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do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 1504-1011AS

Child's Name: K.C.

Date of Birth: <redacted>

Dates of Hearing: 5/3/11, 6/22/11, 6/24/11,

6/28/11, 6/29/11

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

<parents>

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Date Record Closed:

July 29, 2011

Date of Decision:

August 5, 2011

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student was enrolled in a District elementary school from 1st through 4th grades and as e received regular education instructional interventions each year, primarily because of difficulties with reading and writing skills. At the end of 4th grade, upon receiving a neuropsychological report from an independent evaluator, the District reevaluated and identified Student as IDEA eligible after an initial District evaluation several months earlier resulted in a non-eligibility conclusion. Rejecting the proposed IEP for the current school year, Parents enrolled Student in a private school, filed a due process complaint alleging a child find violation dating back to the 2007/2008 school year, and are seeking compensatory education for the District's alleged denial of FAPE to Student from 2nd grade through the end of 4th grade, including the District's failure to provide an ESY program during the summer following 4th grade.

The hearing was conducted over 5 sessions in May and June 2011. Based on the evidence supporting the findings of fact and discussion below, the District failed to timely evaluate and identify Student as IDEA eligible at the end of 2nd grade, or early in 3rd grade at the latest, and thereby failed to provide a free, appropriate public education (FAPE) to Student during 3rd grade and 4th grade. To remedy the District's denial of FAPE, Student will be awarded the amount and type of compensatory education services needed to make up for the District's failure to timely fulfill its IDEA child find obligations, as established by the testimony of the neuropsychologist who conducted the independent evaluation and testified as Parents' expert witness at the due process hearing. Student will also receive compensatory education for the District's failure to provide the ESY services the IEO team determined that Student needed during the summer following 4th grade.

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ISSUES

Did the School District violate its child find obligations by not identifying Student as IDEA eligible prior to the end of 4th grade, and if so, at what point should the District have evaluated and identified Student as IDEA eligible?!

Was the School District's initial evaluation of Student appropriate?

If the District failed to timely identify Student, is Student entitled to an award of compensatory education and if so, for what period, in what amount and in what form, and should Parents' use of a compensatory education fund, if any, be limited?

FINDINGS OF FACT

1. <student name> (Student) is year old child, born <redacted>, is a resident of the Central Bucks School District and is eligible for special education services. (Stipulation, N.T. pp. 15, 16)

Student has 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); (Stipulation, N.T. p. 17)

School Functioning and Academic Progress, Grades 1—4

3. Very early in 1st grade, Parents were notified that Student's reading skills were below expectations. The 1st grade teacher recommended instituting interventions that were available in the regular education classroom to increase development of basic academic skills, particularly reading, to which Parents agreed. (N.T. pp. 690, 960, 1315, 1316)
4. In the early part of the 1st grade school year, the supports and modifications provided to Student included Title I Basic Skills/Early Literacy Lab and STARS (small group reading support), as well as supplemental/substitute materials, individual/small group assistance,

¹ Parents also asserted claims under §504 of the Rehabilitation Act of 1973 (. J-1), but such claims are also

based upon a denial of FAPE and, therefore, are co-extensive with the IDEA claims. See *D.G. v. Somerset Hills School District*, 559 F. Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009), *Swope v. Central York School District*, 2011 WL 2471518 (M.D. Pa. 2011) at *3. Unless Parents establish a claim for discrimination under §504 by separately proving the elements of a §504 claim, 1.2., 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination at school, the §504 claims are not considered separately from the IDEA claims. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

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assistance with organization and pre-taught/re-taught content. (N.T. pp. 1316, 1317; J-4, pp. 1-3)

5. As the 1st grade school year progressed, the teacher's concerns about Student's reading skills remained, although improvement was noted, and concerns about math, writing and focus also emerged. (N. T. pp. 1318; J-4, p. 4, J-9, J-10, p. 6)

At the request of the 1st grade teacher and with Parents' approval, the elementary school Instructional Support Team (IST) met to develop an action plan with goals for improving writing and focus/concentration, to provide additional instructional strategies and supports, including the Reading Recovery program, and to monitor Student's progress toward the IST plan goals. (N. T. pp. 1318, 1319, 1406, 1410, 1420; J-5, J-6, p. 1)

The District's IST process is a more structured program than the basic skills support that Student was already receiving in the 1st grade classroom. The IST program includes at least an instructional support counselor, the teacher, and a reading specialist who meet with each other and parents. IST intervention is provided for students with greater learning challenges than can be effectively addressed with basic skills classroom support alone. IST intervention is initiated by a classroom teacher to address academic, behavioral or social concerns for a student, to provide support and suggestions to the teacher and/or to discuss strategies to support the student and remediate the areas that aroused the teacher's concerns. (N.T. pp. 677-679, 961)

