

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

ODR No. 14071-1213 KE

Child's Name: E.A.

Date of Birth: [redacted]

Dates of Hearing: 7/24/13, 7/29/13

CLOSED HEARING

Parties to the Hearing:

Parent
Parent

Parent
Parent

School District
Fox Chapel Area
611 Field Club Road
Pittsburgh, PA 15238

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney
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None

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August 30, 2013

September 15, 2013

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, adopted by Parents¹ from a Central American country in early childhood, resides within the District and was enrolled in a District school for the first time during the 2012/2013 school year, having attended a private school from kindergarten through the end of the 2011/2012 school year (5th grade).

Prior to the 2012/2013 school year, the District conducted a psycho-educational evaluation of Student at Parents' request, resulting in the conclusion that Student is not IDEA eligible. Subsequently, at Parent's request, the District conducted a second evaluation to determine whether Student qualifies as a protected handicapped Student.

Parent disagreed with the District's conclusion that Student does not have a disability that substantially impairs a major life activity, and initiated the current due process complaint in late June 2013, asserting a §504 claim only. Parent sought a determination that Student's learning in the areas of reading and writing is substantially impaired by dyslexia and asserts that the District should provide Student with a Service Agreement. The evidence produced at a hearing conducted over two sessions in late July does not, however, support Parent's position, as explained below. The District, therefore, is not required to develop a Service Agreement for Student.

¹ Parents' positions at the due process hearing differed. [Mother] filed the complaint, and unless otherwise specified, will be referred to as "Parent" since she is the Parent primarily involved in the dispute with the District. Student's other Parent, [redacted], did not join in the complaint and was called as a witness by the District.

ISSUES

1. Did the School District appropriately evaluate Student to determine whether Student is a protected handicapped student in accordance with §504 of the Rehabilitation Act of 1973 and 22 Pa. Code Chapter 15?
2. Did the School District correctly conclude that Student does not meet the criteria to qualify as a protected handicapped student in accordance under §504 of the Rehabilitation Act of 1973 and 22 Pa. Code Chapter 15, and/or does not need a Service Agreement?

FINDINGS OF FACT

1. Student, [a pre-teenaged] child with an agreed birth date² of [reacted] is a resident of the School District. The District is responsible for evaluating Student and would be responsible for providing educational services, including special education and/or appropriate accommodations, if Student meets the criteria for any such services. (Stipulation, N.T. pp. 19, 20)
2. Due to developmental concerns at the time Parents adopted Student in 2002, particularly a lack of receptive and expressive language, Parent enrolled Student in early intervention services, secured Therapeutic Staff Support (TSS) services and also worked intensively with Student to foster language acquisition. (N.T. pp. 218—221)
3. From kindergarten through fifth grade, Student was enrolled in a private school, which provided extensive additional support for reading, writing and spelling each school year. Student's academic skills remained below the level of peers in the same grade the entire time Student attended the private school. (N.T. pp. 157, 158, 162—164, 166—169, 171—176, 179—182, 199; P-50 p. 2)
4. Parent also provided additional private tutoring throughout Student's school age years, including currently, when school is in session, and continues to work with Student in reading. (N.T. pp. 224, 225)
5. When Student was in 1st grade, Parents requested an evaluation from the District to determine whether Student had a learning disability. (S-3 pp. 1, 8)
6. In a report dated 1/7/08, the District's school psychologist determined that Student's cognitive ability is in the average range, with a full scale IQ (FSIQ) score of 102 on the WISC-IV (Wechsler Intelligence Scale for Children-Fourth Edition). All component index scores were also solidly within the average range. (S-3 pp. 4, 5)

² Because Parents were unable to determine Student's actual birth date due to lack of records, they used the month and day that Parents brought Student home as Student's "birthday" and relied on information from the orphanage where Student previously resided that Student was approximately two years old at the time to designate a birth year. (N.T. pp. 216, 217)

7. The school psychologist also measured Student's academic achievement using the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III TA), which placed Student in the average to high average range in reading, writing and math, with standard scores ranging from 93 (Passage Comprehension) to 117 (Story Recall). In the reading subtests, Student's percentile rankings were generally well above the 60th percentile, with only passage comprehension below that level, although still in the average range at the 31st percentile. In the Reading Cluster, Student's standard scores were 107 (68th percentile) in Basic Reading Skills and 110 (75th percentile) in Phoneme/Grapheme Knowledge. (S-3 pp. 5, 6)
8. The private school reported curriculum-based assessments from the beginning of first grade (September 2007). Student's grade equivalent score was 1.7 on the Gates-McGinitie Reading test. The DIBELS assessment placed Student at the 81st percentile with phoneme segmentation established and nonsense word fluency at low risk. (N.T. pp. 380—382; S-3 p. 2)
9. The District concluded that Student did not have a learning disability since both cognitive ability and academic achievement were well within the average range. Although language tests also yielded average scores in all measures other than the Test of Word Finding, in which Student scored in the low average range, Student was determined to be IDEA eligible in the category of speech/language impairment. The eligibility conclusion was based upon the evaluator's observation that Student needed a lot of time to formulate responses on the expressive language portions of the Test of Language Development-Primary (TOLD-P), as well as the low average score on the word finding test. (N.T. p. 379; S-3 pp. 6, 7, 9)
10. Student received speech/language services to address expressive vocabulary needs, but was exited from those services after meeting all goals in November 2008. (S-2 p. 2)
11. In 4th grade (2010/2011 school year), Parent obtained an independent neuropsychological evaluation. The pediatric neuropsychologist reported both the ability and achievement scores from the District's 2007 evaluation, but listed the percentiles from the WJ-III as the standard scores Student had obtained on the District's assessment. That error made it appear that Student's academic achievement, as measured by the standardized test the District administered, was much lower than the actual results the District obtained, which were all within the average range except for two subtests in the high average range. (N.T. pp. 51—53, 383; P-7 p. 3; S-3 p. 5)
12. The neuropsychologist repeated the WISC-IV for the 2010 evaluation, also obtaining an FSIQ score in the average range (99), with all index scores also in the average range.³ (P-7 p. 6)

³ The 2010 WISC-IV results are substantively identical to the District's 2007 results, taking into account the confidence interval included in the District's report, which indicated that Student's FSIQ fell between 97 and 107. Similarly, all of the index scores the private evaluator reported were within the confidence intervals listed in the District's report. (P-7 p. 6, S-3 p. 4).

13. The neuropsychologist administered the WIAT-III (Wechsler Individual Achievement Test-Third Edition) as a standardized measure of Student's academic achievement and obtained standard scores similar to the District's 2007 standardized achievement scores. (P-7 p. 8, S-3 p. 5)
14. Based on the erroneous reporting of the percentile ranks from the District's 2007 evaluation as standard scores, the neuropsychologist concluded that Student had a severe learning disability in 2007 that had been successfully remediated to the extent that Student's reading and math scores rose from the significantly impaired range to the average to low average range in the three years between evaluations. For reasons not explained in the independent report, but apparently based upon the error in reporting the District's WJ-III scores, the neuropsychologist concluded that Student had dyslexia, dyscalculia and dysgraphia. (P-7 pp. 9, 13)
15. Prior to Student's enrollment in a District middle school for the 2012/2013 school year, Parent requested another psycho-educational evaluation from the District to determine IDEA eligibility due to a specific learning disability. The same District school psychologist who had evaluated Student in 2007 reviewed prior evaluation results and administered standardized and curriculum-based measures of achievement. (N.T. pp. 377, 378, 385; S-2 pp. 7—10)
16. In the District's 2012 evaluation, Student's standardized achievement test scores fell within the average range on all measures of reading, writing and math achievement other than the Gray Oral Reading Test (GORT), a test that measures oral reading fluency and comprehension. Student's subtest scores fell just below the average range, except for accuracy, which was just within the average range. (N.T. pp. 385; S-2 pp. 7—11)
17. Based upon her observations of Student over the two testing sessions, as well as the results of the assessments that relied on silent reading, the school psychologist concluded that the GORT results underestimated Student's reading skills. (N.T. p. 386; S-2 pp. 7, 11)
18. The psychologist noted in her report that the GORT was administered during the first testing session, the day after Student returned from a trip to the west coast. Student appeared tired, and commented on being fatigued. Student appeared more alert at the second testing session a day later, and performed well on the silent reading assessments and writing assessments. Although Student's Oral Reading Quotient on the GORT was below average, it was still not significantly discrepant from Student's average cognitive ability. (N.T. p. 386; S-2 pp.7, 11)
19. The District again concluded that Student did not have a learning disability, since Student's academic achievement was commensurate with cognitive ability and found no other basis for IDEA eligibility. (S-2 p. 12)
20. Although both Parents indicated that they disagreed with the District's 2012 IDEA evaluation report, they took no further formal action before Student began the 2012/2013

