

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63.

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 3102-1112 KE

Child's Name: E.S.

Date of Birth: [redacted]

Dates of Hearing: 8/2/12, 8/3/12, 8/13/12, 8/21/12

OPEN HEARING

Parties to the Hearing:

Parents

Parents

School District

Council Rock

The Chancellor Center

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Representative:

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Date Record Closed:

September 17, 2012

Date of Decision:

October 3, 2012

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, a District resident is currently in 3rd grade in a District elementary school, has been enrolled since kindergarten. After three District evaluations within a year, and an independent evaluation obtained by Parents, the District declined to identify Student as mentally gifted, or as a child with a disability, except in the area of speech articulation.

Although the District conceded a statistically significant discrepancy between Student's ability and scores on standardized achievement tests in reading [and] written expression, it concluded that Student's grade level performance in all academic skill areas, without even regular education classroom interventions, establishes that Student has no need for specially designed instruction. The District denied IDEA eligibility for special education and also found no need for gifted education, concluding that Students' educational needs can be appropriately met in the regular education setting.

Convinced that Student is "twice exceptional," *i.e.* both mentally gifted and a child with a disability, Parents initiated a due process complaint to obtain special education and gifted education services for Student, compensatory education for denial of services during 1st and 2nd grades, [and] during the summers following the school years.

Because the record compiled over four hearing sessions in August 2012 does not support Parents' claims for eligibility in any additional disability category, claims for current services, for past denial of services, or for reimbursement of private evaluation fees, Parents claims will be denied. Nevertheless, the District would be well-advised to monitor Student's classroom performance closely, particularly in reading and written expression, and intervene should Student's weaknesses, as identified on standardized tests, begin to interfere with academic skill acquisition and educational performance.

ISSUES

1. Is Student eligible for special education under the IDEA statute or §504 of the Rehabilitation Act of 1973 in the categories of specific learning disability and/or other health impairment due to the effects of ADHD and/or due to an auditory processing disorder, requiring specially designed instruction in order to make progress in grade level curriculum and academic skills?
2. If so, when should the District have reasonably identified Student and first provided special education services?
3. Is Student eligible for gifted education services under Chapter 16 of Title 22 of the Pennsylvania Code?
4. Is Student entitled to compensatory education for the District's failure to provide appropriate services in the past, including ESY services and if so, in what amount, for what period and in what form?
5. Are Parents entitled to reimbursement of the costs of two independent evaluations of Student that they obtained and for the expert testimony of the evaluators at the due process hearing?

FINDINGS OF FACT

Background/Educational Progress

1. [Name redacted] (Student), an [elementary school-aged] child, born [redacted,] resides in the Council Rock School District and is enrolled in a District elementary school. (Stipulation, N.T. p. 14; P-30 p. 7)
2. Student has been evaluated by the District three times, twice specifically for gifted education services and once for both special education and gifted services. At Parent's expense, Student was also evaluated privately at the ADHD clinic of the Children's Hospital of Philadelphia (CHOP) and by an audiologist, but has not been found IDEA eligible or eligible for gifted services in accordance with Federal and State Standards. 34 C.F.R. §300.8(a); 22 Pa. Code §§14.102, 16.1. (P-5, P-13, P-17, P-53, S-8)¹
3. During kindergarten, Student was quiet and shy at the beginning of the year, but became more comfortable participating in classroom activities as the school year progressed.

¹ The individually administered standardized cognitive ability and achievement assessments included in the evaluations conducted by the end of the 2nd grade school year, as well as the scores Student received, are [redacted but are] taken from P-5 pp. 2, 3 (May 2011); P-13 p. 3 (December 2011); S-8 pp. 4, 5 (April 2012) and P-17 pp. 7, 8 (March 2012—private evaluation).

