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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

6198/05-06 LS

File Number

B.B.

Child's Name

Xx/xx/xx

Date of Birth

March 7, 2006

Date of Hearing

Closed

Type of Hearing

For the Student:

For the North Penn School District:

Teresa Freeman
Director of Special Education
North Penn School District
401 East Hancock Street
Lansdale, PA 19446-3961

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Date of Hearing:	March 7, 2006
Receipt of Transcript:	March 12, 2006
Date of Decision:	March 27, 2006
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student (Student) is [an elementary school-aged] former resident of the North Penn School District (School District) whose parent seeks reimbursement of private school tuition and the costs of privately secured evaluations because the School District did not retain Student in kindergarten as requested by Student's parent.

ISSUE

Whether or not Student's parent is entitled to reimbursement of private school tuition and/or evaluation costs?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is [an elementary school aged] former resident of the School District (School District) with vision problems that are corrected by prescription glasses. (SD 9)¹
 - a. Professional educators and therapists have also observed symptoms of attention deficit hyperactivity disorder (ADHD) and post traumatic stress disorder (PTSD). (N.T. 61; P3, pp. 3-4)
 - b. Although Student's parent also suggests that Student may have a bipolar personality disorder, there is no professional opinion in the record supporting this suggestion. (N.T. 82, 103)

2002-2003, Public School Kindergarten

2. In September 2002, when she was a [school-aged] resident of the School District, Student attended afternoon kindergarten at her neighborhood elementary school, which shall be called "ES1" in this decision. (N.T. 176) Student was one of the younger children in her class. Student's ES1 kindergarten teacher, who has over 22 years teaching experience, kept a very organized classroom, and Student's parent was quite satisfied. (N.T. 40, 122, 175, 188) Student's ES1 teacher did not observe any reason for referring Student to ES1's child study team (CST.) (N.T. 191)
3. On or about March 3, 2003, Student's parent moved to a different neighborhood within the School District, resulting in Student's move to a different elementary school, which shall be called "ES2." Student's parent described the ES2 kindergarten as totally different, confusing and disorganized. (N.T. 40, 117, 178)
4. On or about April 25, 2003, the principal of ES2, who has nine years experience in her position and 30 years total educational experience, sent home with all children a form

¹ References to N.T. are to the transcript of the March 7, 2006 hearing session. References to SD, P and HO are to School District, Parent and Hearing Officer exhibits, respectively.

- letter asking parents to submit, in writing, their input regarding their child's classroom assignment for the following year. (N.T. 42, 117, 20, 202; P1; P4, p.2)
- a. Student's parent alleges that she handwrote a note on the bottom of this form letter and sent it back to school the following day in Student's book bag. The note asked the principal of ES2 to please call as soon as possible to discuss Student's advancement into the first grade, (N.T. 44-45, 118)
 - b. Student's parent alleges that she followed-up her handwritten note with 10 telephone messages for the principal of ES2, none of which were returned. (N.T. 46)
 - c. The Principal of ES2 denies receiving either the handwritten note or any follow-up telephone messages. (N.T. 203, 228)
5. On May 5, 2003, Student's parent wrote a letter to the School District requesting a meeting to discuss Student's grade placement for the following year. (SD 2, p.1; N.T. 45, 119; P4, p.3) The principal of ES2 asked the school guidance counselor to call Student's parent and to place Student on the CST agenda. (N.T. 203, 234)
6. During the 2002-2003 school year, ES2's CST met regularly on Wednesday mornings to discuss children who had been referred, either by teachers or parents, for discussion. Regular attendees at CST meetings were the school psychologist, a reading specialist, a guidance counselor, the ES2 principal, the student's classroom teacher, and the parent. (N.T. 209) Typically, no procedural safeguards were distributed to parents at CST meetings unless a parent specifically requested an evaluation at the meeting. (N.T. 206, 225, 234) In addition, no official minutes were taken of CST meetings, although participants often took personal notes. ES2 did not create and distribute any follow-up summaries of CST meetings. (N.T. 239, 241-242, 247, 274-275, 278-279)
7. On May 21, 2003, at around 10:45 a.m., the ES2 CST met to discuss Student. (N.T. 46-47, 230, 234, 245)
- a. Student's parent acknowledges receiving the guidance counselor's call and attending the CST meeting, but she is adamant that the CST meeting occurred on or about June 10, 2003, not May 21. (N.T. 28, 46-47, 230, 234-235)
 - b. The School District insists that the CST must have occurred on Wednesday, May 21, rather than on Tuesday, June 10, because:
 - i. Two documents refer to May 21; (SD 2; P4)
 - ii. CST meetings were always on Wednesdays and never on Tuesdays; and
 - iii. The last CST meeting of that school year was Wednesday, June 4, 2003. (N.T. 204-207)
8. Student's parent remembers the following details regarding the CST meeting:
- a. Student's parent expressed her opinion that Student be retained in kindergarten and not promoted to first grade; (N.T. 48, 68)
 - b. Student's parent alternatively requested that Student be placed in a T1, or Transitional First Grade; (N.T. 49, 247)
 - c. Student's parent also requested that Student be evaluated over the summer; (N.T. 49)

