

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: MM
ODR #9509/08-09 AS

Date of Birth:
Xx/xx/xx

Date of Hearing:
February 9, 2009

CLOSED HEARING

Parties to the Hearing:
Ms.

Manheim Township School District
2933 Lititz Pike
Lititz, Pennsylvania 17696

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:
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March 2, 2009

March 10, 2009

Linda M. Valentini, Psy.D.

Background

Student is a primary grade age student, a resident of the Manheim Township School District (hereinafter District). Currently classified as a student with a speech/language impairment, Student was found ineligible for the classifications of specific learning disability and/or other health impaired pursuant to a District evaluation. Student's mother, Ms. (hereinafter Parent) disagreed with the District's determination and requested an Independent Educational Evaluation (hereinafter IEE). The District declined the Parent's request and filed for this hearing to defend its evaluation. At the hearing the Parent sought to add the issue of whether Student is properly placed in an English as a Second Language (ESL) program; the District objected. The hearing officer deferred a determination on whether this issue would be addressed until written closing arguments were available for review.

Student has siblings, and the same dispute exists for each of the children. The Parent, through counsel, requested a consolidated hearing with no objection from the District, therefore all three cases were held on the same day in a consolidated manner. In order that the parties would have time to individualize their closing arguments and so that there would be ample time for the hearing officer to write each decision, the due dates of the written closing arguments were staggered two days apart, with the records closed accordingly. Student's is the first of the three decisions.

Issue¹

Did the Manheim Township School District perform an appropriate evaluation of Student? If not, is Student entitled to an independent educational evaluation (IEE) at public expense?

Findings of Fact

1. Student was born at 33 weeks gestation weighing 4 lbs. 9 oz. Student was slow to develop everyday activities, including crawling, walking, talking, toilet training, feeding self and dressing. Student did not begin to speak until nearly three years of age and did not walk until age two. (S-9)
2. Student received Early Intervention Services in the areas of special instruction and physical therapy pursuant to a May 2003 evaluation, and shortly after an April 2004 re-evaluation physical therapy was decreased. In November 2004 there was a decrease in special instruction and physical therapy was stopped. (S-11)
3. Prior to enrolling in the District, Student attended kindergarten in another School District. (S-11)

¹ As noted below, the ESL issue is not being addressed in this decision.

4. In September 2007 Student was tested for language proficiency in English using the WMLS Normative Update Version 1.1 test. Although the evaluator noted that Student's conversational proficiency seemed limited for age level, she concluded that Student, then a kindergarten student, "had fluent oral English language proficiency, but very limited reading-writing English language proficiency. (S-1)
5. School personnel at the first district expressed concern in November 2007 that Student had deficits in academic and focusing skills. (S-11)
6. While at the first district, Student was assisted by an instructional support team. (S-11)
7. Student entered Kindergarten in the District in late March 2008. The District began providing ESL services to Student because Student had them in the previous school district and was deemed to still be in need of them.² (NT 24, 289)
8. Pursuant to a parental request for an evaluation the District issued a Permission to Evaluate form on April 29, 2008. (NT 40-41; S-8)
9. The Parent and the District met on May 14, 2008 and speech/language and social/emotional concerns were removed from the proposed areas to be evaluated as the child's Kindergarten teacher did not see needs in these areas. (NT 41; S-8)
10. At the conclusion of the 2007-08 school year, Student's kindergarten teacher evaluated Student's classroom performance in a Kindergarten Progress Report. The teacher noted that Student needed improvement in seven of nine math skills categories, needed improvement or was unsatisfactory in four of eight life skills categories, and exhibited "below basic" proficiency in phonological awareness, phonics, fluency, and vocabulary. (S-7)
11. Based on Student's performance on assessments given at the end of the Kindergarten year, the District determined that Student needed intensive support in reading. (NT 293-294)

² Student is not proficient in any non-English language and does not read, speak or write [a foreign language]. The District maintains that Student qualifies for ESL, and that Student cannot be discharged from ESL until Student scores at a certain level on an assessment instrument. The District further maintains that the fact that Student has a diagnosed speech/language disability that might account for Student's inability to pass the ESL exit test is not a factor to be considered and cites PDE guidelines. The Parent gave permission for Student to remain in ESL classes, but is now seeking Student's removal, and cites what she believes are PDE guidelines that over-ride the set that the District is using. This information is noted here, as after reading the parties' briefs, this hearing officer has concluded that a student's participation in ESL is not a subject over which she has authority, whether the student is a special education or a regular education student, unless the provision of ESL is used to supplant a special education student's specially designed instruction. As Student's special education classification is still in dispute, the question of whether or not ESL is supplanting specially designed instruction and thus rendering Student's program inappropriate is not an issue ripe for hearing at this time in this forum.

