

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

## **Pennsylvania Special Education Hearing Officer**

### **Final Decision and Order**

#### **CLOSED HEARING**

**ODR File Number:**

24513-20-21

**Child's Name:**

I.D.

**Date of Birth:**

[redacted]

**Parent:**

[redacted]

**Counsel for Parents**

*Pro Se*

**Local Education Agency:**

Downingtown Area School District  
540 Trestle Place  
Downingtown, PA 19335

***Counsel for the LEA***

Christina Stephanos, Esq.  
Sweet Stevens  
331 Butler Avenue  
New Britain, PA 18601

**Hearing Officer:**

James Gerl, CHO

**Date of Decision:**

May 10, 2021

## **BACKGROUND**

The school district filed a due process complaint seeking to override the parent's failure to provide consent for reevaluation of the student. I find that the school district has proven that the proposed reevaluation of the student is necessary to determine the student's needs and weaknesses in order to design an appropriate educational program for the student and to determine the student's continued eligibility for special education [redacted]. The failure to consent to the reevaluation is overridden.

## **PROCEDURAL HISTORY**

This hearing was conducted in one efficient virtual session. Three witnesses testified at the hearing. School district Exhibits S-1 through S-6 were admitted into evidence at the hearing. Parent Exhibits P-1a, P-1b, P-2, P-3, P-4, P-6 and P-7 were admitted into evidence at the hearing. Exhibit P-5 was withdrawn by the parent. At the hearing, the parent was directed to mark the exhibits submitted by the parent in accordance with the uniform prehearing directions. Apparently, the parent has been unable, even on the second try, to correctly mark exhibits. Although page numbers have now been added, the exhibits still do not contain the exhibit number. Because the parent is not represented by a lawyer in this matter, however, the parent's exhibits are admitted into evidence despite this deficiency.

After the hearing, counsel for the school district and the *pro se* parent each submitted written closing arguments/post-hearing briefs. All arguments and proposed findings submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith,

they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

### **ISSUE PRESENTED**

1. **Has the school district proven that it should be permitted to reevaluate the student despite the refusal of the parent to consent to the reevaluation?**

### **FINDINGS OF FACT**

Based upon the parties' stipulations of fact that were entered into the record at the due process hearing (NT 10 - 21), the hearing officer makes the following findings of fact.

1. The student is [redacted] in the [redacted] grade at a high school in the school district.

2. The student is eligible for special education services under the category of other health impairment.

3. [redacted]

4. On December 8, 2020, the student's parent was invited to a meeting to review data, but the parent did not attend the meeting.

5. On December 21, 2020, the school district issued a Permission to Reevaluate (hereafter sometimes referred to as "PTRE") to the parent to seek the parent's consent for testing of the student.

6. The December 21, 2020 PTRE included a request that the parent consent to the following assessments: standardized cognitive assessments; standardized achievement assessments; classroom diagnostic testing; social/ emotional/ behavior assessments; classroom observation; clinical interview; review of records and parent / teacher input.

7. After several attempts by the district staff to reach the parent, the parent responded by e-mail on January 6, 2021 stating, "[student] will not be testing."

8. The school district's reevaluation report was completed on January 18, 2021.

9. The reevaluation report found that based on the data reviewed during the record review, the student was not presenting with any needs.

10. The reevaluation report states that the team was unable to make an informed recommendation about the student's needs without completing the assessments proposed in the December 21, 2020 PTRE.

11. The student had achieved all of the annual goals in the student's individualized education program.

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:<sup>1</sup>

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<sup>1</sup> (Exhibits shall hereafter be referred to as "P-1," etc. for the parent's exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT\_\_\_").

12. The student is a nice, pleasant kid who is interested in music and who tries to include other students in activities. (NT 145 – 148)

13. The student's mother is a certified teacher of secondary English (Grades 6 to 12), special education (K to 12) and English to speakers of other languages (K to 12). The student's mother has a Master's and Ph.D. in special education. The student's mother has taught future special education teachers at a Pennsylvania university for 13 years. (NT 108 – 109)

14. The parent had previously filed a complaint against the school district for attempting to exit the student from occupational therapy services without first conducting a formal assessment. (NT 138)

15. In January 2018, the student's team had sought consent from the parent for testing for a triennial evaluation, but the parent refused to agree to additional testing. At the time of the instant hearing, the student had not undergone psychoeducational testing for approximately six years. (NT 134 – 135: S - 3)

16. The student was due for the current triennial reevaluation in December 2020 / January 2021. (S-3; S-4)

17. As a part of the review of data for the reevaluation, school district staff reviewed the student's progress on the student's current IEP goals, including the February 19, 2020 IEP, the September 20, 2020 revisions to the IEP, the student's progress reports and a review of previous assessment data. (NT 54 – 57; S-1; S-2; S-3; S-4; P-3)

18. The purpose of the review of data was to determine whether additional assessments were needed to determine continued eligibility for

special education [redacted] and to determine educational functioning in the student's areas of need. (NT 54 – 57)

19. Following the review of data, the team decided that additional assessments were needed. The following assessments were proposed in the PTRE: standardized cognitive assessment(s); standardized achievement assessment(s); classroom diagnostic testing; social/emotional/behavioral assessment(s); classroom observation; clinical interview; review of records; and parent/teacher input. (S-4; S -3; NT 54 - 72)

20. The school district requested consent to conduct a cognitive assessment because the student had not had a cognitive assessment since about 2016. The cognitive assessment would provide information on the student's cognitive profile and intellectual functioning and help inform the student's team concerning which specifically designed instruction and accommodations the student might need. (NT 58 – 59; S -3)

21. Standardized assessments compare a student to a normative population of students their own age. (NT 62 – 63)

22. The student has Attention Deficit Hyperactivity Disorder (hereafter sometimes referred to as "ADHD"), which can impact cognitive abilities, specifically working memory and processing speed. (NT 59 – 62; S - 1)

23. The school district sought consent to conduct a standardized achievement test in order to assess the student's skillsets in comparison to a normative sample of the student's same-aged peers. (NT 61 – 62; S - 3)

24. The school district sought consent to conduct classroom diagnostic testing, which is a measure of the student's progress through the curriculum. [redacted]. (NT 63 – 67; S – 3, S-6)

25. The school district sought consent for social/ emotional/ behavioral assessments of the student. The information obtained would be used to assess the student's issues with attention and to assess whether any social, behavioral, attentional, or executive function needs were impacting the student. (NT 68 – 69; S - 3)

26. The school district sought permission to conduct a classroom observation in order to better assess the student's application of the student's skills in the classroom setting. (NT 71 – 72; S - 3)

27. The school district sought consent to conduct a clinical interview in order to determine the student's perspective with regard to the student's functioning, strengths, and weaknesses. This information is relevant because of the student's age and involvement in the development and implementation of the student's own educational program. (NT 71 – 72; S - 3)

28. The school district staff informed the student's mother that it was not in a position to exit the student from special education based solely upon a review of data and that conducting additional testing would be necessary as a part of the reevaluation. (NT 136 – 138; P -3; S – 3; S – 4)

29. The student's mother did not ask any questions or raise any concerns regarding the health and safety protocols that the school district had implemented as a result of the COVID-19 pandemic. Although COVID considerations could affect the results of an assessment, the publishers of the assessments advise evaluators to continue to conduct the assessments but note any health or safety protocols in writing up the report of an evaluation during the pandemic. (NT 73, 88 – 93; S - 3)

30. After multiple unsuccessful attempts to reach the parent regarding consent and proposed times to schedule testing, the parent

responded to an e-mail on January 6, 2021 stating, “[student] will not be testing.” (NT 73 – 74; S-3; S-4; P-3)

31. At the IEP team meeting conducted on February 8, 2021, the student’s IEP team discussed the fact that the student had achieved the student’s IEP goals. At the conclusion of the meeting, the student’s mother requested additional information concerning the student’s completion of homework. After the meeting, the school district provided detailed information to the parent concerning the student’s homework completion. (NT 115, 155; P – 1a)

### **CONCLUSIONS OF LAW**

Based upon the arguments of the parties, all of the evidence in the record, as well as my own independent legal research, I make the following conclusions of law:

1. A public agency must reevaluate each child with a disability at least once every three years unless the parent and the public agency agree that a reevaluation is unnecessary. Individuals With Disabilities Education Act (hereafter sometimes referred to as “IDEA”) 20 U.S.C. § 1400, *et seq.* § 614(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).

2. If a parent refuses to consent to a reevaluation, a public agency may, but is not required to, pursue the reevaluation by using the consent override procedures, including the filing of a due process complaint. IDEA § 614(c)(3); 34 C.F.R. § 300.300(c)(ii); Questions and Answers on IEPs, Evaluations and Reevaluations, 111 LRP 63332 (OSERS 2011) (Question D-4).

3. In conducting an evaluation, a local education agency must use a variety of assessment tools and strategies to gather relevant functional,

developmental and academic information about the child. It must use technically sound instruments to assess the child. The assessments must be conducted by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer. The child must be assessed in all areas related to the suspected disability. The evaluation must be comprehensive. When conducting an evaluation, a school district must review appropriate existing evaluation data, including classroom-based assessments and observations by a teacher or related service providers, and on that basis determine whether any additional data are needed to determine whether the student is eligible, as well as to identify the child's special education and related services needs. Perrin ex rel JP v Warrior Run Sch Dist, 66 IDELR 254 (M. D. Penna. 2015); IDEA § 614; 34 C.F.R. §§ 300.301, 300.304 – 300.305; 22 Pa. Code § 14-123.

4. A local education agency that files a due process complaint to override consent will be permitted to conduct the reevaluation where it proves that the reevaluation is necessary to determine the student's needs and weaknesses in order to design an appropriate program or to determine continuing eligibility. See, Plum Borough Sch Dist, 111 LRP 56978 (SEA Penna. 2011); Cumberland Valley Sch Dist, 117 LRP 39108 (SEA Penna. 2017); GB by TB v. San Ramon Area Valley Unified School District, 51 IDELR 35 (N.D. Calif. 2008); Spring Branch Independent School District, 76 IDELR 59 (SEA Tex. 2019).

5. In the instant case, the school district has proven that the proposed reevaluation is needed to determine the student's needs and weaknesses in order to design an appropriate educational program and in order to determine whether the student continues to be eligible for special education [redacted].

## **DISCUSSION**

### **1. Has the school district proven that it should be permitted to reevaluate the student despite the refusal of the parent to consent to the reevaluation?**

The school district seeks to override the parent's refusal to consent to the reevaluation of the student and contends that the reevaluation is necessary to collect data to determine the needs of the student in order to design an appropriate program as well as to determine the student's continuing eligibility for special education [redacted]. The parent contends that the school district should not be permitted to reevaluate the student.

Although there is no relevant Supreme Court or Third Circuit precedent, hearing officers generally permit a local education agency to override the lack of consent for a reevaluation where the local education agency proves that the reevaluation is necessary to determine the student's needs in order to design an appropriate educational program for the student or to determine the student's continuing eligibility for special education.

In the instant case, the school district has proven that the proposed reevaluation and the proposed assessments are necessary. The student has not been evaluated for three years and the student has not been tested for approximately six years. The student has met all of the student's IEP goals. Standardized assessments would provide the school district with important data comparing the student to a representative sample of other students who are the student's own age. Because the student has ADHD, testing is necessary to determine whether the ADHD has impacted the student's cognitive abilities.

