

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.*

## **Pennsylvania Special Education Due Process Hearing Officer**

### **Final Decision and Order**

**ODR No. 28809-23-24**

#### **CLOSED HEARING**

**Child's Name**

B.V.

**Date of Birth**

[redacted]

**Parent**

[redacted]

*Pro Se*

**Local Education Agency**

Timothy E. Gilsbach, Esquire  
980 Jolly Road, Suite 110  
P.O. Box 3001  
Blue Bell, PA 19422-3001

**Hearing Officer**

Brian Jason Ford

**Date of Decision**

02/19/2024

## **Introduction and Procedural History**

This special education due process hearing concerns the educational rights of a child (the Student). The Student's public school district (the District) conducted an evaluation and determined that the Student has a disability but does not require special education. Rather, the District determined that the Student's disability could be accommodated through regular education interventions. The Student's parent (the Parent) disagreed with the District's evaluation and requested an Independent Educational Evaluation (IEE) at public expense. The District denied the Parent's request and, as required by law, requested this hearing to defend its own evaluation.

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The specific portions of the IDEA that control this case are discussed below. The District requested this hearing on November 17, 2023. The evidentiary hearing convened efficiently in a single session on December 14, 2023. The parties filed post-hearing briefs (written closing statements) on January 5, 2024.

For reasons set forth below, I find that the District has satisfied its burden to prove that its evaluation was appropriate. The Parent, therefore, is not entitled to an IEE at the District's expense.

## **Issue**

One issue was presented for adjudication: Was the District's Evaluation Report of September 11, 2023, appropriate?

## **Findings of Fact**

The record of this matter is small. Two witnesses testified and one document was entered into evidence. I reviewed the record in its entirety and make findings of fact only as necessary to resolve the issue before me. I find as follows:

1. The Parent asked the District to evaluate the Student because the Parent had concerns about the Student's abilities to read and sustain focus. S-1 at 1.
2. The District evaluated the Student and issued an Evaluation Report on September 11, 2023 (the ER). S-1.
3. The District's evaluator and principal author of the ER is a doctoral-level school psychologist (the Psychologist). S-1 at 1; NT *passim*.

4. The Psychologist solicited information from the Parent using a parent input form. The Parent's responses were included in the ER. The Parent reported that the Student's strengths included math, working independently, time management, and being a self-starter. The Parent reported that the Student's weaknesses were reading and vocabulary. The Parent reported that the Student reported that the Student cannot focus when reading and that the Student was not interested in the subjects of reading materials.<sup>1</sup> The Parent also reported the Student's general lack of interest in reading. See S-1 at 1.
5. The ER included a statement of the Psychologist's observations of the Student during testing. The Psychologist noted that the Student's expressive vocabulary was strong, and that the Student was aware of the concerns about reading. The Student reported a "distain for reading in general." The Psychologist also observed that the "one truly noteworthy observation through the report was the profound effect of [Student's] level of interest seemed to have on attention." The Psychologist included a few examples of this phenomenon. S-1 at 1.
6. The ER included input from four teachers (English Language Arts (ELA), Math, Science, and Social Studies/Civics). Teacher input was solicited through teacher input forms. All of the teachers described the Student as bright and capable. Some of the teachers described the Student as easily distracted, with a tendency to make errors by rushing through work. S-1 at 2-3.
7. The ELA teacher raised specific concerns about the Student's resistance to reading and focus while reading. The ELA teacher framed the Student's reading difficulties in terms of attention, focus, and reluctance/resistance, as opposed to a difficulty with the mechanics of reading (decoding). See S-1 at 2.
8. Neither the Parent nor any of the teachers raised concerns about the Student's behavior. See S-1.
9. The ER included the Student's report card for the 2021-22 and 2022-23 school years. In the 2021-22 school year, the Student's final grades were all As and one B+. In the 2022-23 school year, the Student's grades were all As, two B+s, and a B. S-1 at 3-4.

