COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

**In Re: Student and Hamilton-Wenham Regional School District. BSEA #2104095**

**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 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing in the above-noted matter was held via a virtual platform on May 13 and 17, 2021 before Hearing Officer Alina Kantor Nir. Both parties were represented by counsel. Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Mother

Father

Melissa Dragon Attorney for Parents

Karen Benger Attorney for Parents

Peter Chubinsky Child and Adult Psychiatrist

Mary Ellen Sowyrda Attorney for the Hamilton-Wenham Regional School District

(Hamilton-Wenham)

Ramon Ruiz School Psychologist, Hamilton-Wenham

Leslie Chapdelaine Speech and Language Pathologist, Hamilton-Wenham

David Veiling Special Education Teacher, Hamilton-Wenham

Stacy Bucyk Director of Student Services, Hamilton-Wenham

Marguerite Mitchell Hearing Officer, BSEA (observer)

Marion Schulz Legal Intern, BSEA

Alexander Loos Court Reporter

The official record of the hearing consists of documents submitted by the Hamilton-Wenham Regional School District (“Hamilton-Wenham” or the “District”) and marked as Exhibits S-1 to S-18; documents submitted by the Parents and marked as Exhibits P-1 to P-16, P-7A, P-7C to P-7I, P-19, P-21 to P-24, P-27, P-29 to P-34, P-37 to P-42, P-45 to P-47, P-49, P-51 to P-53; approximately 2 days of recorded oral testimony and argument; and a two volume transcript produced by a court reporter. A transcript of the proceedings was sent to the Parties, and as requested by the Parties, a postponement was granted until June 4, 2021 for submission of written closing arguments.

**RELEVANT PROCEDURAL HISTORY:**

This matter comes before the BSEA pursuant to a December 4, 2020, Hearing Request filed by Hamilton-Wenham seeking substitute consent to authorize the District to proceed with a three-year re-evaluation of Student. It follows a previously litigated matter between the instant Parties in which the District prevailed (BSEA #17-07353, #18-04291[[1]](#footnote-1)). I therefore have considered this decision (hereinafter, “2018 BSEA Decision”) for purposes of providing relevant background information and guidance, and I note the relevant portions below.

The 2018 BSEA Decision was issued on January 5, 2018 by Hearing Officer Rosa Figueroa. In dispute in that matter was an October 2017 IEP which, according to Parents, was not reasonably calculated to offer Student a FAPE. Furthermore, Parents argued that the placement options offered by Hamilton-Wenham were inappropriate to meet Student’s needs.

In Paragraph No. 57 of the Findings of Fact, Hearing Officer Figueroa notes as follows:

1. On October 12, 2017 the Parties participated in a Pre-hearing Conference during which several agreements were reached in an attempt to facilitate Student’s placement. (See Corrected Post Pre-Hearing Order dated October 19, 2017, Administrative File.) The Understanding of the Parties and Orders were as follows:

**UNDERSTANDINGS**:

… 2) HW will include the standard referral letter, the IEP to be developed at the upcoming Team meeting and Beverly Montgomery’s evaluation report in its referral packet to the private special education schools to which Parents consent. Parents intend to include the new IEP to be developed, Kathy Mosca’s report, Beverly [Montgomery’s report] and if they so choose, Leslie Chapdelaine’s report.  Parents further agree to complete any other forms required in the admission process to any private, charter or virtual school of their choice….

Hearing Officer Figueroa concluded that Parents did not meet their burden in the matter. She also indicated, in part, that

…Student is a bright, resilient, creative and kind thirteen year old resident of HW who presents with an expressive language disorder, ADHD and PTSD. He also presents with mild executive functioning and social communication deficits, and suffers from anxiety secondary to PTSD …. Despite craving and seeking friendships with peers, Student is vulnerable in social situations due to his PTSD and presentation as somewhat younger than his chronological age.  As such, any re-entry to school must include a plan that supports and facilitates his transition….

…At every meeting, including the ones on November 14, 2016, September 11 and October 19, 2017, the Team has given serious consideration to all available information, and has remained flexible and willing to work with Parents to draft an IEP based on the objective and subjective data as well as Parents’ input. HW was even willing to set aside the social pragmatic communication disorder diagnosis given by Dr. Roosa in 2016, when Ms. Montgomery evaluated Student in May/June 2017 and explained that instead, Student’s expressive language deficits more accurately accounted for Student’s pragmatic communication difficulties; Dr. Chubinsky agreed….

…It would appear that the experiences of the past three years have impacted not just Student, but Parents as well, to the point where a desire to shield Student from bad experiences, fear for his safety and well-being, and a desire to create the perfect educational conditions have totally paralyzed them.[[2]](#footnote-2)

Hearing Officer Figueroa’s Order included the following:

1) The Parties shall submit a list of the schools they are considering for Student by the close of business on October 19, 2017….

As noted above, no December 4, 2020, Hamilton-Wenham filed a Hearing Request seeking substitute consent to authorize the District to proceed with a three-year re-evaluation of Student. The matter was originally assigned to Hearing Officer Amy Reichbach. On December 18, 2020, Parents responded to Hamilton-Wenham’s Hearing Request denying the request for the 3-year re-evaluation due to “extenuating circumstances.” Also on December 18, the Parents filed a Hearing Request (BSEA #2104633) alleging denial of a free and appropriate public education (FAPE) to Student and seeking, in part, reimbursement for tuition paid to private school placements made unilaterally by Parents for the 2019-2020 and 2020-2021 school years. The matters were consolidated on December 29, 2020, and were reassigned to Hearing Officer Alina Kantor Nir on January 19, 2021. Following multiple postponements, which were granted for good cause, the matters were bifurcated via an Order issued on February 25, 2021, and scheduled for individual hearing dates.

A Hearing in the matter of BSEA #2104633 is pending.

**ISSUE IN DISPUTE**:

Whether Parents’ refusal to consent to the three-year evaluation proposed by Hamilton-Wenham will result in the denial of a FAPE to Student, in which case, substitute consent is appropriate.

**FACTUAL FINDINGS:**

**Background:**

1. Student is a 10th grade, 16 year old student enrolled at Austin Prep in Reading, Massachusetts[[3]](#footnote-3) where he was unilaterally placed by Parents for the 2020-2021 school year. (Mother) Parents are divorced, and Student resides with Mother in South Hamilton, Massachusetts. (S-5; Mother) Student is hard working and loves learning. (Mother; Chubinsky; P-45)
2. Student is eligible for special education services under Communication (Expressive Language Disorder) and Health (mild ADHD, PTSD secondary to bullying) disability categories. (S-5; S-8; S-9; Chubinsky)
3. Student last attended in-district programming in the fourth grade pursuant to a fully accepted IEP for the period beginning from 11/18/2014 to 11/17/2015. This IEP included a diagnosis of ADHD. At that time, Student participated in a full inclusion program at Cutler Elementary School in South Hamilton, Massachusetts. (P-8; P-9)
4. At some time during Student’s fourth grade, Parents removed Student from Cutler Elementary School due to concerns relating to Hamilton-Wenham’s response to bullying issues raised by Parents. (Mother) During this time, Student developed anxiety, sleep disruptions, and OCD symptoms. (Mother; Chubinsky) Said symptoms were later the basis for Student’s diagnosis of Post-Traumatic Stress Disorder (PTSD) secondary to bullying. (Chubinsky)
5. For fourth, fifth, sixth, seventh and part of eighth grades, Student was, at times, home-schooled. At other times, he briefly attended private schools where he was unilaterally placed by Parents. Parents also removed Student from several private placements due to ongoing bullying concerns.[[4]](#footnote-4) (Mother; P-1; P-7A; P-7B )

**Evaluations:**

2013 - Re-Evaluation by Hamilton-Wenham

1. In 2013, Student was assessed by District staff as part of his three-year reevaluation. (S-11; S-12; S-13; S-14; Bucyk) Student participated in academic testing which included the WIAT-III and the CTOPP-2. The results of these assessments revealed average reading skills, low average writing skills, below average mathematical skills, and mostly average, though variable, phonological awareness skills. (S-11) Student also participated in occupational and physical therapy assessments with limited findings. (S-12; S-13) As part of a speech and language evaluation, Student was administered the OWLS-II, CELF-4, TAPS-3 and the Word Test-R. Results suggested a language-based learning disability characterized by difficulty with memory, storage, and retrieval of information, especially relative to complex language. Challenges with attention exacerbated Student’s weaknesses with language processing. (S-14)

2015 – Neuropsychological Evaluation

1. On or about December 2, 2014, Hamilton-Wenham proposed a “Psychological Evaluation (social emotional only)” to determine whether Student required additional supports or services at that time. (P-9; P-10) Parents did not feel that this evaluation was warranted. (P-10)
2. On December 16, 2014, an independent evaluator, Dr. Janice Schwartz, Ed.D., met with Parents and agreed that testing would include cognitive, neuropsychological, achievement and social/emotional testing. (P-9)
3. Dr. Schwartz conducted a neuropsychological evaluation of Student in January/February 2015. She administered a series of tests, including WISC-V, WRAML-2, ROCFT, D-KEFS (Verbal Fluency subtest), WIAT-III, Boston Naming Test, Rorschach, CAT, TAT, Incomplete Sentence Test, Projective Drawings, and Kinetic Family Drawing. Results demonstrated average cognitive ability but weaknesses in verbal information, organization, planning and self-monitoring. Student also displayed impulsive tendencies as part of his ADHD. Although Student reported liking school, he also shared feeling “unsafe and insecure within its confines.” When experiencing insecurity, Student tended to react in a regressive manner and struggled to modulate his behavior when stressed. Student continued to experience difficulty in social situations. Although manifesting some attachment issues, he did not meet the criteria for Reactive Attachment Disorder. (P-10)

