

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

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: BC
ODR #8186/0-08 LS

Date of Birth:
xx/xx/xx

Dates of Hearing:
February 5, 2008
April 11, 2008
April 14, 2008
April 25, 2008
May 2, 2008
May 5, 2008

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Southern York County School District
3280 Fissels Church Road
PO Box 128
Glen Rock, Pennsylvania 17327

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:
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July 17, 2008

July 30, 2008

Linda M. Valentini, Psy.D.

Background

Student is a teenage student who is a resident of the Southern York County School District (hereinafter District). On October 12, 2007 the Parents filed a Due Process Complaint raising Child Find issues that dated back to the 2000-2001 (1st grade) school year through February 28, 2003 (3rd grade) when Student was found to be eligible for special education services and provided with an IEP. The Parents assert that the District then denied Student FAPE by conducting inappropriate reevaluations and offering inappropriate IEPs from the remainder of the 3rd grade school year to May 10, 2006 when Student was exited from special education. The Parents allege that the District inappropriately exited Student from special education and by so doing continued to deny Student FAPE from May 11, 2006 to the present. The Parents sought compensatory education for the 1st grade school year, including summers, to the present, as well as reimbursement for an Independent Educational Evaluation (IEE), for private tutoring services and for private counseling services. Finally, the Parents are seeking a finding that Student is a child who is eligible for special education services and or a 504 Service Plan.

As noted below this hearing officer held a preliminary hearing on the issue of exceptions to the two-year limitations period, and finding no exception(s) existed, limited the scope of the hearing to the period from October 12, 2005 (6th grade) to the present.

Scope of the Hearing

Prior to the first hearing session the District filed a Motion to limit the claims in the above-captioned matter in accord with the IDEIA's two-year limitations period. Parents through their counsel filed a Response to the District's Motion, arguing that a two-year limitation on recovery should be rejected on the basis that: the IDEIA is not retroactive and does not extinguish pre-existing claims; that the Amendments to IDEA have no effect on claims under Section 504; that the IDEIA establishes two time periods – requesting due process and time considered at the hearing; that the time periods are extended for continuing violations of IDEA; and that equitable tolling bars the limitations.

This hearing officer did not find the Parents' arguments to be persuasive, and on February 2, 2008 issued a ruling granting the District's Motion: "Barring the Parents' successfully establishing that one of the two specific exceptions to the statute of limitations exists, the time period under consideration at the hearing will begin on October 12, 2005, two years prior to their filing for a hearing. The Parents will be permitted to present testimony at the beginning of the hearing relevant to the two specific exceptions to the IDEIA's statute of limitations, the District may present contradictory evidence, and I will then rule on the scope of the hearing on the record whereupon we shall proceed with the Parents' case in chief." Accordingly, a hearing on the issue of the existence of IDEIA's exceptions was conducted on February 5, 2008. Student's Parent

testified at length, honestly and clearly credibly, on the Parents' behalf and Student's elementary school principal testified briefly but credibly on the District's behalf.

Since their July 1, 2005 effective date, the new provisions of the IDEIA require a parent or agency to request a due process hearing within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. *See* 20 U.S.C. § 1415(f)(3)(C).

IDEIA and the subsequent regulations permit two specific exceptions to the two-year limit:

- (D) EXCEPTIONS TO THE TIMELINE.-The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to –
- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
 - (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.
- 20 U.S.C. § 1415(f)(3)(D)

At least one Pennsylvania Special Education Appeals Panel has ruled that “bad faith” on a District's part must be present to establish one or the other of the exceptions. In In Re The Educational Assignment of S.I., Spec. Ed. Opinion No. 1850 (November 2007) the Panel wrote:

“Our interpretation of the exceptions component of the statute is that it requires flagrant or bad faith behavior on the part of the District to trigger exceptions to the two-year limitation. We can find no case law to support any other interpretation.”

Following the witnesses' testimony, it was the conclusion of this hearing officer that neither of the two exceptions to the two-year limitations period existed, and she therefore ruled that the scope of the hearing would be the period from October 12, 2005 to the present.

Issues

1. Did the District fail to offer Student a free, appropriate public education (FAPE) from October 12, 2005 to May 10, 2006? If the District did not offer Student FAPE during this time period, is Student entitled to compensatory education and in what form and amount?
2. Did the District inappropriately exit Student from special education on May 10, 2006 at the end of Student's 6th grade school year and thus deny Student's FAPE? If the District did inappropriately exit Student from special education and thus deny Student's FAPE, is Student entitled to compensatory education and in what amount?

3. Is Student a student who is eligible under the IDEIA and therefore a protected handicapped student? If so under what classification(s) is Student eligible? If Student is not eligible under the IDEIA is Student a protected handicapped student?
4. Should the District be required to reimburse the Parents for the Independent Educational Evaluation they obtained for Student?
5. Should the District be required to reimburse the Parents for the private reading tutoring services they obtained for Student?
6. Should the District be required to reimburse the Parents for the private counseling they have obtained for Student?

Findings of Fact

Background¹

1. Student has attended District schools since kindergarten (1999-2000 school year). (NT 24; S-58)
2. Beginning in kindergarten through 2nd grade Student experienced academic difficulty and required a great deal of parental assistance and an excessive amount of time to complete homework. (NT 30, 34-38)
3. The Parents kept the District informed about Student's homework struggles. (NT 31-33, 38)
4. The District told the Parents that Student was a good, hardworking young student and would catch up. (NT 33, 38)
5. On November 14, 2002 the Parents made a written request for a comprehensive evaluation, asking that the IST process be bypassed, noting among other things Student's struggles with reading and writing skills since kindergarten, a paternal family history of dyslexia and Attention Deficit Hyperactivity Disorder, the high degree of teacher and parent support Student needed to achieve acceptable grades, and Student's distress at the amount of difficulty student experienced with written expression versus Student's peers' seeming competence in this area. (S-44)
6. The District issued a Permission to Evaluate form, a Procedural Safeguards Notice and a Parent input form on November 15, 2002. S-45)

¹ Although the scope of the hearing is from October 12, 2005 to the present, background Findings of Fact are necessary as a context in this matter.

7. On February 12, 2003 the District issued a Psychological Evaluation and on February 27, 2003 the District issued its Evaluation Report, finding Student to have a specific learning disability in reading and written expression, but not in math.² (S-1, S-2)
8. On the Wechsler Intelligence Scale for Children – Third Edition (WISC-III) Student achieved a Full Scale IQ of 113 (81st percentile, high average) with a Verbal IQ of 105 (63rd percentile, average) and a Performance IQ of 121 (92nd percentile, superior). Student's Freedom from Distractibility Index score was 84 (14th percentile, low average). (S-1)
9. On the Wechsler Individual Achievement Test (WIAT) Student's scores were as follows: Composite Reading 87 (19th percentile, low average), Composite Math 101 (53rd percentile, average) and Writing Composite 90 (25th percentile, average). Student's subtest scores were: Basic Reading 89, Reading Comprehension 90, Math Reasoning 108, Numerical Operations 90, Spelling 95, and Written Expression 90. (S-1)
10. The Bender Visual-Motor Gestalt Test (Bender) yielded average visual/motor skills as did the Draw-A-Person (Koppitz scoring). (S-1)
11. The Visual Aural Digit Span Test revealed short term memory deficits (10th to 20th percentile, age equivalent 6-9 to 6-11). Although the VADS is particularly susceptible to anxiety interference, data from this instrument is compatible with Student's WISC-III scaled scores on the Arithmetic and the Digit Span subtests, both of which require aural attention and concentration. (S-1)
12. The Psychological Evaluation noted possible anxiety problems and counseled the District to monitor this area. (S-1)
13. A Re-evaluation was completed on May 23, 2003 to catch Student up with the Re-evaluation/IEP schedule of the District. Student's teachers reported Student had difficulties in the areas of focus, concentration, and organization and also noted that Student's assignments were completed inconsistently and were of poor quality. (S-2)

2005-2006 School Year: 6th Grade

14. In 5th grade Student had been receiving 45 minutes of learning support per day in a special education resource room.
15. On May 17, 2005 an IEP to be implemented during Student's 6th grade year was created. (NT 1295; S-3)

² Although the Parents' closing argument makes much of the fact that the ER does not contain the level of detail found in the Psychological Evaluation, this hearing officer agrees with the District that these documents are meant to be considered together and together constitute the District's evaluation of Student.

