

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: A.D.

Date of Birth: [redacted]

Dates of Hearing:

June 16, 2011

July 7, 2011

August 1, 2011

CLOSED HEARING

ODR File No. 1742-1011AS

Parties to the Hearing:

Parent

Representative:

Mark W. Voigt, Esquire
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Parent

Pro Se

Souderton Area School District
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Karl A. Romberger, Jr., Esquire
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Representative:

Date Record Closed:

August 12, 2011

Date of Decision:

August 26, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is an elementary school-aged student in the Souderton Area School District (District) who is eligible for special education under the Individuals with Disabilities Education Act (IDEA)² on the basis of a specific learning disability. Student's Mother filed a due process complaint against the District challenging the educational program provided to Student at the end of the 2008-09 school year and during the 2009-10 and 2010-11 school years, as well as the program proposed in March 2011, seeking compensatory education and tuition reimbursement. The tuition reimbursement claim was subsequently withdrawn.³

The hearing convened over three sessions at which the parties presented evidence in support of their respective positions. Student's Mother claimed that the District denied Student a free, appropriate public education (FAPE). The District countered that its programs as implemented and offered did constitute FAPE. Student's Father did not share the Mother's complaint and took a position essentially aligned with the District. The record closed on August 12, 2011 upon receipt of all parties' closing submissions.

For the reasons set forth below, I find in favor of the District.

ISSUES

1. Whether the District identified Student in all areas of suspected disability;
2. Whether the District provided Student with FAPE for the end of the 2008-09 school year and the entire 2009-10 and 2010-11 school years, including extended school year (ESY) services;
3. Whether the District's proposed program for the 2011-12 school year is appropriate for Student;
4. If Student was denied FAPE for any of those time periods, is Student entitled to compensatory education; and
5. Is the Mother entitled to further reimbursement for the IEE?

FINDINGS OF FACT

1. Student is an elementary school-aged child who is a resident of the District for purposes of educational programming. Student is eligible for special education on the basis of a specific learning disability. (Notes of Testimony (N.T.) 50-52; Parent Exhibit (P) 1, P 12; School District Exhibit (S) 2, S 25)

¹ In the interest of confidentiality and privacy, no further reference will be made to Student's name and gender in this decision.

² 20 U.S.C. §§ 1401 *et seq.*

³ Notes of Testimony (N.T.) 29-30.

2. Student was first evaluated by another school district in September 2007 after a year in private kindergarten. This evaluation responded to a recommendation by a child study team noting Student's academic and attention struggles, and also followed a July 2007 private psychological evaluation conducted due to parental concerns over Student's difficulty concentrating and focusing attention, at which time Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (N.T. 58-60, 199-200; P 1, P 4 at 1A-2; S 2)
3. Cognitive assessment in that initial evaluation revealed average scores on all subtests of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) and a full scale IQ of 97. Assessment of Student's neuropsychological development reflected scores below expected levels with respect to some of the subtests within the Attention/Executive Functions and Language domains. (P 1; S 2)
4. An occupational therapy (OT) evaluation was also conducted, revealing some weaknesses but overall average scores on the Beery Developmental Test of Visual-Motor Integration (Beery VMI). (N.T. 326-27, 331; P 1; S 2)
5. Based upon the evaluation which included administration of the Woodcock-Johnson Tests of Achievement –Third Edition (WJ-III-ACH), the other school district identified Student as eligible for special education based on a specific learning disability in reading, mathematics, and written expression, as well as a speech/language impairment. OT consultation was also recommended. (P 1; S 2)
6. That school district developed an Individualized Education Program (IEP) addressing reading, mathematics, written expression, and speech/language support. Student's Parents participated in developing the IEP. (P 2)
7. Student and Student's family moved to the District in the summer of 2008 just before the 2008-09 school year began. The District convened an IEP meeting and developed an IEP for Student for that school year which was second grade for Student. This IEP noted needs with respect to reading decoding and fluency, written expression, and mathematics computation. Annual goals addressed reading (decoding, comprehension, sight words, and fluency), written expression, and mathematics computation. Student was placed in part-time learning support for Language Arts and Mathematics. (N.T. 65-67; S 8)
8. As in the prior school district, Student was provided consultative occupational therapy (OT) during the 2008-09 school year. (N.T. 297-99, 325-28; S 8 at 14)
9. At a meeting in February 2009, the District and the Parents discussed Student's difficulties with reading and some behavioral concerns. (N.T. 76-77; P 29; S 10, S 11)
10. During that 2008-09 school year, Student exhibited a lack of focus, impulsivity, and difficulty remaining in control in unstructured situations as well as at home. The Parents had Student evaluated by Student's pediatrician who agreed with the prior ADHD diagnosis, and made a written recommendation in June 2009 that Student try medication to improve Student's success at school. The pediatrician repeated this recommendation

in August 2009 after a meeting with both Parents. (N.T. 73-75, 79-81, 83-84; P 4 at 3, P 29; S 10, S 11, S 13)