- d. The CST professionals asked the opinion of Student's classroom teacher;
 - e. Student's classroom teacher stated that she could only stay a minute, that she had to leave to go to her child's musical appointment, and that she thought Student's performance was "baseline;" (N.T. 47, 49)
 - f. The CST decided not to retain Student in kindergarten, and Student's parent left the meeting in tears; (N.T. 235-236, 247) and
 - g. Student's parent has difficulty remembering exactly who attended the meeting. (N.T. 107-108)
9. The ES2 principal remembers the following details regarding the CST meeting:
- a. Student's parent expressed her desire that Student be retained in kindergarten and not promoted to first grade; (N.T. 48, 68)
 - b. Student's parent did not request that Student be placed in a T1, or Transitional First Grade; (N.T. 235-236, 247)
 - c. None of the educational professionals expressed any concern regarding Student's performance, and no one used the term "baseline"; (N.T. 243)
 - d. The CST decided to promote Student to first grade, review Student's performance at the beginning of the school year, and determine whether any regular education interventions might be necessary;
 - e. There was no disagreement at the meeting regarding the CST's decision;
 - f. Student's parent did not request an evaluation of Student and thus no procedural safeguards were distributed; (N.T. 225)
 - g. No teacher left the meeting early; (N.T. 244)
 - h. Student's parent did not leave the meeting in tears. (N.T. 211, 214-215, 218, 235-236, 247)
10. Apparently, only the guidance counselor kept her notes of the CST meeting. (SD 3, p.1; N.T. 74)
- a. Although the agenda form is intended to list the "coverage," i.e., the teachers who will substitute in the classroom for the meeting attendants, the guidance counselor's copy does not list the coverage. (SD 3, p.1; P4, 1; N.T. 249)
 - b. Although Student's parent asked unidentified School District personnel at some time in the past for the CST meeting notes, she was told that no such notes existed. (N.T. 241)
 - c. Parent further alleges that the unidentified School District person with whom she spoke on the telephone said that the May 21, 2003 meeting was an introductory parent meeting, not a CST meeting. (241-242)
11. Student's parent alleges that Student's ES1 kindergarten teacher later agreed that Student should be retained in kindergarten.
- a. At the hearing, however, the ES1 kindergarten teacher credibly denied ever expressing such an opinion. The ES1 kindergarten teacher testified that Student and her parent visited the ES1 kindergarten classroom at the end of the school year to visit some of Student's old friends during a recess period, but the teacher and parent never had a conversation regarding Student's retention in kindergarten.