Reading Recovery, another general education support, is a reading intervention program offered to 18 grade students over a period of 12-20 weeks. It provides 30 minutes of one to one instruction daily with a reading specialist to practice fluency, work on decoding and comprehension and monitor progress by running records, as well as observation of a participant in the regular classroom and suggestions to the teacher for working with the student. At the end of the program, the reading specialist and the IST determine whether a student can successfully discontinue the program. (N. T. pp. 654, 970, 971, 974, 981; J-6, p. 1)

Student was part of the second round" of students receiving Reading Recovery during 18 grade, participating in the program between February and June, for a total of 16

weeks. At the end of the program, the reading specialist determined that Student had successfully completed the program and could be discontinued. (N.T. pp. 971, 972, 982; P-1A, P-1F)

10. Student also participated in Writing Lab, a program with both pull-out and classroom components designed to provide extra support for children experiencing difficulty with written expression and language mechanics. (N.T. p. 1410; J-6, p. 2)

- Commendably, the parties agreed to submit primarily joint exhibits in this matter, which avoided an unnecessarily long documentary record. The joint exhibits are designated by the letter "T" followed by the exhibit number. Additional exhibits submitted by each party separately are designated "P" for Parent and "S" for School District followed by the exhibit number.

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11. By time the IST review meeting was held in late March, Student had exceeded the action plan goals, and met the expected levels of achievement for April of 1st grade on the DRA (Developmental Reading Assessment). Some weaknesses in reading, writing and independent demonstration of skills were noted. The IST team recommended continuing Basic Skills support via the reading and writing labs. (N.T. p. 1321; J-7)

12. In the 4th marking period, Student was still showing progress as well as continuing weaknesses in some areas, including writing complete sentences with capitalization and punctuation and maintaining self control. Modifications in the regular classroom were reduced to individual/small group assistance and assistance with organization. (N.T. pp. 1319, 1321, 1418, 1423, J-4, p. 4, J-7, J-8)

At the beginning of 2nd grade, the District suggested, and Parents agreed, that Student should receive Basic Skills assistance for reading in the form of 30 minute small group instruction with the reading specialist in the Reading Lab 2x/week from October to December and from February to April. The reading lab instruction took the form of guided reading using leveled texts to provide direct instruction in decoding, fluency and comprehension. Referral for reading lab was based on assessments by the reading specialist. (N.T. pp. 64, 75, 983, 984, 1322; J-12, p. 2)

14. In addition to the 2nd grade reading series used for whole group instruction, the curriculum included 3 levels of books intended to assure that all students could develop necessary reading skills, experience success and increase confidence as readers. Small group reading instruction at a particular level was determined through consultation with the classroom teacher and the reading specialist. The teacher testified that Student entered 2nd grade reading at the lower end of the level expected at the beginning of 2nd grade and ended 2nd grade reading at the lower end of the level expected for the end of 2nd grade. DRA scores indicate that Student's fluency and accuracy were not proficient at the level expected at the end of 2nd grade. Due to weaknesses in phonics and word identification, Student received small group reading instruction in the classroom 4 times

weekly throughout 2nd grade instead of the twice weekly small group sessions provided to students reading at a higher level. (N.T. pp. 61, 65, 66, 84, 85, 209-212, P-1A, p. 2)

15. From late September through late February of 2nd grade, Student also received instruction in Sonday, a phonological awareness program, delivered twice weekly in a small group by an educational assistant outside of the regular classroom. Sonday is similar to Orton-Gillingham type of instruction, but is used as a supplemental program not a core curriculum. Phonological awareness tests administered at the beginning and at the end of the Sonday program and the Sonday Mastery tests given throughout the program showed improvement in recognizing letter group sounds and in learning rules for decoding new words. (N.T. pp. 143—145, 157-160, 173, 808, 906 908; J-11, J-14, J-16)

16. Student was also referred for Basic Skills Math instruction, Math Targeted Tutoring and was again provided with Writing Lab support, particularly for improving conventions such as capitalization and punctuation and neatness. Although the 2-4 students from Student's 2nd grade classroom who participated in writing lab changed during the school

year, Student participated in all 4 quarters. Referral for Basic Skills assistance in math and writing was based on end of 1 grade and beginning of 2nd grade curriculum based assessments. (N.T. pp. 49, 53, 62, 64, 69, 70, 1326; 1-4, p. 5, J-12, p. 1, J-19)

17. Other accommodations provided to Student in the regular classroom throughout the school year were small group instruction in reading math and language arts, content pre-taught and re-taught in math, and working outside of the regular classroom in a small group with an educational assistant on targeted math skills. The level of accommodations varied during the year depending upon Student's level of success with skills taught at various points. Because of Student's academic progress with the accommodations in place, no referral was made to the IST during 2nd grade. (N.T. pp. 56, 70-74, 89, 90, 150; J-4, p. 5)

