

*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

Child's Name: B.P.

Date of Birth: [redacted]

ODR No. 00824-0910 AS

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Date of Resolution Meeting

April 28, 2010

Dates of Hearing:

May 12, 2010, June 1, 2010, August  
3, 2010, September 14, 2010

Record Closed:

October 4, 2010

Date of Decision:

October 18, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

Student is a teen-aged resident of the School District of Philadelphia (District), who graduated in 2010 and presently attends college at [redacted] University in [redacted city] [redacted state]. (NT 30-16 to 31-16, 320-17 to 321-14.) While enrolled in the District, Student was not identified as a child with a disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 31-18 to 32-12.) The Student did receive services under a District Service Agreement under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a)(section 504) and Chapter 15 of the Pennsylvania Code, 22 Pa. Code §15.7.

Student's Parent, through the assistance of the Student's sibling, seeks compensatory education and other relief for the District's alleged failure to identify the Student under the IDEA and provide a free appropriate public education (FAPE). (P-1, P-2.) I find that the Student made meaningful educational progress and therefore deny the requested relief.

The hearing was conducted and concluded in four sessions on May 12, 2010, June 1, 2010, August 3, 2010, and September 14, 2010. Written summations were received in the matter on October 4, whereupon the record closed.

## ISSUES

1. During the period from March 16, 2008 to June 1, 2010, did the District inappropriately fail to identify the Student with a Specific Learning Disability regarding reading, thus failing to fulfill its Child Find obligation?
2. Was the District's Re-evaluation, reflected in its Report dated April 20, 2010, appropriate?
3. Should the hearing officer order an independent educational evaluation including psychological, speech and language, auditory processing, reading and assistive technology evaluations?
4. Should the hearing officer order the District to provide compensatory education to the Student for deprivation of a FAPE from March 16, 2008 to June 1, 2010?

## FINDINGS OF FACT

1. The District has known since before February 2007 that the Student had consistently scored below average in reading, specifically showing low achievement in reading speed and fluency. (S-4, 9, 45.)
2. The District has evaluated the etiology of the Student's reading problems and has determined that they are primarily due to the Student's vision; the Student has effective vision for reading only in one eye, while Student's left eye is essentially blind for purposes of reading. (S-12, 42, 45.)
3. The Student's deficit in reading comprehension is due to reading speed and fluency deficits that are caused by Student's vision problem in Student's left eye. (NT 81-1 to 17, 112-11 to 113-2, 196-5 to 200-22 218-12 to 219-2.)
4. The District has provided interventions through section 504 service agreements, but has not identified the Student as a child with a disability pursuant to the IDEA. (P-7, S-2 to 7, 9, 11, 14, 25, 32, 35, 39.)
5. Since February 2007, interventions have included preferential seating, graphic organizers, simplified directions, use of agenda book or note book, resource room, and oral answers and extension of time for probes and tests. (S-19 to 23, 32.)
6. The Student's marks while at [District school] have been average to above average, and the Student has graduated. (S-24, 31, 43, 44, 45.)