- b. At the hearing, Student's parent acknowledged that she may have misinterpreted the ES1 teacher's statements during the visit. (N.T. 193-198)
12. Student's Kindergarten grade report for 2002-2003 indicates satisfactory performance. (SD 3) It does state that Student needs improvement in completing work within a reasonable amount of time, needs improvement in following oral direction and explanation, and needs improvement in demonstrating appropriate attention span. (N.T. 67; P5, p.1; SD 4; P5, pp.1-2) Student's ES1 kindergarten teacher credibly testified, however, that this is well within normal expectations for a kindergarten student and is not a basis for either retention or referral for an educational evaluation. (N.T. 180, 182-183, 187)

Summer 2003

13. On or about July 14, 2003, Student's parent paid \$500 for a private Reading Readiness Assessment of Student. The assessment indicates that Student rhymed words well, but had difficulty isolating individual sounds or phonemes, blending sounds, and identifying sounds. The assessor recommended instruction in a smaller group and a more individualized instructional pace, with explicit teaching of missing phonemic awareness skills, and to develop greater self-confidence. (N.T. 51-54; SD 8, pp.16-17; P3, pp. 1-2)
14. On or about August 26, 2003, Student's parent requested financial assistance from the County Childcare Information Services (CCIS) to enable Student to repeat kindergarten. (SD 8, p.22) In the written request, Student's parent alleged that the ES1 kindergarten teacher believed that retention was in Student's best interests, emotionally, socially and academically. (SD8, pp.22-23)
15. At about the same time, CCIS apparently informed Student's parent that she would not receive subsidized child care for Student because Student was expected to attend full-day first grade during the upcoming 2003-2004 school year. (N.T. 93)
- a. Student's parent then asked the ES2 principal to write a letter to CCIS to help Student's parent re-qualify for subsidized child care. (N.T. 93, 128-130)
 - b. The ES2 principal confirmed that Student's parent asked the ES2 principal to write a letter agreeing with the decision of Student's parent to enroll Student in a private kindergarten the following school year; (N.T. 221)
 - c. The ES2 principal refused to provide the letter requested by Student's parent stating that Student should remain in kindergarten for another year. (N.T. 222)
 - d. Student's parent never asked the School District to pay for the private kindergarten – she just asked the School District to agree with the parent's retention decision. (N.T. 222)

2003-2004, Private School Kindergarten

16. On or about September 2, 2003, Student's parent withdrew Student from the School District and enrolled Student in a private kindergarten (Private School.) (SD 5; N.T. 55,

- 71, 136, 224) At that time, Student's two pre-school siblings were also attending Private School, which appears to be both a day care center and a private school. (N.T. 160)
17. Private School is not a special education school and it does not employ certified special education teachers. (N.T. 132-133) Its kindergarten class was small, in a very small classroom, with a structured setting, and with one-to-one instruction when necessary. (N.T. 134-135)
 18. Private School charges \$5,832 tuition for full-day kindergarten class. Private School gave Student a scholarship, however, and charged Student \$820 tuition for the 2003-2004 school year. (N.T. 151, 157, 159; P6, p.1-2)
 19. Private School's kindergarten teacher agreed with the decision of Student's parent to retain Student in kindergarten for the 2003-2004 school year. That teacher observed in Student an inability to focus, lack of concentration, and failure to pick up on directions. (N.T. 56) She believed that Student lacked development, and that Private School provided an environment for Student's social, emotional and cognitive development. Socially, Student seemed impulsive or overly animated and she rarely initiated conversation or play with peers. (N.T. 135; P3, p.16-17)
 20. In January 2004, Student was sounding phonemes but still had difficulty with blends and Math concepts. (P3, pp.16-17) By June 2004, Student knew the mechanics of reading and writing but lacked fluidity. Her Private School kindergarten teacher recommended more practice with reading and writing over summer. (P3, pp.18-19)
 21. In May 2004, the County Intermediate Unit (IU) issued an evaluation report (IU ER.) (N.T. 57; P3, pp.8-14)
 - a. The IU ER noted that Private School reported that Student had difficult following directions in class, maintaining focus, exhibited inconsistent academic performance, and had difficulty with peer relationships. (SD 8, p.9) The IU ER noted Student's prescription eyeglasses corrected a severe visual problem. (P3, p.3-4)
 - b. Student's WISC-IV verbal comprehension standard score of 93 was in the 32nd percentile, perceptual reasoning SS of 94 was in the 34th percentile, working memory SS of 102 was in the 55th percentile, processing speed SS of 103 was in the 58th percentile, and Student's full scale IQ SS of 96 was in the 39th percentile.
 - c. Student's overall verbal comprehension was at age level. Arithmetic subset performance was below age level. Visual motor integration was above age level, comparable to children 6 months older than Student.
 - d. Student's Wechsler Individual Achievement Test, second edition, performance scores were generally within average levels, with variable performance recognizing beginning and ending sounds and when adding or subtracting single digit numbers.
 - e. Student's emotions appeared to the evaluator to be close to the surface.