11. Progress reports at the end of the 2008-09 school year reflected a need for supports to work independently, manage time wisely, follow directions and rules, use legible handwriting, and exercise self-control, as well as to organize materials and work product. Student did show appropriate progress in other areas such as seeking assistance when needed, completing work on time, and working collaboratively, as well as meeting state standards for content area classes. (S 13)
12. Student was determined to be not eligible for extended school year (ESY) services for the summer of 2009. (N.T. 82-83; S 8)
13. Student started third grade at the beginning of the 2009-10 school year. Student's Mother requested that the District evaluate Student in September 2009 and provided consent. (N.T. 86-87; S 14, S 17)
14. An administration of the WJ-III-ACH in October 2009 reflected scores generally below grade level (second grade) with scores on the Word Attack and Punctuation and Capitalization subtests well below grade level (1.3 and 1.7 grade equivalency, respectively).⁴ (P 6)
15. An IEP was developed in October of 2009. Needs were noted in reading comprehension, reading fluency, written expression, mathematics computation, and mathematics applications. Annual goals addressed reading fluency (from a baseline of 30 words correct per minute to a goal of 90 words correct per minute at a second grade level) and comprehension (from level K at middle second grade level to level N at middle third grade level), written expression (grade level), and mathematics computation and applications (from a baseline of 7 digits correct per minute at a third grade level to 16 digits correct per minute at a third grade level). Student would receive special education in the learning support classroom for Language Arts and Mathematics. Student's Father approved the Notice of Recommended Educational Placement (NOREP). (N.T. 88, 92-93; P 7, P 8; S 19, S 20, S 21)
16. At the time of the October 2009 IEP meeting, the occupational therapist recommended that those services be discontinued on the basis of observations of Student and review and assessment of handwriting samples. Student's handwriting was considered to be functional and legible at that time. (N.T. 300-01, 303, 312, 334; P 7; S 21)
17. Student's Mother had Student evaluated by a pediatric neurologist in the fall of 2009. Student was diagnosed for the first time with dyslexia in addition to ADHD. (N.T. 95-96, 98, 211-12; P 9)

⁴ The WJ-III-ACH scores in the prior school district's initial evaluation did not report grade equivalency scores. (P 1)

18. The District issued its re-evaluation report (RR) in November 2009. Student's Mother noted that Student continued to exhibit difficulty focusing and paying attention, and struggled academically particularly in the areas of reading and written expression. Student's Parents provided input through a caregiver questionnaire as well as the Conners Third Edition Behavior Rating Scales. Student's Mother's ratings indicated very elevated scores with respect to Inattention, Learning Problems, Executive Function, ADHD Inattentive Type, and Oppositional Defiant Disorder; and elevated scores with respect to Hyperactivity/Impulsivity and Aggression. Student's Father's ratings did not reveal any elevated scores. Student's teacher's scores were in the very elevated range with respect to Learning Problems and Peer Relations and in the elevated range with respect to ADHD Hyperactive-Impulsive Type. (N.T. 101-04, 107, 565-70, 574-75; P 12; S 15, S 17, S 18, S 25)
19. Assessments administered for the November 2009 RR included the WISC-IV, on which Student attained a full scale IQ of 90, in the average range. The District also administered several subtests from the Wechsler Individual Achievement Tests – Third Edition (WIAT-III), revealing scores in the extremely low to borderline range in all areas except Sentence Combining. (P 12; S 25)
20. The District's school psychologist observed Student in the learning support classroom and the school counselor observed Student in a science classroom. Student was generally attentive and was easily redirected when momentarily distracted in both classes. (P 12; S 25)
21. Student's needs identified in the RR related to reading including early reading skills and decoding; working memory; processing information; written expression; and mathematics calculation. The RR concluded that Student continued to demonstrate a specific learning disability in basic reading skill, reading fluency, mathematics calculation, and written expression. Student's Father agreed with the learning disability determination. (P 12; S 25)
22. Student's IEP team convened again at the end of November 2009. Student's mathematics goals were modified to reflect probes at the second grade level rather than the third grade level as in the prior IEP, but otherwise went unchanged. Student was determined to be not eligible for extended school year (ESY) programming in 2010. Student's Mother approved the NOREP. (N.T. 105-09; P 10, P 11; S 27)
23. Shortly after that December 2009 IEP meeting, the District was provided with reports from the pediatrician and the private pediatric neurologist from earlier in the year. (N.T. 111-12, 583-87; P 36; S 29, S 30)
24. In the spring of 2010, Student's teacher mentioned to the occupational therapist that Student's handwriting had declined in quality. The occupational therapist assessed Student and provided some interventions and supports. (N.T. 303-04, 341-42)
25. Progress monitoring reports for June of 2010 reflected that Student was reading 80-92 words correct per minute on second grade fluency probes (an increase from a baseline of