Moreover, the school district has proven that the proposed reevaluation is reasonable and would assess the student in all areas of suspected disability. The proposed reevaluation is comprehensive. The proposed assessments are reasonable and would be conducted by persons who are qualified to administer such assessments. It is concluded that the reevaluation and the assessments proposed by the school district are appropriate and are needed to determine the student's needs in order to design an appropriate educational program for the student and to determine whether the student still needs specialized instruction.

The parent's post-hearing brief refers to a number of documents filed with the brief as "appendices" that were not offered into evidence at the hearing. The brief also includes testimony by the mother that was not given at the hearing. Because the documents appended to the parent's brief were not admitted into evidence in this case and because the testimony in the parent's brief was not offered as testimony during the hearing, they are not a part of the evidentiary record in this case. Accordingly, the appendices and the new testimony contained in the brief were not considered in reaching this decision.

The thrust of the primary argument in the parent's brief is that the school district is not required to conduct assessments. This is not the issue before the hearing officer, however. The issue is whether the information sought by the school district is needed in order to determine the student's needs so that the school district may design an appropriate educational program or in order to determine continued eligibility. Moreover, with the exception of a few references to IDEA itself, the parent cites no legal authority in support of the parent's opposition to the reevaluation of the

student. The parent's arguments are not persuasive. The school district has met its burden as to this issue.

The parent's brief contains extensive discussion of certain settlement negotiations between the parties in this case relative to the development of a Section 504 plan for the student. Because these appear to be settlement discussions, it is not appropriate to consider them. Moreover, even if such settlement discussions were appropriate to consider, they do not constitute a basis for concluding that the school district does not need the proposed assessment data in order to determine the student's strengths and needs and continued eligibility. The parent's brief also raises a concern with regard to COVID-19 safety protocols, but the parent's concern is not credible. See the discussion that follows.

To the extent that the testimony of the parent is inconsistent with the testimony of school district staff, the testimony of the parent is less credible and persuasive than the testimony of school district staff because of the demeanor of the witnesses, as well as the following factors: the student's mother testified on direct that the school district had articulated no purpose for testing the student, but on cross-examination, the student's mother testified that the school district staff had told her that they felt that a reevaluation with additional testing was needed before exiting the student from special education. The school district had clearly articulated to the parent a purpose for the testing. The parent's testimony is contradictory on this point. Also, the parent claims that the school district's COVID-19 health and safety protocols are a reason that the parent objects to assessment of the student, but on cross-examination, the parent admitted that she had also previously objected to assessments of the student in 2018, which was substantially before the COVID pandemic.

It is concluded that the school district has proven that it should be permitted to override the lack of consent for a reevaluation and to conduct the proposed reevaluation, including the proposed assessments. The school district has shown that the proposed reevaluation is necessary to determine the student's needs and weaknesses so that the district may design an appropriate educational program for the student and to determine the student's continued eligibility for special education [redacted].

**NOTE:** The parties to this matter clearly have a toxic relationship. For example, the parent concedes in her post-hearing brief that she does not trust the school district staff. It appears that the parties have lost sight of the fact that we are talking about the education of a young person. As the United States Supreme Court has noted, the special education process is designed to be collaborative in nature. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005). The parties should seriously consider taking affirmative steps to repair their relationship. Although the parties have the right to utilize any procedural safeguard provided by IDEA, they are strongly urged consider using mediation or a facilitated IEP<sup>2</sup> team meeting to help repair their relationship in the event that they have another disagreement concerning the student's education in the future. A wealth of additional resources related to less adversarial methods of dispute resolution are available on the CADRE website.<sup>3</sup>

## **ORDER**

Based upon the foregoing, it is HEREBY ORDERED that the relief requested in the due process complaint herein is hereby granted. The

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<sup>2</sup> [Home - Office for Dispute Resolution \(odr-pa.org\)](http://odr-pa.org)

<sup>3</sup> <https://www.cadeworks.org>

school district's request to conduct the proposed reevaluation of the student, including the assessments proposed therein, is granted.

**IT IS SO ORDERED.**

ENTERED: May 10, 2021

*James Gerl*

James Gerl, CHO  
Hearing Officer