

██████████ COUNTY PUBLIC

SCHOOLS

v.

████████████████████  
STUDENT

\* BEFORE WILLIAM SOMERVILLE,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-CRRL-OT-18-11861  
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**DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

On April 13, 2018, ██████████ County Public Schools (█████ CPS or School System) filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review its evaluation of ██████████ (Student) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2017)<sup>1</sup> and 34 C.F.R. §300.502(b) (independent educational evaluation at public expense).<sup>2</sup>

On May 4, 2018, I conducted a telephone prehearing conference in this matter. The Student and his parents (Parent or Parents) were represented by ██████████ Esquire, and the School System was represented by ██████████ Esquire. By agreement of the parties, the hearing was scheduled for June 1, 4, 5, and 6, 2018. The parties requested an

<sup>1</sup> U.S.C.A. is an abbreviation for United States Code Annotated.

<sup>2</sup> C.F.R. is an abbreviation for Code of Federal Regulations.

extension of time until 30 days after the conclusion of the hearing<sup>3</sup> for me to issue a decision. 34 C.F.R. 300.515 (2017); Md. Code Ann., Educ. § 8-413(h) (Supp. 2017).

A resolution session was scheduled for May 10, 2018.

I held the hearing on June 1, 4, and 5, 2018. The hearing was concluded one day earlier than predicted.

In accordance with the federal regulations, the decision in this case would normally be due on Friday, June 22, 2018,<sup>4</sup> which is 45 days after May 10, 2018. 34 C.F.R. §§ 300.510(c); 300.515(a). I may grant specific extensions of time at the request of either party. 34 C.F.R. § 300.515(c). The School System made a motion, which the Student did not oppose, that the time for the decision be extended to a date that is 30 days after the close of the hearing in this case. The earliest date that the hearing could reasonably be predicted to conclude was June 6, 2018. This conclusion was based on counsel's disclosures<sup>5</sup> of the following: 1) counsels' litigation schedules and availability; 2) the five-day disclosure rule; 3) the ten-day subpoena rule; 4) a one-week trip scheduled by a Parent in May 2018, 5) a surgical procedure; 6) the unavailability of various witnesses; 7) counsel's involvement as a hearing examiner in an unrelated matter, and 8) the lack of any harm to the Student if there is a reasonable delay beyond the 45 day period. In addition, based on the need to properly adjudicate this matter by making Findings of Fact, Conclusions of Law, and a decision, in light of the predicted four days of hearing with up to 16 witnesses, both parties agreed and requested that I should have 30 days after the close of the

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<sup>3</sup> In this case, 30 days after the conclusion of the hearing is July 5, 2018.

<sup>4</sup> This predicted date assumed that the scheduled resolution session will not be continued.

<sup>5</sup> Counsel, as officers of the court, are deemed to be truthful in their representations to this tribunal. *Duvall v. State*, 399 Md. 210, 234 (2007) (with regard to credibility of counsel's representations, the Court wrote "Lawyers are officers of the court and should be treated as such.").

hearing to issue my decision. Thus, I granted the request to extend the time line and I will issue a decision on or before Thursday, July 5, 2018.<sup>6</sup>

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2017); 34 C.F.R. §300.502(b); 34 C.F.R. § 300.511(a) (2017); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2017); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 13A.05.01.15C; COMAR 28.02.01.

### ISSUES

The issues are 1) whether the School System must treat a request for a parent-initiated assessment of the Student's orthographic processing as a request for an independent educational evaluation (IEE) under 34 C.F.R. §300.502(a)(3) and (b), and 2) assuming that the request for an orthographic processing assessment at public expense does qualify as a request for an IEE, is the School System's existing evaluation "appropriate" such that the School System does not have to pay for an orthographic processing assessment.

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits contained in a binder, tabbed, and offered by the School System:

1. [REDACTED] report, 5-7-2017
2. Notice, 6-7-17

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<sup>6</sup> At the time of the motion, this predicted date assumed that the scheduled resolution session would not be continued.

3. Audio record, 6-17-2017
4. [REDACTED] report addendum, 7-17-2017
5. Notice, 8-15-2017
6. Specific Learning Disability Eligibility tool, 8-15-2017
7. Other Health Impaired Eligibility tool, 8-15-2017
8. Consent for assessment, 8-15-2017
9. Evaluation Report, 8-15-2017
10. Notice, 9-7-2017
11. Individual Education Plan (IEP), 9-7-2017
12. Observation report, 9-25-2017
13. Notice, 9-28-2017
14. School System Assessment Report, 10-6-2017
15. Notice, 10-4-2017
16. Notice, 10-16-2017
17. Audio record, 10-16-2017
18. IEP, 10-25-2017
19. SLD Eligibility tool, 10-16-2017
20. Notice, 2-9-2018
21. Audio recording, 2-9-2018
22. IEP, 2-9-2018
23. E-mail thread, various dates
24. Assessment manuals
25. CV of [REDACTED]
26. CV of [REDACTED]
27. CV of [REDACTED]
28. CV of [REDACTED]
29. CV of [REDACTED]
30. CV of [REDACTED]

I admitted the following exhibits<sup>7</sup> offered by the Parents:

2. Pearson Toolkit, 7-2016
13. Word Identification and Spelling Test sheet, 8-24-2017
14. Gray Silent Reading Test sheet, 8-24-2017
16. Informal reading assessment, 10-9-2017
26. E-mail, 3-16-2018
28. CV of [REDACTED]
29. CV of [REDACTED]
30. Orthographic Processing information sheet
32. Website information of Wilson Just Words® reading program
38. Test protocol, Gray Silent Reading Test
39. Test protocol, Word Identification and Spelling Test
40. Protocol review document, 5-9-2018

<sup>7</sup> Because many of the Parents' exhibits were redundant or overlapped the School System's exhibits, the Parents did not need to offer all of their documents.

