

**BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION  
STATE OF NEBRASKA**

**LANCASTER COUNTY SCHOOL )  
DISTRICT NO. 55-0145 )  
Commonly known as )  
Waverly School District 145, )  
14511 Heywood St. )  
Waverly, NE 68462 )**

**CASE NO. 19-10 SE**

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER**

**Petitioner,**

**vs.**

**Respondents.**

This case was heard on the March 3, 2020, at the Waverly Central Office conference room, Waverly School District 145, 14511 Heywood, Waverly, NE 68462. Mona (Molly) Burton, the duly qualified and appointed Fair Hearing Officer, presided. Petitioner, Waverly School District, No. 55-0145, commonly known as Waverly School District 145, was represented by attorney, Karen Haase. Respondents, were present and represented by Amy Bonn. The hearing officer granted the Respondents' request to have the hearing open to the public. The hearing was recorded by Jill Pilkington, Registered Merit Court Reporter. The case was adjourned on March 3, 2020, the record closed, written arguments scheduled, and the case taken under advisement. The parties subsequently stipulated to extending the final argument deadline along with the hearing officer's ruling and decision. The hearing officer's decision was extended to June 4, 2020.

Jurisdiction is premised upon NAC Title 92 Ch. 55, § 005.01, and the Nebraska Special Education Act, *Neb. Rev. Stat. § 79-1110 et. seq.*, which confers on the hearing officer exclusive original jurisdiction of this case.

Petitioner, Waverly School District (“WSD”) filed a Petition requesting a due process hearing to determine whether it appropriately denied Respondents’ request for an Independent Education Evaluation (“IEE”) at public expense. (Ex. 1) Respondents answered the Petition denying the allegations that the IEE was not warranted and requested the hearing officer to order the IEE at public expense along with attorney fees. (Ex. 2).

The following witnesses testified at the hearing:

- [REDACTED] Respondent and [REDACTED] mother.
- Angie Cobelens, WSD school psychologist. Ms. Cobelens has a Master’s degree in Educational Psychology as well as an Educational Specialist degree from the University of Nebraska, Lincoln. (80:1-10; 82:1-23). Ms. Cobelens is certified and endorsed to serve as a school psychologist in Nebraska. (84:7-10) She has been performing psycho-educational testing on WSD students for 26 years. (84:11-15)
- Jill McClaslin-Timmons, school psychologist for Fairbury Public Schools. (218:1-5) A nationally certified school psychologist, Ms. McClaslin-Timmons has an Education Specialist degree and a Ph.D. in Educational Leadership. (219:1-3; 219:13-14) She has assessed hundreds of students and has experience assessing and testing for Specific Learning Disabilities (SLD). (220:11-18)
- Stephanie Jones, WSD Occupational Therapist. (237:15-17) Ms. Jones works with students that have deficits in motor skills. (237:24-25)

- Kyla Blum, WSD Speech and Language Pathologist. (282:14-19) Ms. Blum has experience in assessing overall communication deficits, both expressive and receptive. (286:19-25)

- Delanie McMillan, WSD Director of Student Services. (331:25) Ms. McMillan oversees special education services at WSD. (331:13-17) She is certified and endorsed as a special education supervisor and participates in Individual Education Plan meetings (“IEP”) and Multidisciplinary Team Meetings (“MDT”). (331:25; 332:5-8) She has experience reviewing educational evaluations. (332:9-333:1)

- Respondent and father.

Exhibits 1 through 13, 15, 19 through 30, 32, 33, 35 through 40, 42 through 58, 60 through 65, 67 through 70, 73 and 76 were received without objection.

### **FINDINGS OF FACT**

#### ***STIPULATED FACTS:***

The parties stipulated to the following facts (Ex. 70):

- 1.
2. are residents of WSD 145.
3. WSD 145 serves as the Local Education Agency for
4. From October 27, 2016, to October 15, 2019, has been verified as a student with a SLD. During that time, received specialized instruction and supplementary supports pursuant to an IEP.
5. In August 2019, the school district began the process to undertake triennial reevaluation pursuant to 92 NAC 51 § 006.051B1 to determine if remained eligible for special education services under the Individuals with Disabilities Education Act (“IDEA”). The school district

recommended assessment in the areas of academic achievement, review of educational records including teacher input and classroom observation.

6. On August 18, 2019, [redacted] parents sent WSD a parent concern letter requesting that the school conduct a comprehensive evaluation for [redacted] in the following additional areas: psychological evaluation to determine learning potential, expressive oral language, expressive written language, receptive oral language, receptive written language, intellectual function, cognitive processing, including language, memory, working memory, auditory processing, visual processing, visual motor integration, reasoning abilities, and executive function, fine motor skills, visual processing, and phonological processing; tests to determine the level of functioning in basic skill areas of reading, spelling, and math; and a review of developmental and medical records. (Ex. 39)

7. WSD agreed to conduct additional assessments of [redacted] in the areas of intellectual assessment, review of developmental and other medical records and assessment of executive functioning skills.

8. WSD refused to conduct assessments in the areas of fine motor/visual perceptual assessment.

9. WSD refused to conduct additional assessments in the area of expressive and receptive language assessment.

10. After the October 27, 2016, MTD and prior to the assessments conducted as part of the October 15, 2019, MDT, [redacted] was tested by WSD staff using the following educational evaluations:

- a. Kaufman Test of Educational Achievement-Third Edition (“KTEA-3”)
- b. Wechsler Intelligence Scale for Children-Fifth Edition (“WISC-V”)
- c. Fountas & Pinnell Benchmark Assessment
- d. Clinical Evaluation of Language Fundamentals-5<sup>th</sup> Edition (“CELF-5”)

11. Between October 27, 2016, and September of 2019, \_\_\_\_\_ was tested by private providers or, where noted, Lincoln Public Schools' ("LPS") staff, using the following educational evaluations:

- a. Woodcock-Johnson IV ("WJ-IV") ± Tests of Achievement Form A
- b. Woodcock-Johnson IV("WJ-IV") ± Tests of Oral Language
- c. Comprehensive Test of Phonological Processing-Second Edition ("CTOPP-2")
- d. Gray Oral Reading Test-5th Edition ("GORT-5")
- e. Woodcock Reading Mastery ("WRMT")
- f. Test of Silent Reading Efficiency and Comprehension ("TOSREC")
- g. Test of Word Reading Efficiency ("TOWRE")
- h. Fountas & Pinnell Benchmark Assessment
- i. Words Their Way Elementary Spelling Inventory
- j. Houghton Mifflin Phonics Screener
- k. Read Naturally
- l. AimsWeb Maze/Comprehension
- m. Morrison McCall Spelling
- n. AimsWeb Mathematics
- o. Qualitative Reading Inventory ("QRI -6")
- p. Peabody Picture Vocabulary Test - 4th Edition ("PPVT-4")
- q. Developmental Eye Movement Test ("DEM")
- r. Developmental Test of Visual-Motor Integration ("VMI")
- s. Wechsler Individual Achievement Test - Third Edition ("WIAT-III") (LPS)

- t. Test of Reading Comprehension-Fourth Edition (“TORC-4”) (LPS)
- u. Wechsler Intelligence Scale for Children-Fifth Edition (“WISC-V”) (LPS)

12. As part of the triennial reevaluation, School Psychologist Angie Cobelens conducted a School Psycho-educational Assessment. In that assessment, Ms. Cobelens administered the following educational evaluations to [redacted]: (Ex. 57)

- a. Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V)
- b. Comprehensive Test of Phonological Processing - Second Edition (CTOPP-2)
- c. Kaufman Test of Educational Achievement - Third Edition (KTEA-3)
- d. Behavioral Rating Inventory of Executive Function - Second Edition (BRIEF-2)
- e. Measures of Academic Progress testing

13. School Psychologist conducted a time on task observation of [redacted] in a classroom setting on August 27 and 29, 2019.

14. Each of the assessments and other evaluation materials used to assess [redacted] were:

- a. selected and administered so as not to be discriminatory on a racial or cultural basis; and
- b. were provided and administered in the child’s native language or other mode of communication.

15. On or about October 15, 2019, a MDT convened for [redacted] triennial reevaluation. The MDT concluded that the Student was not eligible for IDEA services. [redacted] parents disagreed with the MDT’s conclusions. (Ex. 55)

16. On December 3, 2019, Petitioner provided Respondents prior written notice of Petitioner’s determination that the Student was ineligible for IDEA services. (Ex. 63)

17. On or about October 18, 2019, Petitioner received correspondence from the respondent in which the Respondent requested “an IEE at public expense for our child, (35:80-11)

(Ex. 58)

18. Petitioner sought clarification regarding the grounds upon which the Respondents objected to Petitioner’s evaluation in correspondence provided on October 25, 2019.

19. Attached to the correspondence described in Paragraph 8, Petitioner provided Respondent the policy and criteria applicable to IEEs.

20. On December 12, 2019, Petitioner provided Respondent prior written notice of Petitioner’s decision to deny the request for a publicly funded IEE. The notice described in Paragraph 11 further advised Respondent of the Petitioner’s intent to file this petition pursuant to 92 NAC 51 § 006.07D1. (Ex. 65)

***ADDITIONAL FINDINGS OF FACT:***

After hearing and reviewing the evidence, the hearing officer makes the additional findings of fact:

21. Prior to transferring to WSD in the 2016-17 school year, attended St. Patrick’s Catholic School and was evaluated by LPS staff to determine if qualified to receive special education services. The evaluation determined that had a SLD in reading comprehension. (14:21-15:8; 87:5-7) (Ex. 73)

22. WSD accepted the SLD determination and provided services pursuant to IEP. (90:24-91:6)

23. Reading Comprehension is one of the 13 verified SLD categories. (91:7-12)

24. Rule 51 requires students verified with a SLD to be reevaluated every three years to determine if the verification still exists. (97:23-98:19) This is referred to as a triennial evaluation. (98:3-5)

25. Nebraska recognizes three ways to verify a student as having a SLD. (94:5-8) WSD employs the discrepancy model. (95:6-8) This involves gathering data on the student's cognitive or intellectual ability and academic achievement. The two are then compared to determine whether there is a significant discrepancy. (95:14-21) A significant discrepancy occurs if there is a 20 standard score point or more difference between the best estimate of cognitive agility and academic achievement. (95:21-25) Even if there is a 20 point gap, the achievement score must fall below the average score of 85. (97:13-16) It is possible for a child to have a standard score above 85 with a 20 point discrepancy to be verified with a SLD, but there must be a showing of significant impact and a need for specialized instruction and support. (176:21-177:3)

26. While a student at WSD, \_\_\_\_\_ earned mostly A's and B's. In 5<sup>th</sup> grade \_\_\_\_\_ earned four C's, three in spelling and one in reading. (Ex. 67)

27. Respondents privately obtained evaluations of \_\_\_\_\_ 'to adequately understand \_\_\_\_\_ struggles, and to adequately get \_\_\_\_\_ needs met with whatever accommodations and instruction \_\_\_\_\_ needs to continue to be successful.'" (77:11-14)

28. Respondents had concerns that \_\_\_\_\_ was not comprehending text, was possibly dyslexic, and had an underlying language weakness. (49:1-50:6) Respondents observed \_\_\_\_\_ to struggle with understanding what \_\_\_\_\_ was reading. (57:15-19) \_\_\_\_\_ had struggled with reading since Kindergarten. (50:22-51:2)