Student met expectations for academic skill development in most areas of reading, writing and math at the end of the kindergarten year. (N.T. pp.140, 141; S-18 pp. 1, 2)

4. In 1st grade, Student was again quiet at the beginning and had to be encouraged to share [Student's] ideas with the class group. By the end of the third quarter, Student was more comfortable sharing ideas and was contributing nicely to class discussions and small group work. (N.T. pp. 142, 692; S-18 p. 5)
5. By the end of the 1st grade school year, Student met the reading benchmark for word accuracy and comprehension, and met expectations for academic skills in all areas of reading, writing, math, social studies, science, and with respect to the characteristics of a successful learner. (N.T. pp. 694—698, 702; S-18 pp. 3—5)
6. Within the first week of 2nd grade, Student's assigned teacher left for maternity leave. During the first, second and beginning of the third marking periods, Student's class was taught by a long-term substitute teacher, who is a Pennsylvania certified teacher with a masters degree and a year of prior experience as a classroom teacher in a District elementary school teacher and four years of experience in another school district in other capacities. The assigned teacher returned for most of the third and all of the fourth marking periods. (N.T. pp. 575, 576, 578, 869, 872; S-18 pp. 6, 7)
7. At the end of the second marking period of 2nd grade, Student met expectations in all academic subject areas except for using spelling strategies in daily work, which was still developing. Student also met expectations in all categories assessing the characteristics of a successful learner. (N.T. p. 658; S-18 p. 6)
8. Although neither of Student's 2nd grade teachers expressed concerns about Student's progress in the curriculum, at Parent's request Student was referred to the instructional support team in March of the 2nd grade school year. (N.T. pp. 644, 645, 659, 681, 875, 888)
9. At that time, the District assessed Student on the Woodcock-Johnson 3rd Edition Diagnostic Reading Battery (WJ-III DRB), which placed Student in the average range, overall, and exactly at grade level (GE) with respect to letter-word identification (GE =2.7) and passage comprehension (GE= 2.7). Reading vocabulary, also in the average range, was slightly above grade level (GE= 3.0), while word attack, which measures the ability to apply phonic and structural analysis skills to pronounce non-words, was in the limited to average range (GE= 2.3). (N.T. 430, 431; S-13 pp. 15—18)
10. In comparison with a national sample of 2nd graders, Student was at the 52nd percentile with respect to Brief Reading (letter word identification skills and comprehension), the 45th percentile with respect to Basic Reading Skills (word identification and phonics) and at the 60th percentile with respect to Reading Comprehension (reading vocabulary and passage comprehension). (N. T, pp. 437, 438; S-13 p. 15)

11. Assessments of Student on the QRI (Qualitative Reading Inventory) and the Fountas & Pinnell Benchmark Assessment System indicated that Student was instructional at the 2nd grade level. (N.T. pp. 427—429, 435; S-13 p. 13)
12. Student was provided with an IST Academic Intervention Plan that identified several goals: improve spelling skills; write 5—8 sentences on a topic with correct punctuation, capitalization and improved spelling; improve risk-taking. Interventions in place through the IST plan were helpful to Student. (N.T. pp. 878, 889, 890; S-12 p. 4)
13. Although Student had many spelling errors on written work, the 2nd grade teachers were not concerned, placing Student at the phonetic level of spelling development, which they consider appropriate for the end of 2nd grade. On the spring administration of the Gentry “Monster” Spelling Test, Student’s performance improved from a score of 5 in the fall to an overall developmental level of 6, which is considered proficient at the end of 2nd grade. (N.T. pp. 912, 915, 922, 923, 925, 932, 943, 946, 955—957; S-13 p. 10)
14. On the Developmental Reading Assessment (DRA), Student advanced from Level 18 in mid-September to Level 28 at the end of May and was at the proficient level in decoding, fluency and comprehension at both the beginning and end of the year. (S-13 p. 10)
15. On spring and fall writing assessments, Student was proficient in all domains (focus, content, organization, style and conventions) except for conventions in the fall and style in the spring. (S-13 p. 10)
16. At the end of 2nd grade, Student’s report card indicated that Student met expectations for skills in all academic subject areas except spelling, rated as still developing. Because several homework assignments were late during the 4th marking period, that aspect of the characteristics of a successful learner was rated as still developing. (S-18 pp. 6, 7)

