

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Student v.
Pembroke Public Schools.

BSEA# 2208187

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC §1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the state special education law (M.G.L. c.71B), and the regulations promulgated under these statutes.

Pembroke Public Schools filed a Hearing Request in the instant matter on March 18, 2022. The Hearing, initially scheduled for April 7, 2022, was continued for good cause to May 20 and June 8, 2022, pursuant to a Parent’s request for postponement.

The Hearing was held remotely via Zoom at the joint request of the parties on May 20 and June 8, 2022, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Parent	
Adam Tiro	Advocate for Parent/Student
Jessica DeLorenzo	Director of Student Services, Pembroke Public Schools
Valerie Charpentier	Assistant Principal, Pembroke Public Schools
Marcia Struk	Pre-School Teacher, Pembroke Public Schools
Erin Grealis	Pre-School Teacher, Pembroke Public Schools
Meaghan Foote	Speech and Language Pathologist, Pembroke Public Schools
Kerri Cantino	Occupational Therapist, Pembroke Public Schools
Jane M. Werner	Stenographer, Doris O. Wong Associates, Inc.
Teddy Hereid	Legal Intern, BSEA (observer)

The official record of the hearing consists of documents submitted by Parent and marked as Exhibits PE-1 to PE-12, and documents submitted by Pembroke Public Schools (Pembroke or the District) marked as exhibits SE-2 to SE-8 (with SE-5 further subdivided SE-5A to SE-5K, and SE-6 subdivided as SE-6A and SE-6B),¹ recorded oral testimony, and written closing arguments. At the conclusion of the testimony on June 8, 2022, Parent orally requested to continue the matter through June 23, 2022 for submission of written closing arguments. This request was verbally granted and Parent was ordered to submit the request for postponement in writing, which Parent subsequently did on June 15, 2022.² The District’s closing argument was received on June 22, 2022, and Parent’s closing argument was received on June 23, 2022.³ The record closed on June 23, 2022.

¹ SE-1, a factual argument created by the District in contemplation of Hearing, was withdrawn at the beginning of the Hearing.

² An Order granting this request was issued on June 16, 2022.

³ Parent’s closing argument was received after business hours on June 22, 2022.

ISSUES FOR HEARING:

1. Whether Pembroke's March 14, 2022 finding that Student was no longer eligible to receive special education services should be upheld;
2. Whether the evaluations conducted by Pembroke in February of 2022 were comprehensive and appropriate such that Student is not entitled to public funding for an independent educational evaluation.

PARTIES' POSITIONS:

Pembroke's Position:

Pembroke asserts that it has satisfied its substantive and procedural obligations toward Student including, but not limited to, Student's reevaluation in early 2022.

According to Pembroke, based on the progress reported at Student's Annual Review meeting on October 22, 2021, the District proposed to advance Student's three-year reevaluation. Parent consented to the proposed evaluations and when the Team met in March 2022 to discuss the results of the evaluations, the Team concluded that Student no longer required special education interventions to make effective progress. Thus, Pembroke's Team terminated Student's eligibility. Pembroke asserts that the Team was justified in reaching the finding of no eligibility. Pembroke further asserts that when Parent rejected the finding of no eligibility and invoked "stay-put" rights, the District honored her request and continued delivering the services pursuant to Student's October 2021 to October 2022 IEP.⁴ In May of 2022, Pembroke offered Student participation in the 2022 extended school year program.

Parent also disagreed with the results of the evaluations conducted by Pembroke and requested public funding for an independent educational evaluation. Pembroke has denied this request and contends that its evaluations were comprehensive and appropriate and asserts that within five days of receipt of Parent's request for an independent educational evaluation, Pembroke requested the instant Hearing to defend its evaluation.

Pembroke seeks a BSEA determination upholding its finding of no eligibility and a finding that its evaluations were comprehensive and appropriate and thus it is not obligated to fund the independent evaluation desired by Parent.

Parent's Position:

Parent challenges the appropriateness of the evaluations conducted by Pembroke and seeks public funding for an independent educational evaluation for Student. She also challenges the District's finding of no eligibility reached at the Team meeting convened in March of 2022 because it takes away all of the services that have proven helpful to Student. Parent agrees that Student has made wonderful progress as a result of the significant supports she has received in

⁴ This IEP was not included in either Parent's or the District's exhibit books, but it was referenced during testimony.

her preschool program. Parent still harbors concerns regarding Student's attentional issues and would like her evaluated for ADHD.

Regarding the 2022 evaluations, Parent asserts that Pembroke failed to inform her that the purpose of advancing Student's three-year re-evaluation was to terminate her eligibility for special education services. Believing that the purpose of the evaluation was to better understand Student's needs and tweak her services, Parent consented to an evaluation inclusive of cognitive testing. Parent states that while Student was making effective progress under the then current IEP (the IEP covering the period from October 22, 2021 to October 21, 2022), she had not yet met all of the goals and objectives in her IEP as reflected in her January 14, 2022 progress reports. Thus, while the IEP was achieving what it intended, Student continued to require the services in the IEP in order to continue making effective progress.

Parent asserts that in failing to properly communicate the true purpose for advancing the evaluation (despite her specific inquiries), Pembroke violated Parent's and Student's procedural due process rights noting that said violation amounted to a denial of FAPE to Student. According to Parent, had she known Pembroke would seek to completely cease services for Student on the basis of the results of its evaluations, Parent would have never consented to advancing Student's three-year re-evaluation; an action which she opined was premature. Parent further asserts that she was uninformed and overwhelmed at the March 2022 Team meeting and states that the District's withholding of information amounted to a denial of FAPE.

Lastly, Parent challenges the appropriateness of the evaluations conducted by the District and she seeks funding for an independent evaluation for Student, inclusive of a full battery of cognitive testing.

FINDINGS OF FACT:

1. Student is a four-year old resident of Pembroke. She is enrolled in the pre-kindergarten program at North Pembroke Elementary School, where, since 2020, she has received special education services. Student has been described as a sweet, caring and sociable child (SE-2; Parent).
2. Student received Early Intervention (EI) services through the Kennedy-Donovan Center, from where she was referred for an initial special education evaluation in Pembroke based on a communication delay (SE-5G). Per her EI report, Student communicated her wants and needs via a combination of gestures and language (60 words) at the time Pembroke conducted its initial evaluation (SE-5K).
3. Student was first evaluated in Pembroke on October 13, 2020, by Marcia Struk, M.Ed., Karen Murphy, M.Ed., and Erin Palicia, MS CCC-SLP. This initial integrated pre-school evaluation sought to ascertain Student's strengths and weaknesses in the areas of gross and fine motor skills, communication/language, and overall developmental status. Student was 2.11 years old at the time of her initial evaluation (SE-5H; SE-5J; SE-5K).
4. Ms. Struk administered the Mullens Scale of Early Learning (Mullens) (SE-5). The Mullens is a developmentally integrated assessment that measures receptive and

expressive language, fine motor abilities, and visual perceptual abilities in younger children. Ms. Struk testified that Student was tested during the 2020 COVID outbreak and she was initially very reluctant to participate in the assessment. Student however, remained seated and was ultimately compliant with the demands. While she was observed to be easily distracted by external stimuli, she responded to redirection. Student attempted most tasks, but did not persist when the tasks became challenging, and she mostly resorted to gestures for communication, especially at the beginning of the evaluation (SE-5K).

