

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

FINAL DECISION AND ORDER

Student's Name: J.S.

Date of Birth: [redacted]

ODR No. 13350-1213KE

CLOSED HEARING

Parties to the Hearing:

Parents

Representative:

Pro Se

Northwestern Lehigh School District
6496 Rout 309
New Tripoli, PA 18066

Rebecca A. Young, Esquire
King Spry Herman Freund & Faul, LLC
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Bethlehem, PA 18018

Date of Hearing: February 5, 2013

Record Closed: February 10, 2013

Date of Decision: February 26, 2013

Hearing Officer: Brian Jason Ford

Introduction

The Parents¹ requested this due process hearing on December 4, 2012. In their Complaint, the Parents allege that the District has not appropriately addressed the Student's needs, and has not offered an appropriate program or placement. The Parents demand placement in a specialized private school for students with learning disabilities.

After a brief continuance, a hearing convened on February 5, 2013. Oral closing statements were presented at the end of the hearing session, and the record closed upon my receipt of the transcript.

Issues²

1. Has the District offered an appropriate IEP to the Student?
2. Has the District implemented the Student's IEP?
3. Is the Student entitled to placement in a specialized private school for students with learning disabilities?

Findings of Fact

1. The Student started kindergarten in the 2011-12 school year in a different school district. S-1.
2. The Student's IEP Team from the other school district convened on September 15, 2011, and drafted an IEP that was to be implemented in the other school district until September 14, 2012. S-1.
3. The resulting IEP noted that the Student's "pre-academic skills are not well developed. [The Student] can not identify any letters or numbers at this time. [The Student] is able to identify the 10 basic colors." S-1 at 4. At the same time the student was not experiencing difficulty with expressive or receptive language, gross or fine motor skills, or negative behaviors. S-1 at 4, 5.
4. When the September 2011 IEP was developed, the Parents expressed concerns about the Student's expressive and receptive language. Based on testing conducted in May 2011, however, the IEP determined that "[The Student] is not demonstrating any significant problems with expressive or receptive language. [The Student's] function communications are rated to be in the average range by ... current teacher." S-1 at 4.

¹ Other than the cover page of this decision, identifying information about the Parents and Student are omitted to the extent possible.

² See NT at 20-21.

5. The IEP includes eleven (11) goals, most of which target the Student's ability to identify letters, associate letters with sounds, develop phonics skills, identify and sequence numbers, and associate numbers with quantity. S-1 at 12-16.
6. The IEP included program modifications and specially designed instruction, mostly targeting direct instruction, smaller class size, preferential seating and one-to-one assistance for "seatwork." S-1 at 17.
7. At the time the IEP was drafted, the team determined that the student was not eligible for extended school year (ESY) services. S-1 at 18.
8. The parents approved the program described in the IEP and placement in learning support at the itinerant level (20% of the school day or less) by approving a Notice of Recommended Educational Placement (NOREP) or not responding to that NOREP. S-2.³
9. The Student enrolled in the District in November 2011. The District issued a NOREP to the Parents on November 16, 2011. Through that NOREP, the district explained that the student "will continue to receive itinerant learning support services as per the existing IEP from [the former school district]. The existing IEP ... will be implemented with changes specific to the area of reading and math goals. The goals will be reduced from eleven to four. Two goals will address reading (Letter Naming Fluency, Letter-Sound Fluency) and two goals will address math (Oral Counting, Number Identification). [The Student] will receive support services at [the Student's] home school." S-3 at 1.
10. The parents approved the NOREP on November 30, 2011. S-3 at 3. It is not clear if a new IEP was issued at that time, edited in the way that the NOREP suggests. No such IEP was offered as evidence.
11. The student was not re-evaluated before the NOREP of November 30, 2011 was issued.
12. The District invited the Parents to an IEP team meeting in December of 2011. The invitation was sent on December 9, 2011 proposing a meeting on December 14, 2011. The Student's mother signed the invitation on December 14, 2011, indicating that she would attend, and returned the form to the District the same day. S-4.
13. The IEP team meeting convened on December 14, 2011. At that time, the Student was a [preschool-aged] Kindergartener.
14. According to the IEP drafted at that time, the Student could identify basic colors and shapes, but the Student's "basic reading and math skills [were] significantly below average for [the Student's] age and grade." S-5 at 6. More specifically the student

