

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: MS

Date of Birth: xx/xx/xx

Date(s) of Hearing December 17, 2007

OPEN HEARING

ODR NO. 8229/2007-08 AS

Parents

Mr. and Mrs.

Parents' Representative:

Pro Se

School District:

Carlynton S.D.
435 Kings Highway
Carnegie, PA 15106

District Representative:

Jocelyn Perry, Esq.
Law Offices of Ira Weiss
503 Ft. Pitt Commons Bldg.
445 Ft. Pitt Blvd.
Pittsburgh, PA 15219

Date Final Transcript Received: December 22, 2007

Date of Decision: January 6, 2008

Hearing Officer: Margaret Drayden, Esq.

Précis

Student is xx years old, who has received special education for a specific learning disorder in reading since the 8th grade. A due process hearing was requested by the District based on concerns regarding Student's continued eligibility for special education and the District requests a finding that the Reevaluation Report is appropriate and that Student no longer qualifies for as a special education student for a specific learning disorder as there is no significant discrepancy between ability and achievement. Parent requests a finding that Student continues to qualify for special education services.

Findings of Fact

1. Student was initially evaluated by an independent certified school psychologist prior to the 5th grade and the Wechsler Intelligence Scale for Children III (WISC-III) yielded a Full Scale IQ (FSIQ) score of 133. The examiner recommended gifted education as well as remedial services for language arts. The District did not agree with either recommendation. (SD-5.)¹
2. The independent education evaluation (IEE) FSIQ score was later noted to have a scoring error, which resulted in a FSIQ of 128. (NT at 60, SD-5.)
3. During Student's 6th grade, Parents requested a comprehensive evaluation (CER). The District conducted same and administered the Kaufman Assessment Battery for Children, which yielded a Mental Processing Composite of 117 and an average Achievement score of 109. The District found Student did not qualify for special education but found a relative weakness in reading/understanding and an educational plan within the regular education program was developed. (NT at 60-61; SD-5.)
4. On 9/24/03, the [redacted] University's Reading Clinic reported Student's reading scores on the Woodcock Diagnostic Reading Battery showed "a three year seven month deficit in reading, based upon a comparison of her grade equivalent scores. While the various assessments did clearly establish that specific deficits in skill areas existed, the Clinic's use of grade equivalent scores to determine expectancy and severity of deficit is not psychometrically accurate, and the degree of delay reported should be viewed with caution." (NT at 60-61; SD-5.)
5. Prior to the 8th grade, Parents again requested a CER to determine whether or not Student qualified for special education services. (Id.)
6. As part of the reevaluation, the WISC-III was administered. A FSIQ of 110 was

¹Parents' exhibits are noted as "P-"; District exhibits are noted as "SD-"; Hearing Officer exhibits are referenced as "HO-"; Noted Transcript is referenced as "NT"; Findings of Fact are noted as "FF".