5. Student scored in the average range on the visual reception subtest of the Mullens demonstrating “strength” in the measured skills. In the area of receptive language, Student’s performance fell in the below average range as she was “unable to complete some tasks in the younger testing brackets such as ‘following directions’ (15-22 months range) and ‘following related commands’ (22-32 months range)”, despite demonstrating some age-appropriate skills. Student’s expressive language skills also fell below the average range as she was “unable to complete verbal analogies, repeat sentences or answer questions such as: ‘What do you do when you are hungry/tired/thirsty?’” Her expressive language assessment revealed that she was, however, able to access some words and she could label items spontaneously and upon request. Student, however, was difficult to understand due to speaking quickly and softly, conveying a confusing message, and/or because of her tendency to intersperse “jargon words” with “real words.” Her expressive language articulation skills were age appropriate (SE-5K). In the area of fine motor skills, Student performed in the below average range on the Mullens. She was able to imitate vertical and horizontal crayon lines, place pennies in a slot in horizontal and vertical orientations, and stack eight blocks, but she was unable to imitate a four-block train, unscrew a nut and bolt, or string three small beads.
6. Ms. Struk recommended a number of accommodations including “opportunities to learn and interact with similar aged children”, providing “language modeling to support [Student’s] continued development of language skills”, obtaining Student’s “active attention before giving directions”, providing Student “positive praise during learning”, providing “demonstration of tasks before expecting [Student] to complete [said tasks]”, and providing “visual supports as needed to aid in [Student’s] understanding of directions and expectations” (SE-5K).
7. Kerri Cantino, OTR/L, conducted the initial occupational therapy evaluation of Student on October 13, 2020, to assess Student’s fine motor, visual motor and visual perceptual skills (SE-5H). Ms. Cantino used the Grasping and Visual Motor Integration Subtests of the Peabody Developmental Scales 2 (PDMS-2), and made clinical observations while administering her evaluation. She found that Student demonstrated average grasping skills and just below average fine-motor and visual-motor skill development. She recommended numerous accommodations such as “[b]reakdown and demonstration of new tasks”, “[u]se of short/broken crayons and markers”, “[d]aily practice with fine motor strengthening activities”, a “[m]ultisensory approach to new tasks” and giving Student “extra proprioceptive/heavy work activities throughout the day” (SE-5H).

8. Sarah-Ruth Roberts, MSPT, conducted the 2020 initial physical therapy evaluation using the Stationary, Locomotion and Object Manipulation subtests of the Peabody Developmental Motor Scales (PDMS-2) (SE-5J). Ms. Roberts observed Student to be apprehensive during portions of her evaluation. Student was easily distracted and required “heavy tactile cueing and demonstration.” Student demonstrated overall average skills in the Stationary and Locomotive subtests of the PDMS-2. In the object manipulation portion of the evaluation, Student’s skills fell in the below average range. Ms. Roberts recommended accommodations including “[g]ames to promote developing motor planning and execution, core/postural strength and endurance along with body awareness such as Simon Says and Twister”; [b]reakdown of new and complex motor tasks into smaller, achievable parts”; encouraging the “use of both hands crossing midline during games and ball play in sitting, kneeling and standing, to improve hand/eye coordination and object manipulation”; and, encouraging “completion of activities, such as coloring and [P]lay-[D]oh, in the prone on elbows position to improve postural and shoulder girdle strength and endurance” while discouraging “head propping on hands” (SE-5J).
9. Based on the results of the initial evaluation, Student’s Team found her eligible to receive special education services under the category of developmental delay (Parent). An initial IEP, inclusive of extended school year services, was drafted in October of 2020. This IEP contained goals in the areas of classroom readiness, speech and language, and occupational therapy, and offered Student placement in one of Pembroke’s three Full Day Integrated Pre-school classrooms with Ms. Struk (DeLorenzo; Struk). Parent fully accepted this IEP and placement.⁵ Ms. Struk described Student as a model student who attended school regularly (Struk).
10. Student’s Team reconvened on October 22, 2021, to conduct her Annual IEP Review (SE-2). The Team proposed an IEP offering Student participation in the Full Day Integrated Pre-school program in the morning and the Half Day Integrated Pre-school program in the afternoon for the period from October 22, 2021 to October 21, 2022 (SE-2; PE-1). The Team Meeting Notes noted that Student was making great progress in class but was still working on her attention, comprehension, problem solving and readiness skills, and continued to work on her speech and language and OT benchmarks (PE-5).
11. The October 22, 2021 to October 21, 2022 IEP contains goals focusing on pre-school skills, communication (including receptive and expressive language) and fine motor/visual motor skills, and also offered accommodations. The Service Delivery Grid offered in class support (4 x 307.5 minutes/weekly) under Grid B and provided 2 x 30 minutes/week direct communication services by the speech and language pathologist; 1 x 30 minutes/week occupational therapy services by the occupational therapist/COTA; and 4 x 60 minutes/week services during lunch/recess under Grid C. (SE-2; PE-1).
12. The Schedule Modification section of the October 2021 to October 2022 IEP, contains a mark under “No” for Student’s need for a Longer School Year but the description in the

⁵ This IEP was not included in either Parent’s or the District’s exhibit books, but it was referenced during testimony.

box below it states: “Based on regression data, [Student] will require extended school year services in the area of speech/language to prevent regression” (SE-2; PE-1). The corresponding Team Meeting Notes circled “No” next to Extended School Year (*Id.*).