School District Evaluations and Outcomes

17. In the late fall of 1st grade, the District administers a group intelligence test, the COGAT, to all students as a screening device to locate those who should be evaluated for gifted education services. (N.T. pp. 143, 725, 974, 975; P-1)
18. Although the 1st grade teacher saw no signs of a need for instruction beyond the regular classroom curriculum to meet Student’s educational needs, the teacher referred Student for a gifted evaluation based upon the COGAT results. (N.T. pp. 711)
19. For a gifted assessment, the District completes a rubric for determining whether a student is mentally gifted. The rubric consists of the results of a cognitive ability assessment, taking into account both the overall score and verbal and conceptual reasoning composite scores, selected subtest scores from an individually administered standardized achievement test, parent and teacher ratings on a list of characteristics of gifted students. The gifted rubric assigns a number of points on the rubric based on the scores associated with each component of it. A total of 34 points is needed on the rubric for a student to

- qualify as mentally gifted in kindergarten through 3rd grade. (N.T. pp. 978—982; S-1 pp. 14, 15, S-2 pp. 11, 12, S-7 pp. 20, 21)
20. The teacher checklist asks teachers to rate Student on four characteristics in each of five areas: Ability/Learning, Higher Level Thinking, Creativity and Task Commitment/Motivation, circling 3 when the trait is observed often, 2 when observed sometimes and 1 when rarely observed. To receive points on the rubric for that component, the teacher rating must exceed 39 points. (S-1 p. 14, S-2 p. 11, S-7 p. 20)
 21. In May 2011, the District administered the Wechsler Intelligence Scale for Children, 4th Edition (WISC-IV) to assess Student's cognitive ability, resulting in a full scale IQ score (FSIQ) of 124, comparable to the score Student achieved on the COGAT. (N.T. pp. ; P-5 p. 2; Appendix)
 22. Although the FSIQ score placed Student in the Superior range of intellectual functioning, it did not reach the level of assigning Student the maximum number of 25 points for cognitive ability on the District's rubric. Student was awarded 5 points for the FSIQ score of 124-125 and 1 point each for the verbal comprehension and perceptual reasoning components because both scores fell between 110 and 119. (S-2 p. 11, Appendix)
 23. Student scored in the average range on the standardized achievement test (Wechsler Individual Achievement Test, 3rd Edition (WIAT-III ACH), below scores needed to add points to the gifted rubric. (N.T. p. 984; S-2 p. 12)
 24. Student received 38 of 60 points on the teacher's gifted characteristic checklist and 23 on the Parent rating, adding two points to the rubric based on the Parent rating and no points for the teacher rating. Student's reported rubric score did not reach the level needed for classification as mentally gifted classification. (N. T. p. 982; P-5 p. 2; S-2 p. 12)
 25. In August 2011, the District issued a Notice of Recommended Educational Assignment (NORA) informing Parent that Student was found not to be in need of gifted education based on the Gifted Written Report. (GWR). Parent disapproved the NORA. (P-5, P-7 pp. 1, 2)
 26. In October 2011, in accordance with Parent request, Student was referred for another evaluation for gifted services. (N. T. p. 987; P-8)
 27. The school psychologist again administered the WISC-IV, resulting in an FSIQ of 131, in the very superior range, with a verbal comprehension score of 112 and a perceptual reasoning score of 135. Student's scores on the cognitive ability components of the gifted rubric increased considerably to 26, since Student received the maximum number of points on two of the three assessment measures. (P-13 p.3, S-1 p. 15)
 28. The 2nd grade teacher completed the gifted characteristic checklist, which yielded a score of 36, below the 40 points needed to add points to the District's gifted rubric. Although Student's much higher FSIQ and perceptual reasoning index (PRI) results moved Student

closer to qualifying for gifted services, Student's rubric score of 28 still did not reach the required level for gifted classification and need for gifted services. The second GWR also recommended no gifted services, and Parents disapproved the NORA reflecting that recommendation. (P-13 pp. 2, 5, P-14)

