

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Greenwich Board of Education v. L.B.

Appearing on behalf of the Student:

Meredith C. Braxton, Esq.  
Meredith C. Braxton, Esq., LLC  
280 Railroad Avenue, Suite 205  
Greenwich, CT 06830

Appearing on behalf of the Board:

Abby Wadler, Esq.  
Town of Greenwich Law Department  
101 Field Point Road  
Greenwich, CT 06830

Appearing before:

Melinda A. Powell

**ISSUE:**

Whether the Parents are entitled an independent educational evaluation (IEE) at public expense?

**PROCEDURAL HISTORY:**

The Due Process Complaint was filed on June 12, 2019, and amended on July 1, 2019 in response to the Parents' Sufficiency challenge. The Hearing Officer was appointed on June 13, 2019. A prehearing conference was held on June 21, 2019. The Parents filed a Motion for Summary Judgment on July 12, 2019, and the Hearing Officer deferred a ruling until the issuance of the Final Decision.

The mailing date was set and extended to accommodate hearings and for the parties to submit written briefs at the conclusion of the hearing. The due process hearing took place over the course of two days on the following dates: July 17 and August 23, 2019.

The original Due Process Request and Amended Request of July 1, 2019 were entered as HO-1 and HO-2. Parent exhibits 1-3 were admitted in full. Board exhibits 1-14 were admitted as full exhibits.

The Board called the following witnesses: Safiya Key, the Assistant Principal for Riverside Elementary School; Alexa Quinones, Riverside Elementary School Psychologist;

and Lauren Regan, the Special Education Teacher.<sup>1</sup> The following witnesses were called by the Parent: Parent and Dr. Kristi Sacco, a neuropsychologist.

**STATEMENT OF JURISDICTION:**

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 United States Code Sections 1400 *et seq.* and related regulations, Connecticut General Statutes § 10-76h and related regulations, and in accordance with the Connecticut Uniform Administrative Procedure Act, C.G.S. §§ 4-176e to 4-178 inclusive, §§ 4-181a and Section 4-186.

**FINDINGS OF FACT:**

After considering all the evidence submitted by the parties, including documentary evidence and the testimony of witnesses, I find the following facts:

1. The Student is currently attending Southport School, a unilateral placement (B-5, p. 1).
2. The Student is eligible for special education under the Primary Disability of Specific Learning Disabilities (B-5, p. 1).
3. The Student attended Riverside Elementary for Kindergarten and First Grade. (Spec. Ed.)
4. A Triennial Evaluation (“Evaluation”) for the Student was planned at a PPT of December 7, 2017 (B-8, B-9, B-10) well in advance of the time when it was due, in December 2018.
5. A Triennial Evaluation Planning Report of December 7, 2017, sets forth the following questions to be answered by the Evaluation:

What are the Student’s current levels of performance in the areas of receptive language, expressive language and pragmatic language?

What are the Student’s cognitive abilities?

What are the Student’s current behavioral and attention strengths and weaknesses?

What are the Student’s current reading, writing and math strengths and weaknesses?

(B-9, p. 3)

6. The December 7, 2017 PPT meeting, and all subsequent PPT meetings for the Student, were facilitated by the Assistant Principal of Riverside Elementary School in Greenwich. (B-12). She is trained as a Speech and Language Pathologist and has conducted evaluations in this area. She facilitates PPT meetings as an administrator. She also consulted with other staff and special education administrators about the evaluations that were conducted by the Board and the prior evaluations in the file. The Student had previously been evaluated by Dr. Kristi Sacco, a neuropsychologist, in 2015 and 2017, at Parental expense. These evaluations were considered in planning the triennial evaluation, along with information from Southport School. (Asst. Prin.). Dr. Sacco’s 2017 evaluation was still relevant to the PPT planning and

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<sup>1</sup> The testimony of the witnesses will be cited as follows: Safiya Key (“Asst. Prin.”); Parent (“Parent”); Alexa Quinones (“School Psych”); Lauren Regan, (“Spec. Ed.”); Dr. Kristi Sacco (“Neuropsych.”)

