

*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

ODR No. 9738/08-09 LS

Child's Name: Student

Date of Birth: xx/xx/xx

Dates of Hearing: 4/21/09, 5/07/09, 6/8/09  
7/29/09, 8/03/09

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney:

Angela Januski Evans, Esq.  
Christian & Evans, LLC  
801 Monroe Avenue  
Scranton, PA 18510

School District

Red Lion  
696 Delta Road  
Red Lion, PA 17356-9185

School District Attorney

Christopher Conrad, Esq.  
4200 Crums Mill Road  
Suite B  
Harrisburg, PA 17112

Date Record Closed:

September 2, 2009

Date of Decision:

September 17, 2009

Hearing Officer:

Anne L. Carroll, Esq.

### **INTRODUCTION AND PROCEDURAL HISTORY**

Student is beginning senior year in the Red Lion School District. Student's original IDEA eligibility category, MR, was changed to Specific Learning Disability (SLD) in reading and written expression after a District reevaluation in September 2006. Parent believes that Student's learning disabilities arise from a significant language processing disorder.

Parent filed the due process complaint in this matter to obtain compensatory education for approximately half of the 2006/2007 school year (9<sup>th</sup> grade—from February 19, 2007) through the end of the 2008/2009 (11<sup>th</sup> grade) school year, including ESY services. Parent also seeks reimbursement for an independent neuropsychological evaluation Student obtained, reimbursement for tutoring services and an independent transition evaluation.

The hearing was held in five sessions between April 21 and August 3, 2009. Based upon the findings of fact and reasons set forth below, the District will be ordered to provide Student with compensatory education based upon the District's failure to provide Student with a free appropriate public education (FAPE) in many respects from the middle of Student's 9<sup>th</sup> grade year. Parent will also be awarded reimbursement for the independent neuropsychological evaluation Student obtained in February 2007, and the District will be ordered to provide an independent transition evaluation and appropriate transition services to Student.

## **ISSUES**

1. Did the Red Lion School District provide Student with an appropriate academic program in reading, math written expression and content areas within the District's regular high school curriculum from February 2007 through the end of the 2008/2009 school year?
2. Has the Red Lion School District provided Student with appropriate transition services and speech/language therapy?
3. Should the Red Lion School District have provided ESY services/additional ESY services for Student at any time from the summer of 2007 through the summer of 2009?
4. If the Red Lion School District has not met its FAPE obligation to Student for any reason, is Student entitled to compensatory education, and if so, for what period, in what form and in what amount?
5. Is the Red Lion School District required to reimburse Student's Parent for the costs of an independent neuropsychological evaluation and for private tutoring in reading that Parent provided for Student?
6. Is the Red Lion School District required to provide an independent transition evaluation for Student ?

## **FINDINGS OF FACT**

1. Student is a teen-aged child, born xx/xx/xx. There is no dispute that Student is a resident of the Red Lion School District and is eligible for special education services. (N.T. pp. 31; P-19)
2. The Red Lion School District has given Student a current diagnosis of specific learning disability (SLD) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); ( N.T. p. 29, 62; P-19, p. 9)
3. The District conducted a reevaluation of Student in May 2006, at the end of Student 8<sup>th</sup> grade year, consisting primarily of a review of records but including group achievement testing and curriculum-based assessments. At Student's Mother's request, the District conducted a second reevaluation of Student in September 2006, at the beginning of 9<sup>th</sup> grade, which included updated, individualized intelligence and achievement testing, an auditory processing evaluation and a speech/language evaluation. (N.T. pp. 58, 61, 62, 64, 69, 70, 263, 274; P-4, P-19)

4. As a result of the WISC-IV FSIQ of 78 reported in the reevaluation report (RR) dated October 17, 2006 and a change in Pennsylvania regulations concerning when IQ scores fall within the mental retardation (MR) range, Student's IDEA eligibility category was changed from MR to the current SLD category based upon standardized achievement scores significantly discrepant from Student's FSIQ in reading and written expression. (N.T. pp. 29—31, 39—43, 62, 64, 127; P-19) 144, 207, 219, 263; P-30, S-79)
5. Because the District's speech/language evaluator concluded that Student's language skills were not significantly discrepant from Student intellectual ability, no language disability was identified and Student was determined to be ineligible for speech/language services. (N.T. p. 129; P-19)
6. In November and December 2006, Parent expressed her disagreement with the District's report and requested that the District pay for an independent educational evaluation, which the District denied by letter dated January 2, 2007. The District did not request a due process hearing at any time to support the appropriateness of its October 2006 reevaluation. (N. T. pp. 131—133, 203, 359; P-20, P-21, P-22)
7. In February 2007, Parent obtained an independent neuropsychological evaluation of Student at her own expense. The independent evaluator determined that Student's intellectual functioning was underestimated by the District based upon an undiagnosed processing disorder, particularly in receptive and expressive language, and further opined that Student's learning disabilities arise from Student's language processing deficits. The independent evaluator recommended a more comprehensive speech/language evaluation to delineate the extent of Student's language processing disorder and its effect on learning and school performance. The evaluator also suggested numerous strategies to help Student compensate for Student's language deficits and make better educational progress. (N.T. pp. 134, 146, 360, 361; P-23)
8. After receiving the neuropsychological IEE results, Parent requested an independent speech/language evaluation, which the District agreed to fund based upon the recommendation in the neuropsychological report. The report of speech/language assessments conducted by that independent evaluator concurred with the independent psychologist's conclusion that Student's learning disability is based upon a significant language processing disorder. The independent speech/language evaluator recommended a daily 30 minute session of speech/language therapy centered around eight specific goals directed toward remediating and improving specific language skills, providing environmental supports and teaching compensatory strategies. (N.T. pp. 136, 137, 141, 142, 169, 218; P-32)
9. The District did not adopt the conclusions reached by both independent evaluators that Student has a language-based processing disability, or the recommendation in the independent speech/language evaluation for 30/min/day of speech/language.

therapy, but after two specific requests by Parent, the District added speech/language therapy to Student's educational program beginning in the late fall of 2007 (10<sup>th</sup> grade) for 30 minutes/week of direct 1:1 services. (N.T. pp. 145, 147, 170, 172—177, 295, 297, 316, 319—321; P-23, P-34, P-37<sup>1</sup>)

10. Although speech/language therapy was added to Student's 2008/2009 IEP as a related service in May 2008, that IEP included no speech/language goals. The 2008/2009 IEP was revised in the fall of 2008 to add speech goals in the areas of defining idioms and accurately re-telling a story. Student's speech therapy focuses on strategies for compensating for Student's memory and processing deficits through visualizing and verbalizing. Student is benefiting from the speech/language therapy Student receives. Although Student still struggles with processing large amounts of information presented quickly, Student is improving and has developed some helpful techniques and strategies, with which Student continues to need practice. (N.T. pp. 322, 324—328, 330, 331, 558, 559, 562—565; S-82)
11. Based upon the results of the May 2006 RR in which Student's IDEA eligibility was still based upon the MR disability category, the IEP developed for Student's 9<sup>th</sup> grade year (2006/2007) proposed special education classes for math, history, science and reading. The curriculum in content areas would have been based upon adapted 9<sup>th</sup> grade material presented in a form and at a level Student could understand and that would enable Student to be successful. (N.T. pp. 72—75; P-5, p. 5)
12. The May 2006 IEP (9<sup>th</sup> grade) included goals with no baselines or grade levels at which Student would be instructed in reading, and written expression. Goals for math., science and history were stated in terms of mastering the adapted course content as measured by achieving grades of at least 60% in science and 70% in math and history. Present level of educational performance, however, placed Student's reading and comprehension at 52 words/minute at a 4<sup>th</sup> grade level. Based upon a group achievement test administered to Student at the beginning of 8<sup>th</sup> grade, Student's math level was grade 4.1, Reading at 3.6, science at 2.1 and social studies at 4.8. (N.T. pp. 83—88, 91—93, 97—101, 410, 415; P-5)
13. Student's IEP included math goals when Student's disability category was MR, but because a significant discrepancy was not found between Student's intellectual ability and Student's achievement in math in the October 2006 RR, Student was then considered ineligible for special education in math. The school psychologist who conducted the September 2006 reevaluation also relied on the report of Student's above average math grades to conclude that Student does not

---

<sup>1</sup> P-37, the IEP offered to Student by the Red Lion school District for the 2008/2009 school year was not among the exhibits offered into evidence by Parent and admitted into the record at the last hearing session in this matter. (N.T. p. 601) The District also did not offer a copy of that IEP as part of its evidence. Since there was extensive testimony concerning that document and it is most relevant to the issues in dispute, it is hereby admitted into the record *nunc pro tunc*.