³ The copy of the NOREP that was submitted as evidence is not signed. It may be that the NOREP was signed that the presented copy is a later printout. Regardless, the corresponding IEP (S-1) is not in dispute and was implemented with the Parents' knowledge.

was able to identify only four of 26 upper case letters and could associate a sound with only one letter. Regarding math, the Student could “identify the numbers 0 and 1... count numbers 1 to 10 consistently [when prompted] and has demonstrated one-to-one correspondence using manipulatives. [The Student showed] underdeveloped skills in symbolic thinking, math calculations and math concepts. [The Student needed] concrete construction with the use of manipulatives.” S-5 at 6.

15. The IEP included four goals: letter naming fluency, letter sound fluency, oral counting fluency and number identification fluency. S-5 at 13-14. These are the same goals indicated by the NOREP of November 30, 2011. Testimony strongly suggests that the Student’s goals were changed when the NOREP was sent in November of 2011, and that the goals did not change again when the IEP of December 2011 was drafted. See NT at 129-130.
16. The IEP included program modifications and specially designed instruction. Specifically, the IEP provided for small group instruction, repeated practice, multi-sensory instruction, errorless learning, manipulatives, wait time for responses, chunking of large assignments, and strategic seating. S-5 at 15.
17. At the time of the IEP was drafted, the IEP team concluded that student was not eligible for ESY services. S-5 at 16.
18. Under the terms of the IEP, the student received an itinerant level of learning support. S-5 at 17. More specifically, testimony reveals that the Student was educated in the regular kindergarten classroom, but received 30 minutes per day of 1:1 instruction in a Learning Support classroom. NT at 128-129. This is consistent with calculations in the IEP itself, placing the Student in regular education for 85% of the school day.
19. During the 2011-12 school year, some 1:1 Learning Support sessions were missed when the Learning Support teacher had to proctor PSSA testing. Makeup sessions were offered and provided. P-4.
20. The parents approved the IEP of December 2011, via a NOREP, on December 20, 2011. S-6.
21. A meeting convened on March 28, 2012. It appears that this meeting was not formally an IEP team meeting, but the Student’s mother and several teachers and administrators were there. The District’s Director of Student Services was not at that meeting. S-7 at 4.
22. On March 28, 2012, presumably after the meeting, the District issued a NOREP refusing to change the ESY recommendation in the IEP of December of 2011 (i.e. refusing to provide ESY services in the summer of 2012). S-7. On the face of the NOREP, ESY services were denied based upon the conclusion that any regression that may occur over the summer break could easily be remediated upon return to school. S-7; see *also* P-3.

23. According to a letter from the Student's mother dated April 10, 2012, the meeting on March 28, 2012 was to discuss the Student's progress and need for ESY services. According to that letter, everybody who attended that meeting was in agreement that the Student required ESY services. No contrary evidence or testimony was presented by the District. S-4 at 4.
24. The Parent rejected the NOREP on April 10, 2012. According to a letter from the Student's mother dated April 10, 2012, and submitted with the NOREP, everybody who attended the meeting on March 28, 2012 was in agreement that the Student required ESY services. No contrary evidence or testimony was presented by the District. S-4 at 4.⁴
25. The Parent's letter of April 10, 2012 is consistent with testimony from the Student's Learning Support teacher. The Student's Learning Support teacher came to the conclusion that the Student would benefit from, and was likely in need of, ESY services. NT at 145-148. Following clearly established practices in the District (if not District policy) the teacher "applied" for the Student to receive ESY services by notifying the District's Director of Student Services of the Student's needs and recommending the provision of ESY services for the Student. *Id.* The Director of Student Services denied the teacher's recommendation. *Id.*
26. On April 26, 2012, the District issued a letter to the Parent again refusing to provide ESY services for the same reasons that those services were denied in the past. P-2 at 1.
27. The Parent wrote a letter in response on April 29, 2012, again asking for ESY services and expressing both confusion and consternation about the District's insistence that data suggests that the Student could easily recoup any regression that occurred during the summer. The Parent averred that no such data exists, and that the Student had made only minimal progress towards IEP goals. S-10. The letter is consistent with statements in prior correspondence in which the Parent acknowledged a small amount of progress towards IEP goals and was eager to continue services in the summer so that progress could be maintained.
28. The District included a Permission to Reevaluate - Consent form with the letter of April 28, 2012. S-9. Specifically, the District proposed a number of commonly used, standardized, normative evaluations that would assess the Student's intellectual abilities and achievement, social and behavioral skills, and language abilities. S-9 at 1. The Parents refused consent and returned the form on April 29, 2012. S-9 at 2.
29. While the foregoing events were unfolding, the Parents took the Student for an independent speech-language evaluation. The Student was evaluated on April 18, 2012 and an evaluation report was sent to the Parents on April 24, 2012. S-8. The evaluation included a Clinical Evaluation of Language Fundamentals, Pre-School, Second Edition (CLEF-P:2). As a result of that test and clinical observations, the