29. In early January 2012, Parents requested an evaluation for IDEA eligibility. Although the District initially refused, approximately two weeks later it issued a Permission to Evaluate (PTE) to conduct ability, achievement and behavioral assessments, as well as a speech/language evaluation. (S-4 pp. 1, 5, S-5 p. 1)
30. In late March, the District school psychologist administered the third edition of the Woodcock-Johnson tests of cognitive ability and academic achievement (WJ-III COG, WJ-III ACH), with results comparable to the first administration of the WISC-IV in May 2011. Student's overall ability (GIA) was measured at 122, in the superior range, while achievement test scores were in the average range for reading comprehension, broad reading and broad math. Broad written language was in the low average range. (S-8 pp. 4, 5, Appendix)
31. The District also asked Parents and the 2nd grade teacher to complete the Brown Attention Deficit Disorder Scales based upon Parents' report of attention issues at home. Parent ratings placed Student in the clinically significant range on all categories of attention deficit symptoms, while the teacher ratings were in the average range. (S-8 p. 11)
32. As part of the evaluation, the District completed the gifted rubric for the third time and again determined that Student did not qualify for gifted services. (S-8 p. 15)
33. Although the District acknowledged a statistically significant difference, and, therefore, a discrepancy between Student's ability and achievement in basic reading, reading comprehension and written expression, it concluded that Student did not meet the criteria for IDEA eligibility in the category of specific learning disability (SLD) based upon Student's grade level educational performance. (N.T. pp. 1068, 1069; S-8 p. 15)
34. The District also considered IDEA eligibility on the basis of other health impairment (OHI) based upon ADHD and medical reports of sleep apnea, a digestive disorder and asthma, but found no basis for eligibility since no concerns of limited alertness in the school environment had been raised by teachers or other staff and there was no indication of an adverse effect of any condition on Student's educational performance. (S-8 p. 15)
35. The District's evaluation identified a speech/language disability in the area of articulation only and a need for speech/language therapy to remediate articulation errors. (S-8 p. 12, S-14)
36. Student was determined to be IDEA eligible in the category of speech/language impairment, but no other disability category. (S-8 p. 16)

37. Parents accepted the District's evaluation results and offer of an IEP to provide speech/language services for articulation. (P-35, P-36)

Private Evaluations, Results, Recommendations

38. Just before the District conducted its most recent evaluation, Parent obtained a psychological evaluation from CHOP's Center for Management of ADHD. The evaluator administered an abbreviated intelligence assessment that placed Student in the high average to superior range of cognitive ability, as well as the subtests for the WISC-IV Working Memory Index (WMI) and Processing Speed Index (PSI). For comparison with the WIAT-III achievement tests she also administered, the CHOP evaluator used the FSIQ of 131 from the District's December 2011 evaluation. (N.T. pp. P-17 pp. 7—9)
39. The evaluator diagnosed Student with a specific learning disability in reading. She concluded that Student would benefit from direct and explicit instruction in phonics with an Orton-Gillingham approach. (N.T. p. 78; P-17 p. 11)
40. She did not diagnose a math disability because Student's achievement is adequate for age and grade level, although lower than expected based on the ability testing. (N.T. pp. 78, 79; P-17 p. 10)
41. The CHOP evaluator expressed no opinion with respect to whether Student has a learning disability in writing because she conducted no additional testing in that area. (N.T. p. 79)
42. The CHOP evaluation also included measures of social and emotional functioning using a structured clinical interview with Parent, the BASC -2 (Behavior Assessment System for Children-Second Edition) rating scales completed by Parents and Student's 2nd grade teacher, the ADHD Rating Scale IV, home and school forms. (P-17 p.4)
43. On the BASC-2, both Parent and teacher ratings placed Student in the average range with respect to inattention, conduct problems, hyperactivity, anxiety, depression, somatization and withdrawal. Parent ratings were at a higher percentile level than the teacher's ratings, but still within the average range, with respect to inattention, conduct problems, somatization and withdrawal. Parent and teacher ratings were no more than 3 percentile levels apart with respect to hyperactivity, anxiety and depression. The only trait on which Parent and teacher percentile rankings differed was aggression, with teacher's ratings within the average range and Parent's in the "at risk" range. (P-17 pp. 5, 6, 7)
44. Parent ratings of Student's behaviors were consistently in the "at risk" or "clinically significant" range when completing rating scales specifically directed toward identifying attention disorders, such as the ADHD Rating Scale IV, administered by the private evaluator, as well as the Brown Attention Deficit Disorder Scales, administered by the District. Teacher ratings were in the average range on all measures. (P-17 p. 5; S-8 pp. 10, 11)