12. Early in the school year the 1st grade teacher noted speech/language concerns, and the District sought and obtained the Parent's permission to place speech/language assessment back into the Permission to Evaluate. (NT 42; S-8)
13. Student's evaluation was to include assessments of cognitive functioning, academic achievement, attention, and speech/language. (NT 43; S-8)
14. The District's evaluation included a review of written information from the Parent, a review of information from the teachers including classroom assessments, classroom observations, behavior rating scales, and testing administered by the District's psychologist and the District's speech/language pathologist. (NT 58, 63-68, 129; S-9, S-13)
15. In August and September 2008, prior to the District's evaluation, Student was evaluated privately by a private evaluator. The District received the private evaluator's evaluation report on or around October 13, 2008 and incorporated his testing information into its report. (NT 60; S-11, S-13)
16. A District Evaluation Report was presented to the Parent on October 29, 2008 a date which was within 60 school days³ of the date she signed the Permission to Evaluate. The District held an MDT meeting a few days before the written report was issued. Neither mother nor her counsel, nor school District participants other than the school psychologist and the District's attorney, had a copy of the ER at the time of the MDT meeting. The District's psychologist read the ER from her laptop screen to them, and invited discussion. (NT 44, 73-75; S-13)
17. On November 19, 2008, the Parent, in writing, cited her disagreement with the District's evaluation and requested an independent educational evaluation. (S-16)
18. Although the District's psychologist believed that Student's primary language is English, assuming that Student had verbal problems in English, she chose to use the Wechsler Nonverbal Scale of Ability (WNV) to assess cognitive functioning. She did not consider assessing cognitive functioning using verbal tasks. (NT 45-46, 124, 160)
19. The WNV is designed for persons ages 4.0 to 21.11 years "who are neither English-language nor [foreign]-language proficient, or have other language considerations". (HO-3)
20. On the WNV Student received a nonverbal Full Scale IQ score of 93 which is at the 32nd percentile with a 95% confidence interval. Because Student sneezed several times during a timed subtest (coding), the District psychologist re-scored

³ Pennsylvania Special Education regulations allowed 60 school days at the time the PTE was signed. As of July 1, 2008 the requirement changed to 60 calendar days, exclusive of summer break.

- the test eliminating the coding subtest, which resulted in a nonverbal Full Scale IQ score of 101, at the 53rd percentile with a 95% confidence interval. The lower (4-subtest) score is the one she later used to determine ability/achievement discrepancy. (NT 47, 149, 193; S-13)
21. The private evaluator assessed Student using the complete Woodcock Johnson III Tests of Cognitive Abilities. An overall score and the score on General Abilities was not reported because Student's profile was so inconsistent. (NT 202; S-11)
 22. On the private-evaluator-administered WJ III TCA Student's standard scores ranged from 114 (83rd percentile) to 68 (2nd percentile). Notably, given the District psychologist's belief that it was necessary to utilize a nonverbal instrument, the verbal tasks of Verbal Comprehension (standard score 92 at the 29th percentile) and General Information (standard score 108 at the 69th percentile combined to yield a Comprehension-Knowledge score of 100 at the 49th percentile. Comprehension-Knowledge reflects language-based acquired knowledge and the ability to communicate it verbally, and the differential between the two subtests suggests that Student's social language is more developed than academic language. (S-11)
 23. Although it was the District psychologist's belief that it was necessary to utilize a nonverbal instrument, Student's nonverbal skills as assessed by the private evaluator were variable. The nonverbal tasks of Decision Speed (standard score 100 at the 50th percentile) and Visual Matching (standard score 79 at the 8th percentile) yielded a Processing Speed score of 86 at the 18th percentile. The differential between the two subtest scores revealed that Student was better able to process concepts (pictures) than symbols (numbers), and this would have a significant implication for academic performance because learning academic material involves processing symbols. (S-11)
 24. Although the District psychologist gave certain subtests of the Woodcock-Johnson III Tests of Cognitive Abilities Form A, these were invalidated as she later learned that the private evaluator had already administered this version of the test. (NT 48-51)
 25. The District psychologist substituted the Woodcock-Johnson III Tests of Cognitive Abilities Form B (WJ III-TA B). Student's standard scores in reading were as follows: Letter-Word Identification 90 (25th percentile), Word Attack 101 (52nd percentile), Basic Reading Skills 95 (37th percentile). Student's teachers provided information regarding reading for the evaluation. The reading support teacher noted that Student was unable to decode words or read sentences. On the DRA Student's letter-naming fluency was below basic, and first grade sight words were below basic. (S-13)
 26. The District psychologist does not know what a "reading level A" means other than that it is below basic, nor does she know how many leveled steps there are in