29. Respondents obtained an educational evaluation performed by Trudy Odle on August 3, 2017. Ms. Odle's diagnostic impression was that \_\_\_\_\_ had a SLD with accompanying slow processing speed. (Ex. 8 at 6) Ms. Odle made several recommendations including maintaining an IEP. (Ex. 8 at 9)

30. Respondents additionally, in 2017, obtained a speech-language communication evaluation for [redacted] from the Barkley Clinic with the University of Nebraska, Lincoln. (Ex. 9) The evaluation recommended additional interventions related to reading comprehension and evaluations and data collection to analyze [redacted] expressive and receptive language skills. (Ex. 9 at 5)
31. Respondents provided both evaluations to the WSD. (38:12-15) In 2018, Respondents requested WSD conduct a speech-language communication evaluation. (38:12-22)
32. Responding to this request, Keri Wiseman, WSD Speech Pathologist, first conducted a screening and then determined [redacted] should undergo a full communication evaluation. (297:1-298:9) Ms. Wiseman administered the CELF-5 to measure overall language skills, receptive language skills and expressive language skills. (299:15-24) The evaluation revealed that [redacted] had below average receptive language skills. (302:5-6)
33. Not every student with below average receptive language skills qualifies for special education. (301:15-18) The deficit must also be educationally relevant or negatively impact the student in the classroom. (301:20-23) Ms. Wiseman also observed [redacted], both inside and outside the classroom and collected data from [redacted] teachers. (303:14-18) Ms. Wiseman concluded that [redacted] did not have a language impairment that negatively affects [redacted] in the classroom. (303:23-25) (Ex. 24 at 7)
34. Kayla Blum, WSD Speech Pathologist, concurred with this conclusion. (306:3-6) The 2018 MDT found that [redacted] did not verify as a student with a speech-language impairment. (308:2-5)
35. Respondents requested additional testing of [redacted] expressive oral language, expressive written language, receptive oral language and receptive written language as part of [redacted] triennial evaluation (313:3-11; 314:21-315:1)

36. In response, Ms. Blum reviewed \_\_\_\_\_ file, including previous assessments as well as MAP scores to determine whether there was any educational impact. (315:9-11) 316:9-16) The MAP data indicated that \_\_\_\_\_ did not need a formal communication evaluation. (317:2-6) Ms. Blum additionally asked \_\_\_\_\_ teachers to respond to 40 questions. (Ex. 50) (318:17-20) In order to find a need for a full evaluation, 50 percent of \_\_\_\_\_ teachers would need to respond “sometimes”, “often” or “always”. (321:3-8) Not one question posed came back with the needed 50 percent response. (Ex. 50) (321:9-13) Ms. Blum concluded that if there were any communication deficits, \_\_\_\_\_ did not suffer from any negative educational impact. (321:20-25) Ms. Blum additionally reviewed \_\_\_\_\_ work samples finding support that a formal evaluation was not warranted. (322:12-15) Based on this data, Ms. Blum did not feel that a classroom observation was necessary and the classroom observation conducted in 2018 was sufficient. (322:3-11)

37. Prior to \_\_\_\_\_ triennial evaluation, Respondents requested a fine motor/visual perceptual assessment. This request would be performed by an occupational therapist. (244:11-245:7)

38. Occupational therapy (“OT”) is a related service offered to a student who has been verified under one of the 13 SLD categories. (242:23-243:2)

39. Occupational Therapy in a clinical setting looks for a particular dysfunction and attempts to remedy the dysfunction. (238:8-10) In an educational setting, the therapist looks to see if the child’s abilities match what he/she is being asked to do in the classroom. (238:11-15)

40. Stephanie Jones, WSD Occupational Therapist, has experience screening students who may have fine motor skills, gross motor skills and sensory issues. (241:17-242:1)

41. Before an educational occupational therapist performs an evaluation, he/she first gathers data and performs a screening to determine what if any tests may be needed and whether any of the alleged concerns are affecting the student in the classroom. (240:9-241:1)

42. Ms. Jones follows this protocol. (243:20-244:4)
43. Based on the Respondents' August 2019 request to evaluate fine motor skills and visual motor integration, Ms. Jones started the screening process. (244:25-245:12) (Ex. 39) Ms. Jones was looking for trends across multiple classroom settings that the behaviors noted by Respondents were present on a significant basis and, if so, whether the behaviors interfered with ability to participate in the classroom. (248:20-25)
44. Ms. Jones sent teachers a list of questions and ratings. (Ex. 249) (249:16-20) On two occasions, a teacher responded that performed below peers. (262:12). This did not indicate the need for a full evaluation as it was not significant compared to the majority of responses that rated the "same" or "better" than peers. (262:11-18) Over ninety-five percent of the responses rated as the "same", "better" or "much better" than peers. (262:24-263:4) A little over two percent of the responses rated "below" peers. (263:5-8) (Ex. 40)
45. Ms. Jones observed in the classroom to see how held a pencil as well as posture and sitting position. (266:3-8) behaviors were typical as compared to peers. (266:14-18)
46. Ms. Jones also reviewed work samples. (Ex. 49) (268:2-4) Based on the samples, abilities were at least the same if not better than peers. (268:17-21) handwriting did not indicate that needed an evaluation. (269:2-21)
47. Based on the data collected, Ms. Jones determined OT was not an area of need for (270:13-15)

48. Respondents procured an OT evaluation in September 2019. (39:13-18) Respondents provided this evaluation to WSD. (39:22-40:1) The evaluation recommended OT one time weekly for 2-3 months to help with sensory processing skills, fine motor skills, ocular motor skills, bilateral coordination, motor planning and self-regulation. (Ex. 52 at 10). The report further recommended an OT consult at school as needed. (Ex. 52 at 10)

49. Ms. Jones reviewed the private OT evaluation obtained by the Respondents and the MDT considered the evaluation. (273:23-274:3) Ms. Jones did not observe or see any evidence that struggled with the concerns outlined in the evaluation. (274:9-16)

