HEARING OFFICER DECISION

COVER SHEET

DUE PROCESS HEARING

DOCKET NO: D10-002

SCHOOL DISTRICT (LEA): XXXXXXX COUNTY SCHOOLS

SCHOOL DISTRICT COUNSEL: XXXXXXX, ESQ.

STUDENT: XXXXXXX

PARENT: XXXXXXX

COUNSEL FOR STUDENT: PRO SE

INITIATING PARTY: PARENT

DATE OF REQUEST: JULY 14, 2009

DATE OF HEARING: SEPTEMBER 17, 2009

PLACE OF HEARING: XXXXXXXX COUNTY SCHOOL BOARD

 OFFICE

OPEN V CLOSED: OPEN

STUDENT PRESENT: NO

DUE DATE FOR HEARING OFFICE DECISION: OCTOBER 22, 2009 (BY AGREED

 EXTENSION)

HEARING OFFICER: PATRICK LANE, ESQ.

PRELIMINARY MATTERS

 Subsequent to the Hearing, both parties submitted proposed findings of fact and conclusions of law. Both have been reviewed and considered in offering this Decision. To the extent that any witness testimony is not in conformity with the findings of fact contained herein, such testimony is not found to be credible.

PROCEDURAL HISTORY

 The request for Hearing in this matter was filed on July 14, 2009. The parties attempted resolution but were unable to achieve an agreement. A Prehearing Conference was held on August 28, 2009, the results of which are reflected in the Prehearing Conference Order issued on September 2, 2009. The Hearing was held on September 17, 2009. During the hearing, Petitioner called eight witnesses and offered forty four exhibits into evidence. LEA called four witnesses and offered twenty exhibits into evidence1. The parties agreed to submit written closing arguments, post hearing briefs and proposed findings of fact and conclusions of law. To the extent that such have been submitted, they have been reviewed and considered in formulating this Decision.

ISSUES PRESENTED

 As discussed during the prehearing conference and reflected in the Prehearing Conference Order, the issues presented are as follows:

1. *Did LEA fail to comply with a previous Hearing Office Decision which ordered an independent educational evaluation by requiring the use of an evaluator who was not independent from the LEA*? Petitioner argues that the LEA forced her to acquiesce

1 Petitioner attempted to call additional witnesses who were LEA employees and disclosed to LEA counsel. LEA objected to all witnesses and claimed that the entire witness list and exhibit list had not been disclosed. However, the pro se Petitioner had folded the witness and exhibit disclosure and placed it inside the CD case which contained the Petitioner’s disclosed exhibits. During the hearing, counsel for the LEA found the folded witness disclosure in his case file. Therefore, the LEA objection was overruled. However, the effect of the overlooked disclosure was that LEA did not make several LEA employees who were on Petitioner’s witness list available.

to the use of a particular evaluator by asserting that other evaluators were too expensive. The result, according to the Petitioner, was that an evaluator who had a relationship with the LEA conducted the evaluation and it was not independent. Petitioner requests the subject evaluation be removed from the student’s file and an independent evaluation be conducted and inserted in lieu thereof. LEA argues that the evaluator was mutually agreed upon and the evaluation produced was independent, valid and should remain in the file.

1. *Did the LEA deny the student FAPE by failing to include special education and*

*related services in the IEP which would address the student’s needs for behavioral, social and communication needs?* Petitioner alleges that LEA was ordered to include behavioral support and services related to social and communication needs in the IEP. According to Petitioner, LEA refused to add such services, including a behavior intervention plan, to the IEP. Petitioner requests sixty minutes per day of 1:1 social and communication services be included in the IEP and student be provided compensatory education and services for those services not provided in the IEP. LEA argues that a behavior intervention plan is in place and the student has not been removed from class for discipline reasons in an amount that interferes with student’s education. LEA further argues that to the extent social and communication services are needed, such services are provided.

