STATE OF CONNECTICUT

DEPARTMENT OF EDUCATION

Student v. Portland Board of Education

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Appearing on behalf of the Board: Attorney Peter J. Murphy
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Appearing before: Attorney Patricia M. Strong, Hearing Officer

FINAL DECISION AND ORDER

ISSUES

1. Whether the District violated the Student's rights under the IDEIA by failing to identify her as a child in need of special education during the 2009-2010 school year or for the 2010-2011 school year and by failing to provide special education and related services to her?
2. Whether the District has failed to appropriately test (evaluate) the Student for special education and related services?
3. Whether the District failed to appropriately assess the Student's eligibility for special education and related services?
4. Whether the Student is eligible for special education and related services?
5. Whether the District violated the Student's rights under the IDEIA by failing to provide her with a free and appropriate public education that met her individualized needs during the 2009-2010 school year or for the 2010-2011 school year, including extended school year instruction and services?
6. Whether the District shall provide the Student with compensatory education to compensate the Student for the District's failure to provide special education?
7. Whether the District shall retain a mutually agreeable private agency to provide scientifically research-based instruction and assessment services?

SUMMARY

The Student (also referred to as L.) is a 16 year-old student in the 11th grade at the public high school. She has never been found eligible for special education services. Her Parents requested that she be found eligible under the category of specific learning disability. At a Planning and Placement ("PPT") meeting on June 12, 2009, the PPT reviewed an evaluation of the Student's reading, writing and language by an agreed upon independent consultant and written reports from all of the Student's teachers. The PPT decided to table the meeting until a neuropsychological evaluation scheduled on July 1 was available for review. The PPT reconvened on November 13, 2009. After reviewing the evaluations, the Student's report cards, updated teacher reports and Connecticut Mastery Test ("CMT") scores, the school-based team found the Student ineligible for special education services. The team proposed a Tier II regular education intervention using research-based software. The Parents disagreed with the eligibility determination, but agreed to the reading programs. The Student received the Tier II intervention, which consisted of Read Naturally Level 8 and My Reading Coach. The Student completed both programs in March 2010. Although the Board staff thought that the Student achieved the targeted reading rate and comprehension level, the Parents were not satisfied with the results and requested a PPT meeting, which was held on May 6, 2010. The Student was found ineligible for special education services and the school-based team members refused additional Tier II services because they did not think they were necessary. On June 17, the Parents filed this due process complaint to establish that the Board has failed to identify the Student and has not provided a FAPE for the 2009-2010 and 2010-2011 school years. The Board contends that the Student was not eligible for special education services for those school years and FAPE is not required.

PROCEDURAL HISTORY

The Parents' attorney requested this hearing by mailing a form accompanied by an affidavit signed by the Mother to the State Department of Education (SDE) on June 15, 2010. Hearing Officer (HO) Exhibit 1. The Board received a copy on June 17. This Hearing Officer was assigned to the case on June 18. The Board's attorney filed an appearance on June 24. A prehearing conference was held on June 29. The attorneys reported that the parties agreed to mediation, but it had not yet been scheduled. The mailing date of the final decision was established as September 1, 2010. Hearing dates were agreed on for August 19 and 20. The Parents' attorney agreed to file a statement of issues for the hearing, which she did on July 1. The SDE notified the Hearing Officer that mediation on July 22 was not successful and to proceed with the hearing. On August 4, the Parents' attorney filed a Motion for Declaratory Default Judgment with a supporting affidavit from the Mother and a memorandum of law and a Motion for Judgment on the Pleadings and/or for Summary Judgment with an affidavit from the Mother and a memorandum of law. The Board's attorney filed objections to both motions for the reasons that the motions were procedurally improper, lacking substantive support and were frivolous and unwarranted. On August 10, the Parents' attorney filed a Reply to the Board's objections and supplemental affidavits from herself and the Mother. In that brief, the Parents' attorney withdrew two of the main claims on which the motions were based. The Parents filed Exhibits P-1 through P-40 and their witness list. On August 11, the Board filed Exhibits B-1 through B-32 and its witness list.

The hearing convened on August 19. The hearing request and the statement of issues were entered into the record as Hearing Officer Exhibits HO-1 and HO-2. The Board objected to Exhibits P-1 through P-5, P-38 and P-39. They were marked for identification only. Exhibits P-6 through P-37, and P-40 were entered into the record as full exhibits. The Parents objected to Exhibit B-11. It was marked for identification only. Exhibits B-1 through B-10 and B-12 through B-32 were entered into the record as full

exhibits. After hearing argument, the Hearing Officer denied the Parents' motions. The Hearing Officer ruled that the claim in the Motion for Default Declaratory Judgment regarding the Board's alleged failure to participate in mediation could not be considered. The mediator's notification that the parties did not reach agreement at mediation showed that it had occurred and any inquiry into what happened during that process would violate state and federal law. The claims in the Motion for Judgment on the Pleadings and/or Summary Judgment were based on the Board's failure to convene a resolution session and the failure of the Board to answer every fact alleged in the due process complaint. The Hearing Officer ruled that these claims were not supported by state or federal law and that numerous factual disputes were apparent, which would require hearing the evidence from both parties. The attorneys presented opening statements. The Parents then presented direct testimony from the Mother for the remainder of the day. Exhibits P-1 and P-5 were excluded from evidence, Exhibit P-2 was admitted for the limited purpose of background information and Exhibits P-3 and P-4 were admitted as full exhibits after the Board withdrew its objection. Additional hearing dates were agreed on for September 9 and 14, 2010. The mailing date for the final decision was extended to October 8, 2010.

The hearing continued on August 20. The Mother completed her direct testimony. This was followed by testimony from the Student. After the Student's testimony, the Mother completed her testimony and the Parents rested their case. The Board moved for a dismissal of the case based on the lack of evidence to support the Parents' claims. The motion was denied without prejudice. The Board presented testimony from William Knies, Director of Special Education, Portland Public Schools.

