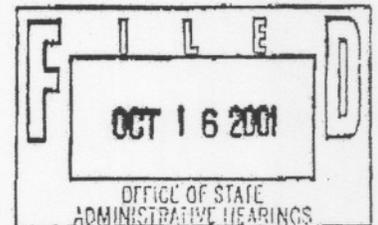


01-0116512

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

XXXXXX)	
Petitioner,)	
)	OSAH Docket NO.: OSAH-DOE-SE-01-16512-60-
)	JSH
)	
Fulton County School System,)	
)	
Respondent.)	



FINAL DECISION

I. Background

A request for hearing on this matter was filed at the Office of State Administrative Hearings (hereinafter "OSAH") on March 9, 2001. Petitioner's parents were requesting that Respondent School System reimburse them for the cost of independent vision therapy evaluations and that the recommendations made in the independent vision therapy evaluations be implemented as part of Petitioner's IEP. Petitioner was represented in this matter by Naomi Walker, Esq., of the Georgia Advocacy Office, and Respondent was represented by Alexa Ross, Esq., and Valerie S. Sanders, Esq., of Sutherland, Asbill & Brennan. A pre-hearing conference was held on April 5, 2001, and both parties agreed to the hearing date of May 9, 2001. Both parties agreed that only one day would be needed for the hearing. Respondent submitted a Motion for Summary Determination dated April 9, 2001, and Petitioner's response to said motion was dated April 19, 2001. Respondent made a reply to the response on April 30, 2001. Respondent's Motion for Summary Determination was denied on May 4, 2001. A full day's hearing was held on May 9, 2001. During the pre-hearing conference held on that date it became apparent that one day would not suffice. Both parties reached an agreement whereby each party's expert witness would testify live on the hearing date and all other remaining witnesses (four proposed for Petitioner and four proposed for Respondent) would be deposed. Parties were given until June 29, 2001, to complete the witness depositions, and provide the judge with the deposition transcripts, closing arguments, proposed Findings of Fact and Conclusions of Law. The record was to close at the end of the business day on June 29, 2001. On May 11, 2001, Respondent submitted a request that the judge reconsider Respondent's Motion For Summary Determination. This motion was denied for the second time.

Each party presented one declared expert. Respondent stipulated to Petitioner's expert witness', Dr. Daniel Gottlieb, expertise in optometry. (*Transcript* (May 9, 2001) p.7 line 10.) Respondent's witness, Dana Deboskey, Ph.D., was declared an expert in neuropsychology, traumatic brain injury, IEP's (Individual Education Program, hereinafter "IEP") for traumatically brain injured students, and education related research studies. (*Transcript* (May 9, 2001) p.117 lines 12 - 16). She was also declared an expert in "the use of vision therapy as a related service in the IEP's of traumatically brain-injury students". (*Transcript* (May 9, 2001) p. 120 lines 16-25; p. 121 lines 1-3.

Petitioner presented four more witnesses with testimony by deposition: Nancy Salzer, deposed June 12, 2001; Dr. Lloyd Warren Walter, deposed June 13, 2001; Dottie Pettes, deposed June 27, 2001; and Erin DiChiara, deposed June 27, 2001. Respondent presented three more witnesses with testimony by deposition: Leslie

Ely, deposed June 11, 2001; Wendy McCarron, deposed June 12, 2001; and Tracy Ramage, deposed June 12, 2001.

This hearing was conducted pursuant to state and federal statutes and regulations including: the Federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400 et seq., 34 C.F.R. Reg. 300, GA DOE Regs. Chapter 160-4-7, and OSAH Rules 616-1-2. Other statutes (and regulations pursuant thereto) may apply, including, but not limited to: the Federal Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101 et seq.; Section 504 of the Rehabilitation Act, 29 U.S.C. Section 700; the Georgia Quality Basic Education Act (QBE), O.C.G.A. § 20-2-130 et seq.; Compulsory Attendance, O.C.G.A. §20-2-690 et seq.; and Discipline, O.C.G.A. §20-2-750 et seq.

The issues in this matter are as follows: (1) Whether, pursuant to 12 U.S.C. §1414 et seq. and state law, Petitioner is entitled to an independent vision therapy evaluation, at Respondent's expense. (2) Whether, pursuant to 12 U.S.C. § 1414 et seq. and state law, Petitioner is entitled to vision therapy at Respondent's expense. (3) Whether, pursuant to 12 U.S.C. §1414 et seq. and state law, Petitioner is receiving FAPE.

After considering all of the credible and relevant evidence in the record, the following has been determined: (1) Petitioner is not entitled to an independent vision therapy evaluation at Respondent's expense. (2) Petitioner is not entitled to vision therapy at Respondent's expense. (3) Petitioner is receiving FAPE.

II. Findings of Fact

1.

Petitioner, [REDACTED], birth date [REDACTED], is a tenth grade student at [REDACTED] High School for the school year 2000 - 2001. (Petitioner's Exhibit #30)

In July, 1989 Petitioner was involved in an accident in which he had rode a Big Wheel into a slowly moving vehicle. (*Transcript* May 9, 2001, p.137 lines 3-4) A CT scan from the emergency room at Scottish Rite Children's Hospital showed an occipital skull fracture with a laceration of the occipital parietal scalp. He had no loss of consciousness. (*Transcript* May 9, 2001, p. 132 lines 14-15; p.135 lines 6-8 & 15-16)

2.

