

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. 15013-1314AS

Child's Name: A. L.

Date of Birth: [redacted]

Dates of Hearing: 7/10/14, 7/23/14, 7/25/14, 8/5/14

OPEN HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

Elizabethtown Area
600 East High Street
Elizabethtown, PA 17022

Representative:

Parent Attorney

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School District Attorney

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Date Record Closed:

August 10, 2014

Date of Decision:

August 25, 2014

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, currently enrolled in a District intermediate elementary school, was evaluated in November 2013 at Parents' request and identified as IDEA eligible in the category of specific learning disability in the areas of reading and written expression. The IEP that was developed in December 2013 and revised in March 2014 provided for Student to receive itinerant special education services within the regular education classroom.

Parents subsequently obtained an independent educational evaluation that suggested adding several additional disability categories, and included recommendations for instructional programs and assistive technology, as well as vision therapy and memory training to be provided as related services. When the District declined to follow all recommendations in the independent report, Parents filed a due process complaint seeking compensatory education for a child find violation, for denial of special education and related services, including ESY, reimbursement for the IEEs, for the vision therapy provided by Parents and for their independent school psychologist's expert testimony at the due process hearing.

The hearing was held over four sessions from early July through early August, 2014. For the reasons that follow, Parents claims are denied. The District, however, should seriously consider revisiting Student's need for assistive technology to determine, in a more systematic fashion, and with the consultation and assistance available from public education support agencies, whether Student might benefit from devices and/or software, particularly talk to text programs.

ISSUES

1. Did the School District fail to timely identify Student as a child with a disability and fail to identify Student as a child with additional disabilities identified in two independent evaluations obtained by Parents?
2. Should the District be required to reimburse Parents for the costs of the independent evaluations, for the cost of vision therapy recommended in an independent evaluation, and under §504 of the Rehabilitation Act of 1973, for the hearing testimony provided by one of the independent evaluators?
3. Should the District be required to provide Student with an IEP for the 2014/2015 school year that incorporates all of the recommendations included in the independent evaluation reports?
4. Did the District fail to provide Student with a free, appropriate public education from May 12, 2012 through the end of the 2013/2014 school year, and if so, should the District be required to provide student with 1,080 hours of compensatory education for non-existent, inadequate and/or inappropriate special education services for that period?
5. Should the District have provided Student with ESY services during the summers of 2013 and 2014, and if so, should the District be required to provide student with 180 hours of compensatory education for denial of ESY services?

FINDINGS OF FACT

1. Student, an elementary school age child, born [redacted], is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 15)
2. Student has been identified by the District as IDEA eligible in the category of specific learning disabilities in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 15)

1st and 2nd Grades

3. Student has been enrolled in a District elementary school since kindergarten. Parents began noticing that Student was having academic difficulties “a little” during 1st grade, but Student was academically successful during that school year, generally meeting benchmarks on reading skills assessments, although with some inconsistency. Student’s final report card for 1st grade indicated that Student had demonstrated mastery of all skills measured in the areas of reading and writing. (N.T. pp. 40, 42, 485; P-27 p. 1, P-32 pp. 1, 2)
4. The second grade teacher considered Student to be performing well academically, but Parents’ concerns increased as reading difficulties became more obvious, with a number

of below benchmark reading assessment scores at the beginning of the school year. Parents also noted that Student was showing frustration. (N.T. pp. 43, 45, 483; P-27 p. 1)

5. During 2nd grade, Student was assigned to a reading clinic for decoding and fluency.¹ Although Student's reading skills as measured by the DIBELS assessment were at benchmark on mid-year assessments, a GRADE assessment administered in the middle of 2nd grade showed below average scores on all reading skills other than passage comprehension, which was just within the average range. By the end of 2nd grade, Student's score on the DIBELS Composite assessment was again below benchmark. Reading fluency is a skill that is considered still developing in 2nd grade. (N.T. pp. 45, 483, 486; P-27 p. 1, P-29 p. 1, P-32 p. 4)
6. At the end of 2nd grade, Student partially met grade level skills for reading in the areas of phonics and comprehension, but had not demonstrated mastery in those areas. In writing, Student had not mastered grade level skills in the areas of organization, style and conventions. (P-32 pp. 3, 4)
7. During the summer after 2nd grade (2012), Parents were able to enroll Student in a Title I reading program offered at the District. Although Parents noted some improvement in reading skills, and believed that the summer instruction allowed Student to maintain skills between school years, it did not eliminate Student's reading difficulties. (N.T. pp. 45, 46)
8. Parents consider the summer break to be too long for children to be taken out of the school routine and maintain academic skills. (N.T. pp. 216, 217)

3rd Grade

9. Early in 3rd grade (2012/2013 school year), Parents discussed Student's reading difficulties with the teacher, who suggested that Parents have Student screened for Irlen Syndrome, a visual/perceptual condition. After online research suggested to them that Student might be affected, Parents found someone locally who screened Student and determined that Student had Irlen symptoms. In addition to providing Parents with information about it and determining that a blue overlay over printed material seemed to help Student, she suggested that Parents request a special education evaluation. (N.T. pp. 49—52, 217; P-47 p. 3)
10. Following that advice, Parents sent a written request to the school principal for a special education evaluation. (N.T. pp. 52, 217; P-46 p. 1, P-47 p. 2)
11. After a discussion with the elementary school principal, Parents agreed with his recommendation to try a regular education academic support program first, the Instructional Support Team (IST). Parents understood that they could again request an

¹ During the clinic period, students participate in some type of small group reading instruction based on their skill levels or areas of difficulty. (N.T. pp. 405, 406, 484)

evaluation if they disliked the IST program or it did not resolve Student's difficulties. (N.T. pp. 52, 53, 218; P-47 p. 2)

12. The first IST meeting for Student was held in connection with the first marking period parent-teacher conference in November 2012, and was attended by Parents, Student's classroom teacher, the principal, school counselor, social worker, reading specialists and IST coordinator. (N.T. pp. 54, 494; P-1 p. 1)
13. The IST team discussed Parents' concerns with Student's inconsistencies in school work. Both Parents and teachers noted Student's difficulties with focus/concentration, frustration and reading issues, such as skipping words, not recognizing common sight words and guessing at words from the beginning letters. Frequent errors and inconsistent work in math were also noted as the numbers were getting larger and difficulty was increasing. (N.T. pp. 54, 58, 59; P-1 p. 1)
14. At the initial IST meeting, the participants identified goals and strategies, agreeing that Student should be closely monitored and work with a reading specialist daily in the Corrective Reading clinic; that other strategies would be used, *i.e.*, stopping to discuss and review reading passages to check for understanding, re-teaching of concepts, chunking of material, spiral review and small group instruction as needed; that Student would wear glasses and continuing to use the blue overlay as recommended by the evaluator who had diagnosed Irlen Syndrome. (N.T. p. 54—56, 223, 491—494; P-1 pp. 1, 2)
15. At subsequent IST meetings in January, March and April 2013, Parents reported less frustration and a greater excitement about reading at home. Student was reported to be proficient in all areas of math. The reading specialist reported growing confidence in reading and improvements in reading assessment scores. After switching Student to the decoding clinic after January assessments, she reported that Student was attempting to sound out more words and became more accurate in "guessing" words using phonics and decoding strategies, with on-level fluency and good comprehension. Parents were never told that Student was on level in all areas of reading. The last IST meeting of the school year was held in April 2013, but the supports remained in place through the remainder of the school year. (N.T. pp. 56, 58, 499, 503; P-1 pp. 2, 3)
16. In 4-Sight assessments administered during 3rd grade, Student's scores were at the below basic level in reading and basic level in math in September, improved to basic in reading and proficient in math in November, remained at proficient in math but fell to below basic in reading in January 2013. At the end of the school year, Student's scores were at the basic level in both reading and math.² (P-1 p. 1; P-27 pp. 1, 2)
17. According to Student's 3rd grade report card, Student had not demonstrated mastery of phonics/word study in reading even with accommodations. Student demonstrated mastery of grade level standards in writing, without accommodations, in all areas except

² 4 Sight assessments were previously administered periodically to all District students to test skills and knowledge the students are expected to acquire by the end of the school year (N.T. p. 312)

conventions, but partially met grade level expectations and was improving. (P-32 pp. 5, 6.)

18. From the District's perspective, nothing in Student's assessment results suggested the need for a special education evaluation. Parents acknowledged that Student made progress in 3rd grade, but did not make as much progress as Parents hoped. (N.T. pp. 219, 504, 505)
19. During the summer of 2013, Parents hired the District reading specialist who had worked with Student during the school year to provide weekly tutoring, since Student had developed a good rapport with her. The purpose of the tutoring was to maintain Student's skills and to continue working on skill areas that Student had not mastered by the end of 3rd grade. (N.T. pp. 61—63)
20. Student took the PSSA assessment in the spring of 3rd grade, with scores reported to Parents early in 4th grade. Student's math score was at the proficient level, but the reading score was below basic. After receiving the PSSA report, Parents again requested an evaluation. (N.T. pp. 56, 57, 62—64, 218; P-27 p. 2, P-30, P-36 p. 1)

District Evaluation/Identification, Initial IEP

21. The District issued a Permission to Evaluate ((PTE) dated 9/17/13, which Parents returned on 9/26, granting permission for the evaluation to begin, and accompanied by a completed parent information form. (N.T. p. 66, 811; P-3)
22. On the information form, Parents noted concerns about Student's reading, spelling, ability to form correct written sentences, use of punctuation and attention/focus. Those concerns remain for Parents through the present. (N.T. pp. 40, 41, 66, 809, 811; P-3)
23. The District issued its evaluation report on November 4, 2013. The results of the WISC-IV standardized, individually administered test of intellectual ability placed Student in the average range of intellectual functioning (FSIQ 97; 42nd percentile), with all component index scores also in the average range (VCI-98; PRI-96; WMI-97; PSI-100)³. (N.T. pp. 815—820; P-5 pp. 4, 6)
24. Student's composite scores on the Wechsler Individual Achievement Test-Third Edition (WIAT-III), a standardized, individually administered achievement assessment, were in the average to low average range, with total achievement in the average range (30th percentile). (N.T. pp. 820—825; P-5 p. 8)
25. The District school psychologist concluded that Student's achievement in reading (decoding, oral reading accuracy) and written expression (spelling, sentence/paragraph composition, idea/theme development, text organization) were significantly below Student's measured ability, leading to her recommendation that Student be identified with

³ Wechsler Intelligence Scale for Children-Fourth Edition. The Full Scale IQ is derived from the scores of the Verbal Comprehension Index, Perceptual Reasoning Index, Working Memory Index and Processing Speed Index.

specific learning disabilities and provided with specially designed instruction to improve academic levels in reading and writing. (N.T. pp. 70, 71, 826—830; P-5 p. 4)

26. In a meeting with Parents to review the evaluation results, the school psychologist estimated that Student was one to two grade levels below a 4th grade reading level, which confirmed Parents' belief about Student's reading skills. (N.T. p. 72)
27. The school psychologist also noted some behaviors characteristically associated with attention deficit disorder, suggested a further evaluation, including a medical assessment by Student's doctor, and offered to compile additional behavioral data. Parents decided not to proceed with a medical evaluation at that time, preferring to wait for the IEP meeting to follow the evaluation report. (N.T. pp. 69, 70, 73, 812, 813, 834; P-5 p. 4)
28. An initial IEP meeting was held on December 3, 2013. The District proposed goals in the areas of reading fluency, spelling accuracy (with accommodations in place), and written expression. Specially designed instruction included extended time for tests and assignments that involved reading and writing; small group, classroom reading instruction; systematic, direct, explicit instruction in decoding; tests and other materials read to Student on request; strategies to assist Student in making connections between similar concepts and prior knowledge/new information; graphic organizers for written expression and a desktop spell check dictionary. (N.T. pp. 72, 74, 75; P-7 pp. 13, 14)
29. The IEP team recommended that Student be provided with itinerant learning support services within the regular education classroom. (P-7 pp. 17, 18)
30. Although Parents signed the Notice of Recommended Educational Placement (NOREP) approving the IEP at the December 3 meeting, they were disappointed that the District's evaluation identified a specific learning disability in reading without further naming the disability, that the IEP reading fluency goal for 90 words correct per minute (wcpm) at a 2nd grade level was too low, and that Student's reading instruction did not appear to them to be different after the IEP was in place. (N.T. pp. 71, 73, 75—77, 232, 233; P-8)

Independent Evaluations

31. Parents consulted with a school psychologist in private practice in the fall of 2013, who advised them that if Parents "wanted to get at the answers" to the questions they still had after the IEP meeting, they should request that the District provide an independent educational evaluation (IEE). Parents made that request in a letter dated December 20, 2013. (N.T. pp. 112, 114, 243, l. 3; P-9)
32. In the Special Education Supervisor's January 8, 2014 letter refusing Parents' IEE request, she also notified Parents of the District's obligation to initiate a due process hearing if it declined to fund the IEE, noted that parents sometimes prefer to avoid a hearing and gave Parents the opportunity to withdraw the IEE request before initiating a due process hearing. The Supervisor also offered an IEP meeting to address the concerns in Parents' letter requesting the IEE. (N.T. pp. 78, 243, 778—780 ; P-36 p. 2)