⁴ Upon rejecting the ESY NOREP, the Parents requested both a due process hearing and mediation. Ultimately, a facilitated IEP meeting convened instead of either of those dispute resolution methods.

evaluator concluded that the student expressed a mild expressive language disorder and inappropriate grammatical errors, but was otherwise age-appropriate in both receptive language and articulation. S-8 at 4. The evaluator recommended goals and objectives, and proposed direct speech language services one time per week for a minimum of 30 minutes per session. S-8 at 4.

30. The Parents provided the independent speech-language evaluation to the district, although it is not clear exactly when. NT at 93.
31. The District convened a facilitated IEP team meeting on May 9, 2012. S-11, S-12 at 1. During that meeting, the IEP of December 2011 was revised. S-12, S-13. No changes were made to the description of the Student's academic achievement and functional performance. Existing goals were clarified to explicitly state that the Student would achieve the goals independently. A number writing goal was added, as was a goal calling for the Student to retell the correct sequence of events in a story. *Id.*
32. The May 2012 IEP also called for an increase in program modifications and specially designed instruction beginning at the start of the 2012-13 school year (the IEP was still expected to carry through December of 2012). S-12, S-13. Time in the Learning Support classroom would increase by 30 minutes per session at the start of the 2012-13 school year, but the student would not receive 1:1 instruction for the entirety of that time.
33. Regarding ESY, the IEP team concluded the student was not eligible for ESY services. The District's stated reason for the denial is the same regression/recoupment analysis. S-12 at 18. However, through the IEP, the district offered one hour of tutoring per week for five weeks in the summer of 2012. S-12 at 17. These services were offered either as a program modification or as specially designed instruction, and the purpose was to "help continue to maintain a routine involving academics in order to facilitate [the Student's] transition back to school [after the summer recess]."
34. After denying the Parents' multiple requests and teacher's recommendations for ESY services, and then providing summer tutoring via an IEP without agreeing that the Student is eligible for ESY, the District sent a letter to the Parents on June 26, 2012 offering 1.5 hours of ESY services per week for five weeks during the summer of 2012. The services would consist of tutoring to address unspecified reading and math goals. P-5.
35. The letter offering ESY services was sent as a result of a clerical error, not as the result of a decision to provide ESY services, or increase summer tutoring from the one hour of tutoring per week provided by the IEP to 1.5 hours as set forth in the letter. NT at 245-246. However, the District offered to provide the tutoring offered in the IEP at the higher rate described in the letter.

