

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

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: D.U.
ODR #2186/11-12-AS

Date of Birth:
[redacted]

Dates of Hearing:
October 28, 2011
December 5, 2011
January 3, 2012

CLOSED HEARING

Parties to the Hearing:
Parents

Representative:
Charles Weiner, Esquire
P.O. Box 212
Newtown, PA 18940

Pennsbury School District
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P.O. Box 338
Fallsington, PA 19058

Claudia Huot, Esquire
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Blue Bell, PA 19422

Date Record Closed:

January 23, 2012

Date of Decision:

February 5, 2012

Hearing Officer:

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

Background

Student¹ is a pre-teen aged child who resides in the District and currently attends a private school [“private school”] for children with learning disabilities. Other than the kindergarten year, Student has never attended public school although the Parents on three occasions sought and received an evaluation from the District. In both February 2007 and May 2008 the District conducted an evaluation and found Student eligible for special education as a child with a specific learning disability, and offered programs which the Parents declined, opting to continue to educate Student at their own expense. However, on a third evaluation in May 2010 [“May 2010 evaluation”], the District found Student no longer eligible for special education and did not offer a program. The Parents chose to continue Student’s private placement, and in May 2011 obtained an Independent Educational Evaluation [“IEE”] which found Student eligible. The Parents filed for this hearing, contesting the appropriateness and/or the conclusions of the District’s May 2010 evaluation, and asking for reimbursement for the IEE as well as for the private school tuition and related costs for the 2010-2011 school year.

For the reasons presented below I find for the District.

Issues

1. Was the evaluation conducted by the District in May 2010 inappropriate?
2. Even if the evaluation was appropriate, did the District’s multidisciplinary team reach an incorrect conclusion regarding Student’s eligibility for special education or for a 504 Service Plan?
3. If the evaluation conducted by the District was inappropriate and/or if the District’s multidisciplinary team reached an incorrect conclusion, are the Parents entitled to reimbursement for the Independent Educational Evaluation they obtained in May 2011?
4. Did the District deny Student FAPE by failing to identify Student as eligible for special education and offer an IEP for the 2010-2011 school year, or as a Protected Handicapped Student and offer a 504 Service Plan?
5. If the District denied Student FAPE, was the unilateral placement selected by the Parents appropriate?
6. Are there equitable considerations that alter the position of either party in this matter?

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

Findings of Fact

1. Student is a resident of the Pennsbury School District. [NT 41; S-27]
2. Student attended full-day kindergarten in a District public school, and then transferred to a private regular education school² for the 2005-2006 school year, first grade. [NT 46, 139, 807]
3. Entering first grade, Student did not know all the letter names or letter sounds, and was having trouble with simple words. The Parents were contacted three or four weeks into the year and invited to a meeting at which tutoring was suggested. The Parents engaged a tutor. [NT 43]
4. In second grade, the 2006-2007 school year, Student had continued difficulty with letter identification/sounds, reading and written expression. [NT 46-47]
5. Student's regular education private school had a 10 or 12 to 1 student to teacher ratio. The school worked with the Parents and put supports in place in the form of twice-weekly sessions with a learning specialist. The Parents hired a reading specialist to provide tutoring at home for 60 to 90 minute sessions three times a week. [NT 47-48]
6. The Parents requested that the District conduct an evaluation. The February 16, 2007 District evaluation report noted that Student's cognitive abilities were at the 96th percentile on the Wechsler Intelligence Scales for Children – Fourth Edition [WISC-IV], with weaknesses in working memory, sequential memory, and processing speed. Significant academic weaknesses compared to same-aged peers as assessed by the Wechsler Individual Achievement Test-Second Edition [WIAT-II] were word reading, reading comprehension, and numerical operations, with all scores more than 1½ standard deviations below cognitive ability. Student was instructional in reading at a pre-primer or early 1st grade level. Teachers and District evaluators all noted significant concerns regarding attention and motor overflow. The District's 2007 evaluation found Student eligible for special education as a student with a specific learning disability. [NT 40-51, 54, 111, 197-198, 263-265; P-15]
7. In March 2007 the District convened an IEP meeting with the Parents. Although the team constructed an Individualized Education Program [IEP] and the District offered a Notice of Recommended Educational Placement [NOREP] the Parents decided that Student should remain at the regular education private school for third grade. [NT 50-51, 54-55, 113, 115; S-2]
8. Early in third grade, the 2007-2008 school year, the Parents obtained a private evaluation. The report of September 20, 2007 conferred the diagnosis of

² Father was employed at the regular education private school. [NT 46-47]

dyslexia, and recommended various systematic, multisensory reading programs. On March 24, 2008 the Parents approached the District requesting an IEP. The District promptly obtained the Parents' permission to re-evaluate Student and conducted a re-evaluation. [NT 55-56, 539; S-6, S-7, S-9, P-14]

9. The District's May 27, 2008 re-evaluation consisted of: record review, including the private evaluation; parent input; teacher input; achievement testing with the WIAT-II; a reading specialist evaluation using the Comprehensive Test of Phonological Processing (CTOPP), Qualitative Reading Inventory 3, Durrell Analysis of Reading Difficulty, and Developmental Reading Assessment (DRA2); behavior and social assessments using the Conners Rating Scales and the Behavior Assessment Scales for Children-Second Edition (BASC-2); and an occupational therapy screening. [NT 126; S-8, S-10, S-12]
10. The May 2008 re-evaluation resulted in the finding that Student's fluency rates were well below expectations, there was a significant discrepancy between overall ability level and reading/writing development, and reading and writing difficulties were manifest in the classroom. Student's "self-corrections, repeats, decoding strategies and fluency affected [Student's] reading rate and consequently [Student's] profile as a reader". Nevertheless, despite not receiving a special education program per se, with the small regular education private school and its supports along with tutoring at home Student had made "considerable gains" in reading skills and could "read for meaning at and above grade level". Student remained identified as eligible for special education, classified as having a specific learning disability. Although Student was assessed on rating scales completed by teachers as being in the at-risk range for ADHD Inattentive Type, behaviors were unremarkable at home according to the Parent rating scales. There was no medical diagnosis of ADHD.³ [NT 120-121, 198-199, 265-269, 780-781; S-11, S-12; P-16]
11. The Parents agreed with the findings of the District's re-evaluation, and acknowledged that Student had made progress in the period between the first and the second District assessments. An IEP meeting was convened on June 16, 2008. However, by letter and the June 26, 2008 NOREP the Parents indicated that they did not approve the IEP and they requested a meeting. [NT 58-59, 123-124, 127-128, 808; S-13, S-14, S-15, S-16]
12. The second IEP meeting was convened on July 21, 2008. School team members discussed their belief that the IEP was appropriate but noted that since Student had not attended a District public school since kindergarten the IEP could change based on needs that manifested themselves once Student began attending the District public school. [NT 177-178, 809-812; S-17, S-18]

³ The Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition [DSM-IV] requires the symptoms to be present in at least two settings in order to fulfill diagnostic criteria.

13. On July 28, 2008 the Parents signed a NOREP indicating that they did not approve the IEP. In November 2008, the IEP team revised the IEP to include a specific systematic multisensory reading program; a new NOREP was sent to the Parents. [NT 130-133; S-19, S-20, S-21, S-22]
14. For the 2008-2009 school year, the Parents chose to remove Student from the regular education private school and place Student in the current special education private school, an independent college preparatory school for children in grades one through twelve with learning differences. The Parents did not request District funding for the placement. [NT 58-60, 134-135; S-27]
15. During the 2008-2009 school year Student showed good academic progress and gained more self-confidence. [NT 62-65, 138]
16. Beginning in the 2008-2009 school year Student began taking medication to address ADHD symptoms. The District did not learn of this until it received a May 2011 independent evaluation that was submitted after the present Due Process request was filed. [NT 148-151, 171-172, 187-190, 332-336]
17. During the 2009-2010 school year, Student was not considered to be in a specific grade. Student was initially being taught in reading at a 4th grade Instructional level. In other subjects such as math and science Student was at a 5th grade level. To build reading fluency, the private school used several particular reading programs daily, and another specific math program was used daily to improve math fluency. [NT 565, 572, 585]
18. Despite progress, Student had needs in the areas of reading fluency, reading pace and reading accuracy. Deficits in fluency negatively affected comprehension of longer material because when Student would lose the meaning of the material. Student's writing was characterized by poor organization and difficulty conveying information. [NT 156-163, 184-185, 566- 567]
19. On February 22, 2010 the Parents made a written request to the District for a re-evaluation and an IEP, and they registered Student in the District under dual enrollment. On March 15, 2010, the District issued a Permission to Re-evaluate form, seeking consent for standardized measures of achievement, a reading evaluation, classroom observation, teacher narrative, parental report, and records review. The Parents provided their consent on March 17, 2010. [NT 72-74, 140, 164-165; S-28; S-27, S-28, S-29]
20. The District psychologist who prepared the 2010 evaluation had been involved in both the 2007 and 2008 evaluations. She administered the WISC-IV in 2007. [NT 194-196, 258-259]

21. The multidisciplinary team used the WISC-IV IQ results from the 2007 evaluation. They considered the General Ability Index [GAI]⁴ as the indicator of Student's cognitive ability. [NT 224-228, 261-262, 284-285; P-15, S-32]
22. A District guidance counselor administered the WIAT-II⁵ as part of the 2010 evaluation. She had also administered the WIAT II for the 2008 evaluation. [NT 285, 504-510; S-31, S-32]
23. As the District was unclear about Student's grade level, the sets of WIAT-II reading comprehension passages were scored for fourth and fifth grades. The District evaluator compared Student's WIAT-II raw scores to age-based norms, fourth grade norms, and fifth grade norms. All scores from the core battery, except for spelling, were in the Average Range regardless of norm group. The nature of Student's errors on the spelling segment of the WIAT-II suggested careless errors rather than deficits in understanding phonics. [NT 282-283, 287, 306, 517, 523-525, 530-531; S-31, S-32]
24. As Student repeated a grade⁶ in the private school there were differences among enrollment grade vs. instructional grade vs. chronological age grade as follows:

School Year in Private School	Grade Level Student Instructed for Reading and Writing	Grade Level Student Instructed for Math	Grade Level Typical for Student's Chronological Age⁷
2008-2009	25. 3	26. 4	27. 4
2009-2010	28. 4	29. 5	30. 5
2010-2011	31. 5	32. 6	33. 6
2011-2012	34. 6	35. 7	36. 7

[NT 42, 61, 67-68, 103, 134-135, 156-159, 162-163, 184-185, 272-274, 455-457, 565-566; District's Closing Brief]

37. According to the Qualitative Reading Inventory – Fourth Edition [QRI-4] Student's Word Recognition was Instructional through the 6th grade level, Decoding was Instructional though the 6th grade level and into the middle

⁴ GAI refers to General Ability Index, which is a summary score based on verbal and performance subtests. Unlike the Full Scale IQ, the GAI separates "intelligence" from weaknesses in processing speed and/or working memory. If there are difficulties in the latter two areas the FSIQ would be lower than the GAI. The GAI is considered a more focused picture of cognitive ability than the FSIQ. [P-15]

⁵ Although the WIAT-III, an updated and re-normed version of the WIAT-II, was introduced in August 2009 the District did not begin using the WIAT-III until September 2010. As a one-year period to adopt an updated version of a testing instrument is accepted practice in the field, the District's use of the WIAT-II in May 2010, although not ideal, was not inappropriate. [NT 404, 506-507]

⁶ It is still not crystal clear to this hearing officer whether Student repeated third grade immediately upon entry into the private school after being in third grade in the previous school, or whether Student was required to repeat fourth grade with both years being in the private school.

⁷ Although the private school and the Parents consider Student to be a 6th grader in the current [2011-2012] school year, the Parents are not sure which grade Student would be assigned for the next school year [2012-2013] in a school other than the private school. [NT 42, 135-136, 184-185, 565]

school levels. Oral Reading Fluency was Instructional at the 5th grade level. Student read 81 words correctly⁸ out of a total of 95 words read⁹. Student read a 4th grade story at a rate of 135 words per minute and answered 7½ out of 8 comprehension questions correctly, falling in Independent-Instructional range. Student read a 6th grade story at a rate of 122 words per minute and answered 6/8 comprehension questions correctly, falling in the Instructional range. The silent reading range for a 5th grader is 73-175 words per minute. [NT 155; 306-309, 730-733; S-32, S-35, S-36; P-2; HO-2; District's Closing Brief]

38. Student can read words in isolation at or above Student's grade level and demonstrates comprehension of passages at or above grade level level, regardless of whether Student is considered a fourth or fifth grade student. [NT 155-163, 184-185, 282-283, 287, 306-307, 517, 530-531, 663, 730-733, 744-745, 747-754; S-32, S-35, S-36; P-2, HO-2]
39. The District's reading specialist found that Student applied self-monitoring strategies, including correcting miscues and repeating text. She opined that any disruptions in Student's reading were good reading strategies representing successful monitoring at a level Student did not demonstrate in 2008. [NT 750-753; S-32]
40. Student's reading was assessed at the private school during the 2009-2010 school year by the school's Director of Literacy who is a reading specialist. In May 2010, Student was reading 113 words per minute at a 5th grade level, at the 28th percentile which is within the average range [25th to 75th percentile]. Student was considered to be a 4th grade student at that time, having repeated a grade. 113 words per minute would be within the average range for a fourth grade student (the level at which Student was being instructed), using the Hasbrouck & Tindal Oral Reading Fluency Data. Testing by the private school showed that Student comprehended reading material at a 5th grade level. [NT 156-163, 184-185, 307-308, 663, 670, 681; S-32, P-2, P-12, P-25]
41. The private school's 2009-2010 reading assessment also showed that Student was gaining 2.01 words per week from fall to winter (typical words gained was 0.81), and gaining 1.78 words per week from fall to spring (typical words gained was 0.69) more than double the number which a typical student was

⁸ 30-114 is the range of words correctly read per minute for a 5th grade student. The QRI-4 manual is unclear as to exactly what these numbers represent. The District's reading specialist is not certain, but believes that 30-114 is the Average Range for words correct. This hearing officer is not certain, but disagrees, believing that 30-114 is the range of words correct read by children in the sample group, from the lowest to the highest number. In either case, Student's score of 81 falls above 72, the middle of the range [114-30=84; 84/2=42; 30+42=72] [NT 737-740; S-36; District's Closing Brief]

⁹ 61-133 is the range given in the QRI-4 manual for total words read for a 5th grade student. The analysis holds for this as in the previous footnote. [133-61=72; 72/2=36; 61+36=97] Student's score of 95 falls near 97, the middle of the range. [See cites in footnote above]

gaining, indicating “more than typical progress” or “very good progress.”
[NT 308, 663, 684; S-32]

42. As part of the re-evaluation the District psychologist observed Student at the private school. Student was focused and attentive and did not show difficulties with motor overflow or impulse control; Student’s teacher reported that this observation was typical for Student. [NT at 145-146, 242, 271; S-32, P-2]
43. In addition to the District psychologist’s observation at the private school, the District obtained data on Student’s behavior through the District’s guidance counselor and reading specialist during their testing sessions, and input from private school teachers and the private school Director of Literacy. There were no significant concerns regarding motor overflow or attention. [NT 230-231, 237-238, 242-243, 270-272, 529, 652-653, 674-676, 691-694]
44. The Parents’ March 19, 2010 input form for the re-evaluation indicated that Student did not have health problems which could affect learning ability. The Parents did not note any attention-related issues, and they did not disclose that Student had been diagnosed with ADHD or had taken medication for ADHD. The Parent’s input was transcribed verbatim into the District’s re-evaluation report. [NT 75-76, 140, 144-145, 148-149; S-30, S-32, P-2]
45. The re-evaluation noted significant improvement in Student’s attention and motor flow from 2008 and the Parents agreed that Student’s behavior was significantly improved at the time of the 2010 evaluation. [NT 152, 201, 527-529, 652-653; S-32, S-12, P-2]
46. The May 24, 2010 re-evaluation concluded that Student was no longer eligible for special education. On May 25, 2010, the District sent the Parents the re-evaluation report and a NOREP stating “[Student] is no longer in need of specially designed instruction in order to make adequate academic progress” and consequently recommending general education. [NT 77-78, 80, 200-201, 286-290; S-32, P-2]
47. On June 12, 2010, the Parents indicated their disapproval on the NOREP and expressed concerns in a letter to the District dated June 14, 2010. The Parents did not request a meeting to discuss the evaluation report with District multidisciplinary team members, or ask what Student’s program would look like if they elected to return Student to public school in a follow-up phone conversation held with the principal of Student’s home school. [NT 81-84, 88, 91-92, 143-144, 162, 166-167, 813-816; S-32, S-33, P-24]
48. On January 22, 2011, the Parents filed for a due process hearing requesting an independent educational evaluation (“IEE”) and for tuition reimbursement. The Parents withdrew their complaint on or about February 9, 2011. [NT 92-95, 168-170; P-19]

