

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: A.W.

Date of Birth: [redacted]

Dates of Hearing: May 11, 2011 and May 12, 2011

CLOSED HEARING

ODR No. 01849-1011KE

Parties to the Hearing:

Representative:

Parent[s]

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Date Record Closed:

June 15, 2011

Date of Decision:

June 26, 2011

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a high-school aged student in the Cumberland Valley School District (hereafter District) who is eligible for special education under the Individuals with Disabilities Education Act (IDEA).² Student's Parents³ filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under both the IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504)⁴ from the time period October 24, 2010 forward.

The parties reached an apparent resolution of the issues when the hearing initially convened in January 2011, and the District thereafter completed a new re-evaluation report. A new Individualized Education Program (IEP) was also developed. The Parents did not approve the program in this new IEP and reinstated their complaint⁵ after it became clear that the parties did not have a final agreement. Two hearing sessions convened at which both parties presented evidence in support of their respective positions. Following review and consideration of the entire record, the Parents' claims will be denied.

ISSUES

- 1) Whether the District appropriately identified Student in all categories of special education under the IDEA;
- 2) Whether the District's proposed IEP appropriately addresses all of Student's needs;
- 3) Whether the District is properly implementing the current IEP; and
- 4) Whether Student is entitled to compensatory education for any or all of the time period from October 24, 2010 through the present, and, if so, in what amount?

FINDINGS OF FACT

1. Student is a high-school aged Student who resides with the Parents within the District. (Notes of Testimony (N.T.) 18, 36)

¹ In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

² 20 U.S.C. §§ 1401 *et seq.*

³ Reference is made to Parents when the Parents were acting together or where one was acting on behalf of both, except where otherwise noted.

⁴ 29 U.S.C. § 794.

⁵ *See* Hearing Officer Exhibits (HO) 1, 2, 3, 4. (N.T. 6)

2. Student was adopted from a foreign country at the age of five or six and did not speak English at the time Student moved to the United States. Student's native language was [redacted]. Student attended a parochial school through the end of eighth grade. (N.T. 35-36, 69; Parent Exhibit (P) 7)
3. In March 2007, the District conducted an initial evaluation of Student for special education services based upon academic difficulties as well as attentional and organizational issues. Information from the parochial school revealed concerns of the Student Support Team that Student did not do homework, was forgetful and lacked responsibility, and required a tutor to help with homework. (N.T. 39; P 2, P 7)
4. The Evaluation Report (ER) included information from Student's parents and teachers as well as a classroom observation, assessments, and Student's current progress in the parochial school. Student's academic skills were reported as below average in reading, writing, and spelling skills as well as in Social Studies. (N.T. 41-44; P 4, P 5, P 7)
5. The District conducted cognitive and achievement testing. On the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), Student achieved a full scale IQ of 98, in the Average range, with all four subtest scores also in the average range. On the Woodcock Johnson Tests of Achievement – Third Edition (WJ-ACH-III), Student demonstrated scores in the Average to High Average range in Reading and Mathematics, and in the Average range in Written Expression. (P 7)
6. Also included in the ER was information from an English as a Second Language (ESL) screening, which reflected that Student exhibited difficulty managing and completing homework and assignments. Student was determined to be English Proficient at Level 4 in Broad English Ability, Oral Language Ability, and Reading-Writing Ability on the Woodcock-Muñoz Language Survey. (P 7)
7. The ER also reported on the Attention Deficit Disorder Evaluation Scales – Third Edition, revealing no areas of concern on the part of the teachers, but scales completed by Student's parents rated Student in the At-risk range for attention difficulties. Student's parents did not indicate concerns with hyperactivity or impulsivity. (P 4, P 7)
8. Student was determined to be not eligible for special education at the time of the March 2007 ER. (N.T. 44-45; P 7)
9. Student first attended school in the District in the 2008-09 school year, repeating eighth grade. (N.T. 36-37)
10. Student began to receive private counseling services during that 2008-09 school year because Student was experiencing difficulties at school. Student would, and continues to, see the private psychologist for counseling one time each week, often with other family members. (N.T. 46-48; P 12)
11. In June 2009, the Parents had Student privately evaluated by a psychologist because of difficulties with academics, attention, behavior, and emotions. This evaluator suggested that Student's behaviors were consistent with Attention Deficit Disorder (ADD) but did

not diagnose ADD or Attention-Deficit/Hyperactivity Disorder (ADHD). (N.T. 51, 106-07, 108-09, 114; P 12)