70 words correct per minute at that level in November 2009); was reading Level M independently but had difficulty with comprehension particularly with inferential questions (an improvement from a baseline at level K in November 2009); correctly solved 12-14 mathematics application problems in eight minutes on probes at a second grade level (an increase from 9-13 correct in March 2010); and remained relatively stable on second grade mathematics computation probes (compared to March 2010). Student continued to struggle on all domains of the District's grade-level writing rubric but benefited from use of a graphic organizer. (S 39)

26. Student's spring 2010 scores on the Pennsylvania System of School Assessment (PSSA) were in the proficient range in Mathematics and in the below basic range in Reading. (P 34 at 1-2)
27. Student's Mother took Student to a private learning center for an evaluation in August 2010. The results of that evaluation were shared with the District. Student did not attend any tutoring sessions at the learning center after its evaluation. (N.T. 116-19, 230-31; P 13)
28. Student started fourth grade at the beginning of the 2010-11 school year. The District uses Read 180 as its reading program for most students in special education from fourth grade on, including Student. The Read 180 Program is a multisensory program which uses leveled texts based on reading level and provides opportunities for teacher modeling, small group and individual instruction, and has a computer component. Read 180 addresses reading comprehension, reading fluency, and spelling. (N.T. 644-45, 648-49, 653-54, 689-96)
29. The Mother requested in September 2010 that OT resume for Student to address Student's fine motor difficulties, and consented to an OT re-evaluation. Student's teacher had also noticed that Student's letter formation was overly large. The occupational therapist determined that Student again exhibited needs for OT with respect to handwriting (spatial orientation of written work and spacing between words) and keyboarding. (N.T. 119-22, 302-12, 662-63; P 14, P 16, P 36 p. 8; S 32, S 37; S 38)
30. An IEP meeting convened in November 2010. It was agreed that OT would be added as a related service, both direct and consultative. Student was determined to be not eligible for ESY services in 2011. (N.T. 124-31, 134-35, 313-14, 317-18, 588-94; S 35, S 37, S 38)
31. The IEP team determined that Student's needs continued to include reading comprehension and fluency, written expression, and mathematics computation and applications, as well as legible written work. (P 16)
32. Annual goals in the November 2010 IEP included reading fluency (101 words correct per minute at a second grade level from a baseline of 67-72); reading comprehension at a beginning fourth grade level; written expression at grade level; and mathematics problem solving and computation at a third grade level. A number of program modifications and items of specially designed instruction addressed Student's need for support in spelling,

organizational skills (checklists of steps and assistance with assignments), attention (preferential seating and positive reinforcement), and OT. (P 16)

33. Student's Father approved the NOREP issued following the November 2010 IEP meeting. Student's Mother did not approve the NOREP and requested mediation. (S 36)
34. Around the time of that November 2010 IEP meeting, Student's Mother requested an independent educational evaluation (IEE) at public expense. The District agreed to the IEE. (N.T. 136-39; P 36 at 24-25; S 40, S 42)
35. The IEE was conducted in January 2011 and a report issued. The independent evaluator administered, among other assessments, the WISC-IV, WIAT-III, Beery VMI, and Comprehensive Test of Phonological Processing (C-TOPP). She also obtained rating scales for the Behavior Assessment System for Children – Second Edition (BASC-2). (P 19; S 44)
36. On the WISC-IV in January 2011, Student's full scale IQ was determined to be 87, in the low average range, but the General Ability Index (GAI) score, which the evaluator determined was a better estimate of Student's overall cognitive potential, was 93, in the average range. (P 19)
37. The C-TOPP administered for the IEE revealed significant weaknesses in phonological awareness and below average scores on the phonological memory and rapid naming subtests. This evaluator concurred with the dyslexia diagnosis. (P 19)
38. On the WIAT-III, Student's scores were in the below average to borderline/poor range on all subtests on the Oral Language, Reading, and Written Expression composites. Student achieved average scores on all of the subtests on the Mathematics composites except with respect to subtraction, which was below average. Student's Total Achievement score was in the borderline/poor range. (P 19; S 44)
39. Student's score on the Beery VMI was in the borderline to poor range revealing difficulty with spacing, symbol orientation, and graphomotor functioning. (P 19; S 44)
40. The independent evaluator obtained information from four of Student's teachers through a rating scale and checklist she developed. The teachers reported that Student, at times, had difficulty with attention and remaining focused, requiring redirection, and also needed directions to be repeated. Individual and small group instruction were noted to be helpful to Student. (N.T. 383-84; S 34)
41. Behaviorally, the BASC-2 rating scales completed by both of Student's Parents and a teacher revealed teacher scores in the At-Risk range with respect to School Problems, the Behavior Index, and Adaptive Skills; scores in the Clinically Significant range by Student's Mother with respect to Adaptive Skills; and scores in the At-Risk range by Student's Father with respect to Adaptive Skills. (P 19; S 44)

42. The evaluator who conducted the IEE made a number of recommendations for Student's educational program. She opined that the reading program was appropriate but did not "go[] far enough" to address Student's reading needs. Her recommendations focused on improving Student's phonological processing, basic reading skills, reading fluency, spelling, and written expression, and also made suggestions for assistive technology (AT). She specifically recommended Wilson Reading System programs and set forth a number of suggestions to address Student's ADHD. (P 19; S 44)
43. The evaluator who completed the IEE concluded that Student was eligible for special education on the basis of a specific learning disability in basic reading skills, reading fluency, and written expression; a speech/language impairment; and an other health impairment (OHI) based on ADHD. She used Student's full scale IQ score to conduct a discrepancy analysis because it was a more stringent measure, and using the GAI would have resulted in an even larger discrepancy between Student's cognitive ability and achievement. (N.T. 409-10; P 19; S 44)
44. The IEE was shared with the District upon its completion. (N.T. 152-53)
45. Student was evaluated by another private psychologist in February 2011 to determine whether Student should be given a trial of medication for the ADHD. This psychologist concluded that such a trial was appropriate and made a written recommendation in a report which was then shared with the District. (N.T. 154-56; P 21)
46. An administration of the Test of Written Language (TOWL) in March 2011 reflected that Student continued to have difficulty with spelling, punctuation, and capitalization. (N.T. 675-76; P 23 at 8-9; S 49)
47. In the spring of 2011, Student started taking medication for ADHD which significantly improved Student's inattention, particularly with doing homework. (N.T. 85-86, 148-51, 522)
48. Student's IEP team convened in March 2011 to revise Student's IEP and discuss the results and recommendations of the IEE. This IEP included some of the information from the IEE as well as recent assessments by the District. Needs were identified as reading comprehension, reading fluency and decoding, encoding, written expression, legibility of written work, mathematics computation and mathematics applications. (N.T. 158-59, 597-98, 600; P 23; S 47, S 50, S 51, S 52)
49. The March 2011 IEP modified the annual goals as follows. The reading fluency goal was changed to 149 words correct per minute on a third grade probe (from 101 words correct per minute on a second grade probe in the prior IEP, with a new baseline) and more detail was provided on the writing goal; in most other respects, the goals were not changed. Numerous program modifications and items of specially designed instruction addressed needs for organizing written work; organizing and recording assignments; understanding directions; staying on task; processing time to organize Student's thoughts; chunking of multi-step assignments and checklists of steps; repetition and practice; "hands-on" instruction; preferential seating; small group instruction for reading, writing, and

mathematics; direct, systematic, multisensory phonetic instruction for reading and spelling; extended time for and/or alternative assessments; scribing for lengthy written responses; prompts and cues; and OT. For organization, a chart was developed to assist Student in being prepared for class and to organize homework, and Student's agenda was to be checked regularly. (N.T. 677-80; P 23; S 52)

