



IEE. (*Id.*) OSD offered to conduct further assessments at the district level, but to date, Respondents have not provided consent to conduct the evaluation. (*Id.*) Respondents also requested an IEE because they disagreed with the Functional Behavioral Analysis (“FBA”) conducted by OSD. An IEE for behavior was granted, and thus any consideration of an IEE in that domain is outside the scope of this Decision and Order.

Between March 1 and March 31, 2019, the parties attempted to resolve the issues presented in the Complaint through mediation. The parties represented to the Hearing Officer they were unable to reach an agreement in mediation. Thus, the 45-day timeline for a due process determination commenced on April 1, 2019. The parties participated in a pre-Hearing telephone conference on April 8, 2019. The Hearing Officer provided a written summary of the conference to the parties the same day. The communication gave written notice of the Hearing dates, May 1 and 2, 2019. Among other instructions, the Hearing Officer also directed the parties to exchange position statements, a list of documents, a copy of the documents to be introduced at the Hearing, and a list of witnesses the parties intended to call at the Hearing on or before April 25, 2019.

Respondents filed a response letter to the Complaint and position statement on April 10, 2019. This letter was replete with links to documents, reference material, and other information, all of which has been considered by the Hearing Officer. The parties also engaged in extensive pre-Hearing communication making motions and many other demands. The motions and requests were resolved as follows:

1. Respondents requested a sufficiency determination related to the Complaint. The Hearing Officer deemed the Complaint sufficient. *See* April 19, 2019 Order.
2. Respondents made a motion to consolidate two or more cases. There are not two or more cases. Moreover, there was no agreement from Petitioner to add issues to the Hearing, and the motion was denied. *Id.*
3. A common complaint made by Respondents was that OSD withheld records. The Hearing Officer ordered relevant documents regarding identification, evaluation, and educational placement and the provision of FAPE to be provided, if the records were not provided previously. *Id.* OSD certified to the Hearing Officer that all documents were provided.

4. Petitioners made a motion to limit the parties that Respondents could copy on communications with the Hearing Officer. The Hearing Officer ruled that Respondents could communicate with any advocates or experts they wished, but the Hearing Officer would limit communications to the parties. *Id.*
5. Finally, Respondents moved for a continuance of the Hearing and a change in the location less than 24 hours prior to the agreed up time and location. Respondents claimed the Hearing Officer was discriminating against them by holding the Hearing at the agreed upon place and time. None of the issues raised had been disclosed prior to the day before the Hearing. The Hearing Officer denied these motions because Respondents did not articulate sufficient cause to justify the potential prejudice to Petitioner and inconvenience to all involved. *See* April 30, 2019 Order.

The Hearing proceeded as scheduled on May 1, 2019 at the Ogden School District Offices despite an eleventh-hour communication from Respondents that they would not attend. The Hearing Officer gave Respondents the option of participating via telephone or some other electronic means, but Respondents declined those options. The Hearing Officer took evidence from seven witnesses called by Petitioner and admitted documentary evidence into the record. In addition to questions posed by Petitioner’s counsel, the Hearing Officer also took the opportunity to question each witness. The Hearing was open to the public by prior request of the Respondents. A court reporter made a record of the proceeding. The Hearing Officer invited Respondents to appear the following day on May 2, 2019 to question witnesses and to offer evidence, but Respondents, once again, failed to appear.

## II. BURDEN OF PROOF

Petitioner, as the party requesting a due process determination, is the party carrying the burden of proof by a preponderance of the evidence in this matter. *Schaffer v. Weast*, 546 US 49 (2005) (“The burden of proof in an administrative hearing challenging [in the IDEA context] is properly placed upon the party seeking relief”). The Hearing Officer informed Petitioners at the pre-Hearing conference that Petitioners would have the burden of proof and the duty to present evidence first at the Hearing.

## III. ISSUES

The Hearing Officer considered the following procedural issues in this matter:

1. Did OSD unreasonably delay in filing for due process after it denied ██████ request for an IEE?
2. Did OSD consider evaluations obtained at private expense in addition to its own evaluations and consider all other relevant data?