50. To prepare for triennial evaluation, Ms. Angela Cobelens, WSD School Psychologist, reviewed previous evaluations. (107:18-108:4)

51. Ms. Cobelens also reviewed Measure of Academic Progress (“MAP”) testing scores. (126:14-15). MAP is a test given by the school districts to measures a student’s progress in the areas of reading, math, language usage, and science. (126:17-25) Fall 2019 MAP scores showed scored in the 70<sup>th</sup> percentile in math, 81<sup>st</sup> percentile in reading, 45<sup>th</sup> percentile in language usage, and 71<sup>st</sup> percentile in science. (Ex. 44) (130:2-8) scored in the average range in all areas. (131:7-10) . MAP scores from the Fall of 2018 to the Fall of 2019 showed a growth rate in the 98<sup>th</sup> percentile for math, 99<sup>th</sup> percentile in reading, 67<sup>th</sup> percentile in language usage and 19<sup>th</sup> percentile in science. (133:11-24) (Ex. 46) These scores placed in the average range of students in the MAP assessment. (133:25-134:3)

52. scored below WSD’s and the State’s average in English Language Arts under the 2019 Nebraska Student-Centered Assessment System (“NSCAS”). However, score was still considered in the average range. (Ex. 35) (141:19-24) scores in math were above both

WSD's and the State's average. (141:25-142:2) Ms. Cobelens reviewed this information when completing her assessment. (142:24-25)

53. Ms. Cobelens additionally observed \_\_\_\_\_ in the classroom and found \_\_\_\_\_ behavior "unremarkable" compared to \_\_\_\_\_ peers. (145:21-25) (Ex. 42 and 43) \_\_\_\_\_ on-task behavior was appropriate and she noted nothing significant regarding \_\_\_\_\_ ability to follow directions, start a task, or interact with peers. (146:2-6) \_\_\_\_\_ classroom behavior was in the average range. (146:8-12)

Ms. Cobelens observed \_\_\_\_\_ listening to a whole group discussion, taking notes, and listening to \_\_\_\_\_ teacher's assignment explanation. (205:6-16)

54. Ms. Cobelens gathered information from \_\_\_\_\_ teachers, asking them about their observations of \_\_\_\_\_ processing speed. \_\_\_\_\_ teachers noted no concerns. (208:11-17) Ms. Cobelens concluded that if \_\_\_\_\_ had issues with low processing \_\_\_\_\_ was compensating in the classroom. (208:18-23)

55. As part of her assessment, Ms. Cobelens requested information from Respondents concerning \_\_\_\_\_ executive functioning. (Ex. 38) (147:17-20) Respondents' concerns with \_\_\_\_\_ organization, handwriting and attention did not align with executive functioning scales performed by WSD. (148:13-149:4)

56. Ms. Cobelens tested \_\_\_\_\_ cognitive and/or intellectual abilities with the WISC-V. (149:5-7; 150:6-9) (Ex. 57) The WISC-V provides certain subtest scores and certain composite scores. These scores demonstrate a child's intellectual functioning in specific cognitive domains or indexes. The test also provides a composite score, either the full scale IQ ("FSIQ") or General Ability Index ("GAI"). (179:8-19) The WISC-V requires administration of 7 of 16 subtests to determine a child's FSIQ. (152:5-7) The seven subtests are: similarities, vocabulary, block design,

matrix reasoning, figure weights, digit span, and coding. (182:3-7) Each index (Visual Comprehension, Visual Spatial, Fluid Reasoning, Working Memory, and Processing Speed) has two subtests. (Ex. 57) The GAI is determined with five subtests and is less reliant on working memory and processing speed. (152:10-13; 157:12-14) One subtest for working memory and one for processing speed is removed to determine the GAI. (157:15-17). Evaluators may use a child's GAI instead of FSIQ when determining a child's cognitive ability. (186:5-9)

57. In 2016, LPS used GAI when assessing [redacted] cognitive ability because there was a significant difference between [redacted] processing abilities as opposed to [redacted] other abilities. (191:6-17) LPS used coding and symbol search when assessing [redacted] Processing Speed Index. (194:11-15) When assessing GAI, the coding subtest was set aside. (193:11-13)

58. Ms. Cobelens substituted cancellation for the coding subtest to ascertain [redacted] Processing Speed Index score because she noticed a trend of declined performance due to differences between WISC-IV and WISC-V. (154:10-14) Students with perfectionistic or OCD tendencies were not performing as well and she did not believe the coding subtest was an accurate measure of their abilities. (154:15-19; 155:7-9) Teachers reported to Ms. Cobelens that [redacted] exhibited perfectionistic tendencies. (156:2-6) Ms. Cobelens made the decision to substitute cancellation for coding in all evaluations. (156:10-22)

59. The publisher's guidelines for administering WISC-V allows subtest substitution, and specifically cancellation for coding, when determining FSIQ, but only when a child's physical condition interferes with performance or if a FSIQ subtest is invalidated for any reason. (Ex. 69) Ms. Cobelens admitted that [redacted] did not have any physical conditions that interfered with [redacted] test taking performance. (184:13-16) Further, Ms. Cobelens did not have to invalidate any of the

subtests. (184:23-7) Ms. Cobelens also admitted that a practitioner would need a good reason applicable to the particular child to warrant a subtest substitution. (185:16-20)

60. According to the WISC-V manual, the two subtests for processing speed are coding and symbol search. (195:5-9) The WISC-V manual does not permit subtest substitution for any of the primary index scores. (195:14-17; 233:9-13)

61. Ms. Cobelens determined FSIQ and GAI to be 104. (158:7-12) To determine GAI, Ms. Cobelens removed the digit span subtest for working memory and the cancellation subtest for processing speed. (157:18-23) Because FSIQ and GAI were the same, it did not matter which was used for the purposes of identifying whether a student is verified with a SLD. (226:8-14) 2016 and 2019 cognitive scores of 102, 104, 109, and 104 were consistent. (226:17-20) Scores within 5 standard points are considered the same score. (227:3-7)