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<sup>1</sup> Hearsay is admissible in this hearing but cannot be used to form the basis of my decision. I include findings about the Parent's report of the Student's comments for the purpose of illustrating that the District incorporated information from the Parent into the ER.

10. The ER included the Student's scores on STAR reading and math tests from fall, winter, and spring from the 2021-22 and 2022-23 school years (six tests total in both subjects). These are standardized tests that "provide information about student growth and achievement." Results are reported as a percentile that compares the Student to a national sample of same-grade peers. In math, the Student's scores ranged from the 80<sup>th</sup> percentile to the 96<sup>th</sup> percentile. In reading, the Student's scores ranged from the 43<sup>rd</sup> to the 66<sup>th</sup> percentile. Noting in the record indicates what reading skills (e.g. phonetics, reading comprehension, or anything else) the reading STAR test targets. S-1 at 4.
11. The ER included the Student's PSSA scores in ELA and math for 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> grade. The Student scored in the "proficient" range in both domains in all three tests except for an ELA score in the "basic" range during 6<sup>th</sup> grade. S-1 at 4.
12. The Psychologist tested the Student's cognitive abilities using the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), and reported the Student's scores and an interpretation of those scores in the ER. The WISC-V is a standardized, normative assessment of intellectual ability. S-1 at 5.
13. The WISC-V yields composite scores that are held out as measures of the Student's overall intellectual ability. The Student's Full-Scale IQ and General Ability Index (GAI) were found to be in the High Average range, and the Student's Cognitive Proficiency was found to be in the Average range.<sup>2</sup> S-1 at 5.
14. The WISC-V also yields index scores. The Student's Verbal Comprehension and Fluid Reasoning scores were in the High Average range and the Student's Working Memory and Processing Speed were in the Average range. S-1 at 5.
15. The WISC-V also yields several subtest scores. The subtests contribute to the composite and index scores but can produce more granular information. All of the Student's subtest scores were in the Average to High Average range except for Coding, where the Student scored in the 25<sup>th</sup> percentile. Coding targets visual-motor dexterity and

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<sup>2</sup> Like the an IQ score, the publisher of the WISC holds out the GAI is a measure of intelligence that does not penalize children with slower processing speeds and/or weaker working memory. There was no statistical difference between the Student's Full-Scale IQ and GAI, which is expected based on the Student's working memory and processing speeds.

nonverbal short-term memory. Coding was factored in with other subtests concerning memory and speed to yield the Student's index scores. S-1 at 5.

16. The Psychologist wrote that the Student's WISC-V scores on tests of working memory – especially the Digit Span (75<sup>th</sup> percentile), Picture Span (50<sup>th</sup> percentile), and overall working memory (68<sup>th</sup> percentile) – were not consistent with children who struggle with attention and focus. S-1 at 6.
17. The Psychologist tested the Student's academic achievement using the Kauffman Test of Educational Achievement, Third Edition (KTEA-3) and some subtests from the Wechsler Individual Achievement Test, Fourth Edition (WIAT-IV).<sup>3</sup>
18. On WIAT-IV, the Student scored in the High Average to Very High range in subtests that target reading mechanics (e.g. Pseudo-Word Decoding, which calls for the Student to sound out nonsense words). The Student scored in the average range in all measures of reading fluency. The Student's Reading Comprehension as measured by the KTEA-3 was also in the average range. S-6 at 6.
19. The WIAT-IV and KTEA-3 are designed to be compared to the WISC-V. There was no statistical discrepancy between the Student's reading scores on the WIAT-IV or the KTEA-3 and the Student's predicted reading ability based on the WISC-V. S-6 at 6.
20. The Psychologist interpreted the WIAT-IV and KTEA-3 reading scores. The Psychologist found that the Student's ability to read was strong, but that the Student's tendency to rush and "limited rehearsal" (the Student only reads when necessary) negatively impacted upon the Student's reading comprehension. However, that negative impact was relative to the Student's very strong reading abilities and intellectual potential. In absolute terms, the Student's reading comprehension was in the average range. See S-1 at 6.
21. The Student's scores on WIAT-IV writing assessments, and the Psychologist's interpretation of those scores, were like the Student's reading comprehension scores. The Student scored in the average range in all writing subtests, and those scores were in line with

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<sup>3</sup> The Psychologist did not administer the complete WIAT-IV, but rather selected subtests that derive information about the Student's reading, writing, and listening comprehension/vocabulary skills. See S-1 at 6-7.

predicted scores based on the WISC-V. The Psychologist also found that the Student's writing scores were "negatively impacted by poor self-monitoring." S-1 at 7.

22. The Student's math achievement as measured by the KTEA-3 was found to be in the very high range. The Psychologist found that the Student's KTEA-3 math scores were consistent with all other measures, including the Student's performance in an accelerated math class. S-1 at 7.
23. The Student's listening comprehension, as measured by the WIAT-IV, was found to be in the 16<sup>th</sup> percentile, which is statistically below the expected scores based on the WISC-V. The Psychologist urged caution when interpreting that score for two reasons. First, the total listening comprehension score is calculated as an average of two subtests: Receptive Vocabulary and Oral Discourse – Comprehension. There was a significant difference between the Student's scores on those subtests (63<sup>rd</sup> percentil for Receptive Vocabulary and 2<sup>nd</sup> percentile for Oral Discourse). Second, the Student "zoned out" during the last 15 minutes of the evaluation, suggesting test fatigue. S-1 at 7-8.<sup>4</sup>
24. The Psychologist administered subtests of the NEPSY-II to assess the Student's attention and executive functioning.<sup>5</sup> The Student scored in the "At Expected" range in all domains assessed except for "Auditory Attention, Combined Score," and Response Set Combined Score. S-1 at 9-10.
25. The Psychologist interpreted the results of the NEPSY-II. As with other tests, the Psychologist found that the Student's tendency to rush lowered the Student's scores. The Psychologist also noted that the Student performed better on more difficult tasks. The Psychologist hypothesized that the Student may not fully activate executive functioning skills if the Student perceives a task as easy. See S-1 at 10.
26. The Parent and two teachers completed the Conners-4, which is a standardized behavior rating scale that targets symptoms associated with Attention Deficit Hyperactivity Disorder (ADHD). All three individuals rated the Student's behaviors, and those ratings were used to calculate several scores and an overall ADHD Index score. All three individuals' ratings yielded a low probability of ADHD as measured by

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<sup>4</sup> The Psychologist offered breaks to the Student, but the Student declined. S-1 at 8.

<sup>5</sup> NEPSY is not an acronym. It is a standardized, normative assessment. NT at 43.

the ADHD Index score. Both teachers' ratings placed the Student in the average range in all domains. The Parent's rating placed the Student in the average range in all domains except for "Family" (elevated) and "Impulsivity" (Very Elevated). S-1 at 9.

27. The Psychologist wrote a statement of the Student's strengths and needs. The Student's strengths included the Student's high intelligence, exceptional math skills, and strong decoding (reading) and math skills. Regarding the Student's needs, the Psychologist wrote, "Strategies and/or accommodations designed to address marked inattention when it comes to reading and listening comprehension." S-1 at 8.
28. Considering all the information acquired through the ER, the Psychologist concluded that the Student met the IDEA's definition of a child with an Other Health Impairment (OHI) but did not require specially designed instruction (SDI).<sup>6</sup> Because the Student did not require SDI, the Psychologist found that the Student was not eligible for special education. S-1 at 10.
29. The Psychologist also concluded that the Student "will require accommodations designed to address significant out of inattention especially for non-preferred tasks." S-1 at 10.

### **Witness Credibility**

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses."<sup>7</sup> One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review.<sup>8</sup>

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<sup>6</sup> IDEA regulations define OHI as follows: Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that [is due to] ... chronic or acute health problems such as ... attention deficit hyperactivity disorder ... and [a]dversely affects a child's educational performance.

<sup>7</sup> *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003).

<sup>8</sup> See, *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion."). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa.

I find that all witnesses testified credibly. Notably, two witnesses testified. Both were called by the District. The Parent did not cross examine either.

### **Applicable Laws**

#### ***The Burden of Proof***

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.<sup>9</sup> The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence is exactly even on both sides.<sup>10</sup>

In this case, the District is the party seeking relief and must bear the burden of persuasion.

#### ***Evaluation Criteria***

The IDEA establishes requirements for evaluations.<sup>11</sup> Evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP for the child to receive a free appropriate public education (FAPE).<sup>12</sup>

Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”.<sup>13</sup>

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Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

<sup>9</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

<sup>10</sup> See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

<sup>11</sup> 20 U.S.C. § 1414.

<sup>12</sup> 20 U.S.C. § 1414(b)(2)(A).

<sup>13</sup> 20 U.S.C. § 1414(b)(2)(B)-(C).



In addition, the District is obligated to ensure that assessments and other evaluation materials are (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.<sup>14</sup>

Finally, evaluations must assess “all areas of suspected disability”.<sup>15</sup>

### ***Independent Educational Evaluation at Public Expense***

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency... .”<sup>16</sup> “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that it's evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.”<sup>17</sup>

“If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.”<sup>18</sup>

### **Discussion**

There is no dispute concerning most of the IDEA’s evaluation criteria. There is no dispute that the tests administered were not discriminatory on a racial or cultural basis, were provided and administered in the language and form most likely to yield accurate information on what the Student knows and can

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<sup>14</sup> 20 U.S.C. § 1414(b)(3)(A).

<sup>15</sup> 20 U.S.C. § 1414(b)(3)(B).

<sup>16</sup> 34 C.F.R. § 300.502(b)(1).

<sup>17</sup> 34 C.F.R. § 300.502(b)(2)(i)-(ii).

<sup>18</sup> 34 C.F.R. § 300.502(b)(4).

do, were used for purposes for which the assessments or measures are valid and reliable, were administered by trained and knowledgeable personnel, and were administered in accordance with any instructions provided by the test publishers.

The District used a “variety of assessment tools and strategies to gather relevant functional, developmental, and academic information.” These included information form completed by the Parent and teachers, rating scales completed by Parent and teachers, a review of the Student’s records, observations of the Student during testing, and standardized, normative assessments of the Student’s intelligence and academic abilities.

Similarly, the District did not use any single measure or assessment as the sole criterion for determining whether the Student is a child with a disability. Rather, the Psychologist carefully considered the information gathered through all means to reach conclusions about the Student’s disability and need for SDI.

The Parent argues that the District’s use of multiple assessment tools was limited. To this end, the Parent notes that many other assessments are available, and that those assessments could yield more robust information about the Student’s abilities. The Parent is correct that other assessments exist, but my consideration is limited to the evidence that was presented during the hearing. There is no proof in the record that other assessments would have produced different or better information. The absence of evidence thwarts the Parent’s argument but, for completeness, I will make an assumption to enable a more balanced analysis.

To consider the Parent’s argument, I will set aside that the record in this case is silent as to other assessments that the District could have done. Rather, I will accept the Parent’s averment as true: other tests exist, and those tests could yield more information about the Student’s abilities. Under the IDEA, however, the question does not turn on whether different – or even better – tests exist. The question turns on whether the ER satisfies the IDEA’s standards. In this case, the District used multiple standardized, normative tests in conjunction with other data sources to derive information about the Student’s reading and attention. Reading and attention were the Student’s suspected areas of disability according to both parties at the time of testing. Through that testing, the Psychologist was able to collect and analyze a significant amount of information in both domains to reach a well-supported conclusion. Even if better tests exist (again, there is no support in the record for that assumption), the ER satisfied the IDEA’s standard.

The Parent also argues that the ER was not comprehensive. This argument is not about what tests were administered, but rather about how the Psychologist reached conclusions. The Parent argues that the ER itself suggests the need for more testing and that a different analysis was warranted. To make this argument, the Parent highlights low scores in certain domains of the NEPSY-2, concerns raised by the Student's ELA teacher through the teacher input form, and observations made by the Psychologist during testing. The Parent is correct that these aspects of the ER illustrate the Student's difficulty maintaining attention, and that the Student's inability to maintain attention had an adverse impact upon the Student's performance on standardized tests administered as part of the ER. The Parent argues that these factors illustrate the need for additional testing to obtain information about the Student's ability to maintain focus.

Some aspects of the Parent's argument are logical but out of sync with the standards that I must apply. Other aspects of the Parent's argument are not supported by the record. The Parent is correct that the ER itself raises concerns about the Student's attention and illustrates how the Student's attention difficulties could adversely impact upon the Student's educational performance. Both the Parent and the ELA teacher were concerned about that exact issue at the time of testing. Beyond that, the Parent's argument is not supported. In her closing statement, the Parent says that the ER is predicated on assumptions about the Student's inability to maintain attention, and that more testing is needed to test those assumptions. I disagree. The Psychologist selected testing to obtain information about the Student's attention and executive functioning. In fact, the Psychologist was able to obtain enough information to conclude that the Student met the IDEA's definition of OHI, a qualifying disability category. By reaching this conclusion, the Psychologist elevated the Parent's and teachers' concerns above several objective measures contained within the ER suggesting that the Student likely does not meet a medical definition of ADHD. The Psychologist recognized that the Student's low interest in reading generally, combined with the Student's full use of executive functioning skills only when tasks are of high interest or perceived as difficult make accommodation necessary. From there, the Psychologist went on to consider whether the Student required SDI.

The Psychologist's conclusions that the Student required accommodations but not SDI are well-supported in the ER itself. The Student's attention and executive functioning difficulties lowered the Student's scores in certain tests, but those lower scores still fell squarely within the average range. At the same time, the Student was educationally successful by all measures. The Psychologist recognized that Student's success did not invalidate the Parent and teacher's concerns (especially long-term concerns) and

recommended formalizing accommodations through a Section 504 plan.<sup>19</sup> That recommendation was also well-supported. While the ER suggests that the Student may be more likely to fully engage as work becomes more difficult, the ER itself illustrates a need to accommodate the Student's difficulty sustaining focus and tendency to rush through work.

Nothing in this decision terminates the District's ongoing IDEA obligations to the Student. Both the Parent and teachers are concerned that the Student's attention difficulties and aversion to reading will have a greater negative impact on the Student's education as the Student progresses and work becomes more difficult. The District has an affirmative obligation under the IDEA to carefully monitor Student, and to take action if it suspects a need for SDI in the future. Nothing in the IDEA forces the Student to fail as a prerequisite for special education. Similarly, nothing in this decision terminates the Parent's right to obtain an IEE without public funding or the District's obligation to consider any such IEE if obtained and shared. By proving that the ER was appropriate under IDEA standards, the District has established that it need not fund an IEE. Nothing else has changed.

### **ORDER**

Now, January 19, 2024, it is hereby **ORDERED** as follows:

1. The Evaluation Report of September 11, 2023, was appropriate.
2. The District need not fund an Independent Educational Evaluation of the Student.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER

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<sup>19</sup> Section 504 is Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. A Section 504 Plan is a document through which regular education accommodations (as opposed to SDI) are formalized so that children with disabilities who do not require special education are able to fully access a school's programs. See *also* 22 Pa. Code § 15. In her closing statement, the Parent avers that, despite recommendations in the ER, "a 504 plan has yet to be agreed on." Disputes about the Student's entitlement to a Section 504 Plan, or the development and substantive content of such a plan are not before me. The Parent also argues that the ER failed to produce sufficient information for the Parent and District to develop a Section 504 plan. While disputes about the sufficiency of the ER under Section 504 are not before me, as *dicta* I disagree with the Parent's assertion. The ER includes robust information about the Student's inability to maintain attention. I urge the parties to move forward with an accommodations plan if they have not already done so.