33. A few days later, the District issued a PTE to supplement its initial evaluation with behavior rating scales. Parents did not return the PTE to accept or reject a further District evaluation. (N.T. pp. 79, 80, 711; P-12)
34. Parents subsequently retained counsel, who initially renewed the IEE request in a letter dated January 15, 2014 and later informed the District that Parents had proceeded with an IEE at their own expense from the independent psychologist who had advised Parents to request the IEE, and would later seek reimbursement. (P-36 pp. 3, 4, 6)
35. During the testing session, the evaluator noted that Student was “fidgety” but maintained attention well during testing. The evaluator administered ability and achievement assessments that were different from but comparable to the District’s tests.⁴ She observed that Student had difficulty with sub-tests in the areas of working memory, and cognitive efficiency. (N.T. pp. 116, 117; P-15 pp. 9, 11)
36. Both Parents and the independent evaluator acknowledged that the ability and achievement assessment results were consistent with the District’s evaluation. The measures used by the independent evaluator also placed Student’s intellectual ability in the average range, and the achievement measures indicated that Student’s performance is consistent with ability. Academic weaknesses were noted in basic reading skills, particularly word attack and reading comprehension, and in written expression, but the independent evaluator did not find a statistically significant difference between Student’s ability and achievement. (N.T. pp. 82, 117, 120, 122—124, 147, 175, 176, 183; P-5 pp. 6—8; P-15 pp. 2, 3, 10, 15—20, 23, 38—47)
37. The evaluator administered the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2) to measure Student’s ability to discriminate sounds, and the Rapid Automatized Naming and Rapid Alternating Stimulus Test (RAN/RAS) to measure Student’s ability to track visual symbols and retrieve their names accurately and rapidly. The evaluator noted that Student had scores in the poor and below average ranges on CTOPP subtests measuring the ability to retain sounds in short-term memory, form sound/symbol connections, and rapidly and accurately track through print. Based on the CTOPP and RAN/RAS results, the evaluator concluded that Student has double-deficit dyslexia, with unstable perception of symbols and difficulty hearing phonemes. According to the evaluator’s analysis, the assessment results predict problems with reading decoding, fluency and comprehension. (N.T. pp. 117—119; P-15 pp. 5, 12—14)
38. In other assessments of school-related skills, Student was in the average range for expressive/receptive language and visual-motor integration. The results of the Jordan Left-Right Reversal Test-3rd Edition placed Student in the atypical range, suggesting to the evaluator that Student might experience difficulties with misperception of symbol

⁴ Woodcock-Johnson III Normative Update, Tests of Cognitive Ability (WJ-III/NU COG); Woodcock-Johnson Tests of Achievement-Third Edition Normative Update (WJ-III/NU-Ach)

- directionality and with the orthographic aspects of reading. (N.T. pp. 121, 122; P-15 pp. 4, 5, 11, 12)
39. The evaluator used parent, teacher and self-rating scales to assess Student's behaviors and to explore whether informal observations of attention issues might be due to attention deficit disorder. (P-15 pp. 4, 5,)
 40. On the BASC-2 (Behavior Assessment System for Children-Second Edition), teachers rated Student in the normal range in all domains. Parents' ratings put Student in the "at risk" category for attention problems and activities of daily living, an area not included in the teacher rating scales. (N.T. pp. 119, 186; P-15 pp. 4, 20, 21, P-16, P-17)
 41. Student completed the Piers-Harris Children's Self-Concept Scale. The results indicated that Student is generally happy, is an important family member, has good ideas and loves school. With respect to school functioning, Student's concerns included being slow in finishing school work, dreaming in school and forgetting what is learned. (P-15 p. 21)
 42. On the Clinical Assessment of Attention Deficit-Child (CAT-C), teacher ratings were again universally in the normal range. Parents' ratings were in the mild "at risk" category for inattention, academics and internal locus. Student's self-rating was in the "at risk" category for hyperactivity and academics. The overall results were in the normal range for parent, teacher and self-ratings. The "at risk" designation indicates that the trait does not meet diagnostic criteria for a clinical diagnosis. Differences between teacher and parent perceptions of a child are common, are often based upon differences in a child's behaviors at home and at school, and can result in differences in rating scale results between parents and teachers. (N.T. pp. 120, 161—165; P-15 pp. 5, 22, P-18, P-19, P-20)
 43. The results of the Vanderbilt ADHD Diagnostic Rating Scales suggested that Student does not meet the criteria for a diagnosis of ADHD of either the inattentive or hyperactive type. (N.T. pp. 158—160, 167; P-15 p. 22)
 44. Since attention issues are also related to language processing difficulties and other perceptual issues, ADHD symptoms may arise from learning disabilities and not be due to the frontal lobe brain dysfunction that supports the diagnosis of classic ADHD. The Parent and Student ratings on the Vanderbilt scale that were consistent with ADHD symptoms were on items that are most closely associated with learning disabilities. (N.T. pp. 162, 168, 191, 210, 211)
 45. The independent evaluator agreed with the District that Student is properly identified as IDEA eligible in the specific learning disabilities category. Despite rating scale results that do not support a conclusion that Student has ADHD, the independent psychologist recommended that Student also be identified as IDEA eligible in the Other Health Impairment (OHI) category due to ADHD because she saw "some indications" that led her to suspect that Student might be affected by classic ADHD, *i.e.*, arising from a frontal lobe disorder. The rating scales used in the IEE cannot distinguish between attention

symptoms related to Student's learning disabilities and a frontal lobe dysfunction, which can only be diagnosed via a brain scan or MRI. (N.T. pp. 123, 124, 133, 162, 165, 166, 189, 190, 207, 210—212, 214; P-15 p. 23, P-18, P-19, P-20)

46. Similarly, despite concluding that Student has no difficulty comprehending language through listening, or in expressing []self verbally and had solidly average scores on a measure of expressive/receptive language, the evaluator recommended adding Speech/Language Impairment to Student's IDEA eligibility categories because Student is nearing the end of the "window" for rapid language development, the results of the CTOPP suggested weaknesses in phonological processing, which is related to language, and Student has language-based learning disabilities with still insecure skills in reading, spelling and writing. The independent evaluator believes that a diagnosis of double deficit dyslexia supports identification of a disability in the categories of specific learning disability and speech/language impairment. (N.T. pp. 125, 133, 168—170; P-15 p. 23)
47. With respect to SDI in the nature of classroom accommodations that should be provided to Student while the reading and writing disabilities are addressed, the independent evaluator explained in detail why permitting Student to take tests orally in content area subjects, such as science and social studies, including having test questions read aloud is reasonable and necessary. The evaluator also suggested frequent breaks, coupled with classroom tasks or errands to address Student's need for movement, and extended time for tests and assignments. (N.T. pp. 133—135; P-15 pp. 30—32)
48. The recommendations in the IEE report also included teaching Student techniques for identifying important information in reading passages for future study and review such as by highlighting, and suggested "pretty standard" techniques for staff to use to address attention issues. (N.T. pp. 135, 136; P-15 pp. 31, 32)
49. The independent evaluator also suspected a vision problem and suggested a further evaluation, which Parents also obtained at their own expense. Parents are providing the vision therapy recommended by the vision therapist based upon the evaluation findings and endorsed by the independent psychologist. (N.T. pp. 108, 136—143; P-21, P-22, P-39, P-40 pp. 2—5, P-42)

March 31, 2014 IEP Team Meeting/Consideration of IEE

50. Parents provided the independent evaluator's report to the District and requested an IEP team meeting to review the IEE report and discuss revisions to Student's IEP in light of the IEE results and recommendations for Student's identification, special education program and related services. (P-15, P-21, P-36 pp. 7, 8)
51. The District issued an invitation to an IEP team meeting that was convened on March 31. In addition to the IEE report, the vision therapy report and recommendations were considered. (N.T. pp. 89, 694, 695; P-23, P-24)