- have a specific learning disability in math. Student was placed in co-taught regular education math classes for the 2006/2007, 2007/2008 and 2008/2009 school years, encompassing both the periods when Student was deemed to be eligible for special education in math and when Student was deemed ineligible. The co-taught math classes provide instruction at a slower pace and with lower level materials than college prep classes. (N.T. pp. 127, 130, 143, 209, 241—243, 285, 288, 289, 291, 466—473, 497—499, 504, 505; P-5, P-19, P-30, P-37)
14. The 11<sup>th</sup> grade co-taught math class to which Student was assigned was directed toward developing the skills needed to pass the PSSA tests early in the year, and later focused on practical functional skills such as maintaining a checking account. Student could learn the content of the math curriculum as it was being presented to Student and was very successful with class work, where Student had extensive support. Several days after instruction, however, Student could not remember the material previously presented to Student. Student's performance on tests that Student completed without support, especially benchmark tests, was very low. (N.T. pp. 473, 474, 483, 484)
  15. The District acknowledged that Student has academic needs in all areas of the curriculum. The District believes those needs were fully addressed via specially designed instruction in Student's adapted regular education classes for all areas of the curriculum other than reading, in which Student received instruction in a special education class, and writing, an area in which Student has an identified learning disability. The 2007/2008 IEP included one general goal for all curriculum areas in which Student was to receive instruction in a regular classroom, providing that Student would use the time and resources available to Student in the academic support room to achieve passing grades in Student regular education classes. (N.T. pp. 144, 161, 163, 204, 208; P-30, p.18)
  16. There were no specific goals in Student's 2007/2008 and 2008/2009 IEPs for academic areas other than reading and written expression because the District does not develop goals for eligible students assigned to regular education classes. Classes co-taught by regular and special education teachers are considered regular education classes for which the District does not believe IEP goals are required. There were, therefore, no math or English goals in Student's 2007/2008 and 2008/2009 IEPs for the co-taught classes. (N.T. pp. 39—43, 144, 207, 219, 243, 516, 527, 528, 537; P-30, S-79)
  17. Regular education high school students in the District take classes at levels designated basic, comprehensive, college prep and honors AP. Some regular education classes, such as a reading class that Parent requested for Student, are not open to a learning support student. Student requires a co-taught English class with a modified curriculum in order to succeed in an English class. (N.T. pp. 116—124, 228—231, 538, 539; P-14, P-17)

18. Student would be unlikely to succeed in the rigorous college prep curriculum regardless of the level of supports, services and modifications provided for Student because of the pace of those classes, the amount and level of the material presented that the students are expected to master, and the amount of reading and writing required. Due to Student's memory and processing deficits, Student would also have a very difficult time in college, and would need significant supports in order to succeed. (N.T. pp. 220, 252, 329, 401, 407, 446, 447, 453, 454, 478—480, 522, 523, 539—543, 548, 577, 579, 581)
19. The District considers passing grades achieved in regular education classes a sufficient demonstration of progress in content areas for eligible students. In addition to grades, the District reported progress monitoring data for Student's IEP goals with respect to instruction provided in Student's special education reading class. (N.T. pp. 148, 149, 240, 576; S-41, S-51, S-62, S-71, S-76, S-78)
20. Student's 2007/2008 IEP included three reading goals, one each for decoding, fluency and comprehension. The IEP also included a goal to write a five sentence paragraph in which Student would achieve three consecutive proficient scores of at least a 3 on the District's writing rubric in the areas of focus, content, organization, style and conventions. A second writing goal provided for Student to add 5 additional words/minute to a story written in response to a prompt. Baselines and grade levels were not included in the IEP, but were to be developed after the school year began. (N.T. pp. 157—162; P-30, pp. 13—16)
21. The District incorporated many of the learning strategies suggested in the independent neuropsychological evaluation into the specially designed instruction in Student's final IEP for the 2007/2008 school year. The speech/language therapy Student has received since November 2007 is consistent with the neuropsychologist's recommendations. (N.T. pp.164, 324, 325, 328, 330, 365; P-23, P-30)
22. Student's 2008/2009 IEP (11<sup>th</sup> grade) included goals for increasing reading fluency at the 3<sup>rd</sup> grade reading level and reading comprehension at the 4<sup>th</sup> grade level. The writing goal was the same as the prior IEP with respect to achieving proficiency scores, but the output requirement was reduced from 5 to 3 paragraphs. The IEP also included a self-advocacy goal for Student to request tutoring when needed. (N.T. pp. 179—182, 204, 205; P-37, pp. 11—14)
23. Since Student reached age 16 during the period covered by the May 2006 IEP, it included transition services and activities for post-secondary education and employment outcomes and independent living. Activities included completing an interest inventory and career research, as well as participating in an independent living class, job shadowing and a graduation project which involves exploring career interests. All District high school students are required to complete a graduation project. (N.T. pp.76—79; P-5, pp. 7, 8)