- reported; several reading/achievement instruments reported scores in the average range, except the WIAT ‘Pseudoword Decoding’ which reported “low average” and the Gray Oral Reading Test which showed “low average” scores in accuracy and fluency. (Id.)
7. Despite an “evaluation [which] did not meet regulatory criteria for severe disparity on any measure, she was nevertheless recommended by the examiner to receive Learning Support services as a child with a Specific Learning Disability in Reading/Language Arts.” (Id.)
 8. Based on the 3rd CER, Student began receiving special education services in the 8th grade and is presently identified as a student with a specific learning disability. (Id.)
 9. On 1/15/07, 2/3/07, and 4/18/07, Student was evaluated at the Total Learning Center (TLC) where she achieved a FSIQ of 109 on the WISC-IV. Parents provided this IEE to the District on 7/9/07. (Id.; P-10.)
 10. Parent offered the IEE without the presence of the testing administrator. Therefore, the Hearing Officer weighed its conclusions accordingly and relied on the District’s educational expert to explain the testing outcomes.
 11. The TLC IEE concluded that Student “continues to be a child with a specific learning disability. The basis (criteria) for making the determination of a specific learning disability is a significant discrepancy between aptitude and achievement that is not correctable without special education and related services.” (P-10.)
 12. Student’s 11th grade (2006-07 SY) final grades were: English (Pre-AP): 83%; Problems of Democracy: 85%; Pre-Calculus: 73%; AP Chemistry: 80%; Drawing/painting: 94%; Crafts: 97%; Music theory: 97%; H.S. Band – 4 days: 98%. Student’s classes were the more advanced “Scholars Level” academic coursework which is the most challenging the District offers. (SD-5, NT at 75.)
 13. Student participated in Scholars’ level English classes throughout high school (NT at 77.)
 14. Participation in the Scholars’ Level classes is through recommendation by 6th grade teachers and is based on test scores. Student must obtain “A’s” to continue in this program each year. The Scholars classes prepare students for AP courses offered in the 12th grade. (NT at 17)
 15. Student obtained a 10th grade Scholars English final grade of 83, which was “just shy of meeting the qualification for the 11th grade scholars class.” A grade of 85 is needed. (NT at 18-19, 74.)
 16. Student’s 11th grade pre-AP English grades were B’s and C’s. (NT at 20.)
 17. Student did not qualify for 12th grade AP English, but that is not an indication of a learning disability. (NT at 21.)
 18. Student was offered tapes for the 11th grade English class novels but she refused them. (NT at 22, 28-29.)
 19. Student understood the basic meaning of the 11th grade English class novels but not deeper meanings; however, the 11th grade English teacher opined that that is no indication of a learning disability. (NT at 22.)
 20. Student participated in the PSSA during the 8th grade (Score of 1428 – Proficient – in Reading) and 11th grade (Score of 1170 – Basic – in Reading). (SD-5.)
 21. There are only 4 scores available on the PSSA: Advanced, Proficient, Basic, or

- Below Basic. If a Below Basic score is obtained, the District is required to offer remedial work. (NT at 76.)
22. Student participated in the Preliminary Scholastic Aptitude Test (PSAT) in both 2005 and 2006. Her Math scores were 33 and 43, respectively, while her Critical Reading scores (45 and 42) and Writing Skills scores (34 and 25) decreased in comparison to her peers. (SD-5.)
 23. The PSAT does not measure Student against all peers her age, only those who choose to take the PSAT. This is a test in preparation for the SAT and students who take it are college-bound. (NT at 53-54, 78, 79.)
 24. The PSAT is not a diagnostic tool for a learning disability. (NT at 53-54, 81.)
 25. On 5/22/07 and 5/31/07, Student was administered a battery of tests, including the Stanford-Binet-V (SB-V), The Gray Oral Reading Test-4 (GORT-4), the WIAT-II, and the Woodcock-Johnson-III (writing subtests) (WJ-III). (SD-5.)
 26. Student obtained a FSIQ score of 92 on the SB-V; Student's WIAT-II standard score of 102 in both Word Reading and Reading Comprehension are within the average range and a standard score of 88 in Pseudo Word Decoding, which is in the low average range. (NT at 105, 124; SD-5.)
 27. The WIAT-II Reading sections in Word Reading and Reading Comprehension do not report any significant discrepancy between her ability and achievement. (NT at 108-109.)
 28. The WIAT-II Written Expression score of 100 did not indicate any type of discrepancy between ability and achievement. (NT at 111-116.)
 29. The WJ scores reported Student working above her documented ability; thus, not disparity or discrepancy was noted. (NT at 116-117.)
 30. The RR reported that student "read without difficulty, was able to use contrast clues consistently and used phonics to sound out words unfamiliar words [sic]." (Id.)
 31. Due to Student's low PSAT scores, she was administered the Broad Written Language (BWL), Basic Writing Skills (BWS), and Written Expression (WE) of the WJ-III and her standard scores were within the average range for both BWL and BWS; her WE standard score was within the high average range and Visual Processing was "way up at the 99th percentile". (NT at 116-117, 163.)
 32. The GORT-4 scores were in the average range for oral reading rate (scaled score of 8) and oral reading accuracy (scaled score of 9) but below average for fluency (scaled score of 7) and comprehension (scaled score of 6). Scaled scores between 8 and 12 are within the average range. (NT at 124; SD-5.)
 33. Student's responses to the questions re content were in the below average range, however, there was no indication of a learning disability. (NT at 120-21; SD-5.)
 34. The GORT-4 is a timed test and Student "appeared to display more anxiety and lack of confidence in herself during this assessment." (NT at 104, 119, 124-125; SD-5.)
 35. Student's anxiety could be reflected in her timed test scores. (NT at 121.)
 36. The Delis-Kaplan Executive Function System (D-KEFS) is a standardized set of tests that evaluate higher-level cognitive functions in children. Scores between 8-12 are considered average and scores above 12 are considered a strength. Student had no scores below 8; 9 scores between 8 and 12; and 9 scores between 13 and

