

BEFORE THE IOWA DEPARTMENT OF EDUCATION  
(Cite as 29 D.o.E. App. Dec. 055)

In re [REDACTED] a child:	)	
	)	
[REDACTED] and	)	Dept. Ed. Docket No. SE-480
[REDACTED]	)	DIA No. 19DOESE0001
	)	
Complainants,	)	
	)	
v.	)	
	)	
URBANDALE COMMUNITY SCHOOL	)	
DISTRICT and HEARTLAND AREA	)	
EDUCATION AGENCY,	)	
	)	<b>DECISION</b>
Respondents.	)	

On or about July 5, 2018, Complainants [REDACTED] and [REDACTED] filed a due process complaint against Respondents Urbandale Community School District (“LEA” or “district”) and Heartland Area Education Agency (“AEA”) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., as implemented by 281 Iowa Administrative Code chapter 41.

Prior to the due process complaint filed in this action, Complainants filed a due process complaint against Respondents on or about December 20, 2017. During a mediation session in January 2018, the parties resolved some of the issues raised in the December 2017 complaint and executed a Legally Binding Mediation Agreement. As part of the agreement, the parties agreed to submit the due process complaint to the undersigned upon stipulated facts and record and to release all of the claims in the December 2017 due process complaint with the exception of those claims described in paragraph 11 of the complaint. As that complaint had not yet been scheduled for hearing, Complainants filed the July 5, 2018 due process complaint at issue here and requested dismissal of the prior complaint. The prior complaint was dismissed on August 14, 2018 based upon Complainants’ request.

The parties subsequently informed the undersigned administrative law judge that they had agreed to submit the case on a stipulated record without hearing. On October 24, 2018, the parties filed a Joint Submission of Stipulated Record. The stipulated record includes documents numbered Exhibits 1 through 386 and audio files from meetings held on September 27, 2017, November 28, 2017, December 12, 2017, May 21, 2018, and June 13, 2018.<sup>1</sup>

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<sup>1</sup> The parties did not provide the audio files to the undersigned. The parties’ Joint Submission of Stipulated Record provides, “Although the parties have reviewed the transcripts of the most recent three meetings, described in Section H, and believe the transcripts to be accurate, the actual audio is available should any subsequent dispute arise over what was said during a meeting.”

A briefing schedule was established and the parties timely submitted the following: 1) Parents' Brief; 2) Respondents' Reply Brief; and 3) Parents' Reply Brief.

Pursuant to 34 C.F.R. § 300.515(a), a final decision must be reached no later than 45 days after the expiration of the 30 day resolution period. This timeline had previously been extended at the request of the parties to accommodate the briefing schedule. At a post-briefing telephone status conference that took place on February 28, 2019, the parties made a joint motion to extend the 45 day timeline until May 17, 2019 to accommodate the drafting of a decision in the case.

*Evidentiary Issues:* At the parties' request, this case was submitted on a stipulated record. The order providing for submission of a stipulated record did not contemplate additional information outside of the stipulated record being submitted by the parties.<sup>2</sup> Complainants referenced two documents in Parents' Brief that are not included in the stipulated record: 1) the AEA's Area Education Agency Special Education Procedures Manual;<sup>3</sup> and 2) Northwest Evaluation Association, 2015 NWEA MAP Growth Normative Data.<sup>4</sup> Complainants provided electronic citations to both documents in their brief and characterized the AEA's procedures manual as a "public document." Notwithstanding the availability of these documents on the internet, they are not part of the stipulated record. The time frame to submit the stipulated record was extended several times at the parties' request. Neither party made any request after submission of the stipulated record and before briefs were submitted to expand the stipulated record. Accordingly, the parties are limited to the evidence presented in the stipulated record. Neither of the documents referenced above are considered as evidence in the case.

Additionally, Respondents offered in Respondents' Reply Brief to provide additional information, should such information be requested by the undersigned, on the following topics: 1) detailed CV and other information to reflect the expertise of Respondents' staff members; 2) an affidavit clarifying use of the State mandated WebIEP system; and 3) information from evaluators explaining why certain assessments were used. The same considerations apply to this offer of additional information as detailed above. The stipulated record was submitted by the parties and comprises the sum total of evidence in this case. No additional information was sought or received by the undersigned in response to this proffer in Respondents' brief.

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<sup>2</sup> The parties included the following statement in their Joint Submission of Stipulated Record: "The parties agree that if one party relies on a fact allegation in briefing and there is documentation to support or refute that fact, then the parties should be permitted to present that information. As an example, the AEA conducted a full and individual initial evaluation and Dr. McCoy conducted an outside independent educational evaluation. If either party were to question the veracity of the assessments conducted, the other party could provide information supporting the validity of the testing instrument chosen. It is not anticipated by either party that extensive rebuttal documents of this type will be necessary." Despite the inclusion of this statement by the parties, the undersigned can recall no discussion during several telephone conferences discussing the submission of the stipulated record that contemplated the submission of additional information.

<sup>3</sup> See Parents' Brief at pp. 7-8.

<sup>4</sup> See Parents' Brief at p. 18.

Finally, the parties discussed at a telephone conference on February 28, 2019 two pages of the stipulated record, Ex-0253-54, that were included as a writing sample by Student. Respondents represented in their brief that the writing sample was not that of Student, but that of another student in the class and had been erroneously included by the parties in the joint submission of the stipulated record.<sup>5</sup> This writing sample was included by Complainants in their brief.<sup>6</sup> Complainants represented that they included the sample in their brief in good faith and had no reason to doubt that the sample was Student's. No formal correction of the record on this point is required. The inclusion of the writing sample from another student was simple error and shall not reflect negatively on either party.

### ISSUES PRESENTED

Pursuant to 34 C.F.R. 300.511(d) and 281 Iowa Administrative Code 41.511(4), the issues in this hearing are limited to those issues raised in the complaint. By order dated September 10, 2018, the issues are limited to those raised in paragraph 11 of Complainants' due process complaint. Those issues are:

Whether Respondents violated the IDEA by the following actions:

- Illegally restricting the scope of federal entitlement under the IDEA by limiting the definition of a "need" for special education to student performance that falls below normative performance standards and measuring ██████████ expected performance without assessing or considering his individual potential – *Paragraph 11(a)*
- Not utilizing aptitude tests to determine ██████████ expected levels of achievement and not giving "careful consideration" to the aptitude testing conducted by Dr. McCoy in violation of 34 C.F.R. § 300.306(c) – *Paragraph 11(b)*
- Illegally restricting the scope of federal entitlement under the IDEA by defining "special education" without reference to the governing federal definition and by asserting, without reference to the federal definition, that various educational interventions requested by the parents are not specially designed instruction – *Paragraph 11(c)*

The parties agree that the issue raised in paragraph 11(c) of the due process complaint is only relevant if a determination is made that Student is eligible for special education services pursuant to the arguments raised in paragraphs 11(a) and 11(b). Complainants have represented that the issue raised in paragraph 12 of the due process complaint is no longer being asserted.

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<sup>5</sup> See Respondents' Reply Brief at p. 9, FN 6.

<sup>6</sup> See Parents' Brief at p. 10.

## IDENTIFICATION OF WITNESSES

In the interest of protecting the privacy of the student in this action, he will be referred to in the decision as Student. His parents will be referred to as Mother, Father, and, collectively, Parents.

## FINDINGS OF FACT

*Background:* Student is a 10 year old boy who resides with his parents and attends school at [REDACTED] Elementary School in Respondent Urbandale Community School District. He has attended school at [REDACTED] since kindergarten and has received core reading and math education each year of school in the general education setting. The district falls within the boundaries of Respondent Heartland Area Education Agency. (Ex-0001-02, 0105).

Student previously received special education services from August 22, 2011 through December 7, 2012 in the domain areas of communication, early literacy, and math. His early literacy goal was discontinued in February 2012. Student was exited from all special education services on December 7, 2012, when he was four years old. (Ex-0105).

In 2015, Student's parents initiated a referral to the University of Iowa for concerns regarding dyslexia. At that time, Student received clinical diagnoses of dysgraphia and visuospatial deficit. Student followed up with the University of Iowa team in fall 2016 for repeat testing and received an additional diagnosis of at risk for dyslexia. Student was also evaluated by Apples of Gold Center for Learning in Pella, Iowa in fall 2016 and received a diagnosis of dyslexia. (Ex-0106, 0175, 0213 0230).

*September 2017 Meeting:* In September 2017, Respondents initiated a meeting with Parents to discuss concerns about Student's speech. Parents supported special education in the area of speech and gave consent for the evaluation process for those services to begin. (Ex-0234).

Following the meeting, Parents also requested that Student be evaluated for special education eligibility in the academic areas of reading and written expression and that he be evaluated for assistive technology related to reading and writing. Parents referenced Student's evaluations at the University of Iowa and Apples of Gold and his diagnoses of dyslexia, dysgraphia, and visuospatial deficit. (Ex-0234).

Parents also included the following observations in their request:

At home, we regularly observe [Student] having difficulty sounding out words as well as skipping and/or misreading words. He verbally expresses a great deal of frustration with reading, frequently stating how hard it is and that he hates it. Regarding writing, we see [Student] having trouble with capitalization, punctuation, spelling and writing in sentence fragments.

(Ex-0234).

*Evaluation Process:* Parents shared the two evaluation reports from the University of Iowa and the evaluation report from Apples of Gold with Respondents. Based on that information and in response to Parents' request, Respondents offered a special education evaluation for Student in the domain areas of reading and written expression.<sup>7</sup> Parents consented to a full and individual initial evaluation of Student for potential special education services. (Ex-0236-42).

The Disability Suspected form completed by Respondents in response to Parents' request identified the following information:

- Student's second and third grade teachers, plus a reading support staff member, reported no concerns with Student's academic performance in reading during the current or past academic years
- Student did not receive supplemental intervention support for reading in second grade, but was progress monitored two times per month on FAST<sup>8</sup> beginning in December 2016 in response to parent request
- During the semester that Student received FAST progress monitoring, his weekly rate of growth was 0.99 correct words per minute, almost double what was needed to meet the spring benchmark
- Student's second and third grade teachers did not report any concerns with Student's written expression skills and he did not receive any supplemental instruction in that area

(Ex-0237-38).

Additionally, the Disability Suspected form catalogued some of Student's assessment scores for kindergarten through third grade. In kindergarten, Student's fall reading composite score was at the level of approaches expectations; his winter and spring composite scores were at the level of exceeds expectations. In first grade, Student's fall and spring FAST reading scores were at the level of exceeds expectations; his winter score was at the level of meets expectations. In second grade, Student's fall, winter, and spring FAST reading scores were all at the level of exceeds expectations. (Ex-0238).