18. Student's 2nd grade report card, portfolio conference report and the 2nd grade teacher's recollection indicated that Student experienced success and made satisfactory progress in all academic areas with the accommodations in place. Student's 2nd grade teacher also noted that Student was a hard worker and had met most of the 2nd grade benchmarks. Student needed to work on reading fluency and comprehension, improve neatness, spelling and writing conventions. At the portfolio conference, the teacher discussed with Parents issues concerning Student's handwriting, periodic inattentiveness and need to move around the room to release energy. (N.T. pp. 47-49, 85, 86, 92-95, 98, 99, 105-110, 160—172, 175, 176, 183, 1325; J-8, J-13, J-15)

19. Due to continuing weaknesses demonstrated on end of the year assessments in phonics and decoding, as well as writing conventions and handwriting, the 2nd grade teacher recommended that the supports and accommodations provided to Student in reading,

language arts and math continue in 34 grade. The 34 grade teacher agreed, particularly in light of the increased content and expectations in 34 grade. (N.T. pp. 90, 91, 99, 156, 228, 234)

20. Student's 34 grade accommodations checklist for reading, math and language arts included small group instruction, supplemental materials and pre-taught/re-taught content during the entire school year. In addition, assistance with organization was provided for language arts and study guides provided for math instruction and assessments, along with math re-tests and use of manipulatives during math assessments. Reading and language arts assessments were accommodated by allowing Student to respond orally in all marking periods for language arts and in the 1st and 2 marking periods for reading. The assessment accommodations were not used consistently for all assessments during 34 grade, but were applied when needed. Student initially completed assessments independently, followed by re-testing with accommodations when the teacher recognized that the results had not fully demonstrated Student's knowledge. (N.T. pp. 240—244, 261—265, 267, 268, 305—308; J-20)

The 3rd grade teacher considered Student's reading to be at a "proficient level upon entering 3rd grade, with comprehension at grade level and fluency close to grade level. The teacher believed that Student was able to maintain a proficient level of reading

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comprehension throughout the school year with the accommodations that were in place. (N.T. pp. 228, 230, 231, 234_240; P-1A, pp. 2, 3)

22. Student's DRA score at the end of 2nd grade placed Student's accuracy on Level 28, the end of 2nd grade benchmark, at 93% with 94% is considered proficient. Student's comprehension was at the proficient level and fluency was basic. On level 24, the mid-year benchmark for 2nd grade, both comprehension and fluency were proficient. (P-1A, p. 2)

3. According to the 3rd grade teacher, Student had reached the benchmarks expected by the end 2 grade in language arts and math, and therefore, was considered proficient in those areas entering 3 grade. Accommodations for language arts and math instruction were maintained throughout 3rd grade, however, because Student benefited from them and was able to make progress toward achieving the District's 3rd grade benchmarks with the accommodations in place. (N.T. pp. 250—262, 274; J-20)

24. In language arts, Student was still working on conventions in writing at the beginning of 34 grade, and after the first marking period also began working on identifying and correcting run-on sentences and sentence fragments. Student was able to demonstrate correct punctuation and capitalization by the end of 3rd grade, and could write a sequential story with the use of graphic organizers and other accommodations to assist with the increased content of the 3rd grade curriculum. As in 1st and 2nd grades, Student

also participated in writing lab for 30–40 min./week outside of the regular classroom.

(N.T. pp. 252, 253, 256-258, 298–301, 303, J-19, J-20)

25. The 3rd grade portfolio conference report indicated outstanding progress with respect to academic progress and effort, with satisfactory progress in learning to learn. The indication of outstanding academic progress was based upon Student's ability to independently apply strategies developed through the accommodations Student received. Student's reading and language arts were at the basic level and math just within the proficient range, based upon end of 3rd grade benchmark, indicating that as of the early April report, Student had achieved the performance expected at the end of 3rd grade in math but not in reading and writing. (N.T. pp. 324328, 330; J-22)

26. On the PSSA tests taken during 3rd grade, Student's scores were in the proficient range for both reading and math. (N.T. pp. 331, 332; J-21)

27. Student's 3rd grade report cards included letter grades in reading, writing and math, achieved with accommodations, followed by indicators of component skill acquisition assessed without accommodations. Student received Cs in writing, Bs in reading, 2 Cs and a B in math. By the end of the school year, Student had made advanced progress in reading independently, and satisfactory progress in the 3 other component reading skills that were assessed. In writing, Student's progress was below expectations with respect to focus, advanced with respect to effort in learning to write and satisfactory with respect to writing of various types in all content areas. Student demonstrated satisfactory skill acquisition in math except in the areas of measurement/estimation, problem

solving communication and reasoning/connections (during the first 2 marking periods).