18. Student performed above expectations on these tests. (NT at 84-888; SD-5.)
37. Student repeatedly expressed concerns that she wasn't doing well on the D-KEFS, indicative of test-taking anxiety. (NT at 77-78.)
38. Student's first 9 week-grade report indicates Student received an 88 in 12th grade English, 85 in Statistics, and 100 in Band. Student also received a mid-term grade of 88%. Student is also ranked 26th in her class. (NT at 35; SD-7.)
39. Student's 11th grade English teacher testified that she was a member of the 11th grade IEP team, that she worked with the special education teacher on materials and that he would work with Student on Tuesdays and Thursdays after school, but that Student said she did not feel she needed to work with the special education teacher. (NT at 23, 79-80, 90-91; P-6.)
40. Student was successful (received a "B") in 11th grade English without any special education accommodations or extra help; however, her writing was not "as sophisticated" as others in the pre-AP class. (NT at 23-26.)
41. Student's spelling was poor in comparison to pre-AP students but was on par with students in the regular English class. (NT at 27, 31-33.)
42. Student's 12th grade English teacher opined that was doing well in class, had 229 out of 259 possible points, that her performance in class was above average, and that the teacher was "no red flags." (NT at 36 - 38.)
43. The 12th grade teacher testified that student volunteers to read aloud and performs well, that Student has no need of any accommodations or modifications, and that Student is ready for college. (NT at 38-39.)
44. The 12th grade English teacher testified that during the last test that Student was one of the first to turn it in and that Student scored well – "there was nothing incomplete. It wasn't like she was frustrated or gave up." (NT at 36-39.)
45. The 12th grade English teacher sees some "spelling issues" but opined they were nothing more than what other students in the same class experience. (NT at 39-40.)
46. When Student has spontaneous writing assignments, without the opportunity to revise, she scores "a strong B." Student's use of vocabulary is appropriate and Student received 9 out of 10 points on a recent in-class assignment. (NT at 42-45; SD-8.)
47. The 12th grade English teacher has not noticed any test-taking anxiety. (NT at 45.)
48. The District Director of Pupil Services (the LEA) is a certified school psychologist who has reviewed the RR and is in agreement with the conclusion that Student is not a child who qualifies for special education services as student has no significant discrepancies and has always done very well in school. (NT at 48-53.)
49. The LEA testified that in her professional opinion Student does not have a disability. (NT at 55.)
50. District Educational Consultant testified that Student 'tends to read a whole word as opposed to ...breaking a word into phonics and ...30 to 40 percent of the population does [this]. It is not considered really any evidence of any weakness.' (NT at 62, 67, 93-95.)
51. District Educational Consultant testified that Student never qualified for special education services or Title I reading. (NT at 62-63, 68.)