Regarding reading, the form indicates:

Based on the summary of data presented above that includes [Student's] scores and benchmark scores, the current and historical pattern and trend that converges across multiple sources of data indicates that [Student's] reading performance is not (and has not been) unique when compared to peers[.]

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<sup>7</sup> Respondents also offered an evaluation in the areas of speech and health, which are not at issue in this case. (Ex-0236).

<sup>8</sup> There does not appear to be information in the stipulated record to indicate what the FAST acronym stands for. The record does reflect, however, that it is an assessment system used for reading by Respondents.

(Ex-0238).

Based on teacher interviews, a file review, and permanent product review, the form also indicates that Student's written expression performance is not unique when compared to peers. (Ex-0239).

October 2017 Evaluation/Educational Evaluation Report (EER):<sup>9</sup> The evaluation of Student was completed and an Educational Evaluation Report was prepared in October 2017. The evaluation process included a review of the following data sources: the evaluation reports from the University of Iowa and Apples of Gold; classroom observation information; assessment and progress data from Student's time at [REDACTED] Elementary; and data from testing conducted as part of the evaluation process. Additionally, interviews were conducted with the following individuals: Student's second and third grade general education teachers and a general education reading support teacher; Heidi Kroner, director of Aspire Academy in Urbandale, Iowa; Jennie Ganzer, tutor at Aspire Academy; and Parents.<sup>10</sup> (Ex-0104-16, 0139).

- 2015 Evaluation – University of Iowa

Student was evaluated by Dr. Tammy Wilgenbusch in the pediatric psychology department at the University of Iowa in November 2015. Student was seven years old at the time and was evaluated at the request of Parents for possible dyslexia and dysgraphia. (Ex-0171).

Dr. Wilgenbusch administered tests in the following areas: cognitive/developmental; neuropsychological; achievement; and social/emotional. Student was found to have average cognitive skills with a specific strength in verbal comprehension. In achievement testing, his overall performance for his age was average in reading, math, and writing. Dr. Wilgenbusch noted that his scores for writing were at the "low end of the average range." No behavioral difficulties were reported by Parents. (Ex-0173-74).

Dr. Wilgenbusch diagnosed Student with visuospatial deficit and dysgraphia. The report concluded:

Testing today showed that [Student] has above average verbal comprehension skills and average visual-spatial, working memory, and processing speed skills. He had below average visual-motor integration, or graphomotor (handwriting) skills. While academic skills were generally average to high average, he had a significant weakness when it came to writing tasks. While most of his scores were average, it is important to note that the discrepancy between his skills will make processing visual-spatial information much more difficult for him. Therefore, it will be

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<sup>9</sup> The EER contains a good deal of information specific to Student's speech/communication needs. As these needs are not a focus of the current complaint, that information will be omitted from this section.

<sup>10</sup> Parents were interviewed, at their request, by e-mail. They provided written responses to questions that were posed by the district and AEA. (Ex-0107).

important to accommodate and support these difficulties for him. In addition, results do indicate that [Student] has dysgraphia.

(Ex-0175).

- 2016 Follow-Up Evaluation – University of Iowa

Dr. Wilgenbusch conducted a follow-up evaluation with Student in November 2016. She administered neuropsychological, achievement, and behavioral/social-emotional testing. Mother reported that Student continues to make progress and meet benchmarks at school for fluency, though he struggles with spelling, leaving out small words, and making reversals. She reported he is more willing to write. (Ex-0228).

Dr. Wilgenbusch added a diagnosis of at risk for dyslexia following this evaluation. The report concluded:

Testing today indicated the [sic] he continues to have average automatic naming, spelling, as well as math and writing fluency. His reading skills continue to be average to low average with the exception of his ability to apply phonic skills to decode words. On a phonological processing test he was able to isolate and blend phonemes, but struggled with being able to delete phonemes from words. This indicates that his phonological processing skills may not be advancing as much as peers and puts him at risk for dyslexia. While his skills are currently within the average range, if he continues not to grow at the rate of peers he may struggle as reading demands increase. Overall, results continue to support diagnoses of visual-spatial difficulties and dysgraphia and show that he is at risk for dyslexia.

(Ex-0230).

- 2016 Evaluation – Apples of Gold

This evaluation was sought by Parents to confirm or rule out the presence of dyslexia after the evaluation by Dr. Wilgenbusch indicated that Student was at risk for dyslexia. Parents reported during the evaluation process that although Student

demonstrates appropriate intellectual function and ability as evidenced in his facility with oral language, daily interactions at home and school, social interactions, athletic involvement, and learning through computer activities, he is having difficulty with reading comprehension and spelling.

Mother also reported that Student generally dislikes school but tries to succeed at schoolwork. (Ex-0178, 0181).

Based on the testing conducted, a determination was made that Student has dyslexia. The report states, “[Student] does not process low-level language or low-level cognitive

tasks (such as word retrieval and perceptual speed) as well as he utilizes his intellect and verbal comprehension abilities to think and reason.” (Ex-0213).

- Interviews

Student’s second and third grade teachers, as well as a reading support staff member, reported no concerns with Student’s academic performance in reading during the current academic year or in past academic years. The only concern reported by Student’s third grade teacher was Student displaying “shut down” behavior at times during reading instruction. She stated this concern was infrequent, redirectable, and only occurred during error correction procedures with reading. She stated that Student does not require more or different error correction procedures compared to peers, but rather that he appears to be sensitive to the accuracy of his performance. She has been seeking naturally occurring opportunities to reflect on the learning process with Student and to explain that perfect answers are not her expectation every time. (Ex-0107).

As of the time of the evaluation, Student had received approximately 18 hours of dyslexia therapy supports at Aspire Academy. Student attended tutoring at Aspire from July 2017 through August 2017. Ganzer, Student’s tutor, noted that Student would become frustrated and teary-eyed as the lesson progressed. Student’s behavior was worse when his mother was in the room with him. Ganzer reported that she did not feel like the strategies she implemented to make the work engaging and game-like were effective. (Ex-0107).

Parents’ reported a concern that Student’s weaknesses in the areas of reading and spelling impact his entire educational experience across content areas. They reported concerns with Student reading words inaccurately, omitting small words from text, and omitting suffixes. The EER provides, “[Parents] are concerned that [Student] has compensated well thus far, but struggles may increase as more challenging work is expected this year and years to come.” (Ex-0108).

Parents also reported a belief that access to and use of technology in the classroom setting would assist Student with more successful reading and spelling outcomes. Parents reported that Student tires quickly with hand writing and that access to technology would help with this and provide Student the platform to express ideas more clearly and use larger variety of words without being limited by his spelling ability. (Ex-0108).

Parents reported that Student’s strengths include his desire to do well at school, his curiosity, his ability to relate well to others, and his interest in books. Parents reported that Student’s weaknesses include the tendency to easily become frustrated when he is struggling to learn and master difficult materials. (Ex-0108).

- Classroom Observation

Student was observed in the general education classroom setting during literacy instruction on two consecutive days. Student was actively engaged with the large group instruction and volunteered answers to questions posed by the teacher. Student

completed writing work independently and accurately; several other students required one-to-one assistance from the teacher. During spelling practice, Student spelled most words correctly; other peers spelled some words inaccurately as well. During another writing task, Student referenced the text and classroom resources, including a list of relevant content vocabulary words written on the board, to answer questions and spell words accurately. (Ex-0108-09).

- Testing

With regard to the assistive technology portion of the evaluation, Student was administered the Protocol for Accommodations in Reading (PAR). The results reflected that Student was more accurate on comprehension questions aligned with grade level text when he was able to read the text, as opposed to text reader or human read-aloud options. (Ex-0109).

The following tests were also administered to Student: the Words Their Way Elementary Spelling Inventory; the Irregular Word Test; and the San Diego Quick Reading Assessment of Reading Ability. The assessments were all presented at once and took approximately 25 minutes for Student to complete. The results reflected performance consistent with Student's grade level. Student's general education teacher also benchmarked him using a reading assessment that monitors reading fluency, accuracy, and comprehension at texts that correspond to specific grade level expectations. Student demonstrated 98% accuracy on texts corresponding to the expectations at the end of third grade. (Ex-0110).

Based on the data obtained through record review, interviews, observations, and assessments, no reading or written expression interventions were implemented for Student during the evaluation. Student's performance did not support the need to implement any targeted interventions. (Ex-0110-11).

- Conclusions

The evaluation team made the following conclusions with regard to the academic domains of reading and written expression: 1) Student is able, through general education alone, to meet and progress toward grade level expectations in the areas of reading and written expression at the expected rate for typical third graders; and 2) Student's performance across reading and written expression is not unique when compared to peers. Further, the evaluation team concluded that Student's instructional needs in reading and written expression could be met in the general education setting. Regarding Student's learning environment, the evaluation team concluded:

[Student] needs to be immersed in a text-rich environment and encouraged to read a variety of texts when appropriate. [Student] also needs practice with error correction procedures outside of reading experiences to strengthen his understanding of benefits of error correction rather than pairing this explicit instructional strategy with feelings of frustration. Removal from the general education classroom should be considered cautiously as [Student] prefers to learn alongside the peers in

his classroom and has demonstrated positive response to core instruction based on the convergence of data summarized above.

(Ex-0111-16).

*December 12, 2017 Eligibility Meeting:* An IEP team meeting was held on December 12, 2017 to discuss Student's eligibility for special education services in light of the evaluation that was conducted in October. Parents, along with the building principal, Student's general education teacher, the district's coordinator of special education, a regional director from the AEA, a special education teacher from the building, an assistive technology specialist from the AEA, a speech language pathologist, and the school nurse participated. (Ex-0265).

The team concluded during this meeting that Student was eligible for special education services in the area of communication based on a need for speech language pathology services. This conclusion is not in dispute in this matter. A speech/communication goal was agreed upon and Parents signed the consent for Student to begin receiving these services under an IEP. (Ex-0282-87, 0297-98).

The main area of disagreement between Parents and personnel from the district and AEA at this meeting centered around the issue under consideration in this due process proceeding: whether Student has a need for special education services outside the area of speech/communication. Parents had specific concerns related to Student's spelling performance at school that they believed warranted specially designed instruction in spelling. Mother reported that she was seeing work come home where Student was spelling simple words, such as "very," incorrectly. Mother expressed her belief that the mistakes she saw Student making did not seem to her like typical third grade mistakes. Parents expressed frustration at the meeting that the testing conducted in Iowa City and through Apples of Gold seemed much more comprehensive than the testing conducted by the school and wondered why those results were not being given greater weight by the district and AEA personnel. Mother also expressed frustration at what she perceived to be a lack of data on the part of the school and AEA personnel to support their conclusions; she felt that Parents were being asked to take their word for the conclusions that Student was performing at the level of a typical third grader. Mother advocated for a "systematic multi-sensory step 'a' to step 'z' approach" to spelling for Student, in order to address his dyslexia. (Ex-0273, 0277-78).

Student's classroom teacher noted that spelling is addressed in third grade through particular instruction, such as the Really Great Reading program, and also organically, as students raise questions about spelling during the course of other instruction. When students make spelling errors that the teacher notices, she will remind a student about rules and concepts they have talked about in spelling that relate to the error and prompt them to use the instruction previously taught. This sort of prompting and correction, even if it has to occur multiple times, is developmentally appropriate for a third grade level. Student's teacher and the district special education coordinator both noted that spelling instruction for young children has changed over the years; spelling is not emphasized as much in the lower grades. Additionally, educators try to keep feedback specific to the content domain so that students are not getting negative feedback

because of spelling in content areas unrelated to spelling. The building principal noted that spelling is not ignored; rather, it is simply not the main focus when students are, for example, drafting a narrative. Instruction does occur around the concept of editing work; this is where spelling comes up in a writing assignment. More focus is placed on getting students to express their ideas using vocabulary they are familiar with; the fact that these words may be misspelled in the drafting process is not a principal concern at the third grade level. (Ex-0267-71, 0278, 0291-92).

With regard to Student's specific performance in spelling, his teacher indicated that she observes Student's spelling accuracy to be higher when he knows that she will be looking at an assignment. School personnel have not observed Student to show a pattern of errors in spelling despite prompting and support. He is not standing out as a child who has not mastered spelling skills being taught in the classroom despite repeated instruction and the rest of the class being at a mastery level. This is what they look for in determining whether a student may need specially designed instruction in a particular area. With regard to Parents' specific frustration that there is a lack of data with which to make the conclusion that Student does not have need in the area of spelling, the building principal noted that as Student has not been identified as having an issue in this area no interventions would have been implemented that would provide the type of data that Parent is seeking. The classroom teacher who works with Student every day is providing information about the level of work and mastery she observes Student demonstrating. (Ex-0272, 0276-77).

Regarding Parents' expressed concern about less weight being given to the previous testing that Student underwent at University of Iowa and Apples of Gold, the district special education coordinator noted that their evaluation process centers on the RIOT formulation: review, interview, observe, and test. Testing is one component of the process, but educators within the district have seen Student every day over a period of years. Formal assessments supplement their understanding of a Student's needs, but testing is not the only consideration in the evaluation process. The special education coordinator noted:

And I think that the root, perhaps, of our difference of opinion around that is the interpretation of his samples and the performance. And perhaps that additional testing data and, if I understand what you are saying correctly, you view that information as an indicator that his performance is not appropriate and that he needs instruction, and I think we're looking at his work samples and what he's doing in the classroom combined with the assessments and reaching a different conclusion, which can happen. But I think that may be the root of our disagreement because I don't think – I think we both agree that there's a diagnosis and I think the difference of opinion is that when you look at all of the data does that indicate need.

(Ex-0273, 0279-80).

At the end of the meeting, there was no agreement between Parents and district and AEA personnel about Student's need for specially designed instruction in the area of

spelling. District and AEA personnel determined that Student did not have a need for specially designed instruction in reading or writing, including spelling. (Ex-0293).

A final issue discussed at this meeting was the fact that the evaluator who conducted the October 2017 evaluation was not charged with the task of evaluating Student for a specific learning disability (SLD). Parents expressed confusion and concern as to why this specific task was not given to the evaluator. Personnel from the district and AEA indicated that in order to make a determination of SLD, each of the team members would have to sign off as agreeing or disagreeing with the SLD determination. They did not feel comfortable requesting that team members do that at this meeting given that the October evaluation did not address the question of whether Student had an SLD. District and AEA personnel proposed to revisit that issue and modify or issue an addendum to the evaluation to address the questions underlying whether Student has an SLD. Parents expressed some reluctance at agreeing to this course of action, as the district and AEA personnel at the meeting had already indicated that they did not believe Student had a need for specially designed instruction in the areas of reading or writing. Parents did not know whether, under those circumstances, an additional SLD evaluation would be useful or change the district and AEA team members' conclusion on the question of need. (Ex-0295-96).

December 12, 2017 Prior Written Notice (PWN): As a result of this team meeting, the district issued a Prior Written Notice (PWN) with an implementation date of December 13, 2017. The IEP team proposed to initiate special education services in the area of communication/speech only and rejected Parents' request for an IEP goal to provide specially designed instruction in the area of spelling based on the results of the full and individual evaluation.<sup>11</sup> (Ex-0136-37).

At the conclusion of the December 12 meeting, the team had arranged to meet in mid-January 2018 to discuss any addendum to the evaluation and discuss the determination of whether Student has an SLD. That meeting was postponed at Parents' request, in part because of the filing of a due process complaint on or about December 20, 2017. As part of the resolution process triggered by the filing of the due process complaint, the parties met on January 26, 2018 for a resolution meeting that addressed allegations pertaining to 34 C.F.R. 300.311(b), including the use of the proposed checklist for determining SLD. Pursuant to the Legally Binding Mediation Agreement executed in resolution of the first due process complaint, the parties agreed that an Independent Educational Evaluation (IEE) would be conducted at Respondents' expense by Dr. Thomasin McCoy. The parties agreed to wait to meet as an IEP team to consider the question of SLD until after an outside evaluation by an independent evaluator was conducted. (Ex-0014-15, 0264).

Independent Educational Evaluation (IEE): Dr. McCoy, a pediatric neuropsychologist, conducted an Independent Educational Evaluation of Student on May 1 and May 15,

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<sup>11</sup> Pursuant to the August 9, 2018 LBMA, the parties mutually agreed that Student no longer needs specially designed instruction in communication/speech; that decision is not at issue in this proceeding. (Ex-0075).

2018. Dr. McCoy produced a report related to that evaluation dated May 16, 2018. (Exh. pp. 20-50).

Dr. McCoy conducted a clinical diagnostic interview, a review of records, and administered approximately 16 tests to Student.<sup>12</sup> As a result of the evaluation, Dr. McCoy diagnosed Student with Nonverbal Learning Disorder (Other Symbolic Dysfunction), Attention Deficit/Hyperactivity Disorder, Predominantly Inattentive Presentation, Dysgraphia (Disorder of Fine Motor Coordination and Visual-Motor Integration), Dysnomia (Disorder of Non-Symbolic Naming), Dyslexia (Specific Learning Disorder with Impairment in Word Reading Accuracy and Reading Comprehension), and Anxiety Disorder, Unspecified. (Ex-0050).

Dr. McCoy noted that Student seemed anxious during testing, and particularly so during timed tests. He frequently asked if he was being timed and how much time remained. Dr. McCoy noted that Student appeared inattentive during testing, sometimes “spac[ing] off” and requiring redirection. There were times when she observed him taking a long time to process information and other times when he appeared somewhat impulsive and appeared to respond before considering all available options. (Ex-0021).

Student’s overall Full Scale Intelligence Quotient, as measured by the Wechsler Intelligence Scale for Children (WISC-V) fell in the average range when compared to other children his age, however Dr. McCoy did not consider that result valid due to significant variability in scores. Language skills assessed were diverse, but appear to be one of Student’s strongest areas of functioning. Student’s performance on verbal comprehension tasks was particularly strong compared to his performance on visual spatial, working memory, and processing speed. Student showed some difficulty with logical thinking skills when solving problems. Performance on visual spatial tasks was slightly below other children his age. (Ex-0025-26).

Dr. McCoy’s report includes a graph entitled Ability-Achievement Discrepancy Analysis. The graph depicts Student’s predicted Wechsler Individual Achievement Test (WIAT-III) scores based upon his Wechsler Intelligence Scale for Children (WISC-V VCI Index) score. According to Dr. McCoy, Student would be expected to obtain higher WIAT-III scores than he actually obtained. In the case of Student’s basic reading score and written expression score, she noted that these differences are statistically significant. Dr. McCoy noted that the lower scores on reading and writing performance suggest that Student’s visual-spatial/organizational deficits are significantly affecting his learning and achievement. (Ex-0045).

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<sup>12</sup> It is not entirely clear from the report precisely what records Dr. McCoy reviewed. She references specifically the University of Iowa 2015 and 2016 evaluations and the Apples of Gold 2016 evaluation. She also states that she reviewed “IEP records from 2011 and 2012 [] provided by Heartland AEA” and “[s]tudent literacy data from 2014-2015 and 2015-2016.” (Ex-0021).

Dr. McCoy's summary includes the following:

The results of the current evaluation indicate that [Student] has a disability that affects his ability to learn. [Student's] visual-spatial skills are weak compared to other children his age and very weak in comparison to his other areas of cognitive functioning. [Student's] pattern of deficits in visual-spatial/organizational abilities, visual-motor integration, and motor coordination (consistent with the diagnosis of Nonverbal Learning Disorder; NLD) indicates that he has substantial difficulty processing nonverbal (visual) information. Testing results show that [Student] has difficulty with cognitive processes involved in identifying how things go together and integrating different forms or pieces of information into a unified whole. [Student] has difficulty analyzing and synthesizing visual information, which is a key aspect of the general education setting. [Student] will likely need interventions aimed at analyzing and synthesizing visual information (e.g., learning to read maps and creating maps of his house, school, or neighborhood; learning strategies to complete puzzles, such as identifying puzzle pieces with similar colors and lines; learning mental rotation activities, such as drawing a simple shape from a different perspective; and digital games aimed at engaging visual-spatial abilities). Because of his nonverbal weaknesses, [Student] may have more difficulty than other children understanding others' subtle nonverbal cues, which may lead to anxiety and/or awkwardness in social situations. [Student] may need more preparation for nonverbal situations (talking with [Student] about what to expect using very concrete terms and role-playing).

(Ex-0045-46).

Dr. McCoy also noted that Student's disability causes difficulty with writing tasks, including difficulty accurately and efficiently executing controlled motor movements, difficulty organizing writing logically, and difficulty integrating ideas into complete, logical sentences. She noted that Student "may exhibit avoidance during written work." Dr. McCoy recommended technological accommodations, including voice to text and the use of computers, as likely be beneficial for Student after explicit teaching on this technology. She concluded:

With instruction in the use of computers and voice-to-text and with access to all written and visual information in audio, [Student] will likely be able to increase functional independence to the point of full inclusion in the general education setting.

(Ex-0047).

Dr. McCoy concluded that the amount and type of instruction that Student requires and the personnel needed to deliver that instruction may exceed the capacity and obligation of the general education program. Dr. McCoy offered her opinion that Student may need to be served under an IEP and recommended consideration of goal areas in

reading and writing. As a subcomponent of that instruction, she recommended teaching Student how to use technology in order to increase his independence and permit him to participate more fully in the general education setting. (Ex-0048).

