

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 regarding closed hearings.

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: ET

Date of Birth: xx/xx/xxxx

Dates of Hearing: 4/30/09, 6/10/09,
7/13/09, 7/22/09

CLOSED HEARING

ODR No. 9529/08-09 KE

Parties to the Hearing:

Representative:

Parents

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Date Record Closed: August 26, 2009

Date of Decision: September 10, 2009

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

ET, now 10 years old, resides with her family in the Lower Merion School District, where she was enrolled and attended school from kindergarten (2004/2005 school year), through the end of 3rd grade (2007/2008 school year). ET left the District elementary school to enroll in a private school for the 2008/2009 school year, where she repeated 3rd grade.

Contending that the District failed to timely evaluate and identify ET as eligible for special education and related services, Parents filed a due process complaint to obtain an award of compensatory education for at least two years prior to the filing date, reimbursement for privately provided speech/language services and payment for an IEE they obtained just prior to the District's IDEA evaluation. Based upon the record compiled during the course of a four session hearing convened between April 30 and July 22, 2009 and the arguments of counsel, Parents will be awarded limited compensatory education for part of the period in dispute, and the District will be required to pay for the IEE provided by a pediatric neuropsychologist who evaluated ET at Parents' request in 2007 and provided the catalyst for the District's subsequent evaluation to determine IDEA eligibility. Because the compensatory education award encompasses speech/language services that should have been provided by the District, separate reimbursement for those services will not be awarded, but Parents may use the compensatory education fund that will be created to reimburse those costs.

ISSUES

1. Did Lower Merion School District violate its “Child Find” obligations under the IDEA statute by failing to evaluate ET to determine whether she had a disability and failing to identify her as eligible for special education and related services prior to June 2008?
2. Did Lower Merion School District deny ET a free, appropriate public education at any time while she was enrolled and attending school in the District?
3. Is ET entitled to an award of compensatory education, and if so, for what period(s), in what amount and in what form?
4. Are ET’s Parents entitled to reimbursement for the speech/language therapy they provided privately for ET?
5. Is the Lower Merion School District required to pay for an independent neuropsychological evaluation obtained by Parents in December 2007?

FINDINGS OF FACT

1. ET is a 10 year old child, born xx/xx/xxxx. She is a resident of the Lower Merion School District and is eligible for special education services. (Stipulation, N.T. pp. 16, 17).
2. ET has a current diagnosis by the School District of specific learning disability in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (N.T. pp. 607, 665; S-60)
3. ET’s Parents believe that she is also IDEA eligible due to a speech/language impairment. (N.T. pp. 151, 152; P-31, p.156¹)
4. ET was first evaluated by a private psychologist in May 2005, at the end of her kindergarten year, because of her Parents’ perception that despite obvious intellectual ability, ET appeared to have some difficulty completing work and attending to tasks in kindergarten. The only standardized assessment administered to ET in that evaluation was the WPPSI-III (Wechsler Preschool and Primary Scale of Intelligence-Third

¹ The page numbers of Parents’ exhibits are continuous, beginning with P-1, p. 1 through P-37, p. 290. As submitted, P-38 had no page numbers.

- Edition), a measure of intellectual functioning, resulting in a Full Scale IQ (FSIQ) score of 130, in the very superior range. (N.T. pp. 45—48; P-1)
5. ET's very superior Verbal and Performance Index scores (133, 131, respectively) on the WPPSI greatly exceeded her average Processing Speed score (94), which fell two standard deviations below her FSIQ, and is a statistically significant difference. (N.T. pp. 621, 622; P-1)
 6. [redacted]
 7. [redacted]
 8. [redacted] Her Verbal Comprehension Index score (130, 99th percentile) and Perceptual Reasoning Index score (131, 98th percentile) were considerably higher than her Working Memory Index score (107, 68th percentile) and her Processing Speed Index score (106, 66th percentile). (N.T. pp. 111, 141, 144, 591—593; P-24, p. 101)
 9. [redacted]
 10. Based upon the GAI Index and standardized measures of achievement that placed ET's fluency scores in reading, math, writing and general academics between the 34th and 62nd percentiles, the evaluator diagnosed learning disorders in math and reading, as well as an information processing disorder and mixed receptive-expressive language disorder. The evaluator recommended various detailed modifications and interventions to ET's educational program to address her areas of relative weakness, including speech/language therapy. (N.T. pp. 591, 592, 595—597; P-24, pp. 107—111)
 11. Although ET's academic, math, reading and writing fluency scores were not significantly lower than expected for an average third grade student, the difference between those scores and ET's measured intellectual ability, which is well above the average range, was statistically significant. The discrepancy is attributable to ET's slow processing speed and working memory difficulties. (N.T. pp. 659—663, P-24, P-28, S-60)
 12. After receiving the private neuropsychologist's report and reviewing the results, the District conducted an evaluation between March and June 2008 to determine whether ET was eligible for IDEA services and concluded that she qualified for specially designed instruction by reason of a learning disability in information processing due to significant weaknesses in processing speed and executive functioning. (N.T. pp. 149, 557, 607, 611, 612, 665, 681, 690; P-28, S-60, p. 8)

13. The District's school psychologist administered the numerical operations subtest of the WIAT-II (Wechsler Individual Achievement Test-Second Edition), the GORT-4 (Gray Oral Reading Test-4) and a Writing Sample. ET's math calculation score was in the high average range (77th percentile), at grade level. ET's oral reading quotient was at the 92nd percentile, with comprehension at the 95th percentile, rate at the 84th percentile, accuracy and fluency both at the 75th percentile. Her timed writing sample in response to a prompt resulted in a minimal amount of text. The school psychologist concluded that ET was at grade level in her writing ability, referencing his general knowledge of 3rd grade writing performance, but noted that her output, ability to generate text, was below expectations for her grade level and reading ability. (N.T. pp. 560, 561, 577, 579, 586—589, 641, 651; P-28, S-60, pp. 5, 6)
14. The school psychologist also observed ET in her 3rd grade classroom in May 2008, noting that ET's intent focus on the task at hand sometimes interfered with attending to other directions. He also noted slow transitioning between tasks and mild distractibility. (N.T. pp. 569, 570, 644; P-28, S-60, p. 4)
15. Input from ET's 3rd grade teacher indicated that ET is a strong reader, at a 5th grade instructional level. On a measure of reading comprehension administered to all 3rd grade students in the fall and spring, (DRP—Degrees of Reading Power), ET's score in the fall of 2007 placed her at the 95th percentile. Spring results were not available at the time the District's ER was compiled, ET's teacher noted in her input that it had taken ET nearly 4 hours to complete the test in the spring, compared to the 1 hour, 45 minute average of other students in her class. (N.T. pp. 576, 672; S-60, p. 3)
16. The time ET needed to complete the DRP test in the spring of 2008 is indicative of her performance on similar tasks without time limits, and is due to her slow processing speed. When ET tries to complete tasks faster, her impulsive errors increase. The effects of ET's slow processing speed, in terms of the amount of time needed to complete tasks and/or errors on timed tasks, will increasingly affect her school performance as the length and complexity of material she is required to read increases. (N.T. pp. 658, 659, 672, 673, 675, 687, 748; P-24, p.103)
17. Despite expressing disagreement with the private evaluator's conclusions in terms of identifying learning disorders in reading, math and writing, the District school psychologist relied on and incorporated the Parents' December 2007 private neuropsychological report into the District ER with respect to all other standardized measures of intellectual functioning and achievement. The District's ER also incorporated the private evaluator's recommendations concerning how ET's needs can be addressed in the school setting. (N.T. pp. 565, 589, 590, 608, 609, 639, 657; P-24, P-34, S-60)
18. A District speech/language pathologist conducted an assessment of ET's receptive and expressive language as part of the District's IDEA evaluation. Based upon the results of the Expressive Language Test and the CELF-4 (Clinical Evaluation of Language Fundamentals-Fourth Edition), which revealed average functioning in all areas of

expressive and receptive language, the speech pathologist concluded that ET's language difficulties are attributable to weaknesses in information processing/processing speed rather than to a language disability. ET's slow processing speed, however, requires classroom accommodations for effective classroom achievement. (N.T. pp. 887—899, 914; P-28, S-60, p.6—8)