- assessment to be completed in 2018. The information in Sacco's 2017 report was not stale, due to the recency of its completion (Asst. Prin.).
7. The Evaluation was conducted by a special educational teacher, a school psychologist, a speech and language pathologist and an occupational therapist. (Asst. Prin.).
  8. The Parents signed a Notice and Consent to Conduct a Reevaluation on December 7, 2017 (B-10).
  9. A Multidisciplinary Triennial Report was completed by Greenwich Public Schools on October 29, 2018 (B-7). The Evaluation Procedures used were: review of records, classroom observation, Wechsler Intelligence Scale for Children, Fifth Edition ("WISC-V"), Conners Comprehensive Behavior Rating Scales ("Conners CBRS"), Vineland Adaptive Behavior Scales, Third Edition ("Vineland-3"), Clinical Evaluation of Language Fundamentals, Fifth Edition ("CELF-5"), Language Processing Test, Elementary, Third Edition ("LPT-3"), Receptive One-Word Picture Vocabulary Test, Fourth Edition, Spontaneous Word Production Articulation/ Phonology Measure, Wechsler Individual Achievement Test, Third Edition ("WIAT-III"), Comprehensive Test of Phonological Processing, Second Edition ("CTOPP-2"), Test of Visual -Perceptual Skills ("TVPS"), Test of Visual Motor Skills-3 ("TVMS"). It is undisputed that all these tests are standardized, norm referenced and considered by experts to be valid instruments to measure the domains assessed for the Student. (B-7, Neuropsych.)
  10. The Evaluation tested six domains: Attention and executive functioning, language, memory and learning, social/emotional functioning, visual/special and sensory motor. (School Psych.)
  11. As the Parents had initially expressed concern that the Student's anxiety may be affected by being tested at Riverside, the Board offered alternative testing locations, but ultimately everyone agreed to complete testing at Riverside. (Asst. Prin.) The Board also prepared a social story for Student so that she would be socially and mentally prepared for the testing days (Asst. Prin.).
  12. The Student wore her glasses for the testing (School Psych).
  13. The Student also used a slant board to address her vision issues (B-7, Spec. Ed.).
  14. The testing was completed over five days so that the Student could take breaks, which is in compliance with the testing instructions (School Psych., Spec. Ed).
  15. Riverside's School Psychologist, conducted part of the Evaluation, including the cognitive pieces. She is a certified School Psychologist (B-13) whose experience includes working on initial evaluations for the centralized District team as well as conducting Triennial Evaluations (School Psych.). She holds a Masters degree from Columbia Teachers College in Educational Psychology and School Psychology. She estimates that she has conducted approximately 40 Psychological Evaluations for the Board and attends 80 PPT meetings per year (School Psych.). She is qualified in the appropriate areas to administer and interpret the assessments that she administered to the Student. (School Psych., B-13)
  16. The School Psychologist conducted the classroom observation, the WISC, and the Conners and Vineland Rating Scales (School Psych.). The WISC was chosen to provide a comprehensive understanding of the Student's cognitive profile. The Conners CBRS was selected because the Student had attention difficulties as well as some Parent reports of anxiety, so additional information on this measure would to look at her social/emotional

functioning in a broader sense. The Vineland was administered due to the Student's cognitive scores to get a better understanding of her current functioning. (School Psych.). Regarding the WISC she testified that she chose the test because it looks at a variety of domains and gives a full picture of a child's cognitive profile. (School Psych.). Due to differences between subtest and composite scores on the WISC-V, the Student's performance should be interpreted at the composite or individual subtest level. (B-7). Most of the scores on the portions of the evaluation administered by the School Psychologist were extremely low and very low.