May 21, 2018 Team Meeting: The team began this meeting by going over Student's performance on testing conducted since the October 2017 evaluation. Student's reading score on the spring Iowa assessment test was at the 62<sup>nd</sup> percentile. Average performance is between the 16<sup>th</sup> and 84<sup>th</sup> percentile. On spring Measure of Academic Performance (MAP) testing, Student scored at the 63<sup>rd</sup> percentile. His raw score increased from 189 in the fall to 203 in the winter and again in the spring. The MAP testing corresponds to the Iowa Core standards, which are aligned to a student's grade level. (Ex-0308-11).

The reading MAP score is broken down into three subsections: literature, informational text, and vocabulary acquisition and usage. Each of those subsections is broken down into smaller segments for evaluation. In literature, Student was showing some skills ready to develop at the third grade level and some ready to develop at the fourth grade level; there was approximately a 50/50 split between third and fourth grade skills.<sup>13</sup> In informational text, all of Student's scores reflected readiness to develop at a fourth or fifth grade level, with approximately a 50/50 split between fourth and fifth grade skills. For vocabulary acquisition and usage, Student's scores were all at least at the fourth grade level, with a number at the fifth grade level. Student showed more fourth grade skills than fifth grade skills in this subsection. (Ex-0311-12).

For spring FAST testing, Student scored 143 words with 97% accuracy. The spring goal for third grade was 131 words with 95% accuracy; Student exceeded grade level expectations. Reading benchmarking with Student came in at a level R, which is what is expected in the middle of fourth grade. Student had 97% accuracy and scored 8 out of 10 on comprehension, which was a satisfactory result. (Ex-0313).

Student's general education teacher expressed during the meeting that she was not differentiating Student's reading instruction in any fashion. Like all the other students in the class, he participates in reading groups and receives instruction through HD Word/Really Great Reading to assist with decoding words. Student participates from time to time in a small group designed to provide extra fluency practice; approximately half of the students in the class cycle through that group depending upon their need for practice. (Ex-0313-14).

Student was assessed three separate times for writing. He scored at goal for third grade on two of the assessments: narrative and opinion writing. On writing to inform, Student scored 2.5. The decrease in score was due to leaving out linking words such as "because," "or," or "for example." In Student's class, about 50% of the students scored a

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<sup>13</sup> In their briefing, Complainants characterize these MAP scores as reflecting a "serious gap[]" in Student's achievement levels. See Parents' Brief at p. 28. It is unclear on what basis Complainants have made this determination. Student was in third grade at the time of the testing, therefore it is not immediately clear that testing as ready to develop at a third grade level reflects a serious gap in achievement.

2.5 on the writing to inform assessment; approximately 20% of the class scored a 3; and approximately 30% scored a 2.0. (Ex-0313).

Student's general education teacher expressed during the meeting that she does not see any current avoidance by Student with writing tasks. At the beginning of the school year, Student told her that he did not like to read and did not like to write; she observed that he had a great deal of self-doubt and lacked confidence. When he made a mistake he would sometimes pull his shirt over his head and start to cry. Student's teacher has been working with him throughout the year on the concept of mistakes as part of the learning process. She no longer sees Student lacking confidence in reading or writing and he no longer gets so upset about mistakes. She observed that he now loves to write and comes in very eager when writing is about to start. In his free time at home, he started writing a book series about the adventures of preschoolers. He came in one Monday and asked when they were going to start writing reports about animals; he reported to the teacher that he had written three animal reports at home over the weekend. The teacher is not prompting Student in the writing process more than she is any other students in the class. (Ex-0314-15).

The team then moved to discussing the Specific Learning Disability (SLD) Eligibility Checklist. That document states that it is intended to be a tool to ensure compliance with 34 C.F.R. § 300.311 and 281 Iowa Administrative Code 41.311. After discussion, the team made a determination that Student does have a specific learning disability. The basis for making the determination is noted on the form as follows: "Based upon clinical findings from outside evaluations, [Student] has specific learning disabilities (SLD). The data in the full individual evaluation (FIE) does not conclude SLD based on educational findings." The consensus among the district and AEA team members was that the outside evaluations of Student supported a conclusion that Student has a specific learning disability. All of the team members present at this meeting signed in agreement with the conclusion that Student has an SLD. (Ex-0051-54, 0315-0324).

Under the space for team members to sign in agreement or disagreement with the conclusion that the child has an SLD, the checklist form provides, "If the team has determined that the child has a SLD, the team must proceed with the discussion and determination of whether that SLD requires special education and related services based on the child's unique needs. *See e.g. r 41.306(3), 41.309(4), 41.320(1)(b), r. 41.323(3)(a).*" After determining that Student has an SLD, the team moved on to discuss need for special education services. In kicking off the discussion, Keri Steele, the AEA special education supervisor, noted a significant difference between what district and AEA personnel had seen in the school context and the data and conclusions that were presented in the outside evaluations. Steele stated that the FIE<sup>14</sup> done in October 2017 did not show that Student had a specific learning disability; rather, it showed that he was meeting and exceeding grade level standards. (Ex-0325).

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<sup>14</sup> The terms FIE (full and individual evaluation) and EER (Education Evaluation Report) are used interchangeably in this record to describe the initial evaluation and corresponding written report completed in October 2017.

Parents spoke in detail about the conclusions of Dr. McCoy's testing and solicited feedback from school personnel regarding areas where Student has been observed to struggle in the classroom. Student's classroom teacher stated:

[A]s I read through this [Dr. McCoy's report] there were a lot of things I just honestly didn't see him struggling in anymore so then [sic] any other child in my classroom would have an issue with something whether its [sic] visual/spatial. I just have not seen that much struggling in [Student] this year in any of things. Is he challenged by some things? Yes. Does he work hard to achieve? Yes, and I have not seen him give up. Um, I can't honestly think of any areas where I thought, oh you know, he is just really having a hard time with this.

(Ex-0327-28).

Student's teacher noted that she had seen spelling as an area of challenge for Student, but noted that she had seen a lot of growth in that area. Additionally, she noted that Student sometimes needed quiet time away from the group. She stated that Student knows how to get that time when he needs it and has done so successfully throughout the year. (Ex-0329).

Parents articulated specific concerns regarding Student's ability to analyze and synthesize visual information, as indicated in Dr. McCoy's evaluation. AEA personnel discussed the possible use of graphic organizers as one response to this type of learning deficit. Student's classroom teacher indicated that she has observed Student demonstrating strategies to visually organize his thought processes in the classroom. She cited as two examples his work in his science journal and his work with maps. The team members expressed concern that if Student is already demonstrating these strategies, forcing Student to organize his work in a specific way (i.e. through a graphic organizer) might feel to him like punishment since he is actually getting to the skill on his own. They discussed whether strategies they were considering would assist Student in being independent, or act as an impediment to the strategies he was already producing independently. Team members expressed concern about implementing strategies that might provoke anxiety or other behavioral concerns that they were not seeing Student manifest at school. (Ex-0345-46).

Mother reported that Student manifests stress and anxiety at home, but hides this at school. She acknowledged that Student "looks fine" at school and is meeting goals, but stated that she believes he is struggling in certain areas such as writing. Mother expressed her belief that the kinds of tests the school is using where Student is shown to be meeting expectations are not really getting to the core of his true struggles. Mother expressed her belief that school personnel are not looking at Student as an individual, but instead are comparing him to peers. Parents also noted that Student's frustration with homework at home seemed to be anxiety-related, with Student expressing concern about whether he would do well on the assignment. Mother also noted that sometimes Student does not seem to understand the concepts. (Ex-0331).

The AEA and district team members noted that they acknowledge and accept outside evaluations, but that they are also charged with examining how any findings from a clinical evaluation manifest at school. Their evaluation process is functional, with a focus on what the student can do as compared to grade level expectations. The assessments given in the school setting are used to drive instruction and identify an individual student's needs. If a child who shows deficits in a clinical assessment is not showing deficits in the school setting, that child may already have developed good coping strategies for the classroom. Sometimes children who show deficits on a clinical assessment are not significantly impacted by those deficits in the school setting. (Ex-0330-32).

The team also discussed Dr. McCoy's findings that Student has nonverbal weaknesses and may have more difficulty than other children understanding others' subtle nonverbal cues, which her report opined may lead to anxiety and/or awkwardness in social settings. Students' teacher noted that she had not seen Student failing to understand non-verbal cues or body language in the classroom and had not observed any problems in peer relationships for Student. (Ex-0343).

As the team members who had interacted with Student in the school setting had not observed performance deficits, the team attempted to gather additional information from Parents about where they believed Student needed more targeted or specially designed instruction. This was a significant focus of the meeting, with team members repeatedly directing the conversation to Dr. McCoy's findings and how those would translate to instructional needs in the classroom setting. (Ex-0327-0335).

This meeting ended due to time constraints without a firm conclusion. The team agreed to meet again shortly. (Ex-0350).

After this meeting, Respondents requested that Parents send information about desired and requested accommodations in order to have more prepared discussions on those items at the next meeting. [REDACTED], parent advocate and tutor at Aspire Academy, sent an email dated June 10, 2018 to personnel from the district and AEA regarding suggestions that Parents wished to be implemented with Student.

[REDACTED] email referenced the recommendations portions of Dr. McCoy's IEE.

Parents' requests included:

- Specially designed reading instruction that is systematic and multi-sensory based
- Verbal instructions instead of visual instructions
- Check for understanding; have Student explain back what needs to be done or talk through questions/answers
- OT evaluation
- Specially designed instruction for written expression
- Assistive technology (computer) assigned to Student equipped with Learning Ally and Kurzweil; move all written assignments to this program and allow all work to flow through this system
- Set up a safe person who Student can talk to when anxious or overwhelmed
- Accommodate ADHD behaviors

- Test taking in a quiet environment
- Extra time on tests; take tests on Kurzweil where it can be read and he can speech to text in answers
- Accommodate by teacher giving affirmations
- Allow Student to listen to music with headphones when possible (i.e. quiet work time)
- Specially designed instruction to preteach and reteach, including reviewing work from the day and concepts taught

(Ex-0245-46).

*June 13, 2018 Team Meeting:* The team reconvened on June 13, 2018. During this meeting, the team focused largely on discussing the recommendations that Parents submitted prior to the meeting and identifying ways in which Student's learning and performance at school might be assisted by these recommendations. The building principal expressed that it was difficult for the educators to determine what specially designed instruction would look like for Student, since he was already exceeding grade level expectations and appeared to be succeeding within the general education context. (Ex-0361).

Parents identified their desire, consistent with the recommendations in Dr. McCoy's report, for a systematic multi-sensory approach to reading, such as Orton-Gillingham. Student's teacher reported that they use a systematic multi-sensory approach to reading in the classroom. The teacher saw no evidence based on the benchmarking she did with Student or his reading fluency scores that he is having problems with reading. His fluency has always exceeded the benchmark and he has no gaps going into fourth grade. Student did not require extra repetitions, more explicitness, or a more systematic approach; the teacher did not use any different strategies with Student than the universal instructions she provided to all students. (Ex-0355-58).