24. The 2007/2008 IEP included the same transition activities listed in the 2006/2007 IEP with the addition of reading instruction by a reading specialist as a post-secondary education outcome service/activity and accessing community resources as part of the independent living outcome. The independent living class was dropped. (N.T. pp. 157—159; P-30, pp. 11, 12)
25. Transition activities and services included in Student's 2008/2009 IEP were directed entirely toward a post-secondary education outcome. Reading instruction was dropped. Student was to pass Student's 11<sup>th</sup> grade courses, identify schools Student might want to attend, learn more about them and attend a career presentation. Accessing community resources as part of an independent living outcome was the only activity repeated from the 2007/2008 IEP. Attending a career presentation was the single IEP transition goal. (N.T. pp. 178, 179; P-30, P-37)
26. Student's reading instruction in 9<sup>th</sup> grade was provided in a special education class and was directed toward decoding and comprehension using novels, short stories and other fiction passage as instructional materials. A QRI (Qualitative Reading Inventory) administered by Student's teacher at the beginning of the school year established that Student was able to read in isolation 100% of words at the 1<sup>st</sup> grade level, 95% at the 2<sup>nd</sup> grade level and 90% of the words at the 3<sup>rd</sup> grade level. Within passages, Student was able to read correctly 99% of the words at the 2<sup>nd</sup> grade level, 98% at the 3<sup>rd</sup> grade level and 96% at the 4<sup>th</sup> grade level. With respect to comprehension, measured on the same reading passages, Student answered 100% of the questions correctly at the 2<sup>nd</sup> grade level, 75% at the 3<sup>rd</sup> grade level and 38% at the 4<sup>th</sup> grade level. Several weeks later, Student's comprehension at the 4<sup>th</sup> grade level had increased to 44%. (N.T. pp. 377, 379—384; S-22)
27. Student's reading teacher was unable to recall specifically the teaching strategies and methods she used for Student's reading instruction. The reading program was centered on comprehension, vocabulary acquisition, phonics, reading and writing, but very little writing was required. Reading instruction in the special education class was provided at a far slower pace and with different material than in a regular education class and little independent reading was required. Student's reading level was lower than the other students in Student's 9<sup>th</sup> grade special education class. (N.T. pp. 382, 385—387, 417)
28. Student's reading instruction in 10<sup>th</sup> grade was focused particularly on decoding. Student's progress in fluency at the 3<sup>rd</sup> grade reading level was monitored and increased from 40 words correct/minute at the end of October 2007 to 110 wcpm at the beginning of May 2008. Student's progress with respect to meeting Student's fluency goals fluctuated throughout the year. When Student fell below Student's target, the teacher had Student repeat the passage until Student's fluency on it increased. (N.T. pp. 389—395, 421; S-51)

29. Student's reading comprehension instruction and monitoring was also provided at the 3<sup>rd</sup> grade level during the 2007/2008 (10<sup>th</sup> grade) school year. Student's progress in comprehension also fluctuated during the school year, but Student moved to the 4<sup>th</sup> grade level by the end of 10<sup>th</sup> grade. During 10<sup>th</sup> grade, Student's reading instruction was provided via the Wilson program. During 10<sup>th</sup> grade, Student was the best reader in Student's learning support class due to a better background in phonics. (N.T. pp. 395—399, 426; P-30, S-51)
30. Part of Student's reading instruction in both 9<sup>th</sup> and 10<sup>th</sup> grades consisted of the teacher reading to the students because she did not have materials at a low enough level for the students themselves to read. (N.T. pp. 384—387, 435—437)
31. In 11<sup>th</sup> grade, Student's progress in reading comprehension and fluency were still monitored at the 3<sup>rd</sup> grade level because that was the level at which beginning of the year assessments placed Student. Student's progress in comprehension was somewhat more consistent, but showed several steep declines during the fall of 2008, and a less severe decline at the end of the second marking period in January 2009. Student's reading fluency improved through the second marking period, but Student did not reach Student's goal of 120 wcpm by the end of the second marking period. (N.T. pp. 402—404, 427—429; S-71)
32. Student's reading teacher for 9<sup>th</sup> and 10<sup>th</sup> grades believes that Student has a language processing disorder. (N.T. p. 432)
33. Since September 2008, Student received tutoring in reading instruction, at Parent's expense, from a District teacher trained in the Orton-Gillingham method. That method of reading instruction was recommended by the independent neuropsychologist as a program likely to be beneficial to Student in light of Student's language processing deficits. The tutor has developed her own lessons based upon Orton-Gillingham techniques. (N.T. pp.193, 334, 336, 337; P-23)
34. Prior to beginning with Student's current tutor, Student's Mother had provided tutoring services for Student from another District teacher in 8<sup>th</sup> and 9<sup>th</sup> grades, including the summers of 2006 and 2007. During the summer of 2007, after 9<sup>th</sup> grade, the District paid for 20 hours of tutoring services as an ESY program for Student. Parent also paid for additional services. (N.T. pp. 361—363, 367, 368)
35. During tutoring sessions, Student works primarily on phonological processing skills. According to reading assessments administered to Student in the fall of 2008 and the spring of 2009, Student has advanced approximately one grade level. Student demonstrated some loss of skills after a two week period when Student did not meet with the tutor. Student would benefit from ESY services in reading to address Student's severe fluency problems. (N.T. pp. 336, 339, 340, 346, 347)

36. Student's reading instruction, particularly in the Wilson method that Student was receiving during the 2007/2008 school year, provided Student with appropriate instruction for vocabulary development and comprehension. Student would benefit from more Orton-Gillingham based instruction to increase Student's fluency and comprehension. (N.T. pp. 345, 348; P-30)
37. Student's 9<sup>th</sup> and 10<sup>th</sup> grade reading teacher believed that Student's English teacher, not she, was responsible for monitoring Student's written expression goals. The special education co-teacher in Student's 11th grade English class believed it was the reading teacher's responsibility to monitor the written expression goals in Student's IEP. The regular education co-teacher in Student's English class thought she and the special education co-teacher shared that responsibility, but did not believe she was responsible for providing quarterly progress monitoring reports. (N.T. pp. 416, 529, 552, 553)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **A. Introduction**

Parent's principal claim in this case, that Student was denied FAPE throughout Student high school years, is based upon: (1) alleged deficiencies in Student's educational program in reading, math, written expression from February 2007, two years before the complaint was filed,<sup>2</sup> through the end of the 2008/2009 school year; (2) the alleged lack of an appropriate transition program and (3) allegedly inadequate speech/language services. The underlying issue on which all claims are premised is Parent's contention that the District did not appropriately determine Student's eligibility category at the beginning of 9<sup>th</sup> grade.

---

<sup>2</sup> Although Parent challenged the appropriateness of the IEP offered in May 2006 for the 2006/2007 school year, she recognized that when IDEA was re-authorized in 2004, it included amendments limiting the contents of due process complaints to "...a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint." 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. §300.507(a)(2). In addition, a request for a hearing must be made "within two years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. §300.511(e). In light of the foregoing limitations, Parent limited her request for compensatory education for the 2006/2007 school year to the period beginning February 19, 2007, two years before the due process complaint in this case was filed.

Although the parties could not resolve their differences concerning these matters, it is apparent that the District acted in good faith to provide Student with instruction that met IDEA standards. To the credit of the parties and counsel, the hearing sessions were conducted with the utmost civility and it was quite evident that there was no personal animosity, despite the obviously deeply held beliefs of both parties in the correctness of their respective legal positions. Unfortunately, the District's interpretation of its obligations based on federal and state standards was, in many respects, erroneous. Consequently, from 9<sup>th</sup> through 11<sup>th</sup> grades, Student was either denied services the District should have provided to Student, or the services Student received were inadequate to assure that Student made meaningful progress in basic academic skills. In addition, because the District did not properly consider the underlying causes of Student's difficulties in acquiring, retaining and using the academic skills Student was taught, the District failed to provide Student with appropriate services to help Student overcome Student's significant processing deficits. Finally, the transition activities/services the District is required by the IDEA statute and regulations to provide to Student have not adequately advanced Student's preparation for post-secondary life. Student is, therefore, entitled to equitable relief designed to remedy the District's lapses to the extent possible.

#### B. General Legal Standards

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*,

one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible child’s program affords him or Student the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/Student unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley*; *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

An eligible student who has not received more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *M.C. v. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996); *Heather D. v. Northampton Area School District*, 511 F.Supp.2d 549 (E.D. Pa. 2007). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District*.

### C. Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other

civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parent has challenged the appropriateness of the District's program provided to Student in 9<sup>th</sup> 10<sup>th</sup> and 11<sup>th</sup> grades, Parent must establish that the District's IEPs were not reasonably calculated to assure that Student would receive a meaningful educational benefit from the proffered services at the time the IEP was offered.

D. Evaluation Results/Language Impairment

The heart of Parent's disagreement with the District's programming for Student, particularly in 10<sup>th</sup> and 11<sup>th</sup> grades, lies in the inconsistent results of evaluations completed by the District and by independent evaluators with respect to whether Student has a language processing disability. Parent's underlying contention that the District never properly determined the source of Student's learning difficulties is correct. The District's most recent reevaluation, and indeed, prior evaluations, relied heavily, nearly exclusively, upon standardized tests of intellectual functioning and academic achievement to conclude, first, that Student was IDEA eligible due to mental retardation, and later, that Student actually has learning disabilities, but only in reading and written expression. The District's conclusion that Student does not need speech/language services because Student does not have a language impairment was drawn from its own speech/language evaluation. The results of that evaluation, however, were flawed in that the evaluator (who did not testify at the hearing) apparently applied a discrepancy analysis to conclude that Student's language deficits were commensurate with Student's intellectual capacity.

In reliance upon that conclusion, and the means the evaluator used to reach it, the District discounted the results of both an independent neuropsychological evaluation

Parent obtained and an independent speech/language evaluation that the District agreed to provide at Parent's request, and thereby refused to acknowledge that Student's disability is based primarily upon a language processing deficit. The evaluation results and logic support Parent's position. Student's lowest WISC-IV Index scores were in Verbal Comprehension (73) and Processing Speed (73). (P-19) The inference is inescapable that if serious language processing deficits are the true source of Student's disabilities and depressed Student's FSIQ, as indicated in the independent evaluation reports, tests to measure language will necessarily be consistent with Student's intellectual capacity, as adversely impacted by a language processing disorder. Consequently, it is illogical to base a conclusion that Student does not have a language impairment upon a discrepancy analysis.

The District failed to fully consider the implications for Student's education of disregarding the conclusions of two independent evaluators who disagreed with the District's speech/language evaluation, thereby assuring that the District could not develop a truly appropriate program that would effectively address all of Student's educational needs. The testimony of District teachers and the speech pathologist who worked with Student also provided ample evidence of language processing deficits based upon Student's performance that is entirely consistent with the independent evaluation reports. *See*, F.F. 10, 14, 32, 35, 36.