52. Although Student's initial IEP already included some of the recommendations in both the psycho-educational IEE and the vision therapy evaluation, and the District agreed to consider incorporating other recommendations from the independent school psychologist into Student's IEP, it declined to provide vision therapy. District staff had noted no vision difficulties that interfered with Student's school functioning and progress indicating a need for intervention, and had no proof that vision therapy would be effective in improving Student's educational progress or school functioning in any way. (N.T. pp. 90, 133—136, 248, 249, 347, 372, 685, 686, 697, 707, 708, 842, 843; P-7 p. 14, P-15 p. 30, P-21 pp. 3, 4)
53. The District also declined to adopt the reading programs the independent school psychologist evaluator recommended. (Wilson, Rave-O). The District members of the IEP team, since Student was making meaningful progress with the instructional programs and techniques the District was using. The independent evaluator agreed that the SRA Corrective Reading Program that the District had been providing to Student is an effective alternative to the Wilson reading program as long as Student is making progress. (N.T. pp. 127—130, 143, 144, 248, 249, 631, 632, 699, 700, 701; P-15 pp. 25—27, P-25 p. 1)
54. The District has the Wilson Reading program available, but in comparing use of Wilson and Corrective Reading, found that instruction in the Corrective Reading program was more successful with most students, in that the reading skills are better generalized to the regular education curriculum than with Wilson. (N.T. p. 699)
55. At Parents' request, the District also considered providing CogMed memory training as a related service for Student. After discussion with the District school psychologist reviewing a February 14, 2013 meta-analysis of published memory training studies conducted through 2011, the Supervisor of special education concluded that there is insufficient evidence that the memory training recommended by the independent evaluator has a positive effect on short-term memory that is generalized and maintained over the long term. In addition, neither the District evaluation nor teacher comments suggested that Student has memory deficiencies. (N.T. pp. 103, 705—707, 781, 782, 823, 837; S-5)
56. The District agreed to explore the use of assistive technology with Student as recommended by the independent psychologist, but did not specifically consider or trial any of the programs listed in IEE report. The special education teacher who worked individually with Student for writing during the last quarter of the school year tried Dragon Dictation talk to text software, but did not know which version it was. (N.T. pp. 96, 131, 132, 578, 579, 603, ; P-15 p. 29, P-24 p. 18)
57. District staff considers talk to text programs difficult for younger students, and the learning support teacher reported that Student had difficulty using the Dragon Dictation program tried. Student was able to use other types of assistive technology that the learning support teacher provided to assist with organizing ideas and other aspects of the writing process. The District concluded that Student does not need sophisticated assistive

technology in the nature of talk to text software or devices. (N.T. pp. 565—569, 578, 579, 581, 723—728, 776, 777; P-33 p. 5)

58. The March 31 IEP included a trial of keyboarding for the writing process as recommended in the IEE report. During the 4th grade school year, Student still experienced difficulties producing or completing writing assignments, particularly at home. The last assignment completed at home, for which Parent read the rough draft aloud while Student typed the final draft, was completed more easily. Because Student has difficulty going back and forth between handwritten versions when copying a handwritten final draft from a handwritten rough draft, the combination of dictation and typing was helpful. Student worked on typing programs to improve keyboarding skills with the learning support teacher. (N.T. pp. 100, 101, 565, 722; P-15 p. 29, P-24 p. 19)
59. The March 31 IEP changed the focus of Student's specially designed instruction in reading from fluency and decoding to instruction and strategies for answering inferential reading comprehension questions, since Student had quickly mastered the fluency reading goal. Improving reading fluency, however, was maintained as a reading goal at a 3rd grade reading level, and practice using the Corrective Reading strategies was still incorporated into Student's reading instruction. (N.T. pp. 716—719; P-24 pp. 9, 16, 17)
60. At the time of the March 31 IEP meeting, Parents were dissatisfied with Student's progress, and after receiving the diagnosis of double deficit dyslexia from their independent evaluator, Parents wanted the District to change its instructional methods to implement the programs the independent evaluator recommended. Parents declined to approve an IEP that continued the instructional programs the District was using for Student's reading instruction. (N.T. p. 97)
61. Although Parents did not agree with the March 31 proposed IEP, they did not sign the NOREP that accompanied the IEP to either approve or disapprove the proposed placement and services. The IEP was partially implemented after Parents agreed in a telephone call to increase Student's time with the learning support teacher. (N.T. pp. 97, 731, 732; P-37)

4th Grade Instruction and Progress in Language Arts

62. In 4th grade, Student received regular classroom instruction from different teachers for math, for science and for social studies and English/language arts. The teacher for the two hour English/ language arts/social studies block is certified in both regular and special education. (N.T. pp. 266—268)
63. English/language arts instruction included a daily 30 minute whole group lesson focused on the skills and strategies of reading comprehension. That was followed by 30 minutes of small group Guided Reading, initially focused on comprehension and later on both comprehension and fluency. The texts used in guided reading were at an upper 3rd grade to lower 4th grade reading level (N.T. pp. 267, 269, 274, 275, 276)

64. The next 30—45 minutes of the language arts block varied depending, on the day of six day cycle, between word work (spelling), writing and social studies. (N.T. p. 267)
65. After noticing difficulty with reading comprehension early in the school year, the language arts teacher recommended Student for Title I services and provided additional one to one reading instruction. Students receiving Title I services are provided with more one to one and small group reading instruction. The same level of small group and individual reading instruction was continued after Student's IEP was developed and was provided in addition to the services Student received through the IEP. (N.T. pp. 270, 271, 389, 609)
66. After a beginning of the year reading fluency assessment placed Student below benchmark, Student began seeing the reading specialist for instruction in Corrective Reading during the morning of each school day. Corrective Reading is a scripted program that was used with Student to address decoding and fluency. The goal is to help students achieve a proper reading pace that flows, without stopping and starting. . (N.T. pp. 268, 285, 405, 609—616)
67. Student also worked with the reading specialist for a period in the afternoon of each school day. Student developed a good rapport with the reading specialist from the beginning of the school year, as Parents acknowledged, and benefitted from the instruction directed toward developing reading skills and strategies. Student continued to work with the reading specialist twice each day throughout 4th grade. (N.T. pp. 78, 275, 609)
68. Early in the school year, the language arts teacher provided Student with one to one instruction in writing. After the December 2013 IEP was implemented, Student began working with the learning support teacher daily after arriving at school for additional writing instruction and reading support, including previewing lessons, review and re-teaching when needed. Later in the school year, the reading specialist also worked with Student on writing tasks, particularly research needed for content area projects. The classroom teachers, the special education teacher and the reading specialist worked closely together to determine the reading and writing skills Student needed to work on. (N.T. pp. 273, 274, 290, 295, 296, 300, 564, 566, 571, 574, 619—621, 626)
69. The learning support teacher used a graphic organizer and several computer-based programs to assist Student in generating and organizing ideas for writing. She used a video program to help Student understand various types of writing and the purpose of each.⁵ She incorporated lessons on grammar and adjectives, and helped Student produce written projects and assignments for content area classes. Student also worked on editing during the writing instruction and became more independent by the end of the school year. (N.T. pp. 565—577, 579, 580)

