

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

Final Decision and Order

CLOSED HEARING

ODR File Number 22056 18 19

Child's Name: L. S. **Date of Birth:** [redacted]

Parent:
[redacted]

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Hearing Officer: Michael J. McElligott

Date of Decision: 08/30/2019

INTRODUCTION

Student (“student”)¹ is a middle-school age student who attends the School District (“District”). The parties dispute whether the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student who requires special education for a potential learning disability in reading.³

The student’s parents claim that the student was denied a free appropriate public education (“FAPE”) since the student was not identified as a student with a specific learning disability in reading. Analogously, the parents assert these claims and request for remedy under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).⁴ Parents seek, among other remedies, compensatory education and a finding that the student qualifies as a student with a specific learning disability in reading.

The District counters that at all times it met its obligations to the student, and that the student does not qualify as a student eligible under IDEIA and Section 504 as a student with a specific learning disability in

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162 (“Chapter 14”).

³ The student is eligible for special education services for a speech and language articulation impairment.

⁴ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 (“Chapter 15”).

reading. Accordingly, the District argues that the parents are not entitled to any remedy.

For the reasons set forth below, I find that, the evidence being in equipoise, parents have not carried their burden of proof. Because the evidence is so finely balanced, however, an independent evaluation will be ordered.

ISSUES

Is the student eligible under the IDEIA as a student with a specific learning disability in reading?

If so, are parents entitled to any remedy?

FINDINGS OF FACT

1. For multiple school years, the student has been eligible for special education under the terms of the IDEIA and Section 504 as a student with a speech impairment. (Parent Exhibit ["P"]-1, P-2).

2016-2017/4th Grade

2. In 4th grade, in the spring of 2017, the student scored "proficient" in English/Language Arts on the Pennsylvania System of School Assessment ("PSSA") testing. (School District Exhibit ["S"]-4).

2017-2018/5th Grade

3. At the outset of the 2017-2018 school year, the student's 5th grade year, the student had an individualized education program ("IEP") in place, an

IEP that had been developed in the prior school year, in February 2017. (P-1).⁵

4. In September 2017, the student was in the 39th percentile on a curriculum-based, regular-education reading assessment. (P-2).
5. In November 2017, during a parent-teacher conference in 5th grade, the student's mother shared with the student's teacher (who taught the student in all subjects, including reading and spelling— but not social studies) —that the student's family was spending an inordinate amount of time each evening on homework and academics. (NT at 150-265, 404-443).
6. The IEP contained input and grades for the student's then-current 4th grade levels of educational performance. At that point, the student had grades as follows: reading – 95%, spelling – 100%, English – 94%, social studies – 100%, mathematics – 96%, and science – 100%. At that time, the student's 4th grade teacher reported daily participation, being on task and “ready to learn”. The teacher noted articulation errors with certain sounds, at times needing to ask the student to repeat spoken language to be understood. (P-1).
7. The IEP noted that the student's articulation errors were found to impede the student's effectiveness and efficiency in oral communication. (P-1).
8. The IEP noted that the student “completes home practice, as well as summer work packets, on a regular basis”. (P-1).
9. The IEP contained one S&L goal for articulation of certain sounds with pullout S&L services on a regular basis. (P-1).
10. In the midst of the student's 5th grade year, in January 2018, the student was re-evaluated by the District. (P-2).
11. The January 2018 re-evaluation report (“RR”) contained parental input, provided by the student's mother. The parent's input was largely related to the student's spoken language and oral communication. The student's mother reported that the student succeeded academically “but not without many, many hours of daily study”. The student's mother also shared that: “I believe (the student's) problems with speech have an effect on (the student's) reading ability. (The student) struggles with sounding out syllables and making words.” (P-2).

⁵ Although it is not explicit on this record, this IEP was not the initial IEP—the student had been receiving speech and language (“S&L”) services for multiple school years prior to February 2017. (P-4 at page 2).