45. The evaluator concluded that Student has symptoms of ADHD and anxiety, manifested at home but not obvious in school. Student was given a diagnosis under the DSM-IV of ADHD NOS because there is no evidence of impairment due to attention difficulties in more than one setting. (N.T. pp. 79, 80)
46. After the 2011/2012 school year ended, Parent privately obtained an examination by an audiologist to assess Student's hearing and auditory processing. She administered a hearing test and five tests of central auditory processing, concluding that Student has normal hearing, as well as normal and age appropriate development in the areas of auditory short term memory, auditory decoding, independently fusing sounds to create a word, auditory attention and vigilance, the ability to attend to auditory stimulus for a sustained period. (N.T. pp. 315—320; P-53 p. 2)
47. On one of the tests, Student's scores indicated normal auditory figure/ground discrimination. On a different test, where the signal to noise ratio was increased, Student tested below the normal range, suggesting difficulty listening in noisy environments. (N.T. pp. 317, 320; P-53 p. 2)
48. The results of one test, the SCAN 3, was within normal limits overall, but one subtest revealed a significant asymmetry between Student's ears, favoring the right ear, suggesting a deficit in transferring information within the brain. The effects of the asymmetry can include delayed responses, difficulties listening in noisy environments and fatigue. (N.T. pp. 317, 318; P-53 p. 2)
49. The asymmetry can arise from either an immature or idiosyncratic auditory processing system and suggested a need for further assessment via speech/language and occupational therapy evaluations to determine the impact of Student's integration weakness on reading and language abilities. If the asymmetry results from immaturity in the auditory processing system, it could improve with age. (N.T. pp. 322, 323; P-53 p. 3)
50. The audiologist also made a number of recommendations for classroom accommodations, such as preferential seating, a classroom FM system or a program like Fast ForWORD and Earobics if it is determined that integration and/or auditory figure ground weaknesses affect Student's progress in developing phonetic skills and following classroom instruction. (N.T. pp. 324, 328, S-53 p. 3, 4)
51. Other recommendations, such as books on tape, were based on Parent reports of Student having difficulty with reading, focusing in a classroom setting and following directions. (N.T. pp. 338—340)
52. If Student is not having the classroom difficulties described by Parent or expected as a result of the two measures that yielded below average results, the recommendations would be unnecessary. (N.T. pp. 350, 351)

DISCUSSION AND CONCLUSIONS OF LAW

This dispute in this case is based primarily upon vastly different views of Student by Parents and the School District. Parents believe that Student is struggling with school work, that the school difficulties impact Student's behaviors and functioning at home, and that the difficulties will increase in the future, leading to decreasing educational success if not addressed immediately. In addition, Parents believe that the District refuses to recognize that Student's disabilities have already had a significantly negative impact on Student's education, a denial of gifted education services despite a high cognitive ability level.

The record leaves no doubt concerning the sincerity of Parents' belief that Student is dually exceptional and in need of gifted support services, as well as specially designed instruction to address weaknesses in reading, writing and spelling, in particular. Moreover, it is certainly understandable that caring Parents seek the optimal level of educational services for a child they perceive to be significantly in need of services to address both special education and gifted needs.

Despite Parents' apparent belief and suggestion throughout the hearing that the District has determined to ignore Student's needs and stubbornly refuses to identify Student as gifted and/or IDEA eligible, there can be no doubt that the District sees Student as a successful, happy, grade level learner whose educational needs can be fully met in the regular education classroom. The evidence and the applicable legal standards, discussed below in the context of Parents' claims, support the District's view of Student and lead to the conclusion that Student is not presently eligible for special services of any kind.

IDEA Eligibility

Under the IDEA statute and regulations, there are two parts to the determination whether a particular student is a “child with a disability.” By means of an evaluation, a school district must determine, first, that the child meets the criteria for at least one of the impairments listed in 34 C.F.R. §300.8(a). Just as significantly, the district must conclude that “by reason thereof” the child needs special education and related services.

