

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: T.B.
ODR #00963/09-10 AS

Date of Birth:
[redacted]

Dates of Hearing:
June 8, 2010
August 10, 2010

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Downingtown Area School District
122 Wallace Avenue
Downingtown, Pennsylvania 19335

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:
Craig Becker, Esquire
1288 Route 73 South Suite 301
Mount Laurel, New Jersey 08054

Andrew Faust, Esquire
Sweet, Stevens, Katz and Williams
331 Butler Avenue PO Box 5069
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August 16, 2010

August 28, 2010

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ recently graduated from the Downingtown Area School District (hereinafter District), having been eligible for special education under the classification of other health impairment and specific learning disability. Student's mother and father (hereinafter Parents) requested this hearing because they believe the District failed to offer Student a free appropriate public education (FAPE) in the areas of reading and writing. The District maintains that Student was not denied FAPE.

For the reasons presented below I find for the District.

Issues

1. Did the District deny Student a free appropriate public education in the areas of reading and/or writing?
2. If the District denied Student a free appropriate public education, is the District required to provide compensatory education to Student and if so in what kind and what amount?

Stipulation

Student and the Parents live within the District. [NT 170]

Findings of Fact

1. Student is a resident of the District who has attended school there since Kindergarten and recently graduated from high school. Student had been receiving special education since 4th grade and was classified as having other health impairment and a specific learning disability. [NT 170-174, 352; S-1, P-13]
2. The father believes Student has done "pretty good" in school, although not living up to Student's potential, but has started "working a lot harder" in school in the last couple of years, especially this past year. [NT 180-181]

Evaluation History:

March 2001

3. When Student was [redacted] in 3rd grade Student was evaluated privately as the Parents wanted to gain a greater degree of understanding concerning [Student's] learning style and particular needs. Cognitive ability as assessed with the WISC-III was in the high average range. Short term auditory memory was weak while short term visual memory was strong. Student was diagnosed with Attention

¹ The decision is written without further reference to the Student's name or gender to provide privacy.

Deficit Hyperactivity Disorder of the Inattentive Type [commonly Attention Deficit Disorder] and Developmental Reading Disorder. [P-13]

4. In the evaluation on the Daniels Informal Word Recognition Inventory Student's Flash and Untimed percentages of correct responses at ascending grade levels were: Pre-Primer 100/100, Primer 92/100, First 88/100, Second 88/100, Third 68+1/76; Fourth 52+1/68. On the Burns and Roe Informal Reading Inventory Student was Independent at the Primer level, Instructional at the First grade level, and Frustrational at the Third grade level. On the Stanford Diagnostic Reading Test Green Level Form J which may overestimate functioning, on all areas except phonetic analysis, Student's scores on vocabulary, comprehension and total reading were at the lower limits of current grade placement. On The Temple University Informal Spelling Inventory Student achieved 90% at the Second grade level but only 56% at the Third grade level. [P-13]
5. Student was found eligible and placed in special education programming in 4th grade, as of November 2001. [S-1]

December 2008:

6. In a December 2008 District evaluation Student's cognitive functioning as assessed on the WAIS III was at the uppermost end of the average range. [S-1]

January-April 2009:

7. In January-April 2009 Student was again privately evaluated over 7 sessions at the same facility but not by the same evaluator that conducted the March 2001 evaluation. The Parents had sought out a psychologist because they noticed Student did not seem as happy as someone of that age should be and seemed to be turning inward a bit. The psychologist saw Student for some counseling sessions then recommended an evaluation.² The initial section of the report states that the Parents referred Student for evaluation because of "their desire to gain a greater degree of understanding of their [child's] learning style and specific needs". [NT 176, 196-197, 250; P-20, P-30]
8. The January-April 2009 evaluation noted that Student had contracted salmonella in 2007 and later in 2007 was diagnosed with celiac disease that proved resistant to dietary changes and medication. Digestive symptoms had decreased since summer 2008 but levels of fatigue, achiness, lowered motivation and general malaise increased. Medication to increase energy level and maintain focus was prescribed but Student stopped taking it around the time of the beginning of the evaluation. [P-20]
9. During the January-April 2009 evaluation Student was affected by frequent bouts of illness including dizziness from the car ride, a sinus headache and an undisclosed illness that had occasioned a three-day absence from school. [P-20]