Testimony

The School System presented the following witnesses:

- [REDACTED] qualified to offer opinions in Special Education and Assessment
- [REDACTED] qualified to offer opinions in Special Education and Assessment
- [REDACTED] qualified to offer opinions in Special Education and Assessment
- [REDACTED] qualified to offer opinions in School Psychology and Assessment
- [REDACTED] qualified to offer opinions in General Education and Assessment

The Student presented the following witnesses<sup>8</sup>:

- The Student's mother
- [REDACTED] previously qualified to offer opinions in Special Education and Assessment
- [REDACTED] qualified to offer opinions in Special Education and Interpretation of Reading Assessments and Design and Delivery of Interventions for Reading

**FINDINGS OF FACT**

Upon considering demeanor evidence, testimony, and other evidence presented, I find the following facts by a preponderance of the evidence:

1. At the time of the hearing in this matter, the Student (DOB [REDACTED] 2008) was enrolled in the third grade at an elementary school within the School System.

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<sup>8</sup> Another witness also testified but, upon motion, the Student voluntarily struck the witness's testimony.

2. On February 7, 2017, and again on March 27, 2017, while in second grade, the Student underwent a battery of tests and observations administered by [REDACTED] Ph.D., at the [REDACTED] Pediatric Hospital in [REDACTED]. During the course of those two days, the Student was tested with the following assessment tools: Wechsler Intelligence Scale for Children (5<sup>th</sup> ed.); Wechsler Individual Achievement Test (3d ed.); Gray Oral Reading Test (5<sup>th</sup> ed.); Oral and Written Language Scales (2d ed.); Comprehensive Test of Phonological Processing (2d ed.); the Beery-Buktenica Developmental Test of Visual-Motor Integration; Behavioral Rating Inventory of Executive Functioning; Behavioral Assessment System for Adolescents (2d ed.); Adaptive Behavior Assessment System (3d ed.); Beck Youth Inventories (2d ed.); Revised Children's Manifest Anxiety Scale (2d ed.); and the Children Sentence Completion Task. In addition, Dr. [REDACTED] observed the Student and collected background information from the Student and his mother.

3. When Dr. [REDACTED] reported her findings, she accurately noted, among other things, that the Student had a high average I.Q. (118 or 88<sup>th</sup> percentile); an average working memory (50<sup>th</sup> percentile); a low average achievement in spelling (16<sup>th</sup> percentile); an average achievement in reading comprehension (61<sup>st</sup> percentile); an average achievement in reading fluency (32<sup>nd</sup> percentile); a low average achievement in word reading (23<sup>d</sup> percentile); and average achievement in pseudo-word decoding (34<sup>th</sup> percentile). She accurately noted that the Student's oral reading skill was one point below average and that the Student's fluency and comprehension were average. She accurately noted that the Student's written expression was within the average range. She accurately noted that the Student had average phonological processing, borderline (gray area of relative weakness between low average and clear deficiency) phonological memory and high average rapid symbolic naming. In addition, Dr. [REDACTED] accurately diagnosed the Student with Attention Deficit Hyperactivity Disorder and an

Unspecified Anxiety Disorder. She accurately opined that although the Student was performing on grade level in reading, because of his high average I.Q. and his strength in math, the Student struggles to perform on grade level in reading. Dr. [REDACTED] suggested that although the Student did not meet the criteria for a learning disability, he would benefit from academic supports in spelling and reading. She accurately noted that the Student's spelling skills were not up to grade level. (SS Ex. 1.)

4. On June 1, 2017, the Parents provided the School System with Dr. [REDACTED] [REDACTED] s evaluation report. (SS Ex. 2.)

5. On June 7, 2017, the School System held an IEP team meeting to consider the Parent's evaluation report. The team determined that there was enough credible information on which to suspect a disability under the IDEA. The team had a data binder with work samples and standardized test scores from phonics assessments, a cognitive ability test, comprehensive benchmark assessments, a Scholastic Reading Inventory, fluency rating scales, sight word benchmark data, and math benchmark data. The team also solicited information from the Parents. At that time, the team was leaning toward coding the Student with "OHI" (other health impaired) but had to reconvene the team on another date in order to complete the School System's OHI eligibility tool. (SS Ex. 2.) The Parent also consented to additional assessments of the Student. (P Ex. 8.)

6. On July 17, 2017, the Student underwent additional testing by Dr. [REDACTED]. The Student was tested with the Test of Written Language (4<sup>th</sup> ed.) because of the Student's poor spelling skills as previously demonstrated in the testing. The Student performed in the low average to borderline range on most of the sub tests. In the resulting report, Dr. [REDACTED] opined that the Student would qualify as a student with a "SLD" (specific learning disability) in "written expression, spelling accuracy, and grammar and punctuation accuracy." (SS Ex. 5.)