Petitioner was referred on June 9, 1998, at the end of the seventh grade for Special Education consideration. The academic reasons for the referral were reading and written expression. The social/emotional/behavioral concerns for the referral were that Petitioner was argumentative, he had inconsistent performance, he was verbally aggressive with a short attention span, and he was attention seeking and manipulative. (Petitioner's Ex.#19 p.1) Petitioner was determined eligible under the Traumatic Brain Injury criteria and he has been receiving special education and related services since. (Petitioner's Ex. #19, p.6)

3.

Petitioner was seen by Dr. L. Warren Walter, PH.D, licensed psychologist for a neuropsychological evaluation on July 6 & 7, 1998. Petitioner's performance on the Wechsler Intelligence Scale for Children administered by Dr. Walter provided a full scale IQ of 90, described as being in the lower end of the average range. Petitioner showed a marked variability on the performance subtests. Performance on subtests showed that Petitioner had a relatively slow graphomotor speed, but performed well on the other three subtests. He appears to have had problems with holistic spatial ability. His visual processing speed is average and much better when there is no graphomotor component included. Results indicated some problems in the area of

visual-perceptual-motor ability when large amounts of planning and organizational skill must be used in concert with visual-perceptual-motor ability. On two visual memory subtests of the Wide Range Assessment of Memory and Learning, Petitioner scored in the average range which was commensurate with his WISC - III performance. Dr. Walter's recommendations were that the IEP have a plan in place at school to address Petitioner's issues of dealing with his anger; that he have "mobility options" to deal with his motoric disinhibition (when he begins to feel restless, to be able to move to another desk, walk to the water fountain); that teachers should approach him with calm demeanors because of his over-reactivity; and that as the complexity of his work increases, some type of work reduction plan should be considered because he has difficulty in being able to complete work in a timely manner. (Petitioner's Ex. #56)

4.

An addendum neuropsychological evaluation performed by Dr. Walter on January 1, 1999, demonstrated that Petitioner was performing in a manner commensurate with his general intellectual ability in almost all areas evaluated. He demonstrated very strong reading comprehension ability (reading at the 13.0 grade level). While generally writing at approximate grade level, he showed relative weakness in areas of written expression having to do with punctuation, capitalization, and spelling and usage. (Petitioner's Ex. #56)

Dr. Walter never recommended to Respondent school system that it should provide vision therapy as a related service to Petitioner. (*Dr. Lloyd Warren Walter Deposition* p.118 lines 14 -17) Nor did Dr. Walter recommend at any of the seven IEP meetings for Petitioner which he attended that vision therapy be provided as a related service to Petitioner. (*Walter Deposition* p. 118 lines 22 - 25 & p. 119 lines 1-2) However, during his testimony he stated that he feels it is appropriate that Petitioner receive a vision therapy evaluation due to Petitioner's problems with visual scanning or visual tracking. (*Walter Deposition* p. 60 lines 24 - 25 & p. 61 lines 1 - 24)

5.

After Petitioner was determined eligible for Special Education Services IEPs were done for each year. IEP meetings were held on August 21, 1998, and September 4, 1998, to develop the IEP for school year 1998-1999. (Respondent's Ex. #10) Petitioner's mother signed acceptance of the proposed IEP for 1998-1999 on September 4, 1998. (Respondent's Ex.#10, p.19) In the IEP under eligibility criteria the question "Is the student blind or visually impaired?" is not marked as an area of applicable criteria. (Respondent's Ex #10 p.1) At another IEP conference held on October 1, 1998, Respondent refused Petitioner's parent's request for vision therapy because Respondent did not see a need for vision therapy since Petitioner had successfully completed sixteen successful sessions with Dr. Berger. (Petitioner's Ex. #23) There was no evidence presented that this refusal was done with written notice to the parents pursuant to 64 C.F.R. 300.503.

6.

The IEP committee for the 1999 - 2000 year met on March 31, 1999. Petitioner's mother along with Dr. Walter attended, but there is no parental signature on the IEP indicating acceptance of the IEP. (Respondent's Ex. #23 p.6) The question "Is the student blind or visually impaired?" is checked "no". (Respondent's Ex. #23 p.1). The reading portion of present levels of educational performance stated that Petitioner needs additional time to read because his processing is slow in reading. Under the cognitive portion of performance a brief description of the findings of Dr. Walter's evaluation was provided including that Petitioner's relative weakness was in the holistic, visual-spatial ability as well as in the speed of processing. There is no mention in the summary of visual problems nor are there any goals directly specific to reading. Accommodations center around Petitioner's organization, social and mobility issues. Some of the accommodations include highlighting of text books, directions and notes; both verbal and written instructions; additional time to copy

or complete assignments if necessary; alternative strategies for completing assignment; a teacher/peer note taker with provision of teaching notes, overheads and board work. (Respondent's Ex. #23 pp. 5-6)

7.