⁵ The learning support teacher who testified at the hearing began working with Student in April 2014, replacing the previous special education teacher when that teacher began a maternity leave. (N.T. p. 564)

70. In addition to the word study Student received in the classroom, the learning support teacher directly and indirectly addressed Student's needs in spelling as part of the writing process. (N.T. p. 575)
71. The District's initial progress report on the goals in Student's December 2013 IEP dated January 17, 2014 indicated that with respect to the fluency goal, using 2nd grade level reading passages from the Qualitative Reading Inventory (QRI), Student was able to read 110 wcpm (94% accuracy) on an expository passage and 121 wcpm (98% accuracy) on a narrative passage. On a 4th grade level DIBELS assessment, read 105 wcpm (97% accuracy). (P-13 p. 1)
72. Later in January 2014, the District informed Parents that based on Student's progress in reading fluency, the reading specialist had moved Student out of Corrective Reading to focus on other skills. The reading specialist continued providing practice with reading comprehension strategies in the afternoon session with Student, and changed the focus of the morning session to work on comprehension, using the comprehension toolkit and the Fast Track program. The classroom teacher added instruction in nonfiction reading comprehension using social studies content. (N.T. pp. 242—244, 268, 286, 611, 612, 615—619, 662)
73. In spelling, Student averaged 99% accuracy on three writing samples with accommodations, meeting the IEP goal of 80% accuracy or above. Student also met the goal of achieving a score of 3 or better on a 4th grade level writing prompt in the areas of content, focus, organization, style and conventions. Student achieved scores of 3 and better in all areas. (P-13 pp. 2, 3)
74. In March 2014, Student took the PSSA reading and math assessments, scoring in the basic range in reading and the advanced range in math. Student's PSSA reading score improved between 3rd and 4th grades from approximately the middle of the below basic range to approximately the middle of the basic range, an indicator of growth. Student took the PSSA science assessment in late April/early May, scoring in the basic range (N.T. pp. 98, 99, 329, 347, 376, 436, 589, 793, 794; P-30 p. 2, P-45)
75. By the end 4th grade in June 2014, Student's report card placed Student at the highly proficient level of performance (90—96%), according to state standards in English/Language Arts, social studies, math and science, with accommodations. All component reading and writing skills in reading and writing were at the proficient level (3), except for reading fluency (2- basic level), phonics and summarizing/synthesizing (4-advanced level). (P-32 p. 7)
76. Classroom accommodations noted on Student's report card included individual assistance, tests read orally, use of substitute and/or supplementary materials (graphic organizers-writing), retesting (math-decimals, fractions), modified assignments, additional time to complete assignments. (P-32 p. 8)

77. The progress report on Student's IEP reading fluency goal issued on June 2, 2014 was based on 3rd, 4th and 5th grade level reading passages based upon the progress Student made in reading. On the QRI assessment, Student was able to read 126 wcpm (98% accuracy) on a level 3 expository passage, 94 wcpm (98% accuracy) on a level 4 expository passage and 91 wcpm (97% accuracy) on a level 5 expository passage. The goal, taken from the 3/31/14 IEP revision was for Student to read 90 wcpm (95% accuracy) on a 3rd grade reading passage. (N.T. pp. 294, 583—586; P-24 p. 16, P-33 p. 1, S-15)
78. With respect to the first reading comprehension goal added to the 3/31/14 IEP, (verbally answering literal and inferential comprehension questions about 3rd grade fiction or non-fiction passages read aloud with 90% accuracy), Student averaged 100% in answering multiple choice questions on comprehension checks focusing on vocabulary, problem-solving, who, what, when, where, why, how and character with a copy of the text available for reference. When questions were read aloud to Student, Student demonstrated the ability to use learned strategies, such going back to the text to find support for answers and to restate questions or clarify anything Student found confusing. (N.T. pp. 583, 584, 586; P-33 p. 3)
79. On the second reading comprehension goal (answering literal and inferential comprehension questions with 90% accuracy at a 3rd grade level for fiction or non-fiction passages read silently), Student averaged 100% in independently answering multiple choice questions focused on who, what, when, where, why, how, vocabulary and problem-solving. Student used learned comprehension strategies such as highlighting, underlining, numbering ideas and circling important words to answer questions. (N.T. p. 587; P-33 p. 4)
80. By the end of 4th grade, Student could read independently at a 4th grade level, and was instructional at a 5th grade reading level. (N.T. pp. 277, 601)
81. According to the June 2014 progress monitoring report, Student maintained a 99% accuracy level in spelling over three writing samples with spelling scores of 99%, 100% and 99%. (P-33 p. 2)
82. Student met the goal of achieving a score of 3 or better on a 4th grade writing prompt, using a 4th level rubric, in the areas of content, focus, organization, style and conventions, with an adapted graphic organizer. Student achieved scores of 4 with respect to focus, organization and conventions, 3.5 for content and 3 for style. (N.T. p. 570; P-33 p. 5)
83. Parents acknowledged that Student has made educational progress, and indeed, was "performing relatively well" in 4th grade, but do not believe that the special education services/instruction that Student received under the March 31 IEP were appropriate in that the District has not "bridged the gap" created by Student's disability between Student and non-disabled, same age peers. (N.T. pp. 107, l. 24, 108, 244, 245, 246, l. 21)

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84. The independent evaluator made no inquiry into whether Student meets the eligibility criteria for ESY services, but believes that due to its intensity, the CogMed training she recommended is best delivered during the summer, when there are no other academic demands. (N.T. pp. 125, 126, 152)
85. During the summer of 2014, Parents provided Student with both vision therapy and CogMed training as recommended by the independent school psychologist. Parents adapted the training at home due to Student's dislike of the tasks required for the training, which they acknowledge are not enjoyable. (N.T. pp. 102, 103, 105; P-15 pp. 23, 24, P-39 pp. 25—27)
86. The March 31, 2014 IEP remains in place for the 2014/2015 school year through March 31, 2015 until and unless the parties agree on a new or revised IEP. Student, however, will be instructed at the reading and writing levels indicated by progress monitoring results and baseline data taken at the beginning of the new school year and updated from time to time. Parents' independent evaluator does not disagree with the goals in the March 31 IEP, but believes the IEP includes insufficient detail concerning the instructional methods the District will use to implement the IEP. She also disagrees with the SDI to the extent that her recommendations are not fully included. (N.T. pp. 109, 147—152, 156, 157)
87. The reading specialist intends to continue emphasizing the development of reading comprehension strategies in the 2014/2015 school year, since Student's 4th grade PSSA scores indicate a continuing need in that area. (N.T. pp. 625, 626)
88. The independent evaluator acknowledged that following her recommendations is not the only way that Student can receive a FAPE. If the instruction Student receives is effective in that Student is making good progress and closing skill gaps, it is appropriate. The independent evaluator considers it a reasonable goal for Student to have grade level reading, writing and spelling skills by the time Student enters middle school, which in the District is 7th grade. (N.T. pp. 203, 204, 208)

DISCUSSION AND CONCLUSIONS OF LAW

In its opening statement, the District described its position in this matter as being “on the right track” with respect to appropriately addressing Student's learning disabilities. (N.T. p. 30) That phrase provides a broad organizing principle for consideration of the specific issues in this case, which center primarily on whether the District timely got on track and is, indeed, on the

“right track” with respect to identification of Student’s disabilities and the means of addressing them.

The difficulty for Parents in this, as in many other cases of disagreement over the details of special education services, is that the District’s track is very broad. The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249. “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley*; *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993).

An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988). On the other hand, however, under the interpretation of the IDEA statute established by the *Rowley* case and other relevant decisions, an LEA is not required to provide an eligible child with services designed to provide the “absolute best” education or to maximize the child’s potential. *Carlisle Area School District v. Scott P.*, 62

F.3d 520 (3rd Cir. 1995). Consequently, the underlying question for all decisions in which the level and type of special education and related services are at issue is not whether the District provided the most and best possible special education and related services, but whether it provided just enough. And in making that determination, the IDEA “gold standard” is whether the services the District provided enables the child to participate and make progress in the regular education curriculum. *See* 34 C.F.R. §300.39(a)(1), (b)(3), (i), (ii)⁶

Here, the record supports the District’s assertion that it is on the “right track” and fulfilled its obligations to provide Student with a FAPE. It is always possible, of course, to provide more or different services in the hope of improving progress, and it is understandable that parents seek the best services for a child with a disability, and every possible advantage to help the child overcome the effects of the disability as to the greatest extent possible, and as soon as possible, as Parents in this case have done.⁷ The School District, however, is not required to assure that Parents’ high aspirations for their child are met. If a school district’s services enable a child with a disability to meet the regular academic standards set for every child in the district by the time the child finishes public school, it has fulfilled its overall obligation. In each school year an eligible child attends the public school, his or her school district is required to provide special education and related services reasonably likely to result meaningful progress with respect to the

⁶ “Special education means specially designed instruction at no cost to parents, to meet the unique needs of a child with a disability.” §300.39(a)(1); “Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child that result from the child’s disability; and (ii) **To ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.**” (Emphasis added)

⁷ *See, e.g.*, N.T. p. 90, discussing vision therapy:

I think when you say a kid's eyes aren't working together to read a word, and a Doctor is telling me that, then I think there's merit to it, and you owe it to the child to perform whatever you need to, to get them all of the tools and skills they need in order to be able to read.

annual IEP goals. To meet the aspirational aspects of the IDEA statute, school districts should also strive, to the extent possible, to provide services that also enable the child to make meaningful progress in the general education curriculum for each grade level.

Burden of Proof

The IDEA statute and regulations provide the opportunity for parents and school districts to present a complaint and request a due process hearing in the event special education disputes between them cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parents challenged the District's actions during the period in dispute, Parents had the obligation to establish the violations they alleged and that were identified at the beginning of the due process hearing in this case. The party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Parents in this case did not produce sufficient persuasive evidence to establish any of violations they alleged and, therefore, have not prevailed on any issue.

Child Find

Parents claims for denial of FAPE to Student are based, in part, upon the "child find" obligation imposed on school districts by the IDEA statute and federal regulations, requiring states to identify, locate, and evaluate all potentially disabled children, including those who may be "advancing from grade to grade." 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1);

G.D. v. Wissahickon School District, 2011 WL 2411098 (E.D.Pa 2011) at *6. In Pennsylvania, that obligation is fulfilled by school districts, and in some cases, intermediate units, in compliance with 22 Pa. Code §§ 14.121–14.125 (2008)

In order to meet the child find obligation, a school district must, within a reasonable time after becoming aware of facts likely to indicate that a child could have a disability, “conduct an evaluation of the student's needs, assessing all areas of suspected disability,” *P.P. v. West Chester Area School District*, 585 F.3d 727, 730 (3d Cir.2009) (citing 20 U.S.C. § 1414(b); *O.F. v. Chester Upland Sch. Dist.*, 246 F.Supp.2d 409, 417 (E.D.Pa.2002) citing *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir.1995). “Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE.” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008), quoted in *G.D. v. Wissahickon School District* at *6.

When a school district violates its "child find" obligations and fails to identify a student as a Protected Handicapped Student under § 504 or as a student in need of special education under the IDEA, and provides no specialized instruction to the student to meet the unique needs of his/her disability, the student has been denied a FAPE. See *Forest Grove Sch Dist. v. T.A.*, 557 U.S. 230, 238-39, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009) (“[W]hen a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.”)

Lauren G. v. West Chester ASD, 906 F. Supp. 2d 375 at 391, 392 (E.D.Pa. 2012)

The evidence in this case does not support Parents’ contention that Student exhibited reading difficulties that were significant enough to cause the District to suspect a disability in the early elementary school years. Parents considered first grade to have been a successful school year for Student, despite noting some inconsistency in reading skills, and Student ended the year with mastery of the skills expected in 1st grade. (FF 3)

Although Student demonstrated some fluctuations and inconsistencies in reading skills during 2nd grade, academic skills, including reading fluency, are still developing at that time, and Student's performance raised no "red flags" for District staff. (FF 4, 5, 6) Although Parents believe that Student's inconsistent performance should have alerted the District to a problem, such inconsistency has the opposite effect, reasonably suggesting to District staff that Student simply needed more time and practice with basic reading skills.

As court decisions considering child find issues have noted, it is not unreasonable for school districts not to "rush" to an evaluation of a child in the early school years, when basic academic skills are still developing. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 252 (3d Cir. 2012); *K.A.B. v. Downingtown Area School District*, 2013 U.S. Dist. LEXIS 99321 *14, 15 (E.D. Pa. 2013).

It was also not unreasonable for the District to suggest trying the IST process before proceeding immediately to an IDEA evaluation after Parents' initial request at the beginning of 3rd grade. (FF 10, 11). First, the evaluation request followed a screening for a visual-perceptual condition that suggested a basis other than a learning disability for Student's reading difficulties. (FF 9) Moreover, Parents understood that they could request an evaluation if they believed the IST interventions were not working, but for the remainder of the school year, those interventions appeared to be successful. (FF 12, 13, 14) Although end of the year results suggested that Student's reading and writing skills were not secure at the end of 3rd grade, the District monitored Student's skills at the beginning of 4th grade and addressed Student's weaknesses in reading with regular education interventions that were successful in greatly improving Student's reading decoding and fluency by the middle of that school year. (FF 16, 17, 65, 66, 67) Finally,

the District responded immediately when Parents renewed their request for an evaluation at the beginning of 4th grade. (FF 19, 21)

Based upon the evidence, the alleged child find violation in this case is a classic example of “20/20 hindsight.” Although Parents may have been disappointed with the pace of Student’s progress in acquiring reading skills by the end of 3rd grade, they realized, at the time, that Student was making progress. (FF18) Knowing now, however, that Student has learning disabilities, they fault the District for not discovering them earlier. The reasonableness of the District’s actions, however, must be evaluated in terms of the information available at the time Student was in 2nd and 3rd grades, not in light of information acquired later.

Taking into full account the facts as known to the parties during the 2012/2013 school year, Parents did not prove a child find violation.

District Evaluation/IEE Reimbursement

The District evaluation was entirely appropriate for the purpose of identifying Student’s IDEA eligibility and identifying the needs to be addressed through a special education placement and specially designed instruction, and, therefore, complied with IDEA requirements. *See* 34 C.F.R. §§300.301, 300.304—306. With respect to identification of Student’s learning disabilities, the assessments used by both the District school psychologist and the private evaluator Parents retained were similar, and the outcome of the evaluations were substantively identical. (FF 23, 24, 25, 36, 45)

In addition, the IEE did not serve any purpose in terms of further defining Student’s disabilities or special education needs, since the existence of additional disabilities identified by

the independent evaluator were not supported by the results of the assessments she reported. (FF 38, 42, 43, 44, 45, 46)

In testimony, the independent evaluator stated that she tries to follow the IDEA guidelines to **identify** an eligible student in all suspected disability categories. (N.T. p. 133) That, however, is a misstatement of the law. The IDEA regulations are far narrower, requiring that an LEA evaluation **assess** an eligible or potentially eligible child in all areas related to **the** suspected disability. 34 C.F.R. §300.304(c)(4). Under the independent evaluator's erroneous formulation of IDEA requirements the actual results of the assessments would be beside the point. As long as a weakness, skill deficit or possible symptom of a disability is identified and an assessment is administered to explore whether there is, indeed, a basis for identifying a disability, a child would be considered to actually have the disability for IDEA identification purposes. Presumably, then, every child evaluated would automatically be IDEA eligible because he or she had been evaluated based on a suspected disability. The absurdity of such an interpretation of the IDEA evaluation/identification requirements needs no elaboration or further discussion.

There is no reasonable basis for concluding that Student should be identified in the category of OHI based on ADHD or speech/language impairment as the independent evaluator recommended. Identification in the category of speech/language impairment is particularly baseless, since that recommendation arises entirely from the independent evaluator's belief that identification of a language-based learning disability should be sufficient to support identification in the speech/language disability category. (FF 46)

With respect to ADHD, and particularly Parents' contention that the District evaluation is flawed for not including assessments for ADHD, it is important to note, first, that the disability

initially suspected and the reason for Parents' evaluation request was clearly Student's skill deficits in reading revealed by the 3rd grade PSSA results. (FF 20)

During the course of the initial evaluation into the suspected disability, the District school psychologist also considered the Parents' input form, noting Student's struggles with focus on tasks where it was most needed. (FF 22) She also reviewed teacher input and appropriately looked for attention symptoms in the course of her evaluation and reported to Parents that some of Student's behaviors suggested ADD symptoms. (FF 27) Although teachers also noticed mild attention issues, they consistently reported that Student was easily re-directed back to task. *See, e.g.,* N.T. pp. 623, 697, 771. The independent evaluator made a similar observation. (FF 35)

Based on the evidence in the record, there is no support for a conclusion that District staff suspected that Student's sometimes wandering attention and difficulty with focusing so interfered with Student's classroom performance that such issues caused them to suspect another disability. There is, therefore, no reason for concluding that the initial evaluation should have included assessments for ADHD. Nevertheless, when Parents later raised that issue in their IEE request (P-36 p. 3), the District offered to assess Student in that area, but Parents did not respond, presumably having become convinced by the psychologist they hired to conduct the IEE that it was the only way to find answers they still sought concerning the best way to address Student's school difficulties. (FF 31, 33)

It is, perhaps, not surprising that the IEE report recommended adding disabilities that were explored but not actually found via the assessments the independent evaluator conducted during the IEE, since Parents would clearly not have been satisfied with an independent evaluation that did nothing more than confirm the results of the District evaluation. Looking at the assessment results in terms of suspected disabilities that were actually supported by the

assessment results, however, that is precisely what the independent evaluation actually determined: Student has a learning disability that led to deficits in reading and writing skills that must be addressed via special education services.

Denial of FAPE/Student's Need for Services Recommended by Independent Evaluators

It is quite apparent that Parents' reasons for disagreeing with the services the District provided during the 2013/2014 school year arises from an error in Parents' understanding of the District's obligations.

When asked whether Student made "meaningful" progress, Parent noted several times that Student did not "close the gap" and requested that the District be ordered to provide Student with whatever is needed to "fix the gap," meaning that Student would reach the same reading and writing levels level of same-age peers without learning disabilities. (N.T. pp. 60, 107, 108, 110, 1. 7, 8, 245) Although it is true, as the District readily acknowledges, that the special education services it provided during the 2013/2014 school year did not fully overcome the "gap" that exists between Student's average cognitive ability and academic performance in the areas of reading and written expression, or between Student and non-disabled peers at a similar cognitive level, that is not the standard the District is required to meet. Nowhere in the IDEA, its implementing regulations or court decisions concerning how/whether school districts have met their IDEA obligations is there a requirement that a school district entirely "close the gap" between the educational performance of children with disabilities and their non-disabled peers, or their own performance in a skill area in which there is no disability. School districts are required only to continue working on building the bridge over the gap that arises because of a disability. When/if the gap is closed, it may signal the end of a need for special education, or at least, for services at a much-reduced level.

Here, it is clear that the District met its obligations. Student received effective instruction in the areas of reading and writing that successfully addressed the needs that arise from Student's learning disabilities, and Student's academic skills advanced, although clearly not as much and as rapidly as Parents wished in order to meet their goal to "bridge the gap" by the end of 4th grade, after only half a school year of specially designed instruction. (FF 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 77, 78, 79, 80, 81, 82, 83) The District, therefore, did not deny Student a FAPE.

IEE Recommendations

Although Student's progress, accomplished without implementation of all of the recommendations of the independent psychologist, provides sufficient reason to conclude all recommended instructional methods and services are not needed for meaningful progress, some further discussion is warranted to help Parents better understand the basis for denial of their claims on this issue.

First, with respect to the contention that the District failed to meaningfully consider the recommendations in the IEE and the vision therapy evaluation, it is clear that Parents' true position is that meaningful consideration means that the District must embrace all such recommendations as completely and uncritically as they have by fully adopting them. Parents' position led to contradictions that Parents apparently did not recognize.

Parents, *e.g.*, questioned the accommodation/SDI of reading tests and other materials aloud because they felt it was "defeating the purpose" of improving Student's reading. (N.T. pp. 67, 234). The testimony of Parents' independent evaluator, however, supported that practice as reasonable and necessary to assure that Student's progress in content areas was not diminished by ongoing reading difficulties. Following the independent evaluator's recommendation, Parents began reading aloud to Student more often, noting that they saw an improvement in

Student's attitude toward and interest in reading when they "took the pressure off" by reading to Student. (N.T. pp. 99, 100, 106)

The vision therapist also recommended reading material aloud to Student, along with extra time for tests and assignments, which is also an SDI included in the District's IEPs. (P-15 pp. 30, 32, P-21 pp. 3, 4) Although Parents want all of independent evaluation recommendations followed, they questioned the District's inclusion of the same or similar recommendations in Student's IEP before the IEE was conducted.