2016 - Neuropsychological Evaluation

1. In August 2016, Parents and Hamilton-Wenham agreed to have Student evaluated by an independent neuropsychologist. (Bucyk)
2. Following a referral from Hamilton-Wenham, NESCA neuropsychologist Nancy Roosa, PsyD, completed a neuropsychological evaluation of Student which included academic and cognitive testing (hereinafter, the 2016 Neuropsychological Evaluation). As part of her evaluation, Dr. Roosa administered the following assessments to Student: WISC-V, WIAT-III (selected subtests), GRST, Form A, TOWL (selected subtests), CASL (selected subtests), Automatized Series, WRAML-2, RCFT, D-KEFS (selected subtests), TOVA, and NEPSY-II (selected subtests). Testing confirmed average cognitive abilities with some skill deficits in mathematics and executive functioning. Impulsivity in responses was observed. Dr. Roosa diagnosed Student with a Generalized Anxiety Disorder (with OCD symptoms), ADHD-Combined Type, and a Social Pragmatics Communication Disorder. (S-10)
3. Mother testified that she never consented to a social pragmatics assessment nor had Hamilton-Wenham informed her that Student would be assessed for same. (Mother)
4. Parents and their expert, Dr. Peter Chubinsky, disagreed with Dr. Roosa’s diagnosis of a Social Pragmatics Communication Disorder. (Mother; Chubinsky; P-6; P-16) Dr. Chubinsky has a private psychiatric practice in Brookline, Massachusetts. (P-21) He earned his medical degree in 1977 and completed his child psychiatry fellowship in 1983. He is Board Certified in child and adolescent psychiatry. (S-21; Chubinsky) He is also a clinical associate in psychiatry at Cambridge Hospital and is a member of several professional societies. (S-21) According to Dr. Chubinsky and Parent,this “misdiagnosis” was unwarranted, inappropriate, and stigmatizing; it furthermore “made it impossible” for Student to gain admittance into several “regular” private schools and DESE approved special education schools. (Mother; Chubinsky; P-1; P-6; P-7) The diagnosis resulted in inappropriate and overly restrictive placement offers for Student. (Mother; Chubinsky; P-1; P-7F)
5. Dr. Chubinsky testified that it is “rare, if ever, to see someone who only has social pragmatic disorder. It’s always in the context of other things.” He indicated that “a lot of the things that you try to test in social pragmatics end up being cultural” because “what’s normal interactive behavior between kids varies depending on where you grew up.” (Chubinsky)
6. Dr. Chubinsky testified to his opinion that Dr. Roosa did not test for a social pragmatics disorder; instead, she “gave an opinion”. He also testified that “there has to be testing in order for there to be a diagnosis…. It has to be valid and reliable and statistically significant for it to be approved as a diagnosis.” (Chubinsky)
7. Mother testified to her belief that the 2018 BSEA Decision “set aside” the diagnosis of Social Pragmatics Communication Disorder.[[5]](#footnote-5) (Mother; P-7G)
8. Mother further testified to her belief that the 2018 BSEA Decision also prohibited H-W from including the 2016 Neuropsychological Report from future referrals. (Mother; P-7G)
9. Rather, as indicated in the **Relevant** **Procedural History** section herein, the 2018 BSEA Decision indicated that Hamilton-Wenham was “*willing to set aside the social pragmatic communication disorder diagnosis* given by Dr. Roosa in 2016, when Ms. Montgomery evaluated Student in May/June 2017 and explained that instead, Student’s expressive language deficits more accurately accounted for Student’s pragmatic communication difficulties.” (emphasis added) . In addition, although Hearing Officer Figueroa made a finding of fact as to the Parties’ “understanding” on October 12, 2017 that Hamilton-Wenham would "include the standard referral letter, the IEP to be developed at the upcoming Team meeting and Beverly Montgomery’s evaluation report in its referral packet to the private special education schools to which Parents consent,” Hearing Officer Figueroa does not order Hamilton-Wenham to exclude the 2016 Neuropsychological Report from future referrals.
10. The 2018 BSEA Decision did not find that Student required a therapeutic placement in order to receive a FAPE.

2017 – Parent-Funded Evaluations

1. Since 2017, Dr. Chubinsky has been seeing Student at least every two weeks. Sessions are approximately 45-50 minutes in length. At times, Parents participate for a portion of the session, and, at other times, Dr. Chubinsky meets with Parents only. (Chubinsky)
2. In January 2017, at Parent’s request, Dr. Chubinsky conducted a psychiatric assessment of Student (hereinafter, “2017 Psychiatric Assessment”). (Chubinsky; P-16)
3. Dr. Chubinsky diagnosed Student with a Communication Disorder, ADHD and PTSD secondary to bullying.[[6]](#footnote-6) (Chubinsky; P-16) Student’s PTSD was the result of an “acute episode” in fourth grade[[7]](#footnote-7); however, PTSD is an ongoing disorder and can be triggered by experiences. (Chubinsky) Dr. Chubinsky rejected a Social Communication Disorder[[8]](#footnote-8) diagnosis for Student; he noted that Student has a history of friendships and caring family relationships and that “empathy and mentalization (being able to assess someone else’s thoughts and feelings) are relative strengths” for Student. He testified that Student’s poor performance on subtests concerning interpersonal relationship can be easily attributed to Student’s experience with bullying. (Chubinsky; P-16)
4. Dr. Chubinsky has not administered any formal testing to Student. (Chubinsky)
5. Around May 2017, Student was referred by Parents for an executive functioning and social communication evaluation with Beverly Montgomery of Lex Communicate. At the time of the evaluation, Student was not receiving any special education services. He was still being home-schooled. (S-8) Ms. Montgomery’s formal testing of Student yielded average scores on standardized testing instruments such as the CELF-5, BRIEF-2, EFT-Elementary, portions of the Social Thinking Dynamic Assessment Protocol, and the Prutting & Kirchner Pragmatic Protocol. She concluded that Student’s challenges with executive functioning and social communication depended largely on language demands and the rapid pace of input and output required. (S-8)
6. In June 2017, Student was referred by Parents for a speech and language assessment at Architects for Learning. The assessment was conducted by Meghann Ridley, a reading specialist and speech language pathologist. (S-9) The following tests were conducted: PPVT-4, EOWPVT-4, CELF-5, and the Informal Narrative Assessment. Ms. Ridley diagnosed Student with an Expressive Language Disorder. A Social Communication Disorder diagnosis was not indicated. (S-9)
7. Assessment results were considered at Team meetings and incorporated into IEP proposals for Student. (P-39; P-51)

Winter 2019 - Extended Evaluation (STEP Program, Dearborn Academy Educational and Clinical Assessment)

1. Following a referral from Hamilton-Wenham, during the period between December 10, 2018 and February 27, 2019, Student participated in an extended evaluation[[9]](#footnote-9) at the Dearborn Academy STEP Program (hereinafter, Dearborn) in Arlington, Massachusetts. At that time, Student was in the eighth grade. (P-19)

The clinical portion of the assessment involved observations of Student only, as opposed to any formal evaluation procedures. (P-19; Bucyk)

The only standardized testing tool utilized was the Kaufman Test of Educational Achievement-3rd Edition[[10]](#footnote-10) (KTEA-3), an academic testing battery with several subtests. (P-19; Bucyk).

On the KTEA-3, Student demonstrated mostly average reading skills and some average math skills, although a math composite score could not be derived as Student refused to complete the test. (P-19) Ms. Bucyk testified that only academic testing was completed as part of the extended evaluation because at that time, Student had not participated in a structured school environment for an extensive period of time. The intent of this extended evaluation was not to take the place of a three-year re-evaluation, where multiple tools are utilized to assess a student. (Bucyk)

Dearborn did not assess Student’s cognitive functioning, executive functions or speech and language skills. (Bucyk; P-19) Mother testified that on November 29, 2018 she signed a “Dearborn Academy/STEP Program: Consent for Psychiatric Evaluation/Consultation” granting permission for Student to “meet with Dr. Xenia Johnson Bhembe for the purpose of conducting a psychiatric interview/evaluation.” (Mother; P-19) The consent form was not generated by Hamilton-Wenham; the District utilizes forms generated by the Department of Elementary and Secondary Education. (Bucyk)

1. As a result of the extended evaluation, the following diagnoses were made: Generalized Anxiety Disorder, Persistent Depressive Disorder, and Expressive Language Disorder. Recommendations included a therapeutic school and classroom setting with a high staff to student ratio. A psychological evaluation with projective testing was also recommended. (P-19)
2. Dr. Chubinsky disputed Dearborn’s diagnoses for Student. He testified that Student’s presentation might have appeared consistent with anxiety or depression but only because Student’s primary disability of PTSD was not considered when making the additional diagnoses. (Chubinsky) According to Dr. Chubinsky, Dearborn retraumatized Student and retriggered his PTSD. As such, the behaviors witnessed by Dearborn staff were in fact manifestations of Student’s PTSD. In addition, Student was shamed and confused by the inconsistencies in his education. (Mother; Chubinsky; P-1; P-6)
3. Dr. Chubinsky also testified that he believes that Student has “a specific learning issue, a learning disability, but it only affects some of his math skills.” (Chubinsky)
4. Following the extended evaluation, Student was placed at Pathways Academy, which he attended until the end of the 2018-2019 school year. (Mother)