- Student's reading program, although she used this information in her report. (NT 135-137; S-13)
27. On the Woodcock-Johnson III Tests of Cognitive Abilities Form B (WJ III-TA B). Student's standard scores in math were as follows Calculation 85 (16th percentile), Applied Problems 93 (32nd percentile), Brief Math 86 (17th percentile). Student's teacher provided information regarding math for the evaluation. Student's teacher said Student's math ability is scattered, in some skills basic and in others below basic. (S-13)
 28. Although she used the information in her report, the District psychologist does not know which of Student's math skills are basic and which are below basic. (NT 139, 157-158; S-13)
 29. The private evaluator administered the Woodcock-Johnson III Tests of Achievement. In the area of math, Student's standard scores were as follows: Brief Math 83 (12th percentile), Calculation 75 (5th percentile) and Applied Problems 91 (28th percentile). (NT 206; S-11)
 30. The District psychologist did not consider administering written (writing, spelling) language tests. Student's teacher provided information regarding writing for the evaluation. She indicated Student's writing is below basic. (NT 150-151; S-13)
 31. The District psychologist administered the Bracken Basic Concept Scale – Third Edition (BBCS-3) to assess school readiness. Notably, this measure is generally used for preschoolers and kindergarten students but Student was a first grader when it was administered. The measure was scored using age cohort. (NT 52-53; S-13)
 32. On the BBCS-3 Student scored as follows expressed in terms of percentage of items correct: Colors 100%, Letters 93%, Numbers/Counting 72%, Sizes/Comparison 73%, Shapes 70%. Student's School Readiness was Delayed, in the 8th percentile of age-peers, and Receptive School Readiness was Delayed, at standard score 79, also at the 8th percentile. (S-13)
 33. Although the District psychologist administered the Beery-Buktenica Developmental Test of Visual-Motor Integration she considered her results invalid because Student had been administered this instrument by the private evaluator several weeks prior. (NT 57-58; S-13)
 34. The District psychologist concluded that Student did not have a specific learning disability. She utilized an ability/achievement discrepancy model that compared Student's cognitive functioning as assessed on the WNV with Student's academic achievement as assessed on the WJ III-TA B. (NT 76)

35. Rather than using published tables, one of the District's psychologists has devised a statistical formula for comparing ability and achievement using a regression to the mean. The District called no witnesses to explain the design, purpose, functionality or limitations of this unpublished and untested computer program, and the District's psychologist was unable to explain it at the hearing. The District no longer uses this formula.⁴ (NT 77-79, 81-83; HO-1)
36. Although Student's teacher noted that Student was lacking so many basic skills that it was hard for Student to catch up with the other students, the District psychologist testified this was "a teacher's opinion", and the psychologist maintained that "[Student] doesn't exhibit a severe discrepancy, that's not a learning disability". (NT 141; S-13)
37. The District psychologist herself, and reportedly the other school staff on the multidisciplinary evaluation team, believed that Student did not require special education for a specific learning disability as Student was already receiving a program that included reading support, math support and ESL support, and was already receiving modifications to assessments and assignments. (NT 77, 141, 143-144, 146-147, 163)
38. The District concluded, based on its discrepancy formula and despite the reports from the classroom teacher, that Student did not have a specific learning disability in reading, math, or writing, although the District psychologist did not assess Student in the area of written language. (S-13)
39. The private evaluator concluded that Student has a specific learning disability in the areas of math and reading, and that Student's disability has to do with processing symbols, but that this does not necessarily translate into Student's being put into a special education program. (NT 213; S-11)
40. The private evaluator recommended teaching Student reading and math skills using programs specifically developed for students with learning disabilities. He noted that Student's progress needs to be monitored to determine if Student is learning what is being taught and that mother should be made aware of the teaching techniques being used in school so she can use similar techniques at home. (S-11)
41. Student's attention was assessed through the Connors' Behavior Rating Scales (L), Parent and Teacher Versions. The Parent's endorsements resulted in a clinically significant score for the presence of both Inattentive Type and Hyperactive-Impulsive Type of Attention Deficit Hyperactivity Disorder

⁴ The District now considers all students who fall at or below the 10th percentile in an academic area as qualifying for specially designed instruction. Student's percentiles were above this cut-off criterion on the WJ III-TA B but fell at the 8th percentile on the BBCS-3 in school readiness.

- (ADHD), while the teacher's ratings did not reach clinical significance.⁵ (NT 69-71; S-13)
42. The District concluded that Student did not qualify for the classification of Other Health Impaired. (S-13)
 43. A District Speech/Language pathologist administered the Photo Articulation Test-3 to assess articulation skills, the Clinical Evaluation of Language Fundamentals-4 (CELF-4) to assess receptive and expressive language skills; the Expressive One-Word Picture Vocabulary Test-2003 to assess general vocabulary, conceptual knowledge, naming ability and determine whether there are word-finding difficulties; and the Language Processing Test=Revised (LPT-3) to assess ability to attach meaning to spoken language. (S-13)
 44. The Photo Articulation Test-3 found a mild articulation disorder. The CELF-4 (average range 85-115, mean 100) yielded a standard score of 73 on the Core Language Index, a standard score of 86 on the Receptive Language Index, and a standard score of 73 on the Expressive Language Index. The Expressive One-Word Picture Vocabulary Test-2003 (average range 85-115, mean 100) yielded a standard score of 78. The LPT-3 (average range 85-115, mean 100) yielded a Total Test standard score of 82. (S-13)
 45. Results of the speech/language assessment were that Student had a mild articulation disorder and a receptive and an expressive language disorder. The speech/language pathologist concluded that Student qualified as a student with a speech/language impairment and recommended that Student receive speech/language support. (S-13)
 46. The District concluded that Student is an eligible student in the area of Speech/Language Impairment. (NT 80; S-13)
 47. The District recommended that Student be reassessed in May 2009 given that Student was young at the time of the evaluation and can change a great deal in a short amount of time. (NT 80-81)
 48. Student receives 30 minutes a day of reading support with a reading specialist, which consists of lessons developed in conjunction with the classroom teacher that focus on Student's specific needs. The instruction is explicitly focused on learning how to read. (NT 293-295)
 49. Student also receives additional support in Math once a week for 15 or 20 minutes to help develop basic math skills. (NT 295)

⁵ Symptoms of ADHD must be seen in more than one setting in order for the diagnosis to be conferred, according to the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV) published by the American Psychiatric Association.

50. Student receives an hour of pull-out ESL instruction daily that is primarily focused on language functions. (NT 289)

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.⁶ 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. This hearing officer found the District's psychologist in general not to be a credible witness, and the reasons for this are reflected in the findings of fact above. The school principal's testimony was largely informational and was relied upon for discrete facts rather than substantive conclusions. Although the private evaluator was generally credible, his equivocation both in his report and in his testimony about whether or not to classify Student (although he identified Student as learning disabled) and whether or not Student should receive special education programming (although recommending that Student receive the types of instruction used for learning disabled children) was not helpful in this legal forum. Although these nuanced considerations are appropriate in a consultation role in the context of a discussion, a more black and white, or at least light grey and dark grey, perspective would have been more helpful to a trier of fact, even though the trier of fact, in this case, is a psychologist.

Legal Basis

Burden of Proof

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). As the District asked for this

⁶ 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).

hearing, the District bears the burden of persuasion. However, application of the burden of persuasion 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.

Special Education

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), 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).

Child Find

IDEA’s so-called “Child Find” provision requires that states ensure that:

“...All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services.” 20 U.S.C. § 1412(a)(3).

A ‘child with a disability’ means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, **and** who, by reason thereof, needs special education and related services. (emphasis added) 34 C.F.R. §300.7

Evaluations

IDEA 2004 provides, at Section 614(b)(2) that

In conducting the evaluation the local educational agency shall

Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--

Whether the child is a child with a disability; and

The content of the child’s individualized education program...

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 under this section--

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).

In the instant matter, the district has the burden of proving that its evaluation was appropriate. IDEA 2004 at Section 615(b)(6) provides for the opportunity for any party to present a complaint - with respect to any matter relating to the identification, evaluation, or educational placement of the child, and for that complaint to be resolved at a due process hearing. An appropriate remedy for a district's failure to provide an appropriate evaluation for a student is the awarding of an independent educational evaluation at the district's expense. This right is explained in the implementing regulations of IDEA 2004:

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, without unnecessary delay, either file a due process complaint notice to request a hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency files a due process complaint notice to request 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).

Discussion

In order to be eligible for special education a student has to have a disability (or in Pennsylvania, meet criteria for giftedness) and by virtue thereof require specially designed instruction. Eligibility is determined by an evaluation that is appropriate under the IDEA. Children must be evaluated in all areas of suspected exceptionality, so that appropriate classifications, if any, may be determined, and so that the child's subsequent IEP including present levels (baselines), goals and objectives, specially designed instruction and supportive services can combine to form an appropriately comprehensive plan of education.

Although Parent's closing argument alleged inappropriateness in both the District's evaluation and the District's IEP, only the evaluation will be addressed here, as in the instant matter only the evaluation was at issue.⁷

In its opening statement, the District as the filing party established the correct parameters of this matter: "The District will show that its evaluations were appropriate in all ways. It doesn't matter if another school psychologist or another team would have come to a different conclusion..." Bearing this legally correct statement in mind, and in consideration of all the evidence presented however, this hearing officer finds the District's evaluation inappropriate for three reasons.

First, there is no evidence that the District psychologist attempted to ascertain directly from the Parent or from any of Student's teachers whether or not Student was fluent in English. She made the assumption that since Student was in ESL, language issues would interfere with assessment of Student's cognitive abilities. This failure to ascertain Student's English proficiency from reliable sources led to a flaw in the District's evaluation. Instead of using one of the several respected and age appropriate instruments assessing intelligence in young children along various cluster skills, the District psychologist utilized a brief, 4-subtest, nonverbal measure that is designed for persons age 4 through age 21.11. This instrument is designed for test subjects "who are neither English-language nor [foreign]-language proficient, or have other language considerations". The WNV was wholly inadequate as a measure of Student's cognitive ability, and the fact that the private evaluator and the District's speech/language

⁷ Insofar as the Parent is making the point that an inappropriate evaluation leads to an inappropriate IEP, the closing arguments referencing the IEP are acknowledged but will not be considered in this decision.

pathologist were both able to assess Student in English demonstrates that the use of this inadequate instrument was totally unnecessary.

The use of this too brief, and very circumscribed instrument led to yet another major flaw in the District's evaluation, that is that the results from the WNV were used in the formula that determined whether or not there was a significant discrepancy between Student's cognitive ability and achievement. Using the Full Scale IQ, which is comprised of verbal, nonverbal, attention, memory and processing skills (among others, depending on the test), is the standard method for ascertaining discrepancy. A discrepancy comparison using only one dimension of cognition is inappropriate, and in Student's case was particularly inappropriate given the great inconsistency among the subsets of Student's cognitive scores found by the private evaluator, information to which the District's evaluator had access two weeks before issuing her report.

Whether or not using a discrepancy model to determine eligibility and classification is appropriate is not going to be addressed here. The discrepancy model, when used with scientific rigor, is a legitimate tool that provides some degree of assurance of standardization when determining whether a child has a specific learning disability. However, the formula used by the District psychologist in itself presents a grave concern. There are a number of published comparison tables in manuals for cognitive and achievement tests, and there is a web-based program that some psychologists use when they need to ascertain discrepancy. In this case the District psychologist used a method (plugging numbers into a formula) that she testified was developed by another psychologist in the District. The District evaluator could not explain the formula, how it had been developed, by whom it had been developed, the research/statistics credentials of the person who had developed it and any process of determining that the formula was valid and reliable. What the District psychologist was able to testify to was that the formula is no longer used in the District.

With respect to the WNV and its use in the formula which was itself questionable, this hearing officer must reject the District's closing argument assertion that the assessments used to evaluate Student "are among the best-know [sic] and most widely-accepted assessments used for determining students' developmental, functional, and achievement information...selected and administered because they are commonly used and widely-accepted for assessing students' cognitive ability, academic achievement, and development". The WNV is not commonly used and widely accepted in assessing young children, and was inappropriate for assessing the totality of Student's cognitive functioning and whether or not Student has a specific learning disability.

The second major area of concern this hearing officer has about the District's evaluation and recommendations is that although the District psychologist received, read, incorporated and said she considered the private evaluator's evaluation, she did not provide any explanation in her testimony or in her report why her conclusions differed from his. This is not to say that she could not have legitimate professional differences, but given that she inserted his findings into her evaluation it is troublesome that she then appeared to ignore the data she had incorporated. Equally as troubling, and related, was

the fact that she disregarded the teacher's input in favor of the discrepancy formula, and particularly disturbing was her comment in testimony, "that's a teacher's opinion" and although not reflected in the written transcript this hearing officer made note that her voice tone and inflection clearly implied she meant, "that's just a teacher's opinion".

The third major concern about the District's evaluation is that the District psychologist, and by her report the rest of the District staff on Student's team, seemed to have decided that Student did not need to be classified as having a specific learning disability and receive specially designed instruction because Student was already receiving a variety of services (reading support, math support, ESL, one-to-one instruction and modifications of assessments and assignments in class) that made classification and a subsequent well-designed IEP unnecessary. Whether or not Student is entitled to a classification of specific learning disability and/or other health impaired is yet to be determined through an Independent Educational Evaluation, but it is unacceptable and inappropriate to deny Student the classification and programming because of Student's already receiving supports in regular education that may or may not be adequate and are not guaranteed through a legally enforceable IEP.

Finally, this hearing officer must comment that she finds the District's method of conducting the MDT meeting atypical and inappropriate, and the inappropriateness may even rise to the level of denying the Parent meaningful participation in the process. Because of the amount of technical information contained in any ER, and particularly in the ERs for Student and Student's siblings, both the Parent and the child's teachers were seriously disadvantaged by not having a written copy in front of them during the meeting. It was particularly egregious that the District's attorney was given a hard copy but the Parent's attorney was not. The District psychologist defended her practice by explaining that she makes revisions to the document during the meeting; however, these revisions could be made in exactly the same manner while all meeting participants have the draft in front of them, with new hard copies incorporating the agreed upon changes being distributed as soon as they were available. The District is strongly urged, by way of dicta, to abandon this practice and issue its ER's in hard copy to MDE team participants.

Order

It is hereby ordered that:

1. The Manheim Township School District's evaluation of Student is not appropriate.
2. Student must receive an Independent Educational Evaluation at public expense. The Independent Evaluator must, at a minimum:

Review the private evaluator's Evaluation Report
 Review the District's Evaluation Report
 Interview the private evaluator in person or by telephone
 Interview the District psychologist in person or by telephone
 Interview the Parent in person or by telephone
 Interview each of Student's teachers in person or by telephone
 Conduct any additional testing, disseminate any additional rating scales,
 and/or conduct any direct classroom observations that are required to
 determine:

Whether Student qualifies for a classification of specific learning disability;
 Whether Student qualifies for a classification of other health impairment; and
 Whether by virtue of either or both these classifications Student requires specially designed instruction to address needs arising from these deficits.

After the Independent Evaluation is completed, the Independent Evaluator must:

- 1) provide hard copies by US Mail or by email to the District Supervisor of Special Education, the Parent, and the attorneys representing the parties; 2) must in person or by telephone participate in a Multidisciplinary Evaluation Meeting regarding Student wherein the results of the Independent Evaluation are explained and discussed.

The District must reimburse the Independent Evaluator for all aspects of the evaluation process, including participation in the Multidisciplinary Evaluation Meeting.

3. This hearing officer does not have jurisdiction over the District's policies or PDE's policies regarding ESL. However, provision of ESL to Student must not be used as a substitute for classifying Student as having a specific learning disability and/or other health impairment and must not be used as a substitute for specially designed instruction in the event that Student is classified in either or both these categories.

March 10, 2009

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
 Hearing Officer