13. Ms. Struk remained Student’s pre-school teacher in the morning program and Ms. Erin Grealis was the teacher in the afternoon integrated pre-school program (Grealis). According to Ms. Grealis, Student has done well in the afternoon program and the curriculum has not needed to be modified for her (Grealis).
14. On December 1, 2021, Parent fully accepted the 2021-2022 IEP and placement (SE-2; PE-1). In February 2022, Ms. Struk reported that Student had made a smooth transition to the afternoon program inclusive of typically developing students and that she demonstrated consistent age-appropriate skill development and social behavior (SE-5D).
15. On January 3, 2022, Ms. Struk emailed Parent suggesting that Student be reevaluated to “look at her current level of need and determine what would be the best support for [Student] going forward” (SE-4; PE-10).
16. Email correspondence between Ms. Graelis, Ms. Palica, Ms. Struk, Michele Sullivan and Ms. Murphy on January 3 and 4, 2022 discusses completion of an “ed b” form. Ms. Grealis asked “have any of you had to fill out an ed b for a kid in your classroom before? ... If yes, let me know I have some questions.” Ms. Palicia responded advising “[t]here was that one year that we had to do it, then not again. I think I did it a couple of times.” Ms. Struk then responded “I will have to do it for [Student] ... I remember doing it for someone else” (PE-6).
17. On January 10, 2022, the District forwarded an Evaluation Consent Form to Parent, offering to conduct an “arena evaluation which consists of speech and language, motor skills and cognitive assessment as well as an educational assessment inclusive of a history of the student’s educational progress and performance in the general curriculum” (SE-4). The Narrative Description of the School District Proposal noted among other standard statements that the “results of the revaluation [would] determine whether [Student] continues to require special education and/or related services in order to access the general curriculum and make effective progress at school” (SE-4). A copy of the Parent’s Notice of Procedural Safeguards was forwarded to Parent at this time. Parent was also provided with the Procedural Safeguards on August 13, 2021, March 16, 2022, and March 18, 2022 (SE-4; DeLorenzo).
18. On January 11, 2022, Parent emailed Ms. Struk noting that in her reading of the paperwork she received it mentioned that evaluations were done every three years and wondering whether that requirement only applied to older students. Ms. Struk responded the same date that “yes, for special education students evaluations are typically done every 3 years to determine level of need. In this case we are testing her before that because the Team feels we need more information now about her level of need to see if her current services and placement best meet her progress” (PE-9).

19. On January 11, 2022, Parent consented to Student's re-evaluation (SE-4).
20. According to her January 14, 2022, Progress Reports Student had made progress in several areas but she had not yet met all of the objectives in the three goals listed in her October 22, 2021 to October 21, 2022 IEP (SE-6B). Specifically, in the goal titled "Pre-school," Student met three of four objectives and was still progressing on the fourth objective. In the Communication goal Student had partially met one objective and was still progressing on the other two objectives. The progress report for the Fine Motor/Visual Motor goal notes that Student was progressing toward meeting the first three objectives and had met the fourth one (SE-6B; PE-3).
21. Between February 1 and February 22, 2022, Pembroke conducted Student's re-evaluation inclusive of a developmental assessment, a speech and language evaluation, and an occupational therapy evaluation (SE-5E; SE-5F; SE-5I).
22. Valerie Charpentier, Pembroke's Assistant Principal and Team Chair completed Part A of Student's Educational Assessment on February 3, 2022. She reported that Student had been making consistent progress in the general curriculum and that her progress was similar to that of her peers (SE-5D). On February 4, 2022, Ms. Struk completed Part B of the Educational Assessment, noting that Student was able to access pre-school level curriculum with "minor accommodations" (*Id.*). Ms. Struk further noted that Student's attention, language, and social skills had improved, although in some instances she still required prompting (*Id.*).
23. On February 8, 2022, Ms. Struk administered the Mullens to Student again. According to Ms. Struk, Student scored within the average range for her age group in the visual reception, receptive language, expressive language, and fine motor assessment domains (SE-5E). While direct services were not recommended, Ms. Struk recommended accommodations inclusive of encouraging Student to expand her language when communicating, gaining her attention before giving directions and providing her with opportunities to learn and interact with similar age peers (SE-5E).
24. Ms. Struk testified that the school psychologist had not been involved in Student's reevaluation. She acknowledged awareness of Parent's concerns for Student's attentional issues but noted that Parent had not specifically requested that this area be evaluated. Ms. Struk testified that despite Student's initial diagnosis of developmental delays, she had no concerns over Student's cognition (Struk).
25. Meaghan Foote, M.S. CCC/SLP, conducted the speech and language reevaluation in small sessions between February 1 and February 17, 2022. She assessed Student's social pragmatic language abilities informally and administered the Clinical Evaluation of Language Fundamentals Preschool- 2nd Edition (CELF-Preschool 2), which assesses receptive and expressive language skills in children ages three to six years old. The CELF-Preschool 2 specifically assesses sentence structure, word structure, expressive vocabulary, concepts & following directions, recalling sentences, basic concepts, and offers word classes-receptive, expressive and total scores. Student's scores in all subtests

of the CELF-Preschool 2 fell within the average range for her age indicating that she did not present with a “speech or language disorder or delay” at the time of this evaluation. Ms. Foote concluded that Student no longer required speech and language services (SE-5F; Foote).

26. On February 3, 2022, Ms. Cantino conducted the occupational therapy re-evaluation of Student. She administered the PDMS-2 again, and the Beery-Buktenica VMI (VMI), and made informal clinical observations. Student’s scores in the PDMS-2 fell solidly within the average range for grasping and visual-motor integration skills (standard scores of 11 and 13 respectively). On the VMI Student scored in the above average range for fine motor skills. Having demonstrated solidly average skills in all measured areas, and pleased with Student’s progress, Ms. Cantino did not recommend any further direct occupational therapy services. She however, recommended accommodations inclusive of ensuring that Student’s desk and chair were at the appropriate height, and that new tasks were broken down and demonstrated for Student (SE-5I; Cantino).
27. Student’s Team convened on March 11, 2022, to discuss the results of Student’s re-evaluation. Based on the District’s evaluation results and progress reports, Student’s Team found Student to no longer be eligible for special education as she was able to access the pre-school curriculum with minor accommodations (SE-5A; SE-5B; SE-5C; SE-5D). At the meeting, Parent was informed that Student’s services would cease the Monday following the Team meeting, but that the District was willing to extend Student’s services through the following Thursday (Parent). Parent testified that she thought she had an amicable relationship with the Pembroke staff but felt blindsided at the Team meeting. She felt overwhelmed and very emotional fearing for Student’s future (Parent).
28. On March 14, 2022, Parent emailed Erika Swift and other Pembroke Team members and evaluators noting her rejection of the Team’s finding of no eligibility and decision to revoke Student’s services by the following week (SE-3; PE-7). In her email, Parent sought confirmation from the District regarding her disagreement with the Team’s determination noting the District’s failure to advise her that Student’s IEP services could be terminated as early as the following week, given that a parent had thirty days to respond to an IEP proposal. Parent invoked Student’s stay put rights and requested funding for an independent evaluation (SE-3; PE-7). Parent questioned the timing of the District’s actions three months short of the end of the school year, expressing concern regarding Student’s potential regression if services were removed, and noting her belief that the reason for Student’s progress was the result of appropriate interventions (SE-3; PE-7).
29. Email correspondence between Jessica DeLorenzo, Pembroke’s Director of Student Services and Ms. Charpentier on March 14, 2022, discussed whether there were any spots available in the AM/PM pre-school programs which Student could attend as a peer as they questioned whether Parent’s request that Student continue to participate in the AM/PM program could be a day care issue (PE-8). Ms. Charpentier responded that there

were no AM spots for Student to attend as a “peer”, but Student could keep her PM spot (PE-8).