school year in regular education classes. Parents met with the District in October 2012 to discuss Parent concerns, classroom supports and accommodations for Student. (N.T. pp. 226—230; P-8)

21. In December 2012, Parent obtained a second independent evaluation by a certified school psychologist in training to become a neuropsychologist. The evaluator administered both the WIAT-III and the WJ-III NU (Normative Update). She obtained subtest standard scores that were, with one exception, within the average range (85—115), and were generally consistent with the 2010 private evaluation test scores, and with the District’s 2007 evaluation in terms of the range of scores. (N.T. pp. 31—33, 58; P-1, P-2 pp. 2, 3, P-7 p. 8, S-3 p. 5)⁴
22. Based upon Parent’s report and the conclusion of the neuropsychologist in 2010, the evaluator noted in her report that Student had a diagnosis and history of dyslexia, dysgraphia and dyscalculia. She did not review the District’s 2007 ER and, therefore, did not know of the error in transcribing the District’s 2007 achievement test results from which the history of dyslexia apparently arose. She concluded that despite average performance on standardized achievement tests, Student continued to exhibit unspecified “subtle phonological processing difficulties that are inherent in a diagnosis of dyslexia.” (N.T. pp. 42—44, 47, 48; P-2 p. 5)
23. The evaluator further concluded that although Student “appear[ed] to have made great gains through intervention up to this point, subtle weaknesses may continue to be present as [Student] develops into adulthood.” (P-2 p. 5)
24. The evaluator listed a number of adverse effects that “may” arise from such “subtle weaknesses” and made a number of recommendations for a Service Agreement based upon needs arising from dyslexia, including oral testing, untimed tests, reduced spelling requirements, minimal oral reading, reduced homework, opportunity to submit alternative assignments, reduced copying tasks, reduced foreign language requirement, textbooks and literature books provided on tape. (N.T. pp.; P-2 pp. 5, 6)
25. After reviewing the District’s 2007 test results for the first time during her testimony at the due process hearing, including the correct standard scores from the WJ-III that were not included in the neuropsychologist’s 2010 evaluation report, the independent school psychologist admitted that the District’s 2007 assessments revealed no evidence of a learning disability and provided no basis for the conclusion that Student had a history of dyslexia. The independent school psychologist was unable to determine a basis for the conclusion of the neuropsychologist, which she repeated in her report, that Student had a history of dyslexia. (N.T. pp. 53—55, 60—62 ; S-3 p. 5)

⁴ The actual standard scores the independent school psychologist obtained on the WJ-III in 6th grade were somewhat lower than those reported by the District in 1st grade on some subtests. Two of the 6th grade WIAT-III reading subtest scores were higher than those obtained by the independent neuropsychologist in 2010. The pseudoword decoding score dropped from 94 in 2010 to 83 in 2012, but still fell within the low average range. (N.T. p. 63; P-2 p. 2) The WIAT-III reading composite scores were virtually identical in 2010 and 2012. (P-2 p. 2, P-7 p. 8).

26. Parent's independent school psychologist also admitted that only one reading subtest score (Word Reading) from the WIAT-III administered by the neuropsychologist in 2010 was significantly discrepant (lower by more than 18 points) from Student's FSIQ, and that Student's subtest scores on other assessments that measured the same skills were in the average range and consistent with Student's FSIQ. (N.T. pp. 59, 60; P-7 p. 9)
27. The independent school psychologist found no basis for a learning disability diagnosis based upon an ability/achievement discrepancy in any standardized ability/achievement assessments, including her own testing. (N.T. pp. 61—67; P-2 pp. 2, 3, P-7 p. 8, S-2 p. 8, S-3 p. 5)
28. To support her conclusion that Student has dysphonetic dyslexia, characterized by poor phonological processing skills, the school psychologist relied upon the history of intervention, particularly the Wilson Reading Program Parent provided, as well as the phonological processing subtest of a language assessment that fell in the borderline range. (N.T. pp. 73—75; P-2 p. 4)
29. Without teacher input or a classroom observation, the evaluator could not conclude that the effects of the pattern she discerned that "may" affect Student's school performance actually has an adverse effect, that Student definitely needs the accommodations she recommended, or will need them in the future. (N.T. pp. 75, 76)
30. Also in December 2012, Parent obtained a report of assessments administered by a reading specialist who was to begin tutoring Student in reading. The assessments were done to determine Student's reading level prior to beginning instruction. (N.T. pp. 129, 131, 132; P-5, P-6)
31. The reading tutor concluded that Student's decoding skills are "fine," that Student has no difficulty with letter/sound relationships and needs no instruction in that area. She further reported that when reading aloud, Student can understand the main idea of a passage. She also noted that Student's fluency is "weak" and that details are lost as miscues increase. (N.T. p. 136, P-6 pp. 3, 4)
32. Based upon the results of Qualitative Reading Inventory (QRI) word list component, the reading specialist placed Student's instructional level at the 6th—7th grade level. Student was in the middle of 6th grade at the time of the assessment. (N.T. pp. 134, 135; P-6 pp. 2, 3)
33. Although the reading specialist placed Student at the 4th grade instructional level on the oral comprehension portion of QRI, the actual scores indicated that Student was independent at the 4th—5th grade level. A chart included in the report placed Student at the 4th-5th grade independent reading level, as well as instructional at the 4th grade level. The reading specialist acknowledged in testimony that according to the actual scores, Student's was independent at both the 4th and 5th grade reading levels, although Student actually performed better at the 5th grade level. (N.T. pp. 137—139; P-4 pp. 1—3)

34. The District school psychologist evaluated Student for the third time in March 2013, again at Parent’s request, to determine whether Student has a disability that substantially affects a major life activity, and, therefore, is a protected handicapped student, eligible for services under §504 and Chapter 15 of Pennsylvania’s education regulations. (N.T. pp. 378; S-1)
35. The school psychologist assessed Student on the WJ-III reading tests, on which all scores were again well within the average range and consistent with prior standardized achievement test results. (N.T. p. 391; S-1 p. 7)
36. The §504 evaluation also included review of Student’s report card grades at mid-year, teacher input, including behavior ratings, and classroom observations.⁵ (S-1 pp.4—7)
37. In preparing the March 2013 evaluation, the District school psychologist also considered the results of the independent evaluations that Parent had obtained and provided to the District. She concluded that neither the evaluation she conducted nor the results of the evaluations Parent provided support the conclusion that Student has a disability. (N.T. pp. 386—388, 391, 392; S-1 p. 1)
38. After the 2012/2013 school year ended, Parent obtained another independent assessment from a reading consultant who is a certified Orton-Gillingham instructor/trainer and former special education teacher. Student’s scores on the tests she gave generally fell into the lower end of the average range, and indicated that Student’s reading comprehension is at the 7th grade level, with word attack at approximately a mid-6th grade level and single word reading at approximately a 5th grade level. On the DIBELS fluency probe, Student read 125 words correct/minute, in the “low risk” range. (N.T. pp. 79—81, 88, 89—93, 97, 99, 103; P-3, P-4)
39. The evaluator concluded that Student has “deficits” in decoding, fluency and spelling and exhibits “subtle weaknesses in phonological processing,” but noted that Student demonstrated mastery of “basic phonetic analysis skills” and that although reading slowly, Student attends to and is able to extract meaning from what is read. The evaluator did not administer a phonological processing test. The evaluator’s conclusion that Student has reading deficits is based upon patterns she detected in the test results, as well as inconsistencies she found in Student’s test performance over the years that, based on her experience, she believes provide more information than the scores alone. In the evaluator’s opinion, Student’s profile “looks like someone who has had...remediation [for] dyslexia.” (N.T. pp. 93—103, 105; P-4 p. 3)
40. The recommendations for accommodations in the June 2013 report are the same as those in the December 2012 independent evaluation report. The recommendations are based, in