16. The Present Levels of Educational Performance for Reading were established using a Developmental Reading Assessment (DRA) administered on May 4, 2005. “Reading accuracy was 98% on the 5th grade level” and “Comprehension skills were satisfactory at the 5th grade level” do not specify where at the 5th grade level Student was achieving 98% accuracy and “Satisfactory” does not establish a baseline for progress monitoring. “Reading fluency at the top of the moderate range with 108 words per minute” is no more specific, leaving the reader to wonder what the ranges are and how Student compared to other 5th graders at the time of year testing was done. (S-3)
17. In her testimony in response to a clarification question the special education teacher testified that that on the DRA reading fluency is divided into four ranges, Low, Moderate, Adequate and Very Good. At the Moderate Range, Student was in the bottom half and not “Adequate”. (NT 1298-1299)
18. The Present Levels of Educational Performance for Writing were established on March 21, 2005 using a 3-minute writing sample. The information provided was insufficient to use as a baseline to monitor progress on either writing or spelling, and related information that was not particularly helpful – for example, Student spelled one word of 7 or more letters correctly, but in Student’s 48-word composition Student only used one 7-letter word. (NT 1299; S-3)
19. Under Classroom Performance, study skills and work habits were said to be “proficiently developed at grade expectancy” without any further explanation. (S-3)
20. Although under Classroom Performance there is the statement “Remediation in speech/language skills continues in the areas of articulation, language, fluency. Specifically difficulties lie in [sic]” the special education teacher did not know why this was included in Student’s IEP. (S-3)
21. The Woodcock-McGrew-Werder Mini-Battery of Achievement (MBA) was administered to Student in March 2004 (4th grade) and March 2005 (5th grade) and used to report academic Achievement in the IEP. Age-based standard scores were grossly consistent which would indicate that Student had made one year’s progress in one year. (S-3)
22. Under Needs the IEP notes: Student needs instruction to improve Student’s achievement levels in the areas of reading and written expressions to levels that are more average for Student’s age and commensurate with Student’s strong level of learning ability”. (S-3)
23. Under Needs The IEP notes: Student needs instruction that is specially designed to Student’s learning style emphasizing Student’s strengths, which are described above, but also helping Student compensate for Student’s relative weaknesses in Student’s learning in the areas of sequential processing and memory skills. This

- will require step-by-step instruction and opportunities for frequent review and practice”. (S-3)
24. Although in the area of Reading Fluency Student was reading 108 words per minute (Moderate Range) on the DRA in May of the 5th grade year, when Student was retested in August at the beginning of 6th grade with the DRA Student’s fluency had dropped to 84 wpm (bottom third). Therefore, the IEP for 6th grade presents benchmarks for the four quarters as 100 wpm, 110 wpm, 120 wpm and 130 wpm. When 6th grade was half-finished Student was supported to be at approximately the same place Student was when 5th grade ended. (S-3)
25. Notably, Student made no progress in reading fluency during the first half of 6th grade, as on the DRA at the end of the second quarter Student was reading only 83 wpm. (S-3)
26. The District changed its evaluation instrument for progress monitoring of reading fluency at the end of the third quarter of 6th grade, using the DIBELS. Unfortunately Student was at the third grade reading level as assessed on that instrument, but Student did read third grade passages at 126 wpm, although not always consistently. (S-3)
27. The end of fourth quarter progress monitoring report for reading fluency in 6th grade reads as follows: “Student is working to Student’s ability in the reading area overall. Oral reading is the only area of reading that may be lower than what you could expect for Student’s ability. Student’s skill in the area of oral reading has been improving, although it can be inconsistent.” This does not tell the reader whether Student managed to reach Student’s IEP goal (130 wpm on 6th grade material 75% of the time) or not. This is doubtful, given that Student was at 126 wpm at the 3rd grade level at the end of the third quarter. (S-3)
28. In the area of Reading Comprehension the annual goal calls for 70% accuracy at Student’s instructional level on 3 of 4 passages, meaning that with Student’s IQ of 113, Student was only expected to comprehend 70% of 75% of Student’s reading passages. (S-3)
29. Progress monitoring for reading comprehension for the first quarter says a “score on the above DRA was in the satisfactory range on 6th grade level material”. It is not clear what “above DRA” is being referenced or what “satisfactory” means. The second quarter progress report says that “comprehension is very good as discussed above”. Nothing was discussed above, “very good” is not defined, and the instrument, if any was used, is not identified. The third quarter progress report says, “continues to exhibit strong comprehension of what is read”. “Strong comprehension” is not defined nor is the method of assessment. The fourth quarter progress report says “Student is working to Student’s ability in this area of reading. Student’s reading grade for this marking period 4 on Student’s report

- card reflects Student's ability in the area of reading comprehension". No assessment result is documented. (S-3)
30. In the area of Written Expression Student's IEP goal is for Student, with Student's IQ of 113, to receive a rating level of 3, in 3 of the 5 domains, in 3 of 4 prompts as scored with the PA Writing Rubric. Thus Student was to meet the set standard on 60% of the domains only 75% of the time. (S-3)
 31. The progress monitoring reports in the area of written expression seem to reflect use of the PA Writing Rubric as a progress monitoring tool. The progress reports are imprecise, and the fourth quarter, as in the other IEP goal areas in reading, notes that Student was "working to Student's ability". (S-3)
 32. The 6th grade SDI, all to be delivered in the regular education classroom, included small group or one-to-one instruction within the regular class, repeated practice and drill to reinforce concepts within the regular class, preferential seating at or near the focus of instruction in the regular class, modeling in the regular class and progress monitoring in the regular class. The parent asked one SDI to be added, that Student could choose to take tests in the emotional support classroom if Student was feeling anxious. (S-3)
 33. There were no related services provided in the 6th grade IEP. (S-3)
 34. Under the IEP that is within the scope of limitations for this hearing, the May 17, 2005 IEP, Student was put on "a monitor basis" for Student's entire 6th grade with Student's supports being the inclusive setting for reading, writing and spelling. Student was not receiving any direct special education support. (NT 198, 322, 1294)
 35. In 6th grade Student met with the learning support teacher for 5 to 10 minutes one time per week to work on reading fluency. (NT 1309)
 36. The previous IEP, dated 5/14/04, which was implemented in Student's 5th grade year, provided Student with learning support in the areas of reading, English, spelling, social studies, science and health for a total of 240 minutes (4 hours) per cycle. (HO-1)³

Reevaluation

37. On March 15, 2006 the District issued a Permission to Reevaluate, the reason being given as "The IEP team will review all current data concerning your child as part of the required cyclical re-evaluation and will make recommendations concerning the appropriate program for your child". The Permission noted that "no new assessment tools, tests, or procedures will be used". The Permission form did not clearly or in any manner other than inferentially indicate to the

³ The District was opposed to providing this exhibit unless the hearing officer ordered it, which is why the May 14, 2004 IEP is a Hearing Officer exhibit. (NT 410-412)

- Parents that the proposed evaluation could result in a recommendation that Student be exited from special education. (S-6)
38. On May 10, 2006 the District issued a Reevaluation Report that formed the basis for its recommendation that Student be exited from special education. The District concluded that Student did not have a disability and was not in need of specially designed instruction. (NT 196, 201, 213; S-7)
 39. The Reevaluation Report that was the basis for exiting Student from special education consisted of a record review, along with achievement testing with outdated instruments (administered by a learning support teacher) being compared to cognitive testing with an outdated instrument, and teacher comments. The report shows no evidence of the Parents' input being taken into serious consideration. The principal, who has no special education certification, observed Student for purposes of the reevaluation. (NT 113-114, 124-125, 215; S-7)
 40. The teacher reports utilized for the Reevaluation Report that was the basis for exiting Student from special education focused on behaviors rather than academic ability. (S-7)
 41. Notably, there was no involvement by a certified school psychologist in any of the current testing used for the determination of ineligibility in the Reevaluation Report, nor in the observation of the child. (NT 202-203, 216-217)
 42. The District psychologist who was on the team responsible for creating and issuing the Reevaluation Report that formed the basis for exiting Student from special education is not entirely familiar with the tests administered by the learning support teacher(s) and used as the current assessments for the reevaluation. (NT 261)
 43. The Reevaluation Report that was the basis for exiting Student from special education cites results of the WISC-III administered in February 2003. By May 2006 the WISC-III was two years out of date. Its successor, the WISC-IV, was extensively revised and renormed, and was one of the acceptable standard appropriate instruments for assessing cognitive ability. (S-7)
 44. The Reevaluation Report that was the basis for exiting Student from special education states that Student is mainstreamed for all subjects and that Student's grades have been in the A-B range. The report states that no SDI had been provided that year. (S-7)
 45. The Reevaluation Report that was the basis for exiting Student from special education states that "Student seems unsure of self". (S-7)
 46. The Reevaluation Report that was the basis for exiting Student from special education includes input provided by the Parents on March 25, 2006. They noted