On August 24, the Board's attorney requested that the hearing scheduled on September 9 be cancelled because a witness was not available. The Parents' attorney had no objection. The request was granted. The hearing continued on September 14 with the remainder of Mr. Knies' testimony. The Parents offered additional Exhibits P-41 and P-42. These were excluded from evidence because they were not filed in accordance with the five-day rule and there was not good cause to allow them as an exception to the rule. The Board then presented testimony from Diana Newman, Ph.D., independent educational consultant. At the close of her testimony, the Board rested its case. The Parents had no rebuttal evidence and rested their case.

The Parents' attorney requested time to file a post-hearing brief. The Board's attorney did not think briefs were necessary and renewed his motion to dismiss or for a directed judgment in the Board's favor. The Parents' attorney was given until September 30 to file her brief. The Board, which was given the option of filing a reply brief, was allowed until October 12. The decision deadline was extended to November 5, 2010 by agreement of the parties. The Hearing Officer sent the attorneys a letter on September 16 confirming these dates. The attorneys were asked to present the briefs in a format of proposed of fact, conclusions of law and order, along with any separate legal argument they wished to make. The Parents' brief was timely filed. The Board's attorney requested an extension of time to and including October 18 to file a reply brief because hearing transcripts were not completed. The request was granted over the Parents' objection and the mailing date for the final decision was extended to November 12, 2010.

The Findings of Fact incorporate various portions of the Parties' Proposed Findings of Fact. To the extent that the findings of fact are conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to their given labels. Bonnie Ann F. v. Callahen Independent School Board, 835 F.Supp. 340 (S.D. Tex. 1993). The findings and conclusions set forth herein, which reference specific exhibits or witness' testimony, are not meant to exclude other supportive evidence in the record. Id.

FINDINGS OF FACT

1. The Student has a birth date of November 18, 1993, is 16 years old and has been attending Board's public schools since September 2006. Prior to that, she was enrolled in private schools. Testimony of Mother.

2. The Student currently attends the Board's public high school. Id.

3. During the 2008-2009 school year, the Student was in 9th grade. Id.; and Exhibits B-1 and B-4.

4. During that school year, the Parents and the Board agreed to have a comprehensive reading, writing and language evaluation done by Diane Newman, Ph.D., an independent consultant, at Board expense. Testimony of Mother and Mr. Knies; and Exhibits B-3 and B-4.

5. Dr. Newman is eminently qualified to perform this type of evaluation. She has a Bachelor's and a Master's degree in speech and language pathology, and a doctorate in Special Education, with an emphasis on reading and adolescence from the Educational Psychology Department at the University of Connecticut. Testimony of Dr. Newman; and Exhibit B-31. One of her dissertation advisors was Dr. Don Shankweiler, a renowned specialist in reading, who has written nearly 100 articles on reading. Testimony of Dr. Newman. Her area of interest, which was also the subject of her doctoral dissertation, is reading and reading difficulties in adolescence. Id. Dr. Newman currently holds national certifications in speech, language and hearing from the American Speech-Language-Hearing Association, as well as state certification from the Connecticut Department of Education as a teacher in the area of speech and language pathology, and a license in speech and language pathology from the Connecticut Department of Health. Id.; and Exhibit 31. She has 30 years experience in public schools as a speech and language pathologist. Id. She currently is an Assistant Professor in the Department of Communication Disorders at the Southern Connecticut State University where she teaches graduate and undergraduate courses and does clinical supervision. Id. She is a consultant with public schools in difficult cases and has presented at numerous conferences and workshops. Id. Dr. Newman also has specialized training in Read Naturally and other reading programs. Exhibit B-31.

6. Dr. Newman evaluated the Student in April 2009. Testimony of Dr. Newman; and Exhibit B-4. The Mother had contacted her prior to the evaluation after Mr. Knies gave the Mother Dr. Newman's name. Testimony of Dr. Newman; and Exhibit 3. Dr. Newman spoke to the Mother by telephone for one to one-and-one-half hours about her qualifications, what her perspective was on reading difficulties in adolescents and what kinds of tests she would use. Testimony of Dr. Newman.

7. Prior to conducting testing, Dr. Newman reviewed the Student's records, which revealed that Parents had asked the Board to identify L. for special education in 2006 and 2007. Id.; and Exhibit 4. Although the PPT did not find the Student eligible under IDEA, the Board provided her with corrective reading instruction. Exhibit B-4. On the Connecticut Mastery Tests in March 2008 (8th grade), the Student achieved levels of goal on mathematics, science and writing and the upper end of proficiency in reading. Id. Dr. Newman selected tests directed to the Student's individual needs, not a standard list of tests. Testimony of Dr. Newman. Using a process-oriented approach, which analyzed error patterns along levels of performance, she administered the Gray Silent Reading Test, the Gray Oral Reading Test ("GORT") 4, Qualitative Reading Inventory ("QRI") 4, Test of Adolescent and Adult Language-Written Language, Test of Written Language 4- Spontaneous Writing, Informal Assessment of Spelling, Test of Silent Word Reading Fluency, Comprehensive Test of Phonological Processing ("CTOPP"), Test of Auditory Processing Skills 3, Lindamood Auditory

Conceptualization 3, Decoding Skills Test-Phonetic Transfer, Test of Problem Solving-Adolescent, Informal Speech/Voice/Fluency and Review of Records/Assessments. Id.

8. Successful reading comprehension and to a large degree, spelling and writing, requires two fundamental skills—decoding and language comprehension. Id. In analyzing the results of the assessments, best practice is to use both standardized measures, norm referenced measures, such as the GORT or the Silent, and classroom performance, and other sorts of informal curriculum-based measures. It is forbidden practice to make a diagnosis based on one test. Testimony of Dr. Newman. She concluded that L. had the fundamental skills that were necessary for decoding to be adequate, was a competent decoder and her comprehension at high school level was appropriate instructionally, with the caveat that her reading rate (75 words per minute) was at the low end of the average range (65-334 words per minute). Id.; and Exhibit B-4. She found that L. has weaknesses in phonological memory and retrieval, which raised a question of whether L. might have a more generalized processing disorder. Id. In writing, the Student had strong abilities in composition, grammar and punctuation. Spelling was a relative weakness, which was most likely related to her weak phonological memory and retrieval. Id. Dr. Newman did not make any recommendations regarding special education eligibility pending the report and review of a neuropsychological evaluation, which was scheduled to occur in the summer. She recommended short-term scientific research-based interventions ("SRBI") to address L.'s weaknesses in reading fluency and spelling. Id. She suggested a program called Read Naturally, which is a reading software program designed to develop reading fluency. Dr. Newman has extensive experience with Read Naturally and has seen it cited in the literature as being successful. Testimony of Dr. Newman.

9. On June 12, 2009, a Planning and Placement ("PPT") meeting was convened to review Dr. Newman's evaluation. Exhibit B-1. The Student and the Mother, accompanied by a Parent Advocate, attended. Dr. Newman attended, as did Scott Giegerich, associate principal, Karen Risley, guidance counselor, Dea Collins, special education teacher, Beth McCormick, regular education teacher, and Mr. Knies. Id. The PPT also reviewed reports from all of L.'s teachers. Exhibit B-2. The PPT recommended tabling the meeting until the report from the neuropsychological evaluation, scheduled for July 1, was available. Exhibit B-1.

10. The Student's final grades for 2008-09 school year were English 9 B+ and A-, World History I B, World History II B-, Spanish I B, Algebra I B-, Intro. Concepts Physics B, Intro. Concepts Chemistry B+, Architectural Drafting I A, Phys. Ed. (S1) A+, Phys. Ed. (S2) A, Introduction to Art A-, and Concert Band A. Exhibit B-25 at 1.

11. Pursuant to an agreement between the Parents and the Board, Michael N. Fulco, Ph.D., clinical neuropsychologist, conducted a neuropsychological evaluation of the Student at Board expense on June 29 and July 1, 2009. Exhibit B-5. Dr. Fulco administered some of the same tests conducted by Dr. Newman, specifically the GORT 4 and the Lindamood Auditory Conceptualization Test. Id.; and Exhibit 4. He also administered numerous other tests, including the Wechsler Intelligence Scale for Children 4 ("WISC"), Delis-Kaplan Executive Function System ("D-KEFS"), Wide Range Assessment of Memory and Learning ("WRAML") – Sentence Memory, WRAML 2 – Story Memory, Wechsler Individual Achievement Test II ("WIAT II"), NEPSY Developmental Neuropsychological Assessment 2d Edition, Beery-Buktenica Test of Visual-Motor Integration 5th Edition ("VMI") and the Behavior Assessment System for Children 2d Edition ("BASC 2"). Dr. Fulco also reviewed the Student's records, interviewed the Mother and the Student. All of L.'s teachers, as well as the Mother and Student completed the BASC questionnaires. In addition, Dr. Fulco spoke with Dr. Newman, L.'s current English teacher and her middle school guidance counselor. Exhibit B-5.

12. Dr. Fulco concluded that L. is functioning for the most part in the average range on the assessment of intelligence with some isolated high average strengths. Id. at 11. The assessment of reasoning and executive functioning showed good reasoning skills, typically average, with no evidence of problem solving skills. Id. at 13. "Residual organizational deficits are congruent with a developmental disorder, but appear fairly compensated by systematic planning." Id. In the area of attention, Dr. Fulco found a pattern of consistently poor performance in auditory attention functions and functions requiring auditory short-term memory. "In light of the history of good sustained attention, the current data would appear to be best interpreted as implicating aspects of auditory processing function, short-term memory particularly involving auditory sequential processing, and self-guidance and self-monitoring." Id. at 14. In the area of memory and learning, the results on the WRAML 2 – Story Memory ruled out any impact of auditory processing deficits on the ability to understand meaningful auditory narrative presentations. Id. at 14-15. L. showed generally intact memory functioning with special strengths in verbal memory. Id. at 15.

13. Academic skills were assessed using the WIAT II. Because L. showed difficulties with phonemic awareness, additional assessments were conducted using the NEPSY, Lindamood and GORT 4 – Form B. Id. at 15-16. Dr. Fulco concluded that L. was a slow and inaccurate reader. Id. at 16. This conclusion is contrary to Dr. Newman's conclusion that L. is a slow but accurate reader. Id. at 16-17. He summarized his assessment of L.'s language and academic skills: "[L.] continues to demonstrate impaired phonemic awareness and diminished reading fluency associated with a partly compensated phonological dyslexic syndrome." Id. at 18. "Executive function deficits associated with erratic self-monitoring and mental guidance functions contribute to errors in writing and to inefficient organization of ideas in writing." Id.

14. Dr. Fulco diagnosed the Student with a reading disorder and a learning disorder, NOS – executive processing disorder. Id. at 21. He recommended that the Board continue to provide the Student with remedial reading intervention programs. He suggested that this continue until the Student "has reached the maximal possible benefit and/or has reached a level that will assure independent functioning in reading." Id. He admitted that prescribing the "particular types of intervention programs, such as curricula or software is beyond the scope of this evaluator's expertise." For that reason, he recommended that an independent reading consultant be employed to establish standards for decision-making regarding exit from remedial services, goals for the reading program and curricula to be used. Id. Dr. Fulco did not make any comments regarding L.'s eligibility for special education in his report, nor did he testify at the hearing.

15. On November 13, 2009, the PPT met to review Dr. Fulco's evaluation and to determine L.'s eligibility for special education. Exhibit B-6. The Student and the Mother, accompanied by a Parent Advocate, attended. Drs. Fulco and Newman attended, as did Mr. Giegerich, Ms. Risley, Ms. Collins, Liz Anderson, regular education teacher, and Mr. Knies. Id. The PPT also reviewed reports from all of L.'s teachers. Exhibit B-7. The PPT determined that L. was not eligible for special education services at that time, but recommended that a Tier-II intervention be implemented using Read Naturally Level 8 and My Reading Coach for 8 weeks under the supervision of a special education teacher. The Parents were to receive updates "as per SRBI guidelines" and a QRI 4 would be administered before the next team meeting to be held in February. Exhibit B-6. The PPT meeting summary indicates that team members had differing opinions of the Student's "relative phonological weaknesses on her reading fluency." Id. There was agreement, however, on implementing the Tier-II intervention and following up with a meeting after the software programs and QRI 4 were completed. Id.; and Testimony of Mr. Knies and Dr. Newman.

16. The Tier-II interventions would be implemented after the Board acquired the software, which was explained to the PPT. Testimony of Mr. Knies. Even though the Mother offered to lend her copy of the software to the Board, they had to obtain a license from the manufacturer in order to use it. Id. The Student began working on the Read Naturally and My Reading Coach programs on December 11, 2009 and completed them on March 17, 2010. Exhibit B-17. The programs were supervised by Nicolas Chaconis, special education teacher. He and Lori Kelly met with the Mother on January 15, 2010 to review the Student's progress to date. Exhibit B-33 at 10-11. They not only went through L.'s test data, but showed the Mother on the computer the processes of how Read Naturally works. Id. at 10. The Mother also asked to come back to observe the My Reading Coach program. Id.

17. The Mother testified that she received four progress reports on My Reading Coach and five on Read Naturally. Testimony of Mother. The Parents' Exhibits contain 11 reports. Exhibits P-10 (1/8/10 My Reading Coach), P-11 (1/13/10 Read Naturally), P-12 (1/22/10 Read Naturally), P-15 (2/18/10 My Reading Coach), P-16 (2/18/10 Read Naturally), P-17 (2/19/10 Read Naturally), P-19 (3/5/10 both programs), P-20 (3/18/10 My Reading Coach), P-21 (3/8/10 Read Naturally), P-23 (3/10/10 Read Naturally), P-24 (3/15/10 Read Naturally) and P-26 (3/17/10 Read Naturally). Although she was concerned about some of the scores, the Mother did not ask the teacher, Mr. Chaconis to explain any of them. Testimony of Mother.

18. On February 18, 2010, the Mother requested a meeting with the team, including the Student, to discuss L.'s present levels of reading performance, the appropriateness of the reading programs, the manner and method of their implementation, weekly progress reports and the use of DIBELS for additional monitoring. Exhibit P-13. In her e-mail to Mr. Knies, she advised him that she would be bringing her attorney to the meeting. Id. Mr. Knies responded on February 18 that he would contact the Board's attorney and provide the Mother with some dates. Id. He also asked the Mother in another e-mail on February 18 if she was requesting a PPT meeting. Exhibit B-32 at 16. She said no, just an informal meeting. Id. On February 22, Mr. Knies confirmed the meeting for Monday, March 8 at 9:30. Id. at 18; and Testimony of Mr. Knies.

19. On February 19, Dr. Newman wrote a letter to L. advising her that she did not need to read all of the stories to finish the Read Naturally program, but only to read 160 wpm for the cold timing for three stories in a row with 80% comprehension for these three stories. On My Reading Coach, L. had a few more sounds to finish. Exhibit P-18. On March 3, Elizabeth Drega, special education teacher, met with L. about her progress and conducted a follow-up QRI. Exhibit P-27. The Student read a high school level expository passage silently at the rate of 184 wpm with 60% initial comprehension and with "look backs" added 30% comprehension, for a total of 90% comprehension. Id. Ms. Drega noted that L.'s initial summarization was accurate, but lacked specific details. When asked specific questions about the story, L. had an initial comprehension of 60%, but after being provided with "look backs," she was able to quickly locate the specific information in the text and give a "very thorough and complete answer." Id.

20. On Friday, March 5, the Mother sent an e-mail to Mr. Knies stating that after discussion with her advocate, she wished to clarify that the meeting was a PPT meeting to address the five items on her February 18 agenda and to determine the Student's eligibility [for special education]. Exhibit B-32 at 19. On Saturday, March 6, Mr. Knies replied by e-mail that as previously agreed, the meeting was not a PPT meeting, but rather a discussion of L.'s response to the intervention that was implemented following the November 13, 2009 PPT meeting. Id. at 20. On March 8, 2010, a meeting was held with the Mother, her attorney, the Student, Mr. Knies, the Board's attorney, Dr. Newman, Mrs. Lavery, the school principal, Ms. Kelly and Mr. Chaconis. Testimony of Mr. Knies. They discussed the Student's progress on Read Naturally

and My Reading Coach. Id. Dr. Newman had prepared a summary on March 5 about the current status of the programs. Exhibit P-19. As of that date, in the Reading Coach program, L. had one remaining phonics lesson. She had mastered all of the Reading Levels from 8.0-10.5. She had Grammar Lessons 13-24 left to complete. The Class Needs Report produced by that program categorized L.'s performance by specific phonics areas. She scored above average in all areas. On her last Review Test of Lessons 1-46 she scored 93%. Id. On the Read Naturally program, L. had completed 21 out of 24 stories for level 8. Her cold timings had improved from 118 wpm to 141 wpm. According to Hasbrouck & Tindal Curriculum-based norms in oral reading fluency, L. was in the 50% range. Id.

21. On March 19, the Mother sent letters to Mr. Knies from her and the Student regarding the March 8 meeting. Exhibit P-28. They had numerous complaints about the meeting and the Mother had more questions about Dr. Newman's March 5 report. Id.

22. Dr. Newman also prepared a final summary on March 24, 2010 of the Student's progress after completing both programs. Exhibit B-17 at 2-22. L. had improved her silent reading (the kind expected in secondary and post-secondary education) from 75 wpm in April 2009 to 184 wpm in March 2010. Id. at 4. L. demonstrated average reading fluency rate (the first goal of the Tier II intervention) and had overcome prior difficulties. Id. On My Reading Coach, which was used to address her need to strengthen spelling and decoding, L. completed all 61 lessons to ensure complete knowledge although she did not need substantial practice in many of the areas. She averaged 93% overall, with scores in individual areas ranging from 90 to 98%. Id. at 5. In spelling, L. scored an average of 82%. Over half of her errors were phonetically correct or close approximations of the target word. In comprehension using decoding knowledge, L. was measured to be at a 10th grade level (100% at 9th grade, 80% at 10.5th). Id. Dr. Newman concluded that since L. had successfully completed the agreed on programs, there was no need for further Tier II intervention. Id. at 6. Mr. Knies sent the report to the Mother on March 30 and, in his cover letter, advised her that since the Student had made sufficient progress in both programs, the Board would not provide her with further Tier-II interventions. Id. at 1.

23. On April 1, the Mother wrote to Mr. Knies requesting a PPT meeting and that the Student be referred to special education. Exhibit P-30. Among other things, she disputed the Board's assertions that L. was making sufficient progress with the reading programs. Id. On April 7, she sent a second letter to Mr. Knies complaining that her attorney had been advised that a PPT meeting was not appropriate. Exhibit P-31.

24. On April 27, Mr. Knies sent the Parents a notice of a PPT meeting on May 6, 2010. Exhibit B-20. In attendance at the May 6 PPT meeting were Mr. Knies, Mrs. Lavery, the Mother, the Student, Elizabeth Anderson, regular education teacher, Mr. Chaconis, Ms. Risley, the Parents' attorney and the Board's attorney. Exhibit B-21. The Mother presented a list of academic concerns including the 8th grade CMT scores, the 2009 PSAT scores, the Student's performance on selected tests from Dr. Newman's April 2009 evaluation, Dr. Fulco's July 2009 evaluation and some of the comments made in Dr. Fulco's evaluation. Exhibit B-22. She also presented a list of claimed deficiencies in the Tier-II intervention. Id. She requested that the Student be identified for special education under the specific learning disability category based on Dr. Fulco's diagnoses of Reading Disorder and Learning Disorder, well as a 2006 diagnosis of Reading Disability. Id. The Mother proposed goals and objectives to address auditory short term memory, executive functioning, reading, math, writing and social/behavioral. Id. She requested the use of DIBELS and GORT twice/year, continued SRBI's in reading/math (i.e. Wilson, Orton-Gillingham, etc.), a monthly planner as an organizational accommodation and extended school year services. Id.

25. The PPT reviewed progress reports from the Student's teachers, which indicated that the Student was performing adequately in class, the Student's report card, which indicated that the Student received A's and B's for the third quarter and the Student's progress in her Tier-II reading interventions, including the fact that the services were discontinued because of that progress. Exhibit B-21. The PPT also reviewed the prior CMT scores. After considering all this information and the concerns expressed by the Mother and the Student, the school-based PPT members determined that the Student was still not eligible for special education and related services. The PPT also determined that the Student did not require additional Tier-II reading services at that time. Id. See also Exhibit B-23 (progress reports from teachers).

26. In mid-May 2010, the Mother e-mailed all of L.'s teachers and requested detailed grade reports for the year. Mr. Knies gathered the reports and mailed them (36 pages) to the Mother on June 1. Exhibits B-24 and B-32 at 23-25.

27. Mr. Knies has a Bachelor of Fine Arts from Sam Houston State University, a Master's of Education and Special Education from South West Texas University and a Sixth Year Certificate from the University of Connecticut for school administration. Testimony of Mr. Knies. He is certified by the State of Connecticut as a school administrator and as a special education teacher for K-12. Id. Mr. Knies has been the Board's Director of Student Services since April 2006. He was the Interim Director for a few months before that. Id. From 2002 until he began in Portland, he worked for the Capitol Region Education Council ("CREC") as a behavior consultant. Id. Prior to moving to Connecticut in 2002, Mr. Knies worked in Texas first as a special education teacher in a psychiatric hospital for five years. Then he was recruited to be the Director of Education at another psychiatric hospital, where he worked for a year. Following that, he worked in a public middle school as a special education teacher for about five years. Id. He has nearly 20 years of experience in the area of special education.

28. As the Director of Student Services, Mr. Knies is responsible for overseeing all of the Special Education programming for students, including identification, annual reviews of IEPs, triennial evaluations, monitoring the related services and service hours in IEPs. He oversees the special education teachers and the related service providers. He is responsible for § 504 accommodation plans. He is also the coordinator for CMT and CAPT for the district. Id.

29. Mr. Knies is familiar with the Individuals with Disabilities Education Act ("IDEA") and with the Connecticut statutes and regulations pertaining to special education. Id. He is in direct ongoing communication with the SDE anytime there are new laws or new forms or new information that needs to be passed on to the district concerning special education. He also has all the state reports that are required. Id.

30. He has experience working with children with learning disabilities. Id. A large percentage of the 150 identified students in the district have learning disabilities. Id. When new students are referred for special education, he is always involved. He would have discussion with the multidisciplinary team to make sure all the documentations are right and to make sure all the protocols are followed. Id. For students who have already been identified as learning disabled, he may consult with the team involved in that particular case about the IEP, about the goals and objectives, about what is appropriate and needed for that particular student. Id. He attends PPT meetings. Id.

31. Mr. Knies is the administrator in the district who is in charge of the SRBI development in the district. Id. He became involved with SRBI when he was at CREC. When he came to Portland, he helped to develop the SRBI program in Valley View School, which is Pre-K to grade 2 school, and then Gildersleeve School, which is the grade 3 to 4 school. Id.

32. SRBI, as the state framework has identified it, is an early intervention program. It's designed to identify students at an early age; kindergarten, first grade, second grade. SRBI is a three tier model, where Tier I effectively is kind of a universal screening of everybody. All the students are under that. When there is a concern based on a student not responding or not performing on tests that are school-wide, then the student may placed under Tier II for a period of time. If he or she responds during that given time, then he or she does not need to move forward. If he or she doesn't and the team decides that there's a need for Tier III, then it becomes more intense, usually more of a one-to-one kind of intervention, more of a pull-out model. The team would set up a systematic program for a period of time to look at the child. At the end of this period of time, if he or she does not respond to the intervention, the team could refer the child for special education consideration, which means that a PPT would then be called. SRBI is a regular education initiative. Id.

33. Under the state framework, Tier II is a short-term intervention from 8 to 20 weeks. Since Portland has used the SRBI program in pre-k to grade 4, fewer children in those grade levels have been referred for special education over the last two years than during the previous two years. Id.

34. Periodically, a parent requests testing for a student in grades 5 to 12. While there is no systematic program of SRBI in those grades, the Board will use that model. They use a multidisciplinary approach, looking at the student's grades, their behavior in class and determine whether there are valid concerns on the parent's part. If it's a reading problem or a math problem, they would talk extensively with that particular teacher to see what kind of interventions have been done before and what can be tried in the classroom. If the teacher has no concerns about the student, they may not have any intervention. Id.

35. Mr. Knies is very familiar with the Student in this case because, among other things, he has attended several PPT meetings and was involved in contracting with the independent reading consultant, Dr. Newman, who was agreed on by the Parents to test L.'s reading deficits. Id. Mr. Knies also contracted with Dr. Fulco to perform the neuropsychological evaluation, which was agreed on by the Parents. Both evaluations were done at Board expense. Id.

36. The teacher's progress reports are a very important factor in determining how a student is doing at any particular time. Grades are also considered, but not as the determining factor in an eligibility determination. At the time of the April and November 2009 PPT meetings, the Student's teachers all stated that she was a great kid, her grades and participation in class were good, her behavior in class was excellent and they had no major concerns. Id. No one questioned that L. had a weakness in reading, however the issue for the PPT was whether it was severe enough to require special education and specialized instruction. Id. The Student's Report Card for the first half of the 2009-2010 school year indicated that the Student was receiving A's and B's in all subjects. Id.; and Exhibit B-26. The PPT also considered her performance on standardized tests, including the CMT. The Student was at the goal level in all areas, except reading where she was at the proficient level. This is sufficient to meet the state standard and is a passing score. Testimony of Mr. Knies. He agreed with the PPT's determination that L. was not eligible for special education in November 2009 or May 2010. Id.

37. The Student made the honor roll in 9th and 10th grades. At the end of 10th grade, her grade average was 3.37 and her class rank was 32 out of 90. She was enrolled in college preparatory classes. Testimony of Mother; and Exhibit B-25.

38. The Student's academic abilities are further supported by the standardized test scores on the Connecticut Academic Performance Test ("CAPT"), which she took in March 2010. L. achieved goal level

scores in mathematics, science and writing and a proficient score in reading. Testimony of Mr. Knies; and Exhibit B-27.

CONCLUSIONS OF LAW

1. The Parents claim that the Board violated the Student's rights under IDEIA by failing to identify her as a child in need of special education during the 2009-2010 or the 2010-2011 school years and by failing to provide special education and related services to her (Issue #1). They also claim that the Board violated the Student's rights under IDEIA by failing to provide her with a free appropriate public education ("FAPE") during those same schools years, including extended school year instruction and services (Issue #5). Issue #4 seeks a determination of whether the Student is eligible for special education and related services. The Board argues that Issues 1, 4 and 5 essentially all ask whether she should have been identified as a special education student and that the issues raise one claim. Since the Parents' attorney could not articulate any legal reasons to separate them, Issues 1, 4 and 5 will be considered as one issue, i.e., whether the Board failed to identify the Student as eligible for special education and related services and to provide her with a FAPE as required by federal law.

2. Congress enacted the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et. seq. ('IDEA") "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs …[and] to ensure that the rights of children with disabilities and parents of children and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A) & (B); see also, Forest Grove Sch. Dist. v. T.A., 129 S.Ct. 2484, 2491-2492 (2009) (discussing the purposes of the IDEA); Winkelman v. Parma City School Dist., 127 S.Ct. 1994 (2007). States receiving federal funding under the IDEA are required to make a free appropriate public education ("FAPE") available to all children with disabilities residing in the state. 20 U.S.C. § 1412(a)(1)(A). To this end, IDEA requires that public schools create for each student covered by the Act an individualized education program ("IEP") for the student's education at least annually. 20 U.S.C. § 1414(d)(2)(A). IDEIA refers to the 2004 amendments to IDEA. References to IDEA in this decision are to the statute as amended in 2004 and to the regulations as amended in 2006.

3. In this case, the Parents are claiming that the Student has a learning disability. The IDEA defines child with a disability as "a child evaluated in accordance with §§ 300.304 through 300.311 as having . . . a specific learning disability . . . and who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A)(emphasis added); 34 C.F.R. § 300.8(a). "Specific learning disability means a disorder in one 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." 34 C.F.R. § 300.8(c)(10).

4. The Parents argue that the Board did not appropriately evaluate and assess the Student's eligibility for special education. The Parents have stated these claims as separate issues (##2 and 3), but the Board asserts that there is no meaningful distinction between "evaluate" and "assess" and that the issues raise one claim. Since the Parents' attorney could not articulate any legal distinctions between the two and since the common meanings of the words are synonymous, Issues 2 and 3 will be considered as one issue, i.e.,

whether the Board failed to appropriately evaluate the Student's eligibility for special education and related services as required by federal and state law. The Parents assert that the Board did not conduct a comprehensive evaluation in all areas related to the suspected disability and did not "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" about the child. 20 U.S.C. §§1414(b)(2) and 1414(b)(3); and 34 C.F.R. §§ 300.304(b)(1) and 300.304(c)(4). This argument is disingenuous given the background of this case. The Board claimed, and the Mother in sworn testimony agreed, that the two evaluations relevant here by Drs. Newman and Fulco were conducted pursuant to a prior, confidential agreement between the Parents and the Board. Therefore, any claims that the Board should have conducted other evaluations will not be considered. Dr. Newman's comprehensive reading evaluation was performed first and discussed at the June 12, 2009 PPT meeting. The evaluation report was thoroughly discussed with the Mother. The PPT agreed (including the Mother) to table the meeting until Dr. Fulco's neuropsychological evaluation report was available. Contrary to the statement in the Parents' brief on pages 23-24 that Dr. Newman was not present at the June 2009 PPT meeting, she was there. The Parent, who brought a Parent Advocate with her to the meeting, testified that Dr. Newman reviewed the evaluation.

5. Dr. Fulco's evaluation, which was done in the summer, was discussed at the November 13, 2009 PPT meeting. Both Drs. Fulco and Newman attended the meeting and participated in the discussion of both evaluations and recommendations. While the Parents heavily rely on Dr. Fulco's diagnosis of the Student's learning and reading disorders, he did not testify, nor did his report contain any opinion that the Student was eligible for special education. The Parents did not offer any admissible evidence to support the conclusion that the Student was eligible for special education in 2009. Dr. Fulco never evaluated the Student after she completed the Tier-II interventions, rendering any conclusion that his 2009 evaluation supports a finding of special education eligibility in the May 2010 PPT meeting speculative. The only competent opinion evidence from qualified professionals (Mr. Knies and Dr. Newman) was that the Student has weaknesses in reading and spelling, but not a disability within the meaning of IDEA. Teacher reports in June and November 2009 and May 2010 uniformly stated that L. was performing well, had grade averages of A's and B's and was a good student. None of the school-based PPT members were of the opinion that the Student had a specific learning disability that adversely affected her educational performance. "It is not whether something, when considered in the abstract, can adversely affect a student's educational performance, but whether in reality it does." Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632 (7th Cir. Wis. 2010). Conn. State Regs., § 10-76d-6 provides in relevant part: "Determination of a child's eligibility to receive special education and related services shall be based on documented evidence, as required by these regulations, that the child requires special education." See also 34 C.F.R. § 300.306. The Board had no documented evidence of the Student's eligibility for special education at either the November 2009 or May 2010 PPT meetings. Since there was no documented evidence presented by Parents at the PPT meetings that showed that the Student required special education or any information to suggest this other than the Parent's "concerns," the PPTs appropriately determined that the Student was not eligible for special education and related services. The Parent was accompanied by a Parent Advocate at the November 2009 PPT meeting and an attorney at the May 2010 PPT meeting. Since the Student was not a "child with a disability" within the meaning of IDEA, the Board was not required to provide a FAPE to her during the 2009-2010 or 2010-2011 school years.

6. The Parents are claiming that the Board violated their procedural rights in a variety of ways. Pursuant to the IDEA, a hearing officer presented with a complaint regarding a child's special education program must make a decision "on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E). Where parents allege a procedural

violation under the IDEA, a hearing officer may find a denial of FAPE "only if the violation '(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.'" Winkelman v. Parma City Sch. Dist., supra at 2001 (quoting § § 1415(f)(3)(E)(i)-(iii)). See also 34 C.F.R § 300.513(a). With the reauthorization of the IDEA in 2004, Congress made clear that a procedural violation under IDEA, in itself, cannot equal the denial of FAPE. As courts within this circuit have held since the 2004 amendments, "[p]rocedural flaws do not automatically require a finding of a denial of FAPE." Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp.2d 415, 419 (S.D.N.Y. 2007).

7. The Parents argue in their brief at page 23 that "it was the unilateral decision not to place the Student that denied the Parent meaningful participation." The Mother attended the three PPT meetings at issue here, was accompanied by an advocate or an attorney at every one, had the opportunity to voice her concerns and offer input in all the discussions at those meetings. The fact that her opinions were not accepted by the school-based PPT members does not violate the IDEA. The mandate in IDEA that the IEP team "considers" the concerns of the Parents does not require that it adopt whatever the parents request. A.E. v. Westport, 46 IDELR 277 (D. Conn. 2006). The Parents next claim that the IEP team did not include an "individual who can interpret the instructional implications of evaluation results" as required by 34 CFR §300.321 (a)(5). They allege that "the evidence shows that no appropriate specialized or unique District staff was present at any PPT to interpret the instructional implications of the independent evaluators' results, i.e. an OT, SLP, PT, nurse or psychologist." Parents' Brief, page 23, paragraph 44. The Parents misstate the regulation, which does not require the presence of "specialized or unique" staff to attend. The regulation requires the IEP team to include the parents, a regular education teacher, a special education teacher, a representative of the public agency who is qualified to provide or supervise the provision of specially designed instruction and is knowledgeable about the general education curriculum and available resources of the public agency and an individual who can interpret the instructional implications of evaluation results. The presence of other individuals at the PPT meeting would have been at the discretion of the Board or the Parents. 34 C.F.R. § 300.321(a)(6). Dr. Newman is a licensed speech language pathologist. As to the others, the Parents did not offer any explanation of why a nurse, occupational or physical therapist should have been at any of the PPT meetings. The claim raised during the hearing and in the Parents' brief at page 24 that the Mother and the Student did not know whether Dr. Newman was an employee of the Board or an independent consultant is specious given the Mother's admission in testimony that the parties agreed to an independent evaluation by Dr. Newman. The argument that the Board should have obtained the Parents' written consent for Dr. Newman to be involved in evaluating the Tier-II interventions is rejected. There is no evidence that the Parents ever objected to Dr. Newman's involvement until this hearing. The Parents claim their procedural rights pursuant to 34 C.F.R. § 300.503 were violated because the Parents received insufficient notice, no notice at all or both of the proposed actions of the PPTs. Parents' Brief, pages 24-25, paragraph 51. The Parents have not shown that even if any of the prior written notices were deficient, how that entitles them to any remedy.

8. The Board argues that the Parents did not raise procedural violations in their due process request or at the hearing conference and should not be permitted to raise them in the hearing or post-hearing in their brief. Procedural violations are not pleaded in the due process complaint. During the hearing when the Parents' attorney claimed that pleading a denial of FAPE encompassed any procedural violations. When asked for legal authority to support this, she was unable to offer any. The Parents were advised to provide legal authority in their brief, which they did not. "The party requesting the due process hearing may not raise

issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees." 34 C.F.R. § 300.511(d). The record demonstrates that the Parents were provided with their procedural safeguards prior to the June 12, 2009 PPT meeting, again on October 23, 2009 prior to the November 13, 2009 PPT meeting, participated fully in all three PPT meetings and were accompanied by an advocate or represented by counsel in all the PPT meetings. There are no procedural flaws that would require a finding that FAPE was denied. Winkelman v. Parma City Sch. Dist., supra.

9. In Connecticut, the party who requested a due process hearing has the "burden of going forward" with the evidence. Conn. Agencies Regs. Section 10-76h-14. The Parents, as the party who requested this due process hearing, have the burden of producing evidence in support of their claims. The Parents presented only two witnesses—the Mother and the Student even though there were nine witnesses on their witness list. The Board had arranged to make Mr. Chaconis and Ms. Risley available to testify on August 20, but the Parents chose not to call them. The Parents claim that they met their burden of production by presenting the two witnesses and offering 36 exhibits. Most of the Parent Exhibits are duplicates of the Board Exhibits. None of the Parent Exhibits support their main claim in this case that the Board should have identified the Student as eligible for special education. At the close of the Parents' case, the Board's Motion to Dismiss was denied without prejudice because the Hearing Officer had not read all the exhibits. The Parents were advised that the testimony presented by the Mother and the Student was not sufficient to meet their burden. While it is true that the burden of proof that it properly determined the Student's eligibility for special education for the 2009-2010 and 2010-2011 school years is on the Board; Walczak v. Florida Union Free School District, 142 F.3d 119, 122 (2d Cir. 1998), Parents filing for due process should have some evidence to support their claims particularly where, as here, they are represented by counsel. The Board should not have to incur the expenses of legal representation and staff time to defend cases where Parents lack sufficient evidence to go forward at hearing. The Board has met the burden of proof that it properly determined that the Student was not eligible for special education.

10. In a case where the school district's and the parents' expert witnesses disagreed, the federal court in this district stated that: "IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent." A.S. and W.S. v. Trumbull Board of Education, 414 F. Supp. 2d 152 (D.Conn. 2006), citing A.B. ex rel. D.B. v. Lawson, 354 F.3d 315, 328 (4th Cir. 2004). See also Hartmann by Hartmann v. London Cty. Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997), cert. denied, 522 U.S. 1046 (1998) ("local educators deserve latitude in determining the individualized education program most appropriate for a disabled child"). In this case, the Parents had no expert witnesses. They offered only the personal opinions of the Mother and the Student. Those opinions cannot be given more weight than Dr. Newman's, Mr. Knies and the PPT's school-based members, who are all qualified and state-certified public school educators.

11. "It is well established that 'equitable considerations are relevant in fashioning relief' under the IDEA." M.C. ex rel. Mrs. C. v. Voluntown Bd. Of Educ., 226 F.3d 60, 68 (2d Cir. 2000) (quoting Burlington v. Dep't of Educ., 471 U.S. 359, 374 (1985)). "Some circuit courts have held that appropriate relief may also include 'compensatory education,' or replacement of educational services that should have been provided to a child before. Reid v. District of Columbia, 365 U.S. App. D.C. 234, 401 F.3d 516, 518, 522 (D.C. Cir. 2005) (citing cases)." P. v. Newington Bd. of Educ., 512 F.Supp.2d 89 (D. Conn. 2007). In Bruno v. Greenwich Bd. of Educ., 45 IDELR, 106 LRP 4075 (D.Conn. 2006), the Court stated that once procedural or substantive violations of the IDEA are found, the decision maker must consider whether the plaintiff is entitled to compensatory education and reimbursement for an independent evaluation. In this

case, no procedural or substantive violations of IDEA have been found. Since no violations of IDEA have been found, compensatory education is not appropriate.

12. The Parents' request for an order requiring the Board to retain a mutually agreeable private agency to provide scientifically research-based instruction and assessment services is not appropriate where, as here, they have not been successful on any claims.

13. Therefore, it follows that they are not entitled to any affirmative relief.

14. Any claims by the Parents, which have not been specifically ruled on are denied.

FINAL DECISION AND ORDER

1. The Student was not eligible for special education for the 2009-2010 school year.

2. The Student was not eligible for special education for the 2010-2011 school year.

3. The Parents and Student are not entitled to any award of compensatory education.

4. The Parents' request for an order requiring the Board to retain a mutually agreeable private agency to provide scientifically research-based instruction and assessment services is denied.

COMMENTS

The Board's attorney requested that comments be made on several aspects of this case. Board's Brief at 21-25. The Parents' Motions for Declaratory Default Judgment and for Judgment on the Pleadings and/or Summary Judgment contain numerous inaccurate, misleading and untrue statements of fact and law. The post-hearing Parents' Brief also has numerous inaccurate, misleading and untrue statements of fact and law. While an attorney may be excused from a certain amount of errors because of inexperience in a complex area of law, attorneys must, however "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions." Commentary to Rule 3.1 Rules of Professional Conduct, as amended June 26, 2006.