In a Parent Notification for a meeting scheduled for June 9, 1999, among the purposes listed for the meeting under "Other" there is a handwritten "request for vision therapy, request for OT evaluation, request for psychological services for [REDACTED] and his parents." (Respondent's Ex.25 p.1) Petitioner's mother discussed her request for vision therapy during the meeting and provided a report from Dr. Gottlieb. The team looked at Petitioner's current grades and determined that he was doing very well with the exception of math. His Iowa Tests of Basic Skills (hereinafter "ITBS") scores were average to above average. (See Respondent's Ex. #31 & #32) It was determined that Petitioner was at that time benefiting from his education. Petitioner's mother stated that she wants "to deal with this before it becomes a problem." She feels if this isn't addressed now, it will become a problem later. It was determined that at that time there was not a need to provide vision therapy, but if Petitioner began to experience difficulty the team could always revisit issues pertaining to his vision. (Petitioner's Exhibit #38 pp. 3-5)

8.

In a meeting scheduled on December 19, 1999, to address parental concerns, Petitioner's mother readdressed Petitioner's need for vision therapy and a full occupational evaluation. The advocate [REDACTED] asked for a written explanation of why assisted technology, vision therapy and full occupational evaluation were being denied by the school system. Petitioner's mother did not sign the IEP amendment. (Respondent's Ex. #28 p. 11)

9.

A meeting was scheduled for May 30, 2000 to develop an IEP for the school year 2000 - 2001. Petitioner's mother attended, but there is no parental signature for acceptance of the IEP. (Respondent's Ex. 30 p. 14)

Petitioner's mother requested during this meeting that information be put in current levels regarding Petitioner's visual spatial problems. (Respondent's Ex. #30 p. 21)

The teachers asked Petitioner's mother about Petitioner's need to wear glasses. Petitioner's mother responded that he "doesn't need to wear them...only when he is fatigued." (Respondent's Ex. #30 p.33) The question "Is the student blind or visually impaired?" is checked "No". (Respondent's Ex. #30 p. 3)

A number of accommodations were listed on the IEP for the school year 2000 - 2001 including the following: extra supplies in the classroom, preferential seating, extra time for tests, verbal and written instructions, highlighting in textbooks, a teacher or peer note-taker, copies of all overheads used and additional time to copy assignments. (Respondent's Ex. #30 p.33)

10.

A review of Petitioner's grades from the school years of 1999 - 2000 and 2000 - February 20, 2001, show that he is functioning as a solid "B" student in college preparatory courses. His ninth grade numeric average for the year was 83.0000. His grades ranged from an 92 in Spanish I for the first semester to a 76 in Algebra I for the second semester. He took weight training the second semester and earned a grade of 88. Most of his grades averaged in the 85 to 88 range. (Respondent's Ex. 78)

His first semester tenth grade numeric average was 82.3333. One of his courses for this semester was Auto

Service Tech, for which he earned a grade of 80. (Respondent's Ex. 78)

A second nine weeks progress report with brief teacher's comments of Petitioner's grades as of February 20, 2001, showed that he had earned an 86 in tenth grade Lit/Comp ("contributes to class"), 80 in World History ("doing well; project is due this semester"), 80 in Informal Geometry ("major grades need improvement; prepare better for eval/perfor"), 74 in Spanish 2 ("doesn't prepare for class; on-job-performance needs improvement"), 86 in Physical Science ("contributes to class"), and 88 in Personal Fitness. (Respondent's Ex. 79)

The IEP developed on May 30, 2000, reviewed Petitioner's current levels of educational performance. Academically his English teachers noted that Petitioner added a great deal to class discussions, but did not always make the best use of his time. It was noted that he read orally with fluency and accuracy; he communicated effectively in writing, but often needs some encouragement to get him started. Biology teachers reported Petitioner to be a good student who gets along with his classmates and makes good use of his time. It was noted that he will typically let the teachers know when he doesn't understand directions or a particular concept; study guides help him with content-area learning. At times he rushed through his essay writing, producing sentences that may be illegible and he has difficulty with fluency, using only a few sentences or words for each essay question. In Algebra he continues to need improvement in areas such as turning work in on time, being attentive in class, making good use of his time, and his test/quiz performance. He can solve equations by factoring, simplify rational and mixed expressions, graph inequalities and equations, solve systems of equations by substitution and elimination, simplify rational square roots and was at that time working on solving equations by graphing, using quadratic formula and by completing the square. It was observed that he generally answers questions correctly, but becomes unsure of himself when teacher assistance is removed and he must attempt the answer on his own. It was recommended that he needs more practice to develop his confidence level on these skills. In Health his teachers reported that he was not as cooperative as during the first part of the semester and he needs improvement in the following areas: making a good effort on assignments, following directions, making good use of his time, and his classroom behavior needs to be more appropriate. In weight training he consistently performs well and exhibits more than adequate gross motor coordination. In Spanish Petitioner is described as highly motivated and an eager participant; his skill to mimic voices actually enables him to speak Spanish without an American accent; he completes his sequential homework every night. Under work habits his teachers report that Petitioner does not always take advantage of his time in class. He can be too social causing him to fall behind. He has been observed in classes trying to hurriedly finish his homework, but when he consistently uses his agenda, he is better able to keep up with his work. He works well in group situations, but class participation fluctuates. At times he is on task and an eager participant and at other times he withdraws and needs verbal reminders to either begin or stay on task. (Respondent's Ex. #30)

Under social/emotional assessment his teachers describe Petitioner as quick witted and funny; this makes him popular with his classmates. He is usually cooperative with his teachers. He accepts criticism and responds to feedback appropriately. (Respondent's Ex. #30)

His teachers describe his gross motor skills as age appropriate and his teachers find that he displays adequate fine motor coordination. This observation conflicts with Dr. Walter's finding that Petitioner experiences slow graphomotor skills (See Petitioner's Ex. #2) Petitioner is described as capable of writing in class and his writing is legible. (Respondent's Ex. #30 & #39)

11.