Parents also request payment for the vision therapy recommended by their independent evaluators that the District declined to provide, noting that Student's reading speed "definitely increased." (N.T. pp. 88, 89) On the other hand, however, Parents disagreed with the IEP that the District proposed at the end of March 2014 because it included no significant changes, and they contend that Student made insufficient progress in reading during the months the District IEP was in place.

Moreover, despite expressing their belief that the Corrective Reading program was largely ineffective, Parents nevertheless professed dismayed surprise at the District's decision to exit Student from Corrective Reading during the 4th quarter of the school year (P-24 p. 9; N.T. p. 93). Parents' disagreement with that decision also followed their expressed concern that the reading fluency goal at the 2nd grade level in the December 2013 IEP was not challenging enough, especially when Student met the goal by the time of the first progress monitoring report in January 2014. (N.T. p. 72)

Unless Parents believed that disagreement with everything the District did was necessary and/or sufficient to establish that the District's educational placement and services were inappropriate, it is difficult to reconcile Parents' concerns about the District initially setting the

bar too low for Student and their disagreement with a proposed IEP that included more advanced reading goals and instruction, based upon progress monitoring data.

Parents' entirely subjective, unquantified beliefs about Student's progress and the reading programs that should be used to instruct Student appeared to be based entirely upon their uncritical acceptance of the generic recommendations of the private evaluator for instructional programs she consistently favors, appearing as they do, along with the term "double deficit dyslexia," very frequently in her private evaluation reports with respect to children who exhibit reading difficulties.. There is nothing inherently wrong, of course, in favoring and recommending certain instructional programs over others for children with similar skill deficits. Such recommendations, however, should not be confused with a truly individualized assessment of instructional techniques in light of Student's specific needs, or a conclusion that only those particular instructional methods will result in meaningful progress. Indeed, in their insistence that all of the evaluator's recommendations be followed to the letter, Parents did not take into account her acknowledgment that different reading programs might be equally effective if Student was making progress with other methods, as clearly occurred here. (FF 53)

Expert Testimony Reimbursement

Parents attempted to support reimbursement for the independent psychologist's hearing testimony by making that claim under §504 because it is not compensable under IDEA. Here, however, because the claims were based upon a denial of FAPE, IDEA standards and limitations apply. Simply invoking §504 is not a "work-around" for expenses that cannot be compensated under IDEA.

In an apparent attempt to establish that the District violated the §504 prohibition against discrimination on the basis of disability by delaying the initial special education evaluation, the

questions directed to District witnesses by Parents' counsel insinuated that the 3rd grade school principal suggested that Parents try the IST process first because the school psychologist who conducted the evaluation is over-extended, and, therefore, that the District ignored Student's needs to save money. That tactic did not establish discrimination under §504. Questions and statements by counsel directed toward witnesses are not evidence, and the answers to the suggestive questions by the witnesses did not support the accuracy of the premises in the questions. To be reasonable, inferences must be based on facts established by the evidence, not innuendo in questioning that is refuted by the testimony of the witnesses.

Assuming, without deciding, that expert testimony might be reimbursable under §504 in appropriate circumstances, it is absolutely clear that no such circumstances were established in this case.

ESY

Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives FAPE. 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
- (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
- (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
- (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

Moreover, school districts are not required to provide ESY based upon "The desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education." 22 Pa. Code §14.132 (c)(3).

Parents made no attempt to establish that Student met the standards for ESY eligibility. To the contrary, it is apparent that their ESY claim for 2014, at least, is premised on the need for vision therapy and CogMed training therapy, which are not necessary for Student to receive a FAPE, and, therefore, are not subject to reimbursement .

Since Student was not identified as IDEA eligible during the summer of 2013, and the absence of an evaluation during the 2012/2013 school year did not constitute an IDEA child find violation, there is no basis for compensatory education for denial of ESY services in 2013.

Assistive Technology

The record establishes that District did consider the independent evaluator's recommendation for assistive technology, and introduced several useful programs. (FF 69) The record also suggests, however, that the District took an overly narrow view of whether and how Student might benefit from additional assistive technology, and that its consideration of talk to text software, was too limited. (FF 56, 57, 58) Although the record does not support the conclusion that Student presently needs assistive technology such as talk to text software in order to make meaningful progress, the District's limited exploration, its quick decision that a talk to text option will be too difficult for Student to use at present, and its quick acceptance of

Student's initial reaction that it was not helpful raises a concern that the issue may not readily be revisited in the future.

If the District maintains the opinion that Student needs to be older before talk to text software is feasible, or that Student's disabilities are not so severe as to warrant it based upon its initial exploration of the issue, it could inadvertently delay or entirely deprive Student of a tool that may be useful now and could become necessary in the future.

The record further suggests that the District's conclusion that assistive technology is not necessary for Student arose primarily from an overly narrow view of when the use of assistive technology is warranted, as well as a limited investigation. The right talk to text software could help Student to address weaknesses in written expression, especially when writing demands increase at the middle school and secondary levels.

The District's exploration of assistive technology for Student was very limited and relied exclusively on District staff rather than exploring whether available resources, such as the SETT process, might be helpful in gaining a full understanding of whether/how Student might benefit from assistive technology, and the full range of options with respect to talk to text software. The District, therefore, should consider further exploring assistive technology for Student.

Notwithstanding this observation, it is important to emphasize that the record does not support a conclusion that the limited exploration of the value of talk to text assistive technology for Student interfered with meaningful progress in any aspect of writing instruction during the past school year. Even the independent evaluator did not suggest that Student currently needs assistive technology, or needed it in the past. Rather, she suggested that it may be helpful to Student in the future as academic demands increase. *See* N.T. pp. 131, 132. Likewise, the record does not establish that Student is either likely or unlikely to benefit from the use of

technology such as talk to text software immediately or in the future. It is, however, inevitable that academic demands will increase as Student moves from the elementary to the middle and high school years. It is, therefore, prudent for the District to take a closer and more systematic look at a potential means for proactively addressing Student's disability-related academic needs, and as an alternative to the possibility of a need to increase the intensity of special education designed instruction in the future in order to assure that Student maintains the ability to fully participate and make meaningful progress in the regular education curriculum. Since it is impossible to predict the course of any disability, it is impossible to predict Student's future needs, but it is better to have some idea of the likely need for /benefit of assistive technology sooner rather than late, but the District will not be ordered to take any action in that regard.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it hereby **ORDERED** that Parents' claims in this matter are **DENIED**.

It is **FURTHER ORDERED** that the School District is not required to take any action with respect to the claims asserted in Parents' May 12, 2014 due process complaint other than to convene IEP meetings as necessary from time to time to discuss, and if warranted, update and revise Student's IEP.

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

August 25, 2014