12. Also in June 2009, the Parents had Student evaluated by a private, licensed school psychologist who conducted cognitive and achievement testing and other assessments. On the WISC-IV, Student's full scale IQ was 106 with average to high average scores on all subtests, and Student exhibited better developed nonverbal reasoning ability when compared to verbal reasoning ability. Administration of the Wechsler Individual Achievement Test – Second Edition (WIAT-II) revealed overall scores in the average range on the Reading, Mathematics, and Oral Language Composites, and in the high average range on the Written Language Composite with some variability on the various subtests. Student's scores on the Bender Visual Motor Gestalt Test and the Test of Variables of Attention did not reveal concerns, although the psychologist noted that Student needed considerable emotional support based upon a House-Tree-Person drawings test. This psychologist recommended individual and family counseling. Educational suggestions included preferential seating, minimal distractions, multi-modal instruction, review of and written directions for assignments, and extra time for tests. (P 11)
13. In September 2009, Student's Parents met with the District to discuss Student's progress and concerns over grades. The District confirmed that Student was receiving a number of general accommodations such as preferential seating and review of assignments, similar to what the private school psychologist recommended in June 2009. The Parents also requested that the District conduct a re-evaluation of Student. No evaluation was conducted at that time, and the Parents understood that the District was not required to conduct more than one evaluation of any student. (N.T. 53-54, 111-13, 219; P 11, P 13; S 13)
14. In December 2009, the Parents arranged for a private neuropsychological evaluation due to Student's continued learning difficulties. On assessment of Student's memory ability, Student's performance was below expectations. Student's attention and concentration were noted to be atypical but no conclusions were reached. On the BASC-2 scales completed by Student and one of the Parents, concerns in the areas of Sense of Inadequacy and Attention Problems (Student), and Conduct Problems (Parent) were revealed. Achievement Testing using the WJ-III-ACH revealed weaknesses in Oral Language, Broad Reading, Math Calculation Skills, and Academic Fluency. This psychologist diagnosed ADD, Cognitive Disorder Not Otherwise Specified (NOS), and Learning Disorder NOS (in oral comprehension and reading). It was not recommended that Student be prescribed medication for ADHD/ADD. (N.T. 51-53, 109-110; P 14)
15. The District re-evaluated Student in early 2010 after the parents gave consent. (N.T. 54, 56-57; P 15, P 20)
16. The District's Re-evaluation Report (RR) was issued in March 2010. The RR reviewed information from all of Student's school years at the parochial school and in the District; summarized the two private evaluations from 2009; and included input from the Parents and teachers, including Student's then-current grades. The District administered the WJ-

III-ACH, reflecting low average standard scores (80-83) in the Oral Language Cluster, and scores in the average or upper end of the low average range on all other subtests. (N.T. 59; P 20)

17. On the Brown ADD Scales, Student was rated in the highly probable range based upon Parental input. The Behavior Rating Inventory of Executive Function (BRIEF) revealed concerns with Working Memory, Planning and Organization, and Monitoring on the Metacognition Index. Parent and Student ratings using the Achenbach System of Empirically Based Assessment (ASEBA) Child Behavior Checklists reflected clinically significant scores on the Externalizing Problems Composite including its Rule Breaking Behavior Scale. (P 20)
18. The RR concluded that Student was eligible for special education on the basis of a specific learning disability in listening comprehension. Speech/language consultation/evaluation was also recommended. Identified needs for Student's educational program related to listening comprehension and executive functioning (working memory, planning/organization, and overall monitoring). The Parents checked agreement with the determination of the specific learning disability. (P 20)
19. The Parents requested an Independent Educational Evaluation sometime after a March 2010 meeting to review the RR. The District agreed to fund an IEE and consider its results. (N.T. 60-61, 65; P 22, P 29)
20. An IEP meeting convened in April 2010. Information from Student's teachers indicated needs in organization and study skills, assignment/homework completion, and focus/attention. The IEP further specified needs for repetition of major concepts, multi-modal instruction, improvement of self-advocacy, in addition to accommodations/specially designed instruction to meet the concerns identified by the teachers. This IEP included a transition plan related to Student's goal of attending a four-year college. Goals addressed improvement of organizational skills, listening comprehension, and self-advocacy. The section on program modifications/specially designed instruction provided for academic support (review of concepts, checking of notes for accuracy, checking for comprehension, reviewing for tests, and monitoring of organizational skills); testing accommodations; preferential seating; use of a checklist for class preparation/organization; check of an assignment planner; written directions for assignments and checking for understanding of those directions; testing accommodations; and chunking of large assignments. The District proposed itinerant learning support as Student's placement, and the Parents approved the Notice of Recommended Educational Placement (NOREP). (N.T. 60-61; P 21; S 24)
21. Progress reports for the fourth quarter of the 2009-10 school year reflected that Student was using some of the strategies for improving organizational skills (for example, Student used an agenda planner independently 63% of the time and had a homework completion average of 97% for that quarter); and made limited progress in targeted listening comprehension skills (25-75% accuracy toward a goal of 85% accuracy). (P 24)