36. By the end of the 2011-12 school year, the Student could identify 85% of upper and lower case letters, but was inconsistent with certain letters. S-15 at 3. By this time, the Student could also associate letters with sounds with 65% accuracy (as measured by sounds correct per total letters in the alphabet) – but was still “unfamiliar” with three vowel sounds. S-15 at 5. The Student could count orally from 0 to 31, identify numbers 0-10 with 100% accuracy and identify numbers 0-20 with 81% accuracy. S-15 at 8, 11.
37. Regarding the two IEP goals that were added in May of 2012, data was collected twice for the number writing goal and once for the story sequencing goal between the time those goals were added and the end of the 2011-12 school year. Even so, by the second probe, the Student could write the numbers 0-5 and 8-10, 11, 14, 16 and 17 independently and without a visual. S-15 at 12. The Student was able to sequence two of five stories at 100% accuracy on the first sequencing probe. S-15 at 13.
38. The Student received the tutoring hours from the District in the summer of 2012. NT at 117-118. The Student also participated in a six-week program in a New Jersey public school that targeted academics and social/emotional development. The New Jersey program was instructed by the Student’s grandmother, who is a special education teacher in that state. The Parents paid tuition for the Student to attend that program. S-14, NT at 63.
39. The Student’s grandmother wrote a descriptive, detailed “Summary of Performance” at the end of the summer program. According to that document, the Student could identify all of the letters of the alphabet and knew all but four corresponding sounds – but only if using strategies instructed in the curriculum used in the summer program. The Student demonstrated good listening comprehension, and could recall story events in order. Using curricular strategies, the Student had some ability to spell three letter words, but demonstrated “reversals” in handwriting. The Student could “count to 40 by 1s and to 100 by tens ... [but] has difficulty reading and writing numbers past nine and demonstrates many reversals writing two digit numbers.” S-14.
40. A small amount of testimony indicates that the Student’s performance in the New Jersey summer program may be the result of the Student’s close relationship with the grandmother. See NT at 74. The District did not, however, challenge the accuracy of the information reported at S-14.⁵
41. The Student started the 2012-13 school year under the IEP that was revised in May of 2012. See, e.g. NT at 225-226.
42. The Student’s current (2012-13) special education teacher implemented the IEP and monitored progress towards its goals. *Id.*, NT at 231; S-18. According to progress

⁵ To the extent that S-14 is hearsay, such evidence is admissible in these proceedings but cannot be used to form the basis of my decision. Regardless, the District did not challenge the accuracy of S-14, and the information therein is not inconsistent with some of the District’s own progress reporting.

reports, by the end of the first marking period (11/01/2012) the Student could identify all upper and lower case letters, associate sounds with letters at 81% accuracy, count to 31 independently with 100% accuracy, identify numerals 0-21 with 67% accuracy, and could write numbers 1-19 (the goal calls for 1-20) but many of those numbers were written backwards, S-18 at 1, 5, 8, 11; S-16 at 14-15. The Student also had good recall of facts from stories read aloud, but still required assistance to sequence those facts when retelling a story. S-18 at 15.

43. Sometime during the first half of the 2012-13 school year, the Student's special education teacher began to suspect that the Student has dyslexia, and shared that concern with the Parents. NT at 189. The teacher recommended that the Student should "see a doctor about it because [the teacher] is not someone who can tell whether a child has that or not." NT at 233.
44. The District convened an IEP team meeting on November 7, 2012 in anticipation of the expiration of the prior IEP. The District invited the Parent to the IEP team meeting on October 26, 2012. S-17. The meeting convened as scheduled.
45. The sequence of events, IEPs and NOREPs around the time of the November 2012 IEP team meeting are exceptionally confusing. Findings of fact concerning this period of time are based on the testimony of the Student's current special education teacher, which appears in the record at NT at 210-235.
46. The Student's special education teacher and the Parents were communicating with each other about the Student's progress and needs. As a result of those conversations, the teacher drafted an IEP and discussed that draft with the Parents. That IEP was submitted as evidence and made part of the record as S-21.
47. The teacher did not bring the IEP at S-21 to the IEP team meeting in November of 2012. Instead, the teacher brought a different IEP, which was submitted as evidence and made part of the record as S-19. It is not clear who authored the IEP as S-19. Team members signed into the IEP meeting on the IEP at S-19, and the Student's mother acknowledged receipt of procedural safeguards on that document.
48. The District also drafted a NOREP that was submitted as evidence and made part of the record as S-20. The teacher also brought the NOREP at S-20 to the IEP team meeting in November of 2012. See NT at 210-235.
49. The IEP at S-19 and the NOREP at S-20 do not square with each other. The IEP calls for the Student to receive an itinerant level (less than 20%) of Learning Support. The NOREP at S-20 would place the Student in the Learning Support classroom at the "supplemental" level (20% to 80% of the school day).⁶ The NOREP at S-20 explicitly rejects an itinerant level of Learning Support as insufficient to meet the Student's needs.

⁶ Neither the IEP at S-19 nor the NOREP at S-20 say exactly how much time the Student would actually spend in the Learning Support classroom. The Penn Data section of the IEP (where such information is often revealed) is completed incorrectly on S-19.