² In testimony the evaluator said that the Parents were concerned about Student's lack of progress in reading and about Student's emotional functioning. [NT 197]

10. The evaluator in the January-April 2009 evaluation noted that “Student entered most sessions with an impassive affect, as if [Student’s] attendance was adequate and [Student] did not expect to be asked to expend much energy. On only one occasion did [Student] appear motivated and interested in the testing process. In that third session [Student] performed conscientiously on two math achievement subtests and expressed concern regarding the adequacy of [Student’s] performance.” Student referenced recently earning the reward of a car from Parents based on improved grades. [P-20]
11. Cognitive testing in the January-April 2009 evaluation with the WISC-IV resulted in a full scale IQ score in the high average range, commensurate with that obtained on an earlier version of the same instrument in 2001 and the WAIS III in 2008. [P-20]
12. On tests assessing attention, concentration and memory, Student performed “in a highly variable manner”. There was also variability between the Woodcock-Johnson and the Nelson Denny reading scores on subtests tapping into similar skills. [P-20]
13. The evaluator found that working memory was an area of weakness, as assessed on tasks of attention and concentration. [NT 199]
14. The evaluator found that Student did significantly better on answering reading comprehension questions when Student was allowed to look back and re-read a passage versus tasks when a passage would be given to Student to read and then be taken away. [NT 201]
15. The evaluator concluded that Student continued to meet criteria for the same diagnoses conferred in 2001, namely Attention Deficit Hyperactivity Disorder of the Inattentive Type and Developmental Reading Disorder. [NT 202; P-20]
16. The evaluator recommended that Student receive reading remediation but “first and foremost engage in a counseling relationship so that...someone could facilitate [Student’s] participation and motivation”. The evaluator became and remains Student’s therapist. [NT 204, 228]

March 2010:

17. At Parents’ request, in March 2010, near the end of Student’s senior year of high school, the District conducted a Re-Evaluation. [S-5]
18. As of March 2010 Student had 20 days absent and 15 days late during the 2009-2010 school year. [S-5]

May 2010:

19. At the Parents' request an occupational therapy evaluation was performed on May 5, 2010, at the end of Student's senior year of high school. Based on teacher consultation, parents' questionnaire responses, and the results of five standardized assessments the evaluator concluded that Student had no school-based occupational therapy needs at this time. [S-10]

IEP Revisions:

20. At the time the December 2008 IEP was written, Student was reading at grade level. The District stopped direct reading instruction based on scores obtained on GATES and GRADE scores. The IEP carried a goal addressing organization, and modifications/specially designed instruction addressing literacy and organization. This junior year, 11th grade, IEP was focused on transition to college. [NT 329, 334, 355; S-2]
21. In 11th and 12th grades Student was receiving learning support in a study skills program which focused on curricular support as well as teaching study skills. Student had needs in the area of writing which were addressed in the learning support period. [NT 327, 330, 357-360]
22. The Parents engaged a consultant to assist Student in negotiating the college admissions process and to help Student begin to consider a career path. The consultant taught English literature for seven years at the junior high level. She is not certified in special education or as a reading specialist, and has never taught the mechanics of reading. [NT 99-102; P-18]
23. Due to concerns about Student's skills raised by the consultant and the private evaluator, the senior year, 12th grade, November 2009 IEP addressed reading although the District did not believe this was necessary [NT 111, 155-156, 177-178, 270, 328, 335; S-3]
24. Part of the District's response to the Parents' concerns was to schedule Student for 6 periods of learning support per 6-day cycle as opposed to the previous 3 periods per cycle. Student then was receiving learning support on a daily basis. [NT 328-329]
25. The learning support teacher who had been working with Student did not have concerns about Student's reading. Student was doing very well in regular education classes instructed at grade level, including economics and political science, the latter being a class that was difficult for many of the pupils. [NT 328, 330]
26. For the political science class Student was required to read textbook chapters independently and take tests on the material without much in-class discussion of that material. For the economics class there was very little discussion of the