The team engaged in a lengthy discussion of Student's writing performance in the school setting. Student's teacher reported that she did not see Student struggling with writing. Student was one of the most organized writers in her class; he got right to work on writing tasks and was prepared when it came time to engage in editing. Student's teacher provided an example of written work that Student did independently while the teacher was instructing other reading groups. The written work was consistent with the expectations in third grade: Student was able to identify the main idea of a book, identify key details in support, identify a connection he had with the book, and articulate things he wanted to remember about the book and questions he had. The district and AEA personnel explained that in order to offer specially designed instruction to Student in writing, they would need to know what part of the process Student is struggling with. Student's teacher identified that she does not see him having a hard time with any part of the process; he willingly and successfully participates in writing a first draft, peer editing, editing with the teacher, and rewriting. (Ex-0363, 0366-67, 0376-77).

The team also talked extensively about Parents' request that Student use assistive technology for writing; specifically, Parents requested that Student always use "talk to

text” technology so that he is not engaging in any handwriting at school. Student’s teacher noted that he is producing drafts very well currently with handwriting. The AEA’s assistive technology specialist noted that in order to teach Student the speaking to write technology Student would have to be removed from the learning environment; like reading, it is a scaffolded learning process that does not happen all at once. He noted that research reflects that speech to text does not do much for students who are already producing work of reasonable quality and fluency. As he did not see a lot of evidence that Student needs assistance with the quality or fluency of his writing, he questioned the efficacy of using a speech to text program with Student. The team also had concerns about the idea of taking Student out of the learning environment to provide instruction in assistive technology if Student does not need the assistive technology to produce successful writing. In response to these concerns, Parents indicated that they wanted Student to start using assistive technology like speech to text now so that he can get acclimated to it and does not feel different from his peers if he needs to use it when he is older. (Ex-0369, 0372-75).

Mother also indicated during the meeting that she believes Student has a great deal of difficulty processing visual information, therefore he will need repetitive teaching multiple times with a heavy auditory component. Mother believes the best way to do that is to have a paraprofessional sitting with Student to provide auditory information to Student while teaching is occurring. Mother believes Student will process information better with this sort of one-to-one support rather than just listening to the teacher in front of the classroom; she identified his diagnosis of ADHD as supporting this need. Additionally, Mother expressed concern about Student not understanding instructions because they are not always produced in an auditory fashion. Student’s teacher explained that she typically gives the whole room instructions on a task twice. She has not noticed any instances where Student completed work incorrectly because he did not understand the instructions. (Ex-0361, 0373).

The team grappled in this meeting with how to reconcile the picture of Student that emerged from the clinical evaluation conducted by Dr. McCoy and the picture of Student that his teachers and other educators have seen in the school setting. Wendy Robinson, Director of Instructional Services with the AEA, noted that the clinical assessments do not take into account the instruction that is happening at school. The assessments that take place at school are tied to ongoing instruction. Several team members noted that they are not ignoring the evaluation done by Dr. McCoy and the previous evaluations at University of Iowa and Apples of Gold; rather, they are trying to reconcile them with Student’s performance at school. Student’s teachers are not seeing educational impairments flowing from the diagnoses that have been identified. Team members noted that they were not looking at simply one piece of data; rather they use an aggregation of data over this school year and past school years. (Ex-0366, 0378, 0380).

Student’s parents expressed frustration about their belief that Student’s individual potential was not being addressed; Mother expressed the belief that Student could be at a higher level with additional supports in place. Parents were frustrated that Student was being compared to grade level peers. The building principal noted that the team was not comparing Student with grade level peers, but rather was looking at him with

regard to grade level standard expectations identified in the Iowa Core curriculum. (Ex-0377-79).

At the conclusion of the meeting, there was a consensus among the team members, minus Parents, that Student does not need specially designed instruction. This conclusion was based upon multiple data sources across the present academic year and multiple years of record review. Team members did not foreclose the possibility that Student might have needs for specially designed instruction in the future, depending upon his performance, but were concerned about putting in place things that were not presently needed. They felt this would be more restrictive than what Student needs to achieve at grade level. (Ex-0359, 0382).

Near the end of the meeting, Respondents proposed to discuss accommodations that could be made without a determination that Student was eligible under the IDEA. Mother stated that she did not want to “move into a 504 meeting” and “hash out accommodations.” Accordingly, the issue of accommodations was tabled at Parents’ request. (Ex-0384).

*June 13, 2018 Prior Written Notice (PWN):* A Prior Written Notice was issued on or about June 13, 2018 at the conclusion of the meeting. The PWN states that the IEP team considered the specific parent requests submitted via e-mail on June 10, 2018 and is refusing the requests. The PWN concludes, “After review and consideration of multiple sources of data, including the outside independent evaluation, parent requests, and the school performance data, the school team does not see that [Student] is in need of any specially designed instruction or accommodations to access instruction and enable successful learning outcomes.” The PWN notes that the team did consider assistive technology supports but tabled this option for now based on multiple sources of data indicating Student is meeting and at times exceeding expected levels of performance without the use of assistive technology. The PWN identifies the following bases for the refused action: 1) team input during IEP meetings on May 21 and June 13, 2018; 2) general education teacher input regarding Student’s performance; 3) progress monitoring data; 4) permanent product review during IEP meetings; 5) MAP testing; and 6) Dr. McCoy’s evaluation. (Ex-0161).

## CONCLUSIONS OF LAW

*IDEA Overview:* One of the principal purposes of the Individuals with Disabilities Education Act (IDEA) is “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 prepare them for further education, employment, and independent living.”<sup>15</sup> The IDEA offers states federal funding to assist in educating children with disabilities and, in exchange for acceptance of such funding, the state must agree to, among other things, provide a free appropriate public education to all children with disabilities residing in the state between the ages of 3 and 21.<sup>16</sup>

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<sup>15</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>16</sup> 20 U.S.C. § 1412(a)(1)(A).

Free appropriate public education (FAPE), as defined by the IDEA, means special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.<sup>17</sup>

*IDEA Eligibility:* Only children with disabilities are eligible for coverage under the IDEA.<sup>18</sup> A child with a disability means a child –

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.<sup>19</sup>

Special education is defined as specially designed instruction to meet the unique needs of a child with a disability across a range of settings, including in the classroom, in the home, in hospitals and institutions, and in other settings.<sup>20</sup>

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction –

- (i) To address the unique needs of the child that result from the child’s disability; and

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<sup>17</sup> 20 U.S.C. § 1401(9).

<sup>18</sup> See 20 U.S.C. § 1412(a)(1)(A) (mandating that a state is eligible for financial assistance under the IDEA only if the state, among other things, provides a free appropriate public education “to all children with disabilities”); see also 281 Iowa Administrative Code (IAC) 41.8 (defining “eligible individual” as synonymous with “child with a disability” and “child requiring special education”).

<sup>19</sup> 20 U.S.C. § 1401(3)(A); see also 34 C.F.R. § 300.8(a)(1).

<sup>20</sup> 20 U.S.C. § 1401(28).

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.<sup>21</sup>

The IDEA's implementing regulations set forth the procedures that a public agency must follow in determining a child's eligibility and educational need.

(c) Procedures for determining eligibility and educational need.

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

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

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.<sup>22</sup>

*Determination of Specific Learning Disability:* A specific learning disability (SLD) under the IDEA is defined as:

[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. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage.<sup>23</sup>

In determining the existence of a specific learning disability, the team must consider:

a. *Lack of adequate achievement.* The child does not achieve adequately for the child's age, grade-level expectations or such grade-level standards the SEA may choose to adopt in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or grade-level expectations or such grade-level standards the SEA may choose to adopt:

(1) Oral expression

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<sup>21</sup> 34 C.F.R. § 300.39(b)(3).

<sup>22</sup> 34 C.F.R. § 300.306(c).

<sup>23</sup> 281 IAC 41.50(10).

- (2) Listening comprehension.
- (3) Written expression.
- (4) Basic reading skill.
- (5) Reading fluency skills.
- (6) Reading comprehension.
- (7) Mathematics calculation.
- (8) Mathematics problem solving.

b. *Lack of adequate progress.*

(1) The child does not make sufficient progress to meet age expectations, grade-level expectations, or such state-approved grade-level standards as the state may choose to adopt in one or more of the areas identified in 41.309(1)“a” when using a process based on the child’s response to scientific, research-based intervention; or

(b) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, grade-level expectations, such state-approved grade-level standards as the state may choose to adopt, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with rules 281-41.304 (256B, 34 CFR 300) and 281-41.305 (256B, 34 CFR 300).<sup>24</sup>

In order to make the determination of SLD, the team must review data related to the provision of appropriate instruction in reading or math and must observe the child in the classroom setting to document the child’s academic performance and behavior in areas of difficulty.<sup>25</sup> Additionally, the team making the determination must include the child’s general educational teacher if the child has one.<sup>26</sup>

One of the inherent points of tension in this case is that the regulations require that by the time a team concludes that a student has an SLD, it has been determined that the student does not achieve adequately for her age, grade-level expectations, or grade-level standards in one of the specified areas and that the child is not making sufficient progress to meet age expectations, grade-level expectations, or state-approved grade level standards. In a case decided in Iowa in 2017 involving the same parties as the instant case, the administrative law judge stated plainly that “[a] student who is achieving adequately to meet grade-level standards cannot be determined to have a specific learning disability under the IDEA.”<sup>27</sup> The ALJ noted that the appropriate points of comparison regarding achievement and progress are “age and state approved grade-level standards; not as the Complainants argue, the child’s potential.”<sup>28</sup>

<sup>24</sup> 281 IAC 41.309(1)(a), (b); *see also* 34 C.F.R. § 300.309.

<sup>25</sup> 281 IAC 41.309(2), 41.310(1).

<sup>26</sup> 281 IAC 41.308(1)(a).

<sup>27</sup> *In re Urbandale Community Sch. Dist., Heartland Area Education Agency, and Iowa Dept. of Education*, 70 IDELR 243 (IA SEA 2017).