50. The IEP at S-21 matches the NOREP at S-20. The teacher mailed that IEP to the Parents sometime after the IEP meeting in November of 2012.
51. The IEP at S-19 includes a description of the Student's present levels of academic achievement and functional performance, complete with data from the early parts of the 2012-13 school year. The same section of the IEP at S-21 is blank.
52. The annual goals in the IEPs at S-19 and S-21 are identical, and are based both on the performance levels reported at S-19 and assessments of the Student's performance at the start of the 2012-13 school year (reported at S-16).
53. The program modifications and SDI are similar in S-19 and S-21, but with one significant difference. The IEP at S-21, via modifications and SDI, places the Student in Learning Support for Language Arts. It is the addition of this class outside of the regular education classroom that pushes both the IEP at S-21 and the NOREP at S-20 into the supplemental level.
54. Both IEPs defer ESY eligibility determinations until the spring of 2013.
55. The Penn Data reporting in the IEP at S-21 is accurate, based on the SDI. Accordingly, under the IEP at S-21, the Student would spend just short of two hours per day (1.92 hours) in the Learning Support classroom. This correlates to the Student spending 70% of the school day in a regular education classroom.
56. The Parents rejected the NOREP at S-20, and requested this due process hearing.
57. The District has implemented the last-approved IEP at all times during the 2012-13 school year (the IEP at S-12).

Discussion

1. General Legal Framework

I will make an effort to avoid legal terms or, when that is not possible, explain them in plain English. Except in the findings of fact, I have placed citations in footnotes, rather than in-line. I am doing this to make this decision accessible to people who, like the Parents, do not have a legal background or training.

The law that controls this case is the Individuals with Disabilities Education Act (IDEA). The IDEA establishes the educational rights of students with disabilities and their parents. The IDEA also establishes school districts' obligations to students with disabilities and their parents. At its core, the IDEA ensures that all students with disabilities receive a free appropriate public education (FAPE). This does not require schools to give students with disabilities the best possible education. Rather, school districts, working with parents, must develop and implement an Individualized Educational Program (IEP) that will provide a meaningful educational benefit to the student. Schools must also place students with disabilities in the least restrictive environment (LRE). In other words, of all of the possible placements in which a student

could receive a meaningful education, the school must select the placement that is most similar to the regular classrooms that non-disabled students go to.

If a school violates the IDEA and a student does not receive a FAPE, the student is owed compensatory education. Compensatory education usually takes the form of educational services that go above and beyond what a school would otherwise have to provide, and are aimed at helping the student recover from the denial of FAPE. In Pennsylvania, compensatory education is usually awarded in the form of hours of services. In most cases, Parents choose what services will be provided during the awarded hours, and the school districts pay the service providers.

Hearing Officers have authority to correct procedural violations of the IDEA. For example, if an IEP is not drafted in the correct way, a Hearing Officer can order the school district to comply with procedural rules. However, Hearing Officers cannot award compensatory education for a procedural violation – unless the procedural violation results in a denial of FAPE. Hearing Officers can also order school districts to provide the services that a student needs in order to receive a FAPE, and can order school districts to fund independent educational evaluations (IEEs). IEEs are assessments by experts who are not associated with the school district.

In addition to compensatory education, parents may be entitled to private school tuition reimbursement in certain cases. In order to obtain tuition reimbursement, parents must prove that the school district failed to offer a FAPE, that the private school is appropriate for the student, and that awarding tuition reimbursement is fair (i.e. that there are no equitable considerations that would prohibit tuition reimbursement). As the name suggests, however, tuition *reimbursement* is available when parents have actually placed their children into a private school. Seeking reimbursement can be financially risky for parents, and courts have recognized that risk while analyzing tuition reimbursement cases.

2. The Parents' Demand

It is important to highlight that the Parents are not seeking tuition reimbursement. As discussed in this decision, the Parents have not enrolled the Student in a private school. Rather, the Parents have investigated a private school and believe that school is a good fit for the Student. It is not clear how far the Parents have proceeded in the admission process, but it is clear that admission has not been formally offered to the Student.⁷ More importantly, the Parents have not incurred any debt to the private school. They do not owe tuition to the private school. Instead, the Parents ask me to place the Student into the private school prospectively.