52. District Educational Consultant testified that children who do not have strong phonics skills have difficulty with pseudo-word decoding, as does Student, but that 1 low subtest score is not a basis for a determination that Student has a disability. (NT at 65-66.)
53. None of Student's IEPs ever had Specially Designed Instruction (SDI). (NT at 67, 95-96.)
54. Student received 1-on-1 tutoring for reading in 8th or 9th grade for remedial reading. Student completed the corrective reading program and tested out of it but that was not SDI – it was remediation. (Id.)
55. Student's reading comprehension is at a post-high school level. (NT at 94.)
56. District Educational Consultant wrote recommendations for a 504 education plan for test anxiety. (NT at 97; SD-5.)
57. The School Psychologist agrees with the MDE team that Student does not exhibit a severe discrepancy between ability and achievement that is not correctable without special education and or related services. (NT at 121.)
58. The School Psychologist testified that while some of Student's scores may not be above average they are commensurate with her ability, and in some areas of testing Student tested above her ability. (NT at 125, 127-128.)
59. Parent testified that Student is currently attending [redacted] University but Parent is reading and summarizing her textbooks for Student because Student didn't understand them. (NT at 142, 144.)
60. Student is not receiving any accommodations at [redacted] University. (NT at 144.)
61. Family Friend testified that she has known Student for approximately 15 years and has attended all of her IEP meetings. (NT at 146.)
62. Family Friend testified she has seen Student experience difficulty in reading – “she just can't sound out words.” (NT at 146-47.)
63. Family Friend testified that at the last MDE meeting the District did not want to discuss Parent's IEE but said it would be attached to the back of the RR. (NT at 148.)
64. Family Friend testified that Student had to withdraw from a summer program at [University] because she wasn't able to handle the reading requirements. (NT at 149-150.)
65. Family Friend testified Parent is reading Student's college texts because Student is unable to read and understand them. (NT at 150.)
66. District Educational Consultant testified that Parent's IEE was considered by the District and that Parent's IEE did not support a discrepancy between intelligence and achievement. (NT at 159.)
67. District Educational Consultant testified that Parent's IEE indicates the Test of Word Reading Efficiency (TOWRE) was administered and that Sight Word Efficiency was within average range; Phonemic Decoding Efficiency was a very low average, but there is no SLD in phonemic decoding and that it would not be the sole basis to diagnose a SLD. (NT at 160.)
68. District Educational Consultant testified that the Ethical Code of Psychologists requires that no one be labeled based on just one score or one specific area of weakness and that the “rule of thumb” for a diagnosis of dyslexia is 3 separate

- reading weaknesses together. (NT at 160-161.)
69. Parent's IEE used tests unfamiliar to District Educational Consultant as a school psychologist. (NT at 161.)
 70. Parent's IEE did a curriculum-based assessment, but curriculum-based assessments are not used for diagnosis of SLDs by school psychologists because they do not render standardized scores and ethical standards for school psychologists require nationally standardized instruments (NT at 164-166.)
 71. The AP Math and AP Chemistry textbooks used in the curriculum-based assessment are ungraded and lack a known reading level. (Id.)
 72. Student's present placement is Itinerant Learning Support, less than 3%. (NT at 168; P-3.)
 73. The District's RR met the substantive requirements as set forth in the IDEA and 34 C.F.R. §§ 300.303, 300.305, 300.306, 300.308 – 300.311. (SD-5.)

Witness Credibility

11th Grade English Teacher – She has 20 years' teaching experience, a B.S. in secondary English education and 25 credits in the Reading Certification Program. She spoke knowledgeably and without hesitation and she presented herself in a professional manner. Her testimony was credible.

12th Grade English Teacher - This teacher is in her 37th year of teaching and she has taught 12th grade English for 28 years. Her earned her undergraduate degree from [redacted university] and has a Master's equivalency – with work at both [university] and [university] – and her specialty is in Reading. This teacher presented herself in a professional manner; her testimony was without hesitation and she spoke knowledgeably about her subject area and Student. Her testimony was highly credible.

Director of Pupil Services – Earned her Bachelor's in Psychology in 1993 at [redacted] College, earned a Masters at [redacted] University and has been certified as a school psychologist since 1998. She received her permanent school psychologist certification in 2004 and earned her Principal certification from [redacted] University in January 2006. She has worked in the children's mental health arena since 1993. She has been Director of Pupil Services since August 2007. She had limited testimony due to her brief tenure, but she spoke knowledgeably about testing. Her testimony was credible.