22. During the ninth grade school year (2009-10), the Parents arranged for Student to be tutored during the second and third marking periods. Those sessions occurred every day for two hours each day. (N.T. 68, 70-72)
23. Student's final grades for the 2009-10 school year were mostly C grades. (P 25)
24. In June 2010, Student's IEP team met to discuss the Parents' concern that Student was demonstrating inappropriate behavior. (N.T. 72-73; P 26)
25. The agreed IEE was completed in May and June 2010 and a report subsequently issued. The IEE summarized previous evaluations and other educational records and also reported on assessments. Administration of the Wechsler Non-Verbal Scale of Ability (WNV) revealed a full scale IQ of 120 (which is not inconsistent with the Perceptual Reasoning Index score on the WISC-IV in June 2009 (117)). The evaluator explained that these results demonstrate that Student's abilities on non-verbal tests are superior to abilities on verbal or language-based tests. (P 29)
26. The IEE's assessments of Student's language abilities reflected weaknesses in both receptive and expressive language, including phonological awareness and phonological memory. (P 29)
27. The independent evaluator also administered the WIAT – Third Edition (WIAT-III) which revealed below average range scores on both subtests in the Oral Language Composite; an average range score on the Total Reading Composite; an average range scores on the Basic Reading Skills Composite; a below average range scores on the Reading Comprehension/Fluency Composite; average range scores on the Math Fluency and Mathematics Composites; and a below average range score on the Written Expression Composite. The Total Achievement Composite was at the upper end of the below average range (standard score of 89). (P 29) The independent evaluator concluded, based upon a comparison of the WIAT-III scores and the WNV, that Student "is demonstrating severe academic underachievement in listening comprehension, oral expression, reading comprehension, reading fluency, math fluency and written expression" and "should, therefore, be considered learning disabled in these areas." (P 29 at 20)
28. Using the Brown ADD scales, the IEE evaluator determined there was a high probability that Student had ADHD. (P 29)
29. The IEE concluded with a suggestion of exceptionality classifications of Other Health Impaired (based on ADHD), Specific Learning Disabilities (reading comprehension, reading fluency, written expression, math reasoning, oral expression, and listening comprehension), and speech/language impairment. (P 29)
30. Recommendations for specially designed instruction for Student related to phonological processing; word retrieval; reading fluency; reading comprehension; and spelling and written expression. In addition to general considerations (such as use of a multi-modal (visual and verbal) teaching approach, generalization of concepts and skills, learning support for difficult concepts and class materials, a predictable schedule and routine, and

daily monitoring of organizational skills), the IEE further recommended the following accommodations: extra time for assignments and tests in a distraction-free environment, oral testing in content areas; prepared notes/study guides; use of highlights for important text; and learning support to improve Student's ability to complete assignments and homework. (P 29)