17. The academic portion of the triennial evaluation was completed by the Special Education Teacher. She was personally familiar with the Student because she taught the Student in Kindergarten and First Grade. The Student remembered her when the evaluation was completed. The Student was attentive and not distracted during testing. (Sped. Test.) The Student followed all the directions given during testing and was granted breaks, consistent with the testing protocols. The evaluator followed the testing protocols and used well established evaluation procedures. (Id., B-7)
18. The evaluations were discussed with the Parent in an individual meeting in the fall of 2018 when they were completed and again during the PPT meetings. The Parent asked the School Psychologist to omit some of the information provided by the Parent from the report because the Parent had changed her mind and had completed the Parental portion in haste. (Parent, School Psych.) This request was granted by the School Psychologist and the report was edited. (Id.) The School Psychologist and Special Education teacher were also present at the PPT meetings to discuss the evaluations. (School Psych, Spec. Ed., B-5, B-6).
19. On April 22, 2019, the Parents emailed the Board requesting an IEE for a neuropsychological evaluation. (B-4). No IEE was requested in the areas of OT or speech/ language which were covered by the Triennial Evaluation. (Id.)
20. After the Parents requested an IEE, the Board called the Student's home on May 10, 2019, and spoke to the Student's father. The Board explained that she had reviewed the Parents' IEE request and also reviewed the evaluations which were completed. The Board offered to meet with the Parents to discuss the evaluations and the Board's position on their appropriateness. (Asst. Prin., Parent)
21. The Student's mother emailed the Board on May 14, 2019, stating that her understanding was that due process proceedings would begin because the Board disagreed with the Parents' IEE request. The Parent asserted that the Board had unreasonably delayed a response to the request, as of May 10, 2019. (B-3) The Parents scheduled the IEE with the Neuropsychologist for May 20, 2019.
22. Later, on May 20, 2019, the Board emailed and sent a letter to the Parents stating in part that the Board would initiate due process proceedings to defend its evaluations unless the Parents were no longer pursuing their IEE request. (B-3, P-1). This letter was not threatening in any way, as claimed by the Parents. Rather, the letter reiterates that the Board must file for due process to defend its evaluations, as required by federal and state law.

23. The Board filed its Due Process Request on June 10, 2019. There were 49 days between the Parents' request for the IEE and the Due Process filing.<sup>2</sup>
24. The Parent called the Neuropsychologist to testify at the hearing. She is in the process of completing a neuropsychological evaluation of the Student. (Neuropsych.) She raised concerns with specific parts of the Evaluation, such as the Student's low scores on some measures due to the test being constrained by a time limit, which is difficult for a Student with slow processing speed. (Id.) Also, the Student's working memory deficits would impact the analysis of the Student's performance on the CELF. (Id) The School Psychologist and Special Education teacher credibly testified they were aware of the Student's difficulties in these area and accounted for the issues in their evaluations. On discrete subtests involving written language which were timed, the Student did not use all the time allotted. The Special Education teacher testified that this finding was consistent with a Specific Learning Disability, which is the category under which the Student is eligible under the IDEA. (Spec. Ed., B-7). The Neuropsychologist testified that additional tests should be administered including the continuous performance test, and the Stanford-Binet, which is a different measure of cognitive abilities without time constraints. She was concerned that the PPT would misinterpret the impact of attention, memory and processing speed when goals were developed. (Neuropsych.)
25. The Neuropsychologist has used the same tests that were used by Board, including the WISC-V, Conners 3 Parent and Teacher Rating Scales, CELF, CTOPP-2 and the WIAT-III. Scores from that testing in 2017 were generally consistent with the scores obtained from the Triennial Evaluation. (B-11)(B-7).

### **CONCLUSIONS OF LAW:**

1. The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. *See Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) ("Congress repeatedly emphasized ... the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness."). Without public financing of an IEE, a class of parents would be unable to afford an IEE and their children would not receive, as the IDEA intended, "a free and appropriate public education" as the result of a cooperative process that protects the rights of parents. There is "nothing in the statute to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate." *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 694, (11th Cir. 2012), *citing*, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (internal quotations omitted).
2. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to

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<sup>2</sup> The Parents argue that the date of the Amended Request for Due Process is the appropriate date to compare; the Hearing Officer disagrees.

the follow-up or repeat evaluations that occur during a student's education. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).

