

*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: Student

Date of Birth: xx/xx/xx

Dates of Hearing: July 15, August 31, 2009

OPEN HEARING

ODR No. 10086/08-09 KE

Parties to the Hearing:

Parents:

School District:

Octorara Area School District  
228 Highland Road  
Atglen, PA 19310 P.O. Box 5069

Date Record Closed:

Representative:

Mark W. Voigt, Esq.  
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600 West Germantown Pike, Suite 400  
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School District Attorney:

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September 8, 2009

Date of Decision: September 22, 2009

Hearing Officer: Daniel J. Myers

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student (Student) <sup>1</sup> is a very verbal and well-read 5<sup>th</sup> grade student in the Octorara Area School District (District) who complains that the District inappropriately has failed to identify Student as needing special education services. In this case, the District prevails because, while Student written expression skills are weak, relative to Student's strong reading skills, the record does not establish that Student has a specific learning disability.

## **ISSUES**

Whether Student qualifies for special education services?

Whether Student is entitled to compensatory education for denial of special education services?

## **FINDINGS OF FACT**

1. Student, whose date of birth is xx/xx/xx, is a very verbal and well-read 5<sup>th</sup> grade student attending the District's elementary school. (NT 233) <sup>2</sup>
2. In 2<sup>nd</sup> grade (2006-2007), Student exceeded grade level expectations in reading, but was at a basic level in writing. (P16, p.10) Student often cried about any

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<sup>1</sup> All future references to Student will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

<sup>2</sup> References to "HO," "P," and "S" are to the Hearing Officer, Parent, and District exhibits, respectively. References to "N.T." are to the transcripts of the hearing conducted in this matter.

- homework involving handwriting. (NT 238-239) In March 2007 Student scored in the 99<sup>th</sup> percentile on the Terra Nova reading subtest. (S3; P2, p.4)
3. In 3<sup>rd</sup> grade (2007-2008), student simply stared into space during writing assignments. (NT 245) Student's classroom teacher reported that writing was extremely difficult for Student and that Student required alternative writing instruction strategies. (NT 122, 186; S4; P14) On December 2, 2007, Student's parents requested the District to test for dysgraphia. (NT 249; P14) On January 25, 2008, parents again requested help regarding Student's suspected specific learning disability (SLD) in writing. (P14,p2) Student's teacher's February 6, 2008 email stated that Student was still struggling with written responses and that some days were better than others, indicating inconsistency in Student's written expression performance (NT 190; P14,p.2)
  4. The District refused the Parent's request for formal SLD testing and convened an instructional support team (IST) instead. (NT 249) The IST met on March 19, 2008. (P2; P14, p.4; NT 256-257) The IST developed written expression goals for Student and Student's teacher implemented strategies for achieving those goals. (NT 203; P4, p.2; S4) Strategies used were high contrast triple-line paper, proper three finger grip on pencil, lowered desk levels, flexed elbows and proper posture. (NT 125)
  5. On April 10, 2008, the Chester County Intermediate Unit prepared an occupational therapy (OT) report. (S4) It concluded that Student did not require OT services; it did not contain any determination that Student had a written

- expression SLD. The OT report did, however, recommend some handwriting legibility strategies. (S4,p.4; NT 259-260)
6. In Spring 2008, Student scored advanced in reading and math on the Pennsylvania System of School Assessment (PSSA). (S2)
  7. On May 6, 2008, Student's parents complained to the District's special education supervisor that although Student was advanced in language skills, Student was deficient in writing, spatial reasoning and timed tests. Parents again requested evaluation of Student. (P14,p.5)
  8. On May 14, 2008, the IST met. (P4; NT 261) Student's teacher reported that IST strategies had mixed results, but that four or so strategies suggested by the OT (S4) were effective in helping Student write complete sentences as well as improved legibility. (NT 122-123) Student utilized the strategies 75 % of time, ultimately producing three sentence responses. (NT 204) The IST concluded that both Student's writing content and handwriting legibility were much better. (NT 125)
  9. Student's 2007-2008 final report card contained top marks in all areas of reading except in responding to literature in writing and in handwriting, where student was at the lowest level of the "developing concepts" scale (V). (P16,p3; S2, p.7) Student's DRA-II was advanced in reading and oral fluency. (P25,p.4)
  10. On October 7, 2008, the District issued an evaluation report (ER) that concluded Student did not qualify for special education services. (S6; NT 277) Student's Wechsler Intelligence Scale for Children – Fourth Ed. (WISC-IV) indicated a verbal comprehension index (VCI) standard score of 134, with processing speed

index standard score of 106. (P8,p.8) Although teachers indicated 50% focus and time on-task, the school psychologist observed much better, albeit inconsistent, focus and on-task attention in a one-on-one setting with minimal distractions. This suggested that attention and concentration issues, rather than a written expression SLD, were the cause of reduced academic achievement. (S6, p.16) The District's school psychologist concluded that Student's inconsistency in use of IST and OT writing strategies was due to Student's inconsistent motivation and inconsistent application of intervention strategies. (NT 193-194)

11. The District also paid for a February 24, 2009, independent educational evaluation (IEE) by Dr. K. (NT 290; P8; P15) Dr. K is a licensed and nationally certified school psychologist. (P 29) Dr. K's IEE lasted just under three hours. (NT 355-356; P 37)

- a. The Jordan Left Right Reversal test was below normal, indicating haphazard perception of directionality of symbols, which results in orthographic detail errors in writing and math problem solving. (P9,pp.6,15-16) The Halstead-Reitan Neuro Psychological Battery indicated serious impairment in bilateral grip strength and inability to process routine information accurately. (P8,p.16) The Woodcock-Johnson III Achievement Test indicated: (P8,p.3)

<b>W-J III Subtest</b>	<b>Grade Equivalency</b>
Handwriting	K.5
Punctuation and Capitalization	1.7
Writing Samples	2.2
Broad Written Language	3.7
Reading Comprehension	7
Reading Fluency	8.6
Listening Comprehension	13

The Basic Writing Skills Cluster (derived from a combination of Spelling and Editing, and providing a measure of basic writing skills in both isolated and context formats) was in the solidly average range (SS = 99, percentile = 47, age equivalent = 10 years, grade equivalent = 4.6). (P8, p.21)

- b. Dr. K's IEE equivocally states that the District "should give consideration to classifying [Student] as a student with [SLDs] in written expression and math calculation." (P8, p.28) At the due process hearing, Dr. K was unequivocal in her conclusion that Student should be classified as a child with SLDs in written expression and math calculation. (NT 368) This opinion is based upon Student's significant underachievement in relation to ability in written expression and math calculation. (NT 368) Dr. K believes that special education services related to written expression should address Student's math calculation needs. (NT 369)

12. Student's September 2008 WIAT-II written expression writing sample was separately scored by two District school psychologists and by Dr. K. At the time of the writing sample, Student's actual age was 9.8 and Student's grade level was 4.1. The separate psychologists' scores were (S-6, p.7; S-7):

	Mr. V	Mr. K	Dr. K
Standard Score	112	107	100
Percentile	79 <sup>th</sup>	68 <sup>th</sup>	50 <sup>th</sup>
Age Equivalence	12.0	11.0	9.4
Grade Equivalence	6.8	5.8	4.2

13. On April 9, 2009, after reviewing Dr. K's IEE, the District determined that Student does not have a SLD. (S11; NT 221, 293, 296)
14. On May 22, 2009, Student's parents filed a due process complaint. Hearing sessions were conducted on July 15 and August 31, 2009. District exhibits S1-S13 were admitted, with S13 admitted over Student's objection. (NT 427-428) Student exhibits P2, P4, P5, P8, P9, P11-P23, P25-P29, P35 and P37 were admitted into the record. (NT 431) P25 was admitted over the District's objection. (NT 430-431) P30 and P32 were not admitted into the record. (NT 341-341, 375)

### **DISCUSSION AND CONCLUSIONS OF LAW**

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) If one party produces more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, the Parents bears the burden of proof because they seek to have Student identified as a child in need of special education services, and they seek compensatory education for failure to provide such services.

IDEA's child-find provision requires that all children with disabilities who are in need of special education and related services must be identified, located, and evaluated. 20 U.S.C. § 1412(a)(3) A "child with a disability" means a child evaluated, in accordance with §§300.530-300.536, as having, among other things, a specific learning

disability, and who, by reason thereof, needs special education and related services. 34 C.F.R. §300.8

“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 Student or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.39(b)(3)

The IDEA statute and regulations require an evaluation, provided in conformity with statutory/regulatory guidelines, in order to determine whether a child is eligible for special education services before providing such services. 20 U.S.C. §1414; 34 C.F.R. §300.8(a) Once the evaluation is completed, a group of qualified school district professionals and the child’s parents to determine both eligibility and the child’s educational needs. 34 C.F.R. §300.306(a) In making such determinations, the district is required to draw upon information from a variety of sources and assure that all such information is documented and carefully considered. 34 C.F.R. §300.306(c)(1)

### **Student does not qualify for special education services**

The parties present competing opinions from certified school psychologists concerning whether Student has a SLD in either written expression or math calculation. The District argues that its school psychologist’s opinion is more credible because Student has more experience working in public schools, and because the evaluation of Student’s school psychologist, Dr. K, was conducted at “break-neck speed.” Student, on



the other hand, argues that Dr. K's opinion is more credible because the District's psychologist lacks a doctoral degree, lacks specific dysgraphia experience, and did not observe Student in the classroom.

Both the District's and Student's school psychologists were eminently qualified and their testing results were valid. Student's psychologist's conclusions receive less weight, however, because they are based upon an overemphasis of selective data rather than upon an objective analysis of all of the data.

Student's September 2008 WIAT-II written expression writing sample was separately scored by two District school psychologists and by Dr. K, and all three school psychologists arrived at average age and grade level scores. (S-6, p.7; S-7) Dr. K, however, discounted these WIAT-II average scores. By discounting these WIAT-II average scores, Dr. K was then able to conclude that Student demonstrated significant underachievement.

Dr. K discounted the 2008 WIAT-II average written expression scores because she considered them to be inconsistent with home and classroom observations as well as with other tests. In fact, however, the inconsistent classroom observations upon which Dr. K relied were "pre-intervention."

Student's teacher's February 6, 2008 email observed that Student was still struggling with written responses and that some days were better than others, indicating inconsistency in Student's performance. (NT 190; P14,p.2) On March 19, 2008 (P2; P14, p.4; NT 256-257), the IST developed written expression goals for Student and Student's teacher implemented strategies for achieving those goals. (NT 203; P4, p.2; S4) By May 14, 2008 when the IST met, Student's teacher reported that IST strategies had mixed

results, but that four or so strategies suggested by the OT (S4; P4; NT 261) were effective in helping Student write complete sentences as well as improved legibility. (NT 122-123) Student utilized the strategies 75 % of time, ultimately producing three sentence responses. (NT 204) The IST concluded that both Student's writing content and handwriting legibility were much better. (NT 125) The 2008 WIAT-II average written expression scores were not, therefore, inconsistent with classroom observation.

In addition, although teachers indicated 50% focus and time on-task, the school psychologist observed much better, albeit inconsistent, focus and on-task attention in a one-on-one setting with minimal distractions. This suggested that attention and concentration issues, rather than a written expression SLD, were the cause of Student's reduced<sup>3</sup> academic achievement. (S6, p.16)

Further, other test results were not sufficiently inconsistent with Student's average range WIAT-II scores to warrant discounting those WIAT-II scores. While Dr. K's WJ-III Writing Samples grade equivalency was 2.2, the Basic Writing Skills Cluster (derived from a combination of Spelling and Editing, and providing a measure of basic writing skills in both isolated and context formats) was in the solidly average range (SS = 99, percentile = 47, age equivalent = 10 years, grade equivalent = 4.6). (P8, p.21) The Jordan Left Right Reversal test was below normal, suggesting orthographic detail errors in writing and math problem solving (P9, pp.6,15-16), but not so inconsistent with the WIAT-II as to justify discrediting the WIAT-II average scores.

The record supports the District's position that the evidence to date does not establish a SLD in written expression. There also is no evidence of a math SLD. Even

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<sup>3</sup> "Reduced" in comparison to reading skills, but still average.

Dr. K believed that Student's math calculation needs were based upon the written expression SLD. (NT 369) Thus, Student does not qualify for special education services.

**Student is not entitled to compensatory education for denial of special education services**

There is no entitlement to compensatory education where an appropriate education has not been denied. Accordingly, no compensatory education will be awarded.

**CONCLUSION**

The more persuasive psychological opinion in this case establishes that Student does not have a SLD. Both the District's and Student's school psychologists were eminently qualified and their testing results were valid. Student's school psychologist's conclusions receive less weight, however, because they are based upon selective data rather than upon an analysis of all data. Accordingly, the District prevails and no compensatory education will be awarded.

**ORDER**

- Student is not entitled to special education services.
- No compensatory education shall be awarded.
- No action is required of the District.

*Daniel J. Myers*

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Daniel J. Myers  
HEARING OFFICER  
September 22, 2009