Teacher comments for the 4th quarter indicated that Student was able to use context clues to find the meaning of unknown words, continued to use the strategies learned in the Soliday program, had improved in reading during the 4th marking period and had met District standards for 3rd grade in Reading, writing and math, as well as in speaking/listening and research. (N.T. pp. 276–279, 333-337, 342-346; J-23, p. 1)

28. On the Minute Read at the end of 3d grade, Student's fluency score of 69 wpm was the same as in the fall, when it fell just within the acceptable range. The fluency score was well below the 88-141 wpm adequate range for the spring of 3 grade, Accuracy on the 3rd grade spring passage was at 92% and comprehension at 50%. (N.T. pp. 1105, 1106 P-1A p. 3)

29. In 4th grade, academic expectations for students shift and increase. The focus of academic skills during the early elementary years (K-3) is on learning how to read. In 4th grade the focus begins to shift to "reading to learn," i.e., applying reading skills to science and social studies curriculum. There is also an emphasis on higher level thinking skills—using academic skills independently across the curriculum. Students need to

adjust to the new focus and increased demands. (N.T. pp. 538542)

30. Despite Student's determination, effort and accommodations continued from 3 grade, academic difficulties began early in 4 grade. Student was unable to transfer and use skills independently. Student still had weaknesses in writing conventions (capitalization and punctuation) and in supporting ideas with details. In reading, the 4th grade teacher noticed that Student often skipped words and that comprehension on grade level texts was below 70%. The teacher consulted with the reading specialist, whose DRA assessment of 70% comprehension on a 4th grade reading passage placed Student at the 4th grade instructional level for reading comprehension. Student's accuracy was measured at 94% and fluency at 52 wpm, below the adequate fall range of 71-141 wpm. (N.T. pp. 386396, 543, 544, 1334; P-1A, p. 3)

31. As in 1 through 3rd grades, Student had an accommodations checklist for 4th grade that listed instructional and assessment accommodations, including continuation of writing lab. For the first time, the accommodations checklist also included a behavioral strategy, an isolated work area for tests, provided during the first marking period to minimize distractions. A study guide and re-testing were provided for social studies for the first time, reflecting the difficulty Student had with reading to learn" from the 4th grade textbook due to Student's weakness in reading. In October, Student began working with the reading specialist outside of the regular classroom twice each week for 30 minutes. (N.T. pp. 411-416; J-41, J-24, J-58)

32. At a Parent/teacher conference in November, the teacher expressed concerns about Student's focus, self-control, knowledge of math facts, consistent, independent use and application of learning strategies and handwriting. Parents expressed concerns about Student's continuing need for accommodations that did not result in greater independence. (N.T. pp. 422-424, 427, 429, 430, 1331-1336; J-27)

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33. To address Student's difficulty with cursive writing, which the teacher believed was inhibiting Student's fluency in expressing ideas in writing, the 4th grade teacher began working with Student on handwriting once/week after school for app. 20 minutes. (N.T. pp. 430, 431, 443, 1333)

34. Homework was a source of great difficulty for Student, who could not keep up with the increased volume and required 2-3 hours each evening to complete what the teacher expected to be done in much less time. After contact from Parents in October, the teacher suggested strategies for helping Student with the most challenging homework tasks. When issues with homework were again brought to the teacher's attention between January and March, the teacher told Parents to limit Student to 40 minutes of homework each evening, whether completed or not, in addition to 20 minutes of reading. (N.T. pp. 404 408, 466469, 1334; J-39)

35. On November 5, after the parent/teacher conference and subsequent consultation with Student's pediatrician, Parents contacted the 4th grade teacher about obtaining an evaluation to determine whether Student had a learning disability. The District issued a permission to evaluate (PTE) dated December 22, which Parents returned on January 4. (N.T. pp. 439, 440, 1336, 1337; P-6, J-28)

36. On November 13, the District notified Parents that Student's teacher had initiated an IST referral and provided Parents with a form to report Student's strengths, needs, school performance, attitude toward school and Parent concerns. Parents returned the completed form on November 16. (N.T. pp. 434—439, 1339, 1340; J-26)

37. As part of the IST referral, Student's 4th grade teacher requested an observation by the student support counselor to assess Student's distractibility during whole group instruction. The counselor also administered a visual motor integration (Beery-Butenica VMI) screening due to the teacher's handwriting concerns. The screen resulted in a finding of average visual-motor functioning. (N.T. pp.432, 433; J-33, p. 6)

38. Targeted tutoring in math was added as an additional accommodation for Student after the IST process was initiated, since Student's skills were not secure on the assessments administered at the end of 3rd grade. (N.T. p. 443; J-58)

39. At the end of November, as part of the IST Academic Screening process, the reading specialist conducted additional reading assessments using the QRI (Qualitative Reading Inventory) assessments, noting in a written report that Student was instructional at the 4th grade level in word recognition. Fluency on a 3 grade passage was just within acceptable limits for the fall of 4th grade, but was well below expectations on a 4th grade passage. On both 3rd and 4th grade passages, Student used the initial letter to predict difficult words, omitted and substituted words. With respect to comprehension, Student was instructional at the 4th grade level. The reading specialist suggested strategies to address Student's weaknesses. The 4th grade teacher discussed the assessment results with the reading specialist, but made no changes to the reading instruction since Student

was instructional at grade level. (N.T. pp. 448, 449, 839, 840, 850; J-33, p. 3, J-37, p. 4, P-10)

40. In December, Parents met with the instructional support team teacher and the 4th grade teacher to review the results of the Academic Screening Information compiled through the IST process. The screening measures included the Kaufman Brief Intelligence Test-Second Edition (K-BIT-2), the Kaufman Test of Educational Achievement-Second Edition (KTEA-2), The Visual-Aural Digit Span Test (VADS), and the Beery-Butenica Developmental Test of Developmental Test of Visual-Motor Integration (Beery VMI, Fifth Edition), all administered by a student support counselor or the instructional support

teacher. Also included in the screening report were observations of Student in math, large group and small group reading, as well as the reading specialist's assessment. Parents were informed that the results indicated that Student was performing as expected. (N.T. pp. 850, 1340, 1341; P-4)

41. At the 4 grade portfolio conference in April, Student's teacher assessed work habits and study skills (learning to learn), effort and academic progress to be on the borderline between satisfactory and unsatisfactory. Reading was in the proficient range, math on the borderline between basic and proficient and language arts in the basic range, but the teacher considered Student proficient in math based upon District standards. On the 4th grade PSSA assessments, Student scored in the middle of the basic range in reading, the middle of the proficient range for science and just within the advanced range for math. (N.T. pp. 480, 482; J-46, J-47)

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42. During the 4th marking period, Student's teacher became concerned about greater inconsistency in academic performance and independent use of learning strategies, noting that Student's performance reverted to what she had observed during the first quarter, with a greater need for assistance in academic tasks such as generating ideas for writing. (N.T. pp. 587-589)

43. Student's report card grades in academic subjects at the end of 4th grade were Cs in reading, writing, math and science and a B in social studies. The report card indicated less than satisfactory progress in the reading component skills of "reads critically in all content areas" and "reads, analyzes, interprets literature." In writing, Student's skill levels were unsatisfactory in writing of various types in all content areas and in writing of quality. Math component skills that were less than satisfactory were reasoning and connections and problem solving and communications. The 4th marking period comments reflected the teacher's concerns with continuing weaknesses in reading and lack of focus when working independently. (N.T. pp. 493, 589_591; J-59)

Evaluations/Eligibility Determinations/Post 4th Grade Developments

44. The psycho-educational evaluation Parents had requested was completed by a District school psychologist in March of 4th grade. The Evaluation Report (ER) incorporated all of the information in the Academic Screening report completed in December (FF 40, above). Additional assessments included the Reynolds Intellectual Assessment Scales

(RIAS) and selected sub-tests of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) that measured working memory processing speed, components not included in the RIAS. The combined results placed estimated that Student's intellectual functioning was in the high average range, with working memory in the average range and processing speed in the low average range. (N.T. pp. 1242, 1243, 1247; P-4, J-33, pp. 1-4, 7-9)

45. Academic achievement was assessed with the Wechsler Individual Achievement Test-Second Edition (WIAT-II), on which Student's achievement in reading, writing and math fell into the average, high average (reading comprehension, written expression, math reasoning) and Superior (numerical operations, mathematics composite) ranges with respect to various academic skills. The evaluation included a speech language screening that revealed age-appropriate speech-language abilities. On the Connors 3rd Edition Rating Scale, used as a screening tool for symptoms of Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (ADD/ADHD), teacher ratings revealed only one elevated score, while Parent ratings were elevated or very elevated in most areas. (J-33, pp. 10-12)
46. The ER did not include Parent input. Parents were given a background questionnaire to complete at the March 2 meeting to review the completed ER. (N.T. pp. 1364, 1365; J-36)
47. The psychologist concluded that based upon a discrepancy analysis, Student was not IDEA eligible due to a learning disability. In addition, despite weaknesses in attentiveness, hyperactivity and impulsivity according to Parent ratings, the multi-disciplinary team (MDT) concluded that Student's needs did not exceed what could be provided in the regular education setting. (J-33, p. 14)
48. The MDT proposed a more formal Action Plan through the IST process to specify the regular education accommodations and supports Student had been receiving and were recommended to continue. The MDT also suggested developing a positive behavior support plan and strategies to increase attention and focus, including attention to detail in writing assignments, "break" cards, shortened assignments, extended time to complete assignments and organizational support. (N.T. pp. 1221, 1222, 1226; J-33, pp. 13, 14, J-34)
49. Parents disagreed with the non-eligibility conclusion and proposal to continue with regular education supports only. They requested an OT evaluation, an independent neuropsychological evaluation and an ESY program for the summer. The District agreed to conduct an OT evaluation and to fund an IEE. (N.T. pp. 8333, 834, 1347—1353; J-35, J-37, pp. 3, 4, J-39, J-40, J-41, J-42)
50. The independent neuro-psychological examination was completed in April and a report sent to the District in May. After review of the data, including the full WISC-IV battery, the independent evaluator concluded that Student meets the criteria for developmental dyslexia, a significant language-based learning disability in reading. Student presented

performance include significant weaknesses in phonemic decoding and oral reading accuracy, as indicated by every measure that required mental manipulation of words or letters, not only actual reading assessments. (N.T. pp. 778, 1071, 1076—1078, 1083, 1084; J-49, p. 10, J-54, p. 2)

51. In addition, although not rising to the level of an ADHD diagnosis, Student is adversely affected by lack of focus, disorganization and impulsivity. Student's difficulty with fine motor coordination also affects academic performance, particularly with respect to expressing ideas in writing and is likely to have an increasingly negative impact as writing demands intensify in the areas of both note-taking and composition. Because of the physiological effects of connections within the brain, Student's attention and fine motor difficulties also adversely impact Student's ability to read. (N.T. pp. 1079—1082, 1086-1088; J-49, p. 10)

After the additional assessments were completed, the District issued a reevaluation report (RR) dated June 23. Based upon a review of records including the first District report, the results of the independent neuro-psychological evaluation, and the OT evaluation, which disclosed significant difficulties with in visual perception and visual motor speed, the District reversed its initial conclusion and determined that Student is IDEA eligible due to specific learning disabilities in reading and written expression. The later eligibility determination was also based upon the weaknesses Student had demonstrated in the past and inconsistencies in Student's school performance during the last quarter of the school year. (N.T. pp. 835, 869-875, 1226, 1227, 1290, 1294, 1297—1299, 1309; J-49, J-50, J-100, p. 18)

53. The District subsequently proposed an IEP which included a home-based ESY program consisting of hr./week of Orton-Gillingham based reading instruction. The District's Supervisor of Special Education informed Parents that an IEP needed to be in place in order for Student to receive ESY during the summer after 4th grade. (N.T. pp. 782, 783, 787, 790, 814, 898, 890; J-77, p. 27, J-78, J-79)

54. The District's reason for offering ESY although Student had not yet received special education services was to establish early baselines for the Orton-Gillingham based reading instruction the District intended to provide to Student in 5th grade in order to begin that instruction immediately when the new school year began. (N.T. pp. 786, 78, 877, 880)

Parents did not believe that the District's ESY proposal provided a sufficient number of hours or a sufficient level of intensity to meet Student's needs. (N.T. pp. 1569, 1570)

When Parents and the District were unable to agree upon an IEP, Parents enrolled Student in a summer "reading camp" program at a private school recommended by the neuro-psychologist who conducted the independent evaluation. Parents ultimately decided to enroll Student in the same private school for 5th grade. (N.T. pp. 1384, 1385, 1562, 1563; J-61, J-74, J-76, J-80)

DISCUSSION AND CONCLUSIONS OF LAW

A. Child Find

1. Legal Standards

With the exception of the ESY claim, Parents claims for denial of FAPE to Student

during 3 school years is based upon the child find" obligation imposed on school districts by the

IDEA statute and federal regulations, requiring states to identify, locate, and evaluate all

potentially disabled children, including those who may be "advancing from grade to grade." 20

U.S.C. 1412(a)(3); 34 C.F.R. 300.111(a), (C)(1); G.D. v. Wissahickon School District, 2011

WL 2411098 (E.D.Pa.2011) at *6. In Pennsylvania, that obligation is fulfilled by school

districts, and in some cases, intermediate units, in compliance with 22 Pa. Code 88 14.121-

14.125, as well as the federal requirements.

Within a reasonable time after a district is on notice of facts likely to indicate a disability,

it must "conduct an evaluation of the student's needs, assessing all areas of suspected disability,"

P.P. v. West Chester Area School District, 585 F.3d 727, 730 (3d Cir. 2009), citing 20 U.S.C. S

1414(b); O.F. v. Chester Upland Sch. Dist., 246 F.Supp.2d 409, 417 (E.D.Pa.2002), citing W.B.

v. Matula, 67 F.3d 484, 501 (3d Cir. 1995). "Failure to locate and evaluate a potentially disabled

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child constitutes a denial of FAPE." N.G. v. District of Columbia, 556 F. Supp.2d 11, 16

(D.D.C.2008), quoted in G.D. v. Wissahickon School District at *6.

With respect to the necessary evaluation, the IDEA further requires school districts to
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conduct a "full and individual initial evaluation" ... using "a variety of assessment tools and

strategies to gather relevant functional, developmental, and academic information, including

information provided by the parent that may assist in determining whether the child is a child

with a disability." 20 U.S.C §1414(a)(1)(A), (b)(2)(A)(i). A district may "not use any single

measure or assessment as the sole criterion for determining whether a child is a child with a disability. §1414 (b)(2)(B). The purpose of the evaluation is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally" 20 U.S.C.

§1414(b)(3)(A)(ii).

2. Claims/Contentions of the Parties

This case presents one of the more challenging issues with respect to when a school district's child find obligation arises. Parents contend that the District committed an obvious violation by its decision to wait four full school years to conduct an initial IDEA evaluation when Student received virtually all of the available regular education instructional supports every school year, along with a number of instructional and assessment accommodations. (FF 3, 4, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 19, 20, 24, 30, 31, 38)

The District contends that the consistently high level of regular education supports and accommodations provided to Student at each grade level assured that Student made appropriate academic progress each year. Indeed, the District witnesses' testimony that Student met the District's grade level benchmarks each year was repeated so frequently that it began to sound like a mantra.

When the extent of the supports and accommodations provided to Student over 4 school years is described in detail as in the Findings of Fact above, it may appear far more obvious now than it was to both Parents and the District when Student was in the early elementary years that the District delayed an evaluation of Student far too long. On the other hand, however, when the District finally evaluated Student in 4th grade, standardized tests of academic achievement placed Student largely within the average range or above, even in reading and writing, in which Student was ultimately found to have specific learning disabilities. (FF 45) In addition, the wa

neuropsychologist who conducted the independent evaluation that ultimately convinced the

District that Student is IDEA eligible obtained similar results. (J-49, p. 15) Closer analysis of

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the components of the results, however, combined with the results of the OT evaluation,

Student's history and pattern of learning difficulties, and the neuropsychologist's ability to relate

the assessment results to brain function allowed proper identification of Student's disabilities.

(FF 50, 51)

Moreover, this case presents somewhat unusual challenges in terms of the apparent

amenability of Student's reading disability to remediation with even minimal intervention and

the effect of Student's fine motor deficits on written expression and even reading (FF33, 51). It

is also possible that the full extent of Student's academic difficulties in 2nd and 3rd grades were

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masked because Student is a hard worker, generally willing to persist with challenging tasks and

had no behavior issues. (FF18, 25, 30) Nevertheless, despite factors that may make the

District's delay in evaluating and identifying Student understandable to some extent, there is

ample evidence available in the District's own records that it should have acted sooner. The

District, however, not only failed to "connect the dots" in this case, it refused to acknowledge

that there were dots.

The District's Underlying Error

The primary reason that a child find violation occurred in this case was the District's

singular focus on Student's purported progress toward and achievement of grade level

benchmarks in academic skills through the middle of 4th grade as precluding the possibility of a

disability. In effect, the District appears to have adopted a failure standard as the single test for

its own independent notice that a student that is potentially a child with a disability. That

mindset, however is both legally flawed and factually unsupportable in this case. Using failure
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as the only standard for an IDEA evaluation in this case unfortunately closed a window of

opportunity to provide early special education services that were likely to have been very

effective in remediating Student's reading and fine motor skill deficits. Student's ability to make

the kind of academic progress reflected on standardized achievement tests with regular education

supports alone suggests that providing Student with a phonemically based, systematic and

sequential reading program, such as Wilson or another type of Orton Gillingham type of

instruction, would likely have permitted Student to acquire secure and transferable reading skills

as Student moved into higher grade levels with greater reading demands. (FF 29) That

inference is supported by the success Student experienced with the brief exposure to the Sonday

phonemic awareness program in 2nd grade, which Student continued to use in 3rd grade. (FF 15,
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The conclusion that the District believes that a need for special education cannot arise

until and unless school performance is significantly impaired with regular education instructional

supports in place was supported by all of the District witnesses. Student's 3rd grade teacher, e.g.,

testified that based on the training she received from the District, she would not suggest an

evaluation for a student making progress toward the grade level benchmarks students are

expected to reach by the end of the school year. (N.T. pp. 224, 225) There was no suggestion in

the record that at some point, the nature and extent of the accommodations needed to maintain

progress would put the District on notice that an evaluation might be warranted.

The notion that academic progress can be the sole criterion for eligibility is not supported

by the language of the IDEA statute itself or by the courts. As noted above, the IDEA statute

and regulations explicitly preclude relying upon a single criterion for identifying potentially

eligible students, providing instead that districts must "use a variety of assessment tools and

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strategies to gather relevant functional, developmental, and academic information, including

information provided by the parents to determine whether a disability exists and may not use

any single measure or assessment as the sole criterion." 20 U.S.C. §1414(b)(2)(A), (B); 34
measure or assess

C.F.R. §300.304(b)(1), (2). It follows that using a single criterion for determining which

children to evaluate is similarly proscribed.

In *D.S.v. v. Bayonne Board of Education* 602 F.3d 553, 567 (3rd Cir 2010), the Court of

Appeals noted that academic "success" in special education classes with significant support and

reduced or modified standards does not establish that the District's program provides an

appropriate level of educational progress. An analogous principle can be applied where a school

district must determine when to consider a special education evaluation for a student whose

academic progress can only be maintained by continuing and increasing significant academic

support and accommodations in the regular classroom.

The facts of this case closely resemble the situation in *Chad C. v. West Chester Area*

School District, 194 F.Supp. 2d 417 (E.D. Pa. 2002). In that case, the school district failed to

identify as IDEA eligible a considerably older student with ADHD because of the student's

academic success in regular education classes, as indicated solely by grades. In concluding that

the student did not meet IDEA criteria for specially designed instruction, the district failed to take into account the student's potential, which was masked to some extent by wide fluctuations in the subtests of the standardized assessment of cognitive functioning administered by the district. The district also failed to consider the level of effort and parental support outside of school that the student needed to achieve average grades notwithstanding well above average intellectual ability. As in this case, the district based its conclusion that student was not IDEA

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eligible on a single criterion. As the district court noted, however, IDEA eligibility cannot be

reduced to a formula:

There is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination. See *Ridgewood Bd of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (rejecting the notion that what constitutes an appropriate education can be "reduced to a single standard") (citations omitted). 194 F.Supp. 2d at 420. That principle remains true, and applies to this case.

notwithstanding the extensive regular education accommodations and supports that allowed

Student to maintain academic progress despite a verbal learning disability that the District

belatedly—and reluctantly acknowledged—when Student's academic success in the early

"learning to learn" grade school years gave way to the far greater demands of applying insecure

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foundational skills to more complex learning situations

Indications of Potential Disability, Grades 1—3

The District refused to recognize even the possibility that Student has a learning

disability until it received the results of the OT evaluation and independent neuropsychological

evaluation it provided at Parents' request. (FF 52) The District ignored considerable and increasing evidence in 2nd and 3rd grades that Student had not reached a level of learning basic academic skills, particularly in reading and writing, well enough to apply such skills effectively as a means to learn more complex materials.

The District's failure to timely identify Student appears to be one of the unfortunate examples of a pendulum swinging too far. In general, the District appears to have a good system in place for early identification of struggling learners, and provides a variety of academic supports in the regular education environment to students who have difficulty acquiring basic academic skills as rapidly as expected. It is likely that without such supports and ac

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accommodations available in the regular education setting, some students would be referred for special education evaluations when their learning needs can be met effectively with the opportunities available for additional instruction in a small group setting, more repetition and practice. At the end of 1st grade, it appeared that Student could well have fit into that category, having successfully achieved the goals set and monitored through the IST process. (FF 6, 7, 11)

Unfortunately, the same level of monitoring was not maintained in 2nd and 3rd grades, allowing the District to miss the signs that should have prompted an earlier evaluation despite numerous "red flags." The 271d grade teacher believed Student's progress did not warrant IST intervention, but Student received double the small group reading instruction within the classroom than was provided to most of the class, worked with the reading specialist in reading lab outside of the classroom and participated in the Sonday phonemic awareness program for

approximately half of the school year. (FF 13, 14, 15, 17) At the end of the school year,

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Student's DRA scores remained at the level expected at the mid-point of 2nd grade. (FF14, 22)

Student participated in writing lab outside of the regular classroom for the entire 2nd

grade year, unlike other students referred to that program. (FF16) Spelling and conventions

remained as issues with Student's performance, along with handwriting and neatness. (FF 18)

Although Student made progress in phonological awareness during the months of

instruction in the Sunday program, weakness in phonics persisted at the end of 2nd grade and

Student was observed to continue using the Sunday strategies in 3rd grade, Student was neither

re-tested in phonological awareness nor apparently considered for the Sunday program again.

(FF 15, 27) There was no means for assessing the effectiveness of the regular education

supports and accommodations other than the report card grades and level of progress noted on

the portfolio conference reports. (FF 18, 21, 25) The teachers' assessments of progress,
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however, were not entirely supported by the limited objective evidence available. See FF14, 18,

21, 22, 23, 27, 28.

In 3 grade, accommodations for assessments needed to be added to the regular

education supports due to increased expectations and increased content. (FF 19)

Although clearly trying to shape their testimony to avoid directly admitting that

Student could not have reached the all important grade level benchmarks without significant

supports, Student's 2nd and 3rd grade teachers nevertheless noted that Student made appropriate

progress with the accommodations in place and neither considered removing the

accommodations because Student obviously benefited from them. The only reasonable inference

to be drawn from such testimony is that Student would not have demonstrated progress had the

accommodations been removed or even lessened.

Since the level of instructional supports and accommodations Student was receiving

needed to remain intact for academic progress to continue, the District should have considered

how Student would fare academically when increased demands would require more confident

and higher level use of basic reading and writing skills, which began with 3rd grade and increased

even more in 4th grade. (FF 19, 29) An evaluation to determine whether Student's continued

need for support while Student's reading fluency declined was suggested by the end of 2nd grade,

but was clearly needed by the end of 3rd grade. The District, however, focused solely on

Student's ability to succeed with the regular education supports in place, without ever stopping

to consider whether Student's reading and writing skills were strong enough to assure continued

success in the regular education setting when the emphasis in reading shifted from "learning to

read" to "reading to learn."

Indications of Disability -4Ch Grade