#### E. IEE Reimbursement

The District applied the wrong legal standard when it denied Parent's IEE request after the District's most recent reevaluation in the fall of 2006. In accordance with 34 C.F.R. §300.502(b)(2), upon receiving Parent's IEE request, the District was required to

either (i) file a due process complaint for a hearing to demonstrate that its evaluation was appropriate or (ii) provide the evaluation. The District did neither, and when questioned as to why the District refused the IEE, the District's Supervisor of Special Education noted that Parent had not provided sufficient reasons for her disagreement with the District's evaluation. *See, e.g.*, N.T. p. 202.

The IDEA regulations governing IEEs, however, explicitly provide that the District may not "require the parent to provide an explanation and may not unreasonably delay either providing the independent evaluation at public expense or filing a due process complaint...." §300.502(b)(4). Since the District did not file a due process complaint in the 3 years that have elapsed since Parent requested an independent psycho-educational evaluation, it is no longer possible for the District to defend its evaluation in a hearing requested in a due process complaint filed within a reasonable time following the IEE request. For that reason alone, the District would be required to reimburse Parent for the cost of the IEE conducted in February 2007, despite the District's contention that Parent must prove a deprivation of educational benefit in order to obtain reimbursement. By requiring the District to support its evaluation via a due process hearing if it refuses to grant a parental request for an independent evaluation, the IDEA regulations place the burden of persuasion on the District with respect to this issue. Consequently, in this limited circumstance, it would have been the District's burden to establish the absence of a deprivation of educational benefit.

In this case, however, which party bears the burden of persuasion is entirely irrelevant, since the evidence is far from equipoise. The District's September 2006 RR was not appropriate with respect to the conclusions on which the District based future

programming for Student. The language processing disorder first identified in the independent neuropsychological report logically accounts for the full range of Student's needs as reflected in the record.

Moreover, notwithstanding the District's rejection of the conclusions reached in the independent evaluation, the District nevertheless used and relied upon the independent neuropsychological evaluation in a number of areas. The District incorporated some of the evaluator's recommendations in Student's IEP for the 2007/2008 school year and proposed IEP for 2008/2009. (P-30, P-37) In addition, the District would not have provided the speech/language services which Student needed and which benefited Student if Parent had not insisted that those services begin after the neuropsychological evaluation led to the independent speech/language evaluation. The District's use of the IEE for its own purposes provides ample basis for ordering reimbursement of Parent's out of pocket expenses in obtaining the evaluation.

#### F. Annual Goals

While acknowledging that an eligible student's IEP must include specially designed instruction and/or other supports and modifications based upon all identified needs, it is the District's position that the Pennsylvania Department of Education does not require school districts to develop annual goals for eligible students placed in regular education classes. (N.T. pp. 65—68, ) The District's position is based upon a form, an annotated IEP, provided through the Pennsylvania Training and Technical Assistance Network (PaTTAN) website. (N.T. p. 259; S-79) The District's reliance on that resource as an upper limit of its responsibility for offering appropriate IEPs to an eligible student is misplaced for several reasons. First and most important, as the District acknowledged

several times, the annotated form provides guidance only. Although anyone reviewing the annotated IEP might fairly conclude that omitting anything suggested by the form will likely result in an IEP that is not procedurally appropriate, the converse is not true. The District cannot, therefore, assume that following the guided form assures an IEP that is automatically compliant with the applicable procedural standards, and certainly cannot assume that an IEP which conforms to the Annotated IEP will necessarily be considered substantively appropriate, if the goals included in the IEP are not reasonably calculated to assure meaningful progress in all academic areas affected by the child's disability.

Second, the guidance provided in the Annotated IEP does not support the District's position that annual goals are not required for regular education classes that provide specially designed instruction or significant instructional or performance modifications designed to address needs arising from a student's identified disabilities. Describing the purpose of annual goals and how they should be written, the Annotated IEP includes the following language on p. 15: "Annual goals are required for areas that are directly affected by the student's disability." (S-79; Emphasis added)

In light of that language, it is difficult to understand why the District believes that annual goals for regular education classes never need to be included in an eligible student's IEP. Moreover, since the record in this case establishes that Student is many years below grade level in basic academic skills, the District cannot reasonably take the position that Student's learning disabilities, even if limited to reading and written expression as the District contends, do not affect Student's ability to make meaningful progress in the general education curriculum in content areas such as English and math. English certainly requires reading and writing. The math courses that Student has

received during the high school years in co-taught classes with a “modified” grade level curriculum in algebra and geometry, do not have the same content level of in other 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> grade regular education math classes in the District. (F.F. 16, 17)

The District does not contend that Student’s identified needs changed when the District concluded that the FSIQ score Student obtained on the WISC-IV administered to Student in 2006 changed Student’s disability category from MR to SLD. (F.F. 15) Nevertheless, based solely upon an ability/achievement discrepancy analysis of reading, written expression and math, the District concluded that Student’s IEP would no longer include math goals. (F.F. 4, 13, 16)

There was nothing inappropriate in placing Student in co-taught math classes as long as Student’s functional level of basic math skills was appropriately determined, Student’s educational needs with respect to math instruction were appropriately identified and addressed, and Student’s progress in math was appropriately monitored. None of those issues, however, were considered by the District as part of Student’s special education program in 10<sup>th</sup> and 11<sup>th</sup> grades. Moreover, even if the District were correct in concluding that annual goals were required in math only if Student has an identified learning disability in that area, the District was not required to determine whether Student has a learning disability in math based upon whether Student exhibits a significant discrepancy between intellectual ability and achievement in math, and in this instance, should not have relied upon a discrepancy analysis.