Also most significant for this case are the definitions of “special education” found in 34 C.F.R. §300.39(a)(1) and “specially designed instruction” in §300.39(b)(3):

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability...

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.**

(Emphasis added). The definition of “specially designed instruction,” in particular, gives content to the need for special education, which is required to meet the second prong of the IDEA eligibility test.

In this case, Student meets at least part of the criteria that may be used to identify a child with a specific learning disability, *i.e.*, a statistically significant difference between cognitive ability and standardized achievement test scores. (FF 33) Discrepancy alone, however, cannot be the sole basis for identifying a learning disability. Rather, in accordance with 34 C.F.R. §300.309(a)(1), the group making an eligibility determination must take into account whether, with appropriate instruction and learning experiences, the child achieves adequately to meet

state approved grade level standards in the areas of oral expression, listening comprehension, basic reading skill, reading fluency and comprehension, math calculation and math problem-solving.

It follows that if a student is making appropriate grade level progress in the skills listed in §300.309(a)(1), he or she does not meet either of the criteria for IDEA eligibility. A student meeting grade level standards with the age appropriate and state approved instruction provided to all children does not have a learning disability, and certainly does not need modified instruction to achieve adequately at age and grade level.

Here, the District provided ample evidence that Student met grade level standards in 1st and 2nd grade with the instruction provided generally to students in the regular education setting. (FF 5, 7, 9, 10, 11, 13, 14, 15, 16) In light of Student's progress in accordance with state approved standards, the testimony and evaluation provided by Parents' private evaluator did not establish that Student needs specially designed instruction. First, the evaluator diagnosed a reading disability based on national norms, and did not take into account curriculum-based assessments. In addition, she noted only that Student would benefit from an Orton-Gillingham type reading program, not that Student needs more intensive reading instruction in order to make progress. (FF 39) Parents' evaluator acknowledged that Student was achieving adequately in math and also declined to identify a writing disability because she did not conduct her own achievement testing in writing. (FF 40, 41)

Parents also argued that Student should receive special education services due to the effects of ADHD, but even their own evaluator could not diagnose ADHD without qualifying it as "NOS" because ADHD symptoms could not be confirmed in more than one setting. (FF 45)

Moreover, the lack of an adverse effect on educational performance would also defeat eligibility in the OHI category. *See*, 34 C.F.R. §300.8(c)(9)(ii).

The CHOP evaluator noted that the ADHD and anxiety symptoms she identified, which were based entirely on Parent report and rating scales, “could sort of limit [Student’s] major life activity of learning.” (N.T. pp. 79, 80)

A condition such as ADHD qualifies a student for FAPE or accommodations under §504, however, only if it **substantially** limits a major life activity. The possibility of a mild impact on learning from symptoms of either attention issues or anxiety falls far short of supporting a conclusion that Student qualifies for services under §504 based upon either ADHD or learning disabilities. Consequently, Parents’ inability to establish an adverse effect on Student’s educational progress defeats a claim that Student requires special education services under §504 .

Finally, the audiology evaluation Parents obtained during the summer of 2012 does not establish a disability. Most of the tests placed Student in the normal range of functioning. (FF 46, 48) Even in the two instances that the test results were below normal, the audiologist clearly had no idea whether Student’s functioning in the classroom was adversely affected at any time, and the primary issue identified by the tests might be resolved as Student matures. (FF 46, 48, 49) The audiologist’s recommendations for services are suggestions to be implemented if Student’s classroom functioning is affected. (FF 52) There is no evidence, however, that Student’s performance has been affected in the past, so there is no basis for determining that Student is affected by an auditory processing disorder severe enough to support IDEA eligibility and an order to implement the recommendations during the current school year.

Gifted Eligibility

The record of this case also establishes that the District did not violate 22 Pa. Code

Chapter 16 by refusing to identify Student as mentally gifted and eligible for gifted support.

The District more than fulfilled its obligations under Chapter 16 by evaluating Student three times in less than a year, between May 2011 and April 2012. Student consistently scored in the high average to superior range of cognitive functioning, with scores clustering around the mid-120 point on overall measures of ability on two of the three assessments. ([Redacted].)

