother desired, there could be a facilitated IEP meeting on April 5, 2018.

40. Mother did not attend the April 5, 2018 IEP meeting. The IEP meeting was rescheduled for April 17, 2018.

41. Mother attended the April 17, 2018 IEP meeting and an NOA was sent on April 18, 2018 that the outside evaluations obtained by Mother were considered but that there were no recommendations for changes to the IEP or services by the Parent or District.[7]

42. From May 15, 2018 through May 23, 2018, the District and Mother exchanged correspondence regarding various proposals for outside evaluations to occur.[8]

43. On May 22, 2018, Mother e-mailed Martin and again stated that the parents were not willing to move forward with an IQ test.

44. On May 23, 2018, the District filed a due process complaint with this Commission to override Mother's refusal to consent to a re-evaluation of Student.

45. On May 23, 2018, Tucker notified Mother of the filing, and the District offered to enroll Student in Extended School Year (ESY) with 60 minutes of speech services and 120

[7] Mother filed a due process case at this time, which she subsequently dismissed around May 15, 2018.

[8] The e-mail from Mother dated May 16, 2018, indicates Mother's belief that Student has 5 learning disabilities and dyslexia and that Student needs to be categorized as "Other Health Impaired" in order to obtain needed services; however, Mother continues to not consent to a re-evaluation because it would include the IQ testing.

minutes of specialized instruction in basic reading skills per day. Mother did not follow up with this option.

46. The District continued to seek consent for re-evaluation through various proposals until July 10, 2018, and Mother and the District did not resolve the issue.

47. Mother understands that the District has a legal right to perform its own evaluation of Student; however, Mother desires to consent to the specific testing and wants the ability to have the testing explained to her by the evaluators. Mother also indicated during the hearing that she wanted the ability to pick who performs the evaluations.

Motion to Correct the Transcript

The Administrative Hearing Commission processes all due process complaints and handles all issues from the filing of the complaint to the final decision. Missouri's State Plan for Special Education (2017) (State Plan), State Level Due Process Hearings Regulation V, H at 76. According to the State Plan, "Any party to a hearing has a right to: …e. Obtain a written or, at the option of the parents, electronic verbatim record of the hearing at no cost[.] *Id*.

For due process hearings, the Commission routinely hires independent contractors who have a contract with the State of Missouri to provide court reporting services. In this case, the Commission hired Veritext Legal Solutions, which provided a certified court reporter licensed by the Missouri Supreme Court for the hearing. Due to the short time between the hearing and the decision date (30 days) and in order to provide the parties the opportunity to brief any issues in the case, the transcript was expedited, which required per the state contract that it be filed by July 12, 2018. The electronic transcript was received and filed with the Commission on July 10, 2018. The paper copy of the transcript was received and filed on July 13, 2018.

On July 23, 2018, Mother filed what we considered to be a motion to correct the transcript. Specifically, she stated:

> The transcript is missing testimony. I asked Dr. Brackman if it were possible to get a false high on an IQ test and she said "no." I also asked her if it were possible to get a false low on an IQ test and she said "yes." Right after these questions is when Mr. Fry got upset and asked to take a break. These questions and answers are not in the transcript.
> Mr. Fry also asked me if I was an attorney. I replied no. This testimony is also not in the transcript. I also believe that there is testimony missing from Dr. Martin in regards to Childrens Mercy being in Liberty's IEE approved list.

On July 23, 2018, Mother also spoke with a staff attorney of the Commission and reiterated the above concerns as well as her name being misspelled. On July 23, 2018, we ordered the court reporting service to review the transcript and compare it to any audio recordings and correct any errors and recertify the transcript.

On July 27, 2018, the court reporter filed a statement with the Commission that he had reviewed the transcript and audio file and no changes were necessary.

On July 30, 2018, Mother requested a copy of the audio recording of the hearing because she remained concerned about the accuracy of the transcript. On July 30, 2018, we ordered the court reporter to correct the first and last name of parent, to correct the case number on the transcript, to recertify the transcript to the Commission and parties, and to provide to the Commission any audio recording of the transcript by August 1, 2018.

On August 1, 2018, we were provided with the revised and recertified transcript. Additionally, the court reporter filed a statement with the Commission that he no longer had any audio recording. The parties were also provided with corrected copies of the transcript.

Because of the concerns raised by Mother, we have carefully reviewed the transcript. Mother's first concern was that the transcript was missing testimony regarding her question about a false high or false low on an IQ test that she said was directed to Brackman. We found no such question to Brackman; however, questions and answers regarding false highs or lows

can be found in other parts of the transcript, specifically Boswell's testimony at Tr. 48-49, lines 25-6; Tr. 59-61, lines 24-7; Tr. 60-1, lines 19-1; and Martin's testimony at Tr. 118-19, lines 22-5. We took this information under consideration in making our findings of fact.

Mother's second concern was that Mr. Fry had inquired of Mother if she was an attorney. We found no such references in the transcript. It is possible that such an exchange took place before the hearing started or at a time when the hearing was not on the record, such as during a break. Even if such an exchange occurred and could be found in the record, it is not relevant to our decision.

Mother's third concern is that there was testimony missing from Martin in regard to Mercy being on the District's IEE approved list. A review of the transcript indicates that Mother asked this question at Tr. 117-118, lines 20-17. We took this information under consideration in making our findings of fact.

The corrected transcript has been filed and received. With regard to the concerns noted by Mother, the transcript that was prepared and filed by an independent contractor with the State of Missouri appears to be accurate and was certified to be so by a certified and licensed court reporter. We therefore rely upon the transcript as submitted with the noted corrections.

Conclusions of Law

This Commission has jurisdiction over this case. Section 162.961.[9] The burden of proof is on the party seeking relief, in this case the District. *Schaffer v. Weast,* 546 U.S. 49, 62 (2005).

We must judge the credibility of witnesses, as well as the weight and value of the evidence. *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App., W.D., 2014). We have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D., 2001). When there is a

[9] Statutory references, unless otherwise noted, are to RSMo 2016.

direct conflict in the testimony, we must make a choice between the conflicting testimony. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). Our findings of fact reflect our credibility determination.

FAPE in General

Under the Individuals with Disabilities Education Act (IDEA), all children with disabilities are entitled to a FAPE designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A) and 34 C.F.R. §300.1(a). Missouri's State Plan generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction without charge to the parents that meet the educational standards of the state educational agency and are provided in conformity with the student's IEP. State Plan, Regulation I,G, page 6.[10]

The primary vehicle for carrying out the IDEA's goals is the IEP. 20 U.S.C. § 1414. An IEP is a specialized course of instruction developed for each disabled student, taking into account that child's capabilities. 20 U.S.C. § 1414(d)(1)(A). The IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 207 (1982).

"To meet its substantive obligations under the IDEA" an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE*-1, *137 S. Ct. 988*, 999 (2017). This is not a bright-line rule and it "requires a prospective judgment by school officials" that is a "fact-intensive exercise" incorporating information from both school officials and the child's parents. *Id*., citing *Rowley*, 458 U.S. at 207.

[10]*Also see*, 20 U.S.C. §1401(9).

As a student with a disability, Student is entitled to FAPE, and in order to have FAPE and continue to have FAPE, it is possible that adjustments to Student's IEP may need to be made.

Issue of the Case

The sole issue in this case is whether the District may assess Student, without parental consent, in the areas specified in the IEP team's assessment plan. The District seeks to override the lack of parental consent to re-evaluation. While agreeing that re-evaluation is necessary, Mother disagrees with the proposed assessment of Student's IQ. Mother believes that an IQ test is not needed to determine Student's disability, that she has a right to withdraw consent to particular evaluations, and that she has a right to direct the District as to which evaluations and what testing should be used to determine any disability of Student.

Child Find Obligations

The IDEA requires each state's department of education to actively identify, locate, and evaluate children with disabilities. 20 U.S.C. § 1412(a)(3)(A); *Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N. on Behalf of J.N.*, No. 16-CV-09448(TPG), 2017 WL 4641219, at *6 (S.D.N.Y. Oct. 13, 2017). This "child find" requirement extends to students who are suspected of having a disability, despite progressing from grade to grade. 34 C.F.R. § 300.111(c)(1). The IDEA requires the District to conduct an initial evaluation in which it assesses "all areas of suspected disability." 21 U.S.C. §§ 1414(a)(1)(A), (b)(3)(B). This assessment must consider available diagnoses, health history, and specific health needs necessary to assist a child in school. *See L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1008 (9th Cir. 2017).

"The purpose of the child-find evaluation is to provide access to special education." *Fitzgerald v. Camdenton R-III Sch. Dist.*, 439 F.3d 773, 776 (8th Cir. 2006). A district's child find obligation is triggered when there is information to suspect a disability and that special

education services may be needed to address the disability such that a district should determine whether a child should be evaluated. *Dept. of Educ., State of Hawaii v. Rae,* 158 F.Supp. 2d 1190, 1194-95 (D. Hawaii 2001). A district is deemed to have knowledge that a student is a child with a disability if the parent has expressed concern in writing that the student needs special education and related services, the parent has requested an evaluation, or there are concerns about the student's performance. 20 U.S.C.§1415(k)(8); 34 C.F.R. § 300.457(b).

In order to be eligible for special education services, a student must have one or more disabilities. 34 C.F.R. § 300.7(a). The State plan includes a list of conditions that may qualify a student to special education. These include: Autism, Deaf/Blindness, Emotional Disturbance, Hearing Impairment and Deafness, Intellectual Disability, Multiple Disabilities, Orthopedic Impairment, Other Health Impairment, Specific Learning Disability, Speech or Language Impairment, Traumatic Brain injury, Visual Impairment/Blindness, and Young Child with a Developmental Delay. The eligibility requirements for each disability is set forth in detail in the state plan. State Plan, Regulation III, B, Pages 23-33.

The District has previously determined that Student is disabled and is eligible for special education. In this case, the District has been placed on notice that Student may have additional disabilities that may require additional special education services to address because Mother has repeatedly requested an evaluation of Student, provided medical and other outside educational assessments indicating that there may be other disabilities, and has expressed concern about Student's performance. Student may need to be assessed in all areas that may be related to these suspected disabilities so that a determination can be made about the disability involved and whether the current educational program is appropriate. 20 U.S.C. § 1414(a)(2),(3).

Re-evaluations Under the IDEA and Parental Consent

For re-evaluations of students ages 3-21, the State Plan provides the following:

> A public agency must ensure that a re-evaluation of each child with a disability is conducted if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance of the child warrant a re-evaluation or if the child's parent or teacher requests a re-evaluation.
>
> A re-evaluation may occur not more than once a year, unless the parent and the public agency agree otherwise. A re-evaluation must occur at least once every three years, unless the parent and the public agency agree that a re-evaluation is unnecessary.
>
> For parent or district requested re-evaluations, initial evaluation timelines specified in this section must be followed.

State Plan, Regulation III, page 35.

Regulation 34 C.F.R. § 300.303 provides, in pertinent part:

> (a) General. A public agency must ensure that a re-evaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—
>
> (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a re-evaluation; or
>
> (2) If the child's parent or teacher requests a re-evaluation.

Regulation 34 C.F.R. § 300.300 states in pertinent part:

> (a) Parental consent for initial evaluation.
>
> * * *
>
> (3)(i) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.
>
> * * *
>
> (c) Parental consent for re-evaluations.
>
> (1) Subject to paragraph (c)(2) of this section, each public agency—
>
> (i) Must obtain informed parental consent, in accordance with § 300.300(a)(1), prior to conducting any re-evaluation of a child with a disability.

> (ii) ***If the parent refuses to consent to the re-evaluation, the public agency may, but is not required to, pursue the re-evaluation by using the consent override procedures*** described in paragraph (a)(3) of this section.

(Emphasis added).

Under 20 U.S.C. § 1414(c)(3), parental consent is required in order to conduct a re-evaluation of Student. Regulation 34 C.F.R. § 300.9(c)(1) provides that "consent" means "[t]he parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time." While a District needs consent for assessments, if a student intends to avail himself of the benefits afforded under the IDEA, the student must also permit the local educational agency to conduct the necessary and appropriate assessments of student. *Fitzgerald,* 439 F.3d at 773; 34 C.F.R. § 300.500(a)(1)(ii).

Based on Mother's request for an evaluation, the District set up the processes to determine whether any assessments were needed. First, the District set up a meeting where the IEP team performed a RED and considered the additional information Mother had provided, including the Scranton evaluation. Based on the RED, the IEP team concluded additional evaluations were needed and specifically outlined the areas to be assessed and included some of the possible testing to be performed. Specifically, the IEP team noted the significant discrepancy between Student's two IQ scores, and recognized that a new test would be essential to determine an accurate assessment of Student's needs. In written argument, Mother argues that under 34 C.F.R. § 300.9, it is her right to revoke her consent to a re-evaluation of Student. We agree. However, if Mother would like Student to continue receiving special education services under the IDEA at the District, we find that Student must submit to a re-evaluation.

During a re-evaluation, a school is allowed to choose its own expert to conduct the re-evaluation of Student. *G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1263 (11th Cir. 2012). Furthermore, a school is not required to rely solely upon a parent's independent evaluation and

must be allowed to re-evaluate a student. *Id.* at 1264. Similarly, in *Z.B. v. District of Columbia*, 888 F.3d. 515, 525 (D.C.Cir. 2018), the court stated the following:

> [A]ll students with disabilities, regardless of their parents' involvement or ability, are entitled under IDEA to receive IEPs reasonably calculated to enable their educational progress. ***The school may not simply rubber stamp whatever evaluations parents manage to procure, or accept as valid and sufficient whatever information is already at hand.***

(Emphasis added).

Several examples demonstrate these concepts. In *G.J. v. Muscogee Cnty. Sch. Dist*., for example, the parents withheld their approval for a re-evaluation by placing restrictions on how the assessment would be conducted. They requested a specific evaluator, parental approval for each testing instrument, and meetings before and after the evaluation. The Court deemed these requirements to not be consent and ordered the parents to consent to the re-evaluation.

In *Clovis Unified Sch. Dist.*, 114 LRP 37447 (SEA CA 07/17/14), an administrative law judge ruled that the district could proceed with a re-evaluation over the parent's objection that the student be assessed in the areas of intellectual disability and adaptive behavior. The parents were concerned about inaccurate results due to the student's deficits caused by Down's Syndrome. Their concerns were not supported by the evidence.

In *District of Columbia Pub. Sch.*, 114 LRP 39109 (SEA DC 08/24/14), a mother's refusal to sign a consent form without detailed credentials for the proposed evaluators and a list of all the assessments was unreasonable because it went beyond what the IDEA requires for informed consent.

In *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir 2006), *cert. denied*, 549 U.S. 1111 (2007), the student had an IEP and was enrolled at the Conroe Independent School District ("CISD"). The student suffered from a rare autonomic nervous system disorder that made her prone to sudden emergencies that, if left untreated, could result in her death. The

student's grandmother ("guardian") regularly attended class with the student. CISD later informed guardian that her presence in the student's classroom was unacceptable and that she could no longer be present in class with the student. The student's treating physician sent a letter to CISD, and stated that guardian will train an aide to attend class with the student, and until the training is complete, guardian should continue to attend class with the student. The Admissions, Review, and Dismissal committee "ARD committee" met to discuss modifications to the student's IEP and the physician's letter. Guardian refused CISD access to the student's physician, and allowed CISD to submit 14 questions to the student's treating physician. Additionally, the physician's responses to CISD's questions were edited before sending them to CISD.

As a result of guardian's actions, the ARD committee concluded that they needed additional information to re-evaluate student's IEP, and requested guardian's consent to perform an outside medical evaluation of the student. The guardian denied consent for this evaluation. The court in *Shelby* upheld the decisions of the Texas Education Agency and the District court, and concluded that "where a school district articulates reasonable grounds for its necessity to conduct a medical re-evaluation of a student, a lack of parental consent will not bar it from doing so." *Shelby S.,* 454 F.3d at 454. The court in *Shelby* also noted that the guardian was free to refuse consent to the re-evaluation of student, *id.* at 455, but that the student must submit to a re-evaluation if guardian would like the student to continue receiving special education services under the IDEA. *Id.*

Finally, in *Mesquite Indep. Sch. Dist.*, 49 IDELR 208 (SEA TX 2007), the court granted *Mesquite's* request to override the parent's refusal to consent to conduct a re-evaluation when the district proved that a re-evaluation was necessary. In this case, the student was depressed and was preoccupied with death and killing.

All of these decisions are similar to the case at hand in that Student has been identified as needing additional services and Mother is placing restrictions on her consent to the re-evaluation of Student. Mother asks us to deny the consent override because she believes the IQ test is unnecessary. The District argues that the testing is necessary to re-evaluate the student.

We conclude that the District has met its burden by a preponderance of the evidence by proving that it is necessary to conduct an assessment of Student or re-evaluation into areas of suspected disability, and specifically, to administer a third IQ test. Student is having difficulty with reading and comprehension, as well as speech and language deficits. While making progress on her IEP goals, Student appears to be struggling. Additional potential educational diagnoses and possible medical issues have been identified through outside evaluations. Mother remains concerned about the District not providing special education services to address the Scranton evaluation impression of dyslexia and other impressions, yet Mother is not willing to allow the District to re-evaluate.

In this case, the District wants to re-evaluate Student because of the large discrepancy between the 85 Student received on the WISC and the 106 she received on the TONI. The District also argues that a re-evaluation is appropriate in order to "better identify Student's needs as well as her present levels of academic achievement and functional performance." Pet. Brief at 16. We believe the District's witnesses on the issue that a non-verbal comprehensive IQ test is needed to determine the validity of the prior testing. We conclude that the IQ test is necessary to determine what needs Student may have and to better tailor Student's IEP to meet those needs.

At the hearing, Martin testified to the following:

> Q: Could you have used Children's Mercy's TONI, the 106 to meet the state and federal requirements?
>
> A: No.
>
> Q: Can you tell me why?

> A: Because there's a discrepancy between that IQ and what was already in her records, the previous IQ. So when there are two IQs that are so discrepant, the validity and reliability is in question. So a third measure should be administered in order to deem where the student truly is. So that's why we wouldn't have used it. In addition, it wasn't quite as thorough, it is not as thorough of a measure as we would typically administer.

Tr. 118.

We find the testimony of Martin, Brackman, and Boswell credible on the need to re-evaluate Student in the area of general intelligence based upon of the large discrepancy between the 85 Student received on the WISC in 2016, and the 106 she received on the TONI in 2017. We find credible the testimony that this type of discrepancy is statistically rare, and therefore, established the need for a third IQ test that is a comprehensive test. The evidence established the need for a third cognitive test to be administered in order to accurately determine Student's cognitive abilities.

The District's requests for parental consent to re-evaluation are reasonable and necessary given Mother's repeated requests for special education services. The District has complied with the relevant procedures to seek a re-evaluation and consent. Therefore, we conclude that the District is entitled to a consent override.

Summary

We grant the District's request for a consent override. We order that the District's re-evaluation take place as soon as possible before September 30, 2018. Specifically, the District may conduct a re-evaluation in the following areas to be assessed per Exhibit M, page 7, without parental consent:

- Vision: Vision Screening
- Hearing: Hearing Screening
- Communication Skills, Speech: Speech Sample
- Communication Skills, Language: Expressive language assessments
- General Intelligence: A measure of [Student's] general cognitive ability and intellectual functioning (Wechsler Nonverbal Scale or Ability and/or Universal Nonverbal Intelligence Test-2)

- Academic: Information regarding [Student's] academic achievement in the areas of basic reading skills, reading fluency, reading comprehension, written expression, mathematics calculation, and mathematics problem solving (selected portions of the Woodcock Johnson IV Tests of Achievement and related assessments as deemed necessary).
- Observation: Classroom Observation

Student, with the assistance and cooperation of Parents, is ordered to submit to an assessment by the District and to cooperate with the District in completing the re-evaluation by September 30, 2018.

Within 7 days from the date the results of the re-evaluation have been received, the District and Parents shall coordinate the scheduling of an IEP meeting,[11] and the IEP meeting shall be held as soon as practicable to discuss the results and to make a determination as to any needed changes. Student's IEP shall be held as soon as possible, but in no event later than 30 days from the date the results of the evaluation have been received.

SO ORDERED on August 8, 2018.

_____
AUDREY HANSON MCINTOSH
Commissioner

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Per §162.962, when a review of this decision is sought, either party may appeal as follows:

(1) The court shall hear the case without a jury and shall:

[11] We strongly suggest and recommend that the parties consider a "Facilitated IEP" (FIEP) meeting. An FIEP is an IEP that is facilitated by an independent and neutral facilitator who is not a part of the existing IEP team. This outside facilitator may be used whenever either party may be skeptical about the intentions of the other party, and/or when the parties dispute over how an issue should be handled. The outside, independent facilitator is paid for by the Missouri Department of Elementary and Secondary Education, Office of Special Education (DESE). In order to obtain an FIEP, the parties must send a request form to DESE and the FIEP can take place within 14 days after DESE assigns the facilitator for the FIEP. *See*: https://dese.mo.gov/special-education/compliance/facilitated-individualized-education-program-fiep

(a) Receive the records of the administrative proceedings;

(b) Hear additional evidence at the request of a party; and

(c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence.

(2) Appeals may be taken from the judgment of the court as in other civil cases.

(3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state court shall be filed within forty-five days after the receipt of the notice of the agency's final decision.

(4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same.

(5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal is also addressed in 34 C.F.R. §300.516.