FINDINGS OF FACTS2

1. Student is a nine year old female with social and communications deficiencies. She has been diagnosed with autism. P-1.3
2. The previous Hearing Decision required LEA to provide student with an independent evaluation and set out a procedure to follow in undertaking the evaluation. P-1.
3. XXXXXXX clinical and school psychologist performed the independent evaluation. LEA-3.4

2To the extent that facts are not relevant, they may have been omitted from this Decision.

3Petitioner exhibits will be referred to as P-1, P-2, etc. LEA exhibits will be referred to as LEA-1, LEA-2, etc.

1. Petitioner alleged that LEA refused to use any evaluator who it believed was too expensive. This was evidenced by P-42, a letter from Petitioner’s proposed evaluator. The letter was objected to by LEA and Petitioner offered to remove it from her admitted exhibits.
2. XXXXXXX determined that student did not have autism, Asperger’s or Pervasive Developmental Disorder. LEA-3, pg 22.
3. XXXXXXX conclusion that student did not have autism, Asperger’s or Pervasive Developmental Disorder is inconsistent with the conclusions and diagnosis of the majority of medical professionals who have evaluated and/or treated student. LEA-3.
4. XXXXXXX was not called as a witness to explain why he arrived a different conclusion than the majority of other evaluators. In his report, XXXXXXX attempts to distinguish his evaluation procedures from those of previous evaluators. LEA-3. His distinctions and his evaluation results are not credible.
5. School counselor has not provided the student, with any counseling services. *Testimony of School counselor Tr. Pg 33.*
6. School counselor has been present at Student’s IEP meetings. *Testimony of School counselor. Tr. Pg 33.*
7. Student was not given a behavior plan at the time of the February 29, 2008 IEP meeting. *Testimony of School counselor. Tr. Pg 34*
8. Student’s IEP already contained speech and communication in her IEP before the Feb. 29, 2008 IEP meeting, but not social skills. *Testimony of School Counselor. Tr. Pg 34.*
9. School counselor was a part of the team that performed the functional behavior assessment on Student. *Testimony of School counselor. Tr. Pg 44*
10. Student received a behavior assessment on October 9, 2008. *Testimony of School* *Counselor Tr. Pg 45*. It attributed Student with low self-confidence, crying, sucking on thumb, difficulty socializing with peers, especially males. *Testimony of School counselor. Tr. Pg 45.*
11. School counselor believes that the social skills test was performed between January and February 2009. *Testimony of School counselor. Tr. Pg 47.*
12. School counselor does not believe that Petitioner’s complaint caused the meeting regarding Student’s social skills three days later. School Counselor believes the process was being prepared, waiting for necessary tool to be located. *Testimony of School Counselor. Tr. Pg 50.*
13. School counselor filled out a ratings scale regarding Student’s social skills evaluation. *Testimony of School counselor. Tr. Pg 53.* This was submitted to the special education coordinator that was primarily responsible for conduction the social skills evaluation. *Testimony of School counselor. Tr. Pg 54.*
14. School counselor observed Student in various settings throughout a day in preparing her social skills evaluation. *Testimony of School counselor. Tr. Pg 55*. School counselor has observed Student for a period of years overall. *Testimony of School counselor. Tr. Pg 56.*
15. School counselor has observed “tremendous improvement” in Student throughout the 2008-2009 school year regarding her social skills. *Testimony of Elaine Ellis. Tr. Pg 58.*
16. Student’s IEP was not changed regarding speech therapy or communication after the previous hearing decision; According to the IEP, the speech therapist was to continue working on the same goals. *Testimony of Speech therapist Tr. Pg 63*.
17. Speech therapist has not observed any hitting from Student. *Testimony of Speech therapist Tr. Pg 64.*
18. Speech therapist observed Student every week and did not observe any social skills problems. *Testimony of Speech therapist Tr. Pg 71.*
19. Speech therapist is a member of Student’s IEP team, and has been for years. She read a copy of the prior hearing’s decision and implemented the goals that [she does] for any student that [she thinks] that student needs to work on. *Testimony of Speech therapist Tr. Pg 71-72.*
20. Speech therapist does not know why it took eleven months after the previous hearing officer ruled that Student had been denied FAPE by denying her social communication behavioral needs to perform a behavior assessment. *Testimony of Speech therapist Tr. Pg 73.*
21. Speech therapist did not reject or disagree with any of Petitioner’s speech/language goals during any IEP meetings. *Testimony of Speech therapist Tr. Pg 76*. There was also a consensus by the IEP team regarding speech and language goals contained in the IEP. *Testimony of Speech therapist Tr. Pg 76.*
22. The previous hearing officer ordered an additional psychological evaluation that included behavioral social deficits that was performed by XXXXXXX and considered by the IEP team in revising the IEP. *Testimony of Speech therapist Tr. Pg 76-77.*