⁵ The District provided Parent input forms to both Parents. Parent testified that she did not recall receiving the form in connection with the §504 evaluation, but the District’s 2012 IDEA evaluation was completed just a few months earlier and included information from the input form Parent completed at that time. (N.T. pp. 314, 392, 393; S-2 p. 2)

part, on the evaluator's experience with middle and high school students with dyslexia. (N.T. pp. 104, 105; P-4 pp. 5—8)

41. Student's 6th grade report card grades in academic subjects were primarily in the "B" range throughout the school year. Student's final grades were B in language arts, social studies and reading, A- in math and B+ in science. No concerns were expressed by Student's science, language arts, math, social studies and reading teachers with respect to grade level reading, writing, subject matter comprehension, or any other aspect of Student's classroom performance. Student was placed in the 6th grade core reading class to which 6th grade students who are reading on grade level are assigned. The reading teacher considered Student an average reader at the 6th grade level. (N.T. pp. 203—210, 329, 330, 333, 334, 363—365, 369, 432—435, 437, 443—445, 454, 455, 460, 469, 471; S-4)
42. The District has a Response to Intervention (RTI) policy which includes offering Tier 1 interventions to all students at any time in all classes when additional academic assistance and support is needed to maintain adequate performance and assure understanding. The interventions include, in general, differentiated instruction, instructional, assessment and organization accommodations, extra help/tutoring provided at lunch and/or after school, student/parent attendance at team meetings, opportunities for parents to monitor progress and contact teachers. More specific Tier 1 interventions include advance notice of tests, alternative assessments, tests read aloud, extended time for tests, step by step instructions, adapted class work, adapted homework, preferential seating, chunking long-term assignments, extended time for class work/homework. Student sought or was provided several Tier 1 interventions throughout the school year, as were many other grade level peers. Tier 2 interventions were never recommended for Student. (N.T. pp. 336—341, 354—357, 359, 366, 369, 445, 469; S-5 pp. 1, 8)
43. One of the Tier 1 interventions available in all 6th grade classes, and encouraged but not required, is the use of "test correctives" on assessments, generally formative assessments, *i.e.*, quizzes and interim tests. When used by the teacher, students who demonstrate a lack of understanding or mastery, generally of a particular concept or skill that was tested, have the opportunity to access another of the Tier 1 interventions, re-teaching, and then re-take the quiz or test and have the higher score count toward the final grade. (N.T. pp. 325, 326, 342—346, 357, 358; S-5 p. 8)
44. The District's RTI and grading policies were implemented to assure that the focus of the teaching staff is on instruction and on assuring students' understanding of the material that is taught. (N.T. pp. 323—325)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

As noted above, the claims in this case were brought solely under the statute prohibiting disability-based discrimination, commonly referred to as “§504 of the Rehabilitation Act of 1973” or simply “§504,” found at 29 U.S.C. §794(a). §504 provides that,

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Notwithstanding language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009).

The protections of §504 are implemented by federal regulations found at 34 C.F.R. §§104.32—104.37. In addition, Pennsylvania has adopted regulations implementing §504 in the context of prohibiting discrimination on the basis of disability and providing educational services in the public schools, found in 22 Pa. Code §§15.1—15.11 (Chapter 15). As explained in §15.1:

- a) This chapter addresses a school district’s responsibility to comply with the requirements of Section 504 and its implementing regulations at 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance) and implements the statutory and regulatory requirements of Section 504.
- (b) Section 504 and its accompanying regulations protect otherwise qualified handicapped students who have physical, mental or health impairments from discrimination because of those impairments. The law and its regulations require

public educational agencies to ensure that these students have equal opportunity to participate in the school program and extracurricular activities to the maximum extent appropriate to the ability of the protected handicapped student in question. School districts are required to provide these students with the aids, services and accommodations that are designed to meet the educational needs of protected handicapped students as adequately as the needs of nonhandicapped students are met. These aids, services and accommodations may include, but are not limited to, special transportation, modified equipment, adjustments in the student's roster or the administration of needed medication. For purposes of the chapter, students protected by Section 504 are defined and identified as protected handicapped students.

Despite the congruence courts have found between IDEA and §504, however, it is important to keep in mind that the statutes differ in focus. The primary focus of §504 is to “level the playing field,” *i.e.*, to assure that an individual, specifically, a school-aged student in this context, is not disadvantaged in education based upon a disability. As stated in *Chavez v. Tularosa Municipal Schools*, 2008 WL 4816992 at *14, *15: (D.N.M. 2008):

“In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a student] receiving a FAPE somewhere (as was the case with the IDEA), but also that a federally funded program does not treat [the student] differently because [she is disabled]...

Unlike the IDEA, Section 504 does not only look at what is a FAPE, but also what is fair.” *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1281-82 n.22 (quoting C. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 Stan. L.Rev. 1563, 1589 (2006)).

Elements of a §504 Claim

To assert a successful §504 educational discrimination claim, a parent must prove four elements: 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

Pennsylvania law defines a §504/chapter 15 “protected handicapped student” as

A student who meets the following conditions:

- (i) Is of an age at which public education is offered in that school district.
- (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program.

Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under §15.10 (relating to discrimination claims).

Since the January, 2009 effective date of the ADA Amendments Act of 2008, which expanded the definitions of both “substantial impairment” and “major life activity” under §504, as well as the ADA, specific learning disability is explicitly included within the definition of a substantial impairment. Both reading and learning are explicitly included in the definition of major life activity. See 34 C.F.R. §104.3j(2)(i), (ii). See also, *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, found on the Office of Civil Rights (OCR) website.

Claims, Positions and Resolution

The dispute in this case centers on the fundamental, threshold question whether Student qualifies for a Service Agreement under Chapter 15, *i.e.*, whether Student is a “protected handicapped student,” specifically, whether Student has dyslexia, a learning disability that substantially impacts Student’s ability to read. The objective evidence in this case establishes without doubt that Student’s reading ability, as measured by standardized achievement assessments, is commensurate with Student’s consistently measured cognitive ability, and therefore, that Student does not have a learning disability in reading. (FF 6, 7, 9, 12, 13, 19, 25, 26, 27, 35) Moreover, viewed as a whole and objectively, curriculum-based assessments, as well as standardized tests given to Student by all evaluators, including tests administered by

Parent's expert witnesses, consistently found Student's reading ability to be within the average range and at grade level. (FF 7, 8, 13, 16, 17, 21, 26, 31, 32, 33, 35, 36, 38, 41)

As noted above, the focus of §504 and Chapter 15 is on equal access to educational services and assuring that students who have disabling conditions are not placed at a disadvantage in relation to same age and same-grade peers. Assuring a "level playing field" is access-oriented, not result-oriented—there can be no assurance of the educational/achievement results that devoted and loving parents wish for their children, or, indeed, of results that equal the achievement of peers. Parents have a right to expect only equal opportunity and must understand that even on a level playing field, not every child will be a star performer. The right to equal access also does not guarantee that all academic tasks will be easy. Most children, at times, struggle with some skills and concepts in some areas, but that does suggest that every temporary—or even permanent—weakness is an indication of disability.

The evidence in this case suggests several sources for Parent's belief that Student has a disability. First, Student's academic achievement and skills remained lower than peers at the same grade level in the private school. (FF 3) That, however, is not particularly surprising for a number of reasons, and does not support the claim that Student has a disability in reading.

As the District point out, because of the significant cost of private school tuition, the student population in private schools is generally more affluent. Private schools often have a curriculum that is more rigorous and/or that is covered more rapidly than in public schools. If any private school student is not able to successfully maintain the same pace and rigor as classmates, it is not surprising that he or she would receive the kind assistance Student received, in the form of the extra services the private school reading teacher described in her hearing testimony. (FF 3) Indeed, there would be little, if anything, to justify the cost of a secular

private school if both the curriculum and the level of assistance available to students mirrored the curriculum and services available in public school.

Moreover, the conclusion that the private school population is likely to be more affluent, typically, than a random sample of students at the same grade level has farther reaching implications in this case than in many others. At a time when most parents who can afford to send their children to private school were also very likely providing infant and pre-school enrichment activities, Student was living in an orphanage. After being adopted by Parents as a young child, Student needed intensive remediation to acquire the basic speech and language skills that most typical children, and particularly children from affluent families, develop naturally from the stimulation of a language-rich environment during infancy and early childhood. After spending at least the first two years of life, a critical period for mental and physical development, in such difficult circumstances, Student's average cognitive ability and average academic achievement in relation to a nationally normed sample of same-age peers is a remarkable indication of strength, not disability, as well as a testament to the devoted, loving care Student received and continues to receive from Parents.

The second source of Parent's belief that Student has a disability arose from the egregious error made by the independent neuropsychologist who evaluated Student in 2010, and is the only source of Student's purported "history of dyslexia." (FF 11, 14)

The independent school psychologist who testified on behalf of Parent and offered the opinion that Student should have a Service Agreement noted that in conducting a proper psycho-educational evaluation, a school psychologist reviews prior evaluations, looking for consistency in the pattern of prior test results. (N.T. p. 44) Nevertheless, she relied only on the neuropsychologist's 2010 evaluation report and did not review the January 2008 District report,

which would have revealed the very substantial error the independent neuropsychologist made in reporting percentile ranks associated with Student's standard scores as the achievement test standard scores that the District obtained when it evaluated Student. (FF 22) Consequently, prior to testifying at the due process hearing, Parent's witness entirely missed the indisputable fact that the District's 2007 standardized achievement test scores were consistent with the neuropsychologist's achievement test scores, and her own testing, as she admitted after being confronted with the error on cross examination. (FF 25)

The witness's failure to review the District's 2007 results clearly led to her unquestioning acceptance in her own evaluation report of the neuropsychologist's conclusion that Student had dyslexia, dyscalculia and dysgraphia. In her hearing testimony, however, Parent's independent school psychologist admitted that there was no objective support for a conclusion that Student has either a current learning disability or a history of dyslexia, based upon Student's ability as measured by the WISC-IV FSIQ scores, which were the same in both 2007 and 2010, and in the achievement test scores that remained consistent over a number of evaluations spanning more than five years. (FF 7, 11, 13, 15, 16—18, 21, 22, 26, 27, 31, 32, 35, 38)

Nevertheless, even after reviewing the actual standard scores obtained by the District in 2007, Parent's expert school psychologist persisted in the conclusion she reached in her 2012 report that Student has dyslexia, based upon the "great gains" Student made through intervention between 2007 and 2010. (N.T. p. 69, FF) The apparent "gains" she identified, however, were based upon the clearly erroneous information reported in the 2010 neuropsychological report, *i.e.*, the comparison between Student's purported but inaccurately reported achievement test standard scores in 2007 and the achievement test standard scores obtained in 2010. In fact,

Student's performance on all of the assessments between 2007 and 2012 was very much the same overall.

Information from the private school concerning Student's classroom academic performance was also consistent with the standardized test results and with steadily average achievement, albeit below peers in the private school. The private school reported no significant difficulties in 1st grade, and reported no "great gains" from the consistent, intensive reading instruction it provided. Rather, the school reported in 1st grade that Student's reading and writing skills were strong, and the anecdotal reports were supported by the beginning of 1st grade reading assessments reported in the District's 2007 ER.⁶ (FF 8; S-3)

Parent also presented the testimony and assessment results of Student's current reading tutor, who is a certified reading specialist. Despite objective test scores indicating that Student was instructional on grade level when assessed in December 2012, in accordance with the tutor's general explanation of the meaning of scores obtained on the assessments she gave, the tutor concluded that Student was two years below grade level in reading. (FF 33) In testimony, however, the reading specialist could not clearly explain the basis for her conclusion. The actual test results indicate that Student was instructional at the 5th grade reading level, at least, on assessments given in the middle of 6th grade. The testimony of the Student's reading teacher, also qualified as an expert, that a child with a 5th grade independent reading level would logically be instructional at a 6th grade level—Student's grade level at the time of the testing, makes much more sense.

⁶ If the independent neuropsychologist reviewed the District's entire 2007 evaluation, it is quite surprising that she did not detect the egregious error she made in reporting the achievement test percentile rankings as standard scores before issuing the report. It is difficult to understand how a careful and objective professional could review the results of the private school's assessments and teacher comments that placed Student at or above grade level in reading skills and not double-check the standardized achievement test scores that she described in her report as scores that would be expected of a child in the "impaired" range of functioning. *See* P-7 p. 9.

In general, it was very obvious that Parent's witnesses attempted to "cherry-pick" the test results to support the conclusion that Student has dyslexia, despite no objective indication that the disability ever existed. Both the independent school psychologist and the reading consultant who tested Student after the end of the last school year clearly relied on the error in the 2010 report indicating that Student was, at one time, quite deficient in reading skills. Most of Parent's expert opinions and conclusions depend on the notion that Student made "great strides" in reading through intensive remediation between 2007 and 2010. The purportedly enormous improvement, however, was based only upon the score transposition error in the 2010 private neuropsychological evaluation, and did not actually occur.

The expert opinions of the witnesses who testified on behalf of Parent, therefore, are entitled to no weight with respect to the lingering, residual, "subtle" effects of the purportedly remediated disability, since there is no objective, accurate evidence suggesting that any reading deficit ever existed. The impression that the testimony of the Orton-Gillingham reading instructor and the independent school psychologist, in particular, created was that because they believed in the accuracy of the erroneous 2010 report, they needed to find an explanation for Student's consistently overall average scores on every assessment since then, and found it in what appeared to be the overwhelming success of the remedial services Student received over the years. In addition, their belief in the existence of a very significant learning disability in 1st grade, despite Student's subsequent test performance, led them to detect the "subtle" issues they divined by, in essence, parsing out, closely scrutinizing and ascribing great significance to a few relatively lower subtest scores in the many assessments that were administered to Student between 2007 and 2013.

Moreover, and most notably, neither of the witnesses who testified that Student should be eligible for and receive a Service Agreement testified that Student was actually showing any effects of the purported reading disability. Rather, they testified in terms of the effects that “may” occur. (FF 24; P-4)

In the absence of reliable, objective evidence that Student now has, or ever had, a disability that substantially affects reading or any other aspect of learning, it is apparent that the District was entirely correct in concluding that Student is not a protected handicapped student. In addition, since Student’s academic achievement during the last school year was generally above average with no greater assistance than the District offers to all students who demonstrate a need for repetition, re-teaching or general education accommodations, the District need take no further action with respect to a potential disability unless there is a significant change of circumstances. (FF 41, 42) Based on the record of this case, there is no reason to believe that the District will not be alert to any such changes and diligent in addressing any issues that might arise with Student.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the claims of Parent are **DENIED**. The School District need take no action, at present, to provide Student with a Service Agreement under §504 of the Rehabilitation Act of 1973 and 22 Pa. Code Chapter 15, as there is no reliable, objective evidence indicating that Student has an impairment that substantially limits a major life activity, including learning in general and reading specifically.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

September 15, 2013