The Hearing Officer considered the following substantive issues in this matter:

1. Did OSD properly deny an IEE to Respondent in the domain of occupational therapy because the occupational therapy evaluation was appropriate?
2. Did OSD properly deny an IEE to Respondent in the domain of academics because OSD had not yet performed an evaluation for academics?

#### IV. FINDINGS OF FACT

1. The first Individualized Education Program (“IEP”) in the record was developed for ██████ in May 2014 in Newport News Public Schools. (Exhibit 52).
2. Davis School District (“DSD”) developed an IEP for ██████ in April 2015. The classification on the DSD IEP was speech or language impairment. (Exhibit 51).
3. A subsequent IEP was developed for ██████ in DSD in April 2017. The classification on that IEP was autism. (Exhibit 49).
4. The DSD records contain a private outside evaluation dated July 29, 2016 conducted by two private psychologists and an eligibility determination evaluation conducted by DSD dated April 19, 2017. (Exhibits 37 and 38). Significant testimony was offered that OSD considered the data from outside private evaluators and from DSD (Transcript pp. 47, 49, 109-110, 117-120, 131, 135, 142-144, 146-147, and 157-159)
5. A subsequent IEP was developed for ██████ in OSD in April 2018. The classification on that IEP was autism. (Exhibit 47).
6. ██████ received a private neuropsychological evaluation at the Tanner Clinic dated July 12, 2018. That comprehensive evaluation assessed ██████ in the following areas using standardized measures: adaptive behavior and developmental ratings; behavioral reports and observations; intellectual functioning; academic achievement; language

- screening; visuospatial screening; motor screening; attentional functioning; executive functioning; memory screening; social cognition; and emotional functioning. (Exhibit 1).
7. [REDACTED] also received a private occupational therapy evaluation at the Tanner Clinic dated August 30, 2018. Among other things, that assessment measured handwriting and visual perception, and the assessment developed a sensory profile. (Exhibit 35).
  8. [REDACTED] shared the evaluations and notes with OSD, but for a reason that is unclear in the record, [REDACTED] refused to provide consent to discuss the evaluations with the private outside provider. (Transcript pp. 109-110). [REDACTED] also shared treatment notes from the Tanner Clinic in the date range of July 3, 2019 to January 3, 2019. (Exhibit 53).
  9. OSD submitted a request for consent to evaluate in the domain of occupational therapy to the [REDACTED] in September 2018. [REDACTED] refused to sign and made several changes to the document. (Exhibit 2).
  10. OSD submitted a separate consent to evaluate [REDACTED] in October 2018. [REDACTED] signed this request on October 24, 2019 and gave consent for [REDACTED] to be tested in the areas of motor, social/behavioral, and psychomotor. (Exhibit 3).
  11. [REDACTED] regular education teacher, Julie Rosencrantz, testified that she also conducted regular progress monitoring of [REDACTED] particularly in math. Progress monitoring assessments are referred to as curriculum-based measurements (“CBM”). Ms. Rosencrantz testified that [REDACTED] was capable of doing third grade-level math and reading, and the IEP did not include services for those academic areas. (Transcript, pp. 27, 30-35).
  12. On October 25, 2019, [REDACTED] created a letter formally requesting “an education evaluation and review of instruction be performed.” [REDACTED] demanded, “All education and instruction should be evaluated.” [REDACTED] also wrote, “I request that the evaluation team consider the academic and cognitive testing performed during a Neuropsychological Evaluation by [Tanner Clinic] on July 12, 2018...[and] consider handwriting, visual perception, and sensory testing performed by [Tanner Clinic] on

August 30, 2018.” Finally, the letter requested a functional behavior analysis. (Exhibit 4). The record is not clear when the letter was sent, or to whom.

13. In October and November 2018, Occupational Therapy Specialist [REDACTED] evaluated [REDACTED] for visual perception/motor integration, sensory processing, and handwriting. [REDACTED] completed a report of her assessment on November 5, 2019. [REDACTED] conducted further testing on handwriting on January 4, 2019. The assessment considered the prior report conducted by the Tanner Clinic. The assessment concluded that [REDACTED] had age appropriate fine motor skills, and average or above average visual motor integration and visual perception. The report noted that [REDACTED] scored below average on motor coordination, but it did not impact [REDACTED] ability to access the general education curriculum. [REDACTED] later reviewed the Tanner Clinic treatment notes. According to [REDACTED] OSD’s conclusions were consistent with Tanner Clinic’s evaluation and treatment. (Exhibits 8, 25, 32, 35, 45, and 53; Transcript pp. 117-122).
14. [REDACTED] holds a master’s degree in occupational therapy, is board certified and licensed to practice in Utah, holds a National Board Certification in occupational therapy, and has had four or five years’ experience working for private hospitals and for OSD. (Transcript, pp. 100-102).
15. During November and December 2018, Special Education Teacher Specialist [REDACTED], Special Education Director, [REDACTED], and [REDACTED] engaged in several communications discussing, among other issues, scheduling an IEP meeting for [REDACTED] and reviewing the Behavior Intervention Plan (“BIP”). (Exhibits 10-20). In a November 26, 2018 email, [REDACTED] formally requested an IEE for the first time according to the record. (Exhibit 11).
16. On December 11, 2019, [REDACTED] sent an email to [REDACTED] requesting an IEE, again, “based on the failure to evaluate since we do not have appropriate present levels, sample, or grades in all areas of possible need related to the education of [REDACTED]. [REDACTED] further stated, “I also disagree with evaluations conducted, and the biases behind evaluations conducted” for a variety of reasons. [REDACTED] also “disagree[d] with the credentials involved in evaluations conducted or that they were

adequate for all areas of need and concern, and the reviewing of all areas that impact [REDACTED] education.” (Exhibit 16).

17. On November 29 and again on December 16, 2019, [REDACTED] wrote [REDACTED] requesting clarification regarding the evaluation with which [REDACTED] disagreed. [REDACTED] addressed many other questions, demands, and allegations in the December 16, 2019 letter, but the primary concern was identifying the evaluation or evaluations with which [REDACTED] disagreed to “identify the areas of assessment [REDACTED] was requesting.” [REDACTED] explained, “We have not made a decision to not evaluate...but are seeking clarification as to what areas of assessment you are requesting and then will respond with a decision to your request.” (Exhibits 12 and 19).
18. On December 19, 2019, during the IEP meeting, the record suggests that [REDACTED] identified academics as an area of concern for which [REDACTED] needed evaluation. According to [REDACTED] letter dated January 10, 2019, that meeting was the first time [REDACTED] identified academics as an area of concern for testing. (Exhibit 22).
19. [REDACTED] stated in [REDACTED] January 2, 2019 email to [REDACTED] “In our last meeting you requested additional academic testing, which [OSD was] happy to administer.” The email attached a prior notice and consent form for this purpose. (Exhibit 20).
20. [REDACTED] signed the form on January 3, 2019 but denied permission for evaluation. [REDACTED] attached a letter of explanation dated January 3, 2019,<sup>1</sup> which stated, among other things, she disagreed with the CBMs. [REDACTED] requested an IEE in “all areas of need,” and [REDACTED] cited 34 CFR 300.502(b)(4), which states:
  - a. If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due

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<sup>1</sup> A date of January 3, 2018 appears in the header of the document, but the correct date in the signature line confirms the actual date of January 3, 2019.

process hearing to defend the public evaluation. (Exhibit 21).