- chapters. The textbooks were written at the 11th grade, 12th grade and/or college levels. [NT 331]
27. In mid-December 2009 the District put Student into the Read 180 program, a reading instruction system that is scientifically based and endorsed by the U.S. Department of Education's What Works Clearinghouse. [NT 80, 112, 306]
 28. Student was not happy about having to be in the reading program. Student had been granted Senior Privileges, specifically permission to leave school early in the afternoon. The reading class was conducted during the time Student would be leaving school. [NT 158-160, 288-290]
 29. Read 180 is a very structured program with 4 components: whole group with workshops (grammar and reading skills are taught through literature or non-fiction passages), small group following up on whole group (differentiated instruction takes place in the small group; journaling is required), independent reading, and on-line work with four zones – reading, word, spelling and success. The online component addresses reading fluency, reading comprehension, and word identification. [NT 271-274]
 30. The Parents had concerns about the Read 180 reading program Student was receiving. Student did not like it and the Parent's educational consultant felt it was not appropriate. The District's reading specialist who was instructing Student in that program also believed that parts of the program were below Student's level and Student seemed bored or embarrassed. [NT 114, 181-183, 189, 275-276]
 31. In February 2010 the IEP team met because of the concerns about the Read 180 program. The reading specialist was already adjusting the program. The reading instructor added age-appropriate materials from TeenBiz 3000 (which also includes a writing component) to replace whole group and kept the portions of Read 180 that were appropriate, forming a "hybrid" reading program. [NT 206, 276-277, 281]
 32. In place of small group, for 20 minutes every day on a one-to-one basis the District's reading specialist took Student through marking texts, thinking aloud, turning headings into questions, and explained step-by-step how to tackle new texts in college. She utilized a program called Interactive Reading. [NT 280-282]
 33. The representative from the Read 180 program who came to the class to monitor implementation thought that the District's reading specialist was doing a "great job" of balancing the needs of the students and approved of a hypothetical hybridization program described so as not to break confidentiality of Student. [NT 321-322]
 34. Since there was conflicting data from school and outside sources, the District's reading specialist combed through the private evaluator's report and in the context

- of the Parents' concerns about college requirements designed a program for Student that addressed organization, text structure, monitoring comprehension, recall and higher level thinking. [NT 279, 282]
35. In February 2010 the IEP was also revised because of the Parents' concerns about the need for an occupational therapy evaluation and assistive technology for writing. At the November 2009 meeting they had asked that assistive technology writing program[s] be tried, and the District responded by providing the program[s] and having an IU technology person, as well as the learning support teacher, show Student how to use it/them. Student did not use the program[s] in school and at the end of the trial it was determined that Student did not need it/them. The occupational therapist found no need for OT and did not recommend OT. [NT 338-339, 341-342; S-4, S-10]
36. Progress monitoring with the Scholastic Reading Inventory (SRI) found Student to be an advanced reader on the first administration. On the second administration the score was lower, and as Student admitted not trying a different set of questions was administered and Student again scored as an advanced reader. [NT 283-288]
37. In reflecting about Student's reading, the District reading specialist judged Student to be on grade level for word decoding/analysis and an advanced reader as seen on the SRI (validation studies of which have been comparable to the SAT) and the PSSA. Student had no problem reading aloud with fluency, phrasing, and intonation. Although overall an average reader, she also found Student to be at times unengaged, unmotivated, and functioning inconsistently. The reading specialist sees Student as having "minimal needs" in the area of reading. There are no "true reading needs" requiring remediation. [NT 290-293, 296-298]
38. A person cannot fake reading comprehension, and there were enough on-grade level or extremely close to grade level scores on a variety of measures to indicate that Student is a fluent reader. The purpose of reading fluency is to acquire reading comprehension. [NT 293-294]
39. Student scored Proficient on the 11th grade PSSA's without accommodations. It is not possible for a pupil to obtain a Proficient score if the pupil is weak in decoding, word analysis, and fluency. There can be false negatives (a score lower than actual ability) but not false positives. The PSSA has not only multiple choice but also open-ended questions that employ higher level reading skills – generalizing, separating fact from opinion, main ideas, details, and inferencing. [NT 303-305]
40. Student stopped coming to the District's reading program in about mid-March 2010. Of a possible 66 days Student could have attended the program Student attended approximately 44 days exclusive of snow days or holidays. [NT 294-295, 319]