30. Via email on March 15, 2022, Ms. DeLorenzo acknowledged Parent’s rejection of the finding of no eligibility and decision to invoke stay put rights (SE-3; PE-7). Ms. DeLorenzo sought additional information from Parent regarding her request for funding of an independent evaluation noting that the District’s evaluation had been comprehensive and asserting the District’s right to conduct additional testing in the areas challenged by Parent as not having been comprehensive enough. She requested that Parent provide clarification within 48 hours to ensure compliance with the District’s mandate to request a Hearing within five days of a parent’s request for funding of an independent evaluation if the District disagreed with the parent’s request and noted Parent’s right to a private evaluation at any time (SE-3; PE-7).
31. On March 16, 2022, Ms. DeLorenzo again emailed Parent explaining that there was no new IEP since Student had been found not eligible to receive special education services and explaining that since Parent had rejected this finding and asserted stay-put rights, Student would continue to receive services consistent with the last accepted IEP (the October 2021 to October 2022 IEP). Ms. DeLorenzo attached a copy of Parental Procedural Safeguards to this email (SE-3; PE-7).
32. Parent responded to Ms. DeLorenzo’s emails on March 17, 2022, inquiring about the possibility of proceeding to mediation instead of a Hearing (SE-3; PE-7). Parent further explained that her challenge to the District’s evaluation appropriateness was that she “consented to testing under the assumption [that] it was to see if any adjustments needed to be made to [Student’s] plan” and that she sought clarification in this regard from Ms. Struk who did not mention that Student’s services could potentially be terminated, and noting that had she known this could be the result, she would have never consented to advancing Student’s evaluation. Parent objected to the testing assessments being administered by individuals who knew and worked with Student and to the instruments being the same Student had been given in 2020 and thus were familiar to Student. Lastly, Parent voiced her belief that Student still needed services to progress (SE-3; PE-7).
33. Via email on March 17, 2022, Ms. DeLorenzo, explained that “[m]ediation is an option regarding the process of rejections when both parties feel there is something to mediate. Unfortunately, the [T]eam feels very strongly that [Student] no longer requires special education in order to access pre-school. She has met her goals and performed average across all domains and assessments” (SE-3; PE-7). The same date Parent responded that she “was not clear on the purpose for testing as it was not explained to [her] correctly. [she] was under the impression the testing was to see if any changes needed to be made, not to determine eligibility” and noting her belief that “the way the testing was presented to me was very misleading and I find that very unfortunate” (PE-7).
34. Via letter dated March 18, 2022, Pembroke formally rejected Parent’s request for funding for an independent evaluation (SE-7). On the same date, Pembroke Requested a Hearing before the Bureau of Special Education Appeals (BSEA) to affirm the District’s finding that Student “no longer require[d] special education services in order for her to access the

pre-school curriculum” and to uphold its denial for funding of an independent evaluation. Pembroke acknowledged Student’s stay put rights, agreeing that her services and placement would remain in place during the pendency of the dispute (SE-7; Hearing Request).

35. Student’s Integrated Pre-school Report through May of 2022, completed by Ms. Struk, shows that Student was frequently or consistently demonstrating expected skills across domains with the exception of “beginning to identify words with similar initial sounds, drawing an x and drawing a square – skills she demonstrated occasionally (SE-6A). The speech and language notes for the period from March 30 to May 3, 2022, show that Student was meeting her targeted goals during this time between 71 and 100% of the time.⁶ A May 5, 2022 occupational therapy progress note states that Student was able to meet most of her goals independently or with verbal cues except for copying a triangle which is a skill that she is not expected to master until age 5.3 (SE-6A).
36. On May 2, 2022, Ms. DeLorenzo wrote to Parent notifying her that Student had been recommended to participate in the 2022 extended school year program running from July 11 to August 4, 2022, where she would receive speech and language services (PE-5).
37. Parent testified that the highest level of education she has achieved is earning a high school diploma and stated that she lacks any formal training or education in special education (Parent). She testified that while Student was capable of making friends and socializing, social communication delays interfered with peer relationships. She explained that Student still speaks in ways that make it difficult for others to understand her as she mixes sentence structures. For instance, instead of saying “Oh, I forgot” Student says “got for.” According to Parent, she still struggles to understand Student who “does a lot of that jumbled speech... the typical person wouldn’t understand that. And there’s multiple instances of that type of speech” (Parent). Parent opined that Student’s IEP was doing what it was intended to do and was helping Student progress. She opined that the District’s actions were premature and would likely have a negative impact on Student (Parent).
38. Ms. DeLorenzo testified that special education teachers at Pembroke are trained on administration of tests by the school psychologist, but they do not receive training on cognitive testing because “they are not qualified to administer a full cognitive assessment such as the WPPSI or the WISC”, those tests are administered by the school psychologist (DeLorenzo). During the 2021-2022 school year Pembroke’s staff did not receive training on administration of the Mullens (Charpentier).
39. Ms. Foote testified that she did not recommend extended school year services for Student for the summer of 2022, because Student was not showing signs of regression after long breaks. According to her, the extended school year services had been left in the October 2021 to October 2022 IEP as a result of a clerical error (Foote).

⁶ No equivalent speech and language information was offered for the period from January to March of 2022.

CONCLUSIONS OF LAW:

The instant case presents a dispute over eligibility and the right to a publicly funded independent evaluation based on a dispute as to whether or not the evaluation conducted by the District was comprehensive and appropriate.

Student was originally found eligible for special education services pursuant to the Individuals with Disabilities Education Act⁷ (IDEA) and Massachusetts special education law,⁸ after an initial evaluation in October of 2020. She has received special education services since that time in accordance with individualized education plans (IEPs) drafted in October of 2020, October of 2021 and pursuant to stay-put rights since March of 2022.

The IDEA and the Massachusetts special education law and pertinent regulations mandate that school districts offer eligible students a free, appropriate public education (FAPE), consistent with an IEP specifically tailored to address the student's unique needs⁹ in a manner "reasonably calculated to "confer a meaningful educational benefit"¹⁰ to the student.¹¹ Additionally, the program and services offered to the student must be delivered in the least restrictive environment appropriate to meet the student's needs.¹²

In 2017 the United States Supreme Court explained the federal standard in holding that a student's program and placement must be "reasonably calculated to enable [the student] to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (2017); *D.B. ex rel. Elizabeth B.*, 675 F.3d 26, 34 (1st Cir. 2012). Public schools, therefore, must offer eligible students a special education program and services

⁷ 20 USC § 1400 *et seq.*

⁸ M.G.L. c. 71B.

⁹ E.g., 20 USC §1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that "emphasizes special education and related services designed to meet their unique needs"); 20 USC §1401(29) ("special education" defined to mean "specially designed instruction ... to meet the unique needs of a child with a disability..."); *Honig v. Doe*, 484 U.S. 305, 311 (1988) (FAPE must be tailored "to each child's unique needs").

¹⁰ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (where the court explicitly adopted the meaningful benefit standard).

¹¹ *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) ("the IEP must be custom-tailored to suit a particular child"); *Mr. I. ex rel L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4-5, 20 (1st Cir. 2007) (stating that FAPE must include "specially designed instruction ... [t]o address the unique needs of the child that result from the child's disability") (quoting 34 C.F.R. 300.39(b)(3)). See also *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) (program must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the various 'educational and personal skills identified as special needs'"); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1st Cir. 1984) ("objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP"); 603 CMR 28.05(4)(b) (Student's IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) ("*Progress effectively in the general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.").

¹² 20 USC 1412 (a)(5)(A); 34 CFR § 300.114. See *Roland M.*, 910 F.2d at 983.

specifically designed for each student based on that student's individual circumstances.¹³ Educational progress is measured in relation to the potential of the particular student.¹⁴ The IDEA does not require that school districts provide what is best for the student.¹⁵

Students found eligible to receive special education services are not only entitled to the substantive components of a FAPE as outlined above, but also to the procedural protections of the IDEA, designed to support the parent-school collaboration envisioned by federal and state special education law. Procedural protections serve a dual purpose: to ensure that each eligible child receives a FAPE, and to provide for meaningful parental participation.¹⁶

In order to prevail on a claim of procedural violations, the Hearing Officer must find that such violations (1) impeded the child's right to a FAPE (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. *Doe ex rel. Doe v. Attleboro Public Schools*, 960 F. Supp. 2d 295 (2013); see *Roland M.* 910 F.2d at 983. *De minimis* procedural errors do not automatically render an IEP legally defective and do not automatically constitute a violation of the IDEA. *Gonzalez v. Puerto Rico Dep't of Educ.*, 969 F. Supp. 801, 804 (D.P.R. 1997). However, flagrant procedural violations that cause a negative impact on a student or on an IEP's ability to adequately deliver an appropriate education are considered a denial of a student's right to a FAPE. *Id.* at 801.

Procedural errors alone may be an adequate basis for concluding that a school failed to provide FAPE. *Id.* at 811. For instance, the failure to convene a Team meeting or propose a new IEP may, in some circumstances, constitute a sufficiently significant procedural violation to result in a *per se* denial of FAPE even in the absence of demonstrable educational harm to the student. See *C. D. v. Natick Pub. Sch. Dist.*, No. CV 19-12427, 2020 WL 7632260 (D. Mass. Dec. 22, 2020).

¹³ *Id.*; see MGL c. 69, s. 1 ("paramount goal of the commonwealth is to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential..."); MGL c. 71B, s. 1 ("special education" defined to mean "...educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . ."); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential...").

¹⁴ *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (1982) (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student). See also *Esposito*, 675 F.3d at 36 ("In most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP."); *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1st Cir. 2008).

¹⁵ See *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F. 3d 80, 83 (1st Cir. 2004) ("IDEA does not require a public school to provide what is best for a special needs child, only that it provides an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.")

¹⁶ *Honig*, 484 U.S. at 311 ("Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness; *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013) ("the IDEA's structure relies upon parental participation to ensure the substantive success of the IDEA in providing quality education to disabled students"); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 891-92 (9th Cir. 2001) ("Procedural compliance is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important. . . An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed.")

The concept of parental participation is intertwined with those of notice and informed consent. The IDEA requires school districts to give parents “written prior notice” whenever the district “proposes to initiate or change” or “refuses to initiate or change” the “identification, evaluation, or educational placement of the child or the provision of a free, appropriate public education to the child.”¹⁷ The federal procedural safeguards require school districts to obtain “informed parental consent” at various stages of the process, including before it conducts an initial evaluation of a child¹⁸ or a re-evaluation.¹⁹

The federal special education regulations at 34 CFR §300.9 define consent to mean that

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought....,
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity,
- (c) The parent understands that the granting of consent is voluntary ... and may be revoked at any time.

If the aforementioned requirements are not met, then there can be no presumption that a parent’s consent has been informed and thus, the consent is not valid. This would constitute a procedural violation.

In determining whether a procedural violation amounts to a deprivation of FAPE, courts have focused on the degree to which school districts offered parents the opportunity to play an important participatory role²⁰ at various stages of the process, including when seeking consent for evaluations and before implementing a program or a placement for a student. This includes deprivation of a parent’s right to meaningful participation where information central to a parent’s ability to provide informed consent has been significantly compromised. As such, the fact finder must consider the totality of the circumstances involved in a particular case when rendering a determination that a procedural violation has prohibited a parent from meaningfully participating in the special education process or impacted a student’s right to a FAPE.

This case is unusual in that while Parent alleges significant procedural violations, including having been misled by the district as to its intention in seeking her consent for Student’s early re-evaluation and having been denied meaningful participation at the Team meeting ending Student’s eligibility (which determination she rejected and invoked Student’s right to stay-put), and while she is also seeking public funding for an independent evaluation, Parent never requested a Hearing before the BSEA. Rather, the case comes to the BSEA on Pembroke’s request for a hearing seeking to confirm that its finding of no eligibility and its denial of Parent’s request for public funding of an independent evaluation were justified. In this regard, Pembroke carries the burden of persuasion to show that its evaluation was comprehensive and appropriate consistent with the Massachusetts law and special education regulations, but the burden of persuasion shifts to Parent regarding the finding of no eligibility. Thus, in order to prevail, each

¹⁷ 20 USC §1415(b)(3)(A) and (B).

¹⁸ 20 USC §1414(a)(D)(i)(I).

¹⁹ 20 USC §1414(c)(3).

²⁰ *Quinelle v. Nashoba Regional School District* (BSEA #2009112).

party must prove its case by a preponderance of the evidence, pursuant to *Schaffer v. Weast*, 126 S.Ct.528 (2005).

In rendering my determination, I rely on the facts recited in the Facts section of this Decision and incorporate them by reference to avoid restating them except where necessary. Guided by these principles, the applicable law, the testimonial and documentary evidence and the arguments offered by the Parties, I find that Pembroke's finding of no eligibility must be set aside because of significant procedural violations which impeded Parent's right to meaningful participation and that Parent is entitled to public funding for the educational evaluation she seeks. My reasoning follows.

I. Finding of No Eligibility:

There is no dispute between the Parties that Student's October 2020 and October 2021 IEPs and placements were fulfilling their intended purpose; that is, providing Student with a FAPE such that she was making effective progress consistent with *Andrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017); see also *D.B. ex rel. Elizabeth B.*, 675 F.3d at 34.

The Parties however, disagree with everything that followed from whence the District proposed to advance Student's three-year re-evaluation in early 2022 and sought parental consent to proceed with said evaluation.

Pembroke asserts that although the October 2021 Team members, inclusive of Parent, found Student eligible to continue to receive special education services and offered her continued participation in morning and afternoon pre-school programs by late Fall of 2021 Student had made such great progress that her teacher questioned whether Student continued to require specialized instruction (Struk, Cantino, Foote). The District then sought Parent's consent to advance Student's three-year re-evaluation in January of 2022, but, never explained to Parent that the results of this re-evaluation could lead to terminating Student's services well before the expiration of her IEP.