2019 and 2020 - Hamilton-Wenham’s Re-Evaluation Proposal

1. Pursuant to IEPs dating back to 2017, Student’s three-year re-evaluation was due on or about November 14, 2019. (P-39; P-50) Stacy Bucyk is the Director of Student Services for Hamilton-Wenham. This is her fourth year in the District. She has a master’s degree in moderate special education and educational leadership. She holds Department of Elementary and Secondary Education licenses in several areas, including special education administration. She met Student once in 2017 and has participated in several Team meetings with Parents. (Bucyk)
2. Via Notice dated September 6, 2019, Hamilton-Wenham notified Parents that Student was due for his three-year re-evaluation in accordance with 603 CMR 28.04 and proposed to re-evaluate Student in the following areas: academic achievement, speech and language, psychological, educational assessment and observation. [[11]](#footnote-11) (S-4; Bucyk)
3. Hamilton-Wenham attempted to obtain Parents’ consent for a three-year re-evaluation in these areas four different times since the fall of 2019. (Bucyk; S-1; S-2; S-3; S-4). Ms. Bucyk testified that Hamilton-Wenham needed updated information in order to determine Student’s continued eligibility, to make recommendations for programming, and to plan for Student’s transition, especially in light of disputed prior evaluative findings. (Bucyk)
4. As part of the re-evaluation, Ms. Bucyk supported academic achievement testing because previous evaluations demonstrated that Student was capable of making significant progress, and she anticipated that this re-revaluation too would show progress in academic skills. And, since Student had been attending school consistently for the past few years his skills were expected to have changed significantly. (Bucyk; Ruiz)
5. Ms. Bucyk testified that a speech and language evaluation was appropriate since there were concerns raised in past assessments regarding Student’s speech and language skills.[[12]](#footnote-12) In addition, there was a dispute as to the appropriateness of a Social Pragmatics Communication Disorder diagnosis for Student. In the case of such disputes, or when a service provider no longer thinks a service or a goal is appropriate, it is the school district’s obligation to reassess the student. (Bucyk)
6. Ms. Bucyk selected Dr. Ramon Ruiz, M.Ed., Ph.D., Leslie Chapdelaine, SLP-CCC, and David Veiling, M.Ed., to conduct Student’s psychological, speech and language, and academic evaluations, respectively. With Parents’ consent, she planned on sending the Education Assessment A and B Forms to Student’s private school.[[13]](#footnote-13) (Bucyk)
7. Also on September 6, 2019, following a meeting in August 2019, the District proposed changes to an IEP previously proposed by the District in June 2019. (S-4). Parents continued to object to specific services, including speech and language, and rejected Hamilton-Wenham’s proposed placement at Pathways, where Student had completed his eighth grade school year.[[14]](#footnote-14) (Mother; S-4; P-13) At that time, Parents unilaterally placed Student at Chapel Hill Chauncy Hall in Waltham, Massachusetts[[15]](#footnote-15) for ninth grade. (Mother; S-4; P-13)
8. In 2019, Dr. Chubinsky disputed that Student had an autistic spectrum disorder, a social pragmatic disorder or a primary behavior disorder. (Chubinsky; Mother; P-12) Instead, according to Dr. Chubinsky, Student has a Communication Disorder (expressive and receptive language) and mild ADHD, which may result in Student’s “occasional misunderstanding or odd remarks.” He also believes Student to have anxiety and PTSD, which, in his view, H-W continued to disregard, and as such, the District’s IEPs continued to propose inappropriate services and placement. (P-12; Chubinsky)
9. Via email, on May 20, 2020, Hamilton-Wenham again provided Parents with a Notice seeking consent to evaluate Student.[[16]](#footnote-16) (S-3; Bucyk) The Evaluation Consent Form dated May18, 2020 proposed evaluations in the same areas as those proposed in the Evaluation Consent Form dated 8/21/2019. (S-3)
10. On May 21, 2020, Parents responded, refusing consent to evaluate. They also refused a Team meeting at that time.[[17]](#footnote-17) (Mother; P-4)
11. Via email, on October 20, 2020, Hamilton-Wenham again provided Parents with a Notice[[18]](#footnote-18) seeking consent to evaluate Student as his triannual evaluations had been due in November 2019. (S-2; Bucyk) The Evaluation Consent Form dated October 20, 2020 proposed evaluations in the same areas as those proposed in the previous Evaluation Consent Form. (S-2)
12. On November 17, 2020, Parents refused to provide consent for the re-evaluation. (Bucyk; P-6)
13. In a Notice dated December 2, 2020,[[19]](#footnote-19) Hamilton-Wenham again noted that Student had been due for his three-year re-evaluation since the fall of 2019. (S-1; Bucyk) The Evaluation Consent Form dated October 20, 2020 was reissued to Parents at that time. (S-1)
14. Also in December 2020, Hamilton-Wenham proposed an IEP for the period 11/18/2020-11/17/21, which was based on the IEP for the period 6/11/2019-6/10/20, as revised in August 2019, which contained the most recent information available to the District regarding Student’s current performance levels. Placement was also proposed based on Student’s last documented and accepted Department of Elementary and Secondary Education approved placement. (S-1; S-5)
15. Ms. Bucyk selected H-W school psychologist, Dr. Ramon Ruiz, M.Ed., Ph.D. to conduct the psychological portions of Student’s re-evaluation. (Bucyk; Ruiz) He is licensed by the Department of Elementary and Secondary Education, has a Certificate of Advanced Graduate Studies in School Psychology, and continues to have extensive and ongoing continuing education for both his licenses. He completed a clinical fellowship in psychology and postdoctoral fellowship in pediatric neuropsychology and has over twenty-five years of experience. (S-15; Ruiz) The core part of his job at Hamilton-Wenham, where he has worked for 13 years, is assessing students. He completes approximately 70 assessments per year and has tested over a thousand children. (Ruiz)
16. Although Dr. Ruiz claimed to have no prior knowledge of Student, he had, in fact, participated in a Team meeting with Parents in June 2019. (Ruiz; P-51)
17. In preparation for Hearing, Dr. Ruiz read Student’s active IEP and the 2016 Neuropsychological Evaluation. (Ruiz)
18. Dr. Ruiz testified that it is “standard clinical practice to review the [student] record,” and that, if Parents were to provide consent, he would review Student’s entire record beyond the IEP and the 2016 Neuropsychological Report. He would also meet with and interview parents and current service providers who are working with Student. After collecting information, Dr. Ruiz would formulate areas of concern and the questions for testing. Dr. Ruiz attempts to gather a lot of information regarding a student in order to develop a “composite sketch of where the child is.” (Ruiz)
19. Dr. Ruiz does not have a set testing battery approach. In other words, he does not preselect his testing instruments. Instead, instrument selection is part of the process. He often decides what additional testing needs to be conducted as he is conducting his evaluation. Following testing, he participates in the Team meeting and reports on his findings. (Ruiz)
20. In Dr. Ruiz’s opinion, it is important to re-evaluate Student since “children by virtue [of the fact] that they are growing and developing are moving targets.” Often times, Dr. Ruiz finds that a finding in a prior report is no longer applicable, either because the original diagnosis was inaccurate or because the child is now in a different place. He wants to examine any areas in dispute in order to render his own opinion and make independent clinical findings, which may differ from that of prior evaluators. Dr. Ruiz does not submit his report to any other staff member or supervisor for editing. (Ruiz)
21. Dr. Ruiz refused to comment on how Dr. Roosa reached her conclusion regarding Student’s Social Pragmatics Communication Disorder diagnosis. He indicated that there are evaluations that can assess “aspects of social pragmatics, which include complex language function” and “non-verbal abilities to initiate, maintain, and terminate social exchanges.” It is “ultimately the clinical opinion and judgment of the clinician [] to put it all together and to identify whether or not those identified areas of weakness interfere with functioning.” He also noted that there are many reasons that can impact why a student might not be functioning optimally at a social level beyond “developmentally related deficits” such as autism spectrum disorder. For instance, people with anxiety can be “socially clumsy.” (Ruiz)
22. Dr. Ruiz opined that he would want to assess Student’s intellectual functioning, learning style, verbal and nonverbal memory, executive functioning, social perception, emotional functioning and issues related to anxiety. He would test all areas of suspected need as identified by current teachers and service providers, parents, prior evaluations, and his own conversations, observations and testing of Student. Dr. Ruiz opined that many children are scared of testing; as such, he typically tries to alleviate their anxiety by making connections and learning about them as individuals. He also explains to them what he is testing and why. (Ruiz)
23. Ms. Bucyk selected Leslie Chapdelaine to conduct the speech and language portion of Student’s re-evaluation. (Bucyk) Ms. Chapdelaine, SLP-CCC, is a speech and language pathologist at Hamilton-Wenham. She has twenty-five years of experience, eight of which have been in the District. She holds a Master of Science in communication disorders and is licensed as a speech and language pathologist and a teacher by the Department of Elementary and Secondary Education. Ms. Chapdelaine regularly participates in continuing education for her license. (Chapdelaine; S-17) She conducts approximately thirty evaluations per year and also works directly with students. (Chapdelaine)
24. Ms. Chapdelaine testified that she does not know Student but has met Parents in a prior Team meeting to discuss an outside speech and language evaluation. In preparation for the Hearing, she reviewed the most recent IEP , the last independent speech and language evaluation, and her own notes from the Team meeting which she had attended. If Parents provided consent for the evaluation, she would review Student’s records more deeply. Ms. Chapdelaine would get updated information by speaking to Student’s current providers regarding Student’s strengths, current performance and areas of concern. She would want her testing to identify Student’s strengths and challenges so that recommendations could be made to support him. (Chapdelaine)
25. Ms. Chapdelaine does not have a set battery of testing instruments but rather she selects them after “speaking to people with current information.” She looks at areas of concern, receptive and expressive language, narrative language, “higher order language, like figurative language, making inferences, … social communication, generating sentences, double meanings … and then depending on how [Student is] performing, [takes] it in a different direction if needed.” Because social pragmatics was noted as an area of weakness in the past, Ms. Chapdelaine would want to assess whether that remains a current need. Following testing, Ms. Chapdelaine alone writes and edits her report, noting any qualitative observations of the student. She attends the Team meeting to report on her findings. (Chapdelaine)
26. Ms. Chapdelaine testified that to her knowledge she has not tested a student diagnosed with PTSD. However, she also noted that because she never knows if a student has suffered trauma, she consistently approaches testing by making the student as comfortable as possible. She added that she is always cognizant of student anxiety during testing, especially when she is testing a student with whom she has not worked directly. She believes it is important to develop rapport with the student prior to testing and to find out what they like or find difficult. She also discusses with the student the purpose of the testing and the testing itself, as well as any expectations. She believes this makes her findings more valid and reliable. She also notes qualitative observations in her reports, including student anxiety during testing, due to potential impact on student’s performance. (Chapdelaine)
27. Ms. Bucyk selected Mr. David Veiling, M.Ed., to conduct the academic achievement portion of Student’s re-evaluation. (Bucyk) Mr. Veiling is a special education teacher at Hamilton-Wenham. He has been teaching for 15 years, three of which are at Hamilton-Wenham. He is currently the lead teacher in the district’s language-based program. He has a master’s degree in special education as well as Department of Elementary and Secondary Education licenses in special education (5-12) and history (9-12). (Veiling; S-16) He typically conducts 15-20 evaluations per year, most of which are academic achievement and, at times, reading. (Veiling) He has over 15 years of experience conducting said assessments. (Veiling)
28. Mr. Veiling has not met Student or Parents. In preparation for Hearing, he was provided the academic portions of the Dearborn Report and the 2016 Neuropsychological Evaluation. He also reviewed the goals and services in Student’s active IEP.. He looked at the testing “to see, first and foremost, what kind of instruments have been used with [Student] in the past and to get a general sense of patterns of strength and weaknesses revealed on those.” (Veiling)
29. If Parents were to consent to the evaluation, Mr. Veiling would proceed with a “deeper review.” He wants to assess Student’s growth across the years and to talk to Parents, Student’s tutor, and any current teachers. He especially wants to discuss Student’s writing process. In testing, Mr. Veiling looks as much at patterns of strengths and weaknesses as at the approach a student takes to a task. He notes that it is relevant whether a student attempts a task and fails or whether the student “shuts down,” since those scenarios would necessitate two different education plans. Mr. Veiling has no training as to testing students with PTSD. However, having himself been a victim of bullying, Mr. Veiling testified that he would be especially sensitive to Student’s anxiety. Mr. Veiling is always aware that testing is uncomfortable, and he tries to make the student as comfortable as possible so that the testing results are valid and reliable. At times, if a student is extremely uncomfortable, Mr. Veiling cancels testing. In such cases, he consults with the parents regarding how to get Student more comfortable and less anxious. (Veiling)
30. Following testing, Mr. Veiling authors and edits his own report. He does not make any diagnoses but rather identifies areas of strengths and weaknesses. He attends the Team meeting to review the results of his assessment. Mr. Veiling testified that hehas extensive experience conducting assessments.
31. Prior to testifying at Hearing, none of the selected evaluators was provided with Dr. Chubinsky’s 2017 Psychiatric Evaluation, nor with his letters dated July 1, 2019 and/or October 19, 2019, respectively. Dr. Chubinsky’s 2017 Psychiatric Evaluation was not provided to Dr. Ruiz, Ms. Chapdelaine or Mr. Veiling because it did not include psychological, speech and language or academist testing.) Nor were Dr. Ruiz and Ms. Chapdelaine provided with any portions of the Dearborn report. (Ruiz; Chapdelaine; Veiling; Bucyk)

Dr. Ruiz was provided with the 2016 Neuropsychological Report by Ms. Bucyk because it was the last fully comprehensive psychological testing, and she wanted him to have a “sense” of Student for the Hearing.) If Parents were to provide consent, all evaluators would have access to Student’s complete records. (Bucyk)