7. On August 15, 2017, the IEP team met again. At that time, the IEP team decided that the Student would qualify as a student with a disability under the "other health impaired" category. (SS Ex. 5, 7, and 9.) The team deferred or rejected a determination that the Student could qualify as a student with a specific learning disability because classroom observations had not yet occurred as required by the School System's eligibility determination tool. (SS Ex. 6.) The team reviewed the Student's report card and those previously noted assessments. (SS Ex. 8.) The team determined that further assessment would be helpful in written language and reading. (SS Ex. 5.) The IEP team decided to reconvene once the observation and some further assessments had been completed. (SS Ex. 5.)

8. On August 24, 2017, the Parents gave written consent for the School System to test the Student with the Word Identification and Spelling Test and the Gray Silent Reading Test. (SS Ex. 8.) The Student was tested on that day. (P Ex. 13, 14, 38, and 39.) In filling out the identifying information on the test forms, the examiner identified the Student as in the second grade and accurately identified the Student as nine years and [REDACTED] month old on the Word Identification and Spelling Test. The examiner identified the Student as eight years and [REDACTED] month old on the Gray Silent Reading Test. In scoring the two tests, the examiner made several errors, none of which had any significant impact on the final results or impression to be taken from the assessments. The most significant error was a reported score of 90 (low average) on a Fundamental Literary Ability Index which should have accurately reflected a score of 89 (below average). (P Ex. 40.) The confidence interval on that sub test is more than one point.

9. On September 7, 2017, the IEP team met to begin formulating the Student's IEP. The proposed IEP that was hammered out in the team meeting focused on written language mechanics, written expression, and social/emotional behavior. Goals and objectives were suggested to address those areas of concern. The team suggested that no additional assessments



were needed at that time and that no assistive technology device was needed. Accommodations were suggested and the need for supplementary aids was acknowledged. The team suggested one hour per week of special education in the area of written language (mechanics and expression) and some special education services to address the Student's social emotional behavior. The Student was coded as "other health impaired." The Parent expressed disagreement with 1) the team not coding the Student as a student with a "specific learning disability," 2) the team's determination that the IEP need not further address "reading, phonics, reading comprehension, math problem solving, cognitive and fine motor" skills, and 3) the team's determination of the number of hours of special education in writing. (SS Ex. 10.)

10. On September 25, 2017, a special education teacher employed by the School System observed the Student in class. The focus was reading fluency, reading comprehension, and written expression. (SS Ex. 12.)

11. On September 28, 2017, the IEP team convened at the Parent's request to adjust goals in the IEP with regard to written language mechanics and written expression.

12. On October 4, 2017, the IEP team held another IEP meeting to revise the draft IEP with some changes in wording.

13. On October 6, 2017, the School System's special education teacher wrote an Education Assessment Report in which the Test of Written Language (4<sup>th</sup> ed.) done by Dr. [REDACTED] among other things, was addressed. The report accurately noted that the Student was being instructed on grade level in language arts. She accurately noted that the Student was doing well in reading comprehension, was working on spelling, and was working on reading multisyllabic words, "a skill addressed in second grade." She accurately noted that the Student's assessed reading level as of the spring of 2017 (second half of second grade) was an "N" meaning that the Student was on grade level at that time. The Student's reading fluency as of the

spring of 2017 was at level 4, and the fluency expectation was above level 3 on the general education phonics benchmark assessment. The report accurately showed that on the Scholastic Reading Inventory portion of the assessment, the Student scored well above the benchmark expectation of 401, with a 569 in the winter of 2016, and a 543 in the spring of 2017. The Student's comprehensive benchmark scores were at 81% in November 2016 and 90% in April 2017. The report accurately noted that the Student's word identification was average and sound-symbol knowledge was average for students of the same age. The report inaccurately reflected an average score for the Fundamental Literary Ability Index when in reality the true score was one point into the below average range. The report accurately noted that the Student had an average ability to comprehend what he read silently. (SS Ex. 14.)

14. On October 9, 2017, a reading specialist employed by the School System gave the Student an informal reading assessment. The Student was accurately assessed as reading at "level Q" (middle of fourth grade) and the Student was able to decode on a fourth grade level.

15. On October 12, 2017, the Parent signed a copy of the 32-page IEP document.

16. On October 16, 2017, the IEP team of eleven people convened to continue the evaluation process and to revise or amend the existing IEP. The team reviewed the academic assessments, classroom observation notes, reading assessments, an occupational therapy assessment, School System phonics assessments, a Scholastic Reading Inventory, the Student's grades, and Parent-provided information. The team determined that the Student did not qualify for services in reading, or in occupational therapy, but suggested an occupational therapy consult. The team determined that the Student did qualify for services in writing. The team used an eligibility tool and its discrepancy analysis to determine that the Student qualified as a student with a in the area of written language. Amendments were made to the IEP. (SS Ex. 16.)

