

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Greenwich v. Student Board of Education  
Student v. Greenwich Board of Education

Appearing on behalf of the Student:	Parent, Self-Represented
Appearing on behalf of the Board:	Abby Wadler, Esq. Town of Greenwich Law Department 101 Field Point Road Greenwich, CT 06830
Appearing before:	Melinda A. Powell, Esq. Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUES:**

1. Should the Student be evaluated by the Board without parental consent?
2. Is the Parental request for an independent educational evaluation (IEE) ripe?
3. Did the Board unduly delay its response to the request for an IEE?
4. Was the Board's psychoeducational evaluation appropriate?
5. If not, is the Parent entitled to an IEE in the area of neuropsychology?
6. Did the Board fail to implement the Student's IEP for speech and language therapy services?
7. Did the Board fail to implement the Student's IEP for occupational therapy services?
8. Did the Board comply with the procedural safeguards of the IDEA by:
  - a. Providing the opportunity for parental participation through the notice and/ or scheduling of PPT meetings;
  - b. Holding PPT meetings that included appropriate members;
  - c. Completing timely triennial evaluation(s);
  - d. Scheduling of timely annual review meeting(s);
  - e. Providing notification and the opportunity for parental participation in any IEP service changes or implementation of such changes;
  - f. Providing parental access to educational records of the Student;
  - g. Addressing parental concerns that the Student may meet the criteria for autism;
  - h. Providing parental access, at least five days in advance, to any evaluation to be discussed at a PPT?
9. Do the procedural safeguards of the IDEA require:

- a. Notifying the parent(s) of the identity of the direct service providers working with the Student;
  - b. Notifying the parent(s) of a student's injury; and/ or
  - c. Notifying the parent(s) and documenting the use of seclusion or restraint with a student?
10. Did any procedural violation(s) rise to the level of a denial of FAPE?
11. Did the Board offer and provide FAPE beginning in January 2022 by ensuring the Board developed an IEP that was based on sufficient data, including the Student's present levels of performance and appropriate evaluations?
12. Is the Student entitled to compensatory education as a remedy?

### **PROCEDURAL HISTORY:**

The Board initiated this special education due process matter on January 4, 2023, and the Hearing Officer was assigned on January 6, 2023. On January 20, 2023, the Hearing Officer held a prehearing conference. The initial mailing date was February 18, 2023 and extended to schedule a February 28, 2023 hearing date. In the interim, Parent (Mother) filed a counterclaim on February 21, 2023, which reset the mailing date deadline to May 14, 2023. The mailing date was further extended to allow briefing and to allow the Hearing Officer to consider the briefing, to August 4, 2023.

Virtual hearings were convened on March 8, 20, and 22, April 4, 21 and May 3, 2023. Board exhibits B-1 through B-3, B-5 through B-42, B-43, B-45 through B-51 and B-36A were entered into the record as full exhibits. Parent exhibits P-1, pp. 4-15, 30; P-2, pp. 33-60; P-3, pp. 1-7, 13-14, 23, 26, 47, 51-53; P-4, pp. 1, 10, 17-21; P-5, pp. 133-4, P-8, pp. 8-25, 60-61; P-10, P-12, P-24, and P-26 through P-30 were entered as full exhibits; Parent exhibits P-3, pp. 54-60, were excluded. The Board's Due Process Request was entered as a Hearing Officer exhibit HO-1, and the Parent's Due Process Request was entered as HO-2.

The following witnesses testified: Student's mother (Mother), Student's father (Father), the current out of district program administrator (Admin 1), Principal of Aspire Living and Learning (Prin.), Aspire psychologist (Psych.), Student's special education teacher (Teacher), the prior Board case manager (Admin 2), Aspire Occupational Therapist (OT), Aspire Speech and Language Pathologist (SLP), Aspire Case Manager (Case Mngr.), Aspire Clinical Coordinator (Coord.).

### **STATEMENT OF JURISDICTION:**

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") Sections 1400 et seq. and related regulations, Connecticut General Statutes ("C.G.S.") Section 10-76h and related regulations, and in accordance with the Connecticut Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. Sections 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

### **FINDINGS OF FACT:**

After considering all the evidence submitted by the parties, including documentary evidence and the testimony of witnesses, I find the following facts:

1. The Student has been identified as eligible for special education under the category of Other Health Impaired (B-3)
2. Student's mother brought the counterclaim against the Board on her own behalf. Student's father is not a party to the proceedings. (Mother, Father)

3. Student's mother has received all PPT meeting notices and participates in the PPT meetings for the Student. (B-10, B-19, B-20, Mother)
4. The Student was placed by the Board at Aspire Living and Learning Academy ("Aspire"), a therapeutic day school, during all times relevant to this hearing, from February 2021 to present. (Admin 1). At the time of the hearing, he was in the 5th grade. (B-10, B-13)
5. On May 20, 2022, the Student was involved in an incident at school where he kicked a door and the glass shattered (in place). (Coord., Prin.) Aspire staff escorted him without incident to a separate room for him to calm down. The door was unlocked, and staff remained with him. (Teacher, Coord.) Mother was notified via phone of the situation. (Coord. Prin.)
6. On May 26, 2022, the PPT held an annual review meeting. Mother requested neuropsychological testing due to concerns about Student's behaviors which may have been consistent with Autism Spectrum Disorder. The team agreed to testing by the Board. (Mother, Admin 1, Psych., B-19)
7. The Student's progress was also reviewed at that meeting. Additional modifications and accommodations were added. Counseling as a related service was added to the IEP. The Student was found eligible for extended school year services ("ESY"). The PPT also agreed to address Mother's request to target the Student's ability to be flexible when presented with disagreements under one of the social/ behavioral goals. There was no dispute among any of the team members, including Mother, regarding programming for the Student for the following year. (B-20)
8. Student's mother testified that the IDEA requires that any type of evaluation that was previously administered must be readministered every three years. (Mother) A neuropsychological evaluation was completed by Dr. Cohen in 2018, as part of an IEE. (Mother, P-8, B-11) The Mother's position is that another neuropsychological evaluation was due in 2021, since 2021 was three years after Dr. Cohen's evaluation. Due to the pandemic, she waited until May 2022 to request a new neuropsychological evaluation. (Mother) She did not request an IEE in May 2022. (Mother, B-20)
9. The Student's next triennial review and comprehensive evaluation is due January 20, 2024 (B-13, B-36)(Admin 1)
10. The day following the May 26, 2022 PPT annual review meeting, Mother was contacted by the Board to discuss the neuropsychological evaluation. In lieu of a neuropsychological evaluation, the parties agreed that the Aspire psychologist would complete a psychoeducational evaluation to include Autism specific rating scales, and the speech pathologist will conduct a comprehensive communication evaluation to include expressive language, receptive language, and pragmatics. (B-16)(Admin 2)
11. The Agreement to Change an Individualized Education Program without Convening a PPT was signed by Mother on June 10, 2022. In addition to revising the IEP and listing the testing to be conducted, the form states "We understand that this agreement can be made only if the changes are not part of an Annual Review of the Student's program." (B-16) Mother interprets this language to mean that services, programs or testing discussed at an annual review meeting cannot be changed or amended, regardless of her signing consent to amend. (Mother) The Agreement further provides: "AMENDMENT- Per discussion on May 27, 2022 the parents agreed the Aspire school psychologist would conduct a psychoeducational evaluation to include Autism specific rating scales per mom's concerns by early fall. In addition, Aspire's speech pathologist will conduct a comprehensive communication evaluation to include expressive, receptive, and pragmatics, [sic] this is in lieu of a neuropsych evaluation. Mom agreed that it is not necessary to hold a new meeting and agreed with proceeding with testing as proposed." The Test/ Evaluation Procedure includes: Cognitive (NEPSY, WISC), Rating Scales (BASC, Vineland, ASRS, SRS), and Language-pragmatic, receptive, expressive (CASL-2). (B-16)
12. Mother expected that the entirety of the NEPSY and all its subtests would be administered to the Student by the Psychologist. (Mother)

13. Testing began during the extended school year. The Psychoeducational Evaluation was conducted by Psychologist at Aspire. She holds a Master's degree in School Psychology/Education from Columbia Teachers College and expects to complete her Doctorate in Educational Psychology this year. She has worked as a research assistant and research coordinator at the Yale Child Study Center in its autism research program, served as a school psychologist in Wilton Public Schools, and joined Aspire in July 2020. She has known the Student since 2020 and provides counseling to the Student. The Student was appropriately motivated during testing, and the testing was completed over a course of a few days, within a typical amount of time for the assessments given. (B-45; Psych.)
14. Psychologist is qualified to sign off on her own report without an additional signature, but there is a supervising psychologist at Aspire that is available to consult on evaluations if needed. (Prin.)
15. Psychologist emails the Parent weekly to let her know what she and the Student are working on during their service time. (Psych.)
16. Psychologist has been working with the Student on coping skills. In the past few years, she has seen the Student be able to access his coping skills more easily so that he can handle situations that arise in the classroom with greater flexibility. (Psych.)
17. As part of the evaluation, Psychologist completed a records review including a review of Dr. Cohen's evaluation, and included the relevant information in her report as background information. (Psych.)
18. The Psychoeducational Evaluation contained a SRS (reading skills in the area of autism), ASRS, BASC (behaviors in the classroom and at home), Vineland (adaptive), NEPSY (Theory of mind and affect recognition), and WISC-5. (B-11, Psych.)
19. Standardized practice does not require the administration of all the subtests of the NEPSY. It is permissible to administer components based on a particular area of concern. Psychologist used her professional discretion and chose two components of the test geared toward autism. The NEPSY can be administered in various components based on the area of concern. In this Student's case, two areas were chosen to look at the autism concerns raised by Mother. (Psych.)
20. Psychologist is trained in the administration of the chosen tests, and they were administered in compliance with their instructions. (Psych.)
21. The results of testing that Psychologist completed warranted further investigation of potential autism before reclassifying the eligibility category of the Student to Autism Spectrum Disorder. (Psych)
22. Rating scales were given to Mother by July 18, 2022 (P-1), but were not returned as of September 22, 2022 (P-4). Mother had not completed them by that date. (Id.)(Psych)
23. Psychologist made attempts to provide rating scales to the Student's father as part of the evaluation. She sent them home with the Student, so that when the Student went to visit his father, his father could complete them. He did not visit his father that weekend, however. Mother did not want to be responsible for delivery of the scales to Student's father and asked Psychologist to contact him. Psychologist provided an electronic version of the scales, and attempted to set up a time to talk with Student's father, but Psychologist did not receive any response. (Mother, Psych., Father)
24. Mother generally is in charge of oversight of the Student's education and his education program, rather than Student's father. (Mother) Father is unable to attend PPT meetings. (Mother, Father)
25. The Student was not provided services in his IEP during the pandemic, due to staff shortages starting at the time of the pandemic in March 2020. (Mother, Prin., B-21, B-24) Aspire kept track of any missed services and scheduled compensatory delivery of those missed services. As of November 18, 2022, all SLP services were made up and completed by the speech and language pathologist. (B-8) There were also three service hours owed for occupational therapy. (B-8) However, by the time of the hearing, all services hours had been provided to the Student. (Prin.)
26. The Psychoeducational Evaluation Report by Psychologist is dated November 11, 2022. (B-11) It was provided to Mother two days before the November 17, 2022 PPT. (Mother) However, it was

- discussed with Mother about a week or so beforehand. (Psych.)
27. The Speech and Language Evaluation Report, dated November 11, 2022, outlines the additional testing that was completed. Standardized testing consisted of the CASL-2 (Comprehensive Assessment of Spoken Language). The SLP also observed the Student during therapy sessions, testing and on a field trip. The Student's scores on CASL-2 range from Above Average to Average. His scores reveal strengths in the areas of expressive, receptive and pragmatic language skills. Notwithstanding these scores, the report recommends continued speech and language services and goals and objectives, so that the Student can generalize his skills to other settings. (B-13)(SLP)
  28. At the November 17, 2022 PPT meeting, the Board's evaluations were reviewed. Psychologist reported on cognitive testing and rating scales, and the Speech and Language Pathologist reported on her testing. The Aspire team reported that the Student was making satisfactory progress. Parent agreed Aspire and the program was benefitting the Student; he was showing progress at school. Next, current functioning was reviewed. Ultimately, based on the evaluations and due to some elevated scores on autism specific tests, additional testing was recommended. Specifically, the tests recommended were the Autism Diagnosis Observation Schedule 2d Ed. (ADOS-2), Conners' Rating Scales-Third Ed. (Conners-3) and NEPSY-II. The Parent also requested neuropsychological evaluation to update the prior 2018 test by Dr. Cohen, but it was denied because the team had enough information to inform recommendations for goals and objectives and the Student was making satisfactory progress. (B-10, B-15) Mother then requested a neuropsychological evaluation as an IEE which was denied. (Admin 1)
  29. This IEP contained the Student's present level of performance: average performance in reading maze, average in smart cloze, and average in advanced literacy. His strengths are in knowledge of grade level vocabulary, gathering ideas from what he reads and orally explaining details for writing. The concerns focus on organization, editing and revising. Further, levels of performance in math are also documented, but are below average. Goals and objectives target those areas. The Student's IEP also addresses communication goals with objectives in listening, conversation conventions, listening to non-preferred topics, and strategies for communicating disagreement, differences in opinions and problem solving. Additional areas are also addressed with goals, objectives and direct services in behavior, fine motor, social emotional learning and hygiene. The record does not indicate that any edits or changes to goals or services was requested by or refused to, the Parent. (B-10, Mother)
  30. Since attending Aspire, and in the past year, the Student has gained new skills in reading, such as being able to read for longer periods of time, increased his writing skills including citing to evidence in the text and making inferences from the text. (Teacher)
  31. In the area of behavior, Student has made gains as well. Whereas in the past the Student required a 1:1 to manage challenging behaviors, the 1:1 has been faded out. Behavior logs are no longer sent home because challenging behavior has decreased. (Teacher) Student and Teacher have an excellent rapport. (Mother)
  32. On December 5, 2022, Admin 1 emailed a written response to Mother regarding the IEE request. She replied in part, "[I] am not in agreement with [Psychologist's] evaluation, as it 's not what we agreed to within the meeting and therefore, I am rejecting the evaluation and asking for an IEE at public expense as the district and team agreed to."
  33. On December 8, 2022, Parent signed the refusal of consent form for the additional testing: intellectual and cognitive functioning, and behavioral and social/ emotional functioning. The evaluation procedures proposed were the NEPSY-II, Autism Diagnosis Observation Schedule 2d Ed. (ADOS-2), and Conners' Rating Scales-Third Ed. (Conners-3). (B-9)
  34. The attendance of certain members of the PPT were excused by the Parent verbally while at the meeting. (Admin 1) Admin 1 believed that the written excusal forms were sent by the new CT SEDS software system directly to Mother when the excusal form was checked. He later became aware that Mother had not received the written form, and emailed them to her several weeks after the meeting.

(Admin 1) (B-12)

35. Quarter 1 grades for 2022-2023 show that the Student has met expectations or is developing skills. (B-7)

## **CONCLUSIONS OF LAW:**

### **FAPE**

The overriding goal of the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 et. seq (IDEA) is to open the door of public education to students with disabilities by requiring school systems to offer them a free appropriate public education (FAPE). *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982).

IDEA and Connecticut law provide that parents of students with disabilities may request a due process hearing before an impartial hearing officer to challenge a school district's proposal or refusal to initiate or change the identification, evaluation or educational placement or the provision of a free appropriate public education for their children. 20 U.S.C. Section 1415(f)(1)(A); C.G.S. Section 10-76h(a)(1).

The general rule is that one party has no standing to raise another's rights. *Carrubba v. Moskowitz*, 81 Conn. App. 382, 405 (2004)(one may not gain standing by asserting the due process rights possessed by another individual.); *Delio v. Earth Garden Florist, Inc.*, 28 Conn. App. 73, 78 (1992). ([A party] cannot assert the appellate rights of parties who have never done so themselves.) In this matter, the Student's father participated only as a witness in the case, not as a party. Mother asserted that Father's work schedule did not permit him to participate more fully in the proceeding. This reasoning is insufficient for the Hearing Officer to find that Mother has standing to assert the other Parent's rights. Any claims relating to Father's lack of notice of PPT meetings or claims relating to his right to participate in the Student's special education program are dismissed.

In *Rowley*, the United States Supreme Court held that FAPE "consists of educational instruction specially designed to meet the unique needs of the . . . child, supported by such services as are necessary to permit the child 'to benefit' from instruction." *Rowley* at 188-89. See also *Andrew F. v. Douglas City School District*, 580 U.S. 386, 404 (2017)("The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created"); *Oberti v Board of Education*, 995 F.2d 1204 (3d Cir. 1993).

The IEP itself is the cornerstone of the child's program. However, the "Second Circuit has rejected the "rigid 'four corners' rule prohibiting testimony that goes beyond the face of the IEP." *D.C. ex rel. E.B. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494, 513 (S.D.N.Y. March 26, 2013). Although, the Hearing Officer may not rely on "testimony that materially alters the written plan" she may consider testimony "that explains or justifies the services listed in the IEP." *R.E.*, 694 F.3d at 185-86; see also, *F.L. ex rel. F.L. v. New York City Dep't of Educ.*, 553 F. App'x 2, 5 (2d Cir. 2014).

In *Rowley*, the United States Supreme Court set out a two-part test for determining whether a local board of education has offered FAPE in compliance with IDEA. The first part of the test is whether there has been compliance with the procedural requirements of IDEA, and the second part is whether the student's IEP is reasonably calculated to enable the student to receive educational benefit. 458 U.S. at 206-207. See also, *Fry v. Napoleon Community Schools*, 580 U.S. \_\_\_ (2017). The second part, the substantive component, is measured by whether the school offers an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 999 (2019). The Second Circuit explained, "the substantive adequacy of an IEP is focused on whether an IEP was reasonably calculated to enable the child to receive educational benefits and likely to produce progress, not regression." *Mr. P. v. West Hartford Board of Education*, 885 F. 3d 735, 757 (2018);

*Mr. and Mrs. G v. Canton Board of Education*, 74 IDELR 8, 119 LRP 9264 (D. Conn. March 11, 2019).

The Board here had the burden of proving, by preponderance of the evidence, that the IEPs it offered were both substantively appropriate and in compliance with IDEA's procedural requirements. Regs. Conn. State Agencies § 10-76h-14(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir 1998).

The first prong of the *Rowley* inquiry, whether the Board complied with IDEA's procedural mandates, is critical. As the Supreme Court said in *Rowley*, Congress based IDEA on the "conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley* at 206. The procedural requirements of IDEA are designed to guarantee that the education of each student with a disability is individually tailored to meet the student's unique needs and abilities and to safeguard against arbitrary or erroneous decision-making. 20 U.S.C. Sections 1412(1) and 1415(a)-(e); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039, and 1041 (5th Cir. 1989).

While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied FAPE. Mere technical violations will not render an IEP invalid. *Amanda J. v. Clark County School District*, 267 F.3d 877, 892 (9th Cir. 2001). In matters alleging a procedural violation a due process hearing officer may find that a student did not receive a FAPE only if the procedural violation did one of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. 34 C.F.R. Section 300.513(a)(2); *L.M. v. Capistrano Unified School District*, 556 F.3d 900, 909 (9th Cir. 2008).

Courts categorize a failure to implement services, which are outlined in a student's IEP, as a procedural violation. *D.D-S. v. Southold Union Free School District*, Docket No. 09-CV-5026(JS)(WDW), 2011 U.S. Dist. LEXIS 100809, at \*39 (E.D.N.Y. Sep. 2, 2011), *aff'd*, *D. D-S v. Southold Union Free Sch. Dist.*, 506 Fed. Appx. 80 (2d. Cir. 2012), *cert. denied*, *D. D-S v. Southold Union Free School District*, 574 U.S. 975 (2014). During the pandemic, the Department of Education issued guidance to school districts concerning the provision of services in a child's IEP. OSEP QA21-06 (September 30, 2021), 79 IDELR 232, 121 LRP 33345. The Guidance includes a discussion about the responsibilities of school districts to address disruptions in service to students during the pandemic. The Guidance states, "A determination of compensatory services by the child's IEP Team is an appropriate proactive mitigating measure intended to address the needs of the child due to the LEA's failure or inability to provide appropriate services." Compensatory services may serve to make up for the delay due to the pandemic. (*Id.*) See also OSEP QA (March 12, 2020). The Hearing Officer finds this Guidance persuasive, as it provides a proactive remedy for students whose services were interrupted. Here, the Student's missing occupational therapy and speech and language services were provided as compensatory services. The parties dispute whether the services were provided on a 1:1 basis, and Mother does not believe the testimony from Aspire witnesses. Mother also argues that any of the compensatory service time which was spent to build rapport with the Student should not be credited toward missing service hours. However, the witnesses from Aspire credibly testified that the services have been provided to the Student to make up for lost sessions during Covid-19. Aspire kept a log of the service time due to the Student. Any time used to establish rapport was also needed to provide the service, and benefits the Student. The Hearing Officer finds that building rapport as a part of providing compensatory services is not a material violation and does not deny the Student FAPE. No additional "make up" services are due. (Finding of Fact #25).

Mother alleges she was not timely apprised of new service providers who were implementing the Student's IEP after other providers left employment with Aspire, and Aspire failed to provide other information in writing. The *IDEA* regulations do not require (a) Notifying the parent(s) of the identity of the direct service providers working with the Student; (b) Notifying the parent(s) of a student's injury; (c) Notifying the parent(s) and documenting the use of seclusion or restraint with a student.

IDEA regulations do not require that evaluations be provided to the parent at least five days in advance of a PPT meeting. Mother's procedural rights were not violated because she received evaluations two days prior to the PPT meeting in November 2022. Insufficient evidence was submitted to support claims that annual reviews were untimely, the Parent was denied access to educational records, service changes occurred, and PPT meetings lacked appropriate members, which denied the Student FAPE.

Each IEP must include: (a) a statement of the student's present level of performance in each area of disability as determined through periodic assessments; (b) a statement of measurable annual goals, including academic and functional goals, that are designed to meet each of the student's educational needs resulting from the disability; (c) a statement of the special education and related services to be provided in order to enable the student to attain his or her goals and to progress in the general education curriculum; and (d) a statement of the special education and related services and supplementary aids and services, to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals; and to be involved in and make progress in the general education curriculum; and (e) an explanation of the extent, if any, to which the child will not participate with nondisabled children; and (f) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the student on state and district-wide assessments. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.

To determine whether an IEP is substantively adequate, the hearing officer must examine the record for any objective evidence indicating whether the child is likely to make progress or regress under the proposed plan, such as test scores and similar objective criteria. The IEP must state "measurable annual goals." Furthermore, to be legally adequate, the IEP must identify a student's behavioral impediments and implement strategies to address that behavior. *A.M. v. N.Y.C. Dept. of Educ.* 845 F.3d 523 (2nd Cir. 2017); Conn. Regs State Agencies §10-76d-11, 34 C.F.R. §300.320 22.

The sufficiency of an IEP under IDEA is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). "An IEP is a snapshot, not a retrospective." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993). It must be viewed in terms of what was objectively reasonable when the IEP was developed. *Id.*

Mother did not put forth evidence or argue that the May 2022 IEP was substantively deficient due to any lack of evaluative information about the Student. The claim of inadequacy focused on the November 2022 IEP and the lack of a neuropsychological evaluation. However, the lack of an updated neuropsychological evaluation did not render the November 2022 IEP inadequate on the basis. The other evidence available to the PPT was sufficient to develop an IEP. See, *Suffield Board of Ed v. L.Y.*, Docket No. 3:12-CV-1026 (JCH), 2014 U.S. Dist. LEXIS 2294, at \*23 (D. Conn. Jan. 7, 2014). The PPT considered the Student's performance, the psychoeducational evaluation, other evaluations, achievement of and toward his goals and objectives, and input from the Aspire team members and Mother. The PPT also recommended additional testing. (Findings of Fact ##27-31, 35).

Furthermore, the Board met its burden to show that the IEP provided FAPE. While not dispositive, the credible evidence did show that the Student made progress under the IEP. (Findings of Fact ##7, 27-31, 35).

### **IEE**

The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. See *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) ("Congress repeatedly emphasized . . . the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness."). Without public financing of an IEE, a class of parents would be unable to afford an IEE and their children would not receive, as the IDEA intended, "a free and appropriate public education" as the result of a cooperative process that protects the rights of parents. There



is "nothing in the statute to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate." *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 694, (11th Cir. 2012), citing, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (internal quotations omitted).

School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur during a student's education. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006)).

Congress included the right to an IEE at public expense as one of the IDEA's essential procedural safeguards:

School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them [Parents] have the right to an independent educational evaluation of the[ir] child. The regulations clarify this entitlement by providing that a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

*Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 60-61, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) (citations and quotations omitted).

The IDEA provides for reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. 20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b). The Student's triennial is not due until January 2024, so the Board complied with the statute. (Findings of Fact #9).

The school district must also conduct a reevaluation if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reevaluation. 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1). A school district must also conduct a reevaluation upon the request of the child's parent or teacher. 20 U.S.C. § 1414 (a)(2)(A)(ii); 34 C.F.R. § 300.303(a)(2).

An evaluation under 34 C.F.R. § 300.304 refers to the processes and procedures used to "gather relevant functional, developmental, and academic information" about the child, including information provided by the parent, that may assist in determining the content of the child's IEP, which includes the use of "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." See also, 20 U.S.C. § 1414 (b).

The Parent gave valid consent for Aspire to perform psychoeducational testing. The discussion regarding psychoeducational testing rather than a neuropsychological evaluation, occurred after that annual review meeting. The IDEA states, "In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP." 20 U.S.C. § 1414(d)(3)(D). Therefore, the proper procedure was followed. (Findings of Fact ##10-11).

A parental right to request for an IEE at public expense accrues when an evaluation has been completed by the Board, and the parent disagrees with that evaluation. 34 C.F.R. § 300.502(b)(1); *D.S. v. Trumbull Board of Education*, 975 F.3d 152 (2d Cir. 2020); *Genn v. New Haven Board of Education*, 219 F. Sup. 3d 296, 317 (D. Conn. 2016);. See also, *Dubois v. Connecticut State Board of Educ.*, 727 F.2d 44, 48 (2d Cir. 1984); *Student v. Ogden School District*, 75 IDELR 55, 119 LRP 29164 (Utah State Educational Agency 6/5/19)(denying IEE in area not assessed).

A parent's right to an IEE at public expense ripens each time a new evaluation is conducted. *D.S. v. Trumbull Board of Education*, 975 F.3d 152, 169-70 (2d Cir. 2020). Parent's position is that evaluation was insufficient because the additional testing proposed at the November 2022 PPT meeting should have been included by Aspire's psychologist, with the other testing she completed.

The preponderance of the evidence showed that the evaluation was completed by a properly credentialed and trained evaluator, who also knew the Student personally, used standardized tests and generally accepted methodology, and the results were valid. (Findings of Fact##13-23). "The IDEA does not require the school district to conduct all assessments possible; it requires school districts to decide what data is needed to determine "the educational needs of the child," among other things. 20 U.S.C. § 1414(c)(1)(B)." *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1189 (9<sup>th</sup> Cir. 2016).

The Hearing Officer finds that a qualified evaluator is not required to make a conclusive determination of a particular disability category for the evaluation to be valid. A recommendation for continuing testing and further investigation is an equally valid conclusion, when proper procedures are used. The Board is entitled to complete the additional testing recommended, but to which consent was denied.

**ORDER:**

The Parent's request for an IEE is denied. The Board shall complete the ADOS-2, NEPSY-II, Connors-3. The evaluator shall determine, using professional judgment, if certain subtests of the testing instruments will be sufficient or otherwise administer an instrument in its entirety. This Order overrides the Parent's lack of consent.

The Parent is not entitled to relief for Issues # 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).

  
Hearing Officer Signature

Melinda A. Powell  
Hearing Officer