

*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**

DECISION  
DUE PROCESS HEARING

Name of Child: B.L.

ODR #15486/14-15 AS

Date of Birth:  
[redacted]

Date of Hearing:  
December 22, 2014

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Representative:  
Pro Se

Owen J. Roberts School District  
901 Ridge Road  
Pottstown, PA 19465

Sharon Montanye, Esquire  
Sweet, Stevens, Katz and Williams  
PO Box 5069  
331 Butler Avenue  
New Britain, PA 18901

Date Record Closed:  
Date of Decision:  
Hearing Officer:

December 30, 2014  
January 19, 2015  
Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is an early teen-aged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the current classification of Autism. There is no dispute about the classification of Autism which was conferred prior to the family's move to Pennsylvania from [another state]. The Parents<sup>2</sup> filed this complaint because they believe that Student should receive a secondary classification of Intellectual Disability. As such they disagree with the District's evaluation, which only conferred the classification of Autism. The Parents are challenging the District's evaluation, specifically the omission of Intellectual Disability as a secondary classification. For the reasons given below I find in favor of the Parents.

## Issue

Was the District's 2012 evaluation inappropriate because of its failure to classify Student as intellectually disabled as well as autistic?

## Findings of Fact

1. Student is an eligible student living with the Parents within the boundaries of the District; Student moved from [another state] for the 2012-2013 school year. [P-3/S-4]
2. As Student was growing up, Student's family members, including father, mother, and two teenage siblings all spoke [another language] and English at home, with [the other language] being the Parents' predominant language at home and English being the teenage siblings' predominant language at home. [S-1]
3. Student received Early Intervention Services in [the other state]. A bi-lingual psychologist completed a Social History and Behavioral Observations at 2 years and 9 months. The Parents described Student as shy, quiet and sensitive, and reported that when corrected Student became angry and had temper tantrums. The psychologist observed Student to be very quiet and self-directed, with inconsistent reciprocal eye gaze and a short attention span for age. [S-1]

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<sup>1</sup> This decision is written without further reference to the Student's name or gender. Other singular characteristics such as previous residence and second language will be redacted to provide privacy when the decision is posted on ODR's website.

<sup>2</sup> In this decision the term "Parents" is used because even though the father attended the hearing and was the primary participant in advocacy efforts for Student it is understood that he acted on behalf of both parents.

4. Student received a bi-lingual Speech/Language evaluation at age 2 years and 10 months. Student had been receiving twice-weekly 30 minute, speech/language therapy for about 5 months at the time of that evaluation. Testing with the Preschool Language Scale Fourth Edition [PLS-4] found auditory comprehension to be at age equivalent 1 year 6 months, expressive communication to be at age equivalent 1 year 8 months, and total language to be at age equivalent 1 year 6 months. Based on the Parents' report, observation, and evaluation performance the speech/language pathologist concluded that Student was exhibiting a 47% receptive language delay in both [the other language] and English and about a 40% delay in expressive language. [S-2]
5. As assessed by the speech/language pathologist, using Blackstone, Cassatt and Cupples' Levels of Play Student was functioning at the 15-19 month old level. [S-2]
6. Student was given a Psychoeducational Evaluation in [the other state] in February 2009 at age 7 years 10 months. At that time Student had already been classified as autistic and was placed in a self-contained classroom with an 8:1:1 ratio. Student also was receiving weekly direct services in the form of individual speech/language therapy four 30-minute sessions, and group speech/language therapy one 30-minute session. [S-3]
7. The psychologist conducted record review, parent interview, teacher interview, and Student observation, and directly assessed Student's cognitive and adaptive functioning and other pertinent behavioral functioning. [S-3]
8. The psychologist referenced an earlier cognitive assessment done with the Stanford Binet Fifth Edition five years previously when Student was 2 years and 10 months old<sup>3</sup>. That testing yielded a Full Scale standard score of 71 [3<sup>rd</sup> percentile<sup>4</sup>], a Nonverbal standard score of 90 [25<sup>th</sup> percentile], and a Verbal standard score of 56 [0.2 percentile]. The psychologist made note of the fact that the previous examiner wrote that the validity of that assessment "was compromised because the presentation of items was altered (i.e. guidelines for standardized administration were not followed)" and that the previous examiner indicated that the interpretation of the results should be "undertaken with caution."<sup>5</sup> [S-3]

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<sup>3</sup> A copy of that report was not put into evidence by either party.

<sup>4</sup> A percentile rank is a score indicating how many other test-takers scored below the level of the test subject. The 50<sup>th</sup> percentile is the point where 49 percent of the normative group scored below the test taker. In Student's case very few test takers scored below Student.

<sup>5</sup> The hearing officer, a clinical psychologist and certified school psychologist who spent over 20 years specializing in preschoolers, takes notice that when non-standardized methods are used results nearly always are higher than they would be if strict standardized administration were followed. It is not forbidden or unethical to deviate from standardized administration as long as this is clearly acknowledged, as the previous evaluator did. Deviation is done with young children for various good reasons, for example to maintain rapport and cooperation, to be certain that the child understood the directions.

9. In February 2009 the psychologist administered cognitive and achievement testing to Student in a manner consistent with standardization guidelines. The psychologist noted that “overall, testing conditions were conducive to obtaining credible data”, and “results of testing are believed to be an accurate estimate of [Student’s] current level of functioning”. [S-3]
10. The Kaufman Assessment Battery for Children Second Edition [KABC-II], a cognitive assessment, was administered. Subtest scaled scores<sup>6</sup> and their corresponding percentiles on the KABC-II were as follows<sup>7</sup>: *Number Recall 1/0.1%ile, Word Order 1/0.1%ile, Triangles 1/0.1%ile, Atlantis 1/0.1%ile, Rebus 1/0.1%ile, Story Completion 2/0.4%ile, Pattern Reasoning 1/0.1%ile, Verbal Knowledge 1/0.1%ile.* [S-3]
11. Index standard scores<sup>8</sup> and their corresponding percentiles on the KABC-II were as follows: *Sequential 49/<0.1%ile, Simultaneous [not calculable], Learning 48/<0.1%ile, Planning 54/0.1%ile, Knowledge [not calculable].* [S-3]
12. Calculation of the Nonverbal Index score yielded a standard score below 40 which falls below the 0.1<sup>st</sup> percentile. [S-3]
13. The Kaufman Test of Educational Achievement Second Edition [KTEA-II], a test of academic achievement, was administered. Standard scores and their corresponding percentiles on the KTEA-II were as follows: *Letter and Word Recognition 45/<0.1%ile, Math Concepts and Applications 40/<0.1%ile, Math Computation 55/0.1%ile, Written Expression 40/<0.1%ile.* [S-3]
14. The Vineland Adaptive Behavior Scales Second Edition [VABS-II] Teacher Rating Form was completed to assess Student’s adaptive functioning. Results expressed in standard score/percentile rank/descriptor were as follows: *Communication 40/<1<sup>st</sup>/Low; Daily Living Skills 44/<1<sup>st</sup>/Low; Socialization 32/<1<sup>st</sup>/Low; Motor Skills Est. 59/3<sup>rd</sup>/Low. Student’s Adaptive Behavior Composite was 32/<1<sup>st</sup>/Low.* [S-3]
15. The Vineland Adaptive Behavior Scales Second Edition [VABS-II] Parent/Caregiver Rating Form was also completed. Results expressed in standard score/percentile rank/descriptor were as follows: *Communication 59/<1<sup>st</sup>/Low; Daily Living Skills 63/1<sup>st</sup>/Low; Socialization 62/1<sup>st</sup>/Low; Motor Skills Est. 72/3<sup>rd</sup>/Moderately Low. Student’s Adaptive Behavior Composite was 61/<1<sup>st</sup>/Low.* [S-3]
16. The psychologist kept the “Autistic” classification. He did not confer a secondary classification. [S-3]

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<sup>6</sup> Mean 10, standard deviation 3.

<sup>7</sup> Subtests in italics for the KABC-II and the KTEA-II are those on which Student did not earn any raw score points, i.e. Student could not answer any of the items correctly.

<sup>8</sup> Analogous to IQ scores; Mean 100, standard deviation 15.

17. Student's family moved to Pennsylvania within the boundaries of the District; Student is enrolled in a private school for children with special needs. [P-3/S-4]
18. In a telephone conversation with the District's psychologist on September 6, 2012 the Parents reported that they were pleased with Student's transition to the private school. [P-3/S-4]
19. The District conducted an evaluation in October 2012. The psychologist's portion of the evaluation consisted of a record review, parent written questionnaire, telephone conversations with the father, obtaining information from Student's teacher at the private school, and a classroom observation at the private school. [P-3/S-4]
20. Student was 11 years and 7 months old at the time of the District's reevaluation. It had been nearly 4 years since Student's last formal cognitive and academic assessment completed at age 7 years and 10 months. [P-3/S-4]
21. Either [the record is unclear] because the psychologist attempted and was unable, or decided based only on observation, that Student could not cooperate with formal testing the District sought and received the Parents' agreement to use the previous scores in lieu of conducting its own formal standardized cognitive and achievement testing and adaptive behavior assessment. [NT 22, 34; P-3/S-4]
22. The District used the previous Vineland scores to assess adaptive behavior, even though the scores were nearly four years old. The District could have performed its own adaptive behavior assessment given that the Vineland is a questionnaire based on observation and report and does not in any way involve a test subject's cooperation. [P-3/S-4]
23. Observations of Student at the private school by the District's psychologist included the following: a 1:1 aide standing directly behind Student often offered hand-over-hand assistance including moving Student's arms during a group song; when requesting a snack Student received hand-over-hand assistance to point and repeated "popcorn" and "apple" after the teacher; Student wrote name with hand-over-hand assistance; Student successfully and independently cut on a line, cut out a square and snipped paper; Student played catch with the OT standing about 4 feet apart and said "ball". [P-3/S-4]
24. Observations of Student at the private school by the District's speech/language therapist included the following: Student vocalized various intonations but no words were uttered at any time; Student traced name three times with hand-over-hand assistance; with the occupational therapist Student sorted plastic utensils accurately and quickly and also assorted various items by color; Student gave items upon request; Student followed the directions "put bed on yellow rug" and "make dad sit at the table"; Student could not point to own clothing; Student

- verbally approximated knife, grape, pizza, apple, dad, corn, cookie, chair, green and yellow. [P-3/S-4]
25. Observations of Student at the private school by the District's occupational therapist included the following: Student sought tactile input; Student could self-feed; Student drinks from bottle and straw but will not use a cup; Student followed class activities with assistance; Student appeared to be right handed but switched hands during an activity; Student could zip own jacket; Student did not pay attention to boundaries of lines on paper; Student can write first letter of first name alone; Student can trace lines but not directly on the line; Student can copy vertical lines but not horizontal lines or diagonals; Student can string beads; Student cannot copy a design with 4 blocks; Student cannot tie shoe laces; Student needs help to wash hands thoroughly. [P-3/S-4]
  26. When the District re-evaluated Student, it retained the classification of Autism. Although it relied on the cognitive, achievement and adaptive behavior scores obtained by the previous psychologist the district did not confer the secondary classification of Intellectual Disability. [P-3/S-4]
  27. When the Parents were exploring whether Student could receive additional benefits they were referred to the Pennsylvania Department of Mental Health and Intellectual Disability. [NT 12]
  28. Upon review of Student's file, the Pennsylvania Department of Mental Health and Intellectual Disability representative questioned why Student was not classified as having an intellectual disability based on the I.Q. scores and adaptive behavior functioning as reported in the District's reevaluation. [NT 13, 23-24]
  29. The Parents contacted the District to inquire whether the child's classification could be modified but the District did not agree to change the classification, which denial led to this hearing. [NT 14, 24]

### Legal Basis and Discussion

**Burden of Proof:** The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>9</sup> that the other party failed to fulfill its legal obligations as

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<sup>9</sup> A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006). In this case the Parents asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

In deciding this matter I relied most heavily on the documentary evidence but offer some credibility observations here with regard to testimonial evidence. The special education director’s testimony was brief given that he was not the person in that role in 2012 and, adding nothing to the fact pattern, his testimony was not weighed. I found the father’s testimony about the Parents’ reasons for seeking an additional classification at this time rather than at the time of the District’s evaluation to be credible and his understanding of Student’s formal scores obtained in 2009 to be accurate. Given that the psychologist responsible for the District’s 2012 evaluation no longer works for the District, another psychologist was called in support of the District’s position. This witness has neither conducted an evaluation of Student nor observed Student herself, although in connection to an unrelated issue she attempted an observation of Student at the private school. It is unknown whether she had access to the reports of the bilingual Social History and Behavioral Observations or to the report of the bilingual Speech/Language Evaluation, all of which were done prior to Student’s third birthday. Nevertheless, based on her review of the District’s 2012 evaluation, I did not find her testimony to be credible in several respects. She considered scores obtained nearly four years before the District’s evaluation to be “fairly recent” even though Student had been seven when the testing was done and was eleven when the District produced its report. Even with children who are significantly disabled, there is a clear difference between a seven year old and an eleven year old. As Student had adjusted to the routine at the private school by early September 2012 her position that Student needed to adjust and be acclimated before any additional testing would be done is inconsistent with the record. Her testimony that there was “some fluctuation” in Student’s scores was based on scores obtained prior to age three, on a test not administered according to standardized protocol. Her assumption that the [other state’s] psychologist’s sole classification of autism was a “better explanation and better encapsulated what [Student’s] needs are” does not take into account whether [the other state] uses multiple classifications, whether [the other state] treats children with intellectual disability differently than students with other disabilities, and/or consideration of any bias the [other state’s] psychologist may have toward classifying children with intellectual disability. Since in his report the [other state’s] psychologist did not offer any

discussion of his reasoning for not providing a secondary classification there is no way of knowing what went into his reasoning. Although the witness's only role was to review records, this witness was wedded to the narrow view that unless she herself saw and evaluated Student she could not rely on previous records; of note she placed more reliance on spurious scores from 2004 than on robust scores from 2009. For the foregoing reasons I did not find this witness credible and could not accord her testimony much weight.

### Legal Basis and Discussion

The IDEA sets forth two purposes for an evaluation: to determine whether or not a student is a student with a disability as defined in the law, and to “determine the educational needs of such student ...” 20 U.S.C. §1414(a)(1)(C)(i). Once a student is found eligible, school districts and other LEAs provide a free appropriate public education [FAPE] by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan [IEP] informed by the student's needs identified in the initial evaluation and the reevaluations. 20 U.S.C. § 1414(d). The Supreme Court established the FAPE mandate to require “education specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley* 458 U.S. 176, 188-89. 102 S. Ct. 3034 (1984).

The issue in this hearing is whether the District should have conferred the secondary classification of Intellectual Disability when it conducted its 2012 evaluation. Intellectual Disability [Mental Retardation is the term used in the regulations] is defined as “significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifesting during the developmental period, that adversely affects a child's educational performance”.

In his evaluation report, the District psychologist made no reference to having contacted the [other state's] psychologist to discuss the results obtained in 2009. When the District chose to use the scores Student obtained at the last evaluation in its own evaluation, and to construct an IEP based on those scores, the District was acknowledging that those scores were reliable.

Ordinarily once a student is evaluated and found to be eligible for special education the student's actual classification is less important than whether or not the IEP addresses all of the student's areas of need. [The other state's] policies regarding classification and its potential consequences on a student's rights are not in evidence. However with certain students in the Commonwealth of Pennsylvania classification *is* very important because Pennsylvania affords additional advantageous procedural considerations to children with intellectual disabilities. First, as opposed to the federal requirement for triannual re-evaluations set out at 20 U.S.C. 1414(a)(2); C.F.R. 34 Section 300.303(b)(2), in Pennsylvania a child with an intellectual disability “shall be reevaluated at least once every two years.” 22 PA Code Chapter 14 at Section 14.124(c). Second, while



Pennsylvania special education regulations provide that a disciplinary exclusion of a student with a disability for more than 15 cumulative school days constitutes a change in placement, “a removal from school is a change of placement for a student who is identified with [intellectual disability]” [with some exceptions]. 22 PA Code Chapter 14 Section 14.143(b). Even one day of suspension triggers the need for a meeting of the IEP team for a child with an intellectual disability. Given the previous scores that the District accepted as reliable, by not conferring the secondary classification of Intellectual Disability the District denied Student these special procedural protections.

Further, in addition to procedural considerations, substantive FAPE issues may be impacted by an LEA’s failure to confer a secondary disability category. Instructive, although not binding in our Circuit, in *E.M. v. Pajaro Valley Unified School District*, 63 IDELR 211 (9th Cir. 2014), *cert. denied* (01/12/15) (No. 14-604), the 9th U.S. Circuit Court of Appeals held, as a matter of first impression, that a student may seek to classify a particular disorder or impairment under more than one IDEA category. The three-judge panel agreed with the lower court that allowing a particular disability to be classified under more than one category would further the IDEA's goal of ensuring that all students with disabilities receive FAPE, regardless of their classification.

"A contrary position would create the possibility that a child with a disability could be denied special education benefits not because he did not qualify for benefits, but because the child, his parents, or the school district's initial selection of one category barred consideration of a more appropriate category," U.S. Circuit Judge Consuelo M. Callahan wrote.

### Conclusion

The District psychologist did not complete any new cognitive, achievement, or adaptive functioning assessments, instead relying upon those obtained by a previous evaluator in order to inform the members of the IEP team about Student’s needs. Given the information in assessments done prior to Student’s turning 3 years of age, the results of the [other state’s] evaluation which used formal standardized testing completed using standardized protocols for administration upon which testing the District chose to rely, and the direct school-based observations of Student the District’s psychologist, speech/language therapist and occupational therapist made for purposes of its own evaluation, the District should have conferred the secondary classification of Intellectual Disability. Student’s standard scores across cognitive, achievement and adaptive functioning assessments virtually without exception fell into the 1<sup>st</sup> percentile or lower, clearly satisfying the IDEA’s definition of Mental Retardation [Intellectual Disability]. This additional classification is important not only for programming, but because in Pennsylvania special considerations are given to students with an intellectual disability.

Order

It is hereby ordered that:

The District's 2012 re-evaluation was inappropriate because of its failure to classify Student as intellectually disabled as well as autistic.

Any claims not specifically addressed by this decision and order are denied and dismissed.

January 19, 2015

Date

*Linda M. Valentini, Psy.D., CHO*

Linda M. Valentini, Psy.D., CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official