1. Mother testified that she believes the proposed testing suggests that Student’s diagnosis is already “preconceived” and that “the testers are skewed.”[[20]](#footnote-20) (Mother)
2. Mother opined that Student is not yet due for his re-evaluation since he was last assessed in February 2019 at Dearborn. (Mother)
3. Parents are concerned that school-based testing would “trigger” Student’s PTSD. (Bucyk; Mother; Chubinsky) Dr. Chubinsky testified that Student was tested after he was bullied and that is why testing is a trigger for Student. Testing would “retraumatize” Student, and it is not in Student’s “ best interest … to get testing now.” It would not be an “accurate representation” and all one would “be seeing is his diagnosis of PTSD.” (Chubinsky; P-1)
4. Dr. Chubinsky testified that only some forms of testing trigger Student’s PTSD.[[21]](#footnote-21) Although Student has yet to take the PSATs and similar high-stakes tests, Dr. Chubinsky opined that SATs are “very different exams,” and they “have different meanings to [Student]. And if they don’t, if they start to trigger, then you deal with that then.” He explained that SATs are different because Student would feel in control of it. (Chubinsky)
5. For Student, it is “fear of the unknown but also fear of what had been known to happen after he takes test.” He needs to feel “safe and secure,” and he has yet to have that experience in the context of school-based testing. (Chubinsky)
6. Student’s PTSD was “reactivated” during his extended evaluation at Dearborn, where Student reported feeling that he was treated “as if he was retarded.” Despite reassurances from Dr. Chubinsky, Student is worried that testing will show that he is “crazy, autistic or stupid.”[[22]](#footnote-22) (Chubinsky)
7. Although Student has not indicated a connection between being removed from the home and being tested, Dr. Chubinsky suspects that in Student’s mind there is a connection, likely resulting from Student’s experience with the C&P and his participation in the extended evaluation at Dearborn. (Chubinsky)
8. In order for Student’s PTSD to “remediate,” he needs to experience “some successes.” (Chubinsky)
9. Dr. Chubinsky opined that if Hamilton-Wenham were to test Student, Student would become overwhelmed and “be out of commission for a few weeks”, which would impact his ability to concentrate on homework and exams as well as his relationships with other students. Dr. Chubinsky further opined that Student is “struggling as it is to be a student, because of the anxiety that he has when he’s in a school situation.” Although medication might enable Student to undergo testing, it would also skew the results. (Chubinsky)
10. Dr. Chubinsky sees no benefit to testing Student “at all.” (Chubinsky; P-1) In his view here is no information regarding Student that is “missing”[[23]](#footnote-23) ,Student has had a “thorough evaluation,” And has been tested

multiple times even in the last 3 years. I believe further testing would be an obstacle to his placement. He panics around these kinds of tests, fears that any mistakes will end up in his being seen as stupid or slow. Because he connects them with “being sent” to programs with very troubled [] youngsters, at times, his panic about these intelligence and personality tests trigger sleep disturbance, obsessive compulsive rituals and tics that he had in the past. These episodes are distressing and take time to bounce back. They are setbacks in his recovery. … The idea that he would now have what he will see as ‘high stakes’ testing when those who know him best, support the present school placement is not in his best interest in my judgment. (P-1)

1. Dr. Chubinsky opined that the academic achievement testing conducted at Dearborn in 2019 provided enough data for Student’s IEP Team to develop an appropriate IEP for him in 2021. (Chubinsky)
2. Dr. Chubinsky expressed concern that the evaluators chosen by Hamilton-Wenham did not “even think about the most basic thing about what might trigger [Student]…. One would wonder about whether being tested at home or in a library nearby would be a better setting.” He also indicated that Student should be asked his opinion because “trauma is about not being helpless, it’s about not having any agency.” According to Dr. Chubinsky, testing has been “weaponized. It’s almost been like something that gets used against [Student]. People know that it’s hard for him at school, and they push it.” He opined that there are “other ways to find out whether a child is learning.” (Chubinsky)
3. Parents are not comfortable with the “broad” testing proposed by the District, especially in light of “the amount of testing he had.” (Bucyk; Mother; Chubinsky)
4. Dr. Chubinsky explained that the “nature of PTSD” is that it can “reemerge and there are triggers.” Dr. Chubinsky has provided Student with strategies to deal with this stress and anxiety. Reviewing the proposed tests with Student would not be helpful; in fact, it may increase Student’s anxiety. Dr. Chubinsky conceded that if we really needed to get additional information regarding Student, we could “explain” to Student that it is “time-limited” and that “it’s not going to affect [him], it’s not about consequences, it’s only about seeing if we can help him more with whatever the problem is. As long as it’s going to be focused” and Student would not need to leave his school. Dr. Chubinsky stressed that we would need to be “really clear” that “it was just about one area we wanted to know about where he’s stuck.” (Chubinsky)
5. At the resolution meeting, Parents were offered the opportunity to discuss their concerns regarding testing with the evaluators. Neither Parents nor Dr. Chubinsky reached out to District evaluators to discuss the proposed evaluations nor what steps could be taken to mitigate triggers or anxiety for Student. (Bucyk; Ruiz; Chapdelaine; Veiling; Chubinsky; Mother)
6. Dr. Chubinsky testified that he did not contact the evaluators because it was his understanding from the meeting that Student would get tested regardless of Dr. Chubinsky’s input to the evaluators. He also was not provided with the evaluators’ contact information. (Chubinsky)
7. Hamilton-Wenham proposed to test Student in a private space at the central office building. (Ruiz; Chapdelaine; Veiling; Bucyk) Ms. Bucyk, Dr. Ruiz, Ms. Chapdelaine, and Mr. Veiling testified that they do not find Student’s diagnosis of PTSD inherently prohibitive in terms of completing the triannual evaluation. (Bucyk; Ruiz; Chapdelaine, Veiling) All evaluators have been fully vaccinated for COVID-19, and they follow CDC safety protocols to minimize the spread thereof. (Ruiz; Chapdelaine; Veiling) District evaluators testified that they saw no impediments to their testing of Student. (Ruiz; Chapdelaine; Veiling)
8. Ms. Bucyk does not “streamline” assessments for students undergoing a three-year re-evaluation because she relies on the expertise of her evaluators in choosing what instruments are necessary to assess current needs. The District is obligated to “evaluate in areas of suspected disability” and to be able to “answer the disability category questions.” (Bucyk)
9. Hamilton-Wenham proposed the re-evaluation because it is their “legal right and obligation” to do so. (Bucyk) Hamilton-Wenham staff all testified that it is important to get updated information regarding Student in order to determine his eligibility and to develop his program. (Bucyk; Ruiz; Chapdelaine; Veiling). Updated testing is important in order to allow the Team to identify Student’s current needs, develop goal areas, define current performance levels, draft goals and objectives and propose appropriate services and placement. Most students “gain strengths with time but also may develop other weaknesses.” Without testing, Hamilton-Wenham does not have current information to “demonstrate performance” nor the “right information to make the best determinations” for Student. (Bucyk)
10. Ms. Bucyk opined that the 2019 Dearborn academic testing is dated at this time and that the extended evaluation at Dearborn was not as “comprehensive” as a triannual evaluation; for instance, only one academic battery was conducted, and no speech and language assessments, cognitive testing or executive functioning evaluations were administered. Furthermore, there has been “a lot of disagreement on evaluation findings”; in addition to Student’s disputed social-pragmatic profile, there have “been concerns and questions raised around dyslexia.” It is important to “get a good, solid evaluation in place and see where he is to make sure we are making the right decisions” for Student. The importance of a comprehensive evaluation is especially “high” considering Student’s entering 11th grade, since his vision, strengths and disability related needs will drive his transition planning. (Bucyk)
11. On December 24, 2020, Hamilton-Wenham filed a Hearing Request with the BSEA seeking substitute consent. (Bucyk)
12. Mother testified that she has not revoked consent for special education for Student and that she is seeking public school funding of Student’s private placements.[[24]](#footnote-24) (Mother)
13. Mother wants to keep Student safe and to reinforce his feelings of safety and security. (Mother)

**LEGAL STANDARDS AND DISCUSSION:**

1. ***Legal Standards***
2. Free Appropriate Public Education in the Least Restrictive Environment

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education" (FAPE).[[25]](#footnote-25) To provide a student with a FAPE, a school district must follow identification, evaluation, program design, and implementation practices that ensure that each student with a disability receives an Individualized Education Program (IEP) that is: custom tailored to the student's unique learning needs; "reasonably calculated to confer a meaningful educational benefit"; and ensures access to and participation in the general education setting and curriculum as appropriate for that student so as "to enable the student to progress effectively in the content areas of the general curriculum.”[[26]](#footnote-26)  As recognized by the Supreme Court, the IEP is the “primary vehicle” for implementing the goals of the IDEA.[[27]](#footnote-27)  An IEP is prepared at a Team meeting involving a representative of the local school district, the child's teacher, the child's parents or guardians, a multi-disciplinary team, and when appropriate, the child.[[28]](#footnote-28)  The IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.[[29]](#footnote-29) The IEP must be individually tailored to the student for whom it is created.[[30]](#footnote-30)  When developing the IEP, the Team must consider parental concerns, the student’s strengths, disability-related needs, recent evaluations, present level of achievement, the academic, developmental and functional needs of the student, and the student’s potential for growth.[[31]](#footnote-31) The IEP must be reviewed no less than once a year to consider the information available on the child, including progress, lack of expected progress toward goals, , evaluative information, information provided by the parents and the anticipated needs of said child.[[32]](#footnote-32)

“School districts may not ignore disabled students' needs, nor may they await parental demands before providing special education services; instead, they must proactively identify, locate, and evaluate children with disabilities who are in need of special education, and then develop an IEP for each such child.”[[33]](#footnote-33)  Pursuant to the IDEA, before a child with a disability may begin receiving services, a school district must “conduct a full and individual initial evaluation."[[34]](#footnote-34) The IDEA requires an initial evaluation to determine if a child is eligible for special education, and if so, what services the child's IEP should include.[[35]](#footnote-35)  The evaluation must utilize “a variety of assessment tools and strategies.”[[36]](#footnote-36)

1. Re-Evaluation

After the initial evaluation, each child must be reevaluated if the local education agency determines it is necessary or if the child's parents or teacher requests a reevaluation.[[37]](#footnote-37)  The reevaluation shall take place “not more frequently than once a year, unless the parent and the local educational agency agree otherwise” and must be done “at least once every three years” unless the parent and local educational agency agree it is unnecessary.[[38]](#footnote-38)  A reevaluation must employ the assessment tools and strategies required by 20 U.S.C. § 1414(b)(2) and consider any existing data for the child.[[39]](#footnote-39)  The district must examine whether the student continues to have a disability, whether the child continues to need special education and related services and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP o and to participate, as appropriate, in the general education curriculum.[[40]](#footnote-40) The school bears the burden to “ensure that ... the child is assessed in all areas of suspected disability. If the school determines additional assessment is needed, the school is responsible for conducting that assessment.”[[41]](#footnote-41) If the IEP Team determines that a reevaluation is not necessary because no additional data is needed to determine either the child's disability status or the child's educational needs, the local educational agency must notify the student’s parents of that determination and the reasons for it, as well as of the parent's right to request a reevaluation.[[42]](#footnote-42)

Subject to the limitation that they do not occur more frequently than once a year or less frequently than once every three years unless the parent and the local educational agency agree otherwise, subsequent evaluations must be conducted "if the local educational agency determines that the educational or related service’s 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."[[43]](#footnote-43) “When determining whether a proposed evaluation, service, or action under the IDEA is ‘warranted’ the inquiry focuses primarily on whether there will be an abridgement of a free, appropriate public education without the suggested intervention.”[[44]](#footnote-44)

1. Parental Consent

With respect to three-year evaluations, the Massachusetts special education regulations provide, in relevant part, as follows:

*Annual reviews and three-year reevaluations*. The school district shall review the IEPs and the progress of each eligible student at least annually. Additionally, every three years, or sooner if necessary, the school district shall, with parental consent, conduct a full three-year reevaluation consistent with the requirements of federal law.[[45]](#footnote-45)

Federal special education regulations further provide:

*Parental consent for reevaluations*. (1) Subject to paragraph (c)(2) of this section, each public agency--

(i) Must obtain informed parental consent, in accordance with §300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

(ii) If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section [referring to the due process procedures].[[46]](#footnote-46)

As a general rule, because the school district is required to provide the student with a FAPE, a parent may not preclude a school district from evaluating her/his son or daughter, nor may a parent compel a school district to rely upon a parent's own evaluation; instead, if a parent desires special education services, he or she may be required to allow the school district to conduct its own assessments for the purpose of the school district's determining the extent of the student's special education needs and how those needs should be addressed.[[47]](#footnote-47)