62. Ms. Cobelens assessed executive functioning, an area of concern raised by Respondents, with the Behavioral Rating Inventory of Executive Function ("BRIEF"). (166:22-167:18). Scores from self-report, teachers and parents showed was in the average range except one parent noted that was at risk on the Inhibit Scale (168:15-25)

63. Ms. Cobelens found that no longer met the eligibility criteria for a SLD. (169:25-170:1) did not have an achievement score that fell below the 20 standard score point cutoff. (170:10-13) Further, standard scores did not fell below 85 as indicated in the KTEA-3. (Ex. 57 at 4) Additionally, a review of data from teachers along with state-wide testing indicated that skills were in line with the evaluation results. (Ex. 57 at 8) There was no indication from classroom observation and survey results that executive functioning skills were negatively impacting learning. (Ex. 57 at 8)

64. The MDT agreed with Ms. Cobelens' recommendation. (Ex. 55 at 3)

65. After Respondents requested an IEE, school principal sent Respondents an email, titled Clarification of Request. (Ex. 61)

### CONTESTED ISSUES

The parties stipulated that, with regard to the reevaluation of conducted by the School District between August and October 2019, the following constitute the 13 contested issues in this matter which remain for the Hearing Officer's determination (Ex. 70):

(1) Whether the School District assessed using a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about including information provided by the parent, and information related to enabling to be involved in and progress in the general education curriculum.

(2) Whether the tests and other evaluation materials used by the School District to assess include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Whether the School District ensured that a single measure or assessment was not used as the sole criterion for determining whether is a child with a disability.

(4) Whether the School District assessed in all areas related to suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(5) Whether the School District's evaluation of was sufficiently comprehensive to identify all of special education and related service needs, whether or not commonly linked to the disability category in which had previously been classified.

- (6) Whether the School District's refusal to evaluate \_\_\_\_\_ in areas specifically requested by parents was appropriate.
- (7) Whether the School District used technically sound instruments to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors affecting \_\_\_\_\_ educational performance.
- (8) Whether the School District used assessment tools and strategies that provided relevant information that directly assisted persons in determining the educational needs of \_\_\_\_\_
- (9) Whether the school district, in interpreting evaluation data for the purpose of determining if \_\_\_\_\_ is a child with a disability:
- a. correctly administered assessments in the attainment of evaluation data;
  - b. drew upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and
  - c. ensured that information obtained from all of these sources was documented and carefully considered.
- (10) Whether each of the assessments and other evaluation materials used by the School District to assess \_\_\_\_\_ were provided and administered in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer.
- (11) Whether each of the assessments and other evaluation materials used by the School District to assess \_\_\_\_\_ were used for purposes for which the assessments or measures are valid and reliable.
- (12) Whether the standardized tests that were administered to \_\_\_\_\_ by School District staff have been validated for the specific purpose for which they are used and were administered by trained

and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

(13) Whether the School District wrongfully required \_\_\_\_\_ parents to provide an explanation for their request for an independent educational evaluation at public expense.

### CONCLUSIONS OF LAW

#### ***BURDEN OF PROOF:***

66. IDEA and Rule 51 of the Nebraska Department of Education allow for publicly funded IEEs if the parent disagrees with an evaluation obtained by the school district, unless (1) the district demonstrates in a due process hearing that its own evaluation of the child was appropriate; or (2) the district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. 92 NAC § 51 006.07(D).

67. The burden of proof in a due process hearing routinely rests on the Petitioner. Accordingly, the burden in this case is on WSD to show by a preponderance of the evidence, that it's evaluation of \_\_\_\_\_ satisfied IDEA's requirements and procedures. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005).

***Contested Issues 4, 5 and 6: Whether WSD assessed \_\_\_\_\_ in all areas of suspected disability in a comprehensive fashion designed to identify all of \_\_\_\_\_ special education needs and whether WSD's refusal to evaluate \_\_\_\_\_ in the areas of communication and occupational therapy was appropriate.***

68. School districts and approved cooperatives must ensure the child is assessed in all areas related to the *suspected* disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 92 NAC 51 § 006.02C10 (emphasis provided).

69. Child with a disability means a child who has been verified as a child with autism, a behavior disorder (herein referred to as emotional disturbance), deaf-blindness, a developmental delay, a hearing impairment including deafness, an intellectual disability, multiple impairment, an orthopedic impairment, another health impairment, a specific learning disability, a speech-language impairment, a traumatic brain injury or a visual impairment including blindness, *who because of this impairment needs special education and related services*. 92 NAC 51 § 003.08 (emphasis provided). *See also*, 20 U.S.C. § 1401 (3)(A).

70. WSD recommended assessing \_\_\_\_\_ in the areas of academic achievement, review of educational records including teacher input and classroom observation.

71. Respondents requested WSD conduct a comprehensive evaluation for \_\_\_\_\_ in the following additional areas: psychological evaluation to determine learning potential, expressive oral language, expressive written language, receptive oral language, receptive written language, intellectual function, cognitive processing, including language, memory, working memory, auditory processing, visual processing, visual motor integration, reasoning abilities, and executive function, fine motor skills, visual processing, and phonological processing; tests to determine the level of functioning in basic skill areas of reading, spelling, and math; and a review of developmental and medical records. (Ex. 39)

72. WSD agreed to conduct additional assessments of \_\_\_\_\_ in the areas of intellectual assessment, review of developmental and other medical records and assessment of executive functioning skills.