19. Although the District speech/language therapist did not initially believe that ET needed direct speech/language services, the proposed IEP ultimately included three speech/language goals directed toward word developing finding strategies, sequencing events in a story, and comparing/contrasting and categorizing words. ET's IEP team also recommended 30 min./week of direct speech/language services. (N.T. pp.902, 918, 919, 922, 923; P-28, P-34, pp. 214—216, S-60)
20. After receiving their private neuropsychologist's evaluation report, ET's Parents arranged for private speech therapy beginning in January 2008. (N.T. pp. 146, 916; S-36, pp. 271—281; S-60)
21. Based upon the private and School District evaluations completed by June 2008, the District offered ET an IEP for the 2008/2009 school year, which included goals in the areas of [redacted], organization, self-advocacy and speech/language. The proposed IEP also included specially designed instruction to be provided in regular education [redacted] classes to address ET's difficulties in organizing her work, particularly with respect to long term projects, completing assignments and tests, and verbally responding to questions in class. The IEP and accompanying NOREP also provided for pull-out itinerant learning support for 3.75 hrs/week, 30 min/week of speech/language therapy and social skills training/practice by means of a twice weekly lunch group with the guidance counselor. (N.T. pp. 149; P-34)
22. Beginning in February 2007, the District provided ET with a §504 service plan based upon her Parents' concerns that she was struggling to keep up with her peers, [redacted]. Parents requested specific classroom accommodations, which were provided in the original Service Agreement, the modification adopted in February 2008 and were also included in the June 2008 IEP proposal. [redacted] (N.T. pp. 89, 92, 113, 114, 122, 137, 138, 216—218 365—368, 514, 515, 530; P-11, p. 38, P-14, P-17, P-34, pp. 217—219, S-43)
23. From 1st through 3rd grades, ET's regular classroom teachers and observations conducted in connection with evaluations noted and reported the following issues with ET's classroom performance: length of time needed to complete tasks, particularly written assignments; difficulty with organization, starting tasks and transitioning to new tasks; distractibility, difficulty in gathering and expressing her thoughts, difficulty focusing, need for repetition, especially directions (N.T. pp. 260, 278, 291—294, 354, 360, 368—370, 389, 435, 442, 446, 448, 451, 465, 710, 746, 748, 749, 905; S-60)
24. ET's classroom performance as reflected in her report cards and projects was at or above grade level and commensurate with or above her same grade peers in 1st to 3rd grades.

(N.T. pp. 300, 301, 304—312, 315, 316, 334, 372, 380, 391—393, 399, 481, 484, 755, 756, 774, 785—789, 803; P-2, P-30, S-8, S-15, S-32)

25. ET's first grade teacher considered her a "typical" 1st grader in terms of organization skills, time management, forgetfulness and difficulty following directions, since those issues are common in 1st grade. ET was also typical for a 1st grader with respect to her need for classroom accommodations. ET's 2nd and 3rd grade teachers also did not consider the difficulties ET manifested atypical for those grade levels. (N.T. pp. 259, 260, 276—278, 287, 301—303, 336, 399, 752, 802)
26. ET's 1st, 2nd, 3rd grade [redacted] teachers provided various classroom accommodations to address ET's difficulties, including: increased time to respond/ complete her work, reminders, peer partner, redirection/cues to focus on task and retrieve words, positioning in the room, modified assignments, quieter area to complete work outside of the regular classroom, timer, checklists for long-term assignments, advance notice for transitions, limiting and repeating directions, breaking down larger tasks, graphic organizer for writing assignments. (N.T. pp. 274—280, 293, 298, 299, 360, 361, 367, 368, 373, 374, 386, 387, 446, 470, 493, 714—716, 724, 731, 739, 792; S-22)
27. [redacted]
28. ET experienced more difficulties with academic demands in 3rd grade due to an increase in long-term assignments and the output demands of the class to which she was assigned. ET had considerable difficulty with completing homework in terms of remembering books and materials she needed to bring home from school, understanding which assignments she was required to complete, and the amount of time it took to complete her homework. Social difficulties also arose for ET and persisted during 3rd grade. (N.T. pp. 98, 99, 103, 107—109, 113—116, 119, 133—137, 144, 153--; P-16, P-17, P-24)
29. ET's Parents elected to withdraw her from the District for the 2008/2009 school year and enroll her in [private school], a highly competitive private school, where she repeated 3rd grade. (N.T. pp. 46, 168—174)

DISCUSSION AND CONCLUSIONS OF LAW

As Parents noted in their closing argument, a major issue in this case is timing in terms of whether the Lower Merion School District unreasonably delayed an evaluation and thereby failed to timely identify ET's learning disability arising from processing speed and working memory deficits. The timing issue, however, has an additional component in terms of when the District should have determined that ET is a "child with a disability" as that term is defined in

the IDEA statute and regulations. It was only at that point that ET became eligible for special education and related services. Contrary to Parents' contentions, the evidence in this case establishes that there is some disconnection in the timing of those events. In addition, this case presents considerable difficulty in determining what the District could and should have done in terms of providing additional supports and services to ET even after her IDEA eligibility reasonably should have been determined.

The District's position, although not explicitly stated in these terms, is based on the two pronged test for IDEA eligibility, a disability category and need for specially designed instruction. A child is IDEA eligible if he or she is a "child with a disability," defined as having one of the conditions listed in 34 C.F.R. §300.508 and who "by reason thereof, needs specially designed instruction."

The true underlying question with respect to liability and remedy, therefore, is not whether the District would have identified ET's learning disability had it evaluated ET earlier. Based upon the consistency of the teacher reports identifying the same kinds of classroom issues from kindergarten through the end of 3rd grade, and the results of the District's 2008 evaluation, which confirmed the same discrepancy between ET's verbal and non-verbal abilities and processing speed, the answer to that question is a resounding yes. The answer to the necessary second question, whether by reason of that disability, ET required specially designed instruction and related services beyond the classroom accommodations in place for her, is not obvious from the record, at least prior to 3rd grade.

There is no doubt that the District had ample reason to suspect that ET may have a disability from the time it received the report of the first private psychologist who evaluated ET, near the beginning of first grade. That evaluation report identified a statistically significant

discrepancy between ET's very superior verbal and non-verbal intellectual abilities and markedly lower processing speed. (F.F. 4, 5; *see also* N.T. 611, 621, 622—testimony of District school psychologist) The District wholly incorporated those findings into its own GWR, but with little note or comment concerning how ET's relatively much lower processing speed might impact her school performance, despite its evaluator's description of the WPPSI as providing important information concerning ET's relative strengths and weaknesses. (P-4, p. 15). The classroom issues created by ET's slow processing speed were noted by all of her teachers, from kindergarten through 3rd grade, [redacted]. (F.F. 23, 27)

On the other hand, however, Congress has made it clear that the old saying “No harm, no foul” applies to IDEA violations, at least in the sense that a foul resulting in no harm to educational progress does not support an award of compensatory education for denial of FAPE.² Here, Parents drew a detailed picture of the District's many missed opportunities to evaluate ET and learn of her disability, which surely existed and was suggested from the beginning of 1st grade by the WPPSI results and her teachers' comments/observations. Parents were far less clear, however, in describing precisely how the District's failure to evaluate ET to determine whether the discrepancy between the very high verbal and performance index scores and processing speed negatively impacted her educational progress. Both the record and Parents' argument in support of their position fail to identify what the District could and should have done in terms of remediation and specially-designed instruction that was not provided through classroom accommodations and the §504 Service Plan provided to ET from the middle of 2nd grade. ET's 1st grade teacher testified convincingly that many children at that age exhibit

² In accordance with 34 C.F.R. §300.513(a)(1), (2), a determination that FAPE was denied must be based on substantive grounds, and in order for a procedural violation to support a hearing officer decision that FAPE was denied, the violation must have (i) impeded the child's right to FAPE, (ii) significantly impeded Parents' opportunity to participate in the IDEA decision-making process, or (iii) resulted in a denial of educational benefit.

difficulties similar to ET's in organization, attention, timely completion of work and following directions. F.F. 25) ET's 2nd and 3rd grade teachers also testified that her difficulties were not atypical of her same-age peers, although their testimony was less emphatic and suggested that fewer students exhibit such issues as they progress from 1st to 3rd grades. (F.F. 25)

Parents did not point to any evidence suggesting that the accommodations and strategies that ET's teachers used in the classroom were insufficient in 1st and 2nd grade.³ In addition, Parents did not argue that the accommodations provided in the §504 Service Plan developed and approved by Parents in February 2007 were insufficient to meet ET's needs at that time. Substantively, it does not matter whether strategies and modifications necessary for meaningful progress are provided in a service plan or an IEP, as long as ET received all of the supports she needed. Since Parents did not identify anything more that ET needed than was provided to her via classroom accommodations in either 1st or 2nd grade, there is no basis for concluding that ET was denied FAPE, notwithstanding the information the District had that should have triggered a full psycho-educational evaluation. With one exception discussed below, there is insufficient evidence to prove that by reason of the disability the District should and would have identified had it evaluated ET in 1st grade, she needed specially designed instruction that went beyond the accommodations she received in all classes. (F.F. 26)

In addition, the evidence establishes beyond question that ET made excellent academic progress. Parents are correct that grades are that the only factor to consider, and, indeed,

³ Although Parents initially did not seek compensatory education for more than two years prior to the date they filed their due process complaint, they contended in their closing argument that an exception to the IDEA limitations period should apply in this case because the District failed to respond to the concerns they expressed about ET during her 1st and early 2nd grade years. Parents argued that the District should have issued a NOREP refusing to evaluate ET, or otherwise outright denying their request for services to address ET's slow processing speed, accompanied by a procedural safeguards notice. Due to the lack of evidence that ET needed any services in addition to what she received via classroom accommodations, however, it is unnecessary to determine whether the withholding of information exception found in 34 C.F.R. §300.511(f)(2) applies to extend the limitations period under these circumstances.

continued progress does not obviate the need for additional services throughout the entire period in dispute. Here, however, the dispute encompasses the first years of school, where meaningful progress, [redacted], is measured in terms of acquiring basic academic skills. She certainly met that standard. (F.F. 24) [redacted]

By the middle of 2nd grade, however, when Parents expressed concerns that ultimately led to the §504 service plan developed for ET in February 2007, the District most certainly should have undertaken an evaluation. Had the District undertaken an evaluation in the late fall or early winter of 2007, more than a year before it finally issued a permission to evaluate, it would surely have determined that ET's processing problems, of which her teachers were well aware, rose to the level of a disability that may have required more intensive intervention, at least beginning in 3rd grade, than was provided via the accommodations in her §504 service plan. Moreover, although the evidence does not support adding itinerant learning support prior to the beginning of 3rd grade, ET would have benefited from and speech/language services during the latter part of 2nd grade, [redacted]. At the very least, consultative speech services should have begun in order to provide ET's teachers with strategies to help her participate better in classroom discussions across all settings.

Had the District evaluated ET in 2nd grade, and identified her processing disability, it could have considered whether/how that disability was likely to affect ET in 3rd grade, and whether she needed itinerant learning support services at that time. At the very least, when additional problems began to emerge in 3rd grade, the District would have been able to convene an IEP team for ET and consider additional supports and services.

The issues ET had appeared to overcome to a large extent with relatively limited supports in 2nd grade, resurged in 3rd grade, as the District's school psychologist recognized was likely to

happen as academic materials became longer and academic demands more complex. (F.F. 16) The District, understandably but unreasonably, took the position that a significant increase in academic expectations would occur in 4th grade, when the proposed IEP would have been implemented. The record establishes, however, that ET's disability began interfering with her academic performance and affecting her emotional well-being in 3rd grade. ET's Parents had early discussions with her 3rd grade teacher concerning the amount of time it took ET to complete her homework and it took several months and various strategies to eliminate evening "meltdowns" over completing her homework. As ET's Mother pointed out in her testimony, the accommodations in the §504 plan were either inadequate to assist ET in meeting the increased academic demands of 3rd grade in light of her processing issues or was not being implemented as Parents expected. (N.T. pp. 105, 106)

In January 2008, ET's service plan was revised to add more explicit strategies for assuring that her agenda book was up to date and that she was aware of the time she had to complete long term projects. (S-43, p.) That accommodation was included as part of the specially designed instruction included in the IEP the District proposed for ET for the 2008/2009 school year.

All in all, the record in this case supports a limited award of compensatory education in the form of ½ hour of speech/language services/week beginning February 2007 through the end of 3rd grade, and the same level of itinerant learning support services provided in the IEP proposed by the District for the 2008/2009 school year.

Reimbursement for IEE by Private Neuropsychologist

The record establishes beyond doubt that the District relied heavily on the December 2007 evaluation and report Parents obtained from a private pediatric neuropsychologist in

producing its own evaluation of ET in 2008 which established her IDEA eligibility. (F.F.) In addition, the private evaluator's recommendations for strategies to address ET's needs arising from her relatively slow processing speed and working memory difficulties were included, nearly entirely, as specially designed instruction in the District's proposed IEP. For these reasons, there should have been little dispute concerning the District's obligation to reimburse Parents for that evaluation. Although Parents did not actually disagree with the results of a District evaluation before seeking a private evaluation at public expense, as literally required by the federal regulations, (34 C.F.R. §300.502(b)), Parents disagreed, in substance, with the District's failure to initiate its own evaluation to determine whether ET is a child with a disability, despite Parents' request for additional services to address ET's slow processing speed, of which the District was well aware since at least 1st grade. The District's own school psychologist acknowledged that the private evaluation was the immediate precipitating factor in the District's decision to evaluate ET for IDEA eligibility in the spring of 2008. *See*, N.T. 681—683. Under these circumstances, and considering the District's heavy reliance on the evaluation Parents obtained, payment of the evaluation costs by the District is certainly appropriate.

The complicating factor in this case, in the District's view, is the private evaluator's decision not to charge Parents for the evaluation, but to accept full payment from the District, either by agreement or pursuant to an order resulting from a due process hearing. The District's argument that it should not be required to pay for the private evaluation is unavailing for several reasons. First, the District is not entitled to benefit from the private neuropsychologist's willingness to provide his services to colleagues as a professional courtesy. Second, the District derived significant benefit from the services provided by Parent's evaluator and is equitably required to pay for them under the quasi-contract principle of *quantum meruit*, if for no other

reason. This issue is no different, in substance, from the situation where a landowner is equitably required to pay for a structure erected by mistake on its property, which it then used for its own purposes. Third, the IDEA statute and regulations provide for an IEE at public expense under the circumstances set forth in the IDEA statute and regulations. Nothing suggests that such payment is contingent upon Parents' payment for the evaluation. Here, the District's obligation is absolutely no different than if it had agreed to fund an IEE or was ordered to do so as the result of the usual hearing situation, where it failed to support the appropriateness of its own evaluation. Here, Parents proved that the District failed to timely evaluate the student after ample notice that she may have been a child with a disability [redacted]. The District must provide the IEE at public expense pursuant to this decision and the accompanying order. Finally, the circumstances under which Parents obtained an IEE in this case are analogous to the recent U.S. Supreme Court decision in *Forest Grove*, where the Court determined that where a district failed in its obligation to timely evaluate and offer FAPE to a student later determined to be IDEA-eligible, Parents could obtain tuition reimbursement although the student had never been enrolled in the district. As noted, the District in this case failed to timely evaluate the student for IDEA eligibility, despite Parents' request for services to address her slow processing speed over a period of several school years. Parents, therefore, were justified in obtaining an IEE, prompting the District to initiate its own evaluation, which did no more than supplement the private evaluation report provided by the Parents. The District, therefore, will be ordered to pay Dr. Blumenstein's invoice in the amount of \$2,800.00 (P-36, p. 282)

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

Provide ET with compensatory education in the form of ½ hour of speech/language services/week from February 1, 2007 through the end of the 2008/2009 school year and 3.75 hours/week of itinerant learning support services/week for the 2008/2009 school year. The value of those services shall be measured by the cost to the District of providing such services.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

September 10, 2009