23. Speech therapist has not observed any social skills deficits or behavioral problems relating to speech/language that inhibited Student’s access to the educational program in her regular classroom setting*. Testimony of Speech therapist Tr. Pg 77.*
24. Speech therapist does not consider isolated incidents of misbehavior to be necessarily related to a speech/language deficit, nor would those acts call for modification of speech/language goals. *Testimony of Speech therapist Tr. Pg 78.*
25. Director of Special Education believes that the IEP team was adequately meeting Student’s needs. *Testimony of Director of Special Education Tr. Pg 90.*
26. XXXXXXX was paid $2,400.00 for his psychological evaluation. *Testimony of Director of Special Education Tr. Pg 93.*
27. XXXXXXX Psychological was paid $400 for its evaluation. *Testimony of Director of Special Education Tr. Pg 94.*
28. XXXXXXX was paid $250 for a psychological evaluation. *Testimony of Director of Special Education Tr. Pg 94.*
29. Student’s reading scores on the Dibble test improved from 24-25 words per minute to 64-65 words per minute during one school year, which Second grade teacher believes is considerable improvement. *Testimony of Second grade teacher Tr. Pg 100.*
30. Second grade teacher does not believe that a social skills assessment was performed at the same time as the functional behavior assessment that was performed in October 2008. *Testimony of Second grade teacher Tr. Pg 107.*
31. Second grade teacher believes that the psychological evaluations were requested at about the same time approximately 11 months after the hearing officer’s order was for Student’s yearly special education evaluation. *Testimony of Second grade teacher Tr. Pg 109.*
32. Student hit another child in the face with a book and kicked the teacher in Second grade teacher’s classroom. *Testimony of Second grade teacher Tr. Pg 117.*
33. Second grade teacher described Student as sometimes aggressive. *Testimony of Second grade teacher Tr. Pg 118.*
34. Second grade teacher agrees that Student was not difficult to control. *Testimony of Charlene Second grade teacher Tr. Pg 120.*
35. Second grade teacher felt that the behavior plan was very effective for Student. *Testimony of Second grade teacher Tr. Pg 126.*
36. Student’s grandmother attended the XXXXXXX evaluation. *Testimony of grandmother Tr. Pg 139.*
37. Grandmother was very put off by XXXXXXX and his attitude towards Petitioner. *Testimony of grandmother Tr. Pg 140*.
38. Grandmother has noticed Student arrive home from school with cut and torn clothing. *Testimony of grandmother Tr. Pg 143*.
39. Principal considered the incident where Student hit another student with a book as an accident because Student grabbed the book from Second grade teacher when it struck the other child. Principal still considered this to be disciplinary because of the disrespect in grabbing the book from Second grade teacher. *Testimony of Principal Tr. Pg 148-149*.
40. All four people who conducted Student’s social skills evaluation worked at elementary school. She was not evaluated outside of the school or during a summer program. *Testimony of Special education coordinator Tr. Pg 162.*
41. Student was with compensatory services. *Testimony of Special education coordinator Tr. Pg 163.*
42. XXXXXXX was provided the required information needed to evaluate Student. *Testimony of Director of Special Education Tr. Pg 169-172.*
43. XXXXXXX evaluates students from time to time and provides school assistance team training. *Testimony of Director of Special Education Tr. Pg 172.*
44. XXXXXXX was not bound by any informal agreements or requested to reach any specific conclusions. *Testimony of Director of Special Education Tr. Pg 172-173*.
45. At IEP meetings, information, particularly new information is always taken into account. Newer information often weighs heavier than information that is years old. *Testimony of Director of Special Education Tr. Pg 188.*
46. Elementary school does not have a special program for children who have difficulty with social skills, but the classroom teachers, special education teachers, and any professionals who work with students are constantly teaching social skills. *Testimony of Special education coordinator Tr. Pg 204.*
47. Elementary school is a rural school built in 1995 with Pre-K through fifth grade. It was awarded the 2008-09 school year West Virginia Exemplary School based on WESTEST scores and attendance. The school also ranked top in test scores in the county. *Testimony of Principal Tr. Pg 207-208*.
48. Third grade teacher has not noticed any behavioral problems from Student that would impede her ability learn. *Testimony of Third grade teacher Tr. Pg 215*.
49. Third grade teacher does not believe that Student needs a special program for social skills and Student appears to communicate well with her peers. *Testimony of Third grade teacher Tr. Pg 216.*
50. Third grade teacher has had Student in her class for eleven days. *Testimony of Third grade teacher Tr. Pg 217.*

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing

Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The provision of FAPE is determined by a two prong test: First, has the LEA complied with procedures of IDEA. Second, is the IEP reasonably calculated to provide the student with educational benefit? *Bd. of Educ. V Rowley, 102 S. Ct. 3034 (1982).*
2. The educational benefit must be more than trivial. *Carter v. Florence County School Dist. Four, 950 F.2d 156 (4th Cir. 1991) aff’d 510 U.S. 7; 114 S. Ct 361 (1993).*
3. A student is eligible for services under IDEA if the student has a disability and who, by reason of the disability, needs special education and related services. *20 U.S.C. 1401, 34 C.F.R. 300.8*
4. The applicable statutory authority is found at 20 U.S.C. 1400. et seq. (IDEA) and its regulatory interpretations at 34 C.F.R. 300, et seq.
5. Student is disabled child within the meaning of 20 USC 1400, et seq. (IDEA), its implementing regulations at 34 CFR 300, et seq. and West Virginia Policy 2419.
6. The LEA has the burden of proof as to the appropriateness of any proposed action.  *WV* *Policy 2419.*
7. LEA attempted to comply with the prior Hearing Decision in that LEA arranged and paid for an independent evaluation of student which was performed by XXXXXXX. However XXXXXXX results are inconsistent with prior diagnosis. XXXXXXX was not called as a witness to explain how he reached a different conclusion. Therefore, the evaluation and its conclusions are suspect.
8. Given the LEA’s propensity to discredit diagnosis with which it disagrees and to seek out diagnosis with which it agrees, the outlying rejection of autism spectrum diagnosis by XXXXXXX brings into question the independence of the evaluation itself. *LEA-1, pg 22-23.*
9. Therefore, LEA failed to comply with the previous Hearing Decision requirement of an independent evaluation.
10. LEA denied the student FAPE by failing to include special education and related services in the IEP which would address the student’s needs for behavioral, social and communication needs.

DISCUSSION

 This case revolves around the LEA’s compliance or noncompliance with a previous Due Process Hearing Officer Decision (HOD). On November 14, 2007, LEA was Ordered to, among other things, provide an independent evaluation of student and provide compensatory services in the areas of social/communication needs or behavioral needs. Petitioner alleges LEA failed to provide an independent evaluation. Petitioner further alleges that LEA has denied student FAPE by failing to modify the IEP to include services for speech/language/communication/social skills and behavior.

 It should be noted that the LEA carries the burden of proof in this case. *WV Policy 2419*. LEA did not meet its burden on either allegation.

 The issue of the independent evaluation is troubling at best. In the previous HOD, the Hearing Officer identified a propensity by the LEA to disregard evaluations with which it disagreed and to seek out evaluations with which it agreed. *LEA-1*. When choosing the evaluator, LEA offered XXXXXXX and rejected all suggestions from Petitioner. LEA forced XXXXXXX upon Petitioner by default. XXXXXXX then evaluated the student and came to the conclusion that the student was not on the autism spectrum. This is the precise position espoused by the LEA and rejected by the prior HOD. It appears that LEA has attempted to circumvent the original HOD by finding an evaluator whose findings would be consistent with the LEA position that the student did not qualify for services. It is disappointing that LEA offered the XXXXXXX report into evidence but did not call XXXXXXX to defend his conclusions. The XXXXXXX report is inconsistent with numerous other evaluations and is therefore not credible without further substantiation and corroboration by additional independent evaluations.

 It is clear that LEA failed to comply with the independent evaluation requirement of the prior HOD. LEA will again be Ordered to provide an independent evaluation. However, since the LEA has undertaken to interfere with the process of selecting the independent evaluator, the Petitioner will choose the evaluator.

 The second issue deals with social/communication needs and behavioral needs. As this issue also arises from the previous Hearing and HOD, this Hearing Officer adopts the factual determinations that LEA denied student FAPE. “By failing to address the clear needs of the student in social skills, behavior and communication, especially given her tendency to shut down or withdraw when frustrated or upset, the schools have clearly ignored the student’s educational needs.” *LEA-1, pg 30.*

 After reading the admonishing comments of the prior HOD, did the LEA modify the IEP to add services to remedy the deficiencies? No. Instead the LEA continued using the deficient IEP without modification for eleven months after the HOD was issued. When questioned on this point, LEA employees replied that communication and behavior were not affecting student’s education. These replies ignored the numerous disciplinary actions taken and the student’s continuing reluctance to communicate effectively as noted even by XXXXXXX. There is no valid excuse for simply ignoring the needs of the student after being Ordered to take note of and remediate such needs. LEA has denied the student FAPE by failing to address these needs.

ORDER

1. LEA shall pay for an independent comprehensive psycho-educational evaluation of student to be performed by a licensed clinical or school psychologist or psychiatrist to be chosen by the Petitioner. The evaluation should also include a behavior assessment and social skills component.
2. Within fifteen business days of this Order, Petitioner shall notify LEA of the chosen evaluator. The cost of the evaluation is capped at two thousand five hundred dollars ($2,500).
3. Within five days of receipt of the notification required in paragraph 2 above, LEA shall, in cooperation with Petitioner, set a date and time for the evaluation to occur.
4. Within 10 school days from receipt of the report of the evaluation required in paragraph 1 above, the IEP team shall convene and modify the student’s IEP to address the educational needs identified in the evaluation report.
5. LEA shall pay for an independent speech/language/communication evaluation of student to be performed by a licensed speech pathologist to be chosen by the Petitioner.
6. Within fifteen business days of this ORDER, Petitioner shall notify LEA of the chosen evaluator. The cost of this evaluation is capped at two thousand five hundred dollars ($2,500).
7. Within five days of receipt of the notification required in paragraph 2 above, LEA shall, in cooperation with Petitioner, set a date and time for the evaluation to occur.
8. Within 10 school days from receipt of the report of the evaluation required in paragraph 1 above, the IEP team shall convene and modify the student’s IEP to address the speech/language/communication needs identified in the evaluation report.
9. Petitioner is awarded two hours per week of compensatory education and related services in the areas of social/communication/behavior needs for a period of eleven months in addition to the original fifteen months which were Ordered by the prior HOD. The additional eleven months of compensatory education and related services shall be provided in accordance with the standards identified in the prior HOD. *See LEA-1, pg* *37.*
10. This Due Process proceeding is hereby complete and may therefore be closed.

APPEAL RIGHTS

 Any party aggrieved by this decision or any part thereof may appeal to any state or federal court of competent jurisdiction within 120 days of the date of issuance of the decision.

Entered on October 22, 2009 by Patrick Lane (Impartial Hearing Officer)