41. In May 2010 the IEP was again revised to reflect a return to focus on transition planning and the removal of the reading component because Student had stopped attending the program, had demonstrated successful mastery of reading probes on or above grade level, and the Parents wanted Student removed from the reading program. [NT 306, 347; S-6]
42. When Student ended the learning support program at graduation the learning support teacher saw Student's need as transition to college, primarily getting mentally prepared for the rigors of college. [NT 332]
43. Student was "an anxious senior", hesitant to go, but had the support of the educational consultant and the learning support teacher who focused on academics. [NT 322-323]

Test Results – Variability³:

44. In June 2009 Student took the SAT *without* accommodations [i.e. no extended time]. In Critical Reading Student scored in the 42nd national percentile among college-bound test-takers. [NT 108; P-26]
45. In October 2009 Student took the SAT *with* accommodations. In Critical Reading Student scored in the 32nd national percentile among college-bound test-takers, a notable⁴ reduction from the previous score. [NT 108; S-7, P-26]

Test Results – Average Range :

46. In the private evaluation administered in January-April 2009, on the Woodcock-Johnson III Tests of Achievement Student's standard scores in reading were all in the average range as follows: Broad Reading 95, Basic Reading Skills 91, Letter-Word Identification 93, Word Attack 92, Reading Fluency 96, Passage Comprehension 100. [P-20]
47. In the private evaluation administered in January-April 2009, on the Nelson-Denny Reading Test, Form II Student's scores as expressed in percentiles all fell from the low end of average to the high end of average as follows: Vocabulary 31st, Comprehension 25th, Total Reading 26th, Reading Rate 65th. [P-20]
48. In the private evaluation administered in January-April 2009, on the Woodcock-Johnson III Tests of Achievement Student's standard scores in written expression were all in the average range as follows: Broad Written Language 102, Written Expression 105, Spelling 98, Writing Fluency 101, Writing Samples 106. [P-20]

³ Student received the exact same writing score on both, at the 12th national percentile.

⁴ Whether this decrease is statistically significant is not a matter of record.

Test Results Compared Over Time⁵:

49. The KTEA II (Brief) was administered on November 20, 2007. Student's reading standard score was 94. [S-1]
50. The KTEA II (Brief) was administered on April 8, 2010. Student's reading standard score was 101. [S-5]
51. On the KTEA II (Brief) of November 20, 2007 Student's writing standard Score was 87. [S-1]
52. On the KTEA II (Brief) of April 8, 2010 Student's writing standard score was 90. [S-5]
53. On the WIAT II administered in December 2008 Student's standard scores in reading were as follows: Word Reading 93, Reading Comprehension 92, Pseudoword Decoding 91, Reading Composite 90. [S-1]
54. On the WIAT III administered in March 2010 Student's standard scores in reading were as follows: Word Reading 101, Reading Comprehension 106, Pseudoword Decoding 93, Oral Reading Fluency 86, Reading Composite 93⁶. [S-5]
55. On the WIAT II administered in December 2008 Student's standard scores in writing were as follows: Spelling 99, Written Expression 87, Written Language 91. [S-1]
56. On the WIAT III administered in March 2010 Student's standard scores in writing were as follows: Sentence Composition 108, Sentence Building 111, Sentence Combining 104, Essay Composition 113, Word Count 102, Theme Development and Text Organization 89. [S-5]

Performance According to Pennsylvania Standards and General Education Curriculum:

57. In 8th grade Student's performance on the PSSA's was as follows: Reading – Basic and Writing – Basic. [S-1]

⁵ Whether the changes are statistically significant is not a matter of record. However, the reader should note that in order to maintain the same standard score from one testing to the next testing the individual must make one year's progress per year, as the scoring is based on age norms and the individual moves chronologically ahead one year each year with his/her age cohort. An increase in standard score may represent more than one year's progress per year.

⁶ Later versions of the same instrument tend to yield somewhat lower scores than those on previous versions because of re-norming. However, Student scored higher on the newer version of the WIAT reflecting solid gains.