17. On that date, during the IEP team meeting, a school psychologist employed by the School System mentioned the term “orthographic processing deficit” as a possible reason for the Student’s struggle with writing and spelling. The school psychologist gave the attending Parent a document explaining the term. In essence, the document explained that when spelling a word, we often access our visual memory of what the word looks like, and when reading a word, we also access our visual memory of the way a word (or letter pattern) looks in print, in order to read fluently. (P Ex. 30.) The school psychologist noted that the existing assessments had generated data to suggest that the Student had a weakness in orthographic processing.

18. In January 2018, the Parent contacted Dr. [REDACTED] and asked her if she could assess the Student’s orthographic processing abilities. Dr. [REDACTED] said no.

19. On February 9, 2018, the IEP team of eleven people met at the request of the Parent. The Parent had a list of issues that she wanted to discuss. The Parent offered an audiological report that accurately indicated that Student had a mild hearing loss in his left ear. Accommodations were added to the IEP. The Parent asked the School System to assess the Student for an auditory processing disorder. The team reviewed the Student’s progress (results of the consult) in occupational therapy. The team discussed and revised a goal with regard to written language mechanics, and the services to address written language goals were significantly increased from one hour per week to four hours per week. The team discussed the Student’s orthographic processing or orthographic dyslexia concerns raised by the Parent. The school psychologist noted that she has relied on a “Processing Assessment for Learners” (P.A.L.) (2d ed.) test in the past to assess students for orthographic processing deficits, but that her department within the School System did not have that test in its inventory. She suggested that maybe the School System’s Special Education department had access to that test. The School psychologist referred to the P.A.L. (2d ed.) test as a possible “next step” but expressed,

reasonably and accurately, that the IEP team had all the assessment data it needed to program for the Student's orthographic processing needs in written language mechanics. An instructional consultant on the IEP team asked if the Student needed an assessment in that area and the school psychologist said no. A number of other items were discussed and the IEP was revised. (SS Ex. 20.)

20. On February 21, 2018, the Parent sent an e-mail message to the School System's Director of Special Education. The Parent noted that the Student "might have Orthographic Processing Disorder (Orthographic Dyslexia) but . . . that [the School System] does not have the ability to assess in this area. I am requesting an IEE to assess in this area of suspected disability." (SS Ex. 23.)

21. On February 23, 2018, the Director of Special Education responded by writing that the Student "has met eligibility criteria as a student with Specific Learning Disability in the area of written language. At the 2/9/18 IEP meeting, the team did not identify the need for assessments in the area of written language [because] eligibility had already been determined along with areas of impact." He also wrote, "Are you disagreeing with the previous assessments that were utilized to identify the areas of impact (written language expression and mechanics)? If so, I respectfully ask you to clarify."

22. On March 2, 2018, the Parent e-mailed the Director of Special Education writing, "Yes. I disagree with the evaluation."

23. On March 15, 2018, the Director of Special Education e-mailed in response, "It is my understanding that you are requesting an IEE at public expense in the areas of reading and written language because you suspect that [the Student] may have Dyslexia or another reading or writing based disability. If this is not the case I ask you to clarify your request for an IEE."

Then the Director explained, “the [School System] will not fund your request . . . but instead will initiate a due process hearing to show that its evaluation was appropriate.”

24. On April 13, 2018, the School System filed with the OAH its complaint. It alleged that there was no “prior evaluation by the [School System] for Orthographic Processing” to challenge, and that “prior [School System] educational evaluations in the areas of written language (and reading) were appropriate . . . .”

## **DISCUSSION**

### **Burdens**

The School System bears the burdens of production and persuasion by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005).

### **Special Education Law Overview**

The identification, evaluation, and placement of students in special education are governed by the IDEA, state statutes, and state and federal regulations. 20 U.S.C. §§ 1400-1482 (2017); 34 C.F.R. Part 300 (2017); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2018) and COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A) (2017); 20 U.S.C.A. § 1412; *see also* Md. Code Ann., Educ. § 8-403 (2018).

When a disability is suspected, a school system must perform an evaluation of the student. 20 U.S.C.A. §§ 1414(a)(1), (b); 34 C.F.R. §§ 300.301, 300.304, 300.305. The evaluation is to probe: 1) whether the student has a qualifying disability; and 2) whether the student is in need of special education and related services. *Id.* § 1414(a)(1)(C)(i), (b)(4); 34 C.F.R. § 300.306; COMAR 13A.05.01.06D. If it is determined that the student has a disability as defined by the IDEA, and if it

is also determined that the student is in need of special education and related services, a school system must develop an IEP for the student. 34 C.F.R. §§ 300.306(c)(2), 300.324 -300.328; COMAR 13A.05.01.07 -.09.

### **“Evaluation” and “Assessment”**

In the instant case, the Parent requested that an assessment be performed in the area of orthographic dyslexia and called that request one for an IEE. (Finding of Fact 20, 21, and 22.) An IEE is a type of evaluation. The question arose within the School System’s complaint, and thereafter, whether a request for a parent-initiated assessment qualifies as a request for an IEE under 20 U.S.C.A. §1415(d)(2)(A) and 34 C.F.R. §300.502. I conclude that under the particular facts and circumstances of this case, it does.

An evaluation and an assessment are not the same thing. The statute, 20 U.S.C.A. §1414, describes or defines an evaluation, or initial evaluation, as “procedures to determine” various things, as follows:

(C) Procedures

(i) In general

Such initial evaluation shall consist of procedures--

- (I) to determine whether a child is a child with a disability. . . and
- (II) to determine the educational needs of such child.