<sup>28</sup> *Id.*

In this case, the parties agreed during the eligibility determination process that Student has an SLD. In the SLD checklist memorializing this decision and in the discussion surrounding it, Respondents made clear that they conceded this point only based on Dr. McCoy's evaluation and the other outside evaluations. Respondents specifically noted that the data "does not conclude SLD based on educational findings." Respondents argue throughout the briefing in this case that the fact that Student is not exhibiting performance deficits in the school setting and is meeting and achieving grade-level standards is evidence that he does not need special education on the basis of the SLD; this was precisely the basis on which Respondents denied eligibility to Student during the eligibility determination process. Complainants concede that Student is "able to access the general education curriculum and to meet the grade level standards associated with that curriculum."<sup>29</sup>

This decision by the parties creates some ambiguity here, as many of the cases where the impact of an SLD on a student's academic performance are discussed take place around the first prong of the IDEA's eligibility determination, whether a child has an SLD, rather than on whether the child has a need for special education on the basis of the SLD. Nevertheless, the issue of whether Student has an SLD is not before me; the parties have agreed in this action that he does. It should be noted, however, that the fact that the parties made this determination does not change what the record reflects regarding Student's educational achievement at school. The evidence reflects, and the parties agree, that Student is meeting grade level standards in all areas. The fact that such a determination would seem to disqualify him from meeting the definition of an SLD is outside of the scope of this case. Student's need for special education under the second prong of IDEA eligibility will be analyzed in the context of the full record.

*Due Process Complaint:* Under the IDEA, a parent or public agency may file a due process complaint relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to the child.<sup>30</sup> The burden of proof in an administrative hearing on a due process complaint is on the party seeking relief.<sup>31</sup> Complainants, therefore, bear the burden of proof in this proceeding.

Complainants allege that Respondents violated the IDEA in two respects in determining whether Student was eligible under the IDEA. First, they argue that Respondents have illegally restricted the scope of eligibility under the IDEA by concluding that a student needs special education only when the student's performance falls below normative performance standards. Second, they allege that Respondents did not utilize aptitude tests to determine Student's expected levels of achievement and did not give careful consideration to the aptitude testing conducted by Dr. McCoy in violation of 34 C.F.R. § 300.306(c).

Last, Complainants allege that Respondents have illegally restricted the scope of federal entitlement under the IDEA by defining special education without reference to the

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<sup>29</sup> See Parents' Brief at p. 28.

<sup>30</sup> 34 C.F.R. § 300.507(a); 281 IAC 41.507(1).

<sup>31</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61-62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

governing federal definition and by asserting that various educational interventions requested by the parents are not specially designed instruction. The parties have agreed, however, that this issue is only relevant if Student is determined to be eligible under the IDEA pursuant to Complainants' first two allegations.

*Issue #1: Did Respondents Violate the IDEA in Determining that Student Does Not Need Special Education by Reason of His Disability?*

It is undisputed by the parties that eligibility under the IDEA is a two-prong determination: 1) does the student have a disability or impairment listed under the IDEA?; and 2) does the student need special education by reason of the disability or impairment? The parties have agreed that Student has an SLD, which satisfies the first prong.

The parties' principal disagreement in this case comes down to what it means to need special education in the context of the IDEA for purposes of determining eligibility. It is important to note from the outset that this case relates only to Respondents' determination of eligibility with regard to Student and to how the determination of need was made with regard to him. The only evidence in the record relates to how Respondents made the eligibility determination with regard to Student. While Complainants have argued that Respondents are engaging in a more systemic pattern of violations, the only child whose eligibility is at issue in this proceeding is Student.

In their briefing, Complainants divide their challenge of Respondents' need determination into two parts. First, they allege that Respondents violate the IDEA by imposing a "severity test" in order for a student with a disability to receive special education. Second, they allege that Respondents have limited their consideration of need to that which is required to access and progress in the general education curriculum, ignoring the IDEA's dictate to address "other" educational needs. The overarching concern they express, spanning both subparts, however, is that Respondents are not focusing on Student's individual potential and instead are relying solely on the fact that he is meeting grade level standards and expectations to conclude that he does not need special education. Complainants equate Respondents' focus on Student meeting grade level standards and expectations with an indifference to any data regarding Student's potential.

A. The FAPE Standard: *Rowley* and *Andrew F.*

Before discussing eligibility further, it is instructive to take a step forward in the process and to look at what school districts are required to do and what their expectations should be after a student is determined eligible under the IDEA. In enacting the IDEA, Congress concluded that the education of children with disabilities can be made more effective by having high expectations for children with disabilities and ensuring their access to the general education curriculum in the regular classroom in order to meet the same developmental goals and challenging expectations established for all children and

in order to prepare them to lead productive and independent adult lives, to the maximum extent possible.<sup>32</sup>

Both parties cite to *Endrew F. v. Douglas County Sch. Dist. RE-1* in their arguments. In that case, the United States Supreme Court addressed the question of what standard should be used to determine when children with disabilities are receiving sufficient educational benefits to satisfy the requirements of the IDEA.<sup>33</sup> This is one step further in the process than where we are here; in that case, a determination had already been made that Endrew had a disability and needed special education on the basis of that disability. Endrew's parents challenged the IEP that the district put forward, alleging that it denied FAPE to Endrew in that it was substantively similar to the prior year's IEP which had not been successful at addressing any of the challenging behaviors, such as screaming, climbing over furniture, and running away from school, that had inhibited his learning.<sup>34</sup>

Prior to *Endrew F.*, the only other case in which the Supreme Court had addressed the FAPE requirement was *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, decided in 1982.<sup>35</sup> Amy Rowley, the student at issue in that case, was a first grader with impaired hearing. The district and Amy's parents disagreed about what system to put in place to assist Amy in hearing in her classes; the district proposed an FM hearing aid system, while Amy's parents proposed a sign language interpreter. Amy's parents filed a due process complaint, asserting that the district's refusal to furnish an interpreter denied Amy a FAPE.<sup>36</sup> In upholding the determination that Amy had been denied a FAPE, the district court noted that Amy understood less of what goes on in class than if she were not deaf and concluded that Amy's education was not appropriate unless it provided her an opportunity to achieve her "full potential."<sup>37</sup> The Supreme Court, however, noted that Amy was performing better than the average child in her class and advancing easily from grade to grade. The Court concluded that the FAPE requirement was satisfied if a child's IEP sets out an educational program reasonably calculated to enable the child to receive educational benefits. For children receiving instruction in the regular classroom, this would generally require an IEP reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.<sup>38</sup> The *Rowley* Court noted that the district court's mandate that states maximize the potential of children with disabilities commensurate with the opportunities provided to other children was untethered from the statutory definitions in the IDEA or the legislative history.<sup>39</sup>

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<sup>32</sup> 20 U.S.C. § 1400(c)(5).

<sup>33</sup> 137 S. Ct. 988, 993 (2017).

<sup>34</sup> *Id.* at 996.

<sup>35</sup> 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>36</sup> *Endrew F.*, 137 S. Ct. at 994-95 (citing *Rowley*, 458 U.S. at 184-85).

<sup>37</sup> *Id.* at 995 (citing *Rowley*, 458 U.S. at 185-86).

<sup>38</sup> *Id.* at 995-96 (citing *Rowley*, 458 U.S. at 204).

<sup>39</sup> *Rowley*, 458 U.S. at 190.

In revisiting the appropriate standard for FAPE in 2017, the *Endrew F.* Court noted:

*Rowley* sheds light on what appropriate progress will look like in many cases. There, the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom “whenever possible.” *Ibid.* (citing § 1412(a)(5)). When this preference is met, “the system itself monitors the educational progress of the child.” *Id.*, at 202-203, 102 S. Ct. 3034. “Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material.” *Id.*, at 203, 102 S.Ct. 3034. Progress through the system is what our society generally means by an “education.” And access to an “education” is what the IDEA promises. *Ibid.* Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.*, at 203-204, 102 S.Ct. 3034.

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The IEP provisions reflect *Rowley’s* expectation that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade. Every IEP begins by describing a child’s present level of achievement, including explaining “how the child’s disability affects the child’s involvement and progress in the general education curriculum.” § 1414(d)(1)(A)(i)(I)(aa). It then sets out “a statement of measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general education curriculum,” along with a description of specialized instruction and services that the child will receive. §§ 1414(d)(1)(A)(i)(II), (IV). The instruction and services must likewise be provided with an eye toward “progress in the general education curriculum.” § 1414(d)(1)(A)(i)(IV)(bb). Similar IEP requirements have been in place since the time the States began accepting funding under the IDEA.<sup>40</sup>

The Court went on to note that *Rowley* had no need to provide guidance with respect to a child not fully integrated in the regular classroom and not able to achieve on grade level. That is the case that confronted the Court in *Endrew F.*; the child there was failing to make meaningful progress toward the aims stated in his IEP as a result of significant behaviors that inhibited his ability to access learning in the classroom.<sup>41</sup> The Court held that to meet its substantive obligation under the IDEA, a school must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>42</sup> The Court went on to explain that, for children not achieving grade level advancement in the regular classroom, a child’s “educational

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<sup>40</sup> *Id.* at 999-1000.

<sup>41</sup> *Id.* at 996, 1000.

<sup>42</sup> *Id.* at 999.

program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.”<sup>43</sup>

It is important to note that the Court in *Endrew F.* was not faced with an eligibility question; Endrew had already been determined to be eligible for special education and there was no dispute on that point. The question was whether the instruction that had been provided by the school district constituted FAPE. The case is nevertheless instructive, however, in its endorsement of achieving passing marks and advancement from grade to grade as an appropriate measure of progress for an eligible student who is fully integrated into the general education curriculum.<sup>44</sup>

## B. Evaluating Need under the IDEA

The IDEA and implementing regulations specify that a school district must examine information from a variety of sources in determining eligibility and educational need, including aptitude and achievement tests, parent input, and teacher recommendations.<sup>45</sup> Against the backdrop of *Endrew F.*, it is reasonable for a school district to consider as a starting point whether a student has been meeting academic expectations and grade level standards in the general education classroom prior to the evaluation process. Grade level advancement, of course, cannot be the only consideration. As Complainants note, the IDEA’s child find obligations include children who are suspected of being children with disabilities even though they are advancing from grade to grade.<sup>46</sup>

Complainants seek a ruling that Respondents erred in failing to consider Student’s potential in determining his need for specially designed instruction. Potential is not defined anywhere in the IDEA and Complainants offer no definition. In discussing Student’s potential, Complainants point to the Ability-Achievement Discrepancy Analysis in Dr. McCoy’s report and her conclusion that Student’s ability scores on the WISC-V VCI predicted higher scores on the WIAT-III than the scores Student actually obtained in the composite areas of basic reading and written expression. The data suggested to Dr. McCoy that Student’s visual-spatial and organizational deficits were significantly affecting his learning and achievement. The aptitude data that Dr. McCoy collected was relevant to the diagnoses she made and to her conclusions about what sorts of deficits Student might be expected to show in the educational setting.

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<sup>43</sup> *Id.* at 1000.

<sup>44</sup> *See Hood v. Encinitas Union School Dist.*, 486 F.3d 1099, 1107 (“Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate accommodations in the general classroom – and thus is not entitled to special education services – using the benefit standard. Accordingly, the district court used the correct standard of review when it considered the benefit Anna received in the regular classroom as part of its eligibility analysis.”).