3. Congress included the right to an IEE at public expense as one of the IDEA's essential procedural safeguards:

School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. ... [Parents] have the right to an independent educational evaluation of the[ir] child. The regulations clarify this entitlement by providing that 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. IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

*Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 60-61, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) (citations and quotations omitted).

4. The IDEA requires schools to conduct a series of evaluations of students who are or who may be disabled. At the outset, a school must conduct an “initial evaluation” in order “to determine if the child is a child with a disability.” 20 U.S.C. § 1414(a)(1)(B). If the child has a disability, then the school must conduct periodic re-evaluations if the school determines that one is warranted, or if a teacher requests one, or if the child's parent or guardian requests one. *Id.* § 1414(a)(2)(A)(i)-(ii). *D.S. v. Trumbull Board of Education*, 357 F. Supp. 3d 166, 170-71 (D. Conn. 2019).
5. “At a minimum, a school district must conduct a comprehensive reevaluation at least once every three years (known as a “triennial evaluation”) unless the parents and school agree that such a reevaluation is not necessary. 20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); *Cooper v. District of Columbia*, 77 F. Supp. 3d 32, 37 (D.D.C. 2014). A triennial evaluation requires the school district to review existing information about the child as well as to conduct a new round of additional testing to determine the child's abilities and needs. *See* 20 U.S.C. § 1414(b), (c); 34 C.F.R. §§ 300.304-305 (describing comprehensive reevaluation procedures); *see also James v. District of Columbia*, 194 F. Supp. 3d 131, 143 (D.D.C. 2016) (describing triennial reevaluation requirements); *Brennan v. Reg'l Sch. Dist. No. 1 Bd. of Educ.*, 531 F. Supp. 2d 245, 269 & n.25 (D. Conn. 2008) (same).” *D.S. v. Trumbull Board of Education*, 357 F. Supp. 3d 166, 170-71 (D. Conn. 2019).
6. The school district must also conduct a reevaluation if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reevaluation. 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1). A school district must also conduct a reevaluation upon the request of the child's parent or teacher.<sup>4</sup> 20 U.S.C. § 1414 (a)(2)(A)(ii); 34 C.F.R. § 300.303(a)(2).
7. An evaluation under 34 C.F.R. § 300.304 refers to the processes and procedures used to “gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining ... (ii) The content of the child's IEP, which includes the use of “technically sound instruments that may assess

the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.”

8. A parental right to request for an IEE at public expense accrues when an evaluation has been completed by the Board, and the parent disagrees with that evaluation. 34 C.F.R. § 300.502(b)(1); OSERS *Letter to Baus*, February 23, 2015 (“a parent of a child with a disability is entitled to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency.”). *See also, Dubois v. Connecticut State Board of Educ.*, 727 F.2d 44, 48 (2d Cir. 1984).
9. In an IEE case, the Board has the burden to show that its evaluation was appropriate. *See*, 34 C.F.R. Section 302.502(b)(2) (“If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either --) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria); Conn. Agencies Regs. § 10-76d-9(c)(2). If the final decision is that the Board’s evaluation is appropriate, the parent still has a right to an independent educational evaluation but not at public expense. 34 C.F.R. § 300.502(b)(3).
10. On March 28, 2018, the State Department of Education issued Guidelines regarding IEE’s. These Guidelines are available on the Department’s website and were entered into the Record as P-2. The Parents assert that the Board committed a per se violation of the Parent’s rights to an IEE because the Board did not comply with this Guidance. The Parents filed a motion for summary judgment on this basis, and the Hearing Officer deferred ruling on the Motion until the Final Decision. The Guidelines reiterate that when a parent requests an IEE at public expense the school district shall, without unnecessary delay, either: 1. File for due process to defend the evaluation or 2. Ensure the IEE is provided at public expense, unless the school district demonstrates in a due process hearing that the evaluation obtained by the parent does not meet the school district’s IEE criteria. (P-2, p. 5). The Guidelines further explain “best practices” that a school district should employ when responding to IEE requests:

School districts should always respond in writing to a parent’s request for an IEE at public expense. The school district should state that it will either provide an IEE at public expense or file a request for due process hearing to show that its evaluation is appropriate.