Dr. [REDACTED], Doctor of Optometry, saw Petitioner four times as a patient in his clinic. (*Transcript* May 9, 2001, p.7 line 20) Petitioner appeared at the initial visit in February, 1999, with a concern of blurry vision and double-vision. (*Id.* at p.7 lines 24 -24 & p.8 line 1) Dr. [REDACTED] diagnosed Petitioner as having exophoria (eyes having a tendency to turn outward) and exotropia at a distance (eyes having a tendency to turn outward completely) (*Id.* at p.8 lines 7 -11) Both of these conditions have been shown by literature to create and negatively affect a child and adult's ability to read and learn. (*Id.* at p.8 lines 11 - 13) Visual status with these conditions are not constant, but can change with the affects of fatigue, work load, the physical and educational demands of each individual on each particular day. (*Id.* at p.8 lines 22-25; p.9 line1) Dr. [REDACTED] also diagnosed Petitioner on the first patient visit as having double vision mostly at a distance. (*Id.* at p.9 lines 18 - 20) It is his belief that Petitioner has had double vision from the time of his injury. (*Id.* at p.47 lines 11 -12)

Dr. [REDACTED] examined Petitioner's handwriting during some of the clinic visits and found the handwriting to be variable. (*Id.* at p.50 lines 6 - 7) It is Dr. Gottlieb's belief that Petitioner's handwriting variability is created by the variability in his eyes. (*Id.* lines 12 - 15) Dr. [REDACTED] recommends vision therapy for Petitioner. (*Id.* at p.53 lines 19 - 23). Dr. [REDACTED] believes vision therapy will enable Petitioner to have clear, single, comfortable vision. (*Id.* at p.54 lines 1 - 3) In addition that the therapy will provide him with more consistent, legible and understandable writing. (*Id.* at lines 13 -17) The therapy according to Dr. [REDACTED] will provide Petitioner with the ability to read more successfully. (*Id.* at lines 17 - 18) When presented with a handwriting sample by Petitioner (Respondent's Ex. #39) which the teacher who graded it described as "legible and clear" (*Transcript* May 9, 2001, p. 58 line 25), Dr. [REDACTED] disagreed with "legible" and described the writing sample as "discernible" (*Id.* p.59 line 21), "inconsistent, variable" (*Id.* line 25)

Dr. [REDACTED] is of the opinion that often patients with traumatic brain injury would need ongoing vision therapy (*Id.* p.91 lines 1-5) Not just through childhood, but also as adults those patients might need to return for treatments. (*Id.* p.95 lines 7-8)

Dr. [REDACTED] currently charges \$125.00 per session for individual vision therapy treatments. (*Id.* p.90 lines 12 - 13)

On either Petitioner's first or second clinic visit Dr. [REDACTED] prescribed lenses for Petitioner's farsightedness and astigmatism.

12.

Dr. [REDACTED] presented an article entitled "A Randomized Prospective Masked and Matched Comparative Study of Orthoptic Treatment Versus Conventional Reading Tutoring Treatment for Reading Disabilities in 62 Children" by D. Atzmon, C.O., P. Nemet, M.D., A. Ishay, Ph.D. and E. Karni, M.A. published in the Spring, 1993 Volume 8 (No.2); 91-106 issue of *Binocular Vision & Eye Muscle Surgery Qirly*. (See Petitioner's Ex. # 76 & *Transcript* May 9, 2001, p. 38 line 6 - p.42 line 12) Dr. [REDACTED] presented this article as demonstrating orthoptics as a more cost effective treatment than conventional reading tutoring for children identified as having either exophoria, exotropia or convergence insufficiency. In reviewing the article it is noted that the study was conducted in Israel. The article was received for consideration by the quarterly on August 27, 1991. The exact dates of the study are not given. The study problem is stated as "Schools need better & economical methods of treating reading disabilities. Controversies remain whether orthoptics and/or "visual training" can remedy reading disabilities."

(Petitioner's Ex. 76 p. 1) The study divided 120 children with reading disability into three groups: orthoptic, conventional (reading tutoring) and no-treatment control. However the control group participants were deleted as unable to adhere to no-treatment. Each of the forty children in the first two groups had forty treatment sessions of twenty minutes each. Sixty-two children in thirty-one matched sets completed treatment. The results showed equal and statistically significant marked improvement in reading performance in both treatment groups on essentially all tests. The authors concluded that orthoptic treatment is as effective as conventional in-school reading tutoring treatment of reading disabilities. *Id.*

13.

Dr. [REDACTED] receives referrals and does evaluations for Dekalb county Special Education, but the school system has never paid for vision therapy. (*Id.* at p. 67 lines 12 - 15)

14.