49. The Parents arranged for a private evaluation which was conducted in May 2011 after Student had been attending the private school for three years. [NT 98, 171, 175; P-13]
50. The independent evaluator conducted a thorough assessment of Student and conferred diagnoses of reading disorder, disorder of written language and learning disorder not otherwise specified [processing speed, working memory, attention, organization, planning]. The independent evaluator further concluded that under the IDEA Student has a learning disability in reading fluency, writing and processing that affects learning. In the alternative, the independent evaluator would have provided a §504 Service Plan. [NT 297-400; P-13]
51. The Parents filed for due process on August 4, 2011¹⁰ but only provided the District with a copy of the May 2011 private evaluation report on August 9, 2011 subsequent to filing for a hearing. [NT 171-172]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in “equipose,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, 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). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer*. The evidence was very close in this matter, and this hearing officer at many points found it equally balanced both during the course of the hearing and when developing this decision. Had the evidence remained in equipose the moving party, in this case the Parents, could not prevail, failing to produce a preponderance of evidence. However, upon very careful consideration and reexamination of the testimony and documents this hearing officer has determined that the District’s evidence, particularly that provided by the District’s reading specialist, was more persuasive and thus tipped the scale in the District’s favor such that a conclusion under *Schaffer* was ultimately not necessary.

¹⁰ A hearing date was set in accord with regulatory timelines, but on the scheduled day, shortly before the proceeding was to begin, a participant became ill and had to be seen at a hospital.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this matter the witnesses testified candidly and at considerable length. The two psychologists who provided testimony, one for each party, were appropriately trained and school certified. The private psychologist who evaluated Student in May 2011 also holds a doctorate in the psychology of reading. This hearing officer found that although the psychologists held opposing views they were equally credible and their testimony balanced one another out with respect to eligibility or lack of eligibility for special education. However, due to the timing of the private psychologist’s involvement in this matter, her report could not be credited with great weight with regard to the hearing issues, since she assessed Student one full year after the District produced its re-evaluation report in question. One might be tempted to conclude that since student showed indications of eligibility in May 2011 then there must have been eligibility present a year earlier, in May 2010. However, this hearing officer declines to draw that inference, as any one of many influences could have come into play during the intervening twelve months.

The two reading specialists who testified, one for the Parents and one for the District were likewise properly trained and credentialed. Their testimony, was fairly equally balanced, although the District’s reading specialist presented her findings and beliefs in a more organized, confident and persuasive manner. She handled direct and cross examination with candor and convincing conviction, and it was she who provided the additional evidentiary weight to nudge the evidence out of equipoise in the District’s favor.

Identification

The IDEA requires states to provide a “free appropriate public education” (FAPE) to all children who qualify for special education services. 20 U.S.C. §1412. The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. This obligation is commonly referred to as “child find”.

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. “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). Further, “specially designed instruction” means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the unique

needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3).

In conducting an evaluation to determine whether a child has a disability and requires specially designed instruction, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

- (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- (ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
- (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
- (iv) Are administered by trained and knowledgeable personnel; and

- (v) Are administered in accordance with any instructions provided by the producer of the assessments.
- (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
- (3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
- (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;
- (5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.
- (6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
- (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. 34 C.F.R. § 300.304(b).

Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability[.]” 34 C.F.R. § 300.306(a)(1).

To be identified with a learning disability, it must be determined that “[t]he child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of [listed] areas...” 34 C.F.R. § 300.309 The *PA Guidelines for Identifying Students with Specific Learning Disabilities*, published by the Pennsylvania Department of Education in August 2008, “[a] student must be considerably below the performance level considered acceptable for the student's age or grade”. Further, “[S]tudents with

high levels of intelligence must display inadequacies in relation to their age or state standards for their grade in order to qualify for SLD under this criterion.”

The Parents contend that the District improperly failed to identify Student as eligible for special education and that its evaluation process was not appropriate under the law. Examining the evaluation report in question, and the testimony provided by the three District staff who participated in the evaluation, this hearing officer finds that the district’s evaluation was appropriate, meeting all required elements. The evaluation was not perfect (using the WIAT III would have been preferable even though the WIAT II was three months short of being outdated) but perfection is not required, appropriateness being the standard. Although the District may well have been wearying when the Parents asked that it conduct the third evaluation of Student in four years, it did not give the evaluation short shrift; it utilized instruments and procedures reasonably designed to determine whether Student remained eligible for special education. It would certainly have been less complicated for the District multidisciplinary team to simply decide that since Student was eligible before Student should be eligible again. If they had gone that route for the third time, and offered an IEP for the third time, the Parents may or may not have declined the offered program and placement for a third time as well. However, the District chose to make its determination consistent with the data it had available at the time. The Parents did not seek to have the District reconsider its eligibility determination, nor did they inquire about the program Student would be offered upon entry into the public school.