50. Student began the System 44 program for reading decoding in March 2011, which supplemented the Read 180 instruction. System 44 and Read 180 together provide multisensory, direct, explicit, systematic instruction to address reading fluency and phonics including decoding. Student mastered 20 of the 160 topics in the System 44 program between March 2011 and the end of the 2010-11 school year. In the Read 180 program, Student's Lexile level increased from 421 in November 2010 to 635 in June 2011, which was within the proficiency range for Student's grade level. (N.T. 644-45, 648-51, 689-97, 701; P 31; S 57)
51. Student was determined to be ineligible for ESY for the summer of 2011. (N.T. 164; P 23; S 52)
52. Student's Mother disapproved the NOREP of March 29, 2011 and filed a due process complaint on April 18, 2011. Student's Father approved the NOREP. (N.T. 172-73, 276-77; P 24, P 26; S 53)
53. In April 2011, the evaluator who conducted the IEE reviewed the March 2011 proposed IEP and reiterated many of her previous recommendations such as the Wilson Reading System, and provided criticism of that IEP. She also suggested Student attend a specific private school.⁵ (P 25; S 54)
54. The District funded the IEE in full, but did not reimburse the Mother for fees incurred for the independent evaluator's consultation with the Mother and her counsel regarding the March 2011 IEP, or the supplemental report in April 2011. The April 2011 supplement was not part of the IEE; it was submitted to the Mother's counsel and was not directly provided to the District. (N.T. 383, 418-19; P 43; S 54)
55. Student's Mother applied for Student's admission to that private school and Student was accepted. However, Student did not, and will not, attend the private school placement. (N.T. 174-76)
56. Progress reporting for March-June 2011 reflected that Student was reading between 84-94 words correct per minute on third grade fluency probes in June 2011 (a slight increase from a baseline of 73-86 words correct per minute at that level in March 2011); was reading in March 2011 at Level N (mid-third grade) with 94.5% accuracy (an improvement from a baseline at level M in November 2010); correctly computed 13 digits correct per minute on mathematics application problems in three minutes on probes at a third grade level (an increase from 9.3 digits correct per minute in November 2010);

⁵ At the hearing, the psychologist who conducted the IEE testified that she saw no reason that the District could not develop and implement an appropriate educational program for Student. (N.T. 433, 443-44)

and remained relatively stable on third grade mathematics computation probes (compared to November 2010). Student's scores in written expression using the District's fourth grade rubric also remained stable across most domains except Student showed improvement with conventions. (P 31; S 55)

57. The District uses the discrepancy model for identifying students with learning disabilities. (N.T. 577-79)
58. The parties did not move their exhibits into evidence, but rather asked that all exhibits referenced during the testimony be considered. (N.T. 783-86) Based upon a review of the record, the following exhibits are deemed admitted and were considered in this decision even if not specifically referenced:

Parent [Mother] Exhibit Nos. 1 through 14, 16, 18 through 26, 29, 31 through 36, 39, 40, 42, 43, 45 through 48;

School District Exhibit Nos. 2, 8, 10, 11, 13, 14, 15, 17, 18, 20, 21, 25, 27, 29, 30, 32, 34 through 40, 42, 44, 47 through 55, 57, 61, 62

Father Exhibit Nos. 1 and 2

Hearing Officer Exhibit No. 1

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁶ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found the witnesses who

⁶ The burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

testified in this case to be generally truthful and forthright; the credibility of particular witnesses is discussed further in this decision as necessary.

IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). 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). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The first issue is whether the District properly identified Student in all areas of suspected disability. The Mother’s expert opined that Student should also be identified as eligible on the basis of the longstanding ADHD diagnosis under the OHI category, as well as with a speech/language impairment.

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. Those categories are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a).

“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—

- (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 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). “A determination of whether the District failed to identify a student eligible for special education services in a timely fashion requires a finding that the District knew, or should have known, that the child was disabled or in need of special education.” *D.K. v. Abington School District*, 2010 WL 1223596, *6 (E.D.Pa. 2010).

The Mother's evidence regarding Student's areas of eligibility was provided by the private psychologist who conducted the IEE, a very experienced certified school psychologist who has worked with many children with exceptionalities including ADHD and dyslexia. (N.T. 375-76; P 35) With respect to a speech/language impairment, this witness provided little testimony, and the section of her IEE which discusses speech/language needs merely references weaknesses in phonological processes, phonological memory, and rapid naming speed. (P 19 at 25; S 44 at 25) However, her report suggests that these deficits will manifest themselves in Student's reading disability, and does not indicate that specific intervention for a speech/language impairment, rather than in conjunction with Student's specific learning disability in reading, is necessary. (P 19; S 44) Thus, the record does not demonstrate that the District erred in failing to identify Student with a speech/language impairment.

With respect to Student's ADHD as a basis for OHI, the District witnesses testified, credibly, that Student's attentional and focusing difficulties were not significant at school, and that Student was easily redirected and refocused when necessary. (N.T. 573-75, 602-03, 618-19, 622, 626-27, 666-67) Although the school psychologist agreed that Student had historically exhibited attentional difficulties, at the time of the 2009 RR (which is near the beginning of the time period at issue in this case), those behaviors were not of concern at school. (Finding of Fact (FF) 18, 20, 21; N.T. 573-75)

In contrast, the private psychologist who conducted the IEE opined that a functional behavior assessment (FBA) was necessary due to Student's ADHD diagnosis, so that a behavior support plan could be developed. (N.T. 448, 453) However, this witness was not aware that Student had started taking medication for ADHD (N.T. 478-79; FF 47), and also was not familiar with how or whether Student's ADHD impacted Student's education. (N.T. 477-79; P 19 at 33; S 44 at 33) As noted above, a diagnosis alone does not necessarily mean that a child is eligible for special education on that basis; rather, it must be demonstrated that the student, by reason of that disability, requires specially designed instruction. The absence of evidence on this second prong is fatal, and this hearing officer therefore concludes that the Mother failed to meet her

burden of establishing that the District failed to properly identify Student in this category of disability.

Having found no basis for relief on the first issue, the next question is whether the District's programs as implemented and offered denied Student FAPE. This inquiry relates both to the programming for the end of the 2008-09 school year and the 2009-10 and 2010-11 school years, as well as the program proposed for 2011-12. Mother sets forth several bases for finding the District's programming deficient. (Mother's Closing at 21-26)

With respect to the decision to terminate Student's OT, the record reflects that by the fall of 2009, Student was demonstrating functional, legible handwriting as evidenced by assessment of specific samples of Student's handwriting and observations by the occupational therapist. (FF 16) There is no suggestion that anyone disagreed with the decision to terminate OT at that time. It was not until the spring of 2010 that Student's teacher noticed a return of some handwriting difficulties, and she sought assistance from the occupational therapist, who provided some suggestions for supports and interventions. (FF 24) Simply because, by the fall of 2010, Student again demonstrated a need for OT, it does not follow that Student was improperly exited from that service a year prior. Special education programs must be assessed based upon the information known to the IEP team at the time, not based upon hindsight. *Fuhrmann, supra*. Moreover, I find convincing the testimony of the occupational therapist that there was no reason to re-administer the Beery VMI to Student before terminating OT services in the fall of 2009. (N.T. 330-31, 339-341) The record demonstrates that when Student exhibited a need for OT in the fall of 2010, that related service was again provided. (FF 29) There was also credible evidence that while Student did demonstrate poor handwriting during the 2010-11 school year, particularly with first drafts, Student was able to produce a legible final product through pre-writing, use of a graphic organizer or storyboard, drafting, and editing, when given sufficient time. (N.T. 319, 337-38, 340-41, 343-44, 352-55, 598-99, 683-87, 745-47) This process is consistent with that recommended by the evaluator who conducted the IEE, in addition to teaching Student keyboarding skills which was also being done. (FF 29, 30, 31; N.T. 388-91)

The primary contention of Student's Mother is that the District's IEPs do not aim high enough for Student, resulting in minimal progress. (N.T. 78, 82, 87, 90-91, 94, 114-15, 127-28, 200-01, 207-08, 237-40) Her evaluator testified consistent with the Mother's belief, opining that the District's IEPs were flawed because they did not contain goals to bring Student to grade level. (N.T. 421-24, 448-49, 453, 459, 461; *see also* P 19, P 25; S 44) Student's Father did not share this belief. (N.T. 530-31, 535-37)

Annual goals in a student's IEP must be responsive to identified needs. It was not disputed by the District that a long-term goal for any student is to perform at grade level. (*See, e.g.*, N.T. 638) Districts are also required to develop IEP goals that are aligned with state standards and provide access to the student's grade-level curriculum. Nonetheless, annual goals in a Student's IEP must also be based upon needs in relation to academic and functional performance, with the expectation that the student will master that goal in one year's time. If a student's present educational levels are below grade level and the IEP team does not expect that the student would perform at grade level within the one-year duration of the IEP, then the goal cannot be deemed deficient simply because it does not aim that high. This concept was evident

in the testimony by the Mother and the evaluator who conducted the IEE that suggested that the District was failing to “close the gap” between Student’s average intellectual ability and below grade level achievement. (N.T. 237-40, 422-24; P 19, P 25; S 44) The analysis, however, is whether an IEP is reasonably calculated to provide meaningful educational benefit, not whether a student with a disability will perform commensurate with grade-level peers within the duration of an IEP.