58. In 11th grade Student's performance on the PSSA's taken *without accommodations*, was as follows: Reading – Proficient and Writing – Proficient. [NT 238-240, 363; S-7]
59. Student's 11th grade marks⁷ in major subjects were as follows: English B, U.S. History A, Algebra II C, Chemistry I C, Spanish I C. [S-7]
60. Student's 12th grade marks in major subjects for marking period 2 [last available period in the record] were as follows: English B and Probability/Statistics A.
61. At the time of graduation Student was able to read on grade level, write a 5-paragraph essay with little or no support and complete the majority of assigned math independently. [NT 332, 348-349]
62. In 9th grade when Student was exited from the reading program Student was reading at the 9th grade level; Student was reading at the 12th grade level when Student was in 12th grade. Student was making one year of progress for each academic year. [NT 355-356]

Lindamood-Bell®

63. Based on the private evaluator's observation of the Read 180 program, as well as their concerns that the Read 180 program was in its infancy, having implementation problems and not the right program for Student, on February 24, 2010 the Parents had Student evaluated at Lindamood-Bell, a commercial company that provides instruction in reading. The company was having "a special on evaluations that week". The purposes of the evaluation were "to determine [Student's] present levels of sensory-cognitive processing, language and literacy skills, and [Student's] potential for further development in these areas". [NT 37-38, 184-186; P-10]
64. The evaluator was the Lindamood-Bell Center director. Her professional teaching employment in reading instruction has been entirely at Lindamood-Bell, including her practicum for reading specialist certification. [NT 33-34, 36-37, 76-78; P-21]
65. Student was administered all or part of 11 different tests at Lindamood-Bell; the testing was done in one day. The resultant report was titled "Learning Potential Evaluation". The evaluator did not contact the school to see how Student was doing in the curriculum. [NT 79-80; P-10]
66. Consistent with Student's functioning in the private evaluation of January-April 2009, Student's scores during the Lindamood-Bell evaluation were variable across measures. In most cases Student's scores on the norm-referenced instruments were in the average range. Although the evaluator testified that Student has "well developed compensatory skills" she also opined that Student has "severe challenge" or "great need" in multiple areas of reading and writing.

⁷ In the District A is Excellent, B is Above Average and C is Average. [S-7]

- The evaluator testified that Student “is a student who on some level [is] in 12th grade functioning at a 5th grade level”. [NT 40, 48, 53, 84-85]
67. The evaluator recommended that Student receive “intensive sensory-cognitive stimulation in phonemic awareness/symbol imagery and concept imagery for an initial 160-200 hours”. [P-10]
 68. The instruction was recommended to be provided by Lindamood-Bell “2-4 hours a day, 5 days a week” at \$99 per hour for a total of between 160 and 200 hours, using the Seeing Stars® program which was to provide “the sensory-cognitive development of symbol imagery – the ability to visually image sounds and letters within words” and the Visualizing and Verbalizing for Language Comprehension and Thinking® program which was to provide “sensory cognitive development of concept imagery – the ability to create an imaged gestalt from oral and written language”. [P-10, P-14]
 69. The Parents faxed the District the material they received from Lindamood-Bell and asked the District to financially support the program; the District declined. [NT 186-187]
 70. The Lindamood-Bell program is not one of the programs endorsed as having research to support it by the US Department of Education’s What Works Clearinghouse. The evaluator could not describe how well the skills conveyed in the Lindamood-Bell program tie in with the competencies identified in the Pennsylvania Standards. [NT 80-81, 83]
 71. On May 21, 2010 the District issued a graduation NOREP with which the Parents disagreed. They appear not to have disagreed with graduation per se, only noting they “have previously requested through due process that the District reimburse ... expenses for the Lindamood-Bell program started in April and for compensatory education”. [P-16]

Discussion and Conclusions of Law

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing brought under the IDEA, the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play

unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In the instant matter, the evidence was not in equipoise.

Special Education Foundations: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP). 20 U.S.C. §1401(9); 34 C.F.R. §300.17 A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996).

Districts need not provide the optimal level of service, maximize a child’s opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). More recently, the Eastern District Court of Pennsylvania ruled, “districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing Carlisle.