73. WSD refused to conduct assessments in the areas of fine motor/visual perceptual assessment. WSD refused to conduct additional assessments in the area of expressive and receptive language assessment. WSD provided Respondents with prior written notice of its decision. (Ex. 51)

74. As to Respondents' request for a language evaluation, WSD evaluated [redacted] in 2018, finding [redacted] had below average receptive language skills. However, not every student with below average receptive language skills qualifies for special education in this area. The deficit must also be educationally relevant or negatively impact the student in the classroom. Ms. Wiseman also observed [redacted] both inside and outside the classroom and collected data from [redacted] teachers. Ms. Wiseman concluded that [redacted] did not have a language impairment that negatively affects [redacted] in the classroom. *See* 92 NAC 51 § 006.04L2.

75. WSD did not stand on its 2018 evaluation as a basis to deny Respondents' request. Upon notification of the language evaluation request, Ms. Blum reviewed [redacted] file, including previous assessments. She reviewed [redacted] MAP scores to determine whether there was any educational impact. The MAP data indicated that [redacted] did not need a formal communication evaluation. Blum additionally asked [redacted] teachers to respond to 40 questions. In order to find a need for a full evaluation, 50 percent of [redacted] teachers would need to respond "sometimes", "often" or "always". Not one question posed came back with the needed 50 percent response. Ms. Blum concluded that if there were any communication deficits, [redacted] did not suffer from any negative educational impact.

76. Likewise, once notified of Respondents' concern regarding [redacted] motor/visual skills, WSD staff screened [redacted] to determine if further evaluation was warranted. Best practices begin with performing a screening to determine what if any tests may be needed and whether any of the alleged concerns are affecting the student in the classroom.

77. Ms. Jones was looking for trends across multiple classroom settings that the behaviors noted by Respondents were present on a significant basis and, if so, whether the behaviors interfered with ability to participate in the classroom.

78. Ms. Jones sent teachers a list of questions and ratings. On two occasions, a teacher responded that performed below peers. This did not indicate the need for a full evaluation as it was not significant compared to the majority of responses that rated the “same” or “better” than peers. Over ninety-five percent of the responses rated as the “same”, “better” or “much better” than peers. A little over two percent of the responses rated “below” peers.

79. Ms. Jones observed in the classroom to see how held a pencil as well as posture and sitting position. behaviors were typical as compared to peers.

80. She also reviewed work samples. Based on the samples, abilities were at least the same if not better than peers. handwriting did not indicate that needed an evaluation.

81. Based on the data collected, Ms. Jones determined OT was not an area of need for

82. While Respondents suspected demonstrated disability in the areas of language and motor/visual skills, WSD did not share this suspicion once it completed initial screenings in these areas. WSD’s screenings did not indicate that special education services were warranted in these areas. *See e.g., Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310-11 (D. Utah 2002) (concerning its child-find duty, the district must have reason to suspect a disability, and reason to suspect that special education services may be needed to address the disability).

83. WSD appropriately denied Respondents' request for additional evaluations. Respondents' argument that once a district is on notice of a possible disability it must perform a full evaluation is incongruent with the requirement that a district provide prior written notice of any denial. The prior written notice requirement would become meaningless. Any suspicion raised by a school official and/or parent would require a full evaluation regardless of the results of preliminary screenings used in the normal course of practice. This cannot be IDEA's intent. According to rule 51 and IDEA a child with a disability is one with a verified disability who requires special education services due to the disability. If the screening indicates there is no educational impact then the suspicion has been answered and no further evaluation is warranted.

84. Further, OT is a related service offered to a student who has been verified under one of the 13 SLD categories. The potential need for OT alone, cannot be the sole basis for special education services. 92 NAC 51 § 003.49. As explained below, WSD met its burden in establishing that its evaluation was proper. Accordingly, [redacted] could not qualify for this related service.

85. This hearing officer finds that WSD acted appropriately when it denied Respondents' request for further evaluations.

86. As to the thoroughness of WSD's triennial evaluation, a district's evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 92 NAC 51 § 006.02C11.

87. WSD met its burden establishing that its evaluation was sufficiently comprehensive to identify all of the [redacted] special education and related service needs.

88. [redacted] had been verified to have a SLD in reading comprehension. To prepare for [redacted] triennial evaluation, Ms. Angela Cobelens, WSD School Psychologist, reviewed [redacted] previous

evaluations. Ms. Cobelens also reviewed MAP and NSCAS scores. Ms. Cobelens additionally observed in the classroom and found behavior “unremarkable” compared to peers. Ms. Cobelens requested information from Respondents and teachers.

89. Ms. Cobelens performed formal assessments including the WISC-V (cognitive functioning), CTOPP-2 (academic achievement in phonological processing), and KTEA (academic achievement in reading, math and written language). (Ex. 57)

90. The MDT considered all of this information along with Respondents' private evaluations. WSD's experts all opined that the evaluation assessed in all areas of suspected disability in a comprehensive fashion designed to identify all of special education needs. (174:13-20; 229:22-230:5; 328:7-13)

91. This hearing officer finds WSD's evaluation was sufficiently comprehensive and designed to assess and identify special education needs as required by state and federal law. WSD assessed in all areas of suspected disability. WSD's refusal to evaluate in the areas of communication and occupational therapy was appropriate.

92. Accordingly, WSD met its burden as to contested issues 4, 5 and 6.

***Contested issues 1, 2, 3 and 8: Whether WSD employed a variety of assessment tools, that provided relevant information assisting the MDT, that did not rely on a single measure to determine verification and were tailored to assess specific areas of educational need.***

93. School districts and approved cooperatives must ensure a variety of assessment tools and strategies are used to gather relevant functional, developmental and academic information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general education curriculum. 92 NAC 51 § 006.02C5.

94. Ms. Cobelens performed formal assessments including the WISC-V (cognitive functioning), CTOPP-2 (academic achievement in phonological processing), and KTEA (academic achievement in reading, math and written language). (Ex. 57) Ms. Cobelens also used the BRIEF-2 which incorporated information from both the Respondents and WSD screened in the areas of OT and speech/language. These screens included responses from teachers. Ms. Cobelens and the MDT additionally reviewed previous public and private evaluations as well as State standardized scores.

95. WSD's experts opined that the evaluation complied with 92 NAC 51 § 006.02C5. (173:16-21229:2-7; 343:22-344:4) This testimony was credible.

96. This hearing officer agrees with WSD's experts and finds that WSD's evaluation utilized a variety of assessment tools, included relevant functional, developmental and academic information and incorporated information from both Respondents and

97. School districts and approved cooperatives must ensure tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. 92 NAC 51 § 006.02C7.

98. Again, WSD's experts provided credible testimony that WSD's evaluation complied with 92 NAC 51 § 006.02C7. (173:23-174:7; 229:8-16; 344:5-13)

99. SLD was in reading comprehension. WSD not only assessed cognitive abilities (intelligence quotient), but also assessed in achievement in reading and phonological skills. Based on Respondents' concerns, WSD also considered whether met the criteria for formal speech and OT evaluations.

100. Accordingly, the hearing officer finds that WSD's evaluation was tailored to assess specific areas of concern and was not designed to provide a single intelligence quotient.

101. School districts and approved cooperatives must ensure no single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 92 NAC 51 § 006.02C9.

102. WSD employed several assessments and gathered data related to school performance and achievement.

103. Again, WSD's experts opined and the hearing officer agrees and finds their testimony credible that WSD complied with 92 NAC 51 § 006.02C9. (174:8-12; 229:17-21; 344:9-13)

104. The school district or approved cooperative must use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. 92 NAC 51 § 006.02C13.

105. WSD's assessment tools provided relevant information to the MDT. Again, the assessments and information were pertinent to SLD as well as Respondents' additional concerns.

Further, WSD's experts all agreed that the evaluation satisfied 92 NAC 51 § 006.02C13. (175:1-5; 230:19-22; 344:25-345:2)

106. Accordingly, WSD met its burden as to contested issues 1, 2, 3 and 8.

***Contested issues 7, 9, 10, 11 and 12: Whether WSD used technically sound instruments that were interpreted and correctly administered in a way designed to lead to valid and reliable results.***

107. The school district or approved cooperative must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 92 NAC 51 § 006.02C12.

108. In interpreting evaluation data for the purpose of determining if a child is a child with a disability and the educational needs of the child, each school district or approved cooperative shall: Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and ensure that information obtained from all of these sources is documented and carefully considered. 92 NAC 51 §§ 006.02C14, 006.02C14a, and 006.02C14b.

109. School districts and approved cooperatives must ensure assessments and other evaluation materials used to assess are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally, unless it is clearly not feasible to so provide or administer. 92 NAC 51 § 006.02C1b.

110. School districts and approved cooperatives must ensure assessments and other evaluation materials used to assess are used for purposes for which the assessments or measures are valid and reliable. 92 NAC 51 § 006.02C2.

111. School districts and approved cooperatives must ensure any standardized tests that are given to a child: have been validated for the specific purpose for which they are used; and are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. 92 NAC 51 §§ 006.02C6a and 006.02C6b.

112. Applying these regulations to WSD's administration of its tests, particularly the WISC-V, is the central issue raised by Respondents.

113. Respondents argue that Ms. Cobelens's substitution of the cancellation subtest for the coding subtest was in contradiction to the test publisher's manual guidelines and is a procedural violation

amounting to a violation of [redacted] right to a free and public education (“FAPE”), a right guaranteed by the IDEA.

114. A procedural violation may deny a child of a FAPE if the violation (1) resulted in “substantive harm to the child or his parents,” (2) “deprive[d] an eligible student of an [IEP],” or (3) “result[ed] in the loss of [an] educational opportunity.” See *Systema ex. rel. Systema v. Academy School Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008).

115. Because [redacted] was exited from [redacted] IEP and special education services, Respondents argue that the alleged procedural violation amounted to a FAPE denial.

116. Ms. Cobelens made the decision to substitute cancellation for coding for all evaluations. (156:10-22)

117. The publisher’s guidelines for administering WISC-V permits subtest substitution, and specifically cancellation for coding, when determining FSIQ, but only when a child’s physical condition interferes with performance or if a FSIQ subtest is invalidated for any reason. Ms. Cobelens admitted that [redacted] did not have any physical conditions that interfered with [redacted] test taking performance. Further, Ms. Cobelens did not have to invalidate any of the subtests. Ms. Cobelens also admitted that a practitioner would need a good reason applicable to the particular child to warrant a subtest substitution.

118. Ms. Cobelens’s explanation for the substitution for all WISC-V tests was not tailored to a specific child’s test or needs. This practice does not appear to conform with the publisher’s testing protocols. However, Ms. Cobelens’s decision alone does not amount to a denial of FAPE. It must also be shown that the subtest substitution (1) resulted in substantive harm to the child or

parents, (2) deprived an eligible student of an IEP or (3) resulted in the loss of an educational opportunity.

119. Respondents believe that Ms. Cobelens's decision to substitute cancellation for coding resulted in a higher processing speed score and processing speed was an area of concern raised by the Respondents. Respondents point to LPS's testing as proof that Ms. Cobelens's substitution choice amounted to a FAPE denial.

120. LPS used coding and symbol search, the two subtests the publisher directs practitioners to use, when assessing the Processing Speed Index. LPS employed GAI when assessing cognitive ability because there was a significant difference between processing abilities as opposed to other abilities. The GAI is less reliant on processing speed, which is why one of the subtests is removed. Doing this meant that the coding subtest was removed and resulted in a calculation of cognitive ability to be 109 instead of a FSIQ of 102, creating a greater gap or discrepancy with reading comprehension scores which were below 85. LPS determined that [redacted] verified as a student with a SLD in reading comprehension.

121. Assuming Ms. Cobelens erred when she made the subtest substitution, the substitution did not constitute a FAPE denial.

122. WSD employs the discrepancy model to verify a child with a SLD. This involves gathering data on the student's cognitive or intellectual ability and academic achievement. The two are then compared to determine whether there is a significant discrepancy. A significant discrepancy occurs if there is a 20 standard score point or more difference between the best estimate of cognitive agility and academic achievement. Even if there is a 20 point gap, the achievement score must fall below the average score of 85.

123. Ms. Cobelens relied on FSIQ when determining intellectual functioning, a score that included the cancellation test. Further, Ms. Cobelens used this score to compare reading comprehension standard score to determine if a 20 point gap existed to verify with a SLD. standard score for reading comprehension, pursuant to the KTEA-3, was 98.

124. Respondents assume that if the coding subtest had been used, it would have resulted in a lower processing speed index score, necessitating the use of the GAI as a more accurate reflection of cognitive abilities. However, had Ms. Cobelens utilized the coding subtest, it would have been removed to determine GAI. Again, Ms. Cobelens did not use this subtest, but instead used cancellation. Accordingly, to determine GAI, Ms. Cobelens discounted cancellation score, resulting in a GAI of 104. FSIQ and GAI scores were both 104, resulting in the same difference when compared to standard reading comprehension score. Further, reading comprehension of 98 was well above the standard score cutoff of 85.

125. Regardless of whether Ms. Cobelens used FSIQ or GAI, she would have reached the same conclusion that no longer qualified for special education services.

126. Thus, any procedural violation Ms. Cobelens may have committed by substituting cancellation for coding was harmless as it did not deny of a FAPE because was not substantively harmed, deprived of an IEP or otherwise divested of educational opportunities.

127. Regarding the specific regulations at issue, Respondents disputed how the WISC-V was administered thereby casting doubt on its reliability and validity. This concern relates to 92 NAC 51 §§ 006.02C1b, 006.02C2 and 006.02C6b which direct school districts to ensure assessments are used in the form most likely to yield accurate information, are used for purposes for which the

assessments are valid and reliable and are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

128. Having found that any error in administering the WISC-V was harmless, this hearing officer notes that Respondents did not challenge the other assessments utilized by WSD or challenge Ms. Cobelens' s knowledge and training to conduct the testing.

129. Ms. Cobelens has a Master's degree in Educational Psychology as well as an educational specialist degree from the University of Nebraska, Lincoln. Ms. Cobelens is certified and endorsed to serve as a school psychologist in Nebraska. She has been performing psychoeducational testing on WSD students for 26 years. With Ms. Cobelens's training and experience she is qualified to perform the testing outlined in her psychoeducational evaluation.

130. Ms. Cobelens compared testing results from previous evaluations with her testing results and determined her results were valid. (164:6-168:21) She further testified, without challenge, that she followed the administrator's instructions when conducting the CTOPP-2. (164:13-16).

131. Accordingly, WSD's evaluation complied with 51 §§ 006.02C1b, 006.02C2 and 006.02C6b.

132. Ms. Cobelens utilized a variety of sources when completing her evaluation including formal testing, teacher, child and parent input, as well as two classroom observations.

133. The information obtained from all the sources was documented and considered by the MDT. (175:15-19).

133. Respondents question whether Ms. Cobelens's observation sufficiently informed her regarding SLD in reading comprehension. Assuming arguendo, that Ms. Cobelens's classroom observation was not sufficient, the testing results along with teacher observations all supported Ms. Cobelens's recommendation. Thus, any alleged procedural violation in this regard did not deny a FAPE.

134. Therefore, this hearing officer finds that WSD's evaluation complied with 92 NAC 51 §§ 006.02C14, 006.02C14a, and 006.02C14b.

135. Witnesses further testified WSD utilized technically sound instruments to assess in accordance with 92 NAC 51 § 006.02C12 . (174:21-25; 230:7-11). The hearing officer agrees and finds WSD utilized technically sound instruments.

136. If the school district successfully proves that its own evaluation was appropriate, a parent is not entitled to an IEE at public expense. 34 C.F.R. § 300.502(b)(3).

137. Two school psychologists opined that WSD's evaluation was appropriate and in conformity with Rule 51. (175:20-23; 231:12-18).

138. This hearing officer agrees and finds WSD's evaluation was appropriate. WSD met its burden as to contested issues 7, 9, 10, 11 and 12.

***Contested issue 13: Whether the School District wrongfully required parents to provide an explanation for their request for an independent educational evaluation at public expense.***

139. Upon receiving a request for an IEE, a district "may ask for the parent's reason why he or she objects to the public evaluation. However, the school district or approved agency may not require the parent to provide an explanation..." 92 NAC 51 § 006.07F.

140. After receiving Respondents' request for an IEE, WSD asked Respondents to clarify their request. (339:17-340:22) (Ex. 61). The Respondents did not answer and WSD subsequently sent Respondents prior written notice denying the IEE and indicated that it would proceed with a due process hearing defending their evaluation. (343:3-11)

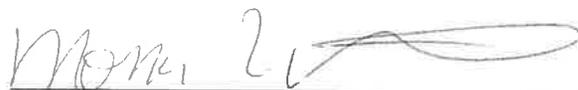
141. WSD's response was appropriate under Rule 51. WSD did not require Respondents to answer its questions or provide an explanation for their request.

IT IS, THEREFORE, ORDERED, AS FOLLOWS:

1. Petitioner's special education petition is sustained.
2. Petitioner is not obligated to grant Respondents' request for an Independent Education Evaluation at public expense.
3. The parties shall be responsible for their attorney's fees.

DATED June 4, 2020

By:



**Mona (Molly) L. Burton, #21696 Hearing Officer**

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the above and foregoing was duly served via certified mail return receipt requested on the 4th day of June 2020.

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