The amendments to the IDEA statute effective on July 1, 2005 explicitly provide that

[W]hen determining whether a child has a specific learning disability...a local education **shall not be required** to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, written

expression basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning.

20 U.S.C. §1414(b)(6)(Emphasis added).

The IDEA statute defines the term “specific learning disability” as

a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

20 U.S.C. §1401(30); 34 C.F.R. §300.8(c)(10). The evidence in this case leaves no doubt, and the District does not dispute, that Student fits all the criteria above, including a marked inability to do math calculations, since Student needs a calculator to add  $1 + 1$  and has great difficulty using the math skills Student is taught without significant support. (N.T. p. 473; F.F.14)

The decision in this case, however, does not depend on whether the District’s perceptions of its procedural obligations are correct with respect to how it determined Student’s learning disabilities, whether Student is eligible for special education services by reason of specific learning disabilities and/or in what areas, or whether Student has a language processing impairment. The only essential inquiry is whether the District substantively considered and addressed all of Student’s educational needs and provided Student with sufficient appropriate instruction to assure meaningful progress.

Unfortunately, the District’s singular focus on developing IEPs for Student that conformed to the District’s perception of the state’s IEP requirements resulted in substantively inappropriate IEPs. None of the IEPs in dispute in this case truly consider how Student’s disability affects Student’s progress in the curriculum, relying instead on Student’s good grades in classes with significant modifications to assure that Student’s

admirable efforts are rewarded with success. As a result, Student remains many years below grade level in reading and Student's current functional levels in math and writing are unknown.

As Parent argues, grades alone cannot be the criteria for meaningful progress when the District itself admits that no level of supports, services and modifications would be sufficient for Student to achieve even passing grades in college prep level academic classes in the high school Student is attending. (F.F. 17, 18) It is difficult to understand how the District can rationally assert that it is adequately preparing Student for post-secondary education at a college level, as provided in the transition plan included in the 2008/2009 IEP, when it admits that given Student's academic skills, particularly in reading, writing and math, Student could not meet the academic demands of regular education classes, especially at the college prep level. (F.F. 18)

In addition to the inappropriate absence of annual goals for math and English in the 2007/2008 and 2008/2009 IEPs, the goals 2006/2007 IEP are vague, unmeasurable and lack baselines. (F.F. 12) Although the District contended that baselines for the reading goals in the later IEPs could not be determined until the beginning of each school year, failing to update the IEPs to include the baseline data masked Student's lack of progress in reading from 9<sup>th</sup> to 11<sup>th</sup> grade established by the need to monitor Student's progress in fluency and comprehension at the 3<sup>rd</sup> grade level for the entire 3 years. (F.F. 26, 29, 31)

With respect to written expression, there was no evidence suggesting that Student made any progress, or evidence concerning how much writing instruction Student was provided. The District produced no progress monitoring data or writing samples, and no

District witness testified to when, how or how frequently Student was taught writing, or who was responsible for providing writing instruction. Neither the reading teacher nor the special education and regular education teachers who taught Student English considered themselves responsible for monitoring Student's progress in writing. (F.F. 37)

Finally, as noted above, Student's overall lack of meaningful academic progress and significant learning throughout Student's high school years is primarily attributable to the District's failure to recognize the significant language processing deficits underlying Student's difficulties with acquiring and retaining sufficient basic skills in reading, writing and math to make reasonable advances in those areas. After the District reluctantly and belatedly began providing Student with speech therapy beginning in November 2007, Student showed some improvement in reading, at least in Student's private tutoring sessions, and Student made progress in the skills and strategies provided by the speech/language therapist. (F.F. 9, 10, 35).

If the District had provided Student with additional reading instruction with the Orton-Gillingham or Wilson methods, and had provided Student with speech therapy of the type that Student received during the 2008/2009 school year, it is likely that Student would have made much better progress in reading. In addition, the District should developed goals for Student's math instruction to assure that Student develops a functional ability in the math skills Student will need throughout Student's adult life and monitored Student's progress toward acquiring those skills. The District should also have assured that Student received sufficient and appropriate instruction in writing and

monitored Student's progress to determine whether Student is acquiring adequate writing skills.