District Educational Consultant – She was formerly the Pupil Services Director and School Psychologist for the District. She has over 20 years of experience, earned her Bachelor's degree from [redacted university] (1965), has a Master's degree in Education Counseling Psychology (1969) and her Doctorate in Graduate Education Counseling Psychology from the University of [redacted] (1973). She is a certified school psychologist (1978), a licensed clinical psychologist and is an adjunct professor of school psychology at [redacted] University, and is employed part-time at the [redacted] Muesum [redacted] in the Education Department. She presented herself as a highly qualified, experienced and credible professional. She was very forthright and her answers were stated without hesitation. She is very knowledgeable and she was a very highly credible

witness.

School Psychologist- The school psychologist has a B.S. in Psychology from [redacted] College and a Master's in Education from [redacted] University; she was certified as a school psychologist in 2005, is currently working on her dissertation in School Psychology at [redacted] U. and, additionally, is taking classes for Administration. She has been employed by the District since the beginning of the 2006-07 school year. She administered the testing on the RR and spoke confidently and knowledgeably about both the tests, testing processes, and Student. Her demeanor was professional and her testimony credible.

Parent – Parent's testimony was highly limited – she introduced documents into evidence, but it was clear that she was highly nervous, which was understandable. Her concern for her child was clear. Her testimony was credible.

Parent/Family Friend - This witness was a family friend who has known Student for approximately 15 years. Her testimony was very limited in both time and content but was credible.

Discussion and Conclusions of Law

Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined parameters. Thus, any concerns parents may have regarding education services which concern matters beyond those parameters are beyond the purview of this process and this Hearing Officer.

Witness Credibility

Within the context of the special education arena, "Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision wherein the hearing officer has included 'findings of fact, discussion and conclusions of law. . . [and] the decision shall be based solely upon the substantial

evidence presented at the hearing.’”² Quite often, testimony – or documentary evidence – conflicts; this is to be expected for, had the parties been in full accord, there would have been no need for a hearing. Thus, as stated, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence of facts which concern 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” and “give some reason for discounting”³ or crediting evidence. Further, Hearing Officers’ decisions are to “specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions”.⁴ The Third Circuit, in Shore Regional High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. Id.;⁵ Carlisle Area School v. Scott P., 62 F.3d 520, 527-29 (3d Cir. 1995). Specifically, this means that a District Court must accept the state agency’s credibility determinations ‘unless the non-testimonial, extrinsic evidence in the record would *justify* a contrary conclusion.’ Carlisle, 62 F.3d at 592 (emphasis added). In this context the word ‘justify’ demands essentially the same standard of review by a federal appellate court. See Anderson v. City of Bessemer City, N.C., 470

² 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).

³ Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

⁴ Id. at *34.

⁵ Citing S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)

U.S. 564, 574 (1985).”⁶ This court further held that “the task of evaluating [witnesses’] conflicting opinions lay in the first instance with the ALJ in whose presence they testified.”⁷

Similarly, credibility has been addressed in various jurisdictions. Looking to California, Stevens v. Parke Davis & Co., 9 Cal.3d 51, 67-68 (1973) held that a trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted....[and also] reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” Further, a fact finder may reject the testimony of even an expert witness, although not contradicted. Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 890 (1971) California courts have also found that “one credible witness may constitute substantial evidence”. Kearl v. Bd. Of Medical Quality Assurance, 189 Cal.App.3d 1040, 1052. (1986).

Burden of Proof

The burden of proof consists of both the burden of production and the burden of persuasion. Neither the IDEA nor the IDEIA⁸ addressed the subject of burden of proof and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden in an administrative hearing challenging an Individualized Education Program (“IEP”) generally fell to the LEA. Recently, however, the United

⁶ Shore Regional at 199.

⁷ *Id.* at 201.

⁸ The IDEIA is variously referred to in case law as the IDEIA or IDEA 2004. In either event, it is one and the same.

States Supreme Court addressed this issue in Schaffer v. Weast, 126 S.Ct. 528 (2005). In the concluding paragraph of the Opinion of the Court, Justice O'Connor held: "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."⁹ In Antoine M. v. Chester Upland School District, Civ. Action No 05-3384, (E.D.Pa. Mar. 14, 2006), the Court held that even where the challenge is not to the sufficiency or appropriateness of an IEP, but rather for the failure to find a child eligible for one, "the overarching logic of Schaffer – that, in the context of the IDEA, the party bringing the challenge bears the burden of proof...[and] [a] student's challenge to a district's determination that he or she is not eligible for an IEP should not be treated any differently than a challenge to the adequacy of an IEP." Thus, where a "case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, *Schaffer* controls."¹⁰

The burden of persuasion in an administrative proceeding lies with the party seeking relief.¹¹ This requires the Hearing Officer to make a determination of whether or not the evidence is "equipoise" rather than preponderant. Preponderance of the evidence is defined as evidence presented by one party that is of greater weight or more convincing than the evidence offered by the other party. In other words, where there is evidence which tips the scales, the party which presented that evidence prevails. However, where the Hearing Officer finds the evidence is equally balanced on an issue, the non-moving party prevails.

⁹ 126 S.Ct. at 537.

¹⁰ L.E. v Ramsey Bd. Of Educ., 435 F.3d 384, 391 (3d Cir. 2006).

¹¹ Greenwood v. Wissahickon Sch. Dist., Civ. Action No. 04-3880 (E.D. Pa. Feb. 3, 2006) ("Hence, because there is no Pennsylvania law imposing the burden on the district, *Schaffer* applies and the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP".)

After a close examination and analysis of all of the evidence and the testimony, this Hearing Officer did not find “equipoise”. Thus, the burden of persuasion was not at issue in this case.

Issues

1. Is the District’s position, as reflected in the 9/18/07 Reevaluation Report, that Student is no longer in need of special education services accurate, or, conversely, does Student continue to qualify as a student with a specific learning disability?

Discussion and Conclusions of Law

The implementing regulations pertinent to the hearing issue are found at 34 C.F.R. §§ 300.8, 300.303, 300.305, 300.306, 300.308, 300.309, 300.310, and 300.311:

300.8. Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part 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.**

(2)(i) Subject to paragraph (a)(2)(ii) of this section, **if it is determined, through an appropriate evaluation under 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.**

300.303 Reevaluations.

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 300.304 through 300.311 –

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child’s parent or teacher requests a reevaluation.

300.305 Additional requirements for evaluations and reevaluations.

(a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must –

(1) Review existing evaluation data on the child, including –

(i) Evaluations and information provided by the parents of the child;

(ii) **Current classroom-based, local, or State assessments, and classroom-based observations;** and

(iii) **Observations by teachers and related services providers;** and

(2) On the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine –

(i)(A) Whether the child is a child with a disability, as defined in 300.8, and the educational needs of the child; or

(B) **In the case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;**

(ii) **The present levels of academic achievement and related developmental needs of the child;**

(iii)(A) **Whether the child needs special education and related services; or**

(B) **In the case of a reevaluation of a child, whether the child continues to need special education and related services; and**

(iv) **Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.**

...
...
...

(e) Evaluations before change in eligibility.

(1) Except as provided in paragraph (e)(2) of this section, **a public agency must evaluate a child with a disability in accordance with 300.304 through 300.311 before determining that the child is no longer a child with a disability.**

300.306. Determination of Eligibility.

(c) Procedures for determining eligibility and educational need.

(1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under 300.8, and the educational needs of the child, each public agency must –

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) **If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in**

accordance with 300.320 through 300.324.

300.308 Additional group members.

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in 300.8, **must be made by the child's parents and a team of qualified professionals**, which must include—

(a)(1) **The child's regular teacher**

(b) **At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.**

300.309 Determining the existence of a specific learning disability.

(a) The group described in 300.306 **may determine that a child has a specific learning disability**, as defined in 300.8(c)(10), if—

(1) **The child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:**

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

(2)(i) **The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified** in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or

(ii) **The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 300.304 and 300.305;**

300.310 Observation.

(a) **The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.**

(b) The group described in 300.306(a)(1), in determining whether a child has a specific learning disability, must decide to –

- (1) Use information from an observation in routine classroom instruction and monitoring of the child’s performance that was done before the child was referred for an evaluation; or
- (2) **Have at least one member of the group described in 300.306(a)(1) conduct an observation of the child’s academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with 300.300(a), is obtained.**

300.311 Specific documentation for the eligibility determination.

(a) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in 300.306(a)(2), must contain a statement of

--

- (1) Whether the child has a specific learning disability;
- (2) The basis for making the determination, including an assurance that the determination has been made in accordance with 300.306(c)(1);
- (3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child’s academic functioning;
- (4) The educationally relevant medical findings, if any;
- (5) **Whether –**
 - (i) **The child does not achieve adequately for the child’s age or to meet State-approved grade-level standards consistent with 300.309(a)(1); and**
 - (ii)(A) **The child does not make sufficient progress to meet age or state-approved grade-level standards consistent with 300.309(a)(2)(i); or**
 - (B) **The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with 300.309(a)(2)(ii)**

...

...

(b) Each group member must certify in writing whether the report reflects the member’s conclusion. If it does not reflect the member’s conclusion, the group member must submit a separate statement presenting the member’s conclusions.

(Emphasis indicated by bolding.)

Preliminarily, this Hearing Officer will note that the District’s RR clearly meets all statutory requirements for an evaluation as set forth in 34 C.F.R. 300.303 et seq., above.

Parents and District disagree on whether Student is currently eligible for special education services. The term “special education” means specially designed instruction, at

no cost to parents, to meet the unique needs of a child with a disability.¹² A discussion of specific learning disability eligibility is predicated on the two-fold requirement set out in the IDEA, and in the implementing regulations, that a student meet one or more of the enumerated classifications, such as SLD, and also need, as a result thereof, special education.

Student's 11th grade English teacher testified that Student received a "B" in pre-AP English, which is an academically challenging course, and did so without any special education accommodations or modifications and that Student refused the special education opportunities available to her. Student's 12th grade English teacher testified that Student volunteers to read aloud in class and performs well, that Student has 229 out of 259 possible points, displays above average performance, does not exhibit any test-taking anxiety, and while she shows some weakness in spelling that it is on par with her peers.

Three certified school psychologists testified that Student's repeated testing clearly shows that while Student has a relative weakness in reading – specifically in word decoding – that not only is there no sign of a discrepancy between intelligence and achievement but that Student's scores are often commensurate with – or even above – her ability.

Student currently receives itinerant services for less than 3% of her academic program; she has never received SDI during her 4-plus years in special education; she earns satisfactory grades in academically rigorous Scholars and AP classes; and is ranked 26th in her 12th grade class.

Further, Parent's IEE, which was offered into evidence without benefit of

¹² 20 U.S.C. § 1401(29).

testimony from the certified school psychologist who administered the testing, did not show a discrepancy between intelligence and achievement. While the IEE did express concerns in regard to the curriculum-based assessments (CBAs), CBAs are not used for diagnoses by school psychologists because they do not render nationally standardized scores which school psychologists are required to use. Further, this IEE did not include either teacher or classroom observations.

Thus, a close scrutiny of testimony and documentary evidence shows that while Student exhibits some reading weakness, it does not rise to the level – or yield the requisite adverse effect – necessitated to continue special education services. Stated differently, not every child who has a weakness in reading meets the legal criteria to qualify for specially designed instruction. As eloquently stated in Spec. Educ. Opinion No. 1716, “[a]lthough we can understand the Parents’ concern . . . the IDEA unfortunately does not, as a policy matter, provide for such optimum services.”

ORDER

For reasons hereinabove discussed, it is hereby ordered:

1. The District’s RR is sufficient under the IDEA and the conclusions of the MDE team are supported by clear and convincing evidence that Student is no longer eligible for special education under the IDEA or Chapter 14.

Margaret Drayden
Margaret Drayden, Esq.
Hearing Officer