Rather on January 3, 2022, Ms. Struk sought Parent's consent for re-evaluation of Student purportedly to "look at [Student's] current level of need and determine what would be the best support for her going forward" (SE-4). Ms. Struk's email was followed by a formal consent form on or about January 10, 2022, along with a Notice of Procedural Safeguards (*Id.*). The Narrative Description in this Form contained standard notifications.

Before accepting the proposed evaluation on January 11, 2022, Parent emailed Ms. Struk questioning why the evaluation was being conducted earlier than three years and wondering whether that requirement applied only to older students. Ms. Struk responded the same date that "yes, for special education students, evaluations are typically done every 3 years to determine level of need. In this case we are testing her before that because the Team feels we need more information now about her level of need to see if her current services and placement best meet her progress" (emphasis added) (PE-9). Believing that the purpose of the evaluation was to better service Student, Parent consented. At no point did Ms. Struk or anyone from Pembroke explain to Parent that given Student's progress Pembroke believed that Student no longer

required special education services, and/ or that the purpose of advancing the evaluations was to obtain information to support the District's position that Student's eligibility and services should come to an end. Parent is persuasive that in order to obtain her consent, the District misled her and that had she been told that the evaluations could be used to terminate Student's eligibility, she would have never consented (Parent). The District's lack of transparency and misrepresentation of the true purpose of the evaluations is the type of procedural violation the federal and state special education statutes and regulations seek to prevent.

As explained in the previous section, informed consent and meaningful parental participation in the planning, developing, delivery, and monitoring of special education services are central components of the IDEA, M.G.L. c. 71B, and the corresponding regulations.²¹

Consistent with federal law, M.G.L. c. 71B, requires parental consent for evaluations and guarantees parental participation in the Team process.²² Teams are charged with the responsibility to review all of the then-current available information, and consider parental input, when making recommendations impacting a student's eligibility and determining the program and placement that meets the student's needs.²³

Parent is persuasive in showing that the District's withholding of information (or at least its failure to accurately explain the purpose of the evaluation), when seeking her consent to move up Student's three-year reevaluations, and the District's failing to explain that the testing could potentially terminate Student's eligibility, was a deprivation of FAPE. When Parent sought clarification for advancing the evaluations, the District again misled her. Her consent was therefore, not informed. Moreover, the District's actions impeded Parent's meaningful participation at the Team meeting where the evaluations were reviewed, wherein the District proposed to terminate Student's special education eligibility. I find that the District's actions and communications around the consent for these evaluations significantly impeded Parent's ability to meaningfully participate in the decision-making process, thus, Parent prevails on her claim regarding a procedural violation.

Pembroke argued that the Narrative Description in the Consent Form warned Parent that Student's eligibility would be reviewed, however, this argument is insufficient to overcome its lack of transparency, as every Team charged with the responsibility of reviewing evaluations and/ or a student's progress must consider a student's eligibility. Given that I conclude that Pembroke's true intentions were other than was explained to Parent when she asked, the District had a responsibility to explain what the evaluation sought to achieve and the potential impact to special education eligibility. It is significant that at that point (and through the conclusion of the March 2022 Team meeting), Parent, who holds a high school diploma and lacks experience and

²¹ See *Bd. of Educ. v. Rowley*, 458 U.S. 405-406 (1982), "... Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard." Also, M.G.L. c. 71B §3. The corresponding regulation 603 CMR §28.07 provides that, "each school district shall obtain informed parental consent" before conducting an initial evaluation, re-evaluation, or extended evaluation, and before placing a student in an initial or subsequent special education program and further require that parents be provided with notice of a meeting²² (including its purpose), and the opportunity to participate at the team meeting.²²

²³ See *Roland M.* 910 F.2d at 992; *In Re: Littleton PS*, 22 MSER 102 (2016); *In Re: Newton PS*, 23 MSER 104, (2015).

education in special education, was not represented by an advocate or an attorney. It is, therefore, not surprising that Parent would have felt blindsided and overwhelmed at the March 2022 Team meeting that proposed to terminate Student's eligibility.

The evidence also suggests that the District's actions in seeking to terminate Student from special education when it did were premature. In addition to having before it the result of the District's re-evaluations, the Team also had Student's January 2022 IEP Progress Reports and Parent's and teacher/ service provider's input to review. The Progress Reports showed that while Student was making effective progress commensurate with her abilities and had met several benchmarks in her IEP goals and objectives, she had not yet met all of the benchmarks in those goals and objectives. This is not surprising, as the IEP period was not yet completed, and it appears reasonable to think Student may have accomplished this by the end of the IEP period in October, 2022. Parent also persuasively testified that Student is still difficult to understand because she continues to make sentence structure mistakes such as saying "got for" instead of "Oh, I forgot" (Parent). While the evidence suggests that Student may perform and communicate more effectively with the structure and facilitation offered within her school programs, it is uncertain how effectively she may be able to communicate with other adults and peers outside the school setting.

It is further troubling that, the Team would have sought to terminate Student's services the week following the March 2022 meeting instead of informing Parent of her procedural rights, including Student's right to stay-put²⁴ in her morning and afternoon pre-school programs under the accepted October 2021 IEP during the pendency of the dispute. Parent ultimately rejected the Team's finding of no eligibility and invoked Student's stay-put rights after reviewing the Procedural Safeguards provided to her by Pembroke and questioning the District's intention to terminate services early. The record shows that after the initial misinformation, the District acknowledged Parent's rejection of the finding of no eligibility and following her request for stay-put per the October 2021 to October 2022 IEP, has consistently continued to deliver the services, program and placement in her IEP.

Lastly, the Parties disagreed on Student's right to extended school year services (ESY) per the IEP from October 2021 to October 2022. The District argued that it had checked the correct box, marking no ESY services needed, and made a mistake in not removing the narrative statement below that box that Student required ESY services in speech and language to avoid regression (SE-2). Parent argued that Student needed the services to avoid regression and that the mistake was in checking the wrong box. Review of the Team Meeting Notes for this Team meeting clearly state that no extended school year services were recommended, thus, it would appear that the District is correct that its mistake was not removing the narrative statement. I find that this issue became moot in early May of 2022, when Pembroke offered Student participation in its 2022 ESY program as it had done the previous year.

Given the significant procedural violations involving lack of informed consent in obtaining evaluations which impacted Parent's meaningful participation at the March 2022 Team meeting,

²⁴ 20 U.S.C. Sec 1415(j); 34 CFR Sec. 300.514; *Honig v. Doe*, 484 U.S. 305 (1988); *Verhoven v. Brunswick School Committee*, 207 F.3d 1, 10 (1st Cir. 1999); *M.R. and J.R. v. Ridley School District*, 744 F.3d 112 (3d Cir. 2014); M.G.L. c. 71B; 603 CMR 28.08(7).

and also considering to some degree the contraindication for termination of services before the Team in the form of the January Progress Reposts and parental input, Pembroke is not entitled to the result it seeks. The March 2022 Team meeting finding of no eligibility is set aside. Pembroke's request to affirm its finding of no eligibility is **DENIED**.

II. Denial of Parent's request for public funding for an independent evaluation:

Generally, school districts are charged with the responsibility to conduct evaluations of students suspected of presenting with a disability that may entitle them to special education and to thereafter periodically evaluate eligible students at least every three years.²⁵ If a district's evaluation is not found to be comprehensive and appropriate, a parent may then be entitled to an independent educational evaluation at public expense.²⁶

Consistent with the federal education statute and regulations, Massachusetts, requires that the evaluation be conducted by "appropriately credentialed and trained specialists", "within 30 school days of receiving parental consent" for said evaluation, and the evaluation must be adapted to the age of the student.²⁷ An initial and three-year re-evaluation assessments must include "an assessment in all areas related to the suspected disability" and an "educational assessment by a representative of the school district."²⁸ Reports of these assessments must be issued to a multidisciplinary team convened to review them and determine eligibility.²⁹

The IDEA and M.G.L. c.71B require that districts re-evaluate eligible students at least once every three years, unless the parent and public agency agree it is unnecessary.³⁰ Subject to the limitation that they not occur more frequently than once a year or less frequently than once every three years unless the parent and the local education agency agree otherwise, subsequent evaluations must be conducted "if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or ... if the child's parents or teacher requests a reevaluation."³¹ A re-evaluation must be individualized, take into account the student's then-current needs and help determine whether the child continues to meet eligibility for special education and related services.³² As part of any re-evaluation, the IEP Team and appropriate professionals, with "input from the child's parents," must "identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ..."³³

The special education statute further requires the use of "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information ..."³⁴ A

²⁵ 20 USC §1414; 34 CFR §300.15; 34 CFR §§300.301 through 311.

²⁶ 34 CFR §300.502(b)(2)(i); 34 CFR §300.502(b)(3).

²⁷ 603 CMR §28.05(2).

²⁸ 603 CMR §28.05(2)(a).

²⁹ 603 CMR §28.05(2)(c).

³⁰ 34 CFR §300.303(b).

³¹ 20 USC §1414(a)(2)(A).

³² 34 CFR §300.305(a)(2).

³³ 20 USC §1414(c)(1)(B)(ii); 34 CFR §300.305(a)(2).

³⁴ 20 USC §1414(b)(2)(A); 34 CFR §300.304(b).

school may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child.³⁵ The student must be assessed in all areas of suspected disability, whether or not commonly linked to the disability category in which the child has been classified,³⁶ including the student’s “social and emotional status.”³⁷ The selected assessment tools must be administered by appropriately credentialed/ trained specialists³⁸, in accordance with the applicable instructions of the instrument’s publisher.³⁹

The evaluation requirements found in 34 CFR §300.304 apply equally to initial and subsequent evaluations. The IDEA does not however require that a school administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information.⁴⁰ Instead, an evaluation must “use technically sound testing instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors.”⁴¹ Moreover, districts must select and administer assessments and evaluation materials that do not discriminate based on race or culture.⁴² Each individual conducting an assessment must also prepare a report of the findings and make them available to the Parent at least two days prior to the team meeting where the report is to be discussed.⁴³

When a parent disagrees with a school district evaluation conducted in accordance with 34 CFR §§300.304 through 300.311 or when a school District fails to assess in a particular area requested by a parent, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability, and the nature and extent of the special education and related services that child needs.⁴⁴

³⁵ 20 USC §1414(b)(2)(B); 34 CFR §300.304(b)(2).

³⁶ See 20 USC §1414(b)(3)(B); 34 CFR §300.304(c)(2) and (6).

³⁷ 34 CFR §300.304(c)(4); see *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1121 (9th Cir. 2016) (finding that the informed suspicions of a consulted outside expert whose report stated that the student displayed autistic behavior established the statutory requirement of suspicion thus necessitating a full assessment for autism); *Dublin Unified Sch. Dist.*, N 2007100454, 108 LRP 32921 (SEA CA, 2008) (where parents did not request an occupational therapy assessment and the district did not have notice of any concerns from the teachers in the areas of occupational therapy or sensory processing, the District had no obligation to conduct an occupational therapy assessment).

³⁸ See 34 CFR §300.304(c)(1)(iv) and 603 CMR §28.04(2).

³⁹ 20 USC §1414(b)(3)(A); 34 CFR §300.304(c)(1); see 603 CMR §28.04(2) (“the school district must ensure that appropriately credentialed and trained specialists administer all assessments.”)

⁴⁰ See, e.g., *Letter to Unnerstall*, 68 IDELR 22 (OSEP 2016); *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); *Letters to Anonymous*, 20 IDELR 542 (OSEP 1993) (“[S]election of particular testing or evaluation instruments is left to the discretion of State and local educational authorities.”)

⁴¹ 20 USC §1414(b)(2)(C); 34 CFR §300.304(b)(3).

⁴² 34 CFR §300.304(c)(1)(i).

⁴³ The “person conducting an assessment shall summarize in writing the procedures employed, the results, and the diagnostic impression, and shall define in detail and in educationally relevant and common terms, the student’s needs, offering explicit means of meeting them. The assessor may recommend appropriate types of placements but shall not recommend specific classrooms or schools. Summaries of assessments shall be completed prior to discussion by the Team and, upon request, shall be made available to the parents at least two days in advance of the Team discussion at the meeting occurring pursuant to 603 CMR §28.05(1).” 603 CMR §28.04(2)(c); 20 USC §1414(b)(4); 34 CFR §300.306(c)(1).

⁴⁴ See *Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015); see also *Administrative Advisory SPED 2004-1: Independent Educational Evaluations*, https://www.doe.mass.edu/sped/advisories/04_1.html (DESE 2003).

A school-based evaluation is a pre-requisite to a publicly-funded independent educational evaluation as such right stems from a parent’s disagreement with the results of the school-based evaluation, or from the parent’s belief that a different area of need should have been evaluated which the school had refused to so evaluate.⁴⁵ Furthermore, the right to request a publicly funded evaluation continues for 16 months following the date of the evaluation with which the parent disagreed.⁴⁶

20 U.S.C. §1415 provides for an “opportunity for parents of a child with a disability to ... obtain an independent educational evaluation of the child ...”⁴⁷ An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the school district responsible for the student’s education. Massachusetts regulations further state that “[a]ll independent education evaluations shall be conducted by qualified persons who are registered, certified, licensed or otherwise approved and conducted by who abide by the rates set by the state agency responsible for setting such rates. Unique circumstances of the student may justify an individual assessment rate that is higher than that normally allowed.” In addition, 34 CFR §300.502(b) provides, in pertinent part, that:

- (1) 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, subject to the conditions in paragraphs (b)(2) through (4) of this section.
- (2) If a parent requests an independent education evaluation at public expense, the public agency must, without unnecessary delay, either -
 - (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
 - (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.”