- f. Student appeared to be sensitive, with average cognitive abilities and achievement skills, with some learning confusion and frustration when presented with academic demands.
- g. The IU ER recommended a well structured academic program with well-defined behavioral limits and that is supportive of Student's ever-changing learning/emotional needs. It recommended continued community counseling, regular reading at home, use of practical and familiar activities when teaching concepts, and reduced competition in the classroom. It recommended that Student's attention levels be monitored, and her reading evaluated and remediated if necessary. It recommended parent-teacher conferences, a behavioral plan at home, and instructional support at school. (SD 8, p. 14-15)

Summer 2004

- 22. On June 14, 2004, Student's outpatient psychotherapist reported that Student displayed PTSD symptoms related to past domestic violence. (SD 8, p.21; P3, p.15; N.T. 70)
- 23. Sometime in July 2004, the private evaluator who assessed Student's reading one year earlier, re-evaluated Student. She observed strong and well-developed conversation and verbal skills, and continued strong rhyming skills. Student matched initial sounds 5 of 5 times, scored 10 of 15 correct in a blending test, and scored 25 of 63 in a phonemic segmentation test. Student's word recognition in a qualitative reading inventory was 70%. Student's reading levels were Instructional at the pre-primer level and Frustrational at the Primer level. In a year, Student had learned to isolate sounds, and developed a beginning sight vocabulary, although her reading comprehension was "problematic." The assessor recommended continued small class size and support to achieve comprehension and fluency. (SD 8, pp.18-20; P3, pp.6-7)
- 24. Also around July 2004, Student's parent retained an attorney who requested that the School District conduct an educational evaluation and develop an IEP after evaluation. (SD 6; N.T. 138) On July 16, 2004, the School District's lawyer responded with a permission to evaluate form. (SD 7; P2, pp. 2-3; N.T. 79)
- 25. On August 12, 2004, the parties met to discuss their dispute, at which time Student's parent signed the School District's permission to evaluate form. (SD 8)
- 26. On August 13, 2004, Student's parent faxed to the School District the 2003 and 2004 private reading, psychological, and IU assessments. (SD 8, p.2; N.T. 123)

2004-2005, Public School First Grade

- 27. In September 2004, Student returned to public school. At her parent's request, Student attended ES3 rather than her neighborhood, and former, elementary school ES2. Almost immediately upon enrolling in ES3, Student's parent received a welcoming call from the ES3 principal setting up a preliminary meeting to discuss how the school might plan for Student's upcoming year. (N.T. 72-73, 127) At the planning meeting, ES3 personnel

- seemed highly professional, caring, loving and personally interested in seeing Student succeed. (N.T. 73) Overall, Student's parent felt that Student's 2004-2005 experience at ES3 was fantastic and most positive. (N.T. 77)
28. On September 23, 2004, while the School District was evaluating Student in response to the August 12 permission to evaluate, Student's Parent told the School District's psychologist that she did not want further testing of Student. (N.T. 145-146, 253; SD 9) The School District's psychologist found this request acceptable, believing that a satisfactory evaluation report could be based upon all of the relatively recent evaluative data already collected. This included the IU ER, the summer reading evaluation, and an interview with Student's current first grade teacher. (N.T. 253)
 29. On November 8, 2004, the School District issued its evaluation report (SD ER). It found that Student's academic functioning was at grade level expectations in all subject areas. It noted that Student was participating in class discussions and seemed confident. The SD ER recommended that Student's future academic and social emotional functioning should be carefully monitored and that, should Student begin to perform below grade expectations in any area, she should be referred to a Child Study Team. Finally, the SD ER concluded that Student is not a child with a disability. The SD ER form, however, which is a state-recommended form, checked the ambiguous box at the end indicating that Student either does not have a disability or is a child with a disability but does not need specially designed instruction. (SD 11, pp.1-7; N.T. 261-267)
 30. The School District's psychologist found nothing in the record suggesting that Student should have been retained in kindergarten. (N.T. 254)
 - a. She saw some risk factors for emotional needs. Specifically, Student's teacher noticed that Student had some emotional reactions occasionally, and the ES3 guidance counselor was touching base with student now and then. (N.T. 258-259)
 - b. There is no evidence in the record of any bipolar disorder diagnosis. (N.T. 255)
 - c. There is no basis for any academic concerns. Student demonstrated average intelligence, average functioning, no discrepancy between ability and achievement, and her ES3 teacher reported that Student was functioning within expectations. (N.T. 255-256)
 31. Student's Parent signed her agreement with the ER. (SD 11, p.8) Everyone attending the multidisciplinary team meeting, including Student's parent, concluded that Student is neither a child with a disability nor does she have a need for special education services. (N.T. 256, 258, 261)
 32. The parties agree that Student had a successful year in her first grade year at ES3. (N.T. 78, 148-149; SD 13) Student's ES3 first grade teacher remembers that, early in the school year, Student took medication for ADHD and then was removed from it. (N.T. 168-169) The teacher did not notice much change in Student's behavior either when she was on or off the medication. (N.T. 172) The parties do not dispute that Student's ADHD was not a significant concern during that school year. (N.T. 172)

2005-2006, Second Grade

33. Student and her parent now live in a different school district in Pennsylvania where Student attends a diagnostic second grade class, which offers a small class size, structured setting, and Title I services in reading and math. (N.T. 100-101; P8) Student does not currently have, nor has she ever had, either an IEP or a Section 504 plan. (N.T. 163)
34. On January 5, 2006, Student's Parent filed a request for due process hearing. (P12)
35. On January 10, 2006, I was assigned as hearing officer to this matter. (HO 2, p.2)
36. On January 18, the School District sent written notification of the insufficiency of Student's complaint. (HO 2, p.2)
37. On January 22, 2006, I found Student's complaint to be sufficient. (HO 2, p.3)
38. On or about February 15, 2006, the School District filed a Motion for Summary Judgment seeking to dismiss this matter because there is no dispute as to the non-eligibility of Student for special education services, and no remedy is available unless Student is a child with a disability who is eligible for special education services. (SD 18; SD 19)
39. On February 26, 2006,² I denied the School District's motion because it was not clear, without an evidentiary hearing, that Student was not a child with a disability entitled to the evaluation and programming guarantees of the Individuals with Education Improvement Act. In particular, I noted that the box checked on the SD ER ambiguously indicated that Student either does not have a disability or is a child with a disability but does not need specially designed instruction. (HO 2, p.5)
40. A hearing was conducted in this matter on March 7, 2006. School District exhibits SD 1, 2, 4-19 were admitted without objection and SD 3 was admitted over objection. (N.T. 290) Parent exhibits P 1-8 and 10-12 were admitted without objection. P 9 was admitted over objection. (N.T. 286-287)
41. Student's parent believes that she is entitled to reimbursement of Private School tuition because:
 - a. The ES2 Child Study Team did not provide her with due process safeguards; (N.T. 104-105) and
 - b. Student's year at Private School allowed her to acquire the extra year of emotional, social, and academic growth that she needed before entering first grade. (N.T. 76, 92, 114)

² I note that Hearing Officer Correspondence No. 4 denying the Motion to Dismiss contains a typographical error. The date of that Correspondence No. 4 was February 26, 2006, and not February 2, 2006.

42. Student's parent seeks to recover not only the \$820 that she actually paid in Private School tuition, but the full \$5,832 that the Private School ordinarily charges, so that another family can take advantage of the scholarship that her daughter enjoyed. (N.T. 161) Student's parent also wants recompense for emotional pain and anxiety that she suffered as a result of her dispute with ES2. (N.T. 162-163)
43. Student's parent's purpose in this matter is not to obtain special education services, but rather to prove that the ES2 Child Study Team made a serious mistake when it concluded that Student should advance into the first grade when she was not academically, emotionally and/or socially prepared. (N.T. 92) She is also upset that it took, in her view, two months of constant communication from Student's parent before ES2 responded to her April 2003 request for a meeting to discuss Student's kindergarten retention. (N.T. 95) She is further upset that she neither saw nor heard from anyone at ES2 at any time between the June 2003 Child Study Team meeting and the March 2006 due process hearing. (N.T. 165)
44. Student is not a child with a disability.
- a. She demonstrates average intelligence, average functioning, no discrepancy between ability and achievement, and she has always functioned within expectations. (N.T. 180, 182-183, 187, 255-256)
 - b. She had a successful year in her first grade year at ES3, and any ADHD symptoms did not affect her performance. (N.T. 78, 148-149, 168-169, 172; SD 13)
 - c. Student does not currently have, nor has she ever had, either an IEP or a Section 504 plan, and her current regular education program is a diagnostic second grade class, with Title I services in reading and math. (N.T. 100-101, 163; P8)
 - d. While Student's extra year in kindergarten at Private School contributed to her social, emotional and academic maturation, this is not a basis for concluding that Student is, in fact, a child with a disability. (N.T. 263)

Credibility Determinations

45. The School District's psychologist credibly testified that Student's extra year in kindergarten at Private School had something to do with Student's coming in as a strong first grader. The School District's psychologist credibly does not believe, however, that Student needed that extra year in kindergarten in order to become a strong first grade student. (N.T. 263)
46. The ES1 kindergarten teacher credibly testified that Student's academic, social and emotional performance during the 2002-2003 school year was well within normal expectations for a kindergarten student and was not a basis for either retention or referral for an educational evaluation. (N.T. 180, 182-183, 187)
47. The ES1 kindergarten teacher credibly testified that she did not tell Student's parent that she, i.e., the ES1 kindergarten teacher, believed that Student should be retained for

another year of kindergarten. This credibility determination is further supported by the acknowledgement by Student's parent during the hearing that she, i.e., Student's parent, may have misinterpreted the ES1 kindergarten teacher's original comments. (N.T. 193-198)

48. The ES2 principal credibly testified that:
- a. She did not receive either an April 2003 handwritten request for a meeting to discuss retention or 10 telephone calls following up on such request;
 - b. The Child Study Team met on May 21, not June 10, 2003;
 - c. Student's parent did not request that Student be placed in a T1, or Transitional First Grade; (N.T. 235-236, 247)
 - d. None of the educational professionals expressed any concern regarding Student's performance, and no one used the term "baseline"; (N.T. 243)
 - e. Student's parent did not request an evaluation of Student and thus no procedural safeguards were distributed; (N.T. 225)
 - f. No teacher left the meeting early; (N.T. 244) and
 - g. Student's parent did not leave the meeting in tears. (N.T. 211, 214-215, 218, 235-236, 247)
49. The ES2 Child Study Team procedures are disappointingly sloppy, with no minutes, no official recorder, and reliance solely upon memory and personal notes (the only survivor of which was the guidance counselor's incomplete notes.) (N.T. 239, 241-242, 247, 249, 278-279, SD 3, p.1; P4, p.1) This, however, does not detract from the credibility of the ES2 principal's testimony regarding the substance of that meeting. I am convinced of the ES2 principal's credibility in describing the May 2003 Child Study Team meeting because her demeanor at hearing, albeit cold,³ was professional, efficient, and honest.
50. Student's parent lacked credibility in several ways.
- a. Although the events at the May 2003 Child Study Team meeting are critical to the theory of Student's case, Student's parent cannot even remember who attended that meeting. (N.T. 107-108)
 - b. After hearing the ES1 kindergarten teacher's testimony, Student's parent acknowledged that she may have erred with respect to another critical fact, i.e., whether or not that teacher agreed that Student should be retained in kindergarten. (N.T. 131-132, 193-198)
 - c. Student's parent appears deceptive and manipulative in having asked the ES2 principal to write a letter supporting a private kindergarten placement so as to enable Student's parent to re-qualify for subsidized child care funding. (N.T. 93, 128-130, 221)
 - d. Student's parent also appears deceptive and manipulative in seeking reimbursement for the full \$5,280 Private School tuition when she only paid \$280 in tuition. (N.T. 162-163)

³ In fact, I believe that the differences in warmth and welcoming feelings that Student's parent perceived between the principals of ES2 and ES3 contributed, in part, to her decision to request this due process hearing.

- e. Student's parent admitted on cross-examination that she had no factual basis for stating in her due process complaint that Student's "reading and writing samples indicate an age 3-4 capability." (P12, p.5; N.T. 144) This unsupported allegation, coupled with her "misinterpretation" of the ES1 kindergarten teacher's opinion regarding Student's need for retention (N.T. 193-198), supports my conclusion that the testimony of Student's parent regarding critical factual disputes lacks credibility.

51. This decision is issued:

- a. 81 days after the due process hearing request;
- b. 76 days after my assignment as hearing officer;
- c. 20 days after the due process hearing; and
- d. 15 days after my receipt of the transcript.

DISCUSSION

Student's parent has requested, at various times in this proceeding, reimbursement of both Private School tuition and private evaluation costs. The burden of proof in an administrative due process hearing is upon the party seeking relief. Schaffer v. Weast, ___ U.S. ___, Dkt. No. 04-698 (Nov. 14, 2005) In this case, I conclude that Student's parent has not met her burden of proving that her child was entitled to any of the protections to which children with disabilities are entitled.

Section 612 of the Individuals with Disabilities Education Improvement Act (IDEIA), provides certain protections to:

"...All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services...."

20 U.S.C. §1412(a)(3); 118 STAT. 2677

Neither the IDEIA nor its federal implementing regulations, however, offer any protections or opportunities for relief to children, such as Student, who are not children with disabilities in the first place. Although this is exactly what the School District argued in its pre-hearing Motion for Summary Judgment, I had to conduct an evidentiary hearing on the matter before there was sufficient evidentiary basis for reaching this conclusion.

This is because a critical piece of documentary evidence in this matter, i.e., the SD ER, is ambiguous in its ultimate conclusion. The SD ER form, which is a state-recommended form, indicates that Student either does not have a disability or is a child with a disability but does not need specially designed instruction. (SD 11, pp.1-7; N.T. 261-267) If the evidence presented at hearing had established that Student was the latter, and not the former (i.e., that she was a child with a disability who did not need specially designed instruction), then it was possible that

Student might have been denied some procedural or substantive entitlements to which she would have been entitled under IDEIA.

As noted above in my Findings of Fact, however, the evidence presented at hearing establishes that Student is not a child with a disability. Everyone attending the November 8, 2004 multidisciplinary team meeting, including Student's parent, concluded that Student is neither a child with a disability nor does she have a need for special education services. (N.T. 256, 258, 261; SD 11, p.8)

No evidence presented at the hearing establishes that the multidisciplinary team was incorrect. Student demonstrates average intelligence, average functioning, no discrepancy between ability and achievement, and she has always functioned within expectations. (N.T. 180, 182-183, 187, 255-256) She had successful experiences in both her ES1 kindergarten class and in her ES3 first grade class, and no emotional or ADHD symptoms affected her performance. (N.T. 78, 148-149, 168-169, 172; SD 13) Student does not currently have in her new School District, nor has she ever had, either an IEP or a Section 504 plan, and her current regular education program is a diagnostic second grade class, with Title I services in reading and math. (N.T. 100-101, 163; P8) While Student's extra year in kindergarten at Private School contributed to her social, emotional and academic maturation, this is not a basis for concluding that Student is, or was, in fact, a child with a disability. (N.T. 263)

Accordingly, I hold that Student's parent is not entitled to reimbursement of any costs.

CONCLUSION

When the School District and Student's parent disagreed over Student's need to be retained in kindergarten, Student's parent exercised her right to unilaterally enroll Student into a private kindergarten for another school year. Student's parent is not entitled to reimbursement of any tuition or evaluation costs, however, because Student is not a child with a disability.

ORDER

For the reasons described above, I ORDER that:

- The request for tuition reimbursement and/or reimbursement of evaluation costs is DENIED;
- No further action is required of the School District at this time.

Daniel J. Myers

Hearing Officer

March 27, 2006

Re: Due Process Hearing
File Number 6198/05-06 LS