1. Substitute Consent

Although parental consent is generally required for an evaluation to occur, limited exceptions exist.[[48]](#footnote-48) The availability of a "substitute consent" mechanism is subsumed in the broad grant of jurisdiction to the BSEA to hear "any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law.[[49]](#footnote-49) A school district may secure substitute consent through the hearing process in order re-evaluate a student without parental consent when the evaluation is "warranted."[[50]](#footnote-50) Circuit courts have found that a re-evaluation is warranted, where in its absence, the school would be unable to secure information that could reasonably lead to the development of an individually tailored IEP or where a student experiences significant changes in his/her circumstances or presentation.[[51]](#footnote-51)

Massachusetts law limits the availability of evaluations over parents' objections to situations in which school district personnel believe an evaluation, other than an initial evaluation, is necessary for the district to provide FAPE.[[52]](#footnote-52) In these circumstances, the district may proceed to the BSEA for a hearing as follows:

If, subsequent to initial evaluation and initial placement and after following the procedures required by 603 CMR 28.00, the school district is unable to obtain parental consent to a reevaluation or to placement in a special education program subsequent to the initial placement, or the parent revokes consent to such reevaluation or placement, the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education to the student. If, after consideration, the school district determines that the parent's failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08.[[53]](#footnote-53)

Because parental participation is paramount with respect to determinations involving the special education of eligible students, “in order to be successful in any claim regarding substitute consent for re-evaluation, the school district must show that it has informed parent as to which evaluations and instruments it seeks to employ *and* must also show that it has made reasonable efforts to obtain said informed consent from the parent prior to proceeding to the BSEA.”[[54]](#footnote-54)

1. Burden of Persuasion

In a due process proceeding, the burden of persuasion is on the moving party.[[55]](#footnote-55) As such, the moving party must prove its case by a preponderance of the evidence. If the evidence is closely balanced, the moving party will lose.[[56]](#footnote-56)

1. ***Application of Legal Standard:***

It is undisputed that Student is a student with a disability who is entitled to special education services under state and federal law. The fundamental issue in dispute is whether Parents’ refusal to consent to the three-year evaluation proposed by Hamilton-Wenham will result in the denial of a free and appropriate public education to Student, in which case, substitute consent is appropriate.

As the moving party in this appeal, Hamilton-Wenham bears the burden of persuasion.[[57]](#footnote-57) In accordance with the legal standard set forth above, to prevail, Hamilton-Wenham must prove by a preponderance of the evidence: 1) that the District provided Parents with prior written notice of its intent to re-evaluate Student; 2) that Parents refused to provide consent for the re-evaluation; and 3) that the District is lawfully entitled to conduct the three-year evaluation (i.e., that the reevaluation is timely and failure to conduct it would result in a denial of a FAPE to Student).[[58]](#footnote-58)

Based upon two days of oral testimony, the extensive exhibits introduced into evidence, and a review of the applicable law, I conclude thatthe Hamilton-Wenham has satisfied its evidentiary burden of persuasion. As such, Hamilton-Wenham is entitled to substitute consent to proceed with its proposed three-year re-evaluations.

My analysis is as follows.

1. Hamilton-Wenham Has Provided Parents with Prior Written Notice As To Its Intent To Re-Evaluate Student.

Hamilton-Wenham was obligated to inform Parents “as to which evaluations and instruments it [sought] to employ” and to make “reasonable efforts to obtain said informed consent from the parent prior to proceeding to the BSEA.”[[59]](#footnote-59) At Hearing, Hamilton-Wenham persuasively showed that since September 2019 it provided Parents with proper notice requesting consent for the fall 2019 triennial evaluation and that it has engaged in numerous attempts to obtain Parents’ consent from that date forward to the time it filed its Hearing Request.[[60]](#footnote-60) (Bucyk; S-1; S-2; S-3; S-4).

Specifically, Hamilton-Wenham issued three N1 forms containing all the required elements associated with written notice. The District sent Parents the Consent to Evaluate form identifying the areas proposed for testing three times, with the third one being sent to Parents on two separate occasions. (Bucyk; S-1; S-2; S-3; S-4). Hamilton-Wenham has further identified Dr. Ruiz, Ms. Chapdelaine and Mr. Veiling to conduct the psychological, speech and language, and academic achievement testing, respectively.[[61]](#footnote-61) Although offered the opportunity to meet with the evaluators to discuss the testing process, neither Parents nor their expert, Dr. Chubinsky, contacted the evaluators. (Bucyk; Mother; Chubinsky)

As such, I find that Hamilton-Wenham has provided Parents with proper prior written notice of its proposed re-evaluation.

1. Parents Have Refused Consent to the Re-Evaluation Proposed by Hamilton-Wenham.

The evidence is undisputed that despite Hamilton-Wenham’s reasonable efforts to obtain parental consent for the re-evaluation, Parents have refused to provide said consent. (P-4; P-6 Bucyk; Mother)

1. Hamilton-Wenham Is Lawfully Entitled to Conduct the Re-Evaluation.

As indicated in the **Legal Standards** section above, when seeking substitute consent to evaluate, a school district must establish both the timeliness of the evaluation and that a reasonable likelihood of educational harm will result absent the requested evaluation.[[62]](#footnote-62)

1. Three Years Have Passed Since Student’s Last Re-Evaluation.

Hamilton-Wenham asserts that Student’s re-evaluation came due on November 14, 2019 and that, at the time of filing of the Hearing Request with the BSEA in December 2020, the triennial evaluation was overdue by more than one year. (Bucky; S-4; P-39; P-50) On the other hand, Parents assert that testing is premature since Student was most recently assessed in 2019 as part of the extended evaluation at Dearborn Academy. (Mother; P-19)

The last three-year re-evaluation conducted by the District was in 2013.[[63]](#footnote-63) At that time, Student was assessed in the areas of psychological, speech and language, occupational therapy, physical therapy, and academic achievement. (S-11; S-12; S-13; S-14). Since then, Student was assessed several times at the District’s behest. In 2015, he underwent a neuropsychological assessment comprising social/emotional, cognitive, and academic achievement domains. (P-9) An additional neuropsychological assessment was conducted in 2016 by an outside evaluator at the parties’ agreement. (S-10) Subsequently, as part of an extended evaluation, Student underwent academic testing at Dearborn in the winter of 2019. (P-19; Mother)

The law gives a school district the right to assess “at least once every three years unless the parent and school district agree that a reevaluation is not necessary.”[[64]](#footnote-64) The “every three-years” provision establishes a floor rather than a ceiling for testing; in other words, if deemed necessary, and provided it is not more than once per year, a student may be re-evaluated more frequently. It is undisputed that psychological testing was not conducted within three years of the District’s proposal for a re-evaluation; the first notice was sent to Parents in the fall of 2019, and the last psychological testing was conducted in 2016. (S-4; S-10). Although Dr. Chubinsky conducted a psychiatric assessment in 2017, he did not utilize any formal testing tools at that time, psychological or otherwise. (Chubinsky; P-16) Dearborn did not conduct any psychological testing in 2019, as evidenced by the recommendation in the Dearborn Report that Student undergo psychological testing (P-19) Therefore, I find that the psychological assessment is timely.

Furthermore, although in 2017 Parents had Student’s speech and language functioning via an independent assessment,[[65]](#footnote-65) Hamilton-Wenham has not conducted its own speech and language testing since 2013. (S-8; S-9; S-14) Therefore, I find that the speech and language assessment is timely. This is in keeping with courts’ consistent holdings that “[i]f a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.”[[66]](#footnote-66)

The only formal testing funded by Hamilton-Wenham within three years of the proposed re-evaluation was the KTEA-3, which was completed by Dearborn. (Mother; P-19) This testing battery looked at Student’s academic achievement in the areas of reading and math. However, Student did not complete the math subtests, and a math composite score could not be derived. (P-19) In addition, writing was not formally assessed at that time. (P-19) As such, I find Ms. Bucyk’s testimony persuasive that the academic testing completed by Dearborn was not as exhaustive or comprehensive as it would have been had it been part of a three-year re-evaluation, which looks at all areas of suspected disability. (Bucyk) I therefore conclude that an academic achievement assessment for Student is also timely.[[67]](#footnote-67)

1. The Areas Identified for Assessment by Hamilton-Wenham Are Appropriate.

Parents assert that the areas identified by the District for assessment are overly broad. (Mother; Chubinsky) Parents dispute the need for a speech and language assessment and object to the Student being evaluated for social perception and social pragmatics deficits. (Mother)

However, I find that Hamilton-Wenham thoughtfully selected the areas for testing which are carefully tailored to allow the evaluators to examine areas of concern previously assessed, to explore current needs and new suspected areas of disability, and to rule out old diagnoses, as appropriate. [[68]](#footnote-68) (Bucyk; Ruiz; Chapdelaine; Veiling) For instance, speech and language is an appropriate area for testing because Student had speech and language services on a previously proposed IEP. (S-4; P-13; Bucyk) Student has also had independent speech and language assessments conducted in 2017 suggesting there were speech and language areas of concern, which extend beyond social pragmatics. (S-4; S-8; S-9; P-13; Bucyk) Parent’s own expert, Dr. Chubinsky, in 2017, endorsed a Communication Disorder for Student. (Chubinsky; P-16) It is important to review these areas to determine if weaknesses persist or if Student’s needs have changed.[[69]](#footnote-69) (Bucyk) Dr. Ruiz’s and Ms. Chapdelane’s intentions to examine formerly contested areas of concern, such as social pragmatics, are not evidence of preconceived bias, but rather reflect comprehensiveness. After all, social pragmatics were identified by Dr. Schwartz as an area of concern as early as 2015, and even earlier, in 2013, student’s testing revealed weaknesses in language processing. (P-9; P-10; S-10; S-14; Bucyk) It is hence not unreasonable for Hamilton-Wenham’s evaluators to re-examine this area of significant dispute.[[70]](#footnote-70) Moreover, as there is a legitimate question as to the continued need for speech and language services for Student, it is appropriate and necessary to reevaluate in this area, so that the Team can consider the need for such services going forward based on recent evaluative information.[[71]](#footnote-71)

I therefore find that the areas selected for evaluation by Hamilton-Wenham are appropriate.

1. Hamilton-Wenham’s Evaluators Are Qualified to Conduct the Re-Evaluation.

Parents dispute the ability of Hamilton-Wenham evaluators to reach independent conclusions. Parents’ allegations of bias are based, in part, on the fact that Dr. Ruiz and Mr. Veiling have reviewed the 2016 Neuropsychological Report which references the disputed diagnosis of Social Pragmatic Communication Disorder. It is also clear that, in this matter, Parents distrust all District personnel.[[72]](#footnote-72)

Nevertheless, Dr. Ruiz, Ms. Chapdelaine and Mr. Veil testified persuasively that reviewing past evaluations is part of a complete assessment process, which includes a full record review, interviews with current providers, interviews with parents and formal testing. (Ruiz; Chapdelaine; Veiling) I found Dr. Ruiz, Ms. Chapdelaine and Mr. Veiling to be credible and persuasive in their testimony that their decision-making (i.e., selection of testing instruments), considering testing results, report-drafting and editing is an independent, professional and unbiased process. (Ruiz; Chapdelaine; Veiling) Moreover, if Parents disagree with any of the findings of Hamilton-Wenham’s evaluators, Parents have recourse under the law; following the District’s assessment, Parents may request an independent educational evaluation to challenge Hamilton-Wenham’s findings.[[73]](#footnote-73)

Parents offered no evidence challenging the qualifications, experience, or ability of Dr. Ruiz, Ms. Chapdelaine and Mr. Veiling to complete said assessments, other than the concerns of bias based on their review of the 2016 Neuropsychological Report. Based on the record I find Dr. Ruiz, Ms. Chapdelaine and Mr. Veiling to be highly qualified and possessing the training and experience necessary to conduct their assigned assessments.[[74]](#footnote-74) (Bucyk; Ruiz; Chapdelaine; Veil; S-1; S-2; S-3; S-4; S-15; S-16; S-17) Each has extensive education,, familiarity with their respective testing instruments, and decades of experience testing students with a variety of special needs and diagnosis; moreover, they all credibly described a well thought-out process for selecting testing instruments based on a combination of past areas of concern and identified current needs. (Ruiz; Chapdelaine; Veil)

1. Student’s PTSD Does Not Negate Hamilton-Wenham’s Obligation and Right to Re-Evaluate Student.

Parents and their expert assert that testing Student would result in harm to him as it would retrigger his PTSD symptoms, set him back in his recovery and prevent him from completing his schooling. (Mother; Chubinsky; P-1; P-16) However, in a similar case, the Fifth Circuit found that the school district’s right to conduct a three-year re-evaluation is absolute.[[75]](#footnote-75) In that case a student was taunted and hazed by his classmates resulting in the student’s admittance to a psychiatric hospital. After his release from the psychiatric hospital, his three-year reevaluation became due, but the student’s parents, based on the advice of the student’s treating psychiatrist, advised that the student would be traumatized by additional testing by the school district to test.[[76]](#footnote-76)

The Hearing Officer found in favor of the school district and granted substitute consent. The district court overturned the hearing officer's decision, but the Fifth Circuit disagreed, holding:

“The district court in the instant case recognized that school districts have the right to use their own personnel to reevaluate students. However, the district court said that there was an exception to this rule when further testing by school officials would harm the child medically and psychologically. The district court found that the exception was met here and the school district did not have a right to reevaluate [the student].

The district court erred in creating this judicial exception to the rule. The district court cited no law in support of its position. Nothing in the statutes, regulations or case law supports such an exception. Therefore, we hold that there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA.”[[77]](#footnote-77)

In addition, although Dr. Ruiz, Ms. Chapdelaine and Mr. Veiling do not have experience testing students with PTSD, they all testified to the precautions they take in testing all students, and especially students with anxiety and/or trauma. (Ruiz; Chapdelaine; Veiling) They credibly asserted their commitment to eliciting reliable and valid testing results by taking students’ trauma, anxiety and apprehension into consideration, both before and during the assessment process, as well as when documenting their findings in their reports. (Ruiz; Chapdelaine; Veiling) Even Parents’ expert, Dr. Chubinsky, conceded that there are ways to mitigate testing anxiety, such as selecting an appropriate location for assessment, providing Student with some power or control over testing by inquiring about his preferences, and reassuring Student of the limited purpose of testing. (Chubinsky)

1. Without the Re-Evaluation, Student will be Denied a FAPE.

Hamilton-Wenham asserts that its re-evaluation is warranted on the grounds that the District requires updated information regarding Student’s eligibility and special education related needs in order to develop Student’s IEP.[[78]](#footnote-78) On the other hand, Parents argue that Hamilton-Wenham has sufficient information to develop Student’s IEP. (Mother; Chubinsky)

It is undisputed that Student has had a highly disrupted educational career; he has transitioned amongst many school programs, attending some for extremely short periods of time. He has also endured periods with no school placement at all. (Mother; Chubinsky; Bucyk; P-1; P-7A; P-7B) Student has not accessed a program proposed by Hamilton-Wenham since his short placement at Pathways during the 2018-2019 school year; as such, Hamilton-Wenham has no information regarding Student’s functioning in a school setting since he left Pathways, and such information is outdated. (Bucyk) Parents have not shared with Hamilton-Wenham any information or progress reports from Student’s private, unilateral placements.

I credit Dr. Ruiz’s testimony that children are “moving targets,” and their needs change frequently as they grow and develop.[[79]](#footnote-79) (Ruiz) Dr. Chubinsky, Parent’s expert, advised that he suspects that Student has a learning disability in math. (Chubinsky) But Hamilton-Wenham has no way of assessing and planning for same without consent to evaluate. In short, Hamilton-Wenham has no way of assessing or synthesizing Student’s present levels of academic achievement and functional performance (an essential part of an IEP), thus rendering it impossible for the District to comply with the IDEA.[[80]](#footnote-80)

In this matter, a re-evaluation is especially necessary because of the significant dispute between the Parties as to the nature of Student’s educational needs.[[81]](#footnote-81) (Mother; Chubinsky; Bucyk) At Hearing, considerable evidence was presented and hotly contested as to Student's diagnoses. (Mother; Chubinsky; Bucyk) In this Decision, I do not attempt to make a determination as to the appropriate educational diagnoses for Student, but instead I highlight this gulf between the Parties as evidence of the need to evaluate Student comprehensively. In order to clarify and identify the totality of a student’s special education and related service needs, whether or not commonly linked to the disability categories and diagnoses advocated by the parties, a comprehensive assessment is required.[[82]](#footnote-82) Less important than Student’s diagnosis per se is the thorough identification and review of his current unique needs, as an “appropriately drafted IEP addresses the unique needs of the student, irrespective of the label attached to him/her…. Thus, the transcending consideration is whether a district develop[s] an IEP that addressed the manifestations of a student's conditions and addressed his/her needs, not the label attached.”[[83]](#footnote-83) Where Hamilton-Wenham has not had the opportunity to work with Student for more than the last two school years, a reevaluation is particularly necessary to determine whether Student has made progress in some areas of need or whether he has developed new areas of need.[[84]](#footnote-84)

In the wake of *Endrew F. v. Douglas County School District RE-1*, Hamilton-Wenham has an obligation to ensure that Student’s IEP is reasonably calculated to enable him to make progress that is appropriate in light of his circumstances.[[85]](#footnote-85) Where, as here, the Parties are in the midst of a dispute as to the type of programming and placement that Student requires in order to receive a FAPE, and where Parents argue that Hamilton-Wenham’s proposed programs do not offer Student a FAPE[[86]](#footnote-86), it is especially important to re-assess Student in order to identify his unique abilities, needs, and “circumstances.”[[87]](#footnote-87) Without the requisite evaluations, there is no reliable way to determine the components of a FAPE for Student.[[88]](#footnote-88)

Accordingly, I find that an updated three-year evaluation is necessary for Hamilton-Wenham to determine what educational services and placement are appropriate for Student, and as such, grant substitute consent. Hamilton-Wenham may conduct the evaluation of Student notwithstanding Parents’ lack of consent. The evaluation shall include a psychological assessment, a speech and language evaluation, academic achievement testing, and an educational assessment.

**ADDITIONAL REQUESTS:**

In their closing argument, Parents requested that

the BSEA retain jurisdiction over this matter to: 1) select evaluators who have not been exposed to documents referencing [a Social Pragmatic Communication Disorder]; 2) monitor documents contained in [Hamilton-Wenham’s] referral packets sent out regarding [Student] to guarantee no documents referencing [the Social Pragmatic Communication Disorder] are included; 3) prohibit [Hamilton-Wenham] from engaging in any form of written and/or oral communication with BSEA selected evaluators in advance of and/or during and/or after any of [Student’s] evaluations; 4) [o]rder evaluations of [Student] be limited to the area of potential need (not to include social pragmatic and/or social perception testing); and 5) identify a neutral location, agreed upon by Parents, for [Hamilton-Wenham’s] new, unbiased evaluators to test [Student].

Parents’ request is hereby DENIED. As articulated in the body of this Decision, Hamilton-Wenham is entitled to choose its own evaluators and is obligated to assess Student in all areas of suspected disabilities.

In its closing argument, Hamilton-Wenham requested that

the hearing officer make clear that, with the Order for Substitute Consent, if the parents choose to refrain from allowing [Student] to be evaluated by the district, the IEP full team process for determining eligibility, services, and placement, will be suspended, until such time as parents provide consent, or, in the event that they voluntarily elect to do so, parents withdraw [Student] from special education from the district, at which time any further need for annual notification of testing and further need for annual notification of testing and further special education process will become moot.

The District’s request is hereby DENIED. Hamilton-Wenham is obligated to continue to engage Parents in the IEP process, and I will not limit Student’s rights to the “IEP full team process.”

**ORDER**:

Substitute consent is granted to Hamilton-Wenham to conduct a three-year evaluation to include a psychological assessment, a speech and language assessment, academic achievement testing and an educational assessment. Parents’ request that the BSEA retain jurisdiction over this matter is denied. The District’s request that I suspend the “IEP full team process” is also denied.

/s/ Alina Kantor Nir

Alina Kantor Nir, Hearing Officer

Date: June 22, 2021

1. Parents’ hearing request (BSEA # 1707353) and the District’s hearing request were consolidated(BSEA# 1804291) d and heard together. [↑](#footnote-ref-1)
2. Citations to testimony and exhibits have been omitted. [↑](#footnote-ref-2)
3. I take notice of Austin Prep’s location as indicated on its website, which may be found at <https://www.austinprep.org>. [↑](#footnote-ref-3)
4. Similarly, Dr. Chubinsky observed that Student attended “a variety of different schools that were poor fits and exacerbated his anxieties, often related to the underlying post-traumatic stress disorder incurred during the original bullying situation.” (P-1; Chubinsky) [↑](#footnote-ref-4)
5. At Hearing, witnesses referred to Social Pragmatics Communication Disorder, Social Communication Disorder and Social Pragmatics Disorder interchangeably. [↑](#footnote-ref-5)
6. Other than the “Mental Status Examination” referenced in Dr. Chubinsky’s 2017 Psychiatric Assessment, it is unclear from the record which instruments Dr. Chubinsky relied on in rendering his clinical diagnoses of Student. (P-16) [↑](#footnote-ref-6)
7. Dr. Chubinsky did not become acquainted with Student until long after the bullying incident in fourth grade. Because Student was no longer “acute” when Dr. Chubinsky first met with him, he relied on Parents’ report of Student’s symptoms following the incident. Symptoms included sleep problems, nightmares, anxiety, regression, tics and OCD. (Chubinsky) [↑](#footnote-ref-7)
8. According to Dr. Chubinsky, Social Communication Disorder should not be included in the DSM-V; cultural factors make testing for the disorder unreliable. (P-16; Chubinsky) [↑](#footnote-ref-8)
9. This extended evaluation came at the heels of a 51A filed by the school district due to Student’s not attending school, which subsequently resulted in the Department of Children and Families (DCF) filing a Care and Protection case (“C&P”) against Parents. (P-7E; P-29; P-38; P-41; P-42; P-46; Mother; Bucyk) According to Mother, Dearborn was “traumatizing” to Student, in part, because he was afraid that he would be removed from the home if he did not attend, as his continued attendance at Dearborn was a significant aspect of the C&P proceeding. (Mother) [↑](#footnote-ref-9)
10. According to the Dearborn Report, the KTEA was administered to Student in September 2018. This appears to be an error since Student participated in the extended evaluation beginning in December 2018. (P-19) [↑](#footnote-ref-10)
11. The Notice Date on the Evaluation Consent Form is August 21, 2019. (S-4) [↑](#footnote-ref-11)
12. While Student attended Pathways following his extended evaluation at Dearborn, there was also a question raised as to the need for an expressive language goal on his IEP. (Bucyk) [↑](#footnote-ref-12)
13. Because no consent was received, said forms have yet to be sent. (Bucyk) [↑](#footnote-ref-13)
14. Student, Parents and their expert, Dr. Chubinsky, found Pathways to be “an inadequate fit” for Student. During his time at Pathways, Student voiced concerns that his peers had autism and compared the school to a mental institution. (P-14; Mother; Chubinsky) [↑](#footnote-ref-14)
15. I take notice of Chauncy Hall Chapel Hill School’s location as indicated on its website, which may be found at <https://www.chch.org>. [↑](#footnote-ref-15)
16. The Notice was dated May 18, 2020. (S-3) [↑](#footnote-ref-16)
17. Mother testified that she was advised to respond as such by her then-current advocate. (Mother) [↑](#footnote-ref-17)
18. The Notice was dated October 20, 2020. (S-2) [↑](#footnote-ref-18)
19. Hamilton-Wenham notes that the November 18, 2020 meeting was an annual Team meeting because Parents had not consented to a re-evaluation of Student. (S-1) Parents did not attend the meeting. (Bucyk) [↑](#footnote-ref-19)
20. Mother also noted that Dr. Ruiz was present at a Team meeting where he “accepted” Dr. Roosa’s “false diagnosis.” (Mother) [↑](#footnote-ref-20)
21. Other in-school activities also appear to increase Student’s anxiety. For example, in October 2019, Dr. Chubinsky recommended delaying Student’s participation in a foreign language class due to it being “very trying” for Student as it could “negatively complicate his adjustment to his new school because of the added stress.” Dr. Chubinsky explained that Student has an expressive language disorder that could “make learning a foreign language more challenging for him.” He also noted that Student suffers from anxiety when “speaking in front of others” which “has roots in the way he as mistreated in the 4th grade.” He indicated that Student “can become anxious at times especially if triggered by name-calling or criticism or reminders of incidents that happened in his past at school.” (P-22) However, in January 2020, while attending Chapel Hill-Chauncy Hall, Student was commended for being a successful speaker, when he delivered an “excellent” speech to his peers. (P-40) [↑](#footnote-ref-21)
22. Records from Pathways also reflect Student’s concern with being labeled as autistic. (P-14) [↑](#footnote-ref-22)
23. At a different unilateral school placement, Student was “immediately and very actively pressured to take a mathematics placement examination which [Student] explained to them was making him very anxious.” Dr. Chubinsky opined, “We were left *at a loss for … the need to have an examination in math* before he had a chance to transition to his new school.” (P-23) (emphasis added) [↑](#footnote-ref-23)
24. As indicated in the **Relevant Procedural** **History** section herein, on December 18, 2020, Parents filed a Hearing Request (BSEA #2104633) alleging denial of a FAPE to Student and seeking, in part, reimbursement for tuition for the 2019-2020 and 2020-2021 school years and for continued counseling with Dr. Chubinsky. [↑](#footnote-ref-24)
25. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (d)(1)(A). [↑](#footnote-ref-25)
26. See 20 U.S.C §1401(9), (26), (29); 603 CMR 28.05(4)(b); Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 84, 84 (1st Cir. 2012); C.D. v. Natick Public School District, et al., No. 18-1794, at 4 (1st Cir. 2019) (quoting Fry v. Napoleon Community Schools, 137 S. Ct. 743, 748-749 (2017));*Lessard v. Wilton Lyndeborough Cooperative School Dist.,* 518 F.3d 18 (1st Cir. 2008); *C.G. ex rel. A.S. v. Five Town Community School Dist.,* 513 F. 3d 279 (1st Cir. 2008); *In Re: Chicopee Public Schools,* BSEA #1307346, 19 MSER 224 (Byrne, 2013). [↑](#footnote-ref-26)
27. Honig v. Doe, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). [↑](#footnote-ref-27)
28. Id. [↑](#footnote-ref-28)
29. See Id.; see also 20 U.S.C. § 1401(19). [↑](#footnote-ref-29)
30. *Endrew F. v. Douglas Cty. Reg'l Sch. Dist.*, 137 S. Ct. 988, 1001 (2017). [↑](#footnote-ref-30)
31. 34 C.F.R. § 300.324(a)(i-v); *Endrew F.*, 137 S. Ct. at 999; *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). [↑](#footnote-ref-31)
32. 34 C.F.R. § 300.24(b)(ii)(A-E). [↑](#footnote-ref-32)
33. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 518-9 (D.C.Cir.2005). [↑](#footnote-ref-33)
34. 20 U.S.C. § 1414(a)(1)(A). [↑](#footnote-ref-34)
35. 20 U.S.C. § 1414(a)(1). [↑](#footnote-ref-35)
36. 20 U.S.C. § 1414(b)(2). [↑](#footnote-ref-36)
37. 20 U.S.C. § 1414(a)(2)(A); see also *James v. D.C.,* 194 F. Supp. 3d 131, 142–43 (D.D.C. 2016)