- areas of need as follows: “Difficulty reading (blends, sequencing), overwhelmed by subjects requiring reading for problem-solving, test taking causes anxiety and inability to focus due to reading problems, Student feels Student isn’t smart”. The Parents requested that no changes be made. (S-7)
47. The Reevaluation Report that was the basis for exiting Student from special education cites the 5th grade PSSA testing in which Student (at an IQ of 113) scored Basic in Reading, with Writing not assessed. (S-7)
 48. The Reevaluation Report that was the basis for exiting Student from special education notes that in January 2006 Student was given the 6th grade level DER on which Student scored overall at the end of the 5th grade. Student’s oral reading rate was in the 5th grade range, with 83 wpm. The Reevaluation Report does not note that 83 wpm in January 2006 represents a decline from 108 wpm in May 2005 and that there was virtually no change from the first quarter 6th grade DRA on which Student’s wpm was 84. (S-7)
 49. The school psychologist who was part of the team that issued the Reevaluation Report that exited Student from special education did not know, and did not attempt to find out, at what age or grade level a child would be expected to read 83 wpm. (NT 204-205)
 50. The Reevaluation Report that was the basis for exiting Student from special education provides the results of a 3-minute Writing Sample administered in February 2006. On the Sample Student spelled 5 of 7 words of 7 or more letters correctly. The sample demonstrated writing fluency at the 5th grade level at the 75th percentile. However, Student was past the middle of 6th grade when the Sample was collected. The Reevaluation Report notes that this was “the highest possible score”. This is the highest possible score because the sample scoring does not go beyond 5th grade. (NT 205-208; S-7)
 51. The Reevaluation Report that was the basis for exiting Student from special education utilized the Woodcock-McGrew-Werder Mini-Battery Tests of Achievement (MBA). The test is administered by the learning support teachers. (NT 188-189, 193, 1235-1242; S-7)
 52. A learning support teacher, who previously was an instructional advisor to the special education teachers, testified about the MBA that it “is a screener, so there’s not a lot of questions in a certain area”. She also testified that the Writing section of the MBA is not actually a writing sample produced by the student, but a test of conventions (letters, spelling, punctuation, capitalization) in an editing format. (NT 585-588)

53. Use of the Woodcock-McGrew-Werder Mini-Battery of Achievement⁴ for purposes of exiting a student from special education is subject to question as a) it was developed in 1994 and there were several more recent, updated brief achievement tests available by 2004; b) it is designed as an initial screen; c) it helps identify when there is a need to use a more in-depth diagnostic instrument; d) pre-post use is confined to research rather than educational or clinical purposes but the District uses it to monitor progress; e) the instruments used for comparison measures [WJ-R, KTEA, PIAT-R, and WRAT-R] were all at least in their next edition by the time Student took the MBA and therefore the instrument's concurrent validity⁵ was not established. (NT 186, 1194-1195, 1200-1201; HO-3, HO-3a)
54. The Reevaluation Report that was the basis for exiting Student from special education utilized the Kaufman Test of Educational Achievement (KTEA) administered in February 2006. Student's scores were in the average range, however the KTEA is a screening device and much more significantly had been revised and renamed and a new edition, the KTEA II, had been published in 2004.⁶ (NT 197; S-7)
55. The school psychologist who participated in compiling the Reevaluation Report that was the basis for exiting Student from special education is not aware if there had been co-norming studies between the (outdated as of 2004) WISC-III and the (outdated as of 2004) KTEA for purposes of discrepancy analysis such as that done with the WISC-IV and the WIAT-II. (NT 208-209)
56. On May 10, 2006 the District issued a NOREP exiting Student from special education, "based on a review of student educational records, reports and related information, observation data, information from school personnel and parents and the following reports and evaluations: comprehensive Evaluation Report and Individual Educational Planning [sic]". (S-8)
57. The Parents approved the NOREP, although they voiced concern, because they trusted the District to know whether Student needed an IEP or not. (NT 430-431, 540-541; S-8)

⁴ Because this hearing officer was not familiar with the MBA and the witness testifying about it was not able to answer pertinent information sections of the manual relating to publication date and to technical description, copies of pertinent sections were requested and entered into evidence as Hearing Officer exhibits.

⁵ Concurrent validity describes the relative effectiveness of a test in assessing a person when compared to independent criteria, commonly other tests that assess similar skills.

⁶ The hearing officer, a clinical and school psychologist, notes that the professionally acceptable time period allowed to switch to a new version of a test is one year. This is principally because as the population "gets smarter" [the "Lake Woebegone Effect" or the "Flynn Effect"] it is harder to obtain the same scores as the bar is raised.

58. During Student's 6th grade year, the last year Student had an IEP, the Parents communicated to the teachers about Student's struggles with homework (described more fully below). (NT 548-549)
59. After issuing the Reevaluation Report that formed the basis for exiting Student from special education services, and issuing the NOREP recommending that Student be exited from special education, the District did not consider offering Student a 504 Plan. (NT 219)

7th Grade - Evaluation

60. Student reported to Student's Parents that when Student was trying to read in the classroom Student would hear things such as Student's peers' pencils moving and scratching, and Student's peers turning pages, and Student was concerned, as Student was trying to focus on reading, that Student's peers were already that much further along and already turning pages. (NT 432-433)
61. As the Parent has Attention Deficit Disorder she had Student evaluated for this condition. (NT 433)
62. In September 2006 Student's therapist assessed Student and formed the diagnostic impression of Attention Deficit Hyperactivity Disorder, combined type. As a result of the therapist's recommendation Student began receiving medication (10 mg Adderall-XR) to address this disorder. (S-9)
63. After Student's being on medication for one week the prescribing physician asked for teacher feedback via the Connor's Abbreviated Teacher Rating Scale to gauge the effectiveness of the medication. Although the form best captures hyperactivity symptoms, the physician wanted the teachers to address focus and attention behaviors. The teachers' responses indicated the medication was being generally effective. (S-10)
64. On October 31, 2006 the Parents requested that the District guide them through the process of obtaining a 504 Plan for Student, including detailed reasons for their request. The District sent the required paperwork and the Parents returned it. The record does not show that the District provided Student with a 504 Plan. (S-11, S-12, S-13)
65. The Parents sought a 504 Plan for Student because Student was no longer under an IEP and was placed in some classes that were disruptive to Student's ability to focus during instruction and testing. Additionally Student was forgetting assignments, or forgetting things in Student's locker, and because Student no longer had an IEP there was little leeway given by the teachers. (NT 434-435)
66. The Parents filled out the forms required by the District for an assessment for a 504 Plan, and submitted documentation of Student's having been diagnosed with ADHD. (NT 436-437; S-12, S-13)

67. The District denied the Parents' request for a Section 504 Service Plan. (NT 437)
68. On November 30, 2006, having learned that the District was going to deny their request for a 504 Service Plan for Student, the Parents made a written request for a multidisciplinary evaluation to determine Student's eligibility for special education, giving specific reasons for this request. (NT 438; S-14)
69. The Parents were continuing to see the same things with Student that they had seen all along that first prompted their request for an evaluation in 3rd grade. (NT 437-438)
70. The same District psychologist who had participated in compiling the Reevaluation Report that formed the basis for exiting Student from special education, but who had not had any direct involvement with Student, completed the requested Evaluation. (S-16)
71. The District completed its Evaluation⁷ in March 2007. (S-16)
72. Student's teachers noted that Student is a diligent worker who seems very concerned about Student's performance. Student's social studies teacher reported that Student appears to be uncomfortable and anxious as the class transitions to new topics and assignments. (S-16)
73. The District psychologist chose to use the Reynolds Intellectual Assessment Scales (RIAS) which is an instrument that had concurrent validity studies with the WISC-III. As it predated the WISC-IV there were no such studies with the WISC-IV which is a significantly redesigned edition of the WISC-III at the time the instrument was used with Student. (NT 230)
74. The District psychologist likes the RAIS because "it pulls the memory out of the IQ" and provides a general intelligence index. The WISC-IV also pulls the memory out of the IQ, along with the processing speed, when the General Ability Index (GAI) is computed. (NT 322-323)
75. On the RIAS Student achieved a Verbal Intelligence Index of 104, a Nonverbal Intelligence Index of 112, a Composite Memory Index of 98 and a Composite Intelligence Index of 109. (S-16)
76. Student's Composite Memory Index fell "significantly below" Student's Composite Intelligence Index. (S-16)

⁷ Although technically this was a Reevaluation, it is being called an Evaluation in this decision to distinguish it from the Reevaluation that formed the basis for the recommendation to exit Student from special education.

77. The District psychologist concluded that anxiety adversely influenced Student's performance on the RIAS verbal memory activity. The District psychologist also noted that Student's ADHD could be an interference with working memory. (NT 234; S-16)
78. The District psychologist found that the discrepancy between Student's RIAS Composite Intelligence Index (CIX) score of 109⁸ and Student's WIAT-II pseudoword decoding score of 91 represented a relative weakness. (NT 235-236)
79. Student receives Reading Support (regular education) in 7th grade.⁹ (S-16)
80. The District psychologist found that the discrepancy between Student's RIAS CIX score of 109 and Student's WIAT-II spelling score of 93 represented a relative weakness. (NT 241)
81. It is inferred, although not directly stated, that the discrepancy between Student's Written Language Composite on the WIAT-II and the RIAS CIX is a relative weakness. (S-16)
82. Although Student's Supplemental reading speed and word fluency in writing scores on the WIAT-II fell into a quartile that is described as "far below average to below average", neither of these scores is reported in the Evaluation Report. (NT 238-239; S-16)
83. The District psychologist wrote in Student's Summary and Recommendations section, "All of Student's academic skills were found to be age, grade, and ability appropriate". However, the data page of the WIAT shows, at grade 7:6 and age 12:6 the following: Pseudoword Decoding age 9:4, grade 3:2; Spelling age 10:8, grade 5:5. (S-16 p. 43)
84. The District psychologist does not include the MBA results of January 3, 2007 in Student's table of Past Standardized Measures of Achievement in Student's Psychological Evaluation Report but it is included in the Evaluation Report. Although this instrument is subject to serious criticism above, comparing its own data to itself it is notable in that while Student's Writing scores were 107 in March 2005 and 109 in February 2006, Student's Writing score was 95 in January 2007, a drop of 14 points in a year. (S-16, p 21; S-17 p 6, 9)
85. The Evaluation Report concluded that Student "Is not a child with a disability, or is a child with a disability who does not need specially designed instruction". (S-17)

⁸ The writer notes with some interest that CIX is 109.

⁹ Although this hearing officer does not intend to be picayune, since it could impact on the quality of services Student receives it is troubling that the Reading Support teacher's 1-25-07 email twice spells "responses" incorrectly suggesting this was not merely a typo. (S-16)

86. The District psychologist, when discussing that RAIS/WIAT-II discrepancy tables are not available, noted that there has been some criticism of “the entire process of the discrepancy model” such that this model “should not [be relied upon] completely”. She later testified that in determining in March 2007 that Student was not eligible, “Well, we used a discrepancy analysis also with consideration, though, of how Student has responded to the instruction Student has received...although we do not have RTI up and fully running it is in our consciousness when we’re making decisions and we look at how Student has responded to the instruction Student’s had and how Student’s performing in the classroom. However when questioned the District psychologist said that Student had “probably not in the technical sense” been taught reading with “a research-approved reading program”. (NT 230, 267)
87. The District psychologist opined in regard to a 504 Plan, “I don’t believe anybody at the District talked about that. Because Student is so successful a student in the classroom environment, just the presence of ADHD or other health impairment would not necessitate invoking the Chapter 504, 15 [sic] Service Agreement”. (NT 268-269)
88. After reviewing the Evaluation, the Parents believed that they didn’t have enough information, and that there were things of importance not being pointed out in the Evaluation. (NT 441-443)

Independent Educational Evaluation – and 8th grade

89. The Parents disagreed with the Evaluation Report and the NOREP and on April 23, 2007 made a written request for an Independent Educational Evaluation at public expense. (NY 443; S-18, S-20)
90. On May 1, 2007 the District responded that it agreed to fund an IEE and proposed that it be done by an evaluator from the Psychological Services Department of the [Redacted] Intermediate Unit [Redacted],¹⁰ and noted that the Director of that department had already been contacted and was in the process of identifying the school psychologist who would conduct the evaluation, if the Parents agreed. (NT 444-445; S-22)
91. The Parent and the District’s Supervisor of Special Education subsequently had a telephone call in which the Parent several times asked the District for a list of possible evaluators other than IU psychologists. The District repeatedly let the Parents know that they were able to select any certified school psychologist to

¹⁰ In November 2001 the District psychologist who completed the Evaluation Report came to the District. For four years prior to that time she had been a school psychologist with the Lincoln IU #12. The District psychologist knows three psychologists who currently work in IU 12. IU 12 covers the Southern York School District. These circumstances, particularly the latter one, could lead parents to question whether an IEE performed by an IU 12 psychologist would be truly unbiased in a contested case. (NT 161-162, 285, 308-310)

- perform an IEE at public expense and the District verbalized the qualifications needed for an independent evaluator. (NT 446-447, 524-525; S-24)
92. The Parents contacted the Parent Education Network for help in narrowing Student's search for an independent evaluator, and came upon Dr. [redacted]'s name. Based on what the District had told Student's Parents "felt pretty sure that [the evaluator] was going to meet the qualifications". (NT 448)
 93. The Parents in a May 31, 2007 hand-delivered letter informed the District that they had chosen Dr. to conduct the IEE, and asked that Student's teachers provide information for purposes of the evaluation. The May 31st letter was stamped as having been received on that same date. The Parents, in their May 31st letter, asked that if their selection of Dr. did not meet the District's criteria for an IEE at public expense the District inform them via a provided telephone number by the end of the school day on June 1st (the next day). (NT 448-450; S-24)
 94. The District did not get back to the Parents on June 1st. By letter dated June 6, 2007 sent via regular U.S. mail, the District noted that while it "may continue to be willing to agree to an Independent Educational Evaluation at public expense, the District has concerns regarding Dr. as the choice for conducting the evaluation, and will not agree to fund such an evaluation". (NT 450-451; S-25, S-26)
 95. The District's reason for this position was its experience with a previous evaluation of one of its students by Dr. that involved adverse criticism of Student's evaluation by a hearing officer, and criticism of Dr.'s evaluations by an appeals panel. The District provided copies of the hearing officer decision and the appeals panel opinion. (NT 452; S-25)
 96. The District noted that if the Parents used Dr. it would be at their own expense, but that it would consider any evaluation or report they submitted. (S-25)
 97. The District noted that it continued to agree to an IEE by "a qualified individual who meets the same criteria which the school district uses when it initiates an evaluation". The District did not at any time provide a written description of its criteria for independent evaluators. At some point after the District declined to fund an IEE by Dr. it forwarded a list of potential evaluators to the Parents. (NT 458, 530; S-25)
 98. The Parents were beginning to feel overwhelmed by the IEE process, and had already started with Dr. , so they obtained advice from legal counsel. (NT 453-454, 457-458)
 99. Not having received a response from the Parents the District re-sent a copy of its June 6th letter on June 21, 2007 by certified mail. (S-26)

100. By letter dated July 13, 2007, having not yet heard back from the Parents, the District withdrew its agreement to fund an IEE “at this time”, but indicated willingness to discuss the possibility of funding an IEE “in the future” and indicated that it was willing to fund an IEE if a qualified individual is chosen. (NT 454-455; S-27)
101. On July 23, 2007 the Parents filed for a due process hearing, but this request was withdrawn on August 6, 2007 through Parents’ counsel. (S-27)
102. An IEE was conducted by Dr. in September 2007. Student was at the beginning of 8th grade and was age 13:2. (S-30)
103. Student was cooperative and hard-working during the IEE, and had taken medication to address ADHD on the date of the testing. (S-30)
104. Student evidenced significant word-retrieval problems during the evaluation and required additional “wait time” to formulate Student’s thoughts before speaking. (S-30)
105. Student had difficulty completing a task requiring a written response and erased what Student had written in an attempt to respond correctly. (S-30)
106. On the WISC-IV, a cognitive ability assessment instrument, Student achieved a Verbal Comprehension Index of 104, a Perceptual Reasoning Index of 108, a Working Memory Index of 83 and a Processing Speed Index of 88. Student’s Full Scale IQ was 98. The District psychologist pointed out that the WISC-IV manual allows the examiner to compute a General Ability Index (GAI) if there is weakness in the Working Memory Index or the Processing Speed Index. Student had weaknesses in both. Student’s GAI was 107. (NT 288; S-30)
107. The District psychologist noted that the RAIS research-based assessment of “G”, i.e. general intelligence, would be comparable to the GAI on the WISC-IV and that the RAIS (CIX) 109 and the WISC-V GAI of 107 are “very compatible as an overall cognitive profile”. (NT 288)
108. The District psychologist upon reviewing Dr.’s report found that the cognitive testing with the WISC-IV was congruent with the RAIS testing in that there was solidly average verbal and nonverbal functioning with relative weakness in the memory area, although the memory and attention scores were a little bit higher in the average range on the RAIS than on the WISC-IV¹¹. (NT 287)

¹¹ The District included a one-half page Internet citation of a study published on December 1, 2007 in the Journal of Psychoeducational Assessment examining the correlation of the RAIS and the WISC-IV scores of 48 “elementary school” students (age of students not given) administered both instruments. The analysis of the scores showed “significant positive correlations between conceptually similar RIAS and WISC-IV sub-tests, however, overall mean scores were significantly higher for the RAIS”. (S-42, p 18)

109. The District psychologist testified that Student at times performs with greater difficulty on tasks that emphasize short-term auditory attention and memory. (NT 320)
110. The IEE utilized the Comprehensive Test of Phonological Processing (CTOPP) on which Student received a Phonological Awareness standard score of 79 (8th percentile, Poor), a Phonological Memory standard score of 82 (12th percentile, Below Average), and a Rapid Naming standard score of 61 (<1st percentile, Very Poor). Standard scores on the CTOPP subtests ranged from the 1st percentile to the 25th percentile, most clustering around the 7:6 age equivalency. Phonological processing skills are especially relevant for the mastery of written language. (S-30)
111. The District psychologist was “very surprised” at Student’s CTOPP scores, as she administers this test often and Student’s scores seemed “very low” given Student’s reading comprehension skills. She reasoned however that Student is benefited by Student’s good general knowledge and Student’s ability to use contextual cues, and believes that Student is “less stressed in a comprehension task than [when] put on the spot when reading words”. She did not disagree with the scores themselves. (NT 288-291, 310-311)
112. The District psychologist attributed short-term memory deficits and anxiety to Student’s poor functioning on the test of phonological awareness. However, she did not administer specific additional instruments to assess memory or anxiety when the District was preparing its Final Report, saying that she would not have been able to do further evaluation because the Permission to Evaluate signed by the Parents did not include that. (NT 292-293, 311)
113. The IEE utilized the Rapid Automated Naming and Rapid Alternating Stimulus Test (RAN/RAS) which assesses a person’s ability to perceive visual symbols such as letters shapes and numbers and retrieve their names accurately and rapidly. These tests provide a predictor of the person’s ability to develop fluent reading and comprehension. Student received a standard score of 73 for RAN Colors, 67 for RAN Numbers, 64 for RAN Letters, 61 for 2-set letters and numbers and 60 for 3-set letters, numbers and colors. (S-30)
114. Students with deficits in rapid naming speed (as assessed with the RAN/RAS) and phonological processing (as assessed with the CTOPP) tend to be the most severely impaired learners across all subtypes of reading disability and require intensive, synthetic-phonetic code-emphasis direct instruction to establish literacy skills commensurate with their ability. (S-30)
115. The District psychologist was not asked to comment on the RAN/RAS results. (NT 161-329)

116. The IEE utilized the Woodcock-Johnson Third Edition Normative Update (W-J/III NU) to assess Student's academic achievement using norms based on grade 8:0. (S-30)
117. The District psychologist's professional practice is to give less weight to a discrepant subtest score than to a discrepant domain score, and she therefore identified in her testimony the domain scores on the WJ-III/NU. (NT 323-325)
118. In examining the IEE WJ-III/NU portion, the District psychologist identified the domain (summary) scores (bolded) that should be compared with the RAIS CIX of 109 and the WISC-IV GAI of 107 in the area of Reading as: **Basic Reading Skills 81** (made up of Letter/Word Identification of 90 and Word Attack of 73); **Reading Comprehension 108** (made up of Passage Comprehension of 101 and Reading Vocabulary of 114); **Broad Reading 89** (made up of all the above, plus Reading Fluency of 78). (NT 325; S-30)
119. In examining the IEE WJ-III/NU portion, the District psychologist identified the domain (summary) scores (bolded) that should be compared with the RAIS CIX of 109 and the WISC-IV GAI of 107 in the area of Written Language as: **Basic Writing Skills 97** (made up of Spelling of 95, Editing of 100, Punctuation and Capitalization of 79, and Handwriting of 99); **Written Expression of 93** (made up of Writing Fluency of 92 and Writing Samples of 96); **Broad Written Language 93** (made up of all the above). (NT 326; S-30)
120. In examining the IEE WJ-III/NU portion, the District psychologist identified the domain (summary) scores (bolded) that should be compared with the RAIS CIX of 109 and the WISC-IV GAI of 107 in the area of math as **Math Calculation 87** (made up of Calculation of 93 and Math Fluency of 81); **Broad Mathematics 92** (made up of all the above plus Applied Problems of 98). (NT 326; S-30)
121. Student's WJ-III/NU scores are summarized as follows: **Academic Skills 91, Academic Fluency 81, Academic Applications 98, Total Achievement 91.** (S-30)
122. The District psychologist testified that the Woodcock-Johnson manual suggests that if one were to look at discrepancies within the Woodcock Johnson itself, especially for reading and writing, that one should look at the Oral Language Extended rather than at the GIA for purposes of comparison. The District psychologist agreed that this would result in an even larger discrepancy than that which would be obtained if one used the 3rd grade IQ. (NT 326-328)
123. On **Oral Language Extended** of the WJ-III/NU Student achieved a standard score of **113**¹², on **Oral Expression** Student achieved a standard score of

¹² The IEE notes an Oral Language Extended score of 113 and an Oral Language score of 112. (S-30)

115, and on **Listening Comprehension** Student achieved a standard score of **109**. (S-30)

124. Taking the same approach to discrepancy analysis which the District psychologist noted is recommended by the WJ-III/NU publisher, the independent evaluator found significantly lower skills than would be predicted on Broad Reading, Basic Reading, Broad Mathematics, Mathematics Calculation, Broad Written Language and Written Expression. (NT 327, S-30 p 32)
125. The IEE found that Student qualified under the disability classifications of Specific Learning Disability (basic reading, reading fluency, math calculation and written expression) and Speech and Language Impairment (phonological awareness, phonological memory, and rapid naming). (S-30)
126. The independent evaluator agreed with the District psychologist that Student does not meet full diagnostic criteria for ADHD and would therefore not recommend classification under the category of “Other Health Impairment” at the time of the IEE. (S-30, p. 33)
127. The Parents provided a copy of the IEE as soon as it became available, on September 26th of Student’s 8th grade. (NT 463-464)

District’s Final Evaluation

128. Following receipt of the independent educational evaluation, the District prepared a final Re-Evaluation report¹³ that consisted of review of: the IEE, initial screening results from the reading tutor, a letter from the private therapist, input from the Parents, results of a January 2007 MBA, and a January 2007 curriculum-based assessment CBA in reading and writing. (S-42)
129. In the Final Report, the Parents are quoted, expressing their belief that Student’s learning [continues to be] impacted in the areas of reading fluency, decoding, reading comprehension, spelling and written expression”. They noted that Student “continues to compensate with Student’s intelligence to maintain Student’s (grades)” but that in order to assist Student they “spend several hours helping Student with homework, especially with reading and written assignments” and “compensating is becoming more difficult as the complexity of the coursework and text increases”. (S-42)
130. As per the Final Report, the Parents further noted that “the struggle to compensate and hide Student’s learning issues is affecting Student’s emotionally”. (S-42)

¹³ So as not to be confused with the Reevaluation Report which formed the basis for Student’s being exited from special education, or the District’s March 2007 Evaluation Report, this January 2008 report will be referenced as the District’s Final Report.

131. In the Final Report, the January 2007 CBA in reading was noted to be a 1-minute reading sample in which Student read 107 words correct on a junior high passage. No expected score for a 7th grader was presented for purposes of comparison. Reading accuracy was 97% again with no normative expected score provided. Reading comprehension was 83%, again with no normative average score provided. Student was allowed to go back over and re-read the passage to answer comprehension questions and this area was not timed. There is no way a Parent would know if the reported results are good or bad. (553-554, 565, 569, 573-574, 582; S-42)
132. The CBA used with Student came from a book available in the District. It is not a book that is available as a general publication. (NT 571-572)
133. In the Final report, the January 2007 CBA in writing was noted to be a 3-minute writing sample. Although the teacher noted three spelling errors, there are actually six spelling errors on the document, rendering the spelling assessment invalid. Further, the teacher who administered the writing CBA could not testify to what word count or rate per minute a 7th grade student needs to indicate mastery, or what level of word length/vocabulary sophistication would be expected of a 7th grader, despite having administered the probe to well over 600 7th graders and currently teaching 7th graders. (553-554, 565-567, 579; S-42, HO-2)
134. In the Final Report, the private reading tutor's testing of November 21, 2007 with a curriculum-based assessment is presented, reflecting 40% accuracy in reading phonograms (decoding) at Level 1 (this is about the norm for a Kindergarten to 1st grade student), and 11% accuracy in reading phonemes at Level 2. Additionally Student achieved a 64% accuracy rate in reading nonsense words (decoding) at Level 2. When compared to Student's significantly higher success in reading isolated real words and reading real words in context, the lower decoding scores reflect that Student is clearly a "sight reader" who has learned to read by memorizing words. (S-42)
135. In the Final Report, the private reading tutor is quoted as explaining what sight readers do when there are no basic underlying decoding skills is guess at the word. Inaccurate guesses can quickly distort the meaning of the text. The private reading tutor notes that Student reports expending a great deal of energy reading in this manner so it follows that Student would not be able to read accurately and at a rate that enables Student's to comprehend what Student has read. (S-42)
136. The Final Report provides MBA test results for March 2005, for February 2006, and for January 2007. The January 2007 scores show a drop from 109 to 95 in writing, a 14-point drop. The special education teacher who administered the MBA in January 2007 was not aware of the previous scores, but testified that the drop would not be a red flag because "it's a screener". She did not know

- Student's IQ (113) that was on record as of January 2007. (NT 553-555, 585; S-42)
137. The Final Report notes results of a BASC-2 given to three teachers, two of whom were Student's reading and English instructors. The English teacher's responses placed Student in the At-Risk range in the areas of anxiety and withdrawal. (S-42)
138. The Final Report indicates that Student is a student with ADHD who is medicated for this disorder and from teacher report this condition is not an area of concern. The Final report notes that Student reports difficulty with attention and confusion, and "reported and exhibited anxiety during the testing" such that "it is possible that anxiety symptoms are mixing with ADHD symptoms and making it difficult to discriminate between these areas". (S-42)
139. The Final Report concludes that Student "is not a child with a disability, or is a child with a disability who does not need specially designed instruction". (S-42)
140. The District did not change its position about Student's eligibility status, nor did it offer Student with any supportive services.
141. In January 2008 the District proposed to evaluate Student to see if Student qualified as a protected handicapped student. The Parents did not sign permission because they were afraid that this would delay the hearing (their first hearing request had been withdrawn because of the pending IEE). The Parents ultimately did sign the permission on April 11, 2008. (NT 466-469; P-8)

Private Therapy

142. Student was seen in therapy monthly at first, then every two weeks, by a private therapist and Student's Parent testified that Student discussed Student's struggles with schoolwork, Student's anxiety about schoolwork and Student's interactions with Student's peers. (NT 512-517)

Reading Tutoring

143. Since November 2007 Student has received twice-weekly individual reading tutoring sessions of 60 to 70 minutes duration from a certified special education teacher who is pursuing a Master's Degree with a specialty in reading. This individual is currently employed as a learning support teacher for 9th through 12 grades in another school district. She teaches ESY reading using the Orton-Gillingham approach at the request of the district for whom she works. (NT 331-333, 340, 364, 389)

144. Student's reading tutor has been trained in the Orton-Gillingham method for teaching reading to individuals with dyslexia. The training consisted of a 12-month period of learning the method and then practicing it under supervision. There is an ongoing professional development requirement of 30 hours every 3 years to maintain certification. (NT 334-336)
145. Student's reading tutor began her Orton-Gillingham training in 2001, was initially certified in 2003, obtained advanced training, became a supervisor in the program and was the lead trainer for the initial level tutors. (NT 335-336)
146. Along with a colleague, Student's reading tutor wrote the remedial reading program now being used at a high school in the district in which she works. (NT 336)
147. If Student were seen at the agency where the tutor received her training and later served as a supervisor/trainer, Student's sessions would be at no cost to the Parents, but the cost in travel time (2 hours round trip) and the gas to and from Harrisburg made taking advantage of the free sessions unworkable. (NT 518)
148. Student's reading tutoring is done utilizing the Orton-Gillingham method. (NT 340)
149. Based on Student's response to the reading tutoring the reading tutor is certain that Student has dyslexia. (NT 340)
150. The reading tutor's initial assessment of Student indicated that Student is much more successful reading whole words than reading phonemes (small sounds that make up words) because Student had memorized sight words and had very little decoding ability. (NT 343, 391)
151. Students who lack decoding skills pick up information from context to compensate and gain meaning. The difficulty with this approach is that when the student switches to reading to learn rather than learning to read, and is faced with unfamiliar words such as in science or social studies, it is more difficult to make meaning from context. Substituting even one or two words can make a large difference in comprehension. (NT 344-345, 392)
152. The reading tutoring involves learning phonemes, with drill and practice with real words and nonsense words. The tutoring also involves encoding (spelling). Additionally the tutor works on passages with Student, applying Student's decoding skills to the text and checking for comprehension. (NT 347-351)
153. The tutor works with books at the third or fourth grade level, but also works with Student on Student's school textbooks for the last 10 to 20 minutes

about every other session. Student cannot read Student's textbooks at the level of an 8th grader. (NT 349-351)

154. Student has made progress in reading since Student started with the Orton-Gillingham tutor. (NT 358)

Ability and Achievement Grouping in the District¹⁴

155. All the District's special education classes are itinerant or resource classrooms, except for the life skills classrooms which are part time. (NT 1213)
156. The 8th grade science classes are composed of one "honors" class and four "academic classes". The academic classes have a mix of student ability and some of the students are special education students. There are no special education students in the 8th grade who are not included in one of the academic classes, and in past years students who are mentally retarded were also in the academic classes. (NT 869, 884, 927-928)
157. There are 26 students in the 8th grade honors science class, and an average of about 20 students in each of the 4 academic classes, for a total of 80 in the academic classes. Therefore about 24% of the 8th graders are removed from the academic classes and put into the honors class, leaving the "bottom 76%" of the 8th graders in Student's pool of classmates. (NT 886)
158. The 8th grade science teacher has three tiers of tests that she gives to Student's academic classes – an easy, a medium and a hard test.¹⁵ The tests are not tiered in the "honors" class. (NT 869, 885)
159. Although in Student's 8th grade science class there is only one child with an IEP, there are 5 to 7 children there who receive the easy test because "they're trying, but they just don't get it, it takes them definitely longer to process". (NT 887-888)
160. The 8th grade science teacher, asked whether Student struggled with learning vocabulary in class, said, "I can't – I don't believe so. I didn't notice anything at least. I can't recall completely". (NT 880)
161. The 7th grade science classes are arranged similarly to the 8th grade classes. For example, although in Student's 7th grade science class of 12 students, Student received the second or third highest grade, some children are "taken off

¹⁴ As Student's reading, writing and English struggles are well documented through standardized testing and Student's work samples, this section will focus primarily on other subjects to illustrate the point that Student's report card grades, and descriptors by the teachers of how Student functions in relation to Student's regular education peers, may be misleading.

¹⁵ She gives Student the "hard" test. (NT 869)

- the top” and put into an accelerated class so the pool to which Student is compared was not the entire population of 7th graders. (NT 986)
162. The 7th grade English classes were similarly divided. There were 50 children removed to the two accelerated classes (25 each) and 120 total students in 7th grade English. Therefore about 42 percent of the students were removed from Student’s pool of student peers, and Student was instructed with the lowest 58%. (NT 1075)
163. The 7th grade reading support class in which Student was placed had 14 students, and was designed for students reading “below or slightly below grade level”. The students were “not necessarily special education students”. Student was very quiet, didn’t readily volunteer, and seemed nervous about reading orally but did receive the top grade in that class. (NT 1126, 1142, 1164, 1178)
164. In 7th grade science there were 29 accelerated students and there were about 81 academic students. Therefore about 27 percent of the students were taken off the top for accelerated science; Student was in the lower 73 percent of the 7th grade science students.¹⁶ (NT 996)
165. The students in the math “honors” class are taking geometry while the students such as Student in the “academic” class are taking algebra 1. (NT 884)
166. Although in Student’s 8th grade math class Student is among the top 6 or 7 students from among 25 or 26 in the class, the honors students are already removed from the pot. (NT 702)

Homework and Intensive Work with Parents

167. In 6th grade, when Student had an IEP but was no longer receiving special education services, the Parents noted continuing difficulties. Student started Student’s homework right after Student came home from school because they never knew how long Student’s homework would take Student. The Parents worked on math with Student, specifically word problems, and Student also struggled with multiplication and some addition and subtraction. (NT 471)
168. Student struggled with anything Student had to put into writing, for example answers to questions. If Student became stuck on the spelling of a word Student wouldn’t necessarily remember the rest of the sentence Student was writing. (NT 471, 475-476)

¹⁶ The teachers’ recollections were not precise as to the numbers, nor should they necessarily have been. What is important is that between about 25% and 40% of the students were “taken off the top”, and Student, with Student’s IQ of around 109 was left in the remaining student pool. When Student’s teachers therefore award Student good grades or say Student was among the top students in the class, this has to be kept in mind, as the old saying reminds us, “In the land of the blind, the one-eyed man is king”.

169. If Student were writing longer pieces, Student and the Parents would use a tape recorder because Student knew what Student wanted to say and could say it aloud, but could not write it down without great difficulty. (NT 477)
170. Often Student just wrote out what Student wanted to say, with run-on sentences, disjointed [phrases], missing words, incorrect spelling, no punctuation, and missing word endings. Student's Parent would then read out loud what Student had written so that Student could hear what it sounded like, and Student would stop Student's Parent and tell her what Student meant to say. They did this sentence by sentence. Student's own mistakes did not pop out at Student when Student looked over Student's written work, but Student recognized them when Student's Parent read them verbatim. (NT 477-478)
171. It seemed as though once Student had "dumped everything out onto the page" Student became exhausted. When Student put Student's work into the computer it helped Student because of the spell check and grammar check. (NT 479)
172. Student's needs in writing, as Parent described them in her testimony, continued in 7th and 8th grade as well. (NT 479-480)
173. For Christmas 2007 Student wanted, and the Parents bought, a Fly Pen that Student could use to write and then could download Student's writing into the computer. (481-483)
174. Student would become frustrated and it would take Student longer to do Student's homework. (NT 471)
175. Sometimes the Parents sat with Student and served as a kind of memory bank – Student would say the sentence Student was going to write and if Student got stuck the Parents would help Student remember what it was Student was planning to write down. (NT 471-472)
176. When Student was assigned reading in books in 6th, 7th and 8th grades the Parents would obtain the book on tape from the library and Student would read along with the tape. Student watched the words and read along with the tape. (NT 472, 484-485)
177. If the required reading was from a textbook that was not available on tape either the Parent would read with Student, or if there was not enough time that evening, read it for Student, or took turns reading. Student's sister, who is four years younger than Student, would help Student with reading if Student made a deal with her for a return favor. (NT 473)

178. In class, when Student was asked to read out loud Student experienced difficulty to the point where students behind Student were feeding Student the words Student was struggling with so that the teacher did not know the extent to which Student was struggling. (NT 486)
179. Because Student had difficulty reading aloud in 8th grade Student chose to join a group that was reading silently, but Student could not keep up with the reading and was “becoming a mess”. The Parent communicated this to the reading teacher, who put Student into the read aloud group. Student would bring the reading home and Student and Student’s Parent would pre-read the selected pages. (NT 486-488)
180. Student was missing the meaning of text in Student’s social studies book because the words were difficult for Student to read, so Student’s Parent read this out loud with Student at home as well. (NT 489)
181. Student and Student’s Parent, and sometimes Student’s younger sister, have an elaborate system of preparing Student for Student’s vocabulary tests that makes use of Student’s ability to utilize visual memory to fix the test format in Student’s mind. (NT 490-495)
182. Homework would frequently take two to three hours to complete. (NT 473-474)
183. The struggles that the Parent described in her testimony continued in 6th, 7th and 8th grades, and included social studies and science as well as reading and writing. (NT 495-496)
184. Student has worked hard to hide the fact that Student has extreme difficulty reading from Student’s peers and Student’s teachers. Student only feels safe asking for help from Student’s English teacher. Student tries to fly under the radar so that Student’s deficits will not be noticed. Student also rather successfully hides Student’s anxiety from Student’s teachers. (NT 496-499, 508, 520-521; S-35)
185. The Parents communicated extensively with Student’s teachers about Student’s struggles with school work. They were desperate to communicate the fact that Student gets good grades and seems to be a good student because of all the intensive work Student does at home with Student’s family and Student’s reading tutor. (NT 500-509)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹⁷ Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child’s special education experience. Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

The District psychologist served as part of the team that developed the Reevaluation Report exiting Student from special education, and she also conducted the Evaluation of Student in March 2007. Her testimony involved both these evaluations as well as a review of Dr.’s IEE. This hearing officer was quite concerned that this professional had participated in a very significant decision to change Student’s placement/eligibility under a specific learning disability classification without any direct involvement with the child, particularly since she was not very familiar with the testing instruments used to support the decision. Had this been the only area of testimony the witness would have been found not to be credible. However, when she testified about her own Evaluation, generally, and when she testified about Dr.’s IEE, this witness appeared to be competent and knowledgeable about the instruments she and the independent evaluator used. This hearing officer was impressed by her willingness to support Dr.’s methods and findings in various instances, and when there was disagreement to approach it as an honest difference between professionals, although it was disappointing to learn her reasons for not following up on Dr.’s CTOPP findings with further testing on her own. Overall, this witness’ testimony was given careful consideration as it assisted in clarifying some of the complexities of the testing data, although her ultimate conclusion that Student is not an eligible student was not sufficiently supported.

Student’s Parent testified at length and very credibly. Her descriptions of the lengths to which she and the rest of the family supported Student when Student was struggling with homework were detailed, and what the Parent described in layman’s terms brought into real life the functional difficulties that Dr.’s testing revealed. It was clear that the Parents tried to do the right thing and trusted that the District knew what was best for Student. Their eventual filing for due process appears to have been the only avenue left to them to help their child.

¹⁷ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

The reading tutor was very knowledgeable and credible. Her descriptions of Student's functioning during tutoring sessions dovetailed with the testing results presented in Dr.'s report.

Many other District personnel testified, and overall their testimony added little weight to the understanding of the case because their grades and their comments were based upon how Student did in Student's class groups. The students in Student's grades were divided into the "honors" or "accelerated" students who were "taken off the top", and the academic students. The students in the academic classes comprised the rest of the non-honors/non-accelerated students for that grade, whether they were in regular or in special education. The District is to be commended for this inclusionary model, but it does not give an accurate picture of Student's academic functioning. Furthermore and additionally, this hearing officer respectfully suggests that Student's true educational deficits were hidden from Student's teachers by the Herculean efforts of the student and Student's family.

Legal Basis, Discussion and Conclusions

Burden of Proof – The Parents requested this hearing and therefore they bore the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio.

In this matter the evidence was not in equipoise, and in their case in chief the Parents met their burden of proof on all but one issue.

Did the School District fail to offer Student a free, appropriate public education (FAPE) from October 12, 2005 to May 10, 2006?

Children with disabilities who require specially designed instruction are guaranteed a free, appropriate public education (FAPE) by federal and commonwealth statutes.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Eligible students are entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

Student had been found eligible for special education in the middle of Student’s 3rd grade year, and subsequently received part-time special education at the resource room level. (FF 35) However, in 6th grade, Student was put on a “monitoring” basis and received no direct special education services other than 5 or 10 minutes per week. (FF 36) The District presented no reasonable basis upon which it made this determination, and insofar as it relied on results of the MBA it relied upon questionable data. (FF 53)

Student's IEP for 6th grade was inappropriate, and as such failed to offer FAPE. (See FF 16, 18, 19, 21, 22, 23, 24, 27, 28, 29, 30, 31, 34)

If the District did not offer Student FAPE during this time period, is Student entitled to compensatory education and in what form and amount?

Student's 6th grade IEP was inappropriate and therefore Student is entitled to compensatory education. Compensatory education is a remedy designed to provide a student with the services Student should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that Student should have received, compensatory education is an in-kind remedy. Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991) A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPE.

The standard for determining whether and to what extent compensatory education should be awarded was summarized by the Third Circuit in M.C. v. Central Regional School District, 81 F. 3d 389, (3d Cir. 1996). As the Court in M.C. observed, when a school district fails to deliver that to which a student is entitled, an award of compensatory education is justified. Traditionally in the Third Circuit the calculation of the compensatory education due was generally made on an hour-by-hour basis. However, in 2006 in a case concerning gifted education, Commonwealth Court created an alternative standard, requiring the decision-maker to base an award on what it will take to bring the student to the point student should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 2006). The circumstances of this case are such that this hearing officer chooses to calculate compensatory education according to the M.C. standard. The M.C. Court, while recognizing a district's responsibility to correct its failure to provide FAPE, also excludes from the calculation of the compensatory education period, "the time reasonably required for the school district to rectify the problem". Ordinarily Districts are given some allowance of time to correct ineffective programming. However, since the District had plenty of experience with Student by the time Student's 6th grade IEP was created, the District will not be allotted this grace period.

Student will be awarded 3 hours per day for every day Student attended school from October 12, 2005 to May 10, 2006. The form of Student's compensatory education will be chosen by the Parents, and may include any educational, tutorial, developmental, or therapeutic activity that will contribute toward the needs identified in Student's IEE and Student's IEPs. The hours may not be used to substitute for services that Student should be receiving through Student's IEPs. The hours may be taken singly or in blocks and may be used after school, in the evening, on weekends, and/or in the summer and may be used after Student turns twenty-one. The District has the right to question the reasonableness of the cost of a service if it is not in line with the usual and customary rate for the service in the geographical area. The total cost of all the services must not exceed

the total cost the District would have borne (salaries and benefits) if it had been providing Student with an appropriate program and services.

Did the District inappropriately exit Student from special education on May 10, 2006 at the end of Student's 6th grade school year and thus deny Student FAPE? If the District did inappropriately exit Student from special education and thus deny Student FAPE, is Student entitled to compensatory education and in what amount?

A school district must conduct a reevaluation at least every three (3) years unless the District and the parents agree that an evaluation is unnecessary. 34 C.F.R. Section 300.303(b)(2). In addition, Pennsylvania's regulations regarding reevaluations require that a certified school psychologist be among the group of qualified professionals which reviews the evaluation materials to determine whether a student is a child with a disability when evaluating a child for autism, emotional disturbance, mental retardation, multiple disabilities, other health impairments, specific learning disability or traumatic brain injury. 22 Pa. Code 14.114(a).

A school district is required to conduct a comprehensive evaluation, as under 34 C.F.R. 300.304, of a student before determining a change in eligibility, that the student is no longer eligible for special education services. 34 C.F.R. § 300.305(e). That evaluation must consist of a comprehensive multi-disciplinary evaluation that meets the standards imposed for initial evaluations under IDEA and Section 504, set forth above. 34 C.F.R. §§ 300.305(e) and 300.304 through 300.311.

The ill-considered and inadequate process by which Student was exited from special education was fatally flawed, and therefore the District's subsequent regular education program and placement were patently inappropriate. (See FF 39, 40, 41, 42, 43, 47, 48, 49, 50, 52, 53, 54, 55)

The District's exiting Student from special education eligibility was inappropriate and Student was denied FAPE from May 10, 2006 through the end of the 2007-2008 school year. Compensatory education in the amount of 3 hours per day for every day Student attended school from May 10, 2006 until the day that the District offers Student an appropriate IEP will be ordered.

Is Student a student who is eligible under the IDEIA and therefore a protected handicapped student? If so under what classification(s) is Student eligible? If Student is not eligible under the IDEIA is Student a protected handicapped student?

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1414[a][1][A] provides that a local educational agency shall conduct a full and individual initial evaluation, in accordance with subsection [b] dealing with evaluation procedures, before the initial provision of special education and related services to a child with a disability. 20 U.S.C. §1414[b][2] instructs that in conducting the evaluation, the local educational agency shall use a variety of assessment tools and strategies to gather relevant information, including

information provided by the parent, that may assist in determining whether the child is a child with a disability. 20 U.S.C. §1414[b][3][C] requires that the child be assessed in all areas of suspected disability.

In evaluating a child, a district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

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

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child

- Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;
- Are used for purposes for which the assessments or measures are valid and reliable;
- Are administered by trained and knowledgeable personnel; and
- Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEA 2004 provides, at Section 614(b)(4) that

Upon completion of the administration of assessments and other evaluation measures,

The determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).

Student was evaluated and found eligible for special education mid-way through Student's 3rd grade year. Mid-way through Student's 6th grade year Student was Reevaluated and found to be no longer eligible for special education. Student spent 7th grade as a regular education student.

Reevaluation

In conducting its Reevaluation the District violated the IDEIA's mandate that it must use technically sound instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). Additionally the IDEIA provides that all testing instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The MBA used to generate the data that was relied upon to exit Student from special education in 2006 was published twelve years before it was administered to Student, and it was co-normed with instruments that were out-of-date in 2004. The instrument's publishers intended it to be a screener. The instrument's publishers did not intend it to be used as a pre-post test for making educational decisions. Moreover, the District psychologist who was part of the team that made the decision to exit Student from special education was not familiar enough with the instrument to discuss it in her testimony. It is truly troubling that the District, and particularly the District psychologist who otherwise presented herself in a professional and knowledgeable manner, made the decision to exit a child from special education based primarily on the MBA and grades without any direct testing by the school psychologist.

A District must utilize information provided by the parent that may assist in the evaluation. This must include evaluations or other information provided by the parent. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with "input from the child's parents," must identify what additional data, if any, are needed to determine "...[t]he present levels of academic achievement and related developmental needs of the child..." 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). The District must utilize information provided by the parent that may assist in the evaluation.

Equally troubling as the misuse of the MBA in this case is the District's disregard for the Parents' input which, although dutifully quoted in the Reevaluation Report (and later in the Final Evaluation Report), appears not to have been seriously considered at all. Student's Parent testified at length and in detail about Student's struggles with homework and about the extent to which the Parents, and even Student's younger sister, had to go to support Student with Student's homework. One merely has to examine the first draft of Student's writing assignments and compare them with the available final drafts to conclude that there had been considerable input from others, which given the poor quality of the first drafts was sorely needed by this student.

(See FF 39, 40, 41, 42, 43, 47, 48, 49, 50, 52, 53, 54, 55)

Evaluation

At the Parents' request, midway through 7th grade Student was evaluated by the District (and later by an independent psychologist as the Parents disagreed with the District's Evaluation). The District's Evaluation is considered in this Decision as being an initial evaluation rather than a Reevaluation as Student had been returned to regular education status. The Evaluation conducted by the District concluded that Student was not an eligible student. There were flaws in this evaluation. (See FF 73, 75, 76, 77, 78, 80, 81, 82, 83, 84, 86)

IEE

The IEE clearly established that Student is an eligible student under the IDEIA and Pennsylvania Chapter 14. As such Student is also a protected handicapped student under Section 504 and Pennsylvania Chapter 15. Much of the data generated in the IEE was supported by the District's psychologist in her own testimony. (See FF 107, 108, 109, 111, 112, 117, 118, 119, 120, 121, 122, 123, 124, 126) It is an inescapable conclusion that Student is an eligible student. (See FF 104, 105, 106, 110, 113, 114, 116, 125 in addition to the FF cited directly above)

The District's Final Evaluation included, but then virtually ignored, input from the Parents, input from the reading tutor and the findings of the independent evaluator. The District's Final Evaluation is simply indefensible, and its conclusion may reflect a perceived need to stay the course of viewing Student as ineligible given the raised stakes created by the likelihood of an ensuing due process hearing and/or its opposition to the independent evaluator. (FF 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140)

During this lengthy hearing the District produced many of Student's teachers, nearly all of whom testified to Student's earning good grades, being a good student, and not exhibiting anxiety. Notable, by way of interest, is that although Student's teachers frequently said Student was at the top of Student's class, or one of the best students in Student's class, for most of the subjects the District removes the top 25-40% of its students out and up into another level of instruction, so that Student, with an IQ somewhere between 107 and 113 and a strong desire to hide Student's deficits and be a successful student, is indeed at the top of Student's class which is the bottom 60% of the total population in Student's grade. (See FF 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166)

It is the belief of this hearing officer that although the teachers were testifying honestly, they did not grasp the extent (FF 178, 179, 184, 185) to which Student's façade in school was being maintained by intensive work with Student's family at home (FF 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 180, 181, 182, 183), and more recently also with Student's Orton-Gillingham tutor. This hearing officer found the Parent's testimony sincere, credible, genuine, and in fact, moving, and is absolutely certain that without the hours of nightly parental input on homework Student would never have been exited from

special education and would never appear as well functioning in Student's classes as Student was said to be.

Should the District be required to reimburse the Parents for the Independent Educational Evaluation they obtained for Student?

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

Student's Parents disagreed with the District's Evaluation and requested an independent educational evaluation to which the District agreed rather than going to a hearing to defend its own Evaluation. Having initially agreed to fund an IEE, the District then withdrew its offer because of its experience with the Parents' chosen psychologist in the case of another child in the District. In that particular child's case the IEE had been criticized by another hearing officer.¹⁸ The same psychologist's report was critiqued by an appeals panel in the case of another child in another district.¹⁹ Such decision-making runs contrary to the concept of individualized programming for special education students, which is a primary focus and purpose of the IDEA.²⁰ The Parents identified their chosen evaluator and asked the District to let them know immediately if there were any problems. Not hearing from the District, the Parents proceeded with their evaluator. The District's subsequent withdrawal of its offer based upon its experience with the Parents' chosen expert was inappropriate. (See FF 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100)

Because the District did not ask for a hearing to defend its own Evaluation, and did in fact agree to fund an IEE, and did not immediately inform the Parents that their choice of evaluator was not acceptable, and because the IEE added significant new information to the District's knowledge base (i.e. that Student is an eligible student) the District will be ordered to reimburse the Parents for the IEE.

By way of *dicta*, although this hearing officer is not taking sides with specific regard to either the Hearing Officer Decision or the Appeals Panel Opinion in question, she does point out with regard to the District's wish to preclude funding an IEE from the private psychologist that 1) District psychologists are routinely criticized in hearing officer

¹⁸ ODR File Number 2938/03-04 (February 2004). Interestingly, although that hearing officer was critical of the differential response he perceived Dr. giving to the opposing attorneys, and was unsure of what she meant by several terms she used (Matthew Effect and Dyslexia Specialist), he agreed with her conclusion that the student in question has not made meaningful progress in reading and awarded the student 230 hours of compensatory education.

¹⁹ Spec. Educ. Opinion No. 1808 (March 2007).

²⁰ 20 U.S.C. § 1400(d)(1)(A).

decisions (including this one) and in appeals panel opinions, some psychologists more than once given the number of assessments they conduct over the course of their employment, and it is doubtful that their employment is terminated on this basis as it would be a grave injustice to do so; 2) as have District psychologists, Dr. has conducted hundreds of assessments and can expect to be criticized more than once over the course of her career; 3) psychologists (and this hearing officer is one), whether employed by school districts or independently employed, do not “get it exactly right” every time; and 4) hearing officers are overturned by appeals panels, and appeals panels are overturned by courts, and courts are overturned by other courts, suggesting that the art and science of psychological assessment is at least as imprecise as is the art and science of the law.

Should the District be required to reimburse the Parents for the private reading tutoring services they obtained for Student?

Beginning in 6th grade the District failed to offer Student specially designed instruction to address Student’s reading disability. The Parents are attempting to fill this void with private reading tutoring, and were fortunate enough to find a certified special education teacher with extensive training in the Orton-Gillingham method, a scientifically-based multisensory approach. Orton-Gillingham forms the basis of various reading programs in wide use, such as the Wilson reading program. (See FF 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154)

The tutor is well qualified for the service she is rendering, the service addresses the reading deficits described by Dr. in Student’s IEE, and the service supplies what the District should be supplying. The Parents are entitled to reimbursement for Student’s reading tutoring with Student’s current teacher from the first session in November 2007 until the District resumes providing Student with appropriate specially designed reading instruction under an appropriate IEP.

Should the District be required to reimburse the Parents for the private counseling they have obtained for Student?

Student received counseling on a monthly basis and more recently on an every two weeks basis. (FF 142) The record was scant regarding the exact reason for the initial referral to the therapist, the treatment plan(s) the therapist created for Student and/or progress notes of the therapy sessions. School-related issues are entirely likely to be addressed by middle school students who are in therapy, and the fact that Student addressed these issues (by Parent’s hearsay testimony) is not enough to conclude that Student was principally addressing school-related issues or more importantly that the therapy was a requisite for Student’s being able to access the curriculum.

Order

It is hereby ordered that:

1. The District did fail to offer Student a free, appropriate public education (FAPE) from October 12, 2005 to May 10, 2006. As the District did not offer Student FAPE during this time period, Student is entitled to compensatory education in the amount of 3 hours per day for every day Student was in attendance at school during that time period.
2. The District inappropriately exited Student from special education on May 10, 2006 at the end of Student's 6th grade school year and thus denied Student FAPE. As the District did inappropriately exit Student from special education and thus denied Student FAPE, Student is entitled to compensatory education in the amount of 3 hours per day for every day school was in session from May 10, 2006 until the date upon which the District offers Student an appropriate IEP.
3. The compensatory education is to be used as described above.
4. Student is an eligible student. The District must convene an IEP meeting within 15 days of receiving this Order, and considering Dr.'s Evaluation and [the reading tutor]'s input along with the Parents' input, create an appropriate IEP to address Student's needs in the areas of reading, spelling, written expression, focus, attention and performance anxiety.
5. The District must reimburse the Parents for the Independent Educational Evaluation of Student they obtained from Dr.
6. The District must reimburse the Parents for the private reading tutoring they obtained for Student from [the reading tutor].
7. The District is not required to reimburse the Parents for the private counseling they obtained for Student.

July 30, 2008

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer