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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION DUE PROCESS HEARING

Name of Child: GD
ODR # 8243/07-08 AS

Date of Birth: xx/xx/xx

Dates of Hearing: 1/7/08, 1/9/08, 2/6/08
2/19/08, 2/21/08, 3/27/08 ¹

CLOSED HEARING

Parties to the Hearing:

Central Dauphin School District
1600 Rutherford Road
Harrisburg, PA 17109

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

Vivian Narehood, Esquire
Gibbel, Kraybill & Hess
41 East Orange Street
Lancaster, PA 17602

Shawn Lochinger, Esquire
Rhoads & Sinon, LLP
Twelfth Floor
One South Market Square
P.O. Box 1146
Harrisburg, PA 17108-1146

April 2, 2008

May 8, 2008 ²

Marcie Romberger, Esquire

¹ The parties requested until April 17, 2008 to submit written closings.

² The decision was delayed as a result of a vacation.

BACKGROUND

Student was enrolled in the Central Dauphin School District (hereinafter, "District") for the 2006-2007 school year. Student alleges his Individualized Education Program was not appropriate nor was it being implemented. Student enrolled in the Private School for the 2007-2008 school year. Student is seeking tuition and transportation reimbursement for expenses at the Private School.

FINDINGS OF FACT

1. Student was born with neuroblastoma which was treated with surgery and chemotherapy. J-2; NT 138-139, 142.
2. Student began Kindergarten at a private school when he was 7 years old. J-5; NT 143, 144. He started Kindergarten late because at the age of 5 and 6, Student was not academically ready for Kindergarten, nor was he able to sit still for any length of time. NT 143, 144.
3. When Student was in 3rd or 4th grade, Student's mother requested an assessment from the public school in which they resided at that time. J-5. Although Student would have received special education services at the public school, Student's mother opted to keep Student in the private school. J-5.
4. Student continued to be educated in a private school during the 2005-2006 school year when Student was in 6th grade. J-5. NT 147-148. Student struggled with literature and language arts, and his reading fluency and reading comprehension skills needed improvement. J-5. Student also struggled with organization and study skills but made improvements throughout the school year. J-5.
5. Student received additional support from a learning disability specialist while attending the private school. J-5. At the end of the 2005-2006 school year, the specialist recommended Student leave the private school because he was not able to keep up academically with the other students. NT 148-149.
6. Student's mother explored a few private schools for Student to attend for the 2006-2007 school year, including the Private School. NT 150. She also had discussions with District personnel who motivated her to enroll Student in the District. NT 150, 151, 152-153.
7. In July, 2006, Student was evaluated by [redacted] Center. J-2. Behavior scales completed by Student's mother and teacher found Student exhibiting difficulties with attention, writing, and performance speed. J-2. Student's teacher also rated Student as having difficulty with motivation and self-confidence and inconsistent academic performance and grades. J-2.

8. Student also completed a self concept scale. J-2. He reported problems with learning, writing, and attention. J-2.
9. The Center evaluation concluded Student was below age level on tests measuring attention, graphomotor (writing skills), visual motor skills, and performance speed. J-2.
10. He was diagnosed as having a learning disability in written expression, dysgraphia, slow processing speed, and attention deficit disorder (hereinafter "ADD"). J-2. It was recommended that Student receive specialized instruction and adaptations to address these issues. J-2.³
11. Student was enrolled in the District for the 2006-2007 school year. NT 238, 239. Although the last grade Student completed was 6th grade, Student's mother and District personnel agreed to place Student in 8th grade. NT 280.
12. Prior to the 2006-2007 school year, Student provided the District with the Center evaluation. J-5; NT 160. The District wanted to perform its own evaluation, but agreed to provide Student with services under a Section 504 Service Agreement until its evaluation was completed. J-3; NT 161.
13. Also prior to the 2006-2007 school year, Student's case manager was assigned. NT 418. She was told to treat Student as a special education student even though a special education evaluation would not be completed by the commencement of the school year. NT 417-418.
14. On August 18, 2006, a Section 504 Service Agreement was developed. J-3. Student rejected the Section 504 Service Agreement, instead developing his own Service Agreement which he provided to the District for review. J-3; NT 162.
15. Between September 13, 2006 and September 15, 2006, Student visited the Private School. J-23. Student's mother testified she was still investigating all educational options for Student. NT 263.
16. On September 20, 2006, a new Section 504 Service Agreement was developed which mimicked to a great extent the Service Agreement written by Student. J-3. It provided: 1) a referral to the Assistive Technology specialist; 2) teachers training Student to bring the assignment book to each teacher for signature and initialing Student's assignment book each class period; 3) an opportunity for one-to-one tutoring to address concepts when Student received a grade of "C" or

³ Dr. K reviewed the evaluation conducted by Dr. M. Dr. K believes the low standard score on the ADD analysis can also be indicative of a non verbal disability as a result of a right hemispheric disorder. NT-46, 47. Either way, it signifies an inability to sustain attention on non-verbal tasks that involve fluency. NT-48.

- lower on homework assignments, quizzes or tests; and 4) remedial tutoring in math to reinforce and practice skills and concepts presented in class. J-3.
17. On October 20, 2006, the District developed an initial Evaluation Report (hereinafter, "ER") for Student. J-5. No additional testing was completed by the District's school psychologist even though the psychologist agreed there were gaps in the testing completed by Center. NT 803, 844, 845, 846, 849.⁴ The District did conduct its own speech/language and occupational therapy screenings, but did not conduct full evaluations in either area. J-5. Student was found ineligible for either of these services. J-5.
 18. The Speech and Language screening focused on social skills. NT 593, 594. The speech and language pathologist did not screen for areas of weakness regarding chronological awareness, chronological memory, or rapid naming. NT 598. She also did not assess him for auditory issues. NT 602. The pathologist did agree, however, discrepancies obtained from Dr. K's testing was cause to do further testing. NT 604. She also did agree Student was below average on an oral expression tests. NT 605.
 19. The ER and an Individualized Education Program (hereinafter, "IEP") were sent through the mail or given to Student to take home. J-5, 6, 7; NT 180, 181. No meeting occurred at that time to discuss the ER or IEP. J-7; NT 180, 181.
 20. District personnel testified the team agreed to send home the ER and IEP for Student's mother to review without a meeting because Student's mother had difficulty attending meetings and she preferred that it be sent home. J-26; NT 810, 1261. Student's case manager testified she informed Student's mother a meeting could be held if requested. NT 444-445, 449. It is unclear whether a Notice of Recommended Educational Placement (hereinafter, "NOREP") was provided with the IEP. NT 181, 810.
 21. The specially designed instruction in the IEP were the same as the accommodations provided under the Section 504 Service Agreement. J-3, 6.
 22. District personnel began implementing Student's IEP in October, 2006 although a Notice of Recommended Educational Placement (hereinafter, "NOREP") was not signed by Student. NT 449-450.
 23. The NOREP was dated before the ER and IEP: The NOREP was dated October 18, 2006 while the ER and IEP were dated October 23, 2006. J-5, 6, 8. Yet, the date for commencement of services on the NOREP was listed as January 12, 2007, the date a meeting finally occurred to discuss the ER and IEP. J-7, 8.

⁴ Testing was not completed in the areas of oral expression, listening comprehension, and math reasoning. NT 844, 845, 846.

24. Sometime after she received the ER and IEP, Student's mother contacted District personnel asking when a meeting would occur to discuss the documents. NT 281, 446, 1261. ⁵ Based upon schedules, a meeting did not occur until January 12, 2007. NT 281.
25. During the January 12, 2007 meeting, Student informed the IEP team that he was not able to use the Alphasmart, a word processor provided to Student to assist him with note taking and writing assignments. J-7. It was agreed the District would provide keyboard tutoring to Student. NT 189, 507-508. When Student's typing speed increased, the District would again introduce the Alphasmart. Id.
26. At first, Student was to receive keyboard tutoring for 15 minutes during homeroom. NT 189, 466, 1091-1092. For keyboarding to occur at this time, Student would be 5 to 10 minutes late for his first period class, History. NT 466. However, Student's bus arrived late to school often and Student began missing more and more instructional time in History. NT 467, 468, 1093.⁶ On many occasions, Student had to walk to school because the bus did not arrive. NT 189. This would force Student to be late for school and miss his keyboard tutorial. NT 190-191.
27. Student's mother complained on numerous occasions to District and transportation personnel about the transportation issues. NT 189-190, 683-684.
28. As a result, Student's keyboard tutorial was moved from homeroom to flex period on approximately April 3, 2007. NT 467, 471. ⁷ Approximately 20 students would be in the classroom during flex when Student was receiving tutorial. NT 1094-1095.
29. Also at the January 12, 2007 meeting, Student informed the team that he was not receiving tests or quizzes back. J-7. The team decided Student would receive all tests and quizzes to take home, with an error analysis to occur whenever he receives a score of a "C" or lower. J-7. However, Student did not bring home test or quizzes on a regular basis, nor were error analysis completed. NT 198.
30. Student's mother signed the NOREP approving the program on January 12, 2007. J-8. The Superintendent did not sign the NOREP until January 26, 2007. J-8.

⁵ Although Student's case manager stated she was told by Student's mother via phone call that she wanted a meeting to discuss the IEP, no mention of this appears in the case manager's phone log. J-14; NT 446. Student's case manager also testified that she makes an entry into her phone log the same day or within 24 hours after a phone call. NT 448. However, on at least one occasion, her phone log is not chronologically in order. J-14.

⁶ Apparently, Student had issues with his bus arriving late to school for most of the school year. J-26; NT 1268, 1269.

⁷ Flex is a period in the school day for all students. Students can seek help from teachers, get instruction in music, or go to the computer lab during this time.

31. Also approximately January, 2008, Student's math was changed from Pre-Algebra to Algebra. J-12. At this time, Student began feeling the school work was getting difficult. NT 995-996. Getting additional tutorial in Algebra during flex was not helping Student. NT 997.
32. Beginning approximately late January, 2007, Student's mother called District personnel many times to attempt to get help for Student because he seemed very tired and he was complaining the classes were moving too fast for him. NT 176, 184-185, 217-218.
33. Approximately February 28, 2007, District personnel determined Student did not qualify for Extended School Year services. J-9, 11, 26. This decision was not determined by an IEP team. NT 206. This information was added to the IEP on March 8, 2007 without a meeting, but with Student's mother's knowledge of the decision. J-10, 14, 26; NT 475.
34. On March 27, 2007, a change was made to Student's IEP which provided one to one tutoring for a minimum of one day out of six in the resource room while any other tutorials were to be provided in a regular education class. J-11.
35. Also on March 27, 2008, Student's Language Arts class was changed from a resource room setting to a regular education classroom with team teaching. J-11. Student's mother says she was not aware of this change but it appears she was. J-26; NT 209. This change was done for the entire class, not just Student. NT 579, 664-665.
36. Instead of going to the regular education classroom for Language Arts, Student and approximately four other students chose to go to a smaller classroom and listen to the book on tape and answered questions in a smaller group setting rather than reading it or writing a play. NT 1162.
37. The written expression and math goals in Student's IEP do not have baselines. J-6.
38. Student's IEP does not have services or goals to address Student's slow processing speed, low motivation, and lack of self-confidence. J-6. ⁸ There is also no goal or specially designed instruction to address Student's lack of study skills by teaching him how to review and self-correct his work. J-2, 5, 6.
39. Student's Section 504 plan and subsequent IEP require Student to receive one to one tutoring when Student received a grade of a "C" or lower on a homework assignment, quiz, or test. J-3, 6. There was no first hand testimony to show this occurred. J-26; NT 401-402, 668-669, 716, 1136.

⁸ Student's teachers testified Student's slow processing speed affected his schooling globally on all tasks. NT 541, 816.

40. Student was to have preferential seating near the teacher. J-3, 6. However, this did not occur in every class. NT 167. In one class, Student sat in the back of the class and in another he sat by the door. NT 167. In History, Student sat along the perimeter of the classroom. NT 462.
41. Student was to receive tutoring in a one to one student teacher ratio. J-3, 6. Yet, there was no testimony that this ever occurred.⁹ The only time it appeared Student saw teachers for “tutoring” was when he was behind in his work and he met with the teachers to try to catch up. Student did receive math and reading clinics during the school day, but they were not in a ratio of one to one. He also was “pulled” from the regular science lecture daily for the entire school year with the paraprofessional, but with a group of students. NT 407.
42. Student’s Section 504 plan and subsequent IEP called for a support teacher in Student’s Pre-Algebra class. J-3, 6. Yet there was none provided, not even when the District moved him to the Algebra class halfway through the school year. NT 173.
43. A referral was to be made for an assistive technology assessment to determine Student’s needs if any. J-3. Yet, an assessment does not appear to have been completed nor a report generated. J-5; NT 175.
44. As per Student’s 504 Service Agreement and IEP, Student was to receive an assignment book tailored to his needs. J-3, 6. However, Student received the same assignment book as other students except a box marked “other” was split into two sections for reading and reading and research. NT 423-424.
45. According to the Section 504 Service Agreement, Student’s assignment book was to be initialed by each teacher daily even when there was no homework. J-3. Student’s teachers were responsible for “training [Student] to bring the assignment book to them to be signed, and will be responsible for follow up for maintaining it.” J-3, 6.
46. Without progress to require such a change, the organizational goal in Student’s IEP decreased the number of days Student needed to have his teachers sign his assignment book from every day in his Section 504 Service Agreement to a minimum of two days per six-day cycle. J-3, 6. This goal was inconsistent with the specially designed instruction which required teachers to sign daily. J-6.
47. Student’s teachers did not sign his assignment book daily, not even when Student’s case manager was checking for signatures on a daily basis. J-27; NT 508-509. Nor does it appear the teachers documented when Student did not have

⁹ In fact, when Student would go to the resource room for additional tutoring, there was an average of four to six students in the room. NT 430.

- his assignment book with him. J-26; NT 671.¹⁰ In fact there was one day in particular where Student left his assignment book in his locker at the beginning of the day and no teacher documented this, made him get the assignment book from his locker, or provided Student with his homework on a separate sheet of paper. NT 744.
48. Student was to see his case manager for two or three minutes at the end of the day so she could check for signatures in his assignment book. NT 672. If he was missing signatures, Student's case manager testified she would go back to the teachers and speak to them. NT 672. There is no indication this occurred or if it did, that it caused the teachers to sign Student's assignment book on a more consistent basis.
49. Instead, Student's case manager wrote in many homework assignments in the assignment book when Student's teachers did not do so. NT 724, 725. She stated she did this because she did not have time at the end of the day to talk to the teachers to determine if homework was assigned. NT 724, 725 She relied on Student to inform her if he had any homework. NT 724, 745. This is contradictory to what she had previously testified. NT 672, 724.
50. There are many days/weeks where it appears Student's case manager did not check Student's assignment book. J-27; NT 746, 747, 754.¹¹
51. Because Student could not understand what was written in his assignment book, Student had to redo homework assignments a "good amount of times" because it was not correctly done the first time. NT 1022-1023.
52. Student's case manager did not ask Student if the assignment book was helpful to him. NT 740-741.
53. Student's IEP also required District personnel to check Student's binder once per cycle to measure Student's organization. J-6. Student's case manager testified she checked his binder weekly beginning in October, 2006. NT 441, 443. Yet, there is no indication this occurred. Rather, there is evidence to show District personnel only checked Student's binder once in January, twice in February, and at no time in March. J-12.¹² District personnel made it appear binder checks were occurring more frequently than they really were. J-13; NT 441.

¹⁰ There are days where there is a squiggly line going through some classes in the assignment book. J-27. It is unclear the meaning of the line. NT 742.

¹¹ Student's case manager stated the reason she missed checking Student's assignment book was she got out of habit with Student's absences. NT 747, 748. Yet there are many days prior to Student's absences where his assignment book was not signed by the case manager. J-27.

¹² Student's case manager claims there are other pages that show she checked his binder weekly, but that does not appear to be feasible based upon the dates shown on the document. J-12. Nonetheless, although it was discussed that the District will provide a weekly check of Student's binder, it is not required under the IEP. J-6.

54. Student testified he was more confused when his case manager would check his binder because she would organize it for him, not teach him how to organize it. NT 991. When he would try to find his work, he did not know where she had put it. NT 992.
55. Student's grades for the first three marking periods during the 2006-2007 school year were good, consisting of "A" and "B" with only one "C."¹³ J-12. There were times when Student was getting good grades but not understanding the work. NT 1030. During the fourth marking period, Student received one "A," two "B," three "C," and three "D." J-12. Comments on the report card state Student's grades were affected by absences and incomplete assignments. J-12.
56. During the first marking period in keyboarding class, Student missed a quiz which was not able to be made up. J-12; NT 1123.
57. During the first and second marking periods, Student needed extra time to complete writing assignments for Language Arts. J-12; NT 1184. Student would see his Language Arts teacher "quite often" in the beginning of the year during Flex for assistance. NT 1216. She noticed Student was tired in class as the year progressed and thought Student was not as diligent and more lackadaisical about his work. NT 1186, 1189, 1190. His organizational skills declined. J-13; NT 1213, 1214.
58. Student did not complete a book report in Language Arts during the 4th marking period even though Student's teacher worked with him during flex period to complete the assignment. NT 1170. Student was given a grade based upon what he was able to complete. NT 1170.
59. Student's Language Arts teacher saw Student exhibit gaps in organization, sluggishness, slow performance speed, inconsistencies, low motivation and self-confidence, difficulty with writing, planning, and following through on long-term projects. NT 1204, 1234. These were the difficulties Dr. M found in her evaluation of Student before Student entered the District. J-2; NT 1204.
60. Student's Science teacher requested to see Student once per week during flex period from the beginning of the school year. J-26. It can be surmised she wanted to see him because of issues she saw in her classroom. Throughout the first three marking periods in Science, Student had some difficulty with organization. NT 361. He had to redo assignments and he began turning in assignments late during the second marking period. NT 361. This is inconsistent with the testimony of Student's case manager who stated Student did not fall behind in his work until the fourth marking period when he was absent quite often. NT 505.

¹³ A few of these grades were inflated due to incorrect computer generated percentages on tests, quizzes and labs. J-12. For example, even though Student received a 10 out of 20 on a keyboarding lab, the computer calculated his score as 100% and Student received an A for the lab. J-12.

61. Student had many incomplete assignments in Science class during the 4th marking period. J-12. Student was excused from 6 assignments as a result of absences. J-12. He did not turn in 6 other assignments although he was present at school. J-12; NT 365-366.
62. During some weeks, Student was pulled from flex to attend tutorials to get remediation in math, English, and reading based upon his PSSA scores. J-26; NT 428, 538. These tutorials were provided by direct instruction from a teacher. NT 648. During those weeks, Student did not attend the resource room for tutorials or to obtain extra help from his teachers. NT 428, 545. As a result, Student's grade could not be decreased because he could not get the help he needed. NT 545.
63. Also based on Student's reading test results, Student was offered an after school direct instruction reading program focusing on comprehension. NT 785, 786.
64. During the fourth marking period, all of Student's teachers were "literally fighting for him during flex period because he had math to make up, he had English to make up, he had reading to make up, he had social studies. And with the keyboarding," Student's Science teacher had no time to work with Student on his labs. NT 363, 490. ¹⁴ She became very frustrated because he was falling "excessively behind." NT 368. She believed Student may have been frustrated because he was behind and could not catch up. NT 370.¹⁵ Yet, at no time did the IEP team reconvene to discuss the issues of Student's attendance or lack of assignment completion, or to change his program to provide Student with more assistance.
65. Student's progress reports curiously state the wrong year for the comments for the first marking period (11/17/07 instead of 11/17/06). J-13. In addition, language on the progress report dated March 27, 2007 for Language Arts was actually not provided to Student's case manager by Student's Language Arts teacher until April 24, 2007. J-13, 26; NT 1248. Student's mother does not recall being provided progress notes until the end of the school year. NT 267, 268.
66. Student's IEP progress report comment for March 27, 2007 states Student was not receiving graded papers to take home. J-6, 13, 26. This is contrary to the agreement made in January, 2007 that all graded tests and quizzes would be sent home. J-7. When Student did get his tests and quizzes from his teachers, Student was not taking his graded work home. J-13. This is contrary to the case manager's testimony that Student made progress on his organization goal to the point of mastering the goal. NT 441. She claimed Student had very few papers in

¹⁴ Student's Language Arts teacher confirmed the need for all teachers to see Student during flex period. NT 1170-1171 1171-1172.

¹⁵ This is contrary to the testimony of Student's case manager who testified she never saw Student exhibit signs of frustration during the school year. NT 615.

- the wrong place. NT 441. Yet, it is clear Student did not make progress on his organization goal. J-13, 26; NT 548-549.
67. It is difficult to determine whether Student made any progress in Math based upon his progress report. J-13.
 68. Student was provided with the Inspiration Program at home and he was able to use it at school if he preferred. NT 163. However, there was disagreement if the training provided to Student on how to use the program was sufficient.
 69. Student chose to write his projects rather than type them. NT 453.
 70. Student alleges that the 504 plan was not implemented because Student did not receive a laptop for use at home and at school. NT 163. However, Student was provided with an Alphasmart which he did not use because of his keyboarding skills weakness. NT 163, 164.
 71. When Student began the school year, he did not have many typing skills. He was not aware of the home row and would watch his fingers rather than look at the material. NT 1088.
 72. Student received typing class twice during the 2006-2007 school year to try to improve his typing skills. NT 1096.
 73. Most 8th graders type 25 to 30 words per minute. NT 1089. Student's keyboarding teacher testified Student was typing up to approximately 12 or 13 words per minute after the first marking period. NT 1090. Yet, in the beginning of February, Student was only typing 8 - 9 words per minute. J-12. On average, Student was typing approximately 15 words per minute during February and March, 2007. J-12. There is nothing in the record to suggest Student made any additional progress in typing during the remainder of the year. J-12.
 74. At no time did anyone consult with Student's keyboarding teacher about using a different keyboarding program with Student. NT 1131.
 75. The occupational therapist assigned to the middle school offered to assess Student's typing skills in May, 2007 if the District felt Student was struggling, but the District did not ask her to do so. J-26.
 76. Student's case manager testified Student sometimes did not have answers to questions or could not put answers into words. NT 658.
 77. Student completed 4sight testing three times during the 2006-2007 school year in math and reading. J-12. On a few subtests, Student received a zero score. J-12. A student can receive a zero if the student did not complete that portion of the test

because he/she ran out of time or because the student did not answer any questions correctly. NT 1049.

78. On a number of subtest on the 4sight, Student's scores dropped or remained the same. J-12. That is not the pattern the District likes to see. NT 1051. It hopes with each administration of the test, the student will evidence more mastery of the concepts. NT 1051.
79. Student had the most difficulty with open ended questions on both the math and reading 4sights. J-12. Open ended questions are answered by multiple choice answers and written responses. NT 1057-1058. It requires independent critical thinking. NT 1070.
80. Student missed a number of school days. J-12. Although he had numerous illegal absences, the District did not notify Student's mother to inform her of these absences in a timely fashion. NT 272. Student's teachers and principal would discuss it, however. J-26; ¹⁶ NT 396, 405. Student's mother raised the issue with District personnel at the end of the Third Marking Period when she noticed how many absences he had on his report card. NT 276. A meeting was held with the school Principal to discuss the matter on May 29, 2007. NT 277. No changes occurred to the IEP to address the situation. Student admitted he cut school beginning in May. NT 1018.
81. It is hard to tell exactly how many days Student actually missed and how many days he was in school but marked absent. J-24, 27. For example, on May 3, 2007, a day in which the District has Student marked absent from school, Student's case manager knows Student was at school. J-24; 27; NT 778.
82. Student's case manager stated part of her duties as case manager was to ask questions when a child is not in school for a couple of days, when a child's grades are dropping, or when homework is not being completed. NT 433. However, she later testified that attendance is not an issue under her jurisdiction, so she did not do anything when Student was absent often. NT 588. She also believed it was not her duty to deal with bussing issues or Student's attendance at after school academic tutorials. NT 684, 685.
83. On May 30, 2007, Student was evaluated by Dr. K, a certified school psychologist. J-16. Student's intelligence scores were as follows: full scale IQ, 85; Verbal Comprehension Index, 102; perceptual reasoning index, 94; working memory index, 80; and processing speed index, 68. J-16. His test results showed an extremely low performance on the processing speed index which could make comprehension and completing work time consuming and difficult. J-16.

¹⁶ In fact, on March 30, 2007, Student had so many absences, a discussion occurred between District personnel about Student being placed "on DR's note soon." J-26.

84. Based on the results of achievement tests, Student has “severe deficits” in higher level reading comprehension, math reasoning, written expression, and oral expression. J-16. He also has a “serious weakness” in reading, writing, and math fluency. J-16. He also demonstrated persistent Attention Deficit Disorder/Inattentive type. J-16.
85. Student also received low scores on the Comprehensive Test of Phonological Processing. J-16. These low scores indicate Student will have difficulty processing complicated visual presentations. NT 74-75.
86. Dr. K determined Student had slow processing speed which will require Student to take more time to complete a task. J-16, NT 32.
87. Student’s fluency issues will hinder the amount of work Student can produce in a given time frame. NT 33, 60.
88. Dr. K compared her WIAT results with those obtained by Dr. M a year earlier. J-2; J-16. The results do not show progress according to Dr. K. NT 62, 64. The District psychologist disagrees. NT 818. She believes Student has shown progress by maintaining a standard score. NT 818.
89. Dr. K’s results were consistent with Dr. M’s results in certain areas: difficulty on comprehension tests that require Student to separate relevant from irrelevant details; and difficulty with block designs and matrix reasoning which would adversely affect his ability to work with math and writing symbols, multiple choice, and true and false tests. NT-52, 53.
90. Dr. K’s results were inconsistent with the District’s occupational therapy assessment. J-5; NT-49. The District determined Student was not in need of occupational therapy because his writing was legible and functional. J-5. Dr. K observed Student having difficulty with line awareness and letter formation. NT 49.
91. Dr. K diagnosed Student with Traumatic Brain Injury resulting in Neurological Impairment, Other Health Impairment based on his Attention Deficit Disorder, Specific Learning Disability in reading comprehension, reading fluency, written expression, math reasoning, and oral expression, and Speech and Language Impairment for his deficits in phonological awareness, phonological memory, rapid naming, and pragmatic language. J-16. Dr. K is not a speech and language clinician. NT 114. She listed a speech and language impairment because she believes he might have this based upon the results of the Comprehensive Test of Phonological Processing and the rapid naming test. NT 114. She did not anticipate the District classifying Student as exceptional under all of those categories. NT 135.

92. Dr. K also found a large split between his verbal and nonverbal abilities. NT 54-55. She diagnosed him with a nonverbal learning disability based upon a traumatic brain injury caused by the chemotherapy Student received as a child. NT 83. This type of learning disability will cause a student to lose attention and concentration, fade in and out during the day, and take a long time to process things. NT 83-84.
93. Based on test results, Student may have problems with mental math reasoning and math word problems. NT 54.
94. Student's Science teacher told Dr. K science was not "clicking" for Student and that his responses are "so way off that it concerns me or he [sic] response is nothing and he needs hints for any response." J-16. Student's comprehension weakness was adversely affecting him in class. NT 110. Student had these problems even though there was a paraprofessional working with him daily, sometimes all period. NT 348.
95. Student's science teacher also rated Student as always being withdrawn, painfully shy,¹⁷ and easily confused. J-16. In Science, Student had difficulties with spelling, grammar, writing, math, vocabulary usage, and reading comprehension. J-16. He daydreamed, was slow in completing tasks, had poor logical reasoning, critical thinking skills, and understanding of concepts. J-16; NT 373, 377, 379. She testified that Student worked much slower and needed more time than the other students to complete work. NT 373. His writing was slower, his answers shorter, and he would need more probing questions to get him to write than her other students. NT 377. Student's science teacher did not address these concerns with Student's mother or the IEP team. NT 388.
96. Student's keyboarding teacher identified Student as being easily distracted and inattentive with poor attendance. J-16.
97. Student's math teacher stated Student daydreams and gives up on his work. J-16. He also identified Student with the following difficulties: completing tasks, computing math calculations, understanding abstract math concepts and reasoning, and solving word problems. J-16.
98. Student's reading teacher told Dr. K Student works at a slow pace, has problems with predicting cause and effect, making inferences, comprehending and summarizing main ideas, finishing tasks on time, and expressing himself verbally. J-16. She also identified Student as quiet and withdrawn. J-16.

¹⁷This is inconsistent with her testimony. She testified Student interacted very well with his peers, consistently talking and joking with them. NT 333. Student's science teacher also testified she saw Student and a friend together "a lot" during flex period because they both were in her class. NT 346. Yet there was numerous testimony that Student was not in her flex period very often because he was needed elsewhere that period. NT 390.

99. Another of Student's reading teachers stated Student appears to have difficulties comprehending the material, processing, rereading words, making inferences, finishing tasks, and following directions. J-16. She also said Student was quiet and withdrawn. J-16.
100. Student's history teacher told Dr. K Student had problems with comprehending the material, predicting cause and effect, making inferences, fluency, accuracy, finishing assignments on time, and using correct punctuation. J-16. Student was identified as quiet, withdrawn, and easily distracted in this class as well. J-16.
101. Student's English teacher told Dr. K Student does not complete work even when given an extension, does not ask for help, and has difficulty with spelling, capitalization, and punctuation. J-16. She also stated Student was tired, listless, and apathetic. J-16.
102. Some students with ADD get tired as the school year progresses. NT 856. Being tired is also a symptom of children with slow processing speed. NT 1240.
103. Dr. K made numerous recommendations for specially designed instruction. J-16. Dr. K did not anticipate the District to implement all of her recommendations. J-16; NT 88. She did acknowledge the IEP does include some of her suggestions. NT 116-117.
104. Dr. K reviewed the IEP offered to Student in October, 2006. NT 96. Dr. K believed the IEP was inappropriate because it did not provide direct instruction in critical thinking and comprehension -- areas of weakness for Student. NT 96-97. She also believed other assistive technology tools needed to be provided to Student. NT. 97.
105. Dr. K also did not believe basing Student's progress on PSSA performance was appropriate because it does not focus specifically on Student's areas of weakness. NT 100, 101. She also did not believe the goal for organizational strategies addressed all of Student's areas of weakness in attention, higher level thinking and organization, and self-regulation. NT 101.
106. Dr. K also testified the IEP did not adequately address Student's needs in the area of reading comprehension, fluency, and oral expression. NT 102, 105.
107. Dr. K believes Student needs small class sizes that would enable him to work at his pace and a college preparatory curriculum taught with a lot of review and repetition. NT. 106, 107. She also believes he needs a one to one tutorial. NT 108.

108. Dr. K believes Student's needs are so great that he needs a program such as the one being implemented at Private School in order to receive a free appropriate public education. NT 111.
109. A functional MRI was conducted which showed Student having significant underactivation in the primary brain region for number knowledge and calculation and overactivation of other areas of the brain to compensate for what the other part of the brain cannot do. J-20; NT 316, 317. It is believed Student's brain function patterns are a result of Student's early health issues. NT 320.
110. This compensation method is not a very efficient style of working and will slow down Student's processing. NT 318. It will be expressed in learning and achievement difficulties. NT 320. As a result, Student may need more one-on-one teaching to correct the problem. NT 315.
111. The functional MRI results were consistent with Dr. K's results. NT 321.
112. Student's mother pays approximately \$225 to \$245 a month for Student's transportation to school. NT 225, 226.
113. Student was accepted into the Private School in September, 2006. NT 928.¹⁸ In Spring, 2007, Student's mother decided to place Student in the Private School for the 2007-2008 school year. NT 221, 225. She officially enrolled Student in August, 2007. NT 928.
114. Private School is a school where every student's schedule and every student's goals and program are different. NT 877.
115. Every first year student at Private School receives a tutorial – one on one instruction for 30 to 45 minutes per day. NT 877, 878.¹⁹ Student's tutorials center around certain goal areas: comprehension, critical thinking, math skills,²⁰ and keyboarding. NT 888. The school also teaches a student about his or her own learning style. NT 889.
116. The original plan developed for Student in October, 2007 did not include keyboarding, occupational therapy, or speech services. NT 929, 930. A referral had been made to the Intermediate Unit for a speech and language evaluation prior to the plan being developed. NT 930.²¹

¹⁸ Student could have enrolled anytime after he was accepted in September, 2006

¹⁹ When Student first began at Private School, he was only receiving tutorial three times per week. NT 932. This changed in January, 2007 as a result of changes to Student's class schedule. NT 962.

²⁰ Student is currently enrolled in Algebra, but receives supplemental math instruction during tutorial to fill in the gaps of math skills he does not know. NT 942-943.

²¹ Had Student received speech services at the District, speech services would have begun earlier at Private School. NT 980.

117. Student receives Nancy Bell's Visualizing and Verbalizing to assist him in language comprehension and critical thinking strategies. NT 892. Student also receives a Language Enrichment class which assists Student in visually and auditorally thinking about language. NT 893-894.
118. Student receives an integrated Language Arts class which focuses on developing Student's writing and oral expression. NT 906-907. This class also works on listening comprehension and short term auditory working memory for repetition and application in a different environment. NT 907-908.
119. Student receives keyboarding instruction with the Type 2 Learn typing program one time per week in tutorial. NT 893, 965. Private School does not have a typing class. NT 930. He works on this program at home and at school. NT 893. He is also required to use the computer for certain class work. NT 944.
120. Student also receives speech and language therapy to work on Student's weaknesses in short term auditory working memory, auditory processing, and pragmatic language. NT 894, 904, 905, 909.²²
121. Class sizes at Private School are between 6 and 10 students. NT 878.
122. Private School has expertise in teaching children with a nonverbal learning disability. NT 880.
123. The Private School has identified Student as having difficulties with phonological processing, abstract reasoning, auditory processing, reading comprehension, study skills, pragmatic language, and math. NT 891, 898, 903, 909.
124. Student has gaps in his math skills. NT 899. He has not mastered pre-algebra concepts. NT 901. Student also needs to learn information a direct way so that he can synthesize information. NT 891.
125. Student is making progress at the Private School. NT 895. When Student began at Private School, Student was passive and disengaged from the learning process and from forming relationships. NT 940. Now, Student has a good work ethic, is organized, and able to manage his time. NT 910, 911.²³ He does not miss many days of school. NT 911, 977. He has increased his classroom participation. NT 912.

²² The speech and language therapist from the Intermediate Unit determined Student should be receiving speech and language services. NT 922.

²³ The Private School has worked on Student's organization from the beginning. It is expected that he write down his homework assignments and every teacher signs his assignment book after every class. NT 911.

126. Unlike the teachers at the District, Student believes the teachers at Private School take time and explain things to the students in different ways until the student understands. NT 1019-1020.

ISSUES

Was the IEP dated October 23, 2006 inappropriate as a result of procedural and substantive errors?

Was the IEP dated October 23, 2006 implemented appropriately?

Is Student entitled to tuition reimbursement and transportation costs for the Private School?

DISCUSSIONS AND CONCLUSIONS OF LAW

Burden of Proof

Following [Schaffer v. Weast, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 \(Nov. 14, 2005\)](#), and [L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 \(3d Cir. 2006\)](#), the burden of persuasion in IDEA cases, as one element of the burden of proof, is now borne by the party bringing the challenge. As it was Student who filed this due process request, he has the burden of persuasion. Pursuant to [Schaffer](#), though, it only comes into play when neither party introduces preponderant evidence and, as a result, that evidence is fairly evenly balanced.

Special Education Services

The Individuals with Disabilities Education Act (hereinafter, “IDEA”) entitles each child with a disability a free appropriate public education (hereinafter, “FAPE”). The IDEA defines FAPE as special education and related services provided at public expense, under public supervision and direction, and without charge to the child’s family. 34 C.F.R. § 300.17. Special education for a student with disabilities can include instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. 34 C.F.R. § 300.39.

A. Evaluation

In order to be entitled to FAPE, a child must have a disability established under the IDEA. In order to determine if a child has a disability under IDEA, a comprehensive

evaluation must be completed. 34 C.F.R. §300.301(a). In conducting an initial evaluation, a school district must use a “variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability.” 34 C.F.R. § 300.304. A child must be assessed in all areas related to the suspected disability, including social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304. The evaluation must be sufficiently comprehensive to identify all of the child’s special education and related services needs. 34 C.F.R. § 300.304.

The District’s evaluation was not comprehensive. It did not assess Student in all areas of suspected disability. The speech and language pathologist and the occupational therapist did not conduct evaluations of Student, only screenings. J-5. Prior to him entering the District, Student was found to be below age level on tests measuring attention, graphomotor (writing skills), visual motor skills, and processing speed. J-2; NT 598, 602. Yet, no testing was conducted by the therapists to confirm these prior results nor were the prior results sufficient to enable Student to receive speech/language or occupational therapy. In addition, had the therapists conducted evaluations, they would have found Student’s areas of weakness in chronological awareness and memory, rapid naming, auditory processing, and motor skills. J-16.

Based on Student’s auditory issues and slow processing speed, the District should also have completed the full WIAT battery of tests, specifically oral expression, listening comprehension, and math reasoning to determine whether his auditory weaknesses were affecting those areas. NT 844, 845, 846.

B. IEP

The IEP is the cornerstone of the special education program of a student. The IEP must include comprehensive present educational levels; measurable annual goals which point toward the child’s actual educational needs;²⁴ benchmarks or short term objectives relating to the goals to address the child’s disability and from which progress can be monitored;²⁵ a statement of special education and related services and supplementary aids and services which meet the individual needs of the child as reflected in the CER and extend beyond mere classroom accommodations;²⁶ and an explanation of the extent to which the child will be educated with non-disabled children. 34 C.F.R. § 300.320; Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 (3d Cir. 1988).

²⁴ 34 C.F.R. §300.320. Bernardsville Board of Education v. J.H., 42 F.3d 149 (3rd Cir. 1994); Battle v. Commonwealth 629 F.2d 269 (3d Cir. 1980); David P. v. Lower Merion S.D., 1998 U.S. Dis. LEXIS 15160 (E.D. Pa. 1998).

²⁵ Kelsey B. v. Camp Hill School District, ___ F.Supp.2d ___ CV-01-1082 (M.D.Pa. 2003).

²⁶ 34 C.F.R. §300.320;

To be appropriate, the IEP "must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." Shore Regional High Sch. Bd. of Educ. v. P.S. ex rel. P.S., 381 F.3d 194, 198 (3d Cir. 2004); L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008). The relevant inquiries are: "First, has the State complied with the procedures set forth in the Act? And second, is the [IEP] . . . reasonably calculated to enable the child to receive educational benefits?" Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

Regarding the first inquiry in determining FAPE, mere non compliance with IDEA procedures is not enough to find a lack of FAPE. "A child is denied a FAPE only when [a] procedural violation [of the IDEA] results in the loss of educational opportunity or seriously infringes the parents' opportunity to participate in the IEP formation process." R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 940 (9th Cir. 2007); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 860 (6th Cir. 2004); L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008). When no substantive harm occurs, an "IDEA procedural error may be held harmless." R.B., 496 F.3d at 938; see e.g., Robert B. ex rel Bruce B. v. W. Chester Area Sch. Dist., 04-2069, 2005 U.S. Dist. LEXIS 21558, 2005 WL 2396968, at 9 (E.D. Pa. Sept. 27, 2005) (denying relief because although "no regular education teacher was present at the IEP meeting," "the Court finds no evidence in the record that Robert has been denied any necessary service . . . as a result of the flaw"). L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

The ER and IEP were provided to Student without a meeting to discuss the documents until January 12, 2007, almost three months after the ER and IEP were developed by the District. J-5, 6, 7; NT 180, 181. Student did not have the opportunity to provide input into the IEP until the school year was almost half over and he was having difficulties. Had the IEP team met earlier, some or all of the difficulties Student was having could have been addressed and rectified before Student fell farther and farther behind. Moreover, the IEP team, including Student's mother, did not determine whether Student qualified for Extended School Year services. J-9, 11, 26. Instead, Student's case manager made that determination. J-9, 11, 26; NT 206.

In addition to not holding a meeting to discuss the ER and IEP, the NOREP was dated before the ER and IEP. The NOREP was dated October 18, 2006 while the ER and IEP were dated October 23, 2006. J-5, 6, 8. This is clearly not acceptable under the IDEA. The IEP team, including Student's mother, is to determine placement once the IEP is developed, not prior to the development of the ER and IEP.

Regarding the second inquiry in determining FAPE, an IEP must be sufficiently specific to address all of a child's identified needs. Christen G. v. Lower Merion School District, 919 F.Supp. 793 (E.D. Pa. 1996). An IEP which is inadequate in any material way is inappropriate as a matter of law. Rose v. Chester County Intermediate Unit, 1996 WL 238699, aff'd 114 F.3d 1173 (3d Cir. 1997). "[T]he measure and adequacy of an IEP

can only be determined as of the time it is offered to the student, and not at some later date." Fuhrmann ex. rel. Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993) ("Neither the statute nor reason countenance 'Monday morning Quarterbacking' in evaluating the appropriateness of a child's placement."); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995); L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

The IEP does not have services or goals to address Student's slow processing speed,²⁷ low motivation, and lack of self-confidence. J-6.²⁸ There is also no goal or specially designed instruction to address Student's lack of study skills by teaching him how to review and self-correct his work. J-2, 5, 6. It also does not address Student's needs in the area of reading comprehension, fluency, independent critical thinking, and oral expression. NT 102, 105; finding of fact 81.²⁹ In addition, the written expression and math goals do not have baselines. J-6.

Without progress to require such a change, the organizational goal in the IEP decreased the number of days Student needed to have his teachers sign his assignment book from every day in his Section 504 Service Agreement to a minimum of two days per six-day cycle. J-3, 6. This goal was inconsistent with the specially designed instruction in the IEP which required teachers to sign daily. J-6. Moreover, on March 27, 2007, a change was made to Student's IEP which provided one to one tutoring for a minimum of one day out of six in the resource room while any other tutorials were to be provided in a regular education class. J-11. This occurred even though it was clear at that point in time that Student was falling behind in his work and not making progress in typing.

In addition, at no time did the District call an IEP meeting or request changes to the IEP when it was clear Student was having difficulty completing assignments, failing tests, and missing school. More services and supports should have been provided to Student during the school year to help Student progress.

Therefore, as a result of both procedural and substantive errors, the IEP provided to Student was not appropriate.

C. Implementation of IEP

In addition to errors relating to the making of the IEP, Student's IEP was not being implemented. Student's teachers did not sign his assignment book daily, not even when Student's case manager was checking for signatures on a daily basis, nor did the teachers train Student to bring the book to them for signature. J-27; NT 508-509;

²⁷ This error is as a result of the District's failure to conduct a comprehensive evaluation.

²⁸ Student's teachers saw Student's slow processing speed affect his schooling globally for all tasks. NT 541, 816.

²⁹ Student was provided numerous opportunities for additional reading services as a result of his low scores on the 4Sight testing, yet his IEP does not address all of his areas of weakness.

findings of fact 45, 46, 47. Student's binder was not being checked once per cycle to measure Student's organization. J-6, 12, finding of fact 52, 53.³⁰ Student did not receive preferential seating in all classes. There was no support teacher in Student's math class as required under Student's Section 504 plan and subsequent IEP, not even when the District moved him to the algebra class halfway through the school year. J-3,6; NT 173. An assistive technology assessment does not appear to have been completed nor a report generated. J-3, 5; NT 175.

In addition, Student did not receive his tests or quizzes to take home. J-6. Student's teachers did not perform an error analysis when Student received a "C" or lower, nor did he receive one on one tutoring. J-6; finding of fact 41. No review of typing programs was done to determine if a different typing program should be used with Student.

Therefore, Student's IEP was not being implemented.

Tuition Reimbursement

Parents of a child with a disability, who previously received special education and related services from a public agency, may receive tuition reimbursement for enrolling that child in a private school if the public agency "had not made a free appropriate education available to the child in a timely manner prior to that enrollment." Lauren W. v. Deflaminis, 480 F.3d 259, 276 (3d Cir. 2007). A student is entitled to tuition reimbursement if "(1) the court determines the student's IEP is inappropriate and (2) the student demonstrates that the private placement he seeks is proper." Id. (quoting Florence County Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993)); 34 C.F.R. § 300.148. In order to be proper, a private placement must be (1) appropriate, providing significant learning and conferring meaningful benefit, and (2) provided in the least restrictive educational environment. *Id.* However, an appropriate private placement will be not disqualified just because it is more restrictive than a public placement. Ridgewood Bd. of Educ. v. N.E. ex rel. ME., 172 F.3d 238, 249 (3d Cir. 1999). Jonathan H. v. Souderton Area Sch. Dist., 2008 U.S. Dist. LEXIS 21993 (E.D. PA 2008). The Third Circuit has said, "the test for the parents' private placement is that it is appropriate, and not that it is perfect." Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999). Daniel S. v. Council Rock Sch. Dist., 2007 U.S. Dist. LEXIS 81187 (E.D. PA 2007).

As I have already determined the IEP offered to Student was inappropriate, I now must analyze whether the Private School is an appropriate placement for Student. At the Private School, Student is receiving a daily one on one tutorial in his areas of need. finding of fact 118. He is receiving speech and language therapy which focuses on Student's weaknesses in auditory working memory and processing. finding of fact 122.

³⁰ Student's case manager claims there are other pages that show she checked his binder weekly, but that does not appear to be feasible based upon the dates shown on the document. J-12.

He is receiving Visualizing and Verbalizing, Integrated Language Arts, and Language Enrichment to assist him with his written expression, oral expression, listening comprehension, and auditory working memory. finding of facts 119-121. Student's program at the Private School is tailored to his needs.

Although the Private School enrolls only students with learning disabilities, I do not believe that is sufficient in itself to consider Private School an inappropriate placement for Student. Ridgewood Bd. of Educ. v. N.E. ex rel. ME., 172 F.3d 238, 249 (3d Cir. 1999). Jonathan H. v. Souderton Area Sch. Dist., 2008 U.S. Dist. LEXIS 21993 (E.D. PA 2008). Therefore, I find the Private School to be an appropriate placement for Student.

In the analysis for tuition reimbursement, federal regulations permit a limit on reimbursement under certain circumstances. 34 C.F.R. § 300.148. However, I do not find any of these circumstances to apply in this matter.

ORDER

Student's October, 2006 IEP was procedurally and substantively flawed.

Student's October, 2006 IEP was not being implemented.

Student is granted reimbursement for the 2007-2008 school year for tuition at the Private School and for transportation costs.

Marcie Romberger, Esquire