<sup>45</sup> 34 C.F.R. § 300.306(c).

<sup>46</sup> 34 C.F.R. § 300.111(c)(1).

Upon consideration of the record as a whole, it is clear that the team involved in making the eligibility decision for Respondents did not disregard Dr. McCoy's findings about Student's cognitive abilities, or aptitude, as compared to his performance on the achievement tests she administered. To the contrary, this subject was a matter of intense focus for the team. The team spent considerable time discussing how those findings correlated with what they were observing regarding Student's performance and any functional limitations in the academic setting. While Respondents may not have labeled this issue as one of "potential," it is clear that the team considered the aptitude testing in light of Student's academic performance at school in determining whether Student had a need for special education. The team determined, however, that the discrepancy between Student's aptitude and achievement that appeared in Dr. McCoy's testing was not one that was showing up in the academic setting. While there were a number of evaluative measures where Student performed below average in Dr. McCoy's achievement testing, Student was achieving on par with grade level expectations at school and teachers did not detect performance deficits in the areas that were highlighted as potential areas of concern in the clinical evaluation.

The team gave great weight to the observations and conclusions of Student's classroom teacher, who by the time of the May and June 2018 meetings had taught Student for nearly the entire third grade academic year. While Complainants have expressed frustration that they have been asked to take the teacher's word for the fact that Student was performing as a typical third grader and not exhibiting the type of performance deficits predicted in the IEE, the teacher is in a unique position to make such a conclusion. The IDEA regulations recognize this unique position in requiring a general education classroom teacher to be part of the team who determines whether a child has an SLD.<sup>47</sup> Additionally, the school assessments buttress the teacher's conclusion, showing Student to be making appropriate academic performance and hitting grade-level benchmarks. The AEA and district personnel pointed out in the IEP team meetings that a lack of the type of data that Complainants were apparently seeking is the norm for students who are performing at grade level at school in a general educational setting; they are observed by teachers, their work is evaluated and they are given grades, and they are assessed in the manner the district assesses all students, but because there has been no determination that they need anything out of the ordinary no specific data showing, for example, response to interventions is being collected for them. I do not find the absence of such data to undermine Respondents' conclusions regarding Student's academic performance. Additionally, I do not conclude that the observations of Student's teacher or the work product and assessment data collected at school are any less important than the type of data obtained through testing in a clinical setting.

As part of considering Student's need for specially designed instruction, the team explicitly considered whether implementing specially designed instruction to address the visuospatial deficit documented in Dr. McCoy's IEE would inhibit the organizational strategies Student had already developed and was demonstrating in the classroom. Team members also expressed concern about, for example, Complainants' request to transition all of Student's written work from handwriting to speech-to-text. The AEA's assistive technology expert noted that the research did not support such a transition for

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<sup>47</sup> 281 IAC 41.308(1).

a student already producing work of reasonable quality and fluency. Additionally, the team expressed concern about taking Student out of the learning environment to teach such assistive technology when it did not appear to be necessary for him to succeed academically in the domain of written expression. Student's teacher noted that she saw him independently producing successful strategies to organize writing in class.

Student was evaluated as early as 2015 at the University of Iowa and was diagnosed with visuospatial deficit and dysgraphia. The evaluator noted that Student had a weakness with regard to writing tasks. During the 2017-18 school year, Student was still performing to grade level expectations and demonstrating proficiency in the areas of reading and writing, the areas in which Complainants proposed evaluation. Student's second and third grade teachers did not identify any atypical performance deficits in these two domains. In fact, Student's third grade teacher identified writing as something that Student particularly enjoyed and attacked with vigor, from the drafting process through editing and rewriting. Student's written work was in line with grade level expectations. In fact, Student was writing an adventure fiction series about preschoolers and animal reports at home during his free time. This fact underscores the district and AEA team members' conclusions that Student has developed successful strategies to address the processing difficulties that were documented by Dr. McCoy.

With regard to writing, it is also significant to note that Dr. McCoy's IEE demonstrates that Student had some anxiety around the fact that the assessments in the clinical setting were timed. Student's teacher was able to see him write across in a range of circumstances across a range of topics with various levels of editing. Her observations and conclusions about his writing ability are therefore important given the relative limitation of the timed writing assessments in the evaluation.

Complainants' framing of the issue here suggests that Respondents focused entirely on grade level progress in determining Student's need for specially designed instruction, without any further thought. The evidence in the record reflects that this is simply not what happened in this case. While Complainants hoped for Respondents to give greater weight to aptitude testing and the aptitude/achievement discrepancy noted by Dr. McCoy, Respondents gave careful consideration to all of the information at their disposal, including thorough and credible input from Student's general education teacher that the aptitude/achievement gap that was noted by Dr. McCoy and the potential areas where she noted Student might be expected to struggle in school were not materializing in the classroom. While receiving no specially designed instruction, Student was succeeding academically and his teachers were not observing the types of performance deficits that were predicted in the clinical evaluations.<sup>48</sup>

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<sup>48</sup> *Compare West Chester Area School Dist. v. Bruce C.*, 194 F.Supp.2d 417, 420-21 (E.D. Pa. 2002) (district court reversed a finding that a student was ineligible for special education based in part on its finding that the student spent an extensive time out of class receiving remedial and supplemental assistance from his mother in order to meet grade level standards and once that assistance was removed his grades dropped considerably).

The Eleventh Circuit Court of Appeals, in a post-*Andrew F.* case, addressed the question of eligibility where a student with a diagnosed disability is meeting or exceeding academic expectations and is demonstrating the ability to access the general education curriculum and make progress.<sup>49</sup> In that case, the court laid out the following formulation:

In making [the eligibility] determination, a school district must “[d]raw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations . . .” 34 C.F.R. § 300.306(c). The purpose of a FAPE, in part, is to “ensure access . . . to the general curriculum so that the child can meet [] educational standards.” 34 C.F.R. § 300.39(b)(3)(ii). A student is therefore unlikely to need special education if, *inter alia*: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to comprehend course material. *See Alvin Indep.*, 503 F.3d at 383; *D.K.*, 696 F.3d at 251; *Bd. of Educ. of Fayette Cty. v. L.M.*, 478 F.3d 307, 313-14 (6th Cir. 2007).

These factors were all analyzed by Respondents in determining Student’s eligibility under the IDEA. He was meeting academic standards. Teachers who were very familiar with his academic performance and had spent extensive time teaching him did not believe specially designed instruction was necessary. Student did not exhibit unusual or alarming conduct and, based on academic performance assessments and teacher input, Student demonstrated the capacity to comprehend grade-level material.

It is not impossible to imagine that a student with an SLD might have a performance deficit in one or more particular areas that are so great that specially designed instruction is necessary, even if that student can be said to be generally meeting grade level expectations.<sup>50</sup> Respondents’ decisionmaking process in the case of Student does not foreclose this possibility. In such a scenario, teachers who had interacted extensively with the student might recommend special education to identify deficits they saw occurring despite the student meeting academic standards. Here, Respondents specifically looked at Student’s performance in the school setting to determine whether the issues identified in the IEE were causing the Student to display a deficit in performance. Respondents concluded, after considering data that included extensive information from Student’s grade level teacher, who offered credible and thorough

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<sup>49</sup> *Dunbrow v. Cobb County Sch. Dist.*, 887 F.3d 1182, 1193-94 (11th Cir. 2018).

<sup>50</sup> It is possible, however, that such a student might not be determined to have an SLD under the IDEA, for the reasons discussed *infra* at pp. 23-25. In this case, no analysis of whether Student has an SLD has taken place because the parties have agreed that prong of the eligibility determination is not in dispute. Several of the guidance letters cited by Complainants, including *Letter to Ulissi*, 18 IDELR 683 (OSEP 1992) and *Letter to Lillie/Felton*, 23 IDELR 714 (OSEP 1995), relate to the determination of whether a child has an SLD and not whether a child has a need for special education as a result of that disability.

observations about his performance, that Student did not need specially designed instruction because of his disability.

In *Letter to Anonymous*,<sup>51</sup> OSEP offered guidance regarding school districts that have adopted educational standards for achievement and the provision of FAPE to students with high cognition. OSEP noted that states that have adopted achievement standards must still make FAPE available “to any child with a disability who needs special education and related services, even though the child has not failed or been retained in a course, and is advancing from grade to grade. 34 C.F.R. § 300.101(c). A State has an obligation to take [sic] available to an eligible child with a disability even if that child meets the State’s academic achievement standards.” OSEP goes on to note:

A public agency cannot rely on any single procedure as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 CFR § 300.304(b)(2). In conducting the evaluation of a child suspected of having a disability, including a child with high cognition, a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, about the child that may assist in determining whether the child is a child with a disability and the educational needs of the child. 34 CFR § 300.304(b)(1).

This is exactly what Respondents did in Student’s case. No one criterion was regarded as determinative. Respondents did not simply look at whether Student was advancing from grade to grade or whether he met achievement standards. After considering an array of information, including the IEE and related testing, Complainants’ input, teacher input, and school assessments, Respondents determined that Student did not have a need for special education. There is no conflict between the guidance set out in this letter and the eligibility process that took place in this instance.

### C. Severity Test

Complainants’ argument that Respondents’ method of evaluating Student imposed a severity test in violation of the IDEA is unpersuasive. Complainants’ cite to the following portion of the IDEA’s child find provisions in support of their argument that Respondents imposed a severity test for need in violation of the IDEA:

[a]ll children with disabilities residing in the state, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, *regardless of the severity of their disabilities*, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with

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<sup>51</sup> 60 IDELR 47 (OSEP 2012).

disabilities are currently receiving needed special education and related services.<sup>52</sup>

While the relative severity or lack thereof of a child's disability cannot be a barrier to identifying a child, it is nevertheless true that a determination must still be made about whether the child needs specially designed instruction as a result of the disability. Respondents made a determination, based on a full picture of Student, including his achievement in the classroom and observed lack of performance deficits in the educational setting, that Student did not need specially designed instruction. This determination was not based on the severity of Student's disability.

Complainants have also cited to *Yankton School Dist. v. Schramm*<sup>53</sup> in support of the position that Respondents have imposed a severity test in violation of the IDEA. In that case, the student was a high school student who had been born with cerebral palsy and had physical limitations based on her disability. She was unable to function independently outside of school, including requiring assistance getting dressed and putting on shoes. At the end of ninth grade, when the district's physical education requirements ended, the district proposed to exit her from special education services, arguing that the only specially designed instruction that she had received was in physical education. In addition to adaptive physical education, however, the student had also received services that were not included in her IEP, such as assistance moving between classes, going up and down stairs, and carrying her lunch tray. The student had also received photocopies of teachers' notes, used computers for certain classes, was given specialized instruction for typing with limited mobility, and received shortened writing assignments. Under the IEP and with the benefit of the services she had received, the student had been able to earn A grades and was very successful academically.<sup>54</sup>

The district court determined that the student was eligible under the IDEA based on a finding that her orthopedic impairment necessitated specially designed instruction and related services. The court found that her impairment adversely affected her educational performance in that she would not be able to benefit from regular classroom instruction without the instructional modifications and related services. The court tied her academic success to the specially designed instruction and other services she was receiving under her IEP.<sup>55</sup>

The Eighth Circuit affirmed, concluding that but for the specialized instruction and services provided by the school district, the student's ability to learn would be adversely affected by her cerebral palsy.<sup>56</sup> The *Yankton* court focused on the impact of the student's disability on her ability to succeed in the classroom and meet academic expectations. This is precisely the analysis that Respondents engaged in; unlike the student in *Yankton*, however, Student is able to achieve commensurate with grade level

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<sup>52</sup> 20 U.S.C. § 1412(a)(3)(A); see also 34 C.F.R. § 300.111(a)(1); 281 IAC 41.111(1).

<sup>53</sup> 93 F.3d 1369 (8th Cir. 1996).

<sup>54</sup> *Id.* at 1371-72.

<sup>55</sup> *Id.* at 1372.

<sup>56</sup> *Id.* at 1375.

standards and without observed performance deficits attributable to his disability without any specially designed instruction.

I decline to find, as Complainants request, an explicit mandate in the IDEA that public agencies must make a specific finding regarding a student's potential in service of determining eligibility under the IDEA.<sup>57</sup> The IDEA requires careful consideration of a range of data regarding a student with a disability in order to make a holistic determination about whether that student needs specially designed instruction in light of his disability. That occurred here; Respondents made an individualized determination of Student's needs and found him ineligible.

#### D. "Other" Educational Needs

Complainants' second prong of their argument in support of the assertion that Respondents have impermissibly narrowed the scope of need for special education under the IDEA is that Respondents ignore students who may have "other" educational needs that do not correlate to accessing the general education curriculum. As examples of situations that would arise if "other" educational needs are not included in the need analysis, Complainants note that a child with severe hearing impairments might be determined not to need special education if she is able to gather enough information from reading alone to meet minimum goals or a child with severe visual impairments not needing special education if she can get enough information to access the general education curriculum by listening attentively.

In support of this argument, Complainants cite to the IDEA's provision that articulates what is required to be included in an IEP. That provision requires, among other things, a statement of measurable annual goals, including academic and functional goals, designed to –

- (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- (bb) meet each of the child's other educational needs that result from the child's disability[.]<sup>58</sup>

This argument is unpersuasive. As an initial matter, an IEP is developed only after a determination of eligibility is made. Complainants' argument that the cited statutory language prevents Respondents from determining whether other educational needs are present or require specially designed instruction at the eligibility determination stage is

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<sup>57</sup> Complainants have cited to a line of Third Circuit cases in which that circuit has outlined a requirement to evaluate FAPE in light of individual needs and potential. *See, e.g., T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (citations omitted). That formulation of FAPE has not been articulated by the Eighth Circuit. The relevant standard after *Andrew F.* is whether an IEP is appropriately ambitious in light of a child's circumstances, as discussed in detail above. In any event, that standard applies to a determination of FAPE, not a determination of eligibility.

<sup>58</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(II).

inapposite. It is true that an IEP developed for a student who has been determined eligible under the IDEA may contain information about services to be provided that are not specially designed instruction; for example, accommodations or related services.<sup>59</sup> It is also true, however, that a need for a related service or an accommodation, without a need for specially designed instruction, does not qualify a child for eligibility under the IDEA.<sup>60</sup> It is only after need has been established that a full determination is made about what services are required to assist the child in benefiting from special education.

As emphasized above, this is a case about Student's eligibility under the IDEA; it is not about whether Respondents have made the appropriate determination of need for any student other than this one. As such, Complainants' argument that Respondents have ignored other educational needs in favor of an emphasis on grade level achievement is unpersuasive. Complainants have cited to no other educational needs that would have qualified Student for specially designed instruction. Respondents made an individualized determination based on a variety of factors described in detail above that Student does not need special education based on his specific circumstances; this decision does not implicate the rights of other students in the district who may have other needs that point to a need for specially designed instruction. No violation of the IDEA on this basis has been established.

*Issue #2: Did Respondents violate the IDEA by not utilizing aptitude tests to determine Student's expected levels of achievement and by not giving "careful consideration" to the aptitude testing conducted by Dr. McCoy in violation of 34 C.F.R. § 300.306(c)*

The second issue Complainants raised in the due process complaint relates to the procedural requirement outlined in 34 C.F.R. § 300.306(c) for Respondents to draw upon a variety of sources, including aptitude and achievement tests, parent input, and teacher, recommendations, in determining a child's eligibility and educational need. In addition, Respondents must ensure that the information from all of the sources is documented and carefully considered.

This rule is one of several provisions of the IDEA governing how public agencies must conduct educational evaluations and make determinations regarding eligibility and need. With regard to the evaluation process, public agencies must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. The regulations caution that a public agency may "[n]ot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or for determining an appropriate educational program for the child."<sup>61</sup>

Complainant's argument is premised upon two interrelated assertions: that Respondents did not utilize aptitude testing in determining Student's need – or lack

<sup>59</sup> See 34 C.F.R. § 300.320(a)(4).

<sup>60</sup> See 34 C.F.R. § 300.8(a)(2)(i); *D.R. v. Antelope Valley Union High Sch. Dist.*, 746 F.Supp.2d 1132, 1142-43 (C.D. Cal. 2010).

<sup>61</sup> 34 C.F.R. § 300.304(b).

thereof – for specially education and that Respondents did not carefully consider the aptitude testing that was conducted by Dr. McCoy. It is undisputed that Dr. McCoy, the independent evaluator who conducted the evaluation that was discussed at both the May and June 2018 team meetings, administered aptitude tests to Student as part of the evaluation. The results of the aptitude testing are outlined in the IEE report that Dr. McCoy prepared.

Complainants assert that Respondents could not consider the results of aptitude testing because a child's cognitive abilities are not part of their decision-making rubric. In support of this assertion, Complainants cite to the EER that was prepared in October 2017.<sup>62</sup> As an initial matter, the October 2017 EER was prepared prior to the IEE completed by Dr. McCoy, which included aptitude testing. The team met two times after Dr. McCoy prepared her report; at both meetings, the report, including the testing results and recommendations were a primary point of discussion. The team members, both Parents and the district and AEA team members, spent a great deal of time comparing Student's results from the testing with Dr. McCoy with the academic performance they were observing from Student in the school setting and the assessment results that were being obtained in the school setting.<sup>63</sup> The team explained that the discrepancy between aptitude and achievement that Dr. McCoy noted in her report was not consistent with what they were seeing in the school setting, either through assessments or direct observation by classroom teachers over a lengthy period of time. The team noted that they consider whether a child who is showing achievement deficits in a clinical evaluation is showing those same deficits in the school setting; answering that question in the negative, as the team did for Student, indicates to them that the student may already have developed good coping strategies for the classroom. The district and AEA team members did not ignore the aptitude testing; rather, they considered it in the context of whether the same discrepancy between aptitude and achievement that was observed in the clinical setting was observed in the school setting.

The IDEA regulations make clear that no one criterion is to be used to determine whether a child meets the definition of a child with a disability, which includes a determination of whether the child has a need for special education. Respondents gave good faith consideration to Dr. McCoy's IEE, which included aptitude testing of Student. Respondents considered this information as one part of the universe of information that they collected during the evaluation process. The fact that Respondents failed to find that Student had a need for special education does not equate with a failure to consider

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<sup>62</sup> Complainants also cite to Appendix B of the AEA's "Area Education Agency Special Education Procedures" document. As noted above, this document is not part of the stipulated record therefore will not be considered in this decision.

<sup>63</sup> Complainants' assertion in briefing that the entirety of the team's discussion of Dr. McCoy's IEE at the May 21, 2018 team meeting encompassed approximately a single paragraph of transcribed text is inaccurate. *See* Parents' Brief at p. 19. Consideration of the results of the testing conducted by Dr. McCoy and her recommendations comprised a significant portion of the meetings in May and June 2018.

the aptitude testing in good faith.<sup>64</sup> Complainants have not met their burden of proving Respondents violated 34 C.F.R. § 300.306(c).

*Issue #3: Did Respondents Violate the IDEA by Defining Special Education without Reference to the Governing Federal Definition and by Asserting that Requested Interventions Are Not Specially Designed Instruction?*

It is unnecessary to address the issue raised in paragraph 11(c) of Complainants' due process complaint as the parties agreed that the issue is only relevant if a determination of eligibility for special education is made. As I have determined that Complainants have not established that Respondents erred in finding Student ineligible for special education, this issue is moot.

*Section 504 of the Rehabilitation Act:* The issue of whether Student can receive accommodations for his disability under Section 504 of the Rehabilitation Act is one that was tabled at Complainants' request when the parties came to an impasse regarding the issue of Student's eligibility under the IDEA. This decision offers no opinion regarding availability or provision of accommodations under Section 504.

*Prevailing Party:* Respondents have asked for a determination that they are the prevailing party in this action. Under the IDEA, federal district courts have jurisdiction over awards of attorneys' fees.<sup>65</sup> A court may award reasonable attorneys' fees as part of the costs to a prevailing party under three scenarios:

- (I) to a prevailing party who is the parent of a child with a disability; or
- (II) to a prevailing party who is a State educational agency or local education agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
- (III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.<sup>66</sup>

Based upon the above Conclusions of Law, Respondents are the prevailing party in this action. Complainants have failed to establish the alleged violations of the IDEA identified in the due process complaint. This decision makes no findings nor

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<sup>64</sup> See *K.E. ex rel. K.E. v. Independent Sch. Dist. No. 15*, 647 F.3d 795, 806 (8th Cir. 2011) (an IEP team satisfies its obligations by considering an evaluation; it is not required to incorporate the evaluation).

<sup>65</sup> 20 U.S.C. § 1415(i)(3)(A).

<sup>66</sup> 20 U.S.C. § 1415(i)(3)(B)(i).

conclusions regarding whether the other criteria for awarding attorneys' fees to a prevailing local educational agency have been met. Neither Complainants nor Respondents have made any argument on this point.

**ORDER**

Complainants have not proven that Respondents violated the IDEA as alleged in the due process complaint. Complainants' requested relief is therefore denied and the due process complaint is dismissed.

Dated this 17th day of May, 2019.



Laura E. Lockard  
Administrative Law Judge

cc: Curt Sytsma, Attorney for Complainants (via electronic and first class mail)  
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