31. Student was in tenth grade for the 2010-11 school year. Student continued to demonstrate needs in Science and Mathematics, as well as with self-advocacy and using an agenda book to independently track assignments and complete them. (N.T. 280, 306-07, 313-21)
32. In October 2010, the District issued another RR which contained information from all previous evaluations, including the IEE, as well as updated information about Student's academic performance. A Functional Behavior Assessment had been conducted on several targeted behaviors, which concluded that Student did not exhibit behaviors that interfered with Student's learning or the learning of others. The District concluded that Student was eligible for special education based upon a specific learning disability in listening comprehension, and further noted processing weaknesses (part of executive functioning). It did not find Student eligible for special education on the basis of a specific learning disability in math reasoning or written expression because Student had not consistently demonstrated weaknesses or performance below expectations in those areas. It also concluded, based upon a speech/language screening, that Student did not need speech/language support. (N.T. 74-75, 227-29, 239-40; P 31)
33. In November 2010, the IEP team met to discuss Student's educational program, including concerns and progress, and to develop a new IEP for Student. This IEP contained information from Student's current teachers, including academic performance, and continued needs with organizational skills and homework and assignment completion were noted, as was improvement in those areas. Transition planning focused on Student's main interest areas. Goals again addressed improvement of organizational skills, listening comprehension, and self-advocacy. Program modifications/specially designed instruction were similar to the prior IEP: academic support (review of concepts, checking of notes for accuracy, checking for comprehension, reviewing for tests, and monitoring of organizational skills); testing accommodations; preferential seating; use of a checklist for class preparation/organization; check of an assignment planner; written directions for assignments and checking for understanding of those directions; testing accommodations; and chunking of large assignments. The Parents did not approve or return the Notice of Recommended Educational Placement (NOREP). (N.T. 75-76, 220-25, 229-32, 293-95; P 33; School District Exhibit (S) 3)
34. The District did implement the November 2010 IEP. (N.T. 232)
35. Student's Parents filed a due process complaint in early December 2010. (P 23)
36. Student continued to be provided with private tutoring for two hours each day, four or five days per week, during the 2010-11 school year. The tutor worked with Student on assignments which were sent to the Parents by email from the special education teacher

each day, as well as on upcoming tests. After each tutoring session was over, the tutor and Student reviewed with one of the Parents what was accomplished, and the Parents related the information to the special education teacher. Student was generally able to complete assigned work during those two-hour sessions with the tutor. (N.T. 82-83, 104-06, 117-19, 281-83, 291, 296, 332)

37. Also during the 2010-11 school year, Student received itinerant learning support for 45-90 minutes every day. In that time period, Student was given assistance with completing assignments and organizing assignments that would be completed at home; the teacher also worked with Student reviewing for tests and clarifying instruction in other classes as needed. The teacher additionally worked with Student on study skills through chunking assignments and previewing vocabulary. Student could take tests in that room as well. (N.T. 280-85, 296, 300, 311-12, 321-23)
38. In January 2011, following the due process complaint filed by the Parents, the parties agreed that the District would conduct additional assessments of Student in several areas including speech/language. (N.T. 241-42; HO 1)
39. The District issued a new RR in March 2011 and convened a meeting to discuss it. The District reported results of the Gray Oral Reading Test – Fourth Edition (GORT-4), the Gray Silent Reading Test, the Key Math Diagnostic Assessment (Key Math), and the Test of Written Language – Fourth Edition (TOWL-4). Student's scores on the GORT-4 were all in the average range for reading rate, accuracy, fluency, and comprehension, as were the scores on the Gray Silent Reading Test for reading comprehension. Student also scored in the average range on all subtests of the Key Math as well as on overall math proficiency with a standard score in the average range. On the TOWL-4, Student again scored within the average range in all areas as well as on the Overall Writing Index. Observations of Student's time on task were also reported, with results appropriate for the classroom tasks observed and consistent with that of Student's peers. A Speech/Language Assessment was also conducted using the Receptive and Expressive One-Word Picture Vocabulary Tests – Fourth Edition, which reflected generally average scores with a few areas below average; when the results were viewed in the context of other information, the speech/language pathologist concluded that Student did not exhibit a speech/language impairment. The RR continued to find Student eligible for special education by reason of a specific learning disability in listening comprehension, as well as noting processing deficits. (N.T. 85-86, 101-03, 243-45; P 38)
40. Another IEP was developed following the March 2011 RR in a meeting convened on April 5, 2011. This IEP was similar to the November 2010 IEP, with goals addressing organizational skills, and the following program modifications/specially designed instruction: academic support (review of concepts, checking of notes for comprehension and accuracy, review for tests, monitoring of organizational skills, study strategies, preview of vocabulary, and monitoring of classwork completion); testing accommodations; a checklist for classroom preparation/organization; procedures for use and monitoring of a daily assignment book; written directions for extended assignments with checks for comprehension; chunking of larger assignments; auditory skill strategies (preferential seating, reduced background noise and distractions, clear and concise

directions, repetition/rephrasing of directions); multi-modal instruction (verbal and visual); preview and review of new concepts; monitoring of comprehension of directions; and use of visual aids. The Parents did not approve the NOREP. (N.T. 245-49; P 39)

41. The District offers leveled courses at the high school. Level 1 is the most difficult; Level 2 is considered to be college-preparatory but is less rigorous than Level 1; and Level 3 is more basic. (N.T. 88-89)
42. At the end of the third marking period, Student had the following grades: A in Health and Physical Education; B in Photography and World Cultures; C in Spanish (level 3) and Basic Geometry; D in Biology (level 2) and English (level 2). (P 35)
43. Student experienced stress over the course of the 2010-11 school year related to the difficulty of classes. (N.T. 188-90)
44. During the 2010-11 school year, the Parents retained a different private psychologist to observe Student at home and at school, review the proposed IEPs and the IEE, and offer recommendations for Student's educational program. (N.T. 127-28, 132, 138-40)
45. The Parents' main concerns for the 2010-11 school year were and are with Student's performance on tests and in completing classwork/assignments. (N.T. 81-82, 104)
46. The following exhibits were admitted at the due process hearing:

P-1; P-2; P-4; P-5; P-7; P-11; P-12; P-13; P-14; P-15; P-16; P-17; P-18; P-19; P-20; P-21; P-22; P-23; P-24; P-25; P-26; P-28; P-29; P-31; P-33; P-34; P-35; P-36; P-38; P-39; S-3, S-13, S-24; HO-1; HO-2; HO-3; HO-4; HO-5; HO-6.

(N.T. 6-7, 213, 360-63)

DISCUSSION AND CONCLUSIONS OF LAW

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

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

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent. The credibility of particular witnesses is discussed further in this decision as necessary.

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

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). Further,

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

The first issue is whether Student was appropriately identified by the District in all areas of special education eligibility. As set forth above, the evaluator who conducted the IEE recommended that the IEP team consider whether Student was eligible in a number of eligibility categories: Other Health Impaired (based on ADHD), Specific Learning Disabilities (reading comprehension, reading fluency, written expression, math reasoning, oral expression, and listening comprehension), and speech/language impairment. (Finding of Fact (FF) 29) The conclusions with respect to Student's specific learning disability categories was grounded on the evaluator's determination that Student demonstrated "severe academic underachievement" in each of those areas based upon a comparison of the WNV⁷ and the WIAT-III. (P 29 at 20) This evaluator did not testify at the due process hearing to explain why evaluator did not consider Student's performance and abilities on any other previous measures.

Pennsylvania regulations provide that school districts may, in identifying children with specific learning disabilities, utilize a discrepancy model which "examines whether a child exhibits a *pattern* of strengths and weaknesses, relative to intellectual ability as defined by a severe discrepancy between intellectual ability and achievement, or relative to age or grade." 14 Pa. Code § 22.125(2)(ii)(emphasis added). The District presented credible testimony that it considered whether Student had demonstrated a pattern of weaknesses in the learning disability areas specified in the IEE, rather than simply relying on any single test administration, and that it also considered whether Student's achievement met grade-level standards. (N.T. 228-29, 232-34, 238-40) *See* 14 Pa. Code § 22.125(1) and (2). This explanation was set forth in great detail in the RR issued in March 2011 following the parties' agreement to conduct additional testing. (FF 39; P 39)

As mentioned, the evaluator who conducted the IEE concluded that Student demonstrated "severe academic underachievement" in reading comprehension, reading fluency, written expression, math reasoning, oral expression, and listening comprehension based upon test results alone (*see* P 29 at 20: "These test results indicate..."), rather than on a pattern of performance. Furthermore, qualitative language such as "severe" can be subjective rather than black and white depending on the context in which it is used (describing underachievement, for instance, in contrast to using a qualitative descriptor provided by a test publisher with respect to a particular score). Additionally, the IEE report itself inconsistently uses such terms. For example, Student's performance in math fluency on the WIAT-III is described both as "slight

⁷ According to the publisher of the WNV, this instrument was designed for "linguistically diverse populations" and is useful "[w]hen language poses a barrier to typical administration, or where traditional intellectual assessment results would be questionable due to language-related difficulties." (Retrieved from <http://www.pearsonassessments.com/HAIWEB/Cultures/en-us/Productdetail.htm?Pid=015-8338-499> (last visited June 25, 2011)) One noted author has opined that, "[m]ore research is needed to evaluate whether the benefits of using the WNV outweigh those of administering the WISC-IV Perceptual Reasoning Scale or the [Wechsler Adult Intelligence Scale-Third Edition] with similar populations." Jerome M. Sattler, *Assessment of Children, Cognitive Foundations* 697 (5th ed. 2008).

academic underachievement” (P 29 at 19) and “severe academic underachievement” (P 29 at 20) without explanation.⁸

It should be noted that the Parents presented testimony by their most recently retained expert (FF 44) who criticized the District’s March 2011 RR and its conclusions regarding Student’s special education eligibility, while also appearing to bolster the contents of the IEE. (N.T. 130-32, 143-44, 154-67, 173-74, 175-76) This witness was permitted to testify as a fact witness, but not provide an expert opinion, because he had not evaluated Student, nor did he provide any report of his recommendations. (N.T. 121-25) Some of this witness’ testimony was permitted subject to District objection, and this hearing officer reserved ruling on a number of objections. (N.T. 143-44, 154-67, 172-76) Because it was often difficult to separate this witness’ expert opinion from fact-based testimony, and further because this witness could not testify in complete disregard of his education and experience, the objections to his testimony on which a ruling was reserved are hereby overruled. Nevertheless, as this witness candidly observed, the test results in both the IEE and the most recent RR were subject to interpretation, and he could not definitively state whether certain conclusions in those reports were accurately stated or not. (N.T. 159-60, 162-66) Whether a particular score falls within the average or low average range, for example, may be simply “arbitrary” (N.T. 166), and clearly is not determinative in and of itself of whether a student has a specific learning disability. Thus, the testimony to these matters to which the District objected was not particularly helpful.

After careful review of the evidence presented by both parties on the issue of identification of Student’s specific learning disability areas, and for all of the foregoing reasons, this hearing officer concludes that the Parents failed to meet their burden of establishing that Student meets the criteria in Pennsylvania for identifying students with specific learning disabilities in all of the areas set forth in the IEE, and further concludes that the District properly and appropriately considered whether Student demonstrated a pattern of weaknesses in comparison to grade-level standards in all of the areas in question in arriving at its determinations of Student’s areas of specific learning disability.

The IEE evaluator also opined that Student was eligible based on an Other Health Impairment (OHI) based on ADHD, while the District failed to identify Student in that category. (FF 29, 39) Although the independent evaluator used a number of measures to conclude that Student had ADHD, and described how Student’s ADHD characteristics manifest themselves in the school environment, stopped short of discussing whether, or concluding that, Student requires specially designed instruction as a result. (P 29) The lack of support in the record to establish the second prong of eligibility is fatal. Further, while this evaluator did make a number of recommendations to address Student’s difficulties with attention and concentration (*id.* at 29-30), as will be discussed *infra*, the District has been providing a number of those strategies and interventions to address Student’s well-documented attentional needs even without specifying OHI as an eligibility category. For these reasons, this hearing officer concludes that the District’s failure to identify Student separately as OHI did not amount to a denial of FAPE.

⁸ This example is illustrative only, as this hearing officer recognizes that math fluency is not a category of eligibility for specific learning disability. 34 C.F.R. §300.309(a)(1) and 22 Pa. Code § 14.125(1).

With respect to the last eligibility question, speech/language impairment, the IEE evaluator opined that due to Student's weaknesses in phonological awareness, phonological memory, and rapid naming speed, Student qualified for special education in this category as well. (FF 29; P 29) Again, the person who conducted the IEE did not testify at the due process hearing, and the IEE report itself does not include any evaluation of these needs by a speech/language professional. (P 29) By contrast, the District obtained a speech/language evaluation by a speech/language pathologist who determined that Student did not demonstrate a need for a separate classification in this area. (FF 39) This hearing officer finds the District's evaluation of Student's needs in speech/language to be thorough and comprehensive, and the eligibility determination based on that assessment more persuasive than that set forth in the IEE. Accordingly, this hearing officer concludes that the claim that Student should have been identified with a speech/language impairment is not supported in the record.

Having determined that the District did not improperly identify, or fail to identify, Student for special education in all areas of disability, the next issue is whether the District has appropriately programmed for Student's identified needs. During the 2010-11 school year, which encompasses the time period at issue in this case, Student was determined to be eligible for special education based on a specific learning disability in listening comprehension, and also demonstrated needs in certain executive functioning (processing weaknesses) as well as with organizational skills and homework/assignment completion. (FF 32, 33, 39, 40) Goals in the November 2010 IEP again addressed improvement of organizational skills, listening comprehension, and self-advocacy. (FF 33) While the goal addressing organizational skills lacked a baseline and objective measurement of how progress would be determined (P 33), there was adequate information in other sections of the IEP itself, as well as through the communications between the school and home, from which to glean Student's improvement or lack of improvement in this area of need. (FF 36, 37) The IEP at issue also contained a number of program modifications and items of specially designed instruction which provided for academic support (review of concepts, checking of notes for accuracy, checking for comprehension, reviewing for tests, and monitoring of organizational skills); testing accommodations; preferential seating; use of a checklist for class preparation/organization; check of an assignment planner; written directions for assignments and checking for understanding of those directions; testing accommodations; and chunking of large assignments. (*Id.*) Overall, these program modifications and items of specially designed instruction are remarkably similar to the suggestions in the IEE to address Student's needs in the identified areas. The subsequent IEP developed in March 2011 similarly targeted Student's known needs and again did not significantly differ from the recommendations in the IEE. (FF 40) After review of the entire record, this hearing officer concludes that the Parents did not establish a failure on the part of the District to address Student's identified needs through appropriate IEPs during the 2010-11 school year.

The last issue is whether Student's IEP has been properly implemented. The record reflects that the Parents and District have worked together over the course of the 2010-11 school year to support Student with completion of homework and assignments as well as studying for tests. (FF 36, 37) It is fortunate that Student has had the opportunity to work on a daily basis with a tutor who is able to support Student as needed; however, this hearing officer cannot conclude, based on this record, that the fact that Student had a tutor to assist with homework and

assignments necessarily means that Student has been denied an appropriate educational program by the District. Furthermore, Student's learning support teacher worked with Student each day to provide support and monitoring of Student's organizational skills, including organization and completion of assignments and homework, clarification of instruction in content area classes, and studying for tests, all of which were provided based upon Student's identified needs. (FF 37) Although Student continues to demonstrate a need to improve study skills (N.T. 181-84, 199-200, 269-70), the record supports a conclusion that the District provided Student with appropriate special education services to address that need. It also merits mention that, while Student also reportedly experienced stress during the 2010-11 school year due to the level of difficulty of certain classes (FF 41, 42, 43), even the Parents' expert agreed that experiencing some stress is not necessarily undesirable at the high school level (N.T. 187-89), particularly for a student who plans to go on to college.

In their closing, the Parents point out that Student continues to struggle academically. While that is undoubtedly true, based upon a review of the complete record, this hearing officer cannot conclude that the Student is failing to perform commensurate with Student's abilities as a result of the District's failure to appropriately address all of Student's educational needs.

Finally, with respect to the Section 504 claims, this hearing officer notes that the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

CONCLUSION

For the foregoing reasons, this hearing officer concludes that the District did not fail to identify Student in all appropriate areas of disability, did not fail to program appropriately for Student, and did not fail to implement Student's IEPs during the relevant time period. Consequently, there is no basis on which to award compensatory education.

ORDER

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

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

Cathy A. Skidmore
Cathy A. Skidmore
HEARING OFFICER

Dated: June 26, 2011