The District’s school psychologist provided a persuasive explanation on why many of the goals in Student’s IEP were not at grade level. (N.T. 611-12) It is evident that the District did not want to set goals for Student which would not realistically be met. It is also clear that setting annual goals at a level which a child cannot be expected to reach within one year’s time would also render progress monitoring useless. While it is understandable that a parent would seek to have any gap between ability and performance closed as quickly as possible, and one might be extremely hopeful that Student will soon be performing at grade level in all areas, this hearing officer cannot conclude that the District has been denying Student FAPE because the IEP goals have been based upon expectations derived from Student’s present educational levels.

The other major concern of Student’s Mother is with the reading program. Student’s Mother and the evaluator who conducted the IEE are convinced that Student requires the Wilson Reading Program in order to make sufficient educational progress. (N.T. 182-83, 420-21) The psychologist who conducted the IEE also conceded that Read 180 provides direct, synthetic, phonetic, multisensory instruction and is appropriate for Student’s reading needs and addresses Student’s language-based learning disability. (N.T. 392-99, 410-14) She faulted Read 180 for Student, however, because it is not intensive enough to address the gaps between Student’s performance and grade level. (*Id.*) She did admit, however, that she did not know how the District was implementing the Read 180 and System 44 programs for Student. (N.T. 413)

The Read 180 and System 44 programs together provide a direct, synthetic, phonetic, multisensory approach to teaching reading and include a decoding component. (FF 28, 50) The programs together address Student’s needs in this area. (FF 28, 48, 50; N.T. 392-99, 410-14) Simply because the Wilson Reading Program may be better for Student does not mean that the program which has been offered and provided and which does address Student’s language needs is inappropriate. Were I asked to determine what would be the *best* program to address Student’s language-based learning disability, the testimony of the psychologist who conducted the IEE might prove to be compelling. As discussed above, however, the test is what is reasonably calculated, at the time the IEP is developed, to permit a child to derive meaningful educational benefit, not what is best or what might close the gap in one year’s time. For all of these reasons, I find that the Mother has failed to meet her burden of establishing that Student’s reading program denied Student FAPE. Further, based upon the foregoing discussion, this hearing officer also declines to order the District to incorporate and implement all of the suggestions in the IEE in the March 2011 IEP. (Mother’s Closing at 27-28) Moreover, it is clear that the IEP team did consider all of her recommendations (FF 48), which is all that is required. 34 C.F.R. § 300.502(c).

The other major concern of Mother is that Student has not made sufficient progress over the course of the school years in question. (N.T. 90-91, 94, 114-15, 127-28, 171-72, 200-01,

207-08, 237-40) This argument is related to the discussion above about closing the gap which, again, is not the standard. It is noteworthy that the psychologist who conducted the IEE described Student's progress as "trivial" based upon a comparison of WIAT-III scores in November 2009 and January 2011. (P 19 at 26; S 44 at 26) This conclusory statement is not explained, and contradicts the convincing testimony of the District's school psychologist who clarified that Student's scores on these assessments actually reflect more than one year's growth or progress. (N.T. 609-10)⁷ That witness also persuasively explained that determination of a student's progress should not be made based solely on one set of data, but rather should be made upon a consideration of regular assessments of a student such as how he or she is progressing through the curriculum. (N.T. 607-10)

When the record is considered as a whole, this hearing officer concludes that the District's IEPs for the time periods in question are appropriate and that Student did make meaningful educational progress.⁸ Each of the IEPs at issue were responsive to Student's identified needs in reading, written expression, and mathematics, as well as organization, and contained annual goals, program modifications, and specially designed instruction which were appropriate to meet all of those needs. (FF 25, 49, 50, 56) Student made progress toward those goals which, while did not close the gap, was not trivial. (FF 11, 15, 18, 21, 22, 24, 28, 29, 30, 31, 32, 4, 48, 49) In reading fluency, Student not only increased the number of words read correctly per minute but also was probed at a third grade level by June 2011. (FF 15, 56) Student was reading at level N (mid-third grade) in June 2011 from level K (mid-second grade level) in October 2009. (*Id.*) Student similarly increased the number of correct digits per minute at a higher grade level between the fall of 2009 and June 2011. (*Id.*) Written expression assessments were based upon grade-level rubrics and, while Student continued to demonstrate needs in this area, Student continued to make growth commensurate with Student's grade level. Furthermore, standardized achievement testing similarly reflected appropriate progress. (*Id.*; N.T. 607-610) Student also demonstrated improvement with organizational skills. (FF 32; N.T. 677-78) In terms of the reading programs used, by the end of the 2010-11 school year, Student mastered 20 of the 160 topics in the System 44 program and, in the Read 180 program, Student's Lexile level increased to the proficient range for Student's grade level. (FF 50)

Again, the Mother's contention is that Student has not made sufficient progress because the gap has not been closed. It was the Mother's burden to establish that Student's progress was less than meaningful, and this assertion does not set forth the appropriate standard for determining progress as explained above. For all of these reasons, this hearing officer cannot conclude that the District denied FAPE to Student for the school years in question.

Student's Mother also claims that Student should have been provided with ESY for the summers of 2009, 2010, and 2011. (Mother's Closing at 28-30) "Extended school year services must be provided only if a child's IEP Team determines, on an individual basis ... that the services are necessary for the provision of FAPE to the child." 34 C.F.R. § 300.106. Under the

⁷ This explanation also comports with this hearing officer's understanding of these scores.

⁸ There was very little evidence with respect to the 2008-09 school year, and certainly none which would be sufficient to meet the Mother's burden of establishing a denial of FAPE between April 2009 and the end of the 2008-09 school year.

Pennsylvania regulations, IEP teams must make ESY eligibility determinations through consideration of the following factors, although no single factor is determinative:

- (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.

22 Pa. Code § 14.132(a)(2).

The only evidence with respect to Student's need for ESY services was the opinion of Student's Mother and the psychologist who conducted the IEE that the District should have offered them in 2009, 2010, and 2011 given Student's academic deficits. (N.T. 448-49, 452, 466, 481-82) Almost any child, of course, would likely benefit from additional instruction, including summer programming. Nevertheless, school districts are only required to provide ESY services if they are necessary to provide FAPE. There was no evidence that any of the criteria set forth in the Pennsylvania regulations compelled the provision of ESY services to Student, nor that such was required in order to provide FAPE. Rather, the testimony suggested only that because of the discrepancy between Student's cognitive ability and reading needs, and between Student's grade level and performance, ESY should have been provided. (*Id.*) Additionally, contrary to the Mother's argument, the fact that Student demonstrated a need for OT in the fall of 2010 after having that related service discontinued is not, in this hearing officer's estimation, the type of regression due to "an interruption in regular programming" which ESY services are designed to address. 22 Pa. Code § 14.132(a)(2)(i). I am unable to conclude that this evidence suffices to establish that the District deprived Student of FAPE based on failure to provide ESY.

The last issue is whether the District should be ordered to provide additional reimbursement to the private psychologist who conducted the IEE. The fees incurred for the IEE

itself were paid by the District. (FF 54) The services performed by that psychologist in March and April 2011 were not a part of the IEE but, rather, were more akin to expert consultation with the Mother and her counsel. (*Id.*) This psychologist herself testified that the services performed in the spring of 2011 were “after the fact” and not related to the IEE. (N.T. 418-19) Thus, this hearing officer finds no basis on which to provide a remedy on this claim.⁹

Dicta

This hearing officer observes that Student is fortunate enough to have two very loving and caring parents who clearly want the best for their child in all aspects of Student’s life, including educationally. However, the record is also replete with evidence that many educational decisions in this case were heavily influenced by the ongoing custody proceedings between the Parents. (*See, e.g.*, S 14, S 15, S 30 (requesting evaluation based on recommendation of custody master in anticipation of, and for use at, custody hearings); N.T. 154 (referencing February 2011 evaluation sought pursuant to a court order).) It is my sincere hope that both Parents are able to work toward overcoming their differences which undoubtedly have had a significant impact on Student not only educationally but in all facets of Student’s life.

CONCLUSION

For the foregoing reasons, this hearing officer concludes that the District did not fail to program appropriately for Student, and did not fail to offer and implement appropriate IEPs during the relevant time period. I also find no basis to award reimbursement for the unreimbursed fees of the private psychologist who conducted the IEE. Consequently, there is no basis on which to award compensatory education or any other remedy.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Mother’s claims in this matter are **DENIED**. The School District need take no action.

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



Cathy A. Skidmore
HEARING OFFICER

Dated: August 26, 2011

⁹ The Mother has also raised this issue to preserve a future claim for reimbursement of expert witness fees. (Mother’s Revised Statement of Issues at 2)