Although unnecessary delay is not defined by the IDEA, some delay may be necessary to allow the school district to thoughtfully consider its options. As best practice, a school district should provide a written response to a parent’s request to an IEE at public expense practice [sic] as the school district’s written response **within 10 school days from when the request is made during the academic school year and 14 calendar days from when the requires is made in between school years.** (emphasis in original)

11. Thus, these Guidelines do not create binding obligations on school districts, but are recommendations. Furthermore, the Guidelines do not require that the school district file its due process complaint within 10 or 14 school days. Rather, the school district should respond in writing to the Parent. The Board did respond in writing to the Parents on May 20, 2019 via email and by letter on the same date, although not within the parameters recommended by the Guidelines. (P-1, B-3).

12. Whether there has been an unreasonable delay depends on the facts and circumstances of the particular case, and there is no bright line rule. Here, the delay was 49 days, and was not unreasonable. *See, e.g., Montgomery County Board of Education*, 110 LRP 31764 (finding 51-day delay not unreasonable); *Jackson Public School District*, 55 IDELR 181, 110 LRP 57380 (finding delay not unreasonable where there was no evidence of bad faith or intentional violation by school district). The Board was within its rights to carefully consider its option of whether to pursue due process or grant the IEE request. The Assistant Principal, who was not qualified in the assessments which had been given to the Student, needed time to consult with administrators who were more knowledgeable in those areas. She called the Parents, offered to have an in-person meeting about why the Board believed its evaluations were appropriate, and then followed up in writing. Therefore, the Parents' argument as to unreasonable delay is rejected and the Motion for Summary Judgment is denied.
13. In determining the appropriateness of the Board's evaluation, a multiplicity of factors should be considered, including whether the evaluation: (1) used a variety of essential tools; (2) was administered by trained, knowledgeable, and qualified personnel; (3) was administered and conducted under standard conditions and in accordance with instructions provided by the producer of the assessments; (4) incorporated information from various sources such as classroom observations and review of existing data; and (5) whether the independent evaluation would provide any new or additional information. 34 C.F.R. §300.304, §300.305; *Redding Board of Ed. v. Student*, Final Decision and Order 19-0038 (Conn. 2018); *Westport Board of Ed. v. Student*, Final Decision and Order 11-0355 (Conn. 2011); *Warren G. v. Cumberland County School District*, 190 F.3d 80, 87 (3rd Cir. 1999); *S. Kingstown Sch. Comm. v. Joanna S.*, 773 F.3d 344 (1st Cir. 2014); *Doe v. Cape Elizabeth School District*, 832 F.3d 69 (1st Cir. 2016), *District of Columbia Public Schools v. Parent*, 119 LRP 16888, Case No. 2019-0035 (March 15, 2019) (citing 20 U.S.C. § 1414(c)(1), (4) (the IEP Team shall "review existing evaluation data . . . [and] on the basis of that review" decide if more data are needed before it can "determine the child's educational needs", *Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35, 50 (D.D.C. 2016)). Federal IDEA law and regulations do not impose any specific requirements on the content of a psychological or other evaluation. *See, Richardson v. District of Columbia*, 273 F. Supp. 3d 94, 100 (D.D.C. 2017), 70 IDELR 195); *Hill v. District of Columbia*, 68 IDELR 133, 116 LRP 36805 (D.D.C. 2016) ("In fact, the IDEA lacks specific parameters regarding the content of psychological evaluations, or for that matter, of other evaluations).
14. Applying these factors to the Evaluation, the Hearing Officer finds that the Evaluation was appropriate. (FF 4-18; 24-25).

### **ORDERS:**

1. The Board did not unreasonably delay its response to the Parents' IEE request.
2. The Board's Evaluation was appropriate.
3. The Parents are not entitled to a neuropsychological evaluation as an IEE at public expense.