12. The January 2018 RR indicated that the student had showed mastery of the articulation goal in the February 2017 IEP in structured, therapeutic settings but recommended that the student continue to be identified as a student with a speech impairment for articulation needs, especially in extemporaneous speech (i.e, in unstructured, non-therapeutic exchanges where deficits were noted). (P-2).
13. In January 2018, the student's IEP contained one S&L goal for articulation in group conversation and monologue settings, with pullout S&L services on a regular basis. (P-3).
14. Progress monitoring in April 2018 and June 2018 indicated that the student made progress on the goal, including 100% achievement in conversational settings by June 2018. (P-3).
15. As a high-achieving 5th grade student, the student was selected as a peer tutor to provide help to younger elementary-aged students through daily tutoring to improve academic skills, including letter sounds and basic phonics. (P-2; NT at 404-443).
16. The student's 5th grade teacher testified that the student did not exhibit difficulty in reading aloud and that the teacher had no concerns for the student's reading. (NT at 404-443).
17. The student's 5th grade teacher had no concerns recommending the student for promotion to 6th grade, which would include a transition to the District's middle school. (NT at 439-440).
18. In 5th grade, in the spring of 2018, the student scored "proficient" in English/Language Arts on PSSA testing. (S-8).
19. The student's final grades for 5th grade were as follows: reading – 97%, spelling – 100%, English – 97%, social studies – 96%, mathematics – 96%, and science/health – 96%. (S-18).

2018-2019/6th Grade

20. In 6th grade, the student's mother was [redacted]. (NT at 38-146, 150-265).
21. In the fall of 2018, the S&L therapist working with the student shared with the student's mother that the therapist felt the student's reading fluency lagged behind the fluency of same-aged peers with whom the witness worked. The S&L therapist did not feel the fluency issue rose

to the level where it needed to be reported to teachers or special education administration. (NT at 150-265, 446-483).

22. In December 2018, a private psychologist issued an evaluation report (based on an evaluation process in November 2018). (P-4).
23. The December 2018 private evaluation included cognitive testing. The student's full-scale IQ is 98. (P-4).
24. The December 2018 private evaluation included achievement testing. The student exhibited a significant discrepancy between ability and achievement in the pseudoword decoding subtest (77) and oral reading fluency subtest (77). These were the only significantly discrepant achievement scores in the achievement testing. The word reading subtest (94) and reading comprehension subtest (110) scores were not significantly discrepant. Taken together, the reading composite score also did not exhibit a significant discrepancy between ability and achievement (86). (P-4).
25. The December 2018 private evaluation included a phonological processing assessment. The student exhibited a significant deficit in phonological memory (55), the ability to retain sounds in short-term memory, although overall auditory processing was in the average range. (P-4).
26. The December 2018 private evaluation noted that the student exhibited average word reading and reading comprehension skills, but exhibited difficulty working with phonics skills/phoneme blends, which interfered with the student's oral reading fluency. (P-4).
27. The December 2018 private evaluation contained parent input which indicated, among a list of concerns that are not probative of the issues in this matter, concerns with the student's reading ability and the inordinate amount of time the student spent on homework. (P-4).
28. The December 2018 private evaluator rendered a medical diagnosis of dyslexia, deferring to the student's multi-disciplinary team ("MDT") at the District as to whether the student qualified for educational purposes as a student with a specific learning disability under IDEIA/Section 504. (P-4).
29. The parents shared the December 2018 private evaluation with the District and, thereafter, the District requested permission to perform its own re-evaluation. (P-5 at page 8).

30. In January 2019, the student's IEP team met for its annual review of the student's IEP. (P-5).
31. The January 2019 IEP noted that the District was in the midst of a re-evaluation. (P-5 at page 8).
32. The January 2019 IEP noted that the student had made significant progress with articulation needs in structured, therapeutic settings. The student made a degree of progress with articulation needs in unstructured settings but the IEP indicated that the student should continue to receive S&L services. (P-5).
33. In the parental input for the January 2019 IEP, the parents shared concerns based on the content of the December 2018 private evaluation. (P-5).
34. The January 2019 IEP contained one S&L goal for maintaining progress in articulation in unstructured settings, with pullout S&L services on a regular basis. (P-5).
35. The January 2019 IEP contained updated specially designed instruction and modifications, based on recommendations in the December 2018 private evaluation. (P-5).
36. The January 2019 IEP contained no progress monitoring data from the fall of 2018 or winter of 2019 through the date of the IEP. (P-5).
37. In March 2019, the District issued its RR. (P-6; S-15).
38. The March 2019 RR included the results and conclusions of the December 2018 private evaluation. (P-6; S-15).
39. For the March 2019 RR, the District evaluator did not repeat cognitive ability or achievement assessments but adopted those scores from the December 2018 private evaluation. (P-6; S-15).
40. At the time of the March 2019 RR, the 3rd marking period was in progress. The 1st, 2nd, and partial-3rd grades for the student in core academic areas were as follows: language arts 100-100-95, mathematics 100-100-100, science 98-98-98, social studies 100-100-100, and English 100-100-94. (P-6; S-15).
41. The March 2019 RR included teacher input. Two or more teachers rated the student with strong academic, functional, and behavioral characteristics across different criteria. Only one [reporter], endorsed the

academic criterion of “has poor reading and comprehension skills”. (P-6; S-15; NT at 38-146).