20 U.S.C.A. §1414 (a)(1)(C). The statute also sets forth what might be contained in an evaluation, as follows:

(b) Evaluation procedures

(1) Notice

...

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall--

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. . . qualified to offer opinions

(B) 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

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that--

(A) assessments and other evaluation materials used to assess a child under this section--

(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;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided;

20 U.S.C.A. §1414 (b). The statute sets forth additional items and requirements of evaluations, as follows:

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall--

(A) review existing evaluation data on the child, including--

(i) evaluations and information provided by the parents of the child;

(ii) current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) observations by teachers and related services providers; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine

20 U.S.C.A. §1414 (c)(1). Finally, the statute describes a few other items that might be found in an evaluation, as follows:

(2) Source of data

The local educational agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

20 U.S.C.A. §1414 (c)(2).

Under the statute, then, an evaluation is a process by which an IEP team (or an independent professional) reviews a proverbial “bundle of sticks” consisting of: “a variety of assessment tools,” “strategies,” “information provided by the parent,” “measures,” “technically sound instruments,” “other evaluation materials,” “evaluations and information provided by the parents,” “current classroom-based, local, or State assessments,” “classroom-based observations,” “observations by teachers and related services providers,” “input from the child's parents,” and “other evaluation measures.” 20 U.S.C.A. §1414(b) and (c).<sup>9</sup>

The Department of Education’s regulations lead to a similar analysis. The regulations define “evaluation” as “procedures used . . . to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” 34 C.F.R. §300.15. Items that can be used in the evaluation process are: a “variety of assessment tools and strategies,” “information provided by the parent,” “measure[s] or assessment[s],” “technically sound instruments,” and “assessments and other evaluation materials.” 34 C.F.R. §300.304 (evaluation procedures). Additional items found within an evaluation are: “[e]valuations and information provided by the parents,” “[c]urrent classroom-based, local, or State assessments,” “classroom-based observations,” [o]bservations by teachers and related

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<sup>9</sup> The statute itself also tends to blur the line between an assessment and an evaluation. See 20 U.S.C.A. §1414(c)(4)(A)(2) (“the right of such parents to request an assessment” when an IEP team determines that student no longer has a disability), see also 34 C.F.R. §300.305(d)(1)(ii) (same wording).



services providers,” “input from the child’s parents,” and “assessments and other evaluation measures.” 34 C.F.R. §300.305 (additional requirements of evaluations).

In the context of Maryland law, a Maryland statute, Md. Code Ann., Educ. §8-408(a)(2) defines “assessment” as “the process of collecting data . . . .”

Maryland State Department of Education regulations are clear on the distinction between the term “evaluation” and “assessment.” One regulation, COMAR 13A.05.01.03B, defines “assessment” as a “process for *collecting* data” and defines “evaluation” as a “process of *reviewing* information” that has been collected. COMAR 13A.05.01.03B(3) (emphasis added) and (25); *see also* COMAR 13A.05.01.06 (Evaluation).

For the most part, the courts appear to use the terms “evaluation” and “assessment” interchangeably. *N.B v. Hellgate El. Sch. Dist.*, 541 F. 3d 1202, 1208-09 (9<sup>th</sup> Circ. 2008) (“autism evaluation” included gathering information to help an IEP team to make a determination); *James v. D.C.*, 194 F. Supp. 3d 131 (D.D.C. 2016) (terms “speech-language evaluation” and “speech-language assessment” used interchangeably); *Damarcus S. v. D.C.*, 190 F. Supp. 3d 35, 46-47 (D.D.C. 2016) (“speech-language evaluation” and “speech language assessment” used interchangeably) *Tina F. v. Dept. of Ed., State of Hawaii*, 593 F. Supp. 2d 1199, 1212, (D. Hawaii. 2009) (assistive technology evaluation); *Harris v. D.C.*, 561 F. Supp. 2d 63, 67 - 68 (D.D.C. 2008) (trial court determined that a functional behavioral assessment qualified as an evaluation); *B.H. v. West Clermont Bd. of Ed.*, 788 F. Supp. 2d 682, 695 (S.D. Ohio 2008) (occupational therapy assessment labeled an evaluation).

The Supreme Court does not appear to use the two terms interchangeably. *See Schaffer v. Weast*, 546 U.S. at 60-61 (Court explains that an IEE is an evaluation process by which a parents’ expert can review and evaluate all of the assessment materials in order to give an independent evaluation opinion).

I conclude that an “evaluation” is a process (often on-going and evolving) 1) to review and weigh the data generated by various assessments, tools, measures, strategies, observations, and other data sources, and then 2) to determine disability and educational needs, if any. 20 U.S.C.A. §1414(b). Assessments are a means to generate the data. 20 U.S.C.A. §1414 (c).

With regard to the Parent’s request for the School System to pay for an assessment in the instant case, and calling the assessment an IEE, I conclude that those terms “assessment” and “evaluation” are commonly substituted, that School System treated the request as a request for an IEE, and the Parent’s request was later made more clear in that the Parent believed the existing evaluation of the Student was incomplete and inappropriate without an assessment – such as the P.A.L. (2d ed.) -- that focused on orthographic processing. The School System was required, under the facts and circumstances of this case, to treat the Parent’s request as one for an IEE at public expense, as it did. (Finding of Fact 23.) 20 U.S.C.A. §1414; 34 C.F.R. §300.502.

### **Requesting an IEE**

When a parent is not satisfied with the evaluation process on which an IEP team relies, a parent can request an IEE under the procedural safeguard provisions of the federal statute. 20 U.S.C.A. §1415(d)(2). That code section, however, is the only one that mentions an IEE, and it does not specify who is responsible to pay. An IEE, at public expense, is not specifically authorized by the federal statute. *A.C. v. Jefferson Co. Bd. of Ed.*, 701 F. 3d 691, 695 (11<sup>th</sup> Circ. 2012).

Department of Education regulations and Maryland State Department of Education regulations authorize an IEE, “at public expense,” under certain circumstances. 34 C.F.R. §300.502 and COMAR 13A.05.01.14. The federal rule defines an IEE as “an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child.” 34 C.F.R. §300.502(a)(3)(i). The federal regulatory scheme

contemplates that the IEE will be paid for by the school system if the evaluation being challenged is not “appropriate.” 34 C.F.R. §300.502(b). The regulation provides the following:

(b) Parent right to evaluation at public expense.

(1) 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, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) 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 its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense[.]

34 C.F.R. §300.502(b); *see also* COMAR 13A.05.01.14B(2) (virtually identical State regulation).

### **Arguments of the Parties**

The School System argues that all of the assessments, tools, measures, strategies, observations, and other data sources used by, and considered by, the IEP team, constitute an “appropriate” evaluation. It argues that the data was properly generated. It argues that the data was properly reviewed, weighed, and evaluated. It argues that the data was properly used to allow the IEP team to come to a conclusion about the Student’s disability and the Student’s educational needs. It argues that because the evaluation process was “appropriate,” the School System is not required, by regulation, to pay for additional assessments requested by the Parents.

The Parents challenge the School System’s evaluation by asking for the School System to pay for additional assessments. Their theory is that without assessments that specifically collect data with a focus on orthographic dyslexia or orthographic processing deficits in reading, the School System’s evaluation of the Student is inappropriately incomplete. The Parents argue that the evaluation of the Student is incomplete, and also that some included assessment measures are incompetent, such that the Parents are entitled to an IEE at public expense.

## Appropriate Evaluation?

In essence, the Parents have asked for the School System to pay for an additional assessment, or assessments, in their request for an IEE. The School System seeks to show that its evaluation and assessments of the Student were “appropriate” such that the School System is not required to pay for the further assessments.

Nowhere in the statutory or regulatory scheme, on the State or federal side, is the term “appropriate” defined in the context of an evaluation process. The School System contends that if the evaluation process conforms to all of the statutory and regulatory minimum requirements -- “the laundry list” -- then the evaluation is “appropriate.” (T. 598.) The Student agrees that the statutory and regulatory requirements of an evaluation define what is meant in the regulations, 34 C.F.R. § 300.502(b)(2)(i), by “appropriate.” (T. 601-602.) The Student contends, however, that the Student’s evaluation does not conform to all of the legal requirements because certain assessments were not administered in accordance with instructions, 34 C.F.R. §300.304 (c)(1)(v.), and the evaluation process was not sufficiently comprehensive to identify all of the Student’s special education and related services needs. 34 C.F.R. §300.304(c)(6).

Applying the comprehensive requirements of an evaluation set forth in 34 C.F.R. §§300.304 and 300.305, I conclude that the School System has shown that its evaluation is “appropriate.”

The School System’s evaluation process used a “variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.” The Student had an amazing number and variety of assessment tools from which the IEP team gathered relevant information, including much information provided by the Parent. (Findings of Fact 2, 5, 6, 7, 8, 10, 13, 14, 16, and 19.) 34 C.F.R. §300.304(b)(1).

The School System's evaluation process did not use any single measure or assessment as the sole criterion for determining disability and program. 34 C.F.R. §300.304(b)(2). The IEP team looked at all of the data generated by the many assessments to conclude that there were patterns that alerted them to a disability and steered them toward individualized programming for the Student. (Findings of Fact 5, 7, 9, 12, 16, and 19.) Several expert witnesses testified persuasively to that point<sup>10</sup> and that point was not challenged.

The School System's evaluation process used technically sound instruments that assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. §300.304(b)(3). In its evaluation process, the IEP team reviewed data from well-known tests, assessments, measures, and instruments and that data allowed the team to weigh and review cognitive and behavioral along with developmental factors, among others. (Finding of Facts 2, 3, 5, 9, 13, and 16.) Expert witnesses testified persuasively to that point and that point was not challenged. Parroting

The School System's evaluation process used assessments that were not discriminatory on a racial or cultural basis, were provided and administered in the Student's native language, were used for the purposes for which the assessments or measures are valid and reliable, and were administered by trained and knowledgeable personnel. 34 C.F.R. §300.304(c)(1)(i) through (iv). Credentials of test administrators were explored and most were qualified as experts in their respective fields. Curricula vitae were entered into evidence. Expert witnesses testified persuasively to those points and those points were not challenged.

The School System's evaluation process used assessments that were administered in accordance with any instructions provided by the producer of the assessments. 34 C.F.R. §300.304(c)(1)(v). The Student argues that some of the assessments were not administered

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<sup>10</sup> Counsel for the School System asked his witnesses a litany of questions echoing the statutory and regulatory requirements -- "the laundry list" -- of an evaluation. The witnesses persuasively confirmed compliance with fact evidence and with opinion evidence. (For examples, see T. 168 - 172 and T. 247 - 249.)

according to the instructions. It is true that there were some minor glitches in some of the tests with regard to the stated age of the Student, when the age did not matter, and with regard to misreporting several raw scores by a point. (Findings of Fact 8 and 13.) A witness who was qualified to offer opinions on special education and assessments, [REDACTED] offered valid and persuasive opinions about the relative insignificance of those testing errors. Those opinions were well articulated and well supported by facts. She reviewed the assessment protocols for the Gray Silent Reading Test and the Word Identification and Spelling Test, along with the Student's test sheets and she produced a short report on the insignificance of the errors. (P Ex. 13, 14, 38, 39, and 40.) The witness's opinion showed that those two tests were administered in a slightly sloppy manner but not in an incompetent manner that affected the final results. A raw score for a spelling sub-test was one point lower than reported. When corrected, the score still fell in the below average range. A raw score in a word identification test was one point lower than reported. When corrected, the score still fell in the average range. The score on the Gray Silent Reading Test, when adjusted for the Student's correct age, still fell in the average range. That average range score was consistent with other assessments such as the Student's general education reading assessment test. Despite these minor errors, spelling was still shown to be an area of weakness and word identification reading was still shown to be within the average range. (T. 153 – 162.) The evidence before me allows me to conclude that the two tests were administered in substantial compliance with the instructions provided by the producers of the assessments. I cannot conclude that those two tests were assessments that were not administered according to the instructions of the producer such that the evaluation of the Student was "inappropriate."

The School System's evaluation process used assessments and other evaluation materials that were tailored to assess specific areas of educational need and not merely a single general

intelligence quotient. 34 C.F.R. §300.304(c)(2). The assessments, tools, measures, strategies, observations, and other data sources were comprehensive, not merely I.Q. tests, and were also targeted to assess areas of educational concern held by the IEP team. (Findings of Fact 2, 5, 6, 8, 10, and 14.) Expert witnesses testified persuasively to that point and that point was not challenged.

The School System's evaluation process assessed the Student in all areas related to the suspected disabilities,<sup>11</sup> which could include, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. §300.304(c)(4). The evaluation process which included many assessments, tools, measures, strategies, observations, and other data sources was quite comprehensive. (Findings of Fact 2, 5, 6, 7, 8, 10, 13, 14, and 19.) It focused on many areas of concern before the IEP team. The School System's expert witnesses testified persuasively to that point and that point was not challenged.

The School System's evaluation process was sufficiently comprehensive to identify all of the Student's special education and related services needs. 34 C.F.R. §300.304(c)(6). The evaluation was certainly comprehensive. (Findings of Fact 2, 5, 6, 7, 8, 10, 13, 14, and 19.) With regard to identifying needs, on October 16, 2017, the IEP team accurately determined that the Student was reading on grade level in a general education setting. The IEP team immediately understood that the Student had no "special education and related service needs" in reading, at that time. (Finding of Fact 16.) The IEP team, however, determined that the Student had special education needs in written expression. (Finding of Fact 16.) *See* COMAR 13A.05.01.06D(2)(a)(vi) (one of several authorized categories of specific learning disability). The team adjusted the Student's IEP.

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<sup>11</sup> "Child with a disability" is defined at 20 U.S.C.A. §1401 (3).

One team member opined that the Student's struggle in written expression fit a pattern, borne out by the existing data, which she attributed to possible orthographic processing deficits. The team recognized that the possibility of an orthographic processing skills deficit may cause the Student to struggle with "writing spelling patterns" but that the Student "does understand the patterns to be able to read them." (SS Ex. 16; Finding of Fact 16 and 17.)

At the IEP team meeting on February 9, 2018, when the Parent raised the need for further assessment in orthographic processing skills, the team members determined that, with regard to the Student's needs in written language, the team had all of the assessment data it needed to identify and program for the Student's written language needs. Because the Student achieved at grade level in reading, he did not qualify as having a specific learning disability in reading. The team determined that no further assessment in orthographic processing with regard to reading or writing was necessary. (Finding of Fact 19.)

The Student argues that the Student's evaluation process engaged in by the IEP team does not allow it to be certain that the Student does not have orthographic processing deficits in reading. The Student argues that the regulation requires that an evaluation determine *all* the special educational and related service needs.

The IEP team determined all of the Student's special education and service needs. The School System's experts explained, persuasively, why there was no need for further assessment in orthographic processing. For example, Ms. [REDACTED] qualified to offer opinions in the fields of assessment and school psychology, opined that the data before the team presented a "clear pattern" of orthographic processing weakness. (T. 239 - 240.) The IEP Team had a slew of test data on reading, spelling, and written language. (T. 241.) The Student's orthographic processing skill was shown in data from "multiple measures of spelling" and many diagnostic reading measures. (T. 245.) The Student had been assessed in orthographic processing by virtue of the



assessments and tests already given. (T. 250, 252.) Further assessments or tests that focus specifically on orthographic processing ability would not change the Student's eligibility for special education or services, and would not change the areas of need for the Student. (T. 255.) An additional assessment, such as the P.A.L. (2d ed.), would be superfluous and redundant to some extent.

The School System's expert, Ms. [REDACTED] offered credible and persuasive opinions on these points. She clearly expressed her opinions and they were well supported with facts. Her opinions were tested with cross examination. She explained, credibly, how her comment that the P.A.L. (2d ed.) test might be the "next step," meant that if there was insufficient data to determine that orthographic processing was an area of weakness, or to determine eligibility or needed programing, only then it would be a "necessary next step." (T. 252.)

The Student's expert witness confirmed that the assessments and data sources "gave sufficient and significant information" on the Student's special education and related services needs. (T. 539.) The Student's expert confirmed that assessment data before the IEP team looked at orthographic processing. (T. 514.) The Student's expert testified that the interpretation of the data left her with "substantial questions." (T. 539.) The Student's expert<sup>12</sup> acknowledged that it was important to look at all the data before the IEP team with regard to interpreting the data, (T. 555.) but that she did not review all of the data that was before the IEP team. (T. 550.) I am not persuaded by the Student's argument. The School System's evaluation process was sufficiently comprehensive.

The School System's evaluation process included assessment tools and strategies that provided relevant information that directly assisted team members in determining the educational

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<sup>12</sup> It is noteworthy that this case did not represent a classic "battle of the experts." *Copsey v. Park*, 228 Md. App. 107, 117 (2016) (battle of the experts). Although the Student's expert witness was not as well credentialed, licensed, and formally educated in the field of special education and interpreting assessments as were many of the School System's experts, for the most part, she merely confirmed the testimony of the School System's experts.

needs of the Student. 34 C.F.R. §300.304(c)(7). The assessments, tools, measures, strategies, observations, and other data sources were focused over time to help the IEP team determine educational needs. They were discussed, and programming for the Student arose from the discussion about the fruit of those tools and other data sources. (Findings of Fact 2, 3, 5, 6, 7, 9, 13, 16, and 19.) The School System's expert witnesses testified persuasively to that point and that point was not challenged.

The School System's evaluation process included review of 1) existing evaluation data on the child, including: evaluations and information provided by the parents of the child (Findings of Fact 2, 3, 5, 6, 7, 9, 13, 16, and 19.), 34 C.F.R. §300.305(a)(1)(i); 2) current classroom-based, local, or State assessments, and classroom-based observations (Findings of Fact 5, 10, 13, 14, and 16.), 34 C.F.R. §300.305(a)(1)(ii); and 3) observations by teachers and related services providers (Findings of Fact 2, and 10.), 34 C.F.R. §300.305(a)(1)(iii). The School System's expert witnesses testified persuasively to those points and those points were not challenged.

The School System's evaluation process included review of data and Parent-provided information that allowed the IEP team to determine whether additional data was needed regarding: 1) a disability; 2) academic achievement; 3) a need for special education and related services; or 4) a need to modify the IEP to allow the Student to meet goals within a general education curriculum. 34 C.F.R. §300.305(a)(2). (Findings of Fact 5, 7, 9, 16, and 19.) During the on-going evaluation process, the IEP team kept making reasonable determinations either to gather more data in certain areas, or not. Several expert witnesses testified persuasively to that point.

With regard to Maryland regulations about assessment and evaluation minimum requirements, the Maryland regulations generally mirror the federal regulations. COMAR 13A.05.01.05 (Assessments) and 13A.05.01.06 (Evaluation, Reevaluation and Eligibility). In

Maryland, when an evaluation process results in the determination of a specific learning disability, as it did in this case, the IEP team must consider data from repeated assessments of achievement at regular intervals. 13A.05.01.06D (4)(b). In the instant case, the IEP team considered data from achievement tests administered over a period of time, from the Student's second-grade year and his third-grade year. (Findings of Fact 2, 3, 5, 13, and 14.) Several expert witnesses testified persuasively to that point.

In summary, the Parents asked for an IEE at public expense in light of their belief that the School System's evaluation of the Student was incomplete, and contained some incompetent assessments. The School System has shown that the School System's assessments were competent, the comprehensive data before the IEP team met minimum requirements, and the IEP team's review of the comprehensive data resulted in an "appropriate" evaluation of the Student.

#### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the School System was required to treat the Parent's request for an additional assessment as a request for an IEE at public expense. 20 U.S.C.A. §1414; 34 C.F.R. §300.502. I also conclude that the School System has met its burdens of production and persuasion to show that the Student's evaluation was "appropriate." 20 U.S.C.A. §1414; 34 C.F.R. § 300.304; 34 C.F.R. § 300.305; 34 C.F.R. § 300.502; COMAR 13A.05.01.05 and 13A.05.01.06.

#### **ORDER**

I **ORDER** that the record reflect that the School System produced an "appropriate" evaluation of the Student.

July 5, 2018  
Date Decision Issued

WS/ej  
#174508

Signature Appears on  
Original

William J.D. Somerville III  
Administrative Law Judge

## REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2017). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.

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