    (“The IDEA distinguishes between an initial evaluation of a student and a ‘reevaluation.’  An ‘initial evaluation,’ as the name implies, is an opening evaluation ‘to determine if the child is a child with a disability.’ A ‘reevaluation’ refers to subsequent evaluations of a child deemed to have a disability”) (internal quotations and citations omitted). [↑](#footnote-ref-37)
38. 20 U.S.C. § 1414(a)(2)(B). [↑](#footnote-ref-38)
39. 20 U.S.C. at § 1414(c)(1). [↑](#footnote-ref-39)
40. See 34 C.F.R. § 300.305(a)(2)(i)(B) [↑](#footnote-ref-40)
41. *Z. B. v. D.C.,* 888 F.3d 515, 518–19 (D.C. Cir. 2018) (internal citations and quotations omitted). [↑](#footnote-ref-41)
42. 20 U.S.C. § 1414(c)(4)(A). [↑](#footnote-ref-42)
43. 20 U.S.C. at § 1414(a)(2)(A). [↑](#footnote-ref-43)
44. *In Re: Duxbury Public Schools and Ishamel*, BSEA #07-2419, 13 MSER 223 (Byrne, 2007). [↑](#footnote-ref-44)
45. 603 CMR 28.04(3). [↑](#footnote-ref-45)
46. See 34 C.F.R. § 300.300(c). [↑](#footnote-ref-46)
47. *Johnson by Johnson v. Duneland Sch. Corp*., 92 F.3d 554, 558 (7th Cir. 1996) (citing *Andress v. Cleveland Independent School District,* 64 F.3d 176 (5th Cir. 1995)*; see also*, *M.T.V. v. Dekalb County School District*, 446 F.3d 1153, 1160 (11th Cir. 2006) (parents cannot force the school to rely solely on parents' independent evaluation); *Dubois v. Connecticut State Board of Education*, 727 F. 2d 44, 48 (2nd Cir. 1984) (school system may insist on evaluation by qualified professionals who are satisfactory to the school officials); *Vander Malle v. Ambach*, 673 F.2d 49, 53 (2nd Cir. 1982) (school is entitled to have student examined by qualified psychiatrist of their choosing); *M.L. ex rel. A.L. v. El Paso Independent School Dist*., 2009 WL 1019969 (W.D.Tex. 2009) (parent "may not … assert that A.L. is entitled to special education services while simultaneously refusing to allow [the school district] to evaluate A.L. to determine what those services may be"). [↑](#footnote-ref-47)
48. 20 U.S.C. § 1414(a)(D); 34 C.F.R . § 300.300(c)(1)(i). [↑](#footnote-ref-48)
49. 603 CMR 28.03(3)(a); see also *In Re: Bridgewater-Raynham Public Schools v. Student*, BSEA #11-6444, 17 MSER 91 (Figueroa, 2011) (“There is no question that school districts have a right to conduct school-based testing or that this is a pre-requirement to a parent’s right to independent evaluation. Furthermore, the BSEA has jurisdiction to order evaluations where these are warranted”). [↑](#footnote-ref-49)
50. 20 U.S.C § 1414 (I)(D)(II); 20 U.S.C § 1414 (2)(i); 34 C.F.R. § 300.303. [↑](#footnote-ref-50)
51. *See* M.T.V v. Dekalb County Sch. Dist., 446 F.3d at 1160 (affirming Administrative Law Judge's order requiring parents to consent to School District's request to reevaluate student by an expert of its choice, or else forfeit services addressing his motor impairments pursuant to eligibility under "Other Heath Impaired" category); see also, Johnson, 92 F.3d at 557-58 (affirming Hearing Officer's order, under previous version of IDEA, that a three-year evaluation take place absent parental consent where a student's "condition had changed since he last attended school"). [↑](#footnote-ref-51)
52. See 603 CMR 28.07(1)(b); see also *In Re: Lowell Public Schools*, BSEA# 110039, 16 MSER 365 (Crane, 2010) (substituting consent for parents after concluding that an updated three year evaluation is necessary for the school district to determine what educational services and placement are appropriate for the student and that “[w]ithout new evaluations, it simply is not possible to do what state and federal special education law require – that is, to determine whether special education or related services are needed, and to tailor any needed special education and related services to Student’s current strengths and weaknesses”); *In Re: Maynard Public Schools*, BSEA#106645, 16 MSER 206 (Scannell, 2010) (finding that “many of the assessments requested by Maynard in the three year re-evaluation proposal [were] necessary to determine [the student’s] current functioning so that the proper special education services [could] be provided to him”); In Re: Duxbury Public Schools & Ishmael, BSEA #072419, 13 MSER 223 (Byrne, 2007) (where the District expressed concern about conflicting and missing information regarding his mental status and health, the Hearing Officer allowed the district to conduct a comprehensive psychiatric evaluation absent parental consent of student whose mental health was primary disability affecting his education). [↑](#footnote-ref-52)
53. 603 CMR 28.07(1)(b). [↑](#footnote-ref-53)
54. *In Re: Norwell Public Schools*, BSEA #1901470, 24 MSER 252 (Figueroa, 2018). [↑](#footnote-ref-54)
55. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). [↑](#footnote-ref-55)
56. *Id*. [↑](#footnote-ref-56)
57. See *id*. [↑](#footnote-ref-57)
58. See *In Re: Lowell Public Schools*, BSEA# 110039, 16 MSER 365 (Crane, 2010). [↑](#footnote-ref-58)
59. *In Re: Norwell v. Student*, BSEA # 19-01470, 24 MSER 252 (Figueroa, 2020). [↑](#footnote-ref-59)
60. Written notice be given to the parents of a child with a disability within a reasonable time before a school district: a) proposes to initiate … evaluation … of the child ….. See 20 U.S.C. § 1415(b)(3). That notice must include: 1) a description of the action proposed or refused by the agency; 2) an explanation of why the agency proposes or refuses to take the action; 3) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; 4) a statement that the parents of a child with a disability have protection under the procedural safeguards of IDEA and the means by which a copy of the procedural safeguards can be obtained; 5) sources for parents to contact to obtain assistance in understanding the provisions of this part; 6) a description of other options that the IEP team considered and the reasons why those options were rejected; and 7) a description of other factors that are relevant to the agency's proposal or refusal. See 34 C.F.R. § 300.503. [↑](#footnote-ref-60)
61. *In Re: Norwell v. Student*, BSEA # 19-01470, 24 MSER 252 (Figueroa, 2020) (Norwell persuasively argued that since 2016 it had engaged in numerous attempts to obtain Parents’ consent to proceed with Student’s three year re-evaluation). [↑](#footnote-ref-61)
62. See *In Re: Ipswich Public Schools and Soleil*, BSEA #1906526, 25 MSER 220 (Byrne, 2019). [↑](#footnote-ref-62)
63. See *In Re: Concord Public Schools*, BSEA # 11-8996, 17 MSER 296 (Crane, 2011) (“this one undisputed fact --that Concord has not evaluated Student since 2006 -- is sufficient to require that I find that Concord must be allowed to conduct an occupational therapy reevaluation notwithstanding Parents' refusal to consent”).  [↑](#footnote-ref-63)
64. 20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b). [↑](#footnote-ref-64)
65. If a parent obtains an evaluation at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. § 300.502(c); see also *In Re: Concord Public Schools*, BSEA # 11-8996, 17 MSER 296 (Crane, 2011) (“Concord has the right to conduct its own evaluation, rather than be forced to rely on an independent evaluation. Also, Concord did not participate in any way in the Children's Hospital evaluation. As a result, this hospital-based OT evaluation could not consider the actual impact of Student's deficits on his ability to access the curriculum and make educational progress at school, which are relevant to the legal standards for eligibility to receive OT services, as explained above”). In present matter, the evidence suggests that Parents’ assessments were considered and incorporated into Student’s subsequent IEPs. (P-39; P-51) [↑](#footnote-ref-65)
66. See *Andress,* 64 F.3d at 178–79; *see also Johnson by Johnson,* 92 F.3d at 558 ;*Gregory K. v. Longview Sch. Dist.,* 811 F.2d 1307, 1315 (9th Cir.1987) (holding that parents must permit mandatory reassessments under the Education of the Handicapped Act, the IDEA's predecessor, if they want their child to receive special education services); *M.T.V. v. DeKalb Cty. Sch. Dist.,* 446 F.3d at 1160; *Dubois v. Conn. State Bd. of Ed.,* 727 F.2d 44, 48 (2d Cir.1984). [↑](#footnote-ref-66)
67. This is an especially important area to assess in light of Dr. Chubinsky’s suspicion that Student has a learning disability in math. (Chubinsky) [↑](#footnote-ref-67)
68. See *In Re: Duxbury Public Schools and Ishamel*, BSEA #07-2419, 13 MSER 223 (Byrne, 2007) (“The proposed psychiatric evaluation outlined by Dr. Clark, and sought by Duxbury, is carefully tailored to elicit information that will help school personnel develop appropriate supports and programming in the educational setting”); see also *Kornblut v. Hudson City Sch. Dist. Bd. of Educ.,* No. 5:14-CV-1986, 2015 WL 5159082, at \*8 (N.D. Ohio Sept. 2, 2015)(“The record shows, therefore, that the District purposefully chose particular evaluation strategies, within the scope of 20 U.S.C. § 1414(b)(2)(A), aimed at getting "relevant functional, developmental, and academic information" about C.K., without being unduly disruptive of the child's (or other children's) routine. These are professional judgments that must be given due weight by this Court”). [↑](#footnote-ref-68)
69. I note that in her 2018 Decision, Hearing Officer Figueroa found, in part, that Student “presents with mild executive functioning and social communication deficits, and suffers from anxiety secondary to PTSD.” [↑](#footnote-ref-69)
70. See *In Re: Newburyport and Susana*, BSEA #1606551, 22 MSER 32 (Reichbach, 2016) (“Due to discrepancies among reports from her mother and the medical and educational professionals who have worked with Susana, the Newburyport Public Schools lacks sufficient information to develop an IEP for her”); *In Re: Maynard Public Schools*, BSEA#106645, 16 MSER 206 (Scannell, 2010) (where there were many disruptions to the student’s program because of the parents’ inconsistency in allowing certain services, the assessments requested by Maynard for its three year re-evaluation proposal were necessary to determine the student’s current functioning so that proper special education services could be provided to him); see also *New Mexico Pub. Educ. Dep't,* 115 LRP 12278 (NM SEA, 2015) (where there was ongoing disagreement over whether a student’s inability to regulate his behavior was volitional or a result of his disabilities, a district's failure to conduct a comprehensive reevaluation to resolve these conflicts denied the student a FAPE). [↑](#footnote-ref-70)
71. *Downingtown Area School District*, 22847-1920, 120 LRP 8272 (PA SEA, 2019) (the district’s request was “not unreasonable” and was “well-grounded” because, in the most recent re-evaluation, the Speech and Language evaluator opined definitively that the student demonstrated a need in Speech and Language articulation and should continue to receive services to address this need, but, at this point, “this data-based position was nearly two years old, and before moving away from providing such services, a re-evaluation of the student's potential continued need for, or lack of need for, S&L articulation services can be, and should be, supported”). [↑](#footnote-ref-71)
72. See *In Re: Norwell Public Schools*, BSEA # 19-01470, 24 MSER 252 (Figueroa, 2018) (“Lastly, with minor exceptions, Parents generally distrust Norwell’s personnel”). [↑](#footnote-ref-72)
73. See 34 C.F.R. § 300.502(b)(1); see also *In Re: Norwell v. Student*, BSEA # 19-01470, 24 MSER 252 (Figueroa, 2018) (“Based on Mother’s cross examination of one of Norwell’s witnesses, it would appear that she is concerned that all of Student’s strengths and weaknesses may not be captured by the evaluations proposed by Norwell. If that is the case, Parent may request that Norwell conduct additional speech and language evaluations”). [↑](#footnote-ref-73)
74. *In Re: Norwell v. Student*, BSEA # 19-01470, 24 MSER 252 (Figueroa, 2018) (“The evidence further supports a finding that Ms. Murino possesses the requisite licensure and knowledge to perform the evaluations that she is called to conduct on behalf of Norwell despite somewhat limited experience in administering some of the instruments”). [↑](#footnote-ref-74)
75. See *Andress,* 64 F.3d at 179 (“Therefore, we hold that there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA”). [↑](#footnote-ref-75)
76. See *id.* at 177–78. [↑](#footnote-ref-76)
77. *Id*. at 178-79; see also *P.S. v. Brookfield Bd. of Educ.,* 353 F. Supp. 2d 306, 313-314, 315 (D. Conn.), *adhered to on reconsideration*, 364 F. Supp. 2d 237 (D. Conn. 2005), and *aff'd sub nom. P.S. ex rel. J.S. v. Brookfield Bd. of Educ.*, 186 F. App'x 79 (2d Cir. 2006) (“There was some testimony at the hearing indicating that an improper examination might have harmed someone in P.S.'s condition; there was no evidence that the Pernice, the proposed evaluator, was not a qualified psychologist or that an examination by her would have been the kind that would have caused harm.Moreover, the Hearing Officer found—based on the parents' testimony—that the actual reason the parents refused consent was because they were concerned that the Board's psychologist would not be impartial and might make a recommendation they did not like. If there is an exception to the Board's right to evaluate a child, it requires more of a showing than was made here… [In addition, P.S.] spends a good deal of time in his brief explaining why the Board had no *need* to examine him. That is beside the point. The only question is whether the Board was *entitled* to examine him, and it was… That P.S.'s parents may have believed the tests unnecessary is not germane. The Board was entitled to have its professional examine P.S. Of course, if the results of that examination led to an improper IEP, that could have been challenged, but there is simply no authority to support the proposition that a parent's disagreement about the need for a particular test justifies refusing consent”). [↑](#footnote-ref-77)
78. 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); see also *In Re: Norwell Public Schools*, BSEA # 19-01470, 24 MSER 252 (Figueroa, 2018); *Spring Branch Independent School District*, 030-SE-0919, 76 IDELR 59 (TX SEA, 2019) (“Student’s speech/language needs and use of AT are at the center of Student’s educational program. The District must have an accurate, current picture of Student’s needs and abilities in these areas to provide an appropriate special education program”). [↑](#footnote-ref-78)
79. See *In Re: Concord Public Schools*, BSEA # 11-8996, 17 MSER 296 (Crane, 2011) (“It is not difficult to understand Concord's need for an updated OT evaluation as soon as possible. Over the passage of time, any student's special education needs are likely to change, and perhaps to change significantly, thus the requirement within the IDEA that the IEP Team meet at least annually to review a student's progress and educational needs, and propose a new IEP. Concord requires more recent evaluative information for purposes of determining whether current IEP goals related to Student's deficits in this area are appropriate, whether the level and kind of OT services in the IEP are appropriate, and, perhaps most importantly, whether Student should remain eligible to receive OT services”). [↑](#footnote-ref-79)
80. See *Kirby v. Cabell County Bd. of Educ*., 2006 WL 2691435 (S.D.W.Va. 2006) (“This deficiency goes to the heart of the IEP; the child's level of academic achievement and functional performance is the foundation on which the IEP must be built. Without a clear identification of … present levels, the IEP cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed”); see also *Round Valley Unified School District*, 2021010166, 121 LRP 15401 (CA SEA, 2021) **(**The assessment plan was appropriate and necessary to provide the district with updated information about the child's needs since he hadn't attended school in three years, and, as a result, the district did not know his PLEP in areas of need, or suspected areas of need, had no classroom logs, report cards, or any alternate sources of data to develop goals, offer placement and services, or to use as a basis for evaluating his continuing eligibility); see *Brock ex rel S.B. v. New York City Dep't of Educ.,* No. 13 CIV. 8673 GBD DF, 2015 WL 1516602, at \*7 (S.D.N.Y. Mar. 31, 2015) (progress reports utilizing "broad" grading criteria and "rudimentary grading differentials" were an “insufficient substitute for the mandatory triennial reevaluation in this record” which is meant to ensure that the student "is appropriately assessed in all areas related to the suspected disability”).  [↑](#footnote-ref-80)
81. See *Heather S. v. State of Wis*., 125 F.3d 1045, 1055 (7th Cir. 1997) (“Nor does anything in the law require unanimity among those responsible for evaluating a disabled student”). [↑](#footnote-ref-81)
82. See 34 C.F.R. § 300.304(b)(6). [↑](#footnote-ref-82)
83. *In Re: Scott M.*, 24 IDELR 1229 (SEA NA 1996) [↑](#footnote-ref-83)
84. See, for instance, *Round Valley Unified School District*, 2021010166, 121 LRP 15401 (CA SEA, 2021) (where Student was absent the entire 2020-2021 school year, the district had no information regarding his unique needs, including whether he has developed new ones). [↑](#footnote-ref-84)
85. See *Questions and Answers on Endrew F. v. Douglas County Sch. Dist. Re-1*, 71 IDELR 68 (EDU 2017) (the *Endrew F*. decision emphasized that the IEP decision-making process must be individualized and produce challenging objectives and meeting that standard will hinge on how effectively the team gathers and interprets information about the child's current performance). [↑](#footnote-ref-85)
86. This is the issue for the upcoming BSEA Hearing in the matter of BSEA #2104633. [↑](#footnote-ref-86)
87. See *In Re: Ipswich Public Schools and Soleil*, BSEA #1906526, 25 MSER 220 (Byrne, 2019) (“By declining [the re-evaluation], however, the Parents lose the capacity to challenge a potential denial of FAPE linked to information an evaluation could have uncovered and thereby waive any future claim for compensatory services on that basis”). [↑](#footnote-ref-87)
88. See *Brock ex rel S.B. v. New York City Dep't of Educ.,* No. 13 CIV. 8673 GBD DF, 2015 WL 1516602, at \*7 (S.D.N.Y. Mar. 31, 2015) (upholding a hearing officer’s finding that without the requisite evaluations, there is no reliable way of analyzing the FAPE). [↑](#footnote-ref-88)