7. The Student's standard scores in reading achievement tests indicated significant progress; most of the scores were statistically equivalent, indicating that the Student was performing at the same level each year in relation to the Student's peers. Thus, the Student was advancing in achievement from year to year at the same rate as the Student's peers. In addition, reading test scores were scattered, with some scores demonstrating some incomplete achievement at the twelfth grade level. (NT 177-25 to 195-5 376-14 to 22, 381-19 to 382-4; P-5, 6, 7, 13.)
8. The Student has had access to the curriculum through the [high school]'s approach to mastery – that the individual accumulates credits based upon mastering the material at least an 80% level, and graduate when enough credits are accumulated. (NT 203-8 to 22, 329-15 to 332-3.)
9. Since February 2007, the sibling has been authorized to speak for the Parent with regard to the Student's education, and the District has accepted this authority and communicated with the sibling as well as with the Parent. (S-2, 8, 11, 16, 28, 30, 39, 40.)
10. On December 17, 2009, the Parent signed a Permission to Evaluate for the Student. (S-38.)
11. On April 12, 2010, the District issued its re-evaluation report, finding that the Student was not eligible for special education services and recommending a section 504 service agreement with interventions including use of CD texts, books on tape and other auditory learning materials, use of a calculator, extra discussion to ensure comprehension, practicing reading faster, graphic comprehension aids, studying word lists, modeling comprehension strategies, and asking questions about reading materials to assure comprehension. After the Parent requested due process, the District offered to add to the section 504 plan instruction in using auditory learning technology. (S-46, 49, 50.)
12. For its 2010 re-evaluation, the District solicited the input of the Parent and sibling. The school psychologist performed standardized cognitive and achievement testing, and a standardized reading inventory. The psychologist also reviewed previous testing scores, including a variety of achievement test scores regarding reading and mathematics skills, and PSSA scores. (S-38, 45.)
13. The April 2010 re-evaluation report relied also upon a review of school grades, nursing records, medical reports concerning the Student's vision, and teacher reports. (S-46.)
14. The April 2010 re-evaluation report found weaknesses in processing speed, reading comprehension, oral reading fluency and numerical operations. Reading comprehension was scored at the 6.7 grade level, and word reading

was scored at the 6.9 grade level. Oral reading fluency was scored at the 5.7 grade level. (S-46.)

15. In April 2006, the Student's Total Reading Cluster score on the Woodcock Johnson Reading Mastery test was 91, at the 27<sup>th</sup> percentile. This compares with Student's score on the Woodcock Reading Mastery Tests in September 2007 – the Total Reading Cluster score was 90, at the 26<sup>th</sup> percentile; this was a grade equivalent of 6.7. (P-8, S-9.)
16. The Student's April 2006 Woodcock Johnson score for reading comprehension cluster was 90, at the 25<sup>th</sup> percentile; Student Woodcock word attack score in September 2007 was 92, at the 29<sup>th</sup> percentile, a grade equivalent of 7.0. (P-8, S-9.)
17. The Student's April 2006 Woodcock Johnson score for word attack was 95, at the 36<sup>th</sup> percentile; Student's Woodcock word attack score in September 2007 was 93, at the 33<sup>d</sup> percentile, a grade equivalent of 6.4. (P-8, S-9.)
18. The Student's April 2006 Woodcock Johnson score for word identification was 87, at the 19<sup>th</sup> percentile; Student's Woodcock word identification score in September 2007 was 87, at the 19<sup>th</sup> percentile, a grade equivalent of 6.0. (P-8, S-9.)
19. The Student's April 2006 Woodcock Johnson score for word comprehension was 95, at the 36<sup>th</sup> percentile; Student's Woodcock word comprehension score in September 2007 was 88, at the 21<sup>st</sup> percentile, a grade equivalent of 6.1. (P-8, S-9.)
20. The Student's April 2006 Woodcock Johnson score for passage comprehension was 8895, at the 21<sup>st</sup> percentile; Student's Woodcock passage comprehension score in September 2007 was 97, at the 42<sup>d</sup> percentile, a grade equivalent of 8.3. (P-8, S-9.)
21. The Student's April 2006 Woodcock Johnson score for basic skills was 89, at the 23<sup>d</sup> percentile; Student's Woodcock basic skills score in September 2007 was 89, at the 23<sup>d</sup> percentile, a grade equivalent of 6.1. (P-8, S-9.)
22. The Student's April 2010 score on the Wechsler Individual Achievement Test for word reading was 85, at the 16<sup>th</sup> percentile, a grade equivalent of 6.9; the reading comprehension score was 89, at the 23<sup>d</sup> percentile, a grade equivalent of 5.2; the pseudoword decoding score was 89, at the 23<sup>d</sup> percentile, a grade equivalent of 6.7; the oral reading score was 73, at the 4<sup>th</sup> percentile, a grade equivalent of 5.7. All of these scores were rated as low average, except oral reading fluency, which was borderline. (S-46.)

23. The April 2010 re-evaluation report ruled out Specific Learning Disability because the evaluators could not rule out the Student's vision problems as the cause of Student's poor performance in reading. It found that the Student does have a disability that interferes with Student's learning, but does not need specially designed instruction. (S-45 p. 9, 46 p. 6, 12.)
24. Because there was no specific learning disability, and because the Student's low achievement in reading was due to Student's physical vision disability, the District concluded that the Student was not a disabled child within the meaning of the IDEA. (S-45 p. 45, 46 p. 5 to 6.)
25. The District's evaluation found that "how the material is presented makes a difference for" Student. (S-46 p. 6.)
26. The Parent and sibling repeatedly requested reading interventions for the Student. (P-4, 5, 6, 7, 15, S-40.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward 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.<sup>1</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where

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<sup>1</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

neither party has introduced a preponderance of evidence<sup>2</sup> to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student's Parent, who initiated the due process proceeding. If the evidence is in "equipoise", the Parent will not prevail.

#### CHILD FIND

The Commonwealth, through its local educational agencies, including the District, is obligated to ensure that all children with disabilities are "identified, located, and evaluated . . . ." 20 U.S.C. §1412(a)(3). Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where learning or behaviors indicate that the child may have a disability. Ridgewood Board of Education v. M.E., 172 F.2d 238 (3d Cir. 1999).

The preponderance of the evidence in this matter shows that the District did not fail to address the Student's deficits in reading. (FF 4, 5.) For years, the Parent and sibling have requested evaluations, accommodations and other assistance for the Student due to Student's difficulties in reading and other areas of learning. (FF 1 to 3.) There is no evidence that the District ignored these pleas. On the contrary, the District responded

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<sup>2</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. Dispute Resolution Manual §810.

by issuing Permission to Evaluate forms, performing evaluations and providing section 504 plans. (FF 4, 5, 11.)

The Parent argues that the District failed in its Child Find obligation because it inappropriately failed to identify the Student as a child with a disability under IDEA. However, I find by a preponderance of the evidence that the Student was making meaningful educational progress in all subjects, including reading. (FF 6.) Therefore, the District was correct in determining that the Student was not in need of specially designed instruction. Given these facts, the District was legally correct in declining to identify the Student as a child with a disability under the IDEA.

There is no question that the Student has a disability that interferes with Student's learning: Student's left eye is profoundly disabled, and Student cannot use it for reading. (FF 1 to 3.) This reduces the visual field for reading, because the Student must read only with Student's right eye, which has normal vision. Ibid. This makes the physical act of reading more difficult, and tires Student's good eye. (FF 3.) In consequence, the Student has below average achievement in reading and reading comprehension, which in turn has created gaps in the Student's learning in other subjects. (FF 1, 3, 7, 12.)

On the other hand, the Student has achieved at an appropriate rate in all of Student's other subjects. (FF 6, 7, 8, 12.) Student has graduated from the [District's school], an academic magnet school, and was admitted into college. (FF 6.) This demonstrates mastery of the state's high school level curriculum.

In reading, the Student has continued to struggle. Student's achievement scores are consistently low average, and the standardized scores suggest achievement at a grade level that is several years below the grade level in which Student is functioning. (FF 1.)



Taken as a whole, these scores remain essentially stable over the period of time relevant to this due process matter. (FF 7, 14 to 22.) Thus, the scores raise the question whether or not the Student has made meaningful progress during that period.

Both parties presented expert testimony in light of these reading achievement scores. The District's school psychologist testified that the scores, taken as a whole, support the conclusion that the Student was making progress from year to year, for two reasons. (FF 7, 22.) First, standardized achievement scores measure achievement in relation to age appropriate peers. Thus, stable scores over the relevant period show yearly progress. Second, scattered achievement scores on other tests showed that the student had accessed the twelfth grade curriculum with regard to reading.

The psychologist testified that the low grade equivalency reports on the achievement tests are not a valid measure of the grade level of curriculum at which the student is reading, because they measure only part of that question – the grade level of students who made the same degree of mistakes that the Student made on the tests. The psychologist indicated that these grade designations are archaic and not reliable to show grade level of achievement. Moreover, there were other achievement test scores that indicated reading ability at the twelfth grade level.