The Parents argue that even if the District did not find Student eligible for special education under the IDEA, Student should have been identified as disabled and offered a Section 504 Service Plan. Section 504 of the Rehabilitation Act of 1973 protects all qualified persons with a disability who have a physical or mental impairment which substantially limits one or more major life activities. A student is considered “qualified” when the student is of an age at which the student qualifies to attend school. The Section 504 regulations define a "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine: or any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

To fall within the protection of Section 504, a person's physical or mental impairment must have a substantial limitation (permanent or temporary) on one or more major life activities - functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working. Students who qualify for services under IDEA also are protected under Section 504, although not all students protected under Section 504 are eligible for special education services.

The non-categorical criteria for determining eligibility under Section 504 are generally broader, or more inclusive, than the categories of eligibility under the IDEA. As a result, there are students eligible for educational program adaptations and services under Section

504 who are ineligible under the IDEA. A district is on notice of the possibility of a disability where a student is experiencing failing grades, or where it has notice that the student has been identified for ADHD. See, *S.W. v. Holbrook Public Schools* 221 F.Supp.2d 222, *226 -227 (D.Mass.,2002). Notably, the Parents did not provide, and the District did not fall into possession of, information about Student's having been given a diagnosis of, or medication for, ADHD until a year after completing its evaluation. Had the District had that information, it may have found Student as a child with a disability, but without the need for specially designed instruction, and offered a Section 504 Service Plan. The independent evaluator had an additional year of data to access, and was given information that was withheld from the District about Student's being medicated.

As the District's May 2010 evaluation was appropriate, and as this hearing officer accepts the District's conclusion of ineligibility for special education or a 504 Service Plan as of May 2010, reimbursement for the May 2011 independent evaluation cannot be granted.

Tuition

Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA's implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency enroll the child in a private...school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment...”

Even before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) later outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount. Consideration of these three elements is referenced as the “Burlington-Carter analysis”.

The Parents rejected the program and placement offered for Student in 2007 for the 2007-2008 school year, and that offered in 2008 for the 2008-2009 school year, in favor of continuing to educate Student in private schools at their own expense. Over the course of the time Student attended both private schools, significant progress was accomplished and documented with testing starting with the 2007-2008 school year in the regular education private school through the 2008-2009 and the 2009-2010 school years in the special education private school, no doubt aided by the eventual introduction of

medication to address issues of attention and focus. By the time Student was re-evaluated in May 2008, Student had made progress with school and home supports in the context of a regular education program. When Student was re-evaluated in May 2010 Student had received two full years of specialized programming in the private school. Based on information it collected and information disclosed to it, the District determined that Student did not meet eligibility criteria for special education and had no current information that would have led to consideration of a 504 Service Plan.

In accord with the information in the District's possession in May 2010 Student did not qualify for specially designed instruction or accommodations, and therefore a program and placement in general education was appropriate. On the basis of the first prong of the Burlington-Carter analysis, the Parents' request for tuition reimbursement for the 2010-2011 school year must be denied. Of note however, had the first prong not ended the need for analysis, and had the appropriateness of the private school been examined, this hearing officer would have concluded that the Parents' unilateral placement was proper under the Act given its program design and Student's considerable progress in that setting.

Order

It is hereby ordered that:

1. The evaluation conducted by the District in May 2010 was appropriate.
2. The District's multidisciplinary team did not reach an incorrect conclusion regarding Student's eligibility for special education or for a 504 Service Plan.
3. The Parents are not entitled to reimbursement for the Independent Educational Evaluation they obtained in May 2011.
4. The District did not deny Student FAPE by failing to identify Student as eligible for special education and offer an IEP for the 2010-2011 school year, or as a Protected Handicapped Student and offer a 504 Service Plan.
5. The District is not required to reimburse the Parents for tuition and transportation for Student's unilateral placement.

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

February 5, 2012

Date

Linda M. Valentini, Psy.D., CHO

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