With reference to compensatory education, recently, in Mary T. v. School District of Philadelphia, 575 F.3d 235 (3d Cir. 2009), our Third Circuit court reiterated that a student is entitled to compensatory education under the IDEA when “an IEP fails to confer some (i.e., more than *de minimus*) educational benefit to the student.” (Quoting M.C., 81 F.3d 389, 395 (3d Cir. 1996)). Although the IDEA authorizes courts to award “such relief as

the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B), compensatory education is an appropriate remedy only when a school district has failed to provide a student with FAPE. Lester H. v. Gilhool, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district’s failure. (*Id.*)

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.⁸ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child’s special education experience. 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). This is a particularly important function, as in many cases the hearing officer level is the forum in which the witnesses will be appearing in person.

Discussion

In order for this hearing officer to find a denial of FAPE and award the relief sought, Student’s parents must present a preponderance of convincing evidence that Student was denied the opportunity to derive meaningful educational benefit from an appropriate special education program that provided a “basic floor of opportunity”. They have not done so. The evidence cited in the findings of fact, and the testimony described below, creates a compelling picture of a pupil who profited from special education.

There were numerous problems with the evidence and testimony presented by the Parents and they did not meet their burden of proof in this matter.

The Lindamood-Bell Director/Evaluator’s testimony presented a number of credibility issues in terms of Student’s need for any further remediation, and therefore was given little weight on the issue of whether or not Student had been provided with FAPE. First, this witness’s entire professional career providing reading instruction has been with Lindamood-Bell and she has not taught in public schools using any other system of instruction. Second, her assessment of Student’s reading and writing skills was based solely on the one-session, 11-instrument assessment she had conducted, a portion of which was based on Lindamood-Bell proprietary material. Third, she incorrectly described the PSSA [NT 42-43, 79] and criticized the use of the Read 180 program which is endorsed by the What Works Clearinghouse [NT 49-50, 79-80] without having used it with a child. Fourth, she characterized Student as having “severe challenge” and “great

⁸ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

need” despite Student’s consistently average-level standard scores on the WIAT and the Woodcock-Johnson, both of which are well-respected and widely used assessment instruments, and despite Student’s curriculum-based performance. Fifth, she could not describe how well the skills conveyed in the Lindamood-Bell program tie in with the competencies identified in the Pennsylvania Standards [NT 83]. Finally, as Lindamood-Bell center director she has a financial interest in recruiting students for the program and the recommendation of 160-200 hours of instruction at \$99 per hour yields income in the amount of \$15,840 to \$19,800 for one student, creating the potential for bias.

The Father’s concern for his child was palpable and there is no doubt that the Parents were doing what they thought was best for Student. Although the Parents thought Student was doing fairly well in school, and was putting in more effort recently (perhaps because of the incentive of a car), the Parents’ concerns were raised by findings on the private evaluation that Student was doing only average level work. As student was getting ready to leave for college the Parents’ worries became acute. The father came across in testimony as a hands-on, do-whatever-it-takes kind of businessman, and his pursuit of private evaluations and private reading help for Student makes perfect sense. As laypersons the Parents relied on the advice of their educational consultant who suggested they look into the Wilson reading program or the Lindamood-Bell program. Once Lindamood-Bell offered them a program they signed Student up immediately. It may be that this program will enhance Student’s average level and grade-appropriate reading and writing skills just as it would likely enhance any student’s skills.

The Educational Consultant was not qualified by this hearing officer as an expert in special education or reading. She does not hold special education certification or reading certification. [P 18] Her seven-year teaching experience was at the junior high school level, teaching literature response classes. [NT 99] She did not teach students the mechanics of reading and taught writing only insofar as writing was required in the literature classes. [NT 100-102] She was engaged by the Parents strictly to help Student navigate through the college admissions process and think about a career path. [NT 102-103] She was a fact witness only and contributed little to the body of information about this matter in support of the Parents’ case. She did support the father’s testimony that concerns were expressed to the District in November of Student’s senior year and that the District responded by implementing a scientifically-based reading program, Read 180. Her answers to questions tended to be diffuse and this made for tedious testimony.

