

Procedure

On March 30, 2020, Parents filed a due process complaint in the interest of Student against the District. We held a pre-hearing conference on June 15, 2020, and a hearing on the complaint on July 20, 2020. Parents were self-represented. Attorneys Jeffrey Klusmeier and Shana Long represented the District.

Findings of Fact

1. At the time of the hearing, Student was years old. She has medical diagnoses of dyslexia and receptive-expressive language disorder.
2. Student lives with her Parents in Kansas City, Missouri. Mother has a visual impairment and cannot read small typeface.
3. Student began attending Hartman Elementary – a school within the District – in August 2019 as a fifth grade student.
4. Early in the school year, Mother spoke with Hartman’s principal, Jessie Kirksey, Ph.D., to notify the District that an independent educational evaluation (IEE) was pending as part of a request for an IEP. Kirksey referred Mother to Student’s counselor, Patricia VanBibber, to inform her that the IEE would be coming to the school once it was completed.

Education and Health History

5. Student was born healthy and met developmental milestones within appropriate time intervals. Student displays good general health, but suffers from allergies and has a history of ear infections. Student wears prescription glasses. She suffers no problems with fine or gross motor skills.
6. For the 2012-2013 and 2013-2014 school years, Student attended preschool and kindergarten in the Hickman Mills school district where she received an IEP under the

educational diagnosis young child with developmental delay. Student stopped receiving special education services under an IEP after leaving Hickman Mills.

7. Student received homeschool education from Parents until fourth grade.

8. Records maintained by the District reflect that in March 2015 and April 2017, Student underwent assessment by the Hickman Mills school district. Hickman Mills administered the following tests to Student: Stanford-Binet Intelligence Scale, Fifth Edition (SB-V); Test of Auditory Comprehension of Language – Third Edition (TACL-3); Clinical Evaluation of Language Fundamentals, Preschool – 2nd Edition (CELF P-2); and Wechsler Individual Achievement Test-Third Edition (WIAT-III). These assessments did not result in the implementation of an IEP for Student.

9. In November 2017, Student received a medical assessment from Children’s Mercy Hospital. Children’s Mercy staff medically diagnosed Student with receptive and expressive language disorder and dyslexia.

10. Student attended University Academy from August 2018 to May 2019. University Academy is a public charter school in Kansas City, Missouri. As a public charter school, University Academy operates as its own local education agency (LEA).

11. On March 1, 2019, Mother filed a due process complaint in the interest of Student against University Academy. On June 20, 2019, we issued a decision finding University Academy failed to comply with its duty to evaluate a student it had reason to suspect had a disability in violation of 34 C.F.R. §§300.301(c) and 300.111(c)(1). We ordered University Academy to provide an IEE of Student and undertake corrective actions including three months of compensatory education in math and reading using modalities recommended by the independent evaluator.

2019 IEE

12. In five sessions throughout September and early October 2019, Student presented to Theresa Coddington, Ph.D., and Miriam Reder, M.S., for her IEE. The purpose of the IEE was to assess Student's general functioning and academic difficulties and examine the possibility of diagnoses for learning disorder, intellectual disability disorder, attention-deficit hyperactivity disorder (ADHD), or other diagnoses as warranted.

13. Student received the following assessments: Behavioral Assessment System for Children, Third Edition (BASC-3), Adaptive Behavior Assessment System, Third Edition (ABAS-3), Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2), Wechsler Individual Achievement Test, Third Edition (WIAT-III), Amen Behavior Rating Scales (ABRS), DSM-5 Diagnostic Criteria, IVA Plus Continuous Performance Test, Second Edition (IVA-2), and Test of Everyday Attention for Children, Second Edition (TEA-Ch2).

14. The BASC-3 serves to record children's emotional and behavioral factors. Scores above 70 suggest a high level of maladjustment and scores between 60 and 70 are described as "at risk."² Based on reports from Mother, Father, and Student's teacher, Student showed high levels of maladjustment or "at risk" levels in multiple social and behavioral areas.

15. The ABAS-3 measures adaptive skills. The test subdivides into four areas: general adaptive composite, conceptual, social, and practical. Student scored in the average range for all areas of the ABAS-3. The IEE summarizes her results from the test as "typical for her age."³

² Ex. 11 at 5.

³ *Id.* at 10.

16. The WISC-V serves as a “comprehensive clinical instrument for assessing the intelligence of children.”⁴ The WISC-V measures full scale intelligence quotient on a scale of 40 to 160 with scores ranging from 90 to 109 considered average. The standard score mean is 100 and the standard deviation from the mean is 15 points. Student’s full scale intelligence quotient was 77, placing her in the 6th percentile. The WISC-V represents the best available metric for determining intellectual ability as determined by the District.

17. The CTOPP-2 measures a person’s ability to hear, manipulate, and understand speech sounds. The test has three component scores: phonological awareness, phonological memory, and symbolic naming. A score of 100 represents the 50th percentile. Student scored 62 (less than 1st percentile) in phonological awareness, 64 (1st percentile) in phonological memory, and 79 (8th percentile) in rapid symbolic naming.

18. The WIAT-III measures children’s academic achievement. It has components in the areas of listening, speaking, reading, writing, and mathematic skills. The composite score mean is 100 and the standard deviation from the mean is 15 points. Student scored 61 overall (0.5th percentile). Student scored at or below the first percentile across all components except oral language (4th percentile) and math fluency (5th percentile) with subscores ranging from 60 to 76.

19. The ABRS is used to screen children for ADHD using reports from parents and teachers. Student’s evaluators compared these reports with the DSM-5 criteria for ADHD and did not find significant symptoms of ADHD.

20. The IVA-2 is used to measure response control and attention. The results of the test suggested varying degrees of attention and response control impairments. The evaluators summarized the results of the test as follows: “[Student] sustained auditory attention is in the

⁴ Ex. 11 at 10.

severely impaired range and her visual attention is in the extremely impaired range. Specifically, [Student] had the most difficulty responding to the target stimuli, that is, paying attention to important auditory and visual information.”⁵

21. The TEA-Ch2 measures children’s everyday attention skills. The test measures two types of attention: selective attention (the ability to filter out irrelevant stimuli) and sustained attention (the ability to maintain focus on a target task). A score of 100 represents the 50th percentile. Student scored in the “Borderline” range in selective attention, meaning her selective attention was less developed than her peers. Student did not complete testing for sustained attention.

22. The IEE made four suggested educational diagnoses: (1) specific learning disorder, with impairment in reading: word reading accuracy, reading rate and fluency, reading comprehension, specifier: dyslexia; (2) specific learning disability, with impairment in written expression: spelling accuracy, grammar and punctuation accuracy, clarity or organization or written expression (3) specific learning disability, with impairment in mathematics: number sense, memorization of arithmetic facts, accurate or fluent calculation, accurate math reasoning; and (4) language disorder (by history).

23. Regarding the first diagnosis, the IEE report explained, “disability within reading is warranted when a person’s ability to read is *substantially below* the level normally expected based on the individual’s chronological age, measured intelligence, and age appropriate education. Results of the WIAT-III, [Student’s] Total Reading, Basic Reading, and Reading and Comprehension Fluency are all in the Low range.”⁶

24. Regarding the second diagnosis, the IEE report explained, “diagnosis of a Specific Learning Disability, with impairment in written expression is given based on report and

⁵ Ex. 11 at 23.

⁶ *Id.* at 27 (emphasis added).

results of the current evaluation. Results of the WIAT-III suggest [Student] has *significant deficits* across the vast majority of writing abilities.”⁷

25. Regarding the third diagnosis, the IEE report explained, “disability within mathematics is warranted when a person’s ability to communicate in writing is *substantially below* the level normally expected based on the individual’s chronological age, measured intelligence, and age appropriate education. Results of the WIAT-III suggest [Student’s] has profound deficits across all areas related to mathematics.”⁸

26. Regarding the fourth diagnosis, the IEE report explained, “diagnosis of Language Disorder is given by history based on previous reports and [Student’s] current struggles with word knowledge and use, limited sentence structure, and impairments in discourse. Her language abilities are *substantially and quantifiably* below those expected for age, resulting in functional limitations in effective communication, social participation, and academic achievement.”⁹

27. The IEE report concluded with a section of recommendations for school accommodations. The report suggests the implementation of an IEP with speech/language services, individualized or small group special education instruction in all areas of academics, and extra support throughout the summer. The report also notes that Student should be placed in a regular education classroom setting because “[Student’s] academic struggles are not related or caused by an intellectual disability.”¹⁰

28. Coddington completed her report and delivered it to Parents on October 21, 2019.

Request for Special Education and Review of Existing Data

29. During the first week of the 2019 – 2020 school year, Mother met with Kirksey – principal at Hartman Elementary in the District – to discuss Student’s transition to the new

⁷ Ex. 11 at 28 (emphasis added).

⁸ *Id.* (emphasis added).

⁹ *Id.* (emphasis added).

¹⁰ *Id.*

school. During the meeting, Mother notified Kirksey of her desire for Student to have an IEP. Mother asked Kirksey, “[w]ho [am] I supposed to talk to or be referenced in order to ... follow the steps in order to get her IEP.”¹¹

30. On September 13, 2019, Mother sent an e-mail to a District employee with the following message:

I found this so just sharing anything I can think of to help [Student] in school.
She has started today the evaluation for her IEE to be brought over to your school.
I’m still searching for her 504 plan.
The specialist below have reached out to the school as well to contact [Student’s teacher.¹²]

Mother attached to her e-mail the results from Student’s 2017 medical assessment by Mercy Hospital.

31. On October 23, 2019, Parents delivered a copy of the IEE to Student’s teacher. In response, a school psychologist for the District created a referral for evaluation of Student.

32. On November 20, 2019, the District convened a review of existing data (RED) meeting. The RED meeting was attended by Parents; Jason Ayres, LEA representative; Donna Cox, regular education teacher; Jane Scanlon, special education teacher; Abby Gomberg, Ph.D., School Psychologist; and VanBibber, counselor.

33. At the RED meeting, the team reviewed Student’s educational and medical records including Student’s Hickman Mills IEP, Hickman Mills evaluation, Hickman Mills school records, Children’s Mercy report, University Academy school records (2018-2019), documents from Mother’s previous due process complaint; and Coddington’s IEE.

34. The topics discussed at the RED meeting included whether Student had an educational disability, Student’s present level of academic performance, and whether Student

¹¹ Tr. Vol. 2 at 5.

¹² Ex. C at 1.

needs special education services. The RED meeting participants determined that further assessment information was needed in the areas of speech, language, and academic achievement.

35. Concerning speech, the RED meeting participants specifically noted Parents' ongoing concern with Student's speech, and her teacher observed that Student would speak quickly and unintelligibly when excited, but would speak clearly when directed to slow down. The team agreed that Student required specific speech testing because Student had not received a standardized assessment for speech since 2012. The meeting participants expressed concern that unidentified speech difficulties may have influenced assessment of other measures of achievement, like reading comprehension. As such, the District referred Student to Tanya Myrick – an assessor for speech and language for the District.

36. Concerning language, the team noted previous medical diagnoses and the recent IEE, and again repeated concerns that speech issues may affect her assessors' interpretation of Student's language skills. The team determined more evaluation was needed in language and referred her to Myrick for assessment.

37. Concerning academic achievement, Student's teacher noted that Student performed poorly compared to her peers in fifth grade, and Parents expressed similar concern with her performance.

38. The meeting participants determined no further assessment of Student's intellectual and academic achievement was needed because Student received these assessments during the IEE.

Further Evaluation by the District

39. The District arranged for formal classroom observation of Student. Gomborg, a school psychologist for the District, performed this observation.

40. On November 2, 2019, the District sent Parents formal notice of its initial evaluation of Student.

41. On January 15, 2020, Myrick performed a speech and language evaluation of Student. At the time of her assessment, Myrick served as the District's lead speech pathologist. She has worked as a speech pathologist for the District for 12 years and holds a Bachelor's and Master's degree in speech pathology.

42. As part of her assessment, Myrick reviewed prior assessments, including Student's IEE and the report from Mercy Hospital. Myrick then completed a speech and language sample with Student and administered an oral motor examination and stuttering severity instrument. She also administered the following tests: the Oral and Written Language Scale 2 (OWLS-2), the Clinical Evaluation of Language Fundamentals 5 (CELF-5), and the Comprehensive Test of Phonological Processes 2 (CTOPP-2).

43. Speech and language samples involve an informal assessment of conversational speech through conversation and retelling of stories used to evaluate articulation, voice, phonology skills, and understanding of language. Myrick determined from these samples that Student possessed unremarkable articulation skills, adequate voice skills, and some stuttering during rapid speech. Myrick also determined Student presented age-appropriate language skills and sentence length, but presented some difficulty using expanded vocabulary.

44. An oral motor examination measures an individual's physical ability to produce speech sounds. This test revealed no unusual findings for Student.

45. The stuttering severity instrument revealed that Student spoke more quickly than most children her age (a phenomenon described as "cluttering"). Student's final score suggested mild to moderately severe stuttering.

46. The OWLS-2 measures how well a student understands spoken language by having students look at pictures and discuss them. The OWLS-2 indicated Student's language understanding fell in the below average range with a composite score of 81.

47. The CELF-5 is a comprehensive assessment of how well students understand and use spoken language. Student received a core language score of 73.

48. The CTOPP-2 measures a student's use of speech sound segments by having the student repeat words or syllables. Student received scores of 58 in phonological awareness, 65 in phonological memory, and 76 rapid naming.

49. Unlike the OWLS-2 and CELF-5, the CTOPP-2 measures phonological processing as opposed to academic ability. As explained by the District's Compliance and Operations Officer for Exceptional Education – Waukita Williams – “[CTOPP-2] is more of a language test, since it looks at phonological processing, not at academic ability.”¹³

50. On January 16, 2020, Gomberg performed a classroom observation of Student. Student seated herself at the back of the classroom. After putting her things away, she played with her pencil while waiting for class to begin. The teacher entered and instructed Students to begin their math assignment written on the board. The teacher noticed Student had not started her work and moved her closer to the board. She observed Student writing, but at a lesser rate than her classmates. After having the students work on the problems from the board for a half hour, the teacher began calling students up to the board to work out the problems in front of the class. Student did not write notes or change her answers, but appeared focused on the lesson. The teacher asked Student a question, and she seemed “a little bit lost.”¹⁴ The teacher instructed Student to check her answer and she would come back to her with another question. When the teacher asked her another question, Student was able to give a partial answer. As she had with

¹³ Tr. at 51 – 52.

¹⁴ *Id.* at 39.

other students, the teacher asked another student to finish the answer and returned to Student to confirm her understanding. Next, the students began a reading and writing exercise on the computer. Gomberg concluded her observation at this point because she could not observe Student's progress on the computer.

Eligibility Determination

51. The District held a meeting on February 21, 2020, to make a final determination on Student's eligibility for special education services. Gomberg led the meeting and, in preparation for the meeting, created a report summarizing prior assessments of Student, including the IEE and speech assessments performed by Myrick. Parents expressed concern that this report had not been provided to them prior to the meeting, and a representative for the District offered to reschedule the meeting for Parents to review the report. Parents declined, wishing to proceed expeditiously with the eligibility determination.

52. The eligibility meeting substantively began with a review of Student's education history including prior intervention strategies from University Academy and Hartman Elementary and a review of assessments used to evaluate Student. The eligibility team performed a general review of the IDEA's 13 educational diagnoses and their components. Parents expressed concern that Student could qualify for multiple disability diagnoses based on Student's dyslexia and language impairment, so this was discussed in greater particularity. Additionally, the team performed a thorough consideration of specific learning disability, speech or language impairment (and its particular subsets: language impairment and fluency impairment), and visual impairment.

53. The evaluation team determined that Student did not qualify for an educational diagnosis of multiple disabilities under the IDEA because that diagnosis most often concerns

physical and sensory impairments not present in Student. Parents accepted this explanation in the meeting.

54. The evaluation team determined Student did not qualify for an educational diagnosis of visual impairment because Student’s corrective lenses mitigated her visual difficulties. Parents accepted this explanation in the meeting.

55. The evaluation team determined, despite Parents’ dissent, that Student did not qualify for an educational diagnosis of specific learning disability or speech or language impairment.

56. Concerning specific learning disability, the District determined that Student did not qualify for a diagnosis because tests did not show a severe discrepancy between achievement and intellectual ability as defined by the Missouri’s State Plan for Special Education (2019) (State Plan). The District made this determination based on Student’s scores on the WISC-V (for intellectual ability) and the WIAT-III (for academic achievement).

57. Student’s scores on the WISC-V and WIAT-III are reflected as follows:

WISC-V	
Full Scale	77
Verbal Comprehension	84
Visual Spatial	108
Fluid Reasoning	76
Working Memory	88
Processing Speed	98

WIAT-III

Total Achievement	61
Oral Language	74
Total Reading	60
Basic Reading	62
Reading Comprehension	60
Written Expression	62
Mathematics	67
Math Fluency	76

58. For tests scored on a scale with a mean of 100, one standard deviation is 15 points, a standard deviation of 1.5 points is 22.5, and a standard deviation of 1.75 points is 26.25 points.

59. Concerning Speech and Language Impairment, the District determined Student did not qualify for a diagnosis based on language impairment because Student’s tests did not show a discrepancy of greater than 1.75 standard deviations from the mean on two comprehensive language evaluations (the OWLS-2 and the CELF-5).

60. Concerning the second considered component of speech and language impairment, fluency impairment, the District likewise determined Student did not qualify for a diagnosis. However, the specific justifications for this denial are not contained in the record.

61. In its notice of action denying special education services, the District addressed each considered diagnosis in a section marked “reason(s) why each option was rejected.” The “reason” for denial listed for fluency impairment is “Speech Intervention Services to address stuttering/cluttering and provide strategies for fluent speech is recommended.”¹⁵

¹⁵ Ex. 9 at 1.

Conclusions of Law

This Commission has jurisdiction over due process complaints with respect to any matter relating to the identification, evaluation, educational placement, or provision of FAPE for a child in this state.¹⁶ Parents must prove their case by a preponderance of the evidence.¹⁷ A preponderance of the evidence is “evidence which as a whole shows the fact to be proved [is] more probable than not.”¹⁸ We must judge the credibility of witnesses, as well as the weight and value of the evidence.¹⁹ We have the discretion to believe all, part, or none of the testimony of any witness.²⁰

Issues of the Case

Parents allege the District has failed to provide FAPE as required by the IDEA in numerous respects. Parents allege the District denied Student FAPE by:

- delaying testing of Student in a manner that deprived her of educational support;
- making a “skewed and biased” decision by selectively considering facts that supported denial of special education services;
- withholding documents and failing to provide documents in large fonts for Mother to read in violation of FERPA;
- inappropriately focusing on Rehabilitation Act issues during the initial eligibility meeting;
- taking actions Parents did not consent to during the initial eligibility meeting;
- failing to comply with this Commission’s order from Student’s last due process hearing;
- failing to follow the State Plan’s criteria for educational diagnoses; and
- failing to accept the recommended diagnoses from the IEE.

Substantively, the gravamen of Parents’ complaint centers on their disagreement with the District’s determination that Student does not qualify for special education services under the IDEA.²¹ Most of the individual allegations from Parents’ complaint center on this issue. From a

¹⁶ Section 162.961.1, RSMo 2016.

¹⁷ *Tate v. Dep’t of Social Services*, 18 S.W.3d 3, 8 (Mo. App. E.D. 2000).

¹⁸ *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000).

¹⁹ *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App. W.D. 2014).

²⁰ *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001).

²¹ Tr. Vol. 2 at 23 – 24.

purely procedural standpoint, Parents challenge the timeliness of testing performed by the District. Parents make other allegations that we cannot consider for lack of jurisdiction.²² We consider Parents' substantive and procedural allegations in turn.

February 2020 Initial Evaluation

Parents allege the District denied Student FAPE because the District failed to provide Student an educational diagnosis for special education services despite the recommendations of Coddington in Student's IEE and the qualifications listed in the State Plan.

Under the IDEA, all children with disabilities are entitled to FAPE designed to meet their unique needs.²³ However, a medically diagnosed disability does not entitle a student to the provisions of FAPE unless the child qualifies as a "child with a disability" under the IDEA. A "child with a disability" has:

an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.[²⁴]

The State Plan sets forth diagnostic criteria for these ailments. As such, the fact that Student's IEE contains medical diagnoses does not, in itself, qualify Student for special education. At the initial evaluation meeting, the District and Parents considered Student's qualifications under the categories of multiple disabilities, vision impairment, specific learning disabilities, and speech or language impairment. Parents agreed with the District's conclusions regarding multiple disabilities and vision impairment, but disagreed with the latter two.

²²We lack jurisdiction over claims under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C.A. § 1232g and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794

²³ 20 U.S.C. §1400(d)(1)(A) and 34 C.F.R. §300.1(a).

²⁴ 34 C.F.R. § 300.308(a)(1).

Specific Learning Disability

The State Plan sets forth the criteria for specific learning disability as follows:

A child has a specific learning disability when:

(1) The child does not achieve adequately for the child's age or to meet State approved grade level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State approved grade-level standards:

- a. Oral Expression
- b. Listening Comprehension
- c. Written Expression
- d. Basic Reading Skill
- e. Reading Fluency Skills
- f. Reading Comprehension
- g. Mathematics Calculation; and,
- h. Mathematics Problem Solving

(2) The child does not make sufficient progress to meet age or State approved grade-level standards in one or more of the areas identified in A above when using a process based on the child's response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 34 CFR 300.307-300.311. A pattern of strengths and weaknesses is defined as a severe discrepancy between achievement and intellectual ability of at least 1.5 standard deviations; and,

(3) The group determines that its findings under A and B of this section are not primarily the result of:

- a. A visual, hearing, or motor disability;
- b. Intellectual disability;
- c. Emotional disturbance;
- d. Cultural factors;
- e. Environmental or economic disadvantage;
- f. Limited English Proficiency;
- g. Lack of appropriate instruction in reading, including the essential components of comprehensive literacy instruction (as defined in section 2221(b)(1) of the ESEA);
- h. Lack of appropriate instruction in math; and,

(4) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation:

a. Data that demonstrate that prior to or as part of the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel, and

b. Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

Professional Judgment

If a responsible public agency uses a severe discrepancy method: A student who does not display a discrepancy of at least 1.5 standard deviations as defined above, may nonetheless be deemed to have a specific learning disability if:

(1) The student meets the other criteria of this rule; and

(2) Based upon professional judgment and review of formal and informal assessments, the evaluation team concludes that a severe discrepancy exists.

In such cases, sufficient data must be presented in the evaluation report to document the existence of a specific learning disability. It is the policy of the state of Missouri that any agency using a Response to Intervention model for the identification of Specific Learning Disability, must have written procedures for implementation that, at a minimum, incorporate guidelines developed by the SEA which are found on the Department website.

[²⁵]

The District determined that Student did not meet the criteria for specific learning disability because Student did not satisfy the requirements of Subsection (2) in that the discrepancy between her achievement (as measured by her WIAT-III scores) and her intellectual ability (as measured by her WISC-V scores) did not exceed 1.5 standard deviations. Student received a score of 77 on her WISC-V; as such, she would need a score of 22.5 points or more lower (54.5 or less) on her

²⁵ State Plan, Title III, § B page 27-29. (Emphasis added).

WIAT-III achievement scores to meet the requirements of Subsection (2). Because Student did not score 54.5 or less on her WIAT-III composite or subscores, she did not demonstrate a pattern of strengths and weaknesses sufficient for a specific learning disability diagnosis.

Parents do not dispute that Student fails to meet the criteria set forth in Subsection (2). Instead, they argue that Student should be deemed to have a specific learning disability based upon the “Professional Judgment” exception outlined in the State Plan. As evidence of this professional judgment, Parents rely on Coddington’s findings in Student’s IEE.

Coddington determined that diagnoses for specific learning disability were warranted in the areas of reading, written expression, and mathematics. However, her IEE report indicates she based these findings on “substantial” or “significant” deficits between Student’s actual reading skills and her expected ability. Coddington’s report does not reflect an opinion on whether these deficits are “severe” as is required for a diagnosis through professional judgment under the State Plan. Coddington did not testify at the hearing, nor did Parents present any other evidence to show professional judgment of this type of “severe deficit.” Accordingly, we lack sufficient evidence to find that Student is entitled to special education services under an educational diagnosis of specific learning disability.

Speech or Language Impairment – Language Impairment

The State Plans sets forth the criteria for “language impairment” within speech or language impairment as follows:

A language impairment is present when a comprehensive communication assessment documents all of the following:

(1) The language impairment adversely affects the student’s educational performance as documented by lack of response to evidence based interventions designed to support progress in the general education curriculum.

(2) The student’s overall language functioning is significantly below age expectations as measured by two or more composite

standard scores on standardized language assessments. The composite language score reflects both receptive and expressive language function in a single standard score. Significantly below is defined as 1.75 standard deviations or more below the mean for students who are kindergarten age eligible and older. A public agency may accept a second composite score allowing for the standard error of measurement when the criterion is met on the other composite score. The agency may adopt written procedures for utilization of reasonable variances that enable a student to meet the standard score criterion in highly unique situations such as English Learners.

(3) Young child with a developmental disability criteria (communication area) shall be used for eligibility determinations for children who are three (3) to five (5) years of age but not yet kindergarten eligible.

(4) The student consistently displays inappropriate or inadequate language that impairs communication in the student's educational environment as documented by structured qualitative procedures such as a formal language sample, classroom observations, curriculum based assessments, teacher/parent checklists/interviews, or other clinical tasks.

(5) The language impairment is not a result of dialectal differences or second language influence. [²⁶]

The District determined that Student did not meet the criteria for a language disorder because Student did not satisfy the requirements of Subsection (2) in that her language functioning (as measured by her OWLS-2 and CELF-5 scores) did not fall 1.75 standard deviations or more (26.25 points) below the mean of 100 (a score of 73.75 or lower) on two or more standardized language assessments. Parents make no specific argument as to how Student qualifies for a language disorder.

Only one of Student's scores on the OWLS-2 (81) and CELF-5 (73) fell below 1.75 standard deviations from the mean. Student took a third standardized language assessment – the CTOPP-2 – on which she scored below 73.75 in two of the three subtest composites. However, the record does not contain a full composite score for the CTOPP-2, nor does it contain any

²⁶ State Plan, Title III, § B pages 29-30 (emphasis added).

indication that the test’s composite score “reflects both receptive and expressive language function in a single standard score.”²⁷ As such, we lack sufficient evidence to find that Student qualifies for special education services under an educational diagnosis of speech or language impairment under the category of language impairment.

Speech or Language Impairment – Fluency Impairment

The State Plans sets forth the criteria for “fluency impairment” within speech or language impairment as follows:

A fluency impairment is present when a comprehensive communication assessment documents all of the following:

- (1) The fluency impairment adversely affects the student’s educational performance as documented by lack of response to evidence based interventions designed to support progress in the general education curriculum;
- (2) The student’s fluency is significantly below the norm as measured by speech sampling in a variety of contexts and impairs communication in the student’s educational environment as documented by structured qualitative procedures such as classroom observations, curriculum based assessments, teacher/parent checklists/interviews, or other clinical tasks; and,
- (3) The student consistently exhibits at least one of the following symptomatic behaviors of dysfluency:
 - a. sound, syllabic, or word repetition;
 - b. prolongations of sounds, syllables, or words;
 - c. avoidance;
 - d. blockages; or,
 - e. hesitations.^[28]

Parents make no argument regarding fluency impairment, except as a general disagreement with the District’s decision. The record does not contain an explicit explanation for the District’s determination that Student did not have a fluency impairment. In its notice of action denying special education services, the District’s “reason” for denial for fluency

²⁷ *Id.*

²⁸ State Plan, Title III, § B page 31.

impairment was “Speech Intervention Services to address stuttering/cluttering and provide strategies for fluent speech is recommended.” This notation seems to suggest Student may qualify for the diagnosis, but we cannot reach that conclusion on this fact alone. Myrick testified to performing a communication assessment of Student, but her testimony and the records of her assessment do not contain any suggestion of how Student has responded to “evidence based interventions” as required by Subsection (1). Likewise, we cannot tell from the record if Student’s speech fluency is significantly below the norm as required by Subsection (2). Therefore, we lack sufficient evidence to find that Student qualifies for special education services under an educational diagnosis of speech or language impairment under the category of fluency impairment.

Delay in Testing

Parents allege the District committed a procedural error in failing to promptly test Student upon their request for evaluation at the beginning of the 2019-2020 school year. As elaborated in their brief, instead of waiting to receive the IEE to commence testing, the District “could have begun general testing and upon receipt of [the IEE] administered any further tests needed or determined which test, if any were duplicated, would be superseding.”²⁹ The District argues it did not delay testing, and even if it were found to have committed a procedural violation, that violation would not be actionable because it did not result in a denial of FAPE.

Before a student may receive special education and related services, the public agency must conduct an initial evaluation.³⁰ A parent may request an initial evaluation for special education services.³¹ Under ordinary circumstances, the initial evaluation must occur within

²⁹ Pet’r Reply Brief at 5.

³⁰ 34 C.F.R. § 300.301(a).

³¹ 34 C.F.R. § 300.301(b).

60 days of the parents' request.³² No exceptions to that timeline apply in this case.³³ The initial evaluation must include consideration of certain assessments, but no specific timelines apply to testing in anticipation of an initial evaluation.³⁴

The District and Parents disagree on the date Parents requested Student's evaluation. Parents claim they requested an evaluation in the first week of the school year when Mother met with Kirksey and informed her of her desire for Student to have an IEP. The District argues this request did not occur until October when Parents submitted the findings from Student's IEE. As support for this position, the District contends that Parents' early notification of Coddington's pending IEE suggested that they did not wish to begin the evaluation until then.

We find the District's argument unpersuasive and agree that Parents requested an evaluation during the first week of the school year – in August 2019. The IDEA does not require any particular form or wording for a parent's request for initial evaluation. Mother's notification of intent to begin the process necessary for Student to receive an IEP constitutes sufficient notice to trigger the 60-day timeline for evaluation.³⁵

Procedural violations only result in a denial of FAPE if the violation "compromised the pupil's right to an appropriate education."³⁶ The two specific situations in which this occurs are when a procedural violation results in a loss of educational opportunity or when the parent is denied the opportunity to participate meaningfully in the IEP formulation process.³⁷ The Eighth

³² 34 C.F.R. § 300.301(c)(1).

³³ Even if the request for initial evaluation was triggered on October 23, 2019, the District failed to complete the initial evaluation within sixty days. The District claims that snow days and winter break excuse this delay, but no such exception is contained in 34 C.F.R. § 300.301 or the State Plan.

³⁴ See 34 C.F.R. § 300.304.

³⁵ *Bd. of Educ. of Evanston-Skokie Cmty. Consol. Sch. Dist. 65 v. Risen*, No. 12 C 5073, 2013 WL 3224439, at *12 (N.D. Ill. June 25, 2013) (notice by parent of desire to "begin the case study evaluation process," constituted a request for evaluation),

³⁶ *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006).

³⁷ See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1112 (9th Cir. 2016).

Circuit evaluates procedural violations under a “harmless error” standard.³⁸ However, the procedural violations considered harmful under this standard substantively mirror the situations cited by other circuits.³⁹

We find the District’s failure to evaluate Student within 60 days did not result in a denial of FAPE. Although the District committed a procedural violation in waiting for the IEE report to commence its evaluation process, the unique circumstances of Student’s IEE made more hasty action impracticable. If the District had followed the 60-day timeline, it would have completed its evaluation before or shortly after it received the IEE report.⁴⁰ Parents clearly desired consideration of the IEE in the District’s evaluation, and it was only after reviewing the IEE that the District determined additional testing by its speech pathologist was necessary. Therefore, a second evaluation would be needed if the District performed the evaluation earlier. Furthermore, even if the District could have completed its full evaluation with consideration of the IEE within 60 days, Parents have not met their burden to show that Student qualified for special education services under the State Plan. For these reasons, holding the District to the 60-day timeline would not have meaningfully expedited the evaluation process or resulted in greater educational opportunity for Student in the form of an IEP. Therefore, we find the District’s procedural error did not deny Student FAPE.

Summary

The District did not deny Student FAPE. Parents failed to meet their burden to show that Student was eligible for an IEP as a “child with a disability” under the IDEA. The District

³⁸ *Indep. Sch. Dist. No. 413, Marshall v. H.M.J. ex rel. A.J., M.N.*, 123 F. Supp. 3d 1100, 1111 (D. Minn. 2015).

³⁹ *See Indep. Sch. Dist. No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir.1996) (“An IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.”) (Quotation omitted).

⁴⁰ The specific date of Parents’ request is not contained in the record, but 60 days after Monday, August 19, 2019, was October 18, 2019 – one week before the IEE was completed and delivered to the District.

committed a procedural error in failing to complete an initial evaluation within 60 days of Parents' request. However, this procedural violation did not result in a denial of FAPE.

SO ORDERED on August 5, 2020.

SREENIVASA RAO DANDAMUDI
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:
 - (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.