Parents' expert, on the other hand, seemed to give credence to the grade level designations, though his reference to them was brief and in passing, and he did not address the question of whether or not they could be relied upon to find a lack of educational progress. (P-25.) On balance, the clear preponderance of the evidence shows that the grade equivalents are not reliable measures of the grade level reading curriculum in which the Student is achieving.

In according weight to this evidence, I find that the District's school psychologist was highly credible and her testimony was reliable. This individual testified twice on different days, because she was called by both parties. In both instances, her demeanor was calm and professional, and not hostile or adversarial. In explaining the achievement testing and how to interpret it, it was plain from her expression that the psychologist was straining to explain some arcane ideas to the lawyers and parties in the room; she was teaching, not arguing. She was able to concede adverse points, which demonstrated to me that her professional judgment utilized a balanced approach.

## EVALUATION

In this matter, the Parent argues that the April 2010 evaluation report was inappropriate because the District should have identified the Student based upon two facts. First, there is no dispute that the Student has a disability that impedes Student's learning. Second, the evaluation report recommends interventions that are indistinguishable from the specially designed instruction that is commonly found in Individualized Education Programs. (FF 4, 5, 11, 23.)

While these arguments make much sense at first glance, they ignore the precise language of the law. The IDEA and its regulations define the circumstances under which a school district must identify a student as a child with a disability eligible for special education under the IDEA. A "child with a disability" requires a finding of two separate things: first, that the child has one of the disabilities listed in the law; second, that the child with such a disability "needs special education" because of that disability. 22 U.S.C. §1401(3)(A). In this matter, there is no question that the Student has a listed

disability: Student has a “visual impairment” as listed in 22 U.S.C. §1401(3)(A).

However, the second step of the analysis shows that the Student is not legally defined as one who needs special education services.

The phrase “needs special education” is itself defined in the regulations that further delineate the scope of the definition of “child with a disability.” Special education “means specially designed instruction ... .” 34 C.F.R. §300.39(a)(1). “Specially designed instruction” is itself defined as “adapting ... the content, methodology, or delivery of instruction ... to ensure access of the child to the general curriculum ... .” Thus, in sum, a child is eligible for special education services under the IDEA only if the services are needed to ensure access to the curriculum.

I find by a preponderance of the evidence that the various services listed in the evaluations and section 504 plans were not needed in order to ensure access of the Student to the curriculum. The Student demonstrated an ability to access the curriculum, based upon performance in school. The Student was a slow reader, but could read enough to perform well in all courses at an academic magnet school, to graduate and to obtain admission into college. The Student accomplished all this without an IEP.

The Parent attempted to show that other, better interventions would have improved the Student’s performance, including reading. I find that the evidence is not preponderant that this was the case. It must be kept in mind that the IDEA requires the District to provide a “basic floor of opportunity” – not to provide the best services that one can conceive. Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995). I find that the District did this without an IEP, and that the Student proved that it was appropriate to address reading needs through the section 504 plan in this matter.

## CONCLUSION

For all of the reasons set forth above, I find that the District did not fail to fulfill its Child Find obligation, that its evaluation was not inappropriate, and that the Student made meaningful educational progress during the relevant period. Consequently, the requests for independent educational evaluation and compensatory education are denied. Any claims not specifically addressed by this decision and order are denied and dismissed.

## ORDER

1. During the period from March 16, 2008 to June 1, 2010, the District met its Child Find obligation and did not inappropriately fail to identify the Student with a Specific Learning Disability regarding reading.
2. The District's Re-evaluation, reflected in its Report dated April 20, 2010, was appropriate.
3. The hearing officer will not order an independent educational evaluation including psychological, speech and language, auditory processing, reading and assistive technology evaluations.
4. The hearing officer will not order the District to provide compensatory education to the Student from March 16, 2008 to June 1, 2010.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

October 18, 2010