The Private Evaluator who is also Student’s therapist testified in a straightforward and collegial manner. He was able to answer the questions asked without hesitating or qualifying his answers. He was accepted as an expert witness in the area of psychological testing but was not accepted as an expert witness in the area of reading instruction. Although his descriptions of his testing and findings were credible, his credibility did diminish in three respects: First, he was Student’s therapist before and after administering the testing battery which may have affected standardized results or interpretations of data. [NT 228] Second, without knowing what had transpired in Student’s educational program from 4th grade to the end of 11th grade, this witness referenced that Student carries the diagnosis of Developmental Reading Disorder and

testified “nothing I know of has been implemented to remedy or respond to that reading disorder”. This sweeping statement ignored 7 years of special education, ignored the fact that though this special education Student moved from being a severely disabled reader to a person who reads on an average and grade-appropriate level [NT 232-235], and implied that a reading disorder can be “cured”. Third, when opining that Student did well on some types of reading tests, including the PSSA’s, because Student could look back and re-read rather than having to read and remember what was read in order to answer questions, this witness seemed to be ignoring his finding that Student has weaknesses in working memory. He did not consider in his testimony or formulation that the reading deficits Student demonstrated may have been in reality working memory deficits related to ADHD as opposed to a learning disability [compare NT 198-200 with NT 214; 242-246].

The District’s witnesses provided clear and persuasive testimony supporting the conclusion that Student was not denied FAPE and in fact received an excellent special education program that enabled full inclusion in the general education college preparatory curriculum in the District’s high school.

The District’s Reading Specialist’s testimony was credible and very helpful in these proceedings, and was given considerable weight. She was able to present a picture of Student as a learner day-to-day in “real life” rather than simply through the filter of test scores. She established to this hearing officer’s satisfaction that Student now functions on grade level in reading, that Student did not require reading instruction in senior year in order to receive FAPE, that Student’s success in the PSSA’s could not have been a fluke, and that Student’s variability in testing does not have so much to do with ability as it does with motivation or attention. She provided a research-based reading program to Student when the Parents requested that Student receive reading, adjusted it when it was not providing the benefits expected, and developed a hybrid individualized reading program based on data from the school and the private evaluator. She explained all this in a logical and confident manner and was able to clearly elucidate her data and experiences with Student on cross-examination without hesitation or rancor.

The District’s learning support teacher’s testimony served to fill in gaps regarding the various IEP’s created in Student’s senior year. She also explained the content and scope of the learning support program Student received in 11th and 12th grades. Her description of Student as a learner and the needs Student evidenced in the learning support period supported the District’s position that Student no longer required direct reading or writing instruction and that the academic support and college transition work being done was appropriate.

The school psychologist testified credibly but added little to the weight of the evidence. Notably, he testified candidly to the effect that a test score Student obtained on a particular task when being tested a few months before graduation was not as persuasive as the information Student’s teachers were able to provide from their ongoing work with Student and their progress monitoring. [NT 405-408] This testimony was refreshing and in contrast to that offered by the private evaluator and the Lindamood-Bell director, both

of whom appeared to form opinions about this 12th grade Student's needs solely outside the context of Student's actual academic functioning in the high school.

Student was identified with other health impairment (ADHD) and a specific learning disability and began receiving special education services in 4th grade. By 9th grade Student had made considerable progress and was reading on grade level. During the rest of high school Student's needs were less related to a learning disability and were more related to the other health impairment, necessitating assistance in organization, focus, and academic support. Although Student's testing performance, and Student's motivation, has at times been inconsistent, it is an incontrovertible fact that throughout high school Student succeeded in a college preparatory curriculum. Student reads at the 12th grade level in 12th grade; between 8th grade and 11th grade Student moved up from the Basic to the Proficient level in both reading and writing on the PSSAs; and Student was passing grade-level coursework, utilizing high-level textbooks just like the regular education students, with no modification of assignments.

Rather than having been denied FAPE, Student presents an example of the best kind of outcome envisioned by the creators of the IDEA – with special education supports that were adjusted and titrated as appropriate Student functioned and succeeded in the general education curriculum. It is regrettable that Student's final year of high school was tarnished by a flurry of testing and IEP changes and additional instructional demands, and in fact by this hearing, all of which may have sent Student the message that despite all the hard work Student came up short. It is important that Student knows, as Student goes off to college, that there is every reason to believe that Student will succeed as Student has, in fact, succeeded for the last several years.

Order

It is hereby ordered that:

1. The District did not deny Student a free appropriate public education
2. As the District did not deny Student a free appropriate public education, the District is not required to provide compensatory education to Student.
3. The District is not required to take any further action.

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

August 28, 2010

Date

Linda M. Valentini, Psy.D., CHO

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