21. In the same January 3, 2019 letter, ██████ cited *Fullerton Sch. Distr.*, 58 IDELR 177 (SEA CA 2012) and argued, “[I]t has been established that a district can’t respond to a parent’s request for a publicly funded IEE by proposing to re-evaluate the student.” ██████ denied consent to re-evaluate ██████ and demanded, yet again, that OSD grant an IEE.
22. In the same January 3, 2019 letter, ██████ disagreed with the Behavior Intervention Plan (“BIP”) implemented for ██████ by OSD. *Id.*
23. On January 10, 2019, ██████ responded to ██████ and explained the IEP team’s position that OSD had the right to conduct its own evaluation in the domain of academics. Indeed, OSD had requested consent to conduct the testing but ██████ refused. ██████ stated that OSD was not requesting to re-evaluate ██████ because OSD had not tested ██████ in the domain of academics previously. Therefore, ██████ extended another offer to evaluate in the area of academics. Finally, the letter addressed concerns related to the BIP and requested another IEP meeting to discuss the behavior issues. (Exhibit 22).
24. On January 11, 2019, ██████ wrote the IEP team and reiterated ██████ right to disagree with the evaluation conducted by OSD. ██████ stated, “Because [OSD] failed to evaluate in all areas of need, such as handwriting, written responses, math, academics, and more, I have the right to request an Independent Education Evaluation (IEE) to assess my ██████.” (Exhibit 23).
25. On January 21, 2019, ██████ wrote ██████ again, responding to the January 22, 2019 letter. ██████ formally denied a request for an IEE in the domain of fine motor—handwriting and written responses. ██████ cited all the data considered by OSD in assessing ██████ including the OSD assessments and the recent evaluation from Tanner Clinic. (Exhibit 27).
26. The January 21, 2019 letter also attached a document entitled Ogden City School District Criteria for Independent Educational Evaluations. That document lists all the criteria for IEEs. (*Id.*)

27. In the same letter, ██████ formally denied the request for an IEE in the area of academics, specifically math. ██████ cited the outside evaluation by the Tanner Clinic and reiterated OSD's desire to conduct a "comprehensive battery of academic assessments." ██████ also stated that ██████ had refused consent for further assessment in the area of academics and reiterated OSD's position that the district had not completed an assessment with which ██████ could disagree, so the request for an IEE was denied. (*Id.*)
28. Finally, ██████ informed ██████ that OSD was granting ██████ request for an IEE based on ██████ disagreement with the functional behavioral assessment. (*Id.*)
29. ██████ wrote an email to ██████ on January 29, 2019 refuting the position of OSD denying the request for an IEE. Again, ██████ informed OSD if they denied an IEE that provides "a full and comprehensive evaluation to assess all areas of disabilities and needs, [OSD] will have to file for due process." ██████ asked for confirmation of that intention. (Exhibit 29).
30. An IEP meeting was convened on February 4, 2019. Wallace Calder, Facilitating Lawyer, and Esperanza Reyes, Utah Parent Center Representative, were in attendance along with ██████ and OSD employees who were members of the IEP team. According to the meeting minutes, data and services were discussed, but the IEE requests were not discussed. (Exhibit 34).
31. ██████ generated a letter dated February 11, 2019 to summarize the outcome of the IEP meeting. ██████ also attached a letter written previously to address the issue of the IEE. ██████ reiterated that requests for an IEE in the domains of occupational therapy and academics were denied, and an IEE for a functional behavior assessment was approved. ██████ indicated that OSD had initiated a request for a hearing from the state. (Exhibit 42).
32. OSD filed a Complaint with the Utah State Board of Education on March 1, 2019.<sup>2</sup> As proposed resolutions, the Complaint describes the following:

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<sup>2</sup> ██████ signature is dated 3/28/2019. However, it is clear that date is incorrect as USBE received the Complaint on March 1, 2019.

1. We hope to establish that the law allows the district to conduct an evaluation that the parent can disagree with before requesting an IEE. An IEE cannot be requested to replace a district's evaluation. OSD would be happy to conduct an evaluation with consent from the parent. 2. We hope to establish that multiple assessments conducted by agencies other than the district as well as the district assessments can be considered sufficient to inform programming. The parent does not disagree with the results of her private therapy provider's assessments that were provided to the school district and those results align with the district's results. Additional results from an outside provider are not necessary to inform FAPE for the student.

## V. DISCUSSION

### A. General Legal Standards

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC §1400(d); 34 CFR §300.1(a). The IDEA further provides that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled student. 20 USC §1415(b)(6).

In general, local educational agencies ("LEA") are obligated to "conduct a full and individual initial evaluation...before the initial provision of special education and related services to a child with a disability under this subchapter." 20 USC §1414(a)(1)(A). Critical for this matter:

In conducting the evaluation, the local educational agency shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining whether the child is a child with a disability; and the content of the child's individualized education program...[and] not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 USC §1414(b)(2)(A)-(B) (internal citation numbering omitted) (*See also* 4 CFR §§ 300.304 and 300.305). Moreover:

As part of an initial evaluation (if appropriate) and as part of any reevaluation the IEP

Team and other qualified professionals, as appropriate, shall review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers; and on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine—whether the child is a child with a disability...and the educational needs of the child. 20 USC §1414(c)(1) (internal citation numbering omitted).

Under the implementing regulations:

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....If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense....If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense. 34 CFR §300.502(b) (internal citation numbering omitted).

It is undisputed from the record that Petitioner disagreed with the OSD evaluation in the domain of occupational therapy and requested an IEE. Petitioner denied the IEE and filed for due process claiming it should not be required to publicly fund an IEE in this domain because the evaluation is, indeed appropriate. It is also undisputed from the record that OSD has offered to conduct an evaluation in the domain of academics, but to date, Respondent has not offered consent for the evaluation in this domain. Respondent desires an IEE instead. As recited in the procedural history above, the Hearing Officer has limited the scope of the Hearing to the necessary procedural requirements and the two substantive issues described.

B. Procedural Requirements.

An LEA has two choices once it receives a request for an IEE—the LEA must either request a due process hearing or provide the IEE at public expense. 34 CFR §300.502(b). If the LEA files for due process, it must do so “without unreasonable delay.” *Id.* Unreasonable delay is not defined in the regulations, but courts and hearing officers have determined this issue based on the facts of the particular matter. *See, e.g., Santa Monica-Malibu Unified Sch. Dist.*, 62 IDELR 279 (SEA CA 2013) (A two-month delay in filing for due process was not unreasonable where the district sent parents prior written notice of its disagreement within 10 days of the request.); *J.P. v. Ripon Unified School District*, 52 IDELR 125 (E.D. Calif. 2009) (The due

process request filed more than two months after the request was timely as the parties were communicating regarding the request for the IEE in the interim.).

*1. Timeliness*

In this matter, OSD received the request for an IEE on or about November 26, 2018. OSD attempted to clarify the assessment the ██████ were disputing. OSD indicated it first learned of the request for an IEE in the area of academics in the IEP meeting on December 19, 2018. The parties maintained regular contact regarding the IEE until a letter was sent on January 21, 2019 denying an IEE in the areas of occupational therapy and academics but granting an IEE in the area of functional behavior. Communication continued thereafter related to the development of a new IEP on February 4, 2019 and related to the prior request for an IEE. OSD filed for due process on March 1, 2019. Based on the frequent and consistent contact, including seeking clarification from parents regarding the nature of the IEE request, the Hearing Officer finds that OSD filed for due process without unnecessary delay.

*2. Other Data*

The record clearly demonstrates that OSD considered many sources of data in evaluating and re-evaluating ██████. In particular, OSD compared its own evaluations to evaluations from private providers and to evaluations provided by a previous school district. OSD also considered classroom assessments and other data in evaluating ██████.

C. Substantive Issues

*1. Occupational Therapy*

The first substantive issue that was addressed in the Complaint was whether the evaluation completed by OSD in the domain of occupational therapy was appropriate. If the evaluation was appropriate, then Petitioner is not obligated to provide an IEE at public expense.

Once again, unfortunately, the regulations are vague on the definition of appropriate, but 34 CFR §§ 300.304 and 300.304 describe what is required: the use of a variety of assessment tools administered in a nondiscriminatory manner; the use of valid and reliable tools; and assessments administered by knowledgeable personnel in the manner designed by the producer of the assessment. The child must be assessed in all areas of suspected disability to identify all the child's special education and related service needs. Further, the LEA must review all existing

data including evaluations and information provided by parents, classroom assessments, and observations by teachers. *Id.* Courts have held that a special education evaluation does not have to be perfect to be appropriate and a qualified evaluator using best practices will likely fulfill the requirement. *See, e.g., B.G. v. Board of Educ. of the City of Chicago*, 72 IDELR 231 (7th Cir. 2018). Further, just because a parent believes that additional evaluation would be useful is not enough to secure an IEE at public expense. *See, e.g., Fulton County Sch. Dist.*, 9 GASLD 9, (SEA GA 2015).

In this matter, as it related to occupational therapy, OSD reviewed extensive prior evaluations from outside private providers, from prior school district evaluations, and from classroom assessments. For its own occupational testing, OSD employed ██████████ to conduct the evaluations. ██████████ has significant expertise and experience in the area of occupational therapy. ██████████ report documented the standardized testing results from multiple nationally recognized assessment tools and provided comparison analysis to prior evaluations. Despite one unsubstantiated comment in a December 11, 2018 communication from ██████████ no evidence was heard that suggests the evaluation was biased or discriminatory. Based on the evidence in the record, there is no doubt that OSD's evaluation of ██████████ in the domain of occupational therapy was appropriate.

## 2. *Academics*

The issue of whether the IEE was properly denied in the domain of academics requires more legal analysis than factual analysis. OSD has argued that it has not conducted an evaluation in the domain of academics, and thus, there is no evaluation with which the ██████████ can disagree. Therefore, OSD must be afforded the opportunity to conduct an evaluation before an IEE can be requested. The question of whether a parent can request an IEE prior to an evaluation is hotly contested among commentators, lawyers, and special education advocates and professionals.

On one hand, the Office of Special Education Programs (“OSEP”) delivered companion opinions in *Letter to Baus* and *Letter to Carroll* that stand for the proposition a parent has a right to disagree with an evaluation and request a publicly funded IEE if the evaluation failed to assess or address a specific area of the child's needs. Essentially, the letters state that an LEA cannot escape its obligation to provide a publicly funded IEE by simply making up for a missing

assessment. *See respectively* 65 IDELR 81 (OSEP 2015) and 68 IDELR 279 (OSEP 2016). [REDACTED] astutely cited in her January 3, 2019 letter the *Fullerton* case, which states, “The District’s offer to reassess student was not an option available to the District in repose to the request for an IEE. The only two lawful responses were to agree to an IEE, or to file a complaint asking that its prior evaluation be found to be appropriate.” 58 IDELR 177 at para. 21.

OSD responded to [REDACTED] by claiming that it did not yet have an evaluation in the domain of academics, which distinguishes this case from the *Fullerton* case. However, the point is not so easily won. In *Fullerton*, the parents were disagreeing with the insufficiency of a prior evaluation, and the re-evaluation sought was intended to fill in gaps the prior testing failed to address. Similar to the *Letter to Baus* and *Letter to Carroll*, parents in *Fullerton* argued they were disagreeing with the insufficiency of the prior evaluations because the evaluations failed to consider all areas of suspected disability or potential special education and related service needs. Because the evaluation had gaps, the parent could disagree with the deficient evaluation.

In multiple communications in the instant case, [REDACTED] argued that all education and instruction should be evaluated and requested an IEE in all areas of need, and OSD did not have the right to question the request. [REDACTED] cited 34 CFR 300.502(b)(4), which states:

If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

*Id.* [REDACTED] argued that OSD was unreasonably requesting her to provide an explanation when it requested clarification regarding the evaluation with which she was disagreeing. In essence, [REDACTED] argued that OSD was required to fill the gaps.

On the other hand, a separate line of authority stands for the proposition that LEAs cannot be required to provide a publicly funded IEE every time parent requests some testing beyond the scope of an earlier evaluation. *D.S. by & Through M.S. v. Trumbull Bd. of Educ.*, 357 F. Supp. 3d 166, 176 (D. Conn. 2019), for example, stated, “[T]he IDEA does not create a freestanding right to a publicly financed IEE upon parental demand. Instead, the right to a publicly financed IEE must be premised on an actual *disagreement* with an evaluation that the school district has conducted....After all, the right to a publicly funded IEE turns on the parents’

disagreement with an evaluation that was actually done, not a parent's disagreement with an evaluation that was *not* done. *Id.* (emphasis in the original). Many other cases stand for a similar position. *See e.g. T.P. v. Bryan Cty. Sch. Dist.*, 792 F.3d 1284, 1293 (11<sup>th</sup> Cir. 2015) (“The parental right to an IEE is not an end in itself; rather it serves the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation.”); *S.S. v. Hillsborough Twp. Pub. Sch. Dist.*, 2019 WL 396956, at \*6 (D.N.J. Jan. 31, 2019) (“It is uncontroverted that, at the time Plaintiffs made their request, [LEA] had not yet finished an evaluation....As such, there is no evaluation or re-evaluation with which Plaintiffs disagree, and accordingly, they were not entitled to an IEE at district expense.”); *F.C. v. Montgomery Cty. Pub. Sch.*, No. 2016 WL 3570604, at \*5-6 (D. Md. June 27, 2016) (an IEE at public expense was not granted because there was no evaluation with which the parents could disagree and the district had offered to initiate an evaluation).

While true that evaluations from private sources contained information regarding academics, and there was data from the classroom related to academics, no evidence was introduced at the Hearing or at any other time that suggested OSD had evaluated ██████ in the domain of academics. Otherwise stated, a local expert working for the LEA had not been granted an opportunity to apply a variety of assessment tools and strategies and pull together data from various sources to draw conclusions that would inform the IEP team, including parents. Also, it should not be forgotten that ██████ refused consent for an evaluation. Allowing consent to evaluate does not necessarily abrogate the right to disagree and request an IEE at a future time. Yet, providing consent and allowing OSD to evaluate promotes the basic tenant of the IDEA to create and maintain a “cooperative process...between parents and schools.” *Schaffer*, at 53.

The regulations must be read to maintain a balance between the rights of parents and schools. If taken to the logical extreme, the *Letter to Baus* and the *Letter to Carroll* would allow parents to demand an endless number of IEEs in all possible domains. To maintain balance, the regulations allow LEAs to ask the reason a parent objects to a public evaluation but does not allow the LEA to badger a parent for a protracted explanation. 34 CFR 300.502(b)(4). Similarly, the regulations clearly contemplate that a parent can demand an IEE but only after the parent disagrees with an evaluation that has been conducted by the LEA. 34 CFR §300.502(b). It follows, therefore, if no evaluation exists, there is nothing with which the parent can disagree. In the instant case, claims have been made that ██████ disabilities range from autism, to motor skill

impairments, to disruptive mood regulation. If the LEA is not afforded the opportunity to conduct evaluations in-house with which a parent must disagree, parents could demand IEEs in a plethora of domains unchecked and at public expense. Such an outcome does not strike a proper balance, and I believe, runs counter to the intent of the IDEA and its implementing regulations.

## VI. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and analysis of applicable law, the Hearing Officer makes the following Conclusions of Law:

1. Petitioner demonstrated its occupational therapy evaluation was appropriate, and thus, Respondents are not entitled to a publicly funded IEE in this domain.
2. Petitioner has not been afforded an opportunity to complete an evaluation in the domain of academics, and Respondents have not disagreed with an evaluation in the domain of academics. Thus, Respondents are not entitled to a publicly funded IEE in this domain.

## VII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED that Petitioner has no obligation to provide publicly funded IEE to Respondents in the domains of occupational therapy or academics.

Dated this 5th day of June, 2019.

/s/ Douglas R. Larson

Douglas R. Larson

Hearing Officer

**CERTIFICATE OF SERVICE**

On the 5th day of June, 2019, a copy of the foregoing Amended Decision and Order was sent by electronic email to the following:

Naté Dearden

[nate.dearden@schools.utah.gov](mailto:nate.dearden@schools.utah.gov)

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Respondents, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] actin *pro se*

[REDACTED]

[REDACTED]

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By: /s/ Douglas R. Larson

Hearing Officer

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