

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: G. L.

ODR #14626/13-14 AS

Date of Birth:
[redacted]

Dates of Hearing:
March 11, 2014
April 22, 2014
April 28, 2014
June 10, 2014

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Council Rock School District
The Chancellor Center
30 North Chancellor Street
Newtown, PA 18940

Date Record Closed :

Date of Decision:

Hearing Officer:

Representative:
Michael Connolly, Esquire
Connolly, Jacobson and John
99 Lantern Drive Suite 202
Doylestown, PA 18901

Joanne Sommer, Esquire
Eastburn and Gray
60 East Court Street
Doylestown, PA 18901

July 1, 2014

July 11, 2014

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

Background

Student¹ is an elementary school aged child who resides with the Parents in the Council Rock School District. The Parents requested this hearing because they disagree with the District's finding that Student is ineligible for special education under the Individuals with Disabilities Education Act [IDEA] as a child with a disability requiring specially designed instruction or for a Section 504 Plan as a child with a disability needing accommodations.

Issues

Is Student a child with a disability and in need of specially designed instruction under the IDEA and/or a disability and in need of accommodations under Section 504?

If Student is a child with a disability, has the District failed to timely identify Student as such and failed to offer an IEP or a Section 504 accommodation plan?

If Student is a child with a disability and the District failed to timely offer an IEP or a Section 504 accommodation plan, is Student entitled to compensatory education, and if so, of what type and in what amount?

Stipulations

Student is a resident of the School District.

Student was in 4th grade for the 2013-2014 school year.

Student's date of birth is [redacted].

Findings of Fact

1st Grade – 2010-2011 -The Catapult Evaluation

1. Prior to enrolling in the District, Student attended a local parochial school. Because Student was having academic difficulty in reading, Student's 1st grade teacher referred Student for an evaluation [hereinafter Catapult Evaluation]. A cognitive screening was done in March 2011; a full evaluation was done in early April 2011 by a Certified School Psychologist working for Catapult Learning, an agency providing such services to the parochial school. [NT 34-35; P/J-1, P/J-7]²

¹ This decision is written without further reference to the Child's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² The parties have a mutual understanding that the Parents' exhibits are Joint exhibits, but since they were physically pre-marked as "P" they remained marked and referenced as such for ease of identification. Counsel are commended for their cooperation in this regard as it allowed for a streamlined record. I have

2. Student was administered the Kaufman Brief Intelligence Test, Second Edition [K-BIT 2]. Student received a Verbal Standard Score of 118 at the 88th percentile, a Nonverbal Standard Score of 102 at the 55th percentile and a Composite Standard Score of 112 at the 79th percentile.³ [P/J-7]
3. Student was administered the Wechsler Intelligence Scales for Children, Fourth Edition [WISC-IV], a measure of cognitive ability. Student received an Average Verbal Comprehension score [Index score 96] and an Average Perceptual Reasoning score [Index score 92], a Low Average Working Memory score [Index score 80] and a Borderline Processing Speed score [Index score 75]. Combined, these scores resulted in a Full Scale IQ score of 84 and a General Ability Index score of 94⁴. [P/J-1]
4. The evaluator cautioned that due to the scatter among the Index scores, Student's Full Scale IQ score may not be the best estimate of Student's ability. The evaluator noted that Student's General Ability Index score, which is another way to view Student's overall ability, was in the Average range, better than 34% of Student's test-taking peers. [NT 135-136; P/J-1]
5. Academic achievement was assessed with the Kaufman Test of Educational Achievement, Second Edition [K-TEA II]. Student received Standard Scores as follows: Letter and Word Recognition 90, 25th percentile; Reading Comprehension 87, 19th percentile; Nonsense Word Decoding 93, 32nd percentile; Math Concepts and Applications 91, 27th percentile; Math Computation 100, 50th percentile, and Spelling 101, 53rd percentile. [P/J-7]
6. Student's reading skills as assessed by the Woodcock-Johnson Tests of Achievement, Third Edition [WJ-III] were in the Average range for Letter-Word Identification [SS 95] and Word Attack [SS 99] and in the Below Average range for Passage Comprehension [SS 84]. Student's scores were in the Average range for Math Calculation [SS 99] and Writing Samples [SS 98], but in the Below Average range for Applied Math Problems [SS 81]. [P/J-1]
7. Student's Instructional word-reading level as assessed by the Qualitative Reading Inventory, Fourth Edition [QRI-4] was at the Pre-primer level, where Student could correctly read 80% of the words on the list. Student's Frustrational word-

referenced these exhibits as "P/J" throughout. [NT 37-38] However, there are a few exhibits marked "P" to which the District objects; these exhibits, if admitted, will be referenced as "P".

³ Qualitative descriptions of standard scores are generally as follows: 69 and below Extremely Low or Intellectually Deficient, 70-79 Borderline, 80-89 Low Average, 90-109 Average, 110-119 High Average, 120-129 Superior, 130 and above Very Superior. [HO-2]

⁴ The General Ability Index is a score composed of subtests from the Verbal Comprehension Index and from the Perceptual Reasoning Index of the WISC-IV, taking out the Working Memory Index and the Processing Speed Index.

- reading level was at the Primer level where Student could read 50% of the words on the list. [P/J-1]
8. With regard to reading comprehension, the Catapult evaluator noted that while Student had “great difficulty” reading a QRI-4 passage at the Primer level, when the passage was read to Student, Student was able to correctly answer all the questions asked, reflecting that Student’s Listening Comprehension was Independent at the Primer level. [P/J-1]
 9. The Catapult evaluator provided recommendations for intervention in the school setting: small group reading remediation, frequent opportunities to practice new skills, use of visual materials and demonstrations, use of a multi-sensory approach to instruction, encourage Student to use a finger to mark the place when reading, presenting smaller blocks of reading materials, when reading aloud provide any word Student cannot read in 5 seconds, avoid teaching new words when reading, give praise for effort, and provide daily review of skills, concepts and tasks. [P/J-1]
 10. The Catapult evaluator also recommended that the Parents obtain outside tutoring for Student. [P/J-1]
 11. The Catapult evaluator recommended that if Student continued to experience difficulty after the interventions had been put into place, Student should be reevaluated to determine the need for a “Curriculum Modification Plan” as a Learning Disabled student. [P/J-1]

2nd Grade – 2011-2012 - Entry into the District

12. Student enrolled in the District for 2nd grade, the 2011-2012 school year. The Parents noted “Reading tutoring 1x week” on the Registration form. The Parents shared a copy of the Catapult Evaluation with the District, and expressed their concerns to the District over Student’s difficulties in school. [NT 34, 40-41; P/J-2]
13. At the time Student entered the District, Student was already behind grade level peers in reading. The District took no steps to initiate an evaluation of its own, and Student began 2nd grade as a regular education student without any supports. However, due to reading below the benchmark, difficulties in writing and poor classroom performance, by mid-year the classroom teacher referred Student to the Instructional Support Team [IST] and interventions were developed to help bolster Student’s writing skills and bolster independent reading skills. [NT 41-43, 196-197, 273; P/J-3, P/J-7]
14. At the time of the IST referral, Student was already receiving remedial reading sessions with the Literacy Specialist, small group and one to one classroom guided reading three times a week, preferential seating, multimodal instruction, assistance from a STAR student⁵ and other interventions. [NT 651; P/J-3]

⁵ A Star Student is a high school student who comes to class to read with elementary students. [NT 215]

15. At the time of the IST referral Student was performing approximately six months below grade level peers in reading. Student's skill level was rated "Basic", below the proficient level. [NT 104, 657-660, 662-663]
16. The Instructional Support teacher who holds a Master's Degree and is certified as a regular education and special education teacher observed Student in the LLI group setting [2 children] with the Literacy Specialist on January 5, 2012. Student read each sentence word by word but was able to self-correct errors with prompts and independently with wait time. [NT 645-647; P/J-3]
17. A Data Summary regarding written expression noted that Student could not always read back what Student had written. Writings were of limited content but spelling was mostly conventional. [P/J-3]
18. A Data Summary regarding math noted that Student was stronger in math than reading, but did not have automaticity of basic facts and relied upon finger counting. [P/J-3]
19. The Data Summary noted that Student "loses focus frequently". [P/J-3]
20. An Instructional Support Intervention Plan was developed on January 18, 2012. Meeting participants were Student's mother, the 2nd grade classroom teacher, the Literacy Specialist, and the Instructional Support teacher. [P/J-3]
21. The Goals to be met in 30 days were 1) Student to write at least 8 sentences with three details to support a paragraph; and 2) Student will increase independent DRA Level 14 [near to the end of first grade level] to a DRA Level 18 [the beginning of second grade level]. [P/J-3, HO-1]
22. The school-based Interventions/Strategies decided upon were:
 - a. LLI remedial small group [4 children] reading sessions with Literacy Specialist, 5 times a week for 30 minutes each session. The instruction was given through the Fountas and Pinnell reading program, which is systematic and uses multi-sensory teaching;
 - b. Small one-to-one classroom guided reading sessions with the classroom teacher 3 times a week;
 - c. Preferential seating in the classroom;
 - d. Encouragement to answer basic who, what, why, when, where and feelings statement questions while working to extend Weekend News;
 - e. Re-reading books with a STAR Student [high school student] once a week;
 - f. Classroom teacher to read tests aloud when necessary;
 - g. Provision of a library of leveled books. [NT 198-200, 217-219, 228-237, 241-242; P/J-3]

23. A Progress Review Meeting was held on February 28, 2013. The report noted that Student had increased from Level 14 in January to Level 18⁶ by the time of the Review Meeting. The Literacy Specialist noted that “Student has strong grammar skills and knows syllabication rules, but has a difficult time applying these same skills in a timely way to help fluency. Word attack needs to become more automatic so that meaning does not get lost.” [NT 44, 221-222, 661-664; P/J-3]
24. For the Progress Review Report the classroom teacher noted that Student was better using context than decoding while reading, needed extra time to process information and read very slowly, and needed prompts to focus on reading and writing tasks as they were not preferred activities. Student had met the goal of writing at least 8 sentences with three details to support a paragraph. [P/J-3]
25. Student had been in the IST process for over one year but the District did not initiate an evaluation. The conclusion of the Progress Meeting was that “with LLI reading instruction 5x per week and classroom guided reading instruction 3x week, [Student] is making progress in the regular second grade. We will continue to monitor [Student’s] progress for the first half of third grade and share this plan with [Student’s] third grade teacher”. [NT 228-229. 663-664; P/J-3]
26. By the end of 2nd grade, Student was at DRA reading Level 18 which is the beginning of second grade, reflecting that Student was no longer 6 months delayed, but closer to eight or nine months delayed. [P/J-3, HO-1]
27. Student received summer tutoring at the Parents’ expense with a Wilson instructor. [NT 46-47; P/J-3]

Third Grade – 2012-2013

28. Student remained in the Instructional Support program in 3rd grade. [P/J-3]
29. A Progress Review Meeting was held on October 12, 2012. Participants were Student’s father and mother, the 3rd grade classroom teacher, the Literacy Specialist and the Instructional Support teacher. [NT 664-668; P/J-3]
30. As of October 12, 2012, six weeks into 3rd grade and after 6 ½ instructional months in IST, Student’s DRA was a Level 16 [end of first grade], indicating that Student had regressed from Level 18 [beginning of second grade] which had been achieved as of February 27, 2012, now placing Student over one full year below grade level.⁷ Student was also beginning to show difficulties in math. [NT 237-242, 664-665; P/J-3, HO-1]

⁶ Levels are in even numbers, i.e. 10-12-14-16-18, so an increase from 14 to 18 is an increase of two levels.

⁷ The District’s IST teacher noted that sometimes this (regression) "happens over the summer". [NT 665] However the parents had privately obtained Wilson tutoring for student over the summer. [P/J-3]

31. The District again did not initiate an evaluation. The IST Goals developed to be met in approximately 6 weeks were 1) Student will increase independent DRA Level 16 [the end of first grade, beginning of second grade] to a DRA Level 22 [middle of second grade]; 2) Student to use math tools to complete math problems with accuracy. [NT 237-242; P/J-3, HO-1]
32. On the Instructional Support plan, as of October 12, 2012 the remedial reading sessions with the literacy specialist were dropped from 5 times a week to 3 times a week⁸, and the frequency of small one-to-one classroom guided reading sessions with the classroom teacher was not specified. Extra individual reading reinforcement 1-2x per week from the Instructional Support teacher was added. Preferential seating, offer of leveled books, and reading tests aloud when necessary remained. Using a STAR student or a volunteer to read with Student once per week was listed as “explore” on this version of the plan. [P/J-3]
33. The Instructional Support team again decided to continue IST and reconvene in about 6 weeks. [P/J-3]
34. Upon reconvening on November 27, 2012 the Instructional Support Progress Review noted the same goals [increase DRA from 16 to 22, use math tools]. The Progress Report noted that as of the end of the first three months of 3rd grade, Student had increased DRA reading level from 16 to 18 [beginning second grade level], but did not reach the goal level 22; reaching 18 was recouping skills Student had mastered as of the end of February 2012, six-and-a half instructional months previously. Student was now approximately one year below grade level. [NT 111, 243-244, 668-669; P/J-3, HO-1]
35. The Literacy Specialist noted that Student could successfully answer comprehension questions at DRA Level 18. She continued to report that Student’s fluency was weak, in that Student had trouble with easy sight words and made many substitutions to try to gain meaning. However, Student was making closer approximations to the actual words being read. [243-245; P/J-3]
36. The classroom teacher noted that Student “is receiving a very high level of classroom support to be successful”. The Parents requested a multidisciplinary evaluation and the team was in agreement. [P/J-3]
37. In the approximately two months between the November 27, 2012 Instructional Support meeting and the anticipated evaluation completion, Student was to continue to receive sessions with the Literacy Specialist but only twice a week, one session per week with the Instructional Support teacher using the Write In Reader, and an unspecified number of small individual [sic] classroom guided reading groups with the third grade teacher. After November 27, 2012 there were no further IST Progress Reports since Student was in the evaluation phase. [P/J-3]

⁸ There was an error on P/J-3 page 10.

District Evaluation

38. The District issued a Permission to Evaluate [PTE] on December 5, 2012 and received the signed PTE from the Parents on December 10, 2012. [P/J-5]
39. On the Parent Evaluation/Reevaluation Input form, which the Parents submitted with the signed PTE, they wrote: “We are requesting an Auditory Evaluation of [Student] as part of [Student’s] initial evaluation”. The District psychologist did not seek any further information from the Parents, and the only Parent input to the District’s evaluation was quoting their request for an Auditory Evaluation. [P/J-6, P/J-7]
40. The District’s evaluation was completed approximately two years after the screening and evaluation results were obtained at the parochial school – near the end of 1st grade to past the middle of 3rd grade. [P/J-1, P/J-7]
41. Student’s cognitive ability was assessed through the Wechsler Intelligence Scales for Children, Fourth Edition [WISC-IV]. Student received a Verbal Comprehension Index score of 87 at the 19th percentile [Low Average range], a Perceptual Reasoning Index score of 84 at the 14th percentile [Low Average range], a Working Memory Index score of 77 at the 6th percentile [Borderline range] and a Processing Speed Index score of 80 at the 9th percentile [Low Average Range]. Student’s Full Scale score, a composite of the Index scores, was 78 at the 7th percentile [Borderline range].⁹ [P/J-7]
42. The District psychologist did not choose to report the Student’s General Ability Index [GAI] for the WISC-IV. The GAI is “a composite score that is based on 3 Verbal Comprehension and 3 Perceptual Reasoning subtests, and does not include the Working Memory or Processing Speed subtests included in the Full Scale IQ”. [NT 963-966; P/J-7, HO-3:WISC-IV Technical Report #4, Updated December 2008]
43. A Technical Report issued by the publisher of the WISC-IV notes that, “For children with neuropsychological issues such as learning disorders, Attention Deficit / Hyperactivity Disorder and other similar issues, difficulties with working memory and processing speed may result in lower FS IQ [Full Scale IQ] scores”. [HO-3]
44. The WISC-IV developers noted that such a reduction in IQ score may decrease the real magnitude of the child’s ability-achievement discrepancy and make them

⁹ Standard scores and scaled scores are on the bell-shaped curve with 100 being the mean [average] for Standard scores and 10 being the mean for scaled scores. Student’s WISC-IV subtest scaled scores are as follows: Similarities 9 at the 37th percentile, Vocabulary 7 at the 16th percentile, Comprehension 7 at the 16th percentile, Block Design 9 at the 37th percentile, Picture Concepts 8 at the 25th percentile, Matrix Reasoning 5 at the 5th percentile, Digit Span 7 at the 16th percentile, Letter-Number Reasoning 5 at the 5th percentile, Coding 6 at the 9th percentile and Symbol Search 7 at the 16th percentile. [P/J-7]

less likely to be found eligible for special education. In fact, a lower IQ than GAI occurs in approximately 70% of children with such neuropsychological issues. [HO-3]

45. The Technical Report from the WISC-IV publisher further notes, “The GAI can be used as a substitute for the FSIQ to determine eligibility for special education services and placement classification. The GAI increases flexibility in this respect because it is sensitive to cases in which working memory performance is discrepant from verbal comprehension performance and /or processing speed is discrepant from perceptual reasoning performance at an unusual level. It can also be compared to the FSIQ to assess the effects of working memory and processing speed on the expression of cognitive ability.”¹⁰ [HO-3]
46. The District psychologist also administered the Woodcock-Johnson Tests of Cognitive Abilities NU [WJ-III: Cog NU]. Student’s Verbal Ability standard score was 87 at the 20th percentile [Low Average range], Thinking Ability was 87 at the 20th percentile [Low Average range], Cognitive Efficiency was 72 at the 3rd percentile [Low range] and Auditory Processing was 116 at the 85th percentile [High Average range]. Student’s General Intellectual Ability standard score was 78 at the 7th percentile [Low range].¹¹ The WJ-III does not include a score adjustment similar to the GAI. [P/J-7]
47. Student’s academic achievement was assessed using the Wechsler Individual Achievement Test, Third Edition [WIAT-III]. Student’s Standard Scores were as follows: Total Reading Composite 72 at the 3rd percentile [Below Average range], Mathematics Composite 89 at the 23rd percentile [Average Range], Written Expression Composite 79 at the 8th percentile [Below Average range], Oral Language Composite 81 at the 10th percentile [Below Average range].¹² [P/J-7]

¹⁰ The WISC-IV publisher’s Technical Report gives some situations for which a psychologist may wish to consider using the GAI, and notes that the situations are “not limited to but include[e]” the examples given. [HO-3]

¹¹ Student’s WJ-III: Cog NU subtest standard scores are as follows: Verbal Comprehension 87 at the 20th percentile, Visual-Auditory Learning 81 at the 10th percentile, Spatial Relations 92 at the 29th percentile, Sound Blending 108 at the 70th percentile, Concept Formation 82 at the 11th percentile, Visual Matching 76 at the 5th percentile, Numbers Reversed 75 at the 5th percentile, and Auditory Attention 118 at the 88th percentile.

¹² Student’s WIAT-III subtest standard scores were as follows: Basic Reading Skills, 70, 2nd percentile, below average; Word Reading, 71, 3rd percentile, below average; Pseudoword Decoding 69, 2nd percentile, low; Reading Comprehension 78, 7th percentile, below average; Oral Reading Fluency 78, 7th percentile, below average; Oral Reading Accuracy 75, 5th percentile, below average; Oral Reading Rate 80, 9th percentile, below average; Numerical Operations 97, 42nd percentile, average; Mathematical Problem-Solving 83, 13th percentile, below average; Math Fluency 76, 5th percentile, below average; Math Fluency Addition 70, 2nd percentile, below average; Math Fluency subtraction 74, 4th percentile, below average; Math Fluency Multiplication 88, 21st percentile, average; Sentence Composition 89, 23rd percentile, average; Sentence Combining 108, 70th percentile, average; Sentence Building 73, 4th percentile, below average; Essay Composition 74, 4th percentile, below average; Word Count 80, 9th percentile, below average; Theme Development/Organization 73, 4th percentile, below average; Spelling 84, 14th percentile, below average; Listening Comprehension 88, 21st percentile, average; Receptive Vocabulary 86, 18th percentile, average; Oral Discourse Comprehension 94, 34th percentile, average; Oral

48. The District's evaluation did not include any academic input from the Literacy Specialist, nor did it include academic information from the Instructional Support teacher, both of whom had worked with Student for 2nd and 3rd grades. [PJ-7]
49. The District's evaluation included the Clinical Evaluation of Language Fundamentals - Fourth Edition [CELF-4). Student's standard scores were as follows: Core Language 85, low average; Receptive Language 76, borderline; Expressive Language 99, average; Language Content 82, low average; Language Memory 84, low average. The scores of the subtests administered were: Concepts and Following Directions 3, below average; Recalling Sentences 8, average; Formulated Sentences 11, average; Word Classes Receptive 8, average; Word Classes Expressive 11, average; Word Classes Total 8, average; Expressive Vocabulary 10, average; Understanding Spoken Paragraphs 3, below average. [P/J-7]
50. The speech/language pathologist concluded, "These [test results] are strengths in [Student's] overall cognitive ability" and that Student did not qualify for speech and language support at that time. [NT 798-800; P/J-7]
51. The speech/language pathologist testified that in children with lower IQs the expectation is that they would have better receptive language than expressive language. Student's CELF results were the exact opposite with a 20 point spread between expressive language and receptive language in favor of the former. [NT 798-800; P/J-1]
52. The District's evaluation included a behavioral assessment inventory, the Behavior Assessment System for Children- Second Edition [BASC-2]. On this survey Student's Adaptive Skills as rated by the 3rd grade teacher were as follows: Adaptability - average, Social Skills -average, Leadership - average, Study Skills - average.¹³ [P/J-7]
53. The District psychologist concluded that based upon Student's Full-Scale IQ score on the Wechsler cognitive test, and upon Student's academic scores on the Wechsler achievement test, there was not a severe discrepancy between ability and achievement. She concluded that Student was of borderline intelligence and that academic achievement matched intelligence. Accordingly the District psychologist found that Student did not have a learning disability or any other

Expression 79, 8th percentile, below average; Expressive Vocabulary 80, 9th percentile, below average; Oral word fluency 86, 18th percentile, average; Sentence Repetition 83, 13th percentile, below average. [p/j-7]

¹³ Individuals with borderline or intellectually deficient intelligence also typically have commensurately low adaptive behavior skills. To be identified as a child with an intellectual disability there must be deficits in adaptive behaviors.. 34 C.F.R. §300.8(c)(6); *See also*, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5").

- disability, was not eligible for special education, and was properly placed in regular education. [P/J-7]
54. Following its evaluation the District issued a Notice of Recommended Educational Placement [NOREP] indicating its refusal to change the identification of the child. The NOREP noted "Your child is not in need of special education and should continue in his/her present regular education program." [P/J-8]
55. The evaluation team participants reviewing the District's evaluation report were the Parents and the school psychologist. Neither the Literacy Specialist nor the Instructional Support teacher nor the 2nd nor 3rd grade regular education teacher was present at the evaluation team meeting. The Parents signed their disagreement with the results of the evaluation. The Parents disagreed with the District's conclusions in light of their child's previous testing results by Catapult suggesting overall average ability levels, Student's average performance in portions of assessments given by the District as part of its evaluation, and their own experiences with Student. They noted in writing that they were pursuing independent evaluations. [NT 48-53; P/J-8]

4th Grade – 2013-2014 School Year

56. The Parents obtained an independent psychological evaluation in June 2013. Although the results found Student to be functioning in the average range of cognitive ability and were consistent with the Catapult Evaluation, irregularities in test administration and scoring were such that the results could not be deemed to be reliable for purposes of this inquiry. [NT 54; P/J-10]
57. The private reading tutor who had worked with Student since June 2012 [end of 2nd grade] believed Student had an auditory processing disorder. [NT 46-47]
58. Student received an auditory processing assessment through the Robert Wood Johnson Health System on September 6, 2013. The audiologist, one of four recommended to the Parents by the Children's Hospital of Philadelphia, concluded that student demonstrated an auditory processing disorder of a moderate to severe degree - impaired auditory discrimination. The audiologist noted Student showed deficits in the areas of short-term auditory memory, auditory decoding, binaural separation, auditory closure, and phonemic synthesis. [P/J-11]
59. Speech and language pathologists do not consider central auditory processing deficits as a disorder but rather a "difference" because unlike an audiologist who assesses receptive language in a sound proof booth, the speech and language professional assesses how a student understands language in a classroom or school setting. [NT 787-788]
60. The District's speech/language pathologist administered testing and observed Student in the classroom to see if the issues seen in the formal audiology testing were also seen in the classroom. [NT 788]

61. An auditory processing disorder can be comorbid with or mimic the same characteristics in the learning environment as a learning disability, an attention deficit disorder or other academic problems [NT 624, 631-632]
62. On September 19, 2013 student received a vision processing examination by an optometrist who is board-certified in vision therapy and is exceptionally qualified and prominent in his field. Visual processing is the brain's ability to process visual information, the information seen with the eyes. When visual processing is impaired the ability to understand visual information, such as the words on a page, becomes compromised. As such, visual processing disorders can adversely impact a child's educational performance significantly, particularly in the area of reading. [NT 850-852, 876-880]
63. The evaluator found that Student has significant problems in the areas of eye tracking, explaining that inadequate eye movement control may cause Student to lose Student's place when reading, have difficulty copying from the blackboard, and skip or omit small words when reading. In addition the evaluator found that student also has difficulty processing and analyzing incoming visual data. Student scored significantly low in several areas of visual processing and visual motor integration and these deficits are also likely to be factors interfering with Student's school performance. [NT 860-876; P/J-13]
64. On October 1, 2013 the Parents and district representatives met. At this meeting a summary of the supports student was receiving in the regular education program was provided to the Parents. In all subjects Student received small group instruction, frequent teacher check-ins, positive feedback and praise, mnemonic devices, preferential seating, tests read aloud when necessary, extra time, provision of notes when needed, directions restated, and pairing visual with verbal directions. In language arts student received one-on-one writing conferences, small guided reading group 3 times per week, and reading sessions with Literacy Specialist at least two times per week. In math student received math club referral, and small group re-teaching. [P/J – 14)
65. The Parents provided the district with copies of all three private evaluations in October 2013, and in response on October 2, 2013 the District issued a Permission to Evaluate, seeking to conduct a review of records, a behavioral assessment, a speech and language evaluation, an occupational therapy evaluation, and a review of private evaluations. The Parents consented to these evaluations. Specifically the parents noted that they gave permission for a functional behavioral assessment by a behavioral psychologist, an occupational therapy evaluation as recommended by the private audiologist, and a speech and language reevaluation based upon the discrepancy between receptive language and expressive language found in the original speech language evaluation. [P/J – 15]

66. Parental written input to the reevaluation was that student has difficulties with reading which carries over into Student's other school subjects and Student has difficulties with comprehension which carries over into Student's other school subjects. [P/J-16]
67. Student's teachers provided the following information for purposes of the reevaluation: weaknesses were seen in reading fluency and comprehension, math computation and problem solving, and task completion within a given time frame. In addition to the list of supportive services shared with Parents on October 1, 2013 teachers also listed use of graphic organizers for writing. It was noted that student had Math Club with the Math Specialist twice a week for 30 minutes each session. [P/J – 16]
68. The District issued its reevaluation report on or about November 20, 2013, which consisted of a review of the private evaluations, classroom observation, teacher input which continued to demonstrate Student's significant academic difficulties in school particularly in the area of reading, occupational therapy and speech/language evaluations, and the completion of ADHD checklists. (NT 59, 62; P/J-15, P/J18]
69. Under direct systematic observation using the BOSS to assess passive and active attention Student's attention and focus were similar or better than classroom peers. [NT 1021-1028; P/J-18]
70. None of the 4th grade teachers reported Student having any difficulty with attention. To the contrary, they all reported that Student was a role model for other students because of Student's strong organizational skills, work ethic and focus. [NT 1008]
71. Although the District agreed that Student had difficulty in school¹⁴ and required supports¹⁵, the District again failed to identify Student as eligible for special education services, continuing to rely upon the original results of a statistical discrepancy analysis to interpret Student's struggles at school as commensurate with purported low intelligence levels. [P/J-18]

¹⁴ Student continues to have academic difficulty. As Parents noted in their written closing argument, as of February 2014 in the area of reading, Student obtained a Lexile score of 4, which places Student in the beginning reader range at a first grade level whereas the benchmark Lexile score for a 4th grader in February of a school year is 792. [NT 347-353; P-30]. Student's DRA level was an O, at least a year below grade level. [NT 266-268; P-22, P-23] Report cards and other classroom-based assessments also show continuing difficulties in reading, and certain areas of math and written expression. [NT 251-265; 338-347; P-23, P-24, P-29, P-30]

¹⁵ The District notes in its November 19, 2013 evaluation "[although]...[Student] evidences academic difficulty within the classroom [Student] does not meet the first prong required for eligibility [the presence of a disability], and thus is not eligible for special education." [P-18]

Classroom Functioning:

72. Student's 3rd and 4th grade teachers viewed Student as always eager to learn and receptive to individualized instruction and reinforcement of skills. They noted that Student required intensive differentiated instruction in classes. [NT 279-280, 294-295, 673, 669-671]
73. Student's 3rd and 4th grade teachers described a child who was able to master the majority of the concepts of the curriculum, to the same extent as the other students. [NT 358-359]
74. The 4th grade teacher testified that Student was able to master those 4th grade concepts despite the fact that the academic demands and requirements increase significantly in 4th grade. [NT 369-371]
75. On report cards, Student meets or exceeds all expectations for science, social studies, art, music, library, and physical education. [P/J-24]
76. Since enrollment in the District Student did not receive any modifications to the curriculum, instructional presentation or instructional materials in science, social studies, art, music, library, or physical education. With regard to assessments, in science and social studies Student received the same tests as peers, but tests were read orally and done in a small group setting with extra time for completion. [NT 771-776; P/J-24, P/J-26]
77. On report cards Student met expectations in 8 of the 11 skill areas in writing during 3rd grade and met expectations in 8 of 10 skill areas in writing during 4th grade. [P/J-24]
78. In writing, Student received no testing accommodations, but was provided with materials explained in detail, additional time to complete assignments, individual assistance provided at times, and material presented at a different pace. [NT 771-776; P/J-24, P/J-26]
79. In math on report cards the only area in which Student does not meet expectations is problem solving. [P/J-24]
80. In reading on report cards Student fails to meet expectations in nearly all areas. [P/J-24]
81. The District's speech/language pathologist observed Student to be an engaged learner following the teacher's directions and capably listening to more than one learning partner in small group activities. [NT 793]
82. Student is well liked by peers, socially appropriate and very organized. Student self-advocates when not understanding directions or information. [NT 362]

83. As of spring in 4th grade Student was still performing below grade level peers in reading and writing but was proficient in math, science and social studies. [NT 353]

84. Across assessments administered by three evaluators [two certified school psychologists and a speech/language therapist] over a nearly two year period [March 2011 through February 2013] Student consistently achieved scores in the Low Average, Average, and High Average ranges [Standard Scores 80-89, 90-109, 110-119; Scaled Scores 7 through 11]. **Bolded.**

Tests of Cognitive Ability:

Date	Cog Test	Verbal	NonV	Work Mem	Pro Speed	Think Ability	Cog Effic	Audit Proc	FSIQ/ GenAbility	GAI
3/2011	KBIT	118	102						112	
4/2011	WISC-IV	96	92	80	75				84	94
2/2013	WISC-IV	87	84	77	80				78	
2/2013	WJ-III	87				87	72	116	78	

Subtest [SCALED] Scores of Cognitive Test: WISC-IV 4/2011

Sim	Vocab	Compr	BlkDes	PicConc	MatrixR	DgtSpn	LNR	Coding	SymSrch
11	8	9	7	10	9	7	6	5	6

Subtest [SCALED] Scores of Cognitive Test: WISC-IV 2/2013

Sim	Vocab	Compr	BlkDes	PicConc	MatrixR	DgtSpn	LNR	Coding	SymSrch
9	7	7	9	8	5	7	5	6	7

Subtest Standard Scores of Cognitive Test: Woodcock-Johnson III 2/2013

Verbal Comp	Vis-Aud	Spatial Relations	Sound Blending	Concept Formation	Visual Match	Num Rev	Audit Attn
87	81	92	108	82	76	75	118

Tests of Academic Ability:

Date	Ach Test	Letter Word	Read Compre	Nons Deco	Math Conc	Math Comput	Spelling	Read Compos	Math Comp	Wr Exp Comp	Oral Lang Comp
4/2011	KTEA	90	87	93	91	100	101				
2/2013	WIAT							72	89	79	81

Subtest Standard Scores of WIAT-III Reading

Date	Test	Basic Reading	Word Reading	Pseudoword Decode	Read Compr	Oral Fluency	Oral Acc	Oral Rate
2/2013	WIAT Read	70	71	69	78	78	75	80

Subtest Standard Scores of WIAT-III Math

Date	Test	Numeric Operat	Math Prob Solving	Math Fluency	Math Flu Addn	Math Flu Sub	Math Flu Mult
2/2013	WIAT Math	97	83	76	70	74	88

Subtest Standard Scores of WIAT-III Written Expression

Date	Test	Sentence Compos	Sentence Combin	Sentence Building	Essay Compos	Word Count	Theme Dev/Org	Spelling
2/2013	WIAT Writing	89	108	73	74	80	73	84

Subtest Standard Scores of WIAT-III Oral Language

Date	Test	Listen Comp	Recep Vocab	OralDis Comp	Oral Exp	Exp Vocab	Oral Wd Flu	Sent Rep
2/2013	WIAT Oral	88	86	94	79	80	86	83

Phonological Processing Evaluation

Date	Test	Phonological Awareness Comp	Phonological Memory Comp	Rapid Naming Comp
4/2011	CTOPP	94	88	91

Phonological Processing Subtest SCALED scores

Elision	Blending Words	Memory for Digits	Rapid Digit Naming	Non-Word Repetition	Rapid Letter Naming8
10	10	8	8	6	9

Speech/Language Evaluation

Date	Test	Core Lang	RecepLang	ExpLang	LangCont	LangMem
2/2013	CELF-4	85	76	99	82	84

CELF-4 Subtest Scaled Scores

RecallSent	FormSen	WC-Rec	WC-Exp	WC-Total	Exp Vocab	Underst SpPara
3	11	8	11	8	10	3

Discussion and Conclusions of Law

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for a hearing and thus bore the burden of proof. However, as the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express,

qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). The specific contribution of certain witnesses to the weight of the evidence will be discussed in context below.

With regard to the private psychologist who testified for the Parents, I am compelled to agree with the District's closing statement and disregard the testimony and the documents produced by this witness. As the District psychologist pointed out, and as confirmed by this hearing officer's extensive experience in conducting and supervising countless psychoeducational evaluations over more than twenty-five years, this witness' testing methodology was flawed and her understanding of [or at least her ability to explain] statistical concepts was lacking. I draw this conclusion specifically regarding this particular case and solely about her evaluation of this particular Student. Although ultimately I do not find the District psychologist's conclusion that Student is not eligible for special education reliable, my finding in this regard is reached with absolutely no consideration of the private psychologist's input.

Child Find: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The IDEA sets forth the responsibilities [commonly referenced as "child find" responsibilities] borne by school districts for identifying which children residing in its boundaries are in need of special education and related services such that "[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated..." 20 U.S.C. §1412(a)(3).

Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where learning or behaviors indicate that a child may have a disability. This provision places upon school districts the "continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes." *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009). The evaluation of children who are suspected to be learning disabled must take place within a reasonable period of time after the school is on notice of behavior that is likely to reflect a disability. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The failure of a school district to timely evaluate a child whom it should reasonably suspect of having a learning disability constitutes a violation of the IDEA, and a denial of access to a "free and appropriate public education" (FAPE). 20 U.S.C. § 1400.

The possibility that the student's difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. See *Richard V. v. City of Medford*, 924 F.Supp. 320, 322 (D.Mass.1996) The United States Supreme Court held early on that merely passing from grade to grade and achieving passing grades is not dispositive that a student has received a FAPE. *Board of Educ. v. Rowley*, 458 U. S. 176, 203, n.25 (1982). 34 C.F.R. §300.101(c)(1) provides: "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and

related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”

Evaluation: The purpose of an evaluation is to determine whether the child meets any of the criteria for identification as a “child with a disability” as that term is defined in 34 C.F.R. §300.8, as well as to provide a basis for the contents of an eligible child’s IEP, including a determination of the extent to which the child can make appropriate progress “in the general education curriculum.” C.F.R. §§300.8, 300.304(b)(1)(i), (ii). The general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The District is required to 1) “use a variety of assessment tools”; 2) “gather relevant functional, developmental and academic information about the child, including information from the parent”; 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child’s educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2). 305(a)(1),(2).

Once the assessments are completed, the qualified district professionals and the child’s parents determine whether he/she is a “child with a disability” and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, a district is required to: 1) “Draw upon information from a variety of sources,” including those required to be part of the assessments, and assure that all such information is “documented and carefully considered.” 34 C.F.R. §300.306 (c)(1). To be eligible for special education services and entitled to an IEP, the IDEA requires that a child be determined to have at least one of thirteen disabilities identified and defined by the Act, and by reason thereof need special education and related services. 34 C.F.R. §300.8(a).

Based on the testimony and documentary evidence gathered in the course of the four days of hearing, I conclude that Student does have a disability and by reason thereof requires specially designed instruction to access the educational curriculum and derive meaningful benefit. Further I conclude that Student is eligible for special education and related services under at least two of the thirteen classifications in federal and state regulations –

specific learning disability and other health impairment, the latter being based upon a visual processing disorder. Although Student's CELF-4 results indicate a significant difference between expressive and receptive language abilities in favor of the latter, I will not reach the conclusion that Student also has a speech/language disability. This is not to imply that speech/language deficits do not have to be addressed in the IEP; indeed an IEP must address all a child's needs and the IEP team will consider how Student's need in this area will be addressed. I do not find that Student has Attention Deficit Hyperactivity Disorder, and the evidence was equivocal on the issue of an auditory processing disorder.

Specific Learning Disability: A specific learning disability is defined as “. . . a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 34 C.F.R. §300.8(c)(10)(i). The eight categories of Specific Learning Disability in the federal regulations are oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving. 34 C.F.R. § 300.309(a)(1). The Pennsylvania regulations incorporate this federal regulation. 22 Pa. Code § 14.102(a)(2)(xxv); *see also* 22 Pa. Code § 14.125(1).

Student's WIAT-III administered in February 2013 in the area of reading reflects no scores at all in the low average or average range. Student achieved deficient through borderline scores in basic reading [standard score 70 – low end of borderline], word reading [71 – low end of borderline], pseudoword decoding [69 – below borderline at top of deficient] and reading comprehension [78 – high borderline]. In contrast, looking at the WIAT-III math assessment, although Student's scores in fluency for addition and subtraction were in the borderline range, the score for numerical operations was in the average range [97], the score for math problem solving was in the low average range [83], and math fluency in multiplication was in the low average range [88]. Similarly in written expression, while scores for sentence building, essay composition and theme development were in the borderline range, Student achieved a low average score in sentence composition [89], an upper end of the average range score in sentence combining [108], and low average range scores in word count [80] and spelling [84]. Similarly, Student's WIAT-III oral language scores were all in the low average range except for one score, oral discourse comprehension, being in the average range and another score, oral expression, being at the top of the borderline range. Student's listening comprehension, receptive vocabulary, expressive vocabulary, oral word fluency and sentence repetition were all in the low average range.

Pennsylvania law and IDEA permit the use of either an ability-achievement discrepancy model or a response to intervention model to determine the existence of a specific learning disability. Only those districts specifically approved to use the RTI model for assessment may use this method in Pennsylvania. The District is not approved as an RTI District and therefore, uses the ability-achievement discrepancy model. (See 34 C.F.R. Section 300.307 and 22 Pa. Code Section 14.125) The discrepancy model “examines

whether a child exhibits a pattern of strengths and weaknesses, relative to intellectual ability as defined by a severe discrepancy between intellectual ability and achievement, or relative to age or grade.” In conducting this discrepancy analysis the examiner compares achievement with cognitive ability.

The central inflexible position the District, specifically its psychologist¹⁶ has taken in this matter is that in spite of demonstrating low average, average and/or high average subtest scores over all areas assessed except reading, Student has a “low IQ” and “borderline intelligence”. The District bases this claim on a Wechsler Full Scale IQ Score and a Woodcock-Johnson General Ability score which are derived from numerically combining Student’s disparate strengths and weaknesses on the intelligence tests and in the case of the Wechsler Full Scale score, ignoring the test publisher’s own caution that this score may be misleading and refusing to substitute the General Ability Index [GAI] score which the test publisher suggests be done when scores are disparate. Further, the District has then taken the summary Full Scale IQ score, rather than the more descriptively accurate GAI score, and conducted a discrepancy analysis between intelligence and achievement. [NT 122-123] This has led to the erroneous conclusion that Student’s struggles in reading, in particular, are not due to a learning disability but to low cognitive endowment.

Although in the hearing the District repeatedly characterized Student as having a “low IQ” or borderline¹⁷ intelligence, the undisputed fact is that Student consistently manages to obtain broadly average scores on many skills assessed. This is clearly not a case of a single “splinter [out-of-pattern high] skill” that is sometimes seen in an otherwise fairly consistent low profile, this is a case where the number and variety of average range scores offers clear and convincing evidence that Student in fact does have average ability which is compromised by severe weaknesses in certain areas including working memory and cognitive efficiency.

Here the Catapult Evaluation must also be taken into account. About one and a half years prior to the District’s evaluation Student had been evaluated by a certified school psychologist through Catapult. At that time Student’s scores on the WISC-IV yielded average scores [Verbal 96, Non-verbal 92] with Working Memory [77] and Processing Speed [80] pulling down the Full Scale IQ to an 84 [low average range]. The Catapult evaluator however believed that Student’s GAI of 94 which is in the average range was a more accurate estimate of Student’s actual cognitive endowment as reflected in the Technical Report put out by the publisher of the Wechsler instruments. From April 2011 to February 2013 Student did not all of a sudden become less intelligent.¹⁸

In its closing brief the District argues that its psychologist had conducted and published a study that concluded that the Full Scale IQ score obtained in a cognitive assessment is the most reliable predictor of academic performance because all of the cognitive processes

¹⁶ Two psychologists testified for the District; reference here and throughout is to Dr. B.

¹⁷ So named because it is on the Border of Intellectual Disability [formerly Mental Retardation].

¹⁸ There was no evidence of traumatic brain injury, severe depression, a thought disorder or a progressive neurological process, any of which could affect a person’s IQ.

assessed are ones that would be used during the learning process. [NT 939-941] This researched conclusion is absolutely congruent with common sense; of course a combined score that includes strengths and weaknesses would predict and reflect how a person would actually perform in school given those strengths and weaknesses. In an individual whose subtest scores all combine to create a full scale IQ score that is average or above-average it stands to reason that the person would experience average to above-average success in the school setting given reasonable effort. Conversely if most of the person's subtest scores combined to create an IQ that is below average or even well below average it stands to reason that that person's performance in school would be below average or well below average despite reasonable effort. The problem arises in cases such as Student's when the full scale IQ is composed of a pattern of strengths and weaknesses that is so disparate that the strengths are obscured or impeded by the weaknesses thus contributing to significant difficulties academically, or as in Student's case, specific weaknesses in certain areas. It stands to reason that the full scale IQ, rather than the GAI, would predict or reflect overall academic performance, unless the factors not included in the GAI, [those very factors that pulled down the full-scale IQ] were remediated. This remediation is what we call "special education" or "specially designed instruction".

If Student's intelligence were truly "low" or "borderline" [terms which the District used repeatedly in presenting its case] the significant strengths Student demonstrated on standardized instruments would be highly unlikely. When presented with the question of how Student with purported "low intelligence" could do so well in certain areas of functioning on standardized achievement tests the District psychologist was unable to provide an answer other than it might be because of the supports Student was receiving in the regular education program. This is not credible, as the majority of the supports provided to Student by the District were in reading – not math, written expression, or oral language – and Student's reading scores were not in the average range despite those supports. [NT 187-190]

Additionally, when the teachers who see Student on a daily basis in comparison to peers were questioned about how Student actually performs in the classroom, the teachers' descriptions were of a child who was anything but of low intelligence or borderline IQ. [NT 280, 285, 288, 296, 298-299, 301-304, 308-311, 320-321, 330-347, 353-354, 358-359, 360-362, 369-371]

In violation of the proscription against using a single criterion to determine whether a child has a disability, the District's psychologist based her conclusions solely on a statistical analysis of cognitive/achievement discrepancy, using a highly questionable score for the cognitive factor. In *MB. ex rel. J.B. v. S. Orange/Maplewood Bd. of Educ.*, CIV.A. 09-5294 (SRC), 2010 U.S. Dist. LEXIS 78163, 2010 WL 3035494 (D.N.J. Aug. 3, 2010) the court found that the record did not support a determination that the student was ineligible where all the data showed a severe discrepancy except a statistical computer analysis of the achievement and ability scores, because regulations mandate that the determination "must be based on more than a formula-driven numerical assessment". I hold that this was also the District's error in the instant matter, and for this reason as well as all the above findings of fact conclude that the District failed to identify

Student as eligible for special education under the classification of specific learning disability in the area of reading. I further find that Student is in need of specially designed instruction in reading. Student also showed some weaknesses in math and written expression but I do not reach the conclusion that Student has a specific learning disability in math or in written expression, although as noted above in the case of speech/language deficits, the IEP team must address all areas of need which include some weaknesses in math and written expression.

Visual Processing Disorder: The optometrist who privately evaluated Student is an expert in his field, having held prestigious positions throughout his career, including his current position as Interim Dean of Research and Professor of Optometry at Salus University, Pennsylvania College of Optometry. He has been given large federally funded research grants and conducted studies involving a variety of issues and topics in the field of vision, including visual processing disorders and the impact of such disorders on academics, particularly reading. He has been published extensively on this and other topics. [NT 831-832, 835-839; P-34] This witness was able to convey important information about Student's visual processing in a clear and persuasive manner and was neither dismissive of nor swayed by vigorous and skillful cross-examination. He was an excellent expert witness, being able to fully explain his research and findings in lay terms, and when challenged, to disagree without rancor. The only counter argument the District was able to produce was to highlight the ongoing professional feud between non-MD optometrists and MD ophthalmologists, [reminiscent of a very similar but now finally dying feud between psychologists and psychiatrists]. I found this witness to be highly credible and on the basis of his testimony find that Student has a visual processing disability that affects reading.

Auditory Processing Disorder: The evidence is equivocal regarding whether or not Student has an auditory processing disorder, and I will not reach this conclusion one way or another. Good specially designed instruction to address Student's specific learning disability in reading, whether provided individually, in small groups or in the classroom environment, will necessarily also address any auditory processing difficulties Student may have.

Denial of FAPE: The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of a number of specific classifications and who, "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a "free appropriate public education" [FAPE]. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). "Special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a). Further, "specially designed instruction" means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address 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 the child 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).

An "appropriate" education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1). School districts provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefit", a principle established by over 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011).

Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child's progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.320(a). The IEP must also set forth whether the child requires services over the summer [Extended School Year or "ESY"] to prevent undue regression and help a child maintain skills acquired during the school year.

Most critically, the IEP must be appropriately responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [*Board of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986)]. *Polk v. Central Susquehanna IU #16*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing *Board of Education v. Diamond* held that "*Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general

curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... 34 CFR §300.347(a)(1) through (4). An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

As the Parents point out in their closing brief, to the District's credit, it has provided Student with the kind of supports and accommodations one might expect to see in the IEP of a child with a disability. In fact, upon hearing witnesses describe Student's variety of supports, one might say at first blush, as for the proverbial duck, "looks like an IEP, walks like an IEP, talks like an IEP, must be an IEP". [NT 198-200, 217-219, 228-237, 241-244, 322-338; P/J-3; P/J-24, P/J-26]. The fact remains that however many supports and services Student received Student still did not receive an IEP to which Student is entitled under federal and state law. The problem with not having an IEP is that a disabled child who is eligible for special education and requires specially designed instruction is entitled not only to specially designed instruction but to procedural and substantive rights to ensure that entitlement. Moreover, the structured individualized program of instruction described above is created by the IEP team of which parents are significant members. The IEP must be appropriate under the law, must address all areas of the student's disability, must be implemented, must be portable and must be subject to enforcement through the due process system if necessary.

Compensatory Education: Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). It is well settled that compensatory education is an appropriate equitable remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.*

Although I conclude that Student is eligible for special education and the District failed in its child find obligations, I do not find that Student was denied a free appropriate public education under the IDEA in the relevant period covered by this decision. The District to its credit provided individualized and differentiated instruction in an inclusion classroom with access to both a regular education and special education teacher; 1:1 instruction in the area of reading; small group guided reading sessions three times per week; small group mathematics instruction twice per week; and a number of accommodations that were formalized in a checklist. [NT 196-198; 232; 236; 242; 260-261; 278; 318-329; 354-

359; P/J-24, P/J-26] The supports implemented by the District enabled Student to make meaningful educational progress. What has been lacking is the formal, enforceable, detailed, legal document that will guarantee that Student continues to receive FAPE in any school district in the country, which will be ordered below.

Conclusion

Student's average to low average range verbal and nonverbal scores across three intelligence tests, Student's low average to average to high average composite and subtest scores on two achievement tests, Student's scores on a speech/language assessment, Student's classroom performance in areas other than reading, and teachers' descriptions of Student as an active, engaged and focused learner, all weigh heavily against the District's contention that Student has low intelligence or functions in the borderline range of intelligence, particularly as this conclusion was almost entirely based on a statistical analysis that did not utilize a procedure put forth by the test publishers. The evidence presented at the due process hearing in this matter, and the applicable law relating to eligibility for special education services, compels the conclusion that Student has a disability and is eligible for special education services under IDEA and Pennsylvania Chapter 14.

Order

It is hereby ordered that:

1. Student is eligible for special education services under the IDEA and Pennsylvania Chapter 14 as a child with a specific learning disability and a visual processing disorder and a child who by virtue thereof requires specially designed instruction.
2. The District failed to identify Student as a child who is eligible for special education services under the IDEA and Pennsylvania Chapter 14.
3. Despite its child find violation, the District did provide Student with an educational program that enabled Student to make educational progress, therefore no compensatory education is due.
4. Within fifteen calendar days of the date of this order the District must convene an IEP team to develop an appropriate IEP for Student that addresses all Student's educational needs.

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

July 11, 2014

Date

Linda M. Valentini, Psy.D., CHO

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