42. Two teachers (whose identity was not specifically provided) endorsed exhibits a slow rate of work; the District evaluator specifically addressed this issue in terms of how the student worked through the assessments in the evaluation, and the evaluator confirmed that the student is very meticulous with assigned work/tasks. (P-6; S-15; NT at 38-146).
43. The March 2019 RR did not contain parent input but the evaluator was aware from the January 2018 RR and the December 2018 private evaluation of the parents’ input regarding the student spending an inordinate amount of time on homework. (NT at 38-146).
44. Additional assessments in the March 2019 RR included S&L assessment, an occupational therapy (“OT”) assessment (based on a recommendation for OT assessment in the December 2018 private evaluation), academic assessment in reading and writing, and behavioral assessment. (P-6, S-15).
45. The S&L assessment in the March 2019 RR indicated broadly average scores, although there were relatively weaker scores in subtests for word memory and auditory comprehension, leading to a low average score in the auditory memory index. The S&L evaluator recommended that the student no longer required S&L services. (P-6, S-15; NT at 446-483).
46. In the March 2019 RR, there was no progress-monitoring data on the S&L goal in the January 2019 IEP goal. (P-6, S-15).
47. The OT assessment in the March 2019 RR indicated broadly average scores, with a recommendation that the student did not require school-based OT services. (P-6, S-15).
48. The academic assessment in the March 2019 RR indicated broadly average scores, but the subtest scores confirmed the student’s relative weakness in phonological pseudoword decoding. Additionally, the student exhibited relative weakness in sentence writing. (P-6, S-15).
49. The behavioral assessment in the March 2019 RR indicated no at-risk or clinically-significant in the ratings of two teachers. The student’s mother rated the student as clinically significant for anxiety and at risk for depression and internalizing problems, and functional communication. (P-6, S-15).

50. The evaluator noted that the elevated behaviors were seen only in the home environment and not in the school environment, a conclusion consistently supported by the input of teachers across all evaluations in the record and in the comments submitted by teachers in report cards. Likewise, concerns related to anxiety, depression, or other problematic behaviors in school did not surface in the testimony of the student's teachers. (P-6, S-15, S-18; NT at 267-311, 334-397, 404-443).
51. The evaluator concluded that the student had a disability but did not require specially designed instruction. Therefore, the evaluator concluded the student no longer qualified as an eligible student under the terms of the IDEIA. (P-6, S-15; NT at 38-146).
52. In March 2019, the District issued two notices of recommended educational placement ("NOREPs"). One NOREP recommended that the student be exited from S&L services. One NOREP recommended that the student did not require special education and recommended regular education without special education services. (P-7, P-8).
53. The parents did not agree with either NOREP. (P-7; NT at 150-265).
54. In April 2019, parents filed the complaint which led to these proceedings. (Hearing Officer Exhibit-1).
55. The student's 6th grade English teacher testified credibly that the student exhibited struggles in reading, writing, and spelling, with concerns for the "gap" she perceived between the student's in-class performance and where the teacher thought the student should be performing. The teacher felt that, based on these perceived deficiencies, the student is not ready for promotion to 7th grade. Still, the student's final grade in 6th grade English was 100%. (S-18; NT at 267-311).
56. The student's 6th grade English teacher testified credibly that she had no concerns for the student's academic performance. The student's final grade in 6th grade language arts was 100%. (S-18; NT at 334-397).
57. The student's mother testified credibly that the student spends an inordinate amount of time on homework, including support and guidance from the parents. (NT at 150-265).
58. The student's father did not testify. [redacted] (NT at 150-265).
59. The student worked with a reading specialist for enrichment in various summers during elementary school. The reading specialist did not voice to parents any concern for the student's reading ability. (NT at 150-265).

60. The student's final grades for 6th grade were as follows: language arts – 100%, English – 100%, social studies – 100%, mathematics – 100%, and science – 97%. (S-18).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To be eligible as a student under IDEIA, a student must be identified with a disability (or multiple disabilities) explicitly listed in the statute, a disability which requires special education (34 C.F.R. §300.8).

One of the disabilities listed in the IDEIA which qualifies for consideration is a specific learning disability. (34 C.F.R. §§300.8, 300.306, 300.307-311). Under federal and Pennsylvania law, a specific learning disability may be identified in any number of areas, including basic reading skill, reading fluency, and/or reading comprehension. (34 C.F.R. §300.309(a)(1); 22 PA Code §14.125(1)). Finally, the specific learning disability can be established either as the result of the student's response to targeted interventions as measured through regularly monitored progress, or as the result of a severe discrepancy between the student's intellectual ability and academic achievement. (34 C.F.R. §300.309(a)(2)(i-ii); 22 PA Code §14.125(2)(i-ii)).

Here, there is compelling evidence—equally apportioned in the balance—for each party’s position regarding the student’s ability in reading and the need (or lack of a need) for special education in reading. In favor of the parents’ position are the consistent evaluation results, both through the December 2018 private evaluation and the March 2019 RR, that the student shows significant weakness in pseudoword decoding and reading fluency.

Additionally, the mother’s testimony was credible that the student spends an inordinate amount of time on homework, a concern that has been long-voiced by the student’s parents. Finally, two educators— the student’s 6th grade English teacher and the S&L therapist—noted concerns about the student’s ability in grade-level reading.

In favor of the District’s position is the credible testimony of the District school psychologist who explained how the scores on standardized testing do not equate to a problematic deficit in how the student reads/processes text, and the credible testimony of the student’s 5th grade teacher and 6th grade language arts teacher that they had no concerns for the student’s abilities in reading. In fact, in 5th grade, the student had been selected as a peer tutor for kindergarten students struggling with letter sounds and phonic concepts. Additionally, the student’s academic performance has been uniformly excellent in all subject areas over multiple school years, including solidly proficient PSSA scores in English/language arts. Finally, a reading specialist who worked with the student for enrichment over a span of years did not voice to the parents any specific concerns for the student’s reading ability.

Where one party might point to an element of evidence to support an assertion, the other party can point to an element of evidence that is equally strong for the counter-assertion. Indeed, even in deliberating over this evidence and writing this decision, this hearing officer found himself in “evidence loops” where he would go back and forth between equally compelling elements of the evidence between the parties’ positions.

Considering the record as a whole, then, this is one of the rare cases where the evidence between the parties’ positions is truly in equipoise, meaning that the evidence does not weigh definitively in favor of either party. This means that the parents, as the moving party in this matter, have not carried their burden of proof.

The U. S. Supreme Court has addressed the issue of the burden of proof in special education due process hearings. Generally, and in special education due process hearings, the burden of proof has two aspects: the burden of production and the burden of persuasion. (Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005)). The burden of production is a procedural element in a hearing, determining the order and details of the presentation of evidence in a hearing (for example, the order of witnesses, who questions a witness first, the presentation of certain documents at certain times, etc.). The burden of production may be assigned to one party over another, or it may even shift over the course of the hearing (e.g., the attorney for the parents questions witness X first followed by the attorney for the school district; with witness Y, however, the attorney for the school district questions the witness

first followed by the attorney for the parents). (Schaffer, 546 U.S. at 56). The burden of production largely rests with the tribunal as it involves matters of procedure and judicial efficiency.

On the other hand, the burden of persuasion, as described by the U.S. Supreme Court, is the standard to determine “which party loses if the evidence is closely balanced”. (Schaffer, 546 U.S. at 56). The burden of persuasion in special education due process proceedings rests, as it does in most hearings or trials, with the party who is seeking relief through the proceeding.

In this case the parents, as the party seeking relief through this hearing, bear the burden of persuasion to show by a preponderance of the evidence that the District failed in its obligation to identify the student as a student requiring special education to address an alleged specific learning disability in reading. As the U.S. Supreme Court further noted, when evidence is weighed in the balance, it normally tips decisively in one direction or the other-- “very few cases will be in evidentiary equipoise”. (Schaffer, 546 U.S. at 58).

Here, though, as set forth above, this is not the case—the evidence on this record is in equipoise. Accordingly, parents have not met their burden of proof.

But the question of whether or not the student should be identified as a student with a specific learning disability cannot be definitively determined on this record. Does this student require specially designed instruction in reading? That question hangs in the air and cannot be definitively answered by

the evidence in this record. Therefore, a comprehensive independent reading evaluation, at District expense, will be ordered.

Also, the focus of the hearing was the student's eligibility for special education as a student with a specific learning disability in reading. The parties' evidence did not squarely address whether the student continues to qualify for S&L services for the student's long-identified S&L articulation needs, although the student's mother testified that the family felt this was still a need. There was oblique reference to progress on the articulation goal in the January 2019 IEP, but there is no formal progress monitoring or data to support the conclusion that the student has mastered the goal or no longer requires S&L services for articulation. Therefore, the order below will require continued S&L services and explicit progress monitoring on the student's articulation goal until a decision on the continuation/discontinuation of S&L services can be a data-based decision.

Section 504/Chapter 15

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §§15.1-15.8). The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504/Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area*

School District, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis is adopted here— with the evidence in equipoise, under Section 504 as well as IDEIA, the parents have not carried their burden to prove that the student is eligible under IDEIA as a student with a specific learning disability in reading.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the evidence in this matter is in equipoise, and the parents have not carried their burden to prove that the student is eligible under IDEIA as a student with a specific learning disability in reading, and/or that the District has denied the student a free appropriate public education.

The student shall continue to be identified as a student with a speech and language impairment, requiring special education services as outlined in the January 2019 IEP to address that need. The District shall gather regular, explicit progress-monitoring data, for at least one marking period, on the student's baseline-measured progress toward the goal, for consideration by the student's IEP team as to whether or not the student continues to require special education for articulation.

Because the question of whether or not the student should be identified as a student with a specific learning disability in reading cannot be definitively determined on this record, under the authority granted to a hearing officer by

34 C.F.R. §300.502(d)/22 PA Code §14.102(a)(2)(xxix), the District shall fund a comprehensive independent reading evaluation under the terms that follow.

On or before September 13th, the District director of special education shall provide, through e-mail communication to parents, the names, contact information, and curricula vitae, of at least three (but no maximum number) independent reading specialists experienced in conducting comprehensive reading evaluations for educational programming (“independent reading specialist”) who will make themselves available to conduct an independent reading evaluation.

On or before September 20th, the student's parents, to the extent they wish, may select the independent reading specialist from the list identified by the District to conduct the independent reading evaluation (“selected independent reading specialist”), indicating their selection by email communication to the District director of special education. As the parents consider which independent reading specialist from the list they might choose to conduct the independent reading evaluation, there shall be no contact by the parents with the potential evaluators.

If the student’s parents select one of the independent reading specialists, the cost of the independent reading evaluation shall be at the selected independent reading specialist's rate or fee and shall be borne by the District at public expense. As those arrangements are made, the selected independent reading specialist shall be made to understand that it is hoped, but not required or ordered, that an independent reading evaluation report can be

issued as soon as practicable, but no later than November 19th, sixty calendar days beyond September 20th, the last day for selection of an evaluator by the parents.

The selected independent reading specialist shall also be made to understand that the findings and recommendations in the independent reading evaluation report shall be made with a view toward the student's potential eligibility for special education services, if any, as a student with a potential learning disability in reading. The record review, input, assessments, testing, consultation, scope, details, proposed observations, findings, recommendations, and any other content in the independent evaluation report, shall be determined solely by the selected independent reading specialist.

After the selected independent reading specialist has issued the independent reading evaluation report for the student, the student's multi-disciplinary team ("MDT") shall meet to consider the findings of the independent reading evaluation report ("independent evaluation MDT meeting"). At the independent evaluation MDT meeting, the District shall invite and include the selected independent reading specialist as a participant in the MDT meeting, making scheduling accommodations for his or her participation, in person or by telephone, as necessary. The District shall bear any cost or rate for the participation of the selected independent reading specialist at the independent evaluation MDT meeting.

The terms of this order regarding the involvement of the selected independent reading specialist shall cease after that person's attendance at the

independent evaluation MDT meeting, although nothing in the order should be read to limit or interfere with the continued involvement of the selected independent reading specialist, as both parties may mutually agree, or as one party may make singular arrangements therefor.

If by September 20th, the student's parents do not wish to select one of the independent reading specialists identified by the District, or have not indicated by email their selection to the District director of special education, as of September 21st the selection of the independent reading specialist from the list of evaluators identified by the District shall be made by the District. Should that be the case, all other aspects of the order remain in place and operative.

Finally, nothing in this order should be read to interfere with or limit the ability of the parties to agree otherwise, so long as such agreement is in writing and specifically references this order.

Any claim not specifically addressed in this decision and order is denied and dismissed.

With the issuance of this final decision and order, the undersigned hearing officer releases jurisdiction.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

August 30, 2019