#### H. ESY

There was little direct evidence concerning Student's eligibility for ESY services, but the inescapable inferences from the evidence presented concerning Student's progress, particularly in reading, lead to the conclusion that the District should have provided Student with ESY services. Even if the analysis is limited to regression/recoupment, it is obvious from Student's lack of progress that Student has difficulty retaining skills during the school year. (F.F. 14) In addition, Student's reading tutor noted that Student lost skills after a break in services of only two weeks. (F.F. 35) The District provided no data and no testimony to the contrary.

#### I. Compensatory Education Remedy

Because of the District's failure to provide Student with procedurally and substantively appropriate IEPs from 9<sup>th</sup> to 11<sup>th</sup> grades, and failure to provide sufficient services to meet all of Student's needs, Student is entitled to receive compensatory education. Unfortunately, Parent provided little specific evidence of the appropriate amount and form of compensatory education. The record, however, provides a sufficient basis to conclude that Student should have received significantly more reading instruction and speech therapy than Student received. Consequently, Student will be awarded compensatory tutoring services in reading that equals the amount of reading instruction Student was provided during each school year. Student will also be awarded reading services for the three summers between Student's high school years equal to the hours per week of tutoring services provided by Student's Parent for eight weeks each summer (72

hours). The twenty hours of ESY services provided to Student by the District during the summer of 2007 will be deducted from that portion of the compensatory education award.

(F.F. 34)

Student will also be awarded hour for hour compensatory education equal to the time Student spent in math and English class throughout the relevant period.

Finally, Student will be awarded speech therapy for 2.5 hours/week through the end of the 2007/2008 school year and 2 hours/week for the 2008/2009 school year. The award is based upon the recommendation in the independent speech/language evaluation report, and the amount of speech therapy Student received during the 2008/2009 school year. (F.F. 9; P-32)

#### J. Transition Services

The IDEA federal regulations define transition services for eligible students as follows:

(a) Transition services means a coordinated set of activities for a child with a disability that —

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to postschool activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes —

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

34 C.F.R. § 300.43 Transition services

The transition services provided in Student's high school IEPs fail to meet the foregoing criteria in most, if not all respects. Most basically, the transition services and activities in the IEPs are not coordinated, results-oriented, based on Student's needs and clearly will not facilitate Student's movement to adult life. Consequently, Parent's request for an independent transition evaluation will be granted. In addition, the District will be directed to develop and implement a transition plan with the assistance of a qualified professional.

**ORDER**

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

1. Obtain an invoice from Dr. G for the neuropsychological evaluation of Student she completed in 2007 and reimburse that amount to the parent.
2. Arrange for an independent transition evaluation of Student to be completed no later than December 1, 2009 unless the parties agree otherwise.
3. In consultation with the independent transition evaluator or another qualified professional who assists in transition planning, develop an appropriate transition plan for Student that encompasses the school years for which Student is entitled to receive transition services and activities, and fully implement the transition plan before Student reaches age 21.
4. Provide Student with compensatory education as follows:
  - a. Tutoring services in the Orton-Gillingham or Wilson reading methods in an amount equal to the hours of reading instruction Student received in Student's special education reading class from February 19, 2007 through the end of the 2006/2007 school year, the entire 2007/2008 school year and the 2008/2009 school year;

- b. Fifty-two (52) additional hours of tutoring services in the Orton-Gillingham or Wilson reading methods as compensatory ESY services for the summers of 2007, 2008 and 2009.
  - c. Speech therapy at the rate of (i) 2.5 hours/week from the beginning of the third marking period in the 2006/2007 school year through the end of the school year and from the beginning of the 2007/2008 school year until the end of the first marking period; (ii) 2 hours/week from the beginning of the second marking period in the 2007/2008 school year through the end of the 2008/2009 school year;
  - d. Additional compensatory education hours equal to the number of hours Student received academic instruction in math and English from February 19, 2007 through the end of the 2006/2007 school year and for the entire 2007/2008 and 2008/2009 school years. The monetary value of this portion compensatory education award will be measured by the average and proportional hourly cost of a high school special education teacher in the Red Lion School District during the 2007/2008 and 2008/2009 school years, including salary and fringe benefits. (Average hourly compensation of a special education teacher ÷ number of students in Student's co-taught English and math classes in the 2007/2008 and 2008/2009 school year x number of compensatory education hours)
5. The compensatory education awarded in ¶4.d may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs and/or will otherwise assist Student in overcoming the effects of Student's disabilities. The compensatory education services shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the School District through Student's IEP to assure meaningful educational progress. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student. The hours of compensatory education/fund for compensatory education services/products/devices created by ¶4.d and this provision may be used at any time from the present to Student's 21<sup>st</sup> birthday, and may include reimbursement for the reading tutoring services that Parent provided for Student. Parent, in consultation with the other members of the IEP team, may decide how the hours of compensatory education/compensatory education fund are spent, provided that Parent shall make the final determination in the event of disagreement between herself and the School District members of the IEP team.

*Anne L. Carroll*

---

Anne L. Carroll, Esq.  
HEARING OFFICER

September 17, 2009