After reviewing Petitioner's educational records Dr. Dana Deboskey's opinion was that Petitioner was a student who is actually achieving exceptionally well in the classroom. (*Id.* p.124 lines 7 - 16; p.167 lines 18 -20)

Dr. Deboskey has participated in approximately four hundred to five hundred IEPs for traumatically brain injured students. She has never seen vision therapy listed as a service to be provided under an IEP. She has only seen it used with severely injured children in a rehab program versus a school setting. (*Id.* p. 146 lines 1 - 23) In Dr. Deboskey's opinion vision therapy is about four times as expensive as reading tutoring. (*Id.* p.59 lines 11 -16)

In reviewing the educational records Dr. Deboskey found Petitioner to be a solid B student in college prep courses with a low average IQ. These factors led Dr. Deboskey to find that Petitioner is benefiting from his education. (*Id.* p.177 lines22-24; p.198 lines 1-5)

Dr. Deboskey did not find that Petitioner's educational performance as a Traumatically Brain Injured Student reflected any vision problems that would impact Petitioner's educational performance. (*Id.* p.263 lines 11-17; p.268 lines 1 - 17)

15.

In 1995 at his parent's initiative and expense, Petitioner was seen by Dr. [REDACTED], optometrist. Testing of Petitioner's visual motor integration showed that he had an age equivalent of nine years nine months (he was eleven years two months at the time of testing). Visual acuity was 20/20 for each eye, both at distance and near vision. Eye tracking age equivalent was none - ten years. It was noted that strabismus was present with intermittent exotropia at distance. Petitioner reported on September 25, 1995 that he did not like to read and handwriting was difficult. Columns and math were misaligned. After a vision therapy program of sixteen one hour sessions with Dr. [REDACTED] Petitioner scored the following : re-testing on August 22, 1996, of visual motor integration showed an age equivalent of eleven years five months (he was twelve years one month the time of re-testing); eye tracking scores went to fourteen years. His reading was reported to be better and faster although he still did not like to read and his math problems and paper work were neater and handwriting much improved. Dr. [REDACTED] recommended yearly exams. (Petitioner's Exhibits' #17 & #18)

16.

On October 7, 1998, Nancy Knight, Occupational Therapist, did an observation report on Petitioner in response to a request for Occupational Therapy Classroom Assistance. She noted the following in her report: Handwriting - pencil grasp is incorrect, but pencil control appears adequate; writing posture appears basically

correct, except for a slight elevation of the right shoulder which might result in unnecessary fatigue during long writing assignments; handwriting quality appears adequate; letter formation appeared easy, automatic and speed appears average; math problem samples reflected adequate organization and correct alignment of numbers. Keyboarding: those skills appeared to be good. Additional observations: visual tracking appeared to be accurate as Petitioner could follow a moving pencil smoothly and stayed focused on the target in vertical, horizontal, diagonal, and circular directions; eyes moved together and head held still while tracking; eye-hand coordination appeared good; shoulder muscle strength appeared slightly decreased, but sufficient for school activities; hand grip very good. Ms. Knight concluded that Petitioner had adequate handwriting and keyboarding skills to complete assignments without modifications. She made several suggestions; writing warm up activities; encourage Petitioner to hold his right shoulder in a lower more relaxed position to decrease possible fatigue; remind Petitioner to start with good posture when keyboarding; have Petitioner do pushups and jumping jacks for a few minutes three or four nights each week as a shoulder strengthening activity. (Petitioner's Exhibit #25) Petitioner's mother disagrees with Ms. Knight's Occupational Therapy evaluation because in her opinion the evaluation is in direct contrast to Dr. Walter's report and what she herself had personally observed with Petitioner. (*Nancy Salzer Deposition* June 12, 2001, p. 44 lines 9-10; p. 45 lines 10 - 15)

17.

Petitioner's geometry teacher, Wendy McCarron, used an overhead projector with transparencies, a white board, and/ or a chalkboard at the front of the room in teaching Petitioner's class. (*Wendy McCarron Deposition* June 12, 2001, p. 11 lines 3 -16) Petitioner had no problems either copying or working from overhead transparencies, the whiteboard or the chalkboard. (*Id.* p.12 lines 1-3; *Tracy Ramage Deposition* June 12, 2001, p. 9 lines 23 - 25 & p. 10 line 1) Petitioner does not rub his eyes, squint, bump into things, or show any other signs of vision difficulty at school and he did not wear his glasses in class. (*McCarron Deposition* p. 12 lines 4-17; *Ramage Deposition* p.10 lines 2 - 11)

18.

Petitioner's mother is concerned that Petitioner's vision will affect his long term education. She observed problems with Petitioner's ability to read for any length of time, tripping over objects and bumping into walls. (*Salzer Deposition* p. 65 lines 10 -25)

19.

Petitioner has a Georgia driver's license and passed the vision portion of the test without wearing eyeglasses. (*Salzer Deposition* p. 72 line 1 & p. 73 lines 1 - 24) Petitioner does not need eyeglasses to drive, but only occasionally to read. (*Salzer Deposition* p. 74 lines 1- 5)

Conclusions of Law

1.

Pursuant to GA DOE Reg. 160-4-7-.18(1)(g)(8) Respondent School System shall bear the burden of coming forward with the evidence and burden of proof to establish that the proposed IEP is appropriate and provides a Fair and Appropriate Public Education (hereinafter "FAPE"). Pursuant to OSAH Rule 616-1-2-.21(4) the standard of proof on all issues shall be a preponderance of the evidence. Respondent has met both the burden of proof and standard of proof in this case.