Similarly, the Massachusetts Special Education Regulations provide that,

- (d) If the parent is requesting an independent education evaluation in an area not assessed by the school district, the student does not meet income eligibility standards, or the family chooses not to provide financial documentation to the

⁴⁵ See CFR §300.502(b)(5). See also, *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 740 (3d Cir. 2009) (finding an IEE was not reimbursable because the parents had already made an appointment for the IEE when they requested the District evaluation and, as such, parents were not challenging the District’s evaluation); *R.L. ex rel. Mr. L. v. Plainville Bd. Of Educ.*, 363 F. Supp. 2d 222, 234 (D. Conn. 2005) (although an independent evaluation may have been useful to the parents, the district was not required to fund the evaluation because “there was no disagreement between the parties over any existing evaluation” when the parents requested the IEE); *In Re: Eleanor and Pembroke Pub. Sch.*, BSEA # 15-03787 (Reichbach, 2015) (“Both Massachusetts and federal special education regulations focus on independent educational evaluations as a tool for parents, subject to certain conditions, to obtain additional information about their children when they *disagree* with an evaluation obtained by a local educational agency” (emphasis added); *In Re: Easthampton Pub. Sch.*, BSEA # 1911816, 25 MSER 143 (Figueroa, 2019); see also *In Re: Abington Pub Sch.*, BSEA # 04-3493 (Figueroa, 2004).

⁴⁶ 603 CMR 28.04(5)(c)(6).

⁴⁷ See CFR §300.502(b).

district establishing family income level, the school district shall respond in accordance with the requirements of federal law. Within five school days, the district shall either agree to pay for the independent education evaluation or proceed to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate. If the Bureau of Special Education Appeals finds that the school district's evaluation was comprehensive and appropriate, then the school district shall not be obligated to pay for the independent education evaluation requested by the parent. 603 CMR 28.04(5)(d).⁴⁸

It is pursuant to the language in this regulation that Pembroke requested a hearing before the BSEA within five school days of the date on which Parent requested funding of an independent evaluation, to show that its evaluation was “comprehensive and appropriate”.

Parent, who has consistently raised concerns regarding Student’s attentional issues, challenged the appropriateness of the District’s evaluation on the basis that Student’s evaluation was not comprehensive enough. Parent asserted that Pembroke initially found Student eligible under the category of developmental delay and stated that Pembroke failed to conduct a cognitive assessment of Student. She also claimed that the Mullens, the only assessment administered by Student’s teacher to ascertain her performance, fails as a measure for cognitive development noting that there are other instruments better suited to evaluate cognition, such as the Wechsler Preschool and Primary Scale of Intelligence (WIPPSI).⁴⁹ Parent did not challenge the District’s occupational therapy evaluation. Similarly, she did not challenge the District’s speech and language evaluation, despite Student’s continued struggles in this area per Parent’s report. Given that Parent never requested a hearing but rather disputed the District’s allegations that its evaluation in all areas of suspected need tested were comprehensive and appropriate, I limit my analysis to the area challenged by Parent, that is the cognitive evaluation.

Pembroke asserts that the Mullens is an appropriate instrument to assess cognition in addition to development and performance noting that the evaluator was properly trained to conduct said evaluation. Pembroke further asserts that a more in-depth evaluation inclusive of cognitive levels is conducted by the school psychologist and that Pembroke did not offer to have the school psychologist conduct any evaluations, nor did Parent request any evaluations by the school psychologist. Parent has not received any degree beyond a high school diploma, lacks training and education in special education, and was unrepresented by an advocate or an attorney. She understood the District’s statement in the consent form calling for an “arena evaluation” consisting of “speech and language, motor skills and cognitive assessments”, as well as an educational assessment inclusive of a history of the student’s educational progress and

⁴⁸ In the instant case neither Party alleges that Student is a recipient of free lunch or that Student is financially eligible to bypass the appropriateness and comprehensiveness requirement. No financial documentation was requested or received.

⁴⁹ Other instruments similarly appropriate when assessing the development of a pre-school-aged child would have been the Developmental Assessment for Young Children- Second Edition (DACY-2), which “provides a picture of typical skills along the developmental profile of preschoolers”, and the Comprehensive Assessment of Spoken Language, 2nd Edition (CASL-2) and the Bracken Basic Concept Scale, Third Edition (BBS-3) useful when assessing a student for developmental delays. See *In Re: Student and Mendon-Upton Regional School District*, BSEA # 22203125 (Mitchell, March 3, 2022).

performance in the general curriculum to mean that cognitive testing by a qualified professional would be conducted (SE-4). This however, was not the case.

I find the District's argument that a psychological assessment was not proposed unpersuasive, as the District's consent form does not specifically state that the speech and language evaluation would be conducted by the speech and language evaluator or that Student's motor skills would be assessed by the occupational therapist, and yet, both assessments were conducted by properly credentialed individuals (SE-5F; SE-5I; Foote, Cantino). The District's Consent Form called for "cognitive assessments", and it is understandable that Parent, in her limited knowledge, would have assumed that a more in-depth cognitive evaluation by a properly credential individual, would have been performed, especially where the District's initial criteria for finding Student eligible to receive special education services was developmental delays.

Moreover, the email exchange on January 3 and 4, 2022 among Ms. Grealis, Ms. Palica, Ms. Struk, Ms. Sullivan and Ms. Murphy regarding lack of experience and familiarity with portions of the evaluation/ paperwork they would have to complete (PE-6), and Ms. Charpentier's statement that no training in the Mullens had been given during the 2021-2022 school year, without mentioning the last time the District teachers had been trained in this assessment is concerning.

The District's decision to conduct only the Mullens, is insufficient to defend its position that the cognitive assessment instrument it selected was comprehensive and appropriate, given that there were other instruments that could have been administered that, together with the Mullens, would have offered a better understanding of Student's cognition. In light of the preceding, Parent is entitled to public funding for an independent evaluation that assesses Student's cognitive functioning at the applicable state rate.

ORDER:

1. Pembroke's finding of no eligibility is set aside.
2. Pembroke shall fund an independent educational evaluation at the current state rate, by a qualified individual, that assesses Student's cognitive functioning.

By the Hearing Officer,

Rosa I. Figueroa

Rosa I. Figueroa
Dated: July 18, 2022

I note my appreciation to Teddy Hereid, BSEA legal intern, for his contributions to this Decision.

July 18, 2022

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

PEMBROKE PUBLIC SCHOOLS

BSEA # 2208187

BEFORE

**ROSA I. FIGUEROA
HEARING OFFICER**

**ADAM TIRO, ADVOCATE FOR PARENT
JESSICA DELORENZO, DIRECTOR OF STUDENT SERVICES,
PEMBROKE PUBLIC SCHOOLS**