The December 2011 administration of the WISC-IV was the only time student scored above 130, reaching the generally recognized benchmark score for gifted eligibility..

Similar to the two step IDEA eligibility analysis, the gifted multi-disciplinary team must also determine whether a student needs gifted support services. (22 Pa. Code §16.22h) In addition, “a determination of gifted ability will not be based on IQ score alone” and when a potentially gifted student’s cognitive ability score is less than the benchmark 130, multiple criteria must be used to determine eligibility for gifted services. (§16.21d)

The District’s multi-factor gifted rubric fulfills the requirements of Chapter 16 and provides a means for a student whose performance on standardized achievement tests is not commensurate with cognitive ability can qualify for gifted services if the teacher checklists establish that a student has the characteristics of a gifted learner. (FF 19, 20) Although Mother described Student as discussing things at home and pursuing things well beyond [Student’s] age (N.T. pp. 1211, 1212), she identified no specific instances to illustrate how Student demonstrates critical thinking and decision-making skills, or creatively solves problems. Parents believe that Student’s difficulties with reading and writing mask gifted abilities, but the traits that Student’s teachers evaluated in considering Student’s need for gifted services were not dependent on reading and writing.

Student's 1st grade teacher noted, *e.g.*, that Student often displayed greater imagination and curiosity than classmates. She also noted that Student sometimes exhibited exceptional memory, a strong ability to learn concepts quickly and process information in complex ways, use higher level thinking skills, generate original ideas, incorporate unique points of view, become immersed in topics of interest and be a self starter. Such traits displayed sometimes, but not often, do not suggest a need for gifted services.

Similarly, the 2nd grade teacher rated Student as sometimes exhibiting exceptional memory, ability to learn new material quickly, higher level thinking skills and working above grade level. The number of "sometimes" or "rarely" ratings on so many characteristics of giftedness, combined with an ability score just above the benchmark of a 130 IQ score in the December 2011 evaluation as well as the achievement test scores in the average range, all contributed to the conclusion that Student did not meet the criteria for giftedness. (FF 27, 28) Again, the traits that the teachers rated are not dependent upon achievement in academic subjects such as reading, writing and math. The ratings of gifted learner characteristics by different teachers were very similar across all three District evaluations.

Reimbursement for Expert Evaluation/ Expert Fees

Parents did not meet the legal criteria for obtaining an IEE at public expense under 34 C.F.R. §502(b), since the District evaluations were appropriate and there is no equitable basis for reimbursement of the CHOP evaluation. With respect to the audiology evaluation, there was no prior District evaluation and no demonstrated educational need for an audiology evaluation, or District refusal to conduct such an evaluation.

It has long been established that fees for expert testimony at a due process hearing are not reimbursable under IDEA, and a recent district court case confirms that principle. *See Arlington*

Central School District v. Murphy, 548 U.S. 291, 165 L.Ed. 2d 526 (2006); *Madison D. v. Downingtown ASD*, 2111-cv-6685, *slip op.* @ 14—16 (E.D. Pa, Aug. 6, 2012). Parents' reimbursement claims, therefore, are also denied.

CONCLUSION

Careful consideration of the substantial record in this case leads to the conclusion that Parents did not establish that Student meets the criteria for any exceptionality at this time and therefore, Parents' claims must be denied. Without eligibility for special education or gifted services, there is no basis for entering an order directing the District to take any action with respect to Student.

It should be noted, however, that there are indications of a weakness in spelling, in particular, possibly word attack skills in reading and potential auditory processing issues. Those potential issues bear watching, and may require regular education interventions, at least, should Student's classroom performance begin to decline.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** Parents' claims in this matter are **Denied** and the Council Rock School District need take no action at this time to provide Student with gifted or special education services.

It is **FURTHER ORDERED** that because Student is not eligible for gifted services under Pennsylvania law or special education services under state and federal law, in accordance with either IDEA or §504 of the Rehabilitation Act of 1973, Student is not entitled to an award of compensatory education for denial of services during the school years or summers of the period in dispute.

It is **FURTHER ORDERED** Parents are not entitled to reimbursement of the fees paid for independent evaluations and expert testimony at the due process hearing.

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

October 3, 2012

[Appendix redacted.]