Whether Petitioner is entitled to an independent vision therapy evaluation at Respondent's expense.

A child's IEP is to be reviewed periodically, but not less than annually, to determine whether the annual goals for the child are being achieved, and the IEP is revised as appropriate to address any lack of expected progress toward the annual goals. 64 C.F.R. § 300.343 (c) These goals should be related to: meeting the child's needs that result from the child's disability to enable the child to be involved in and to progress in the general curriculum; meeting each of the child's other educational needs that result from the child's disability; and advancing appropriately toward attaining the annual goals. *Id.* at .347 (a) The IEP team is responsible for determining whether the child needs any additions or modifications to the special education and related services to meet the measurable annual goals set out in the IEP and to enable the child to participate, as appropriate in the general curriculum. *Id.* at .533 (a) (2) (iii) & (iv)

In reviewing the evidence presented by both parties, it is apparent that since becoming eligible for special education services Petitioner's IEP has been reviewed periodically in compliance with the governing statute. The evidence shows that with consistent input from both Petitioner's parents and the appropriate school system personnel Petitioner's needs resulting from his Traumatic Brain Injury were considered as the goals were set to enable him to be involved in and progress in the general curriculum. It is also evident that Petitioner's parents and the involved school personnel often disagreed on the goals and/or how they should be put in to effect. One of the areas of disagreement centers around Petitioner's vision and whether his vision is impacting his IEP goals to the extent that he would need additional services (vision therapy) in order to meet his annual goals and enable him to participate in the general curriculum.

The neuropsychological evaluation performed in July, 1998, by Dr. Walter demonstrated that Petitioner had a relatively slow graphomotor speed, and problems with holistic spatial ability. His visual processing speed is average and better when there is no graphomotor component included. Petitioner demonstrated some problems in visual-perceptual-motor ability when large amounts of planning and organization skill must be used in conjunction with that ability. However, on the two visual memory subtests his scores were in the average range. In his recommendations from that evaluation and from an addendum evaluation performed in January, 1999, Dr. Walter made no specific recommendations as to Petitioner's visual skills and abilities. Nor did he recommend vision therapy at any of the seven IEP meetings that he attended. However, in his testimony for this hearing Dr. Walter now recommends a vision evaluation for Petitioner.

Dr. [REDACTED] 1995 evaluation demonstrated that Petitioner had at that time visual acuity of 20/20 for each eye at both distance and near vision. At the time of testing his age was eleven years and two months. His eye tracking age equivalent was nine – ten years with strabismus present and intermittent exotropia at a distance.

Dr. Berger administered sixteen sessions of vision therapy whereupon at retesting when he was twelve years one month, Petitioner showed an age equivalent of eleven years five months for visual motor integration and his eye tracking scores went to fourteen years.

Dr. [REDACTED] also diagnosed Petitioner with exotropia at a distance and exophoria. In addition he diagnosed Petitioner with double vision and prescribed lenses for Petitioner's farsightedness and astigmatism. Dr. [REDACTED] recommended vision therapy that would enable Petitioner to have clear, single, comfortable vision and more consistent, legible and understandable writing.

These evaluations indicate that there is a problem with Petitioner's visual abilities, primarily with eye tracking movements and visual motor integration. The next question is whether or not this visual problem interferes

with Petitioner's attaining his annual goals and participating the general curriculum. The responses from his teachers and other school personnel on the IEP team indicate that it does not interfere. For purposes of school work it is apparent that his teachers find Petitioner's handwriting to be legible and clear. In viewing Respondent's Exhibit #39 presented as a sample of Petitioner's handwriting this judge found the writing to be clearly legible. The teachers find that he displays adequate fine motor coordination. While this observation may seem in conflict with Dr. Walter's findings it may be reasonable to conclude that fine motor control in the classroom does not need to be perfect in order for a student to perform adequately in the classroom. Variable handwriting need not be a problem in the classroom if it is legible. Petitioner has shown no difficulty in the classroom in working from an overhead projector or white boards and chalkboards. He has not complained to any of his teachers about his vision, and he has not been observed rubbing his eyes, squinting, bumping into things or other signs of vision difficulty. Nor has he been observed wearing his glasses in class. The Occupational Therapist's evaluation of October, 1998, showed that Petitioner could follow a moving pencil smoothly; that he stayed focused on the target in vertical, horizontal diagonal and circular directions; that his eyes moved together and his head held still while tracking; and that his eye-hand coordination appeared good. That evaluation indicated that Petitioner's tendency to hold his right shoulder elevated while he was handwriting could result in unnecessary fatigue.

In discussing Petitioner's parent's request for vision therapy during the IEP meeting of June 9, 1999, the IEP team determined that Petitioner was at that time benefiting from his education and there was no need at that time to provide vision therapy, but if Petitioner began to experience difficulty the team could revisit the issues pertaining to his vision.

It is apparent from the evidence that Petitioner's teachers have not been seeing a vision problem for Petitioner in the classroom setting. Great deference should be shown to the educators who develop the IEP. See *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991) Such teams possess a resource of experts who are familiar with the child and his abilities in the classroom, thus enabling them to determine an appropriate IEP for the child. Absent clear evidence that the IEP and the decisions made by the IEP team are not appropriate, it must be concluded that the IEP was appropriate and calculated to provide the child with a basic floor of opportunity. See *Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 930 (11th Cir. 1989) Respondent must provide sufficient support services to enable the child to benefit from his education, but there is no requirement that the school system maximize the child's potential. *Board of Education v. Rowley*, 458 U.S. 176 (1982) at 189. Petitioner argues that Respondent choose to ignore the evidence of Petitioner's visual problems. From the evidence presented it does not appear that Respondent ignored the visual problems, but that Respondent did not find that Petitioner's visual ability problems to be affecting his work in the classroom. Respondent indicated that if Petitioner began to experience visual difficulties in the classroom it would be addressed by the IEP team. This is a reasonable approach considering that the IEP team had addressed other problems related to Petitioner's disability that Petitioner had exhibited in the classroom. For example most of the recommendations made by Dr. Walter were incorporated in Petitioner's IEP. It is apparent from the evidence that Petitioner's parents participated extensively in the IEP meetings and that they have advocated strongly for vision therapy for Petitioner. However, Respondent is not required to provide educational services according to Petitioner's parents' dictates, nor is Respondent required to provide Petitioner with an education which will maximize his potential. See *Weiss v. School Board of Hillsborough County*, 141 F.3d 990 (1998) at 998. Respondent is required to provide sufficient support services to enable Petitioner to adequately benefit from his education. They have met this requirement. (See Conclusions of Law paragraph 3) With Respondent having met this requirement and with the evidence conclusive that Petitioner's visual abilities are not affecting his classroom experience so as to impede his benefiting from his educational experience, Petitioner is not entitled to an independent vision therapy

evaluation at Respondent's expense.

Whether Petitioner is entitled to vision therapy at Respondent's expense.

2.

As discussed under the previous Conclusion of Law addressing Petitioner's entitlement to a vision therapy evaluation, many of the same issues and conclusions are present in this second request. Obviously if the need for a vision therapy evaluation is not exhibited by the evidence presented then the need for the actual vision therapy would not be present. Should Petitioner's visual abilities show evidence that they are impacting his classroom experience and impeding his benefiting from his educational experience, then it is conceivable that a vision therapy evaluation should be performed by the appropriate expert. Or it may be that Respondent would consider some other service more appropriate to address Petitioner's vision problem such as reading tutoring. Petitioner's evidence was not conclusive as to vision therapy being the most appropriate treatment for Petitioner's exotropia and exophoria. The study presented by Petitioner's expert in vision therapy was flawed in that the control group was deleted. The study itself is at least ten years old. Most significant was that the study showed that both groups, those children who received vision therapy and those who received conventional reading tutoring showed equal and statistically significant marked improvement in reading performance on all tests. Petitioner is not entitled to vision therapy at Respondent's expense.

Whether Petitioner is receiving FAPE.

3.

In examining whether or not a disabled child has received FAPE it is necessary to look at the criteria from *Rowley* wherein the Court developed a two-part test to evaluate IEPs. First, has Respondent complied with the procedures set forth in IDEA? And, second is the IEP reasonable calculated to enable the child to receive educational benefits? *Id.* at 206 - 207.

Extensive procedures were incorporated by legislature into IDEA to insure that adequate notice be given to the disabled child's parents permitting them to have meaningful access and input into the preparation of the individual educational program developed for their child. See *Rowley* at 194. Compliance with the notice procedures in IDEA is vitally important to the concepts embedded in IDEA. Pursuant to 64 C.F.R. §300.503 written notice with very specific information is required whenever Respondent proposes to initiate or change the identification, evaluation or educational placement of the child or (italics added) "*refuses to initiate or change the identification, evaluation or educational placement of the child.*" *Id.* at §300.(b) Petitioner has stated that Respondent failed to give the required written notice of Respondent's refusal of Petitioner's parents request for vision therapy made at the IEP conference held on October 1, 1998. (Petitioner's Exhibit #23) Respondent did not see a need for a vision therapy evaluation because Petitioner had received sixteen successful sessions with Dr. Berger. In reviewing the extensive evidence presented by both parties in this matter it appears that contrary to the dictates of IDEA Respondent did not provide written notice to Petitioner's parents of the IEP's team decision not to provide a vision therapy evaluation. Respondent argues that this issue would not apply under the Prehearing Order for this matter issued May 4, 2001, in that it limits the issues in the case to the school year 2000 - 2001. However, the third issue listed in that order is whether or not Petitioner is receiving FAPE. Therefore, under the evaluation set forth in *Rowley* it must be examined whether or not Respondent complied with the procedures set forth in IDEA. In connection with the above described incident it is apparent that Respondent did not comply with the required notice procedures. However, Respondent further argues that there is an applicable two-year statute of limitation to Petitioner's claims and cites to *Mandy S. v. Fulton Cty. Sch. Dist.*, No. 1:99-cv 767-GET at 16 (N.D. Ga. Aug. 30, 2000).

In *JSK* at 1570 the Court reiterated that when Congress has failed to provide a statute of limitations for a federal cause of action, the local state time limitation most analogous to the case is borrowed. In keeping with this statutory interpretation, since the issue of notice in this case is beyond the applicable two year statute of limitations (see O.C.G.A. §9-3-33), that issue would not be applicable for the purposes of this decision.

Petitioner argued a second claim that Respondent had failed to comply with IDEA procedures in that during the IEP meeting on September 4, 1998, Dottie Pettes, Program Specialist, said that she would discuss the vision therapy outside of the IEP meeting with someone from Fulton County to see if the county would agree to provide for a vision therapy evaluation (*Pettes Transcript* p. 3 -21) Petitioner argues that Ms. Pettes' action would have removed the decision from the IEP team and thereby violated federal requirements. Again the statute of limitations would apply with this incident as it did in the previously discussed incident. Furthermore, the evidence is unclear as to whether the Ms. Pettes' conversation with someone from Fulton County would have the affect of removing the decision from the IEP team. Obviously, the school personnel serving as members upon an IEP team are under certain guidelines and procedure requirements implemented by the county and its budget. That a team member would seek guidance or information concerning this when considering a request for services does not necessarily remove the decision from the IEP team, but could possibly provide it with information with which to make a decision. The exact nature of this incident and its decision making affect on the team is not clear from the evidence presented. However, the applicable two year statute of limitations makes the matter moot for the purposes of this decision.

It appears that during the applicable two year time frame that Respondent has complied with the procedures set forth by IDEA thus meeting the first evaluation prong set forth in *Rowley* as to whether Petitioner has received FAPE.

Petitioner argues that he has not received FAPE and cites that his IEPs have relied on the educational testing from Dr. Walter conducted in 1998; that all three IEPs provided for comparable written expression goals; that despite a notation on the 1998-1999 IEP that a written expression goal had been mastered, similar written expression objectives were in his 2000 - 2001 IEP; and that there were no goals or objectives to address visual and reading deficits in the 1999-2000 IEP.

Petitioner was referred for Special Education for academic problems concerning his reading and written expression skills. There were also social/emotional/behavioral concerns for the referral. The goals on all of his IEPs reflect objectives in writing and his organization, social and mobility issues. The IEP for 1998 - 1999 defines the reading goal as improving reading comprehension skills for eighth grade level. If all of Petitioner's IEPs reflect writing goals, it is evident that the expectations for accomplishment of these goals would be at the current grade level that the IEP was designed to meet. Writing, grammar, composition and reading skills are incorporated into English classes which all Georgia school systems require their students to take all four years of high school. That each of Petitioner's IEPs would reflect written expression objectives would be indicative of the importance attached to these skills by the IEP team and Petitioner's continuing need to improve these skills at the higher levels required by each successive grade level.

The 1999 - 2000 IEP under the reading portion of present levels of educational performance reflects that he needs additional time to read because his processing is slow in reading. Under the cognitive portion of performance it was noted that Dr. Walter's evaluation found that Petitioner's relative weakness was in the holistic, visual-spatial ability as well as in the speed of processing. While there are no specific goals in this IEP addressing reading *per se*, it should be noted that several of the accommodations listed for this IEP would address Petitioner's reading visual/reading deficits, such as the following: highlighting of textbooks,

directions and notes; both verbal and written instructions; additional time to copy or complete assignments if necessary; alternative strategies for completing written assignments; and a teacher/peer note taker with provision of copies of teaching notes, overheads and board work. All of these accommodations would address the Petitioner's visual/reading deficits. Both Petitioner's mother and Dr. Walters were present at the March 31, 1999, IEP meeting which developed this IEP. There is no indication that requests were made at that meeting for specific goals to address Petitioner's reading/visual abilities.

Rowley at 189 states "if personalized instructions being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act." Under the *Rowley* standard a school district must provide a "basic floor of opportunity" through services and access to specialized instruction that are "individually designed to provide educational benefit" to the disabled child. *Id.* at 201. A school system is not required to "maximize the potential" of the disabled child. *Id.* at 200. To determine whether a child has been provided FAPE the Eleventh Circuit Court has consistently said "If 'meaningful gains' across settings means more than making measurable and adequate gains in the classroom, they are not required by IDEA or *Rowley*." *Devine v. Indian River County School Board*, 249 F.3d 1289 (11th Cir. 2001) at 1293.

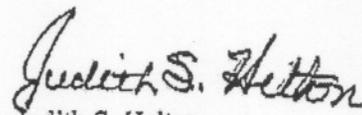
Petitioner's academic record demonstrates that he is benefiting from his education. He is functioning as a solid "B" student in college preparatory courses. He is described by his teachers as quick witted and funny, popular with other students and usually cooperative with his teachers. In the ninth grade he took weight training and earned a grade of "88". He has recently obtained his Georgia drivers license, a milestone for the average teenager in our society, providing a certain sense of independence and demonstrating age appropriate maturity. It is apparent that Petitioner is functioning academically, socially and physically at an average to above average level. It is apparent from his IEPs that Petitioner has access to services and specialized instruction individually designed to provide educational benefit. The findings listed above describe a student who is receiving educational benefit.

It can be concluded that Petitioner is receiving FAPE.

Decision

Petitioner is not entitled to an independent therapy evaluation at Respondent's expense. Petitioner is not entitled to vision therapy at Respondent's expense. Petitioner is receiving FAPE.

SO ORDERED this 16th day of October, 2001.


Judith S. Helton
Administrative Law Judge