My authority to order prospective private school placement is not clear cut. Some courts have upheld due process decisions that place students in private schools outside the context of tuition reimbursement.⁸ Such cases often involve chronic, severe denials of

⁷ NT at 19-20.

⁸ See *N. Kitsap Sch. Dist. v. K.W.*, 130 Wn. App. 347, 369 (Wash. Ct. App. 2005)

FAPE. Further, to whatever extent I have authority to award prospective private school placement, the standard cannot be the same as the standard for tuition reimbursement. Parents do not face the same financial risk, and the placement decision must be made in light of the LRE requirement.⁹ As a result, parents seeking prospective private school placement must prove that the student cannot receive a FAPE in less restrictive public school settings. In light of the vast array of modifications and accommodations that can be provided in public schools (and that the IDEA often requires), the burden on parents seeking prospective private school placement outside the context of tuition reimbursement is quite high.

Regarding the other issues in this case, I very clearly have authority to determine both the appropriateness of the Student's IEP and whether the IEP has been implemented. The Parents have not asked for compensatory education but, in light of the issues, I can order the District to take whatever action is necessary to correct procedural violations and ensure the substantive provision of FAPE to the student.

3. The Burden of Proof

The Parents are the party seeking relief. Under special education case law, the Parents must convince me that they are entitled to what they demand. In legal terms, the Parents must bear the burden of persuasion and cannot prevail if the evidence rests in equipoise.¹⁰

4. IEP Implementation

The Parents claim that the Student's IEP was not properly implemented during the 2011-12 school year when the special education teacher proctored the PSSAs. The District concedes this point, but argues that any missed sessions were made up, and that any educational loss suffered as a result of the missed sessions was remediated. The evidence supports the District's position. The terms of the Student's IEP were violated in the most technical sense over a short period of time (about one week). But, in light of the District's voluntary remediation, the Student was not denied a FAPE as a result of that violation.

5. Appropriateness of the IEP

The Parents allege that the last IEP offered by the District is not appropriate. As

described above, it is not easy to tell what the last-offered IEP is. This confusion is indicative of an IDEA violation in and of itself.

⁹ See *Woods v. Northport Pub. Sch.*, 2012 U.S. App. LEXIS 13819, 29 (6th Cir. Mich. 2012)(applying an LRE analysis to prospective programming within a public school).

¹⁰ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

The IDEA makes parents full members of their children's IEP teams. Predetermination of a student's program or placement violates parent's rights to participate in IEP development. In this case, the District claims that it is offering an IEP (S-21) with a NOREP (S-20). But the offered IEP was never discussed during an IEP team meeting. Instead, a different IEP was discussed (S-19). The IEP that was "offered" and the IEP discussed at the meeting are different in important ways. The offered IEP increases the Student's time in a Learning Support classroom by placing the Student in that classroom for a core academic subject. The IEP discussed at the meeting makes no mention of this. The Parent was denied the opportunity to meaningfully participate in the development of the offered IEP (S-20).¹¹

This situation is analogous to the District's ESY procedures. As a matter of routine practice, the District's Director of Student Services has veto power over ESY eligibility determinations (even when parents and District members of IEP teams believe that ESY is appropriate). This is an absolute violation of the IDEA and its regulations, and is antithetical to the collaborative process required by law.¹² The Parents do not allege a denial of FAPE during the summer of 2012, but it is certainly within my power to ensure that the District complies with IDEA regulations as the Student's ESY eligibility is determined this year.¹³

The offered IEP also makes no mention of dyslexia. To be clear, dyslexia is not a separate disability category under the IDEA. Students with dyslexia who are in need of special education fall into the "specific learning disability" category. The Student has qualified under this category since the initial IEP. A diagnosis of dyslexia, therefore, would not change the Student's eligibility category. The symptoms of dyslexia, however, do not follow from a single condition. The many forms of dyslexia may have similar presentations, but are not all remediated in the same way. Therefore, without careful evaluation, it is impossible for an IEP team to select programming for a suspected-dyslexic student.

In this case, the District was obligated – minimally – to propose an evaluation when the current special education teacher suspected that the Student has dyslexia. The IDEA requires school districts to evaluate all areas of a student's suspected disability, and must initiate an evaluation even before the tri-annual cycle when a new or different

¹¹ The Parents are also under the impression that the Student will spend more time in the Learning Support classroom than what is actually proposed at S-21 and S-20. The Parents' confusion is the direct result of the District's failure to include them in the IEP development process. The District cannot be surprised that the Parents are confused after one IEP is brought to the meeting with an inconsistent NOREP for a different IEP that was not discussed.

¹² Worse, some testimony suggests that the District routinely brings NOREPs, not IEPs, to IEP team meetings; and then presents the IEP only after the NOREP is signed. If so, this would be the most serious denial of parental participation that this Hearing Officer has ever encountered. In this particular case, however, there is not enough evidence to draw that conclusion, even though delivery of the last IEP was unambiguously botched.

¹³ Unfortunately, I do not have the power to order systemic policy changes in a school district. Rather, I can only correct IDEA violations on a student-by-student, case-by-case basis.

disability is suspected.¹⁴ The District's lack of effort in this regard is concerning, as is the recommendation to seek an evaluation from a doctor. It is the *District's* obligation to evaluate the Student; it is not the Parents' obligation to obtain an evaluation when the *District* suspects that the Student may have a previously undiagnosed disability.

Despite all of these problems, all evidence and testimony clearly indicates that the Student has made progress. The Student's baseline levels upon kindergarten enrollment were alarmingly low. The Student has made progress towards IEP goals, as documented in every probe the District has administered. This progress is a function of the hard and serious work that the special education teachers are doing with the Student (both the teacher from the 2011-12 and 2012-13 school years). Those teachers clearly care about the Student and, in the classroom, are driving the Student's success. In light of this work, it is so unfortunate that the District has violated the IDEA by failing to provide necessary evaluations and by excluding the Parent from the IEP development process.¹⁵

In sum, the Parents have proven that the last-offered IEP (S-21) is not appropriate. That IEP was offered before the Student's suspected disability was assessed. To remedy this violation, and in light of the *District's* suggestion that the Parent turn to doctors outside of the District for an evaluation, I will order the District to fund an independent educational evaluation (IEE) of the Student. The last-offered IEP was also issued without meaningful parental participation. To remedy this, I will order the District to reconvene the Student's IEP team after the IEE is completed and to develop an IEP for the Student at the IEP team meeting.

6. Private School Placement

The Parents have not satisfied the very high burden that would require prospective placement at a private school at the District's expense. Said simply, the Parents have not proven that the Student must be placed in a private school in order to receive a FAPE. To the contrary, evidence shows that the Student can make progress in the District. This Hearing Officer is optimistic that the Student will make even greater strides after the Student's needs are fully evaluated, and after the Parents are included as full members of the Student's IEP team.

ORDER

¹⁴ 20 U.S.C. § 1414.

¹⁵ By many accounts, communication between the Parents and teachers has been good. The Parents and teachers appear to have a good relationship (particularly the teacher from the 2011-12 school year). Even so, good parent-teacher communication and parental involvement in IEP decision-making are not the same thing. It is the latter in which the District has failed.

And now, February 26, 2013, it is hereby ordered as follows:

1. The District shall fund an independent educational evaluation (IEE) of the Student. To secure said IEE, the following procedures shall be used:
 - a. The evaluator shall have no affiliation with the District,
 - b. Within five (5) business days of this decision, the District shall propose five (5) such evaluators,
 - c. The Parents may select from the District's list of evaluators or may select a different evaluator, provided that the evaluator is qualified to assess all areas of the Student's suspected disability.
 - d. The parties may come to their own agreement as to whether the District will reimburse the Parents for the evaluation or pay the evaluator directly. If the parties cannot come to their own agreement, the District shall pay the evaluator directly.
 - e. The evaluator must agree to transmit any evaluation report to both parties. Both parties shall sign any releases to enable such transmission.
2. After the parties receipt of the IEE report, the District shall convene an IEP Team Meeting, with the Parents, to review the results of that report and either draft a new IEP for the Student, or amend the Student's IEP as needed. The parties may select a mutually agreeable time, place and location for this meeting.
3. An ESY determination shall be made for the Student during the IEP team meeting. The ESY determination shall be made by the Student's IEP team, and shall not be subject to veto by District administrators.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER