04-0401453

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	)	Docket No.
Petitioner,	)	OSAH-DOE-SE-0401453-60-MSF
	)	
v.	)	
	)	
Fulton County Schools,	)	
Respondent.	)	

Final Decision

I. Introduction

This matter is the Administrative review of an action brought by the parents of Petitioner under the Individuals With Disabilities Act (IDEA) challenging the child's individualized educational program as provided by Respondent for two school years, 2001- 2002 and 2002-2003. [1]

Petitioner alleges that Respondent failed to provide FAPE and seeks reimbursement and compensatory education from Respondent. Additionally, Petitioner has alleged a claim of discrimination against Respondent arguing it acted in violation of the Americans With Disabilities Act (ADA) and Section 504. The administrative law judge lacks jurisdiction over such claims and the matter is hereby preserved on the record. OSAH Rules 616-1-2, Volume (Vol.) I, Transcript (T) 74 [2]

For the reasons given below, the placement provided to Petitioner by the School District was appropriate as it provided him educational benefit in the least restrictive environment and his requested relied is denied.

II. Background

Case Assignment

This matter was originally assigned to Administrative Law Judge Altman who issued an Order of Recusal on July 31, 2003. The matter was then re-assigned to the undersigned. Vol. I, T 72

[1] A hearing of this matter was conducted on August 28, 29 and 30, 2003. Petitioner, a minor child, was not present but was represented by counsel Chris Vance, Esquire. Witnesses for Petitioner included [redacted] and Dr. Marlyne Israelian. Respondent was represented by Sylvia Eaves, Esquire, Neeru Gupta, Esquire and John Wells, Esquire. Witnesses for Respondent included Dottie Pettes, Michelle Norton, Jennifer Schau, Wendy Barker, Lydia Kopel, Lisa Gray and Niall Cronnolly. Exhibits admitted into evidence are Joint Exhibits 1-46 and Petitioner's Exhibits 1-5, 17, 25-26, 28, 33 & 34. Vol. III, T 814

[2] For purposes of this decision the transcript is referred to by Volume and page.

Preliminary procedure

A telephone pre-hearing conference was held with the parties on August 14, 2003. Consistent with the Pre-Hearing Order issued on August 5, 2003, the parties were ordered to exchange exhibits, witness lists and statement of the legal issues by August 21, 2003. The date for hearing was extended to August 28, 2003, to begin on that date and proceed until its completion. *See* Order dated August 18, 2003, record.

Pre-hearing motions

Respondent filed three pre-hearing motions, briefly summarized here. One of Respondent's motions was a motion in limine to exclude one document, one video tape and one witness. The document was later admitted into evidence as Petitioner's Exhibit 34. Respondent objected to counsel for Petitioner's intention to introduce a videotape of Petitioner, filmed by his father, reading from various books. Counsel for Petitioner had indicated, pursuant to the pre-hearing order, that Petitioner was a potential witness. At hearing counsel for Petitioner indicated that she would not call Petitioner as a witness, but that he was available. Counsel told the court that she wanted to introduce the videotape to show, " how Petitioner reads".[3] The court initially ruled that the videotape could be introduced into evidence; then at the hearing, based upon further research, the court ruled that the videotape was offered as testimony and would therefore be hearsay and denied its admission into evidence. It was proffered and admitted into the record. Counsel for Petitioner withdrew the name of her own spouse as a witness in the proceeding at the objection of counsel for Respondent. [4]

Respondent's second motion contained objections to Petitioner's failure to comply with the Pre-Hearing Order. It was determined that Petitioner had failed to file a document list or to consolidate documents as required. Pursuant to the Pre-Hearing Order the parties were directed to consolidate documents by eliminating duplicates and using a common numbering system for joint documents. Respondent indicated to the court by motion that it had been unable to comply with this part of the Pre-Hearing Order due to a lack of cooperation by counsel for Petitioner. The parties were then directed, prior to the commencement of the hearing, to perform this task. Vol. I, T 36, 37 Further, Petitioner's documents are entered into the record as provided to the court.

Respondent also objected to counsel for Petitioner's subpoena of five additional witnesses, former clients of counsel. Respondent's motion was granted and their appearance was denied.

Non-appearance of subpoenaed witness

Counsel for Petitioner placed witness Diane Fleming under subpoena. On the first day of hearing, the witness's husband, who is an attorney, filed a motion to quash her appearance.

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[3] See Vol. I, T 10-14.
[4] See Vol. I, T 13.

Counsel for Petitioner discussed the possibility of taking Ms. Fleming's deposition at a later date. As a practical matter, the court lacks the ability to enforce a subpoena, and it was decided that Ms. Fleming would appear by telephone on the following day, with copies of documents the parties might wish to refer to being sent to her via her husband. However, on the following day counsel for Petitioner informed the court that she had decided not to call Ms. Fleming as a witness. Vol. I, T 128

Petitioner was offered an opportunity to question Ms. Diane Fleming, his resource classroom teacher, via telephone. Counsel for Petitioner elected to forego that opportunity. OSAH rules specifically provide for conducting administrative hearings via telephone. OSAH Rule 616-1-2-.22(4). Vol. I, T 4-6, 41-42, 45-54, 57, 66-67, 70, 128-131, Vol. II, T 349-350.

Proffer of evidence

At the end of the hearing, counsel for Petitioner was provided with an opportunity to perfect the record and make an offer of proof as to the Petitioner's school years 1999-2000 and 2000-2001. Counsel stated that her previous proffer was sufficient. Vol. I, T 41, 108, 167-174, Vol. III,T 800

Motion concerning Petitioner's records

The parties have filed motions and briefs concerning Petitioner's records. A separate order addressing that matter will be issued at a later date.

Respondent's motion for dismissal

At the conclusion of the hearing, Respondent moved for dismissal. That matter is resolved with the issuance of this decision.

Extension of time for issuance of decision

An Order extending the time for the issuance of this decision, as agreed to by the parties for good cause shown, was issued on September 23, 2003. Vol. II, T 455-456

III. Findings of Fact

1.

Petitioner is a minor child born in Illinois on [redacted] At birth Petitioner was admitted into a Neonatal Intensive Care Unit suffering from Thrombocytopenia (low platelet count), Hyponatremia (low blood sodium), disseminated intravascular coagulation, jaundice, enteroviral septicemia and meningitis and he experienced developmental difficulties thereafter. Petitioner was enrolled in private school for first grade and then entered public school and repeated the first grade. He received school system services for special education that included auditory processing, occupational therapy and language services. (Testimony of [redacted], Vol. I, T 135-137, Dr. Marlyne Israelian, Vol. II, T 275, Petitioner Exhibit No. 3)

2.

Despite poor postnatal prognosis, he met his motor milestones "on-time". He has however demonstrated significant speech delays and has received speech therapy since the age of two. (Testimony of Dr. Marlyne Israelian, Vol. II, T 276; Petitioner Exhibit No. 3)

3.

Petitioner's struggles with reading and writing are consistent with a background that includes a family history of reading disabilities. (Testimony of Dr. Marlyne Israelian, T 276)

4.

Petitioner has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and during the school year Petitioner takes prescribed medication this disorder as well as for asthma and allergies. (Joint Exhibit 21, page 1; Joint Exhibit 25, page 2; Petitioner Exhibit 1)

5.

In Illinois, Petitioner divided his day between public and private school and received exceptional children services for speech language. His initial Individual Education Plan (IEP) developed in 1997 indicated that he was below age expectations for expressive receptive language, auditory memory processing and articulation. He was to receive speech language services of 60 minutes per week and 240 minutes per month. (Testimony of [redacted]., Vol. I, T 153-154; Petitioner Exhibit No. 17; Joint Exhibit 3)

6.

In 1999 Petitioner moved with his family to Georgia and enrolled in Fulton County's New Prospect Elementary School for four years, including the two school years at issue in this matter, 2001- 2002 and 2002-2003. At that time Petitioner was beginning the second grade year. (Testimony of [redacted]., T 138; Joint Exhibits 3; 8; 10; 12 –13; 16; 18; 25)

7.

Initially, Respondent used the special education IEP developed for Petitioner in Illinois upon his school enrollment until sufficient time had passed to allow for the development of a new IEP. An IEP is an individualized plan developed for special needs students who will receive special education services. (Testimony of [redacted]., Vol. I, T 140, 153, Vol. II, T 366; Petitioner Exhibit No. 17; Joint Exhibit 3)

8.

Respondent scheduled a meeting to develop its own temporary/diagnostic IEP for Petitioner and notified the child's parents by telephone. His mother waived the ten (10) day notice requirement and indicated she would attend. (Joint Exhibit 2)

9.

At the IEP meeting on August 15, 1999, Petitioner's mother received the notice of parental rights in a School District document listing and explaining parents' rights and waived oral review of the rights. (Joint Exhibit 3, pages 1, 12 & 14)

10.

At that meeting, the IEP team, consisting of Petitioner's mother and School District personnel, developed a temporary/diagnostic IEP for Petitioner. It was determined that Petitioner was eligible to receive special education services under the eligibility categories of "Learning Disabled' (LD) and "Speech Impaired" (SI). Specifically, it was recommended that Petitioner receive two (2) hours per day of special education services to address his learning disability in the area of reading and language arts and ninety (90) minutes per week of speech language therapy to address his articulation needs. (Joint Exhibit 3, pages 1 & 12)

11.

This temporary/diagnostic IEP also contained accommodations for Petitioner in the general education classroom, as well as accommodations related to standardized, state-mandated and system-wide testing. For the Iowa Test of Basic Skills (ITBS), Petitioner was to take the test in a small group and receive extended time. For the California Achievement Test (CAT) in math, Petitioner was to take the test in a small group and have the directions repeated to him. Petitioner required no accommodations to have any of these tests read to him. (Joint Exhibit 3, page 13)

12.

This temporary/diagnostic IEP was in effect from August 30, 1999, to November 16, 1999. Petitioner's mother signed this IEP and the consent for his initial placement. (Joint Exhibit 3, page 14)

13.

The School District, with parental consent given August 25, 1999, conducted required evaluations to determine whether Petitioner was eligible to receive special education services and on November 3, 1999, completed a Special Education Eligibility Report for Petitioner. (Joint Exhibit 5)

14.

Based on this Special Education Eligibility Report, the School District determined that Petitioner was eligible to receive special education services under the primary eligibility category of Specific Learning Disabilities (SLD). Petitioner's learning disability affected his reading and language arts skills. Petitioner's mother attended a meeting to discuss this report, and signed documentation concurring with this determination. (Joint Exhibit 5, page 6)

15.

A primary eligibility category is a student's primary area of disability. A primary eligibility category does not mean that the student has no other disabilities. (Testimony of Pettes, Vol. II, T 375)

16.

On November 3, 1999, the School District completed a Speech Language Eligibility Report that found Petitioner's expressive and receptive language skills were within normal limits. However, the report did identify Petitioner with articulation errors and determined him eligible to receive speech language services, under the secondary eligibility category of Speech-Language Impaired. It is noted that the evaluations for this report were done 9/29, 10/22, 10/25 and 10/27/1999. Petitioner's father signed documentation that he concurred with this determination. (Joint Exhibit 6, pages 2-3, 5-6)

17.

Also on November 3, 1999, the School District held an IEP meeting, attended by Petitioner's parents, to develop his IEP. A copy of the parental rights had been enclosed along with the notification of meeting date to Petitioner's parents. At the meeting, the parents received another copy of their parental rights and the rights were reviewed orally with them. (Joint Exhibits 7 & 8)

18.

The 1999 IEP committee[5], including Petitioner's parents, reviewed Petitioner's eligibility reports and his current level of functioning noting his strength in math and weaknesses in reading and language arts, resulting from his learning disability. His fine and gross motor skills were determined to be age appropriate. (Joint Exhibit 8)

19.

Petitioner's 1999 IEP goals and objectives targeted his areas of disability: reading, language arts and articulation skills. Petitioner would receive two (2) hours of instruction per day, or ten (10) hours per week, in an interrelated resource classroom for his specific learning disability related to reading and ninety (90) minutes per week of speech language therapy for articulation. (Joint Exhibit 8, page 1 & 11)

20.

This resource setting Petitioner attended served only students needing special education services for reading and language arts skills. One teacher would call together three or four children for

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[5] For the purposes of this decision, each year's IEP committee is referred to in the year it met while developing an IEP for the next school year. The May 1999 IEP committee drafting an IEP for fall 1999-to 2000 would be referred to as the "1999 IEP committee."

small group instruction while the others would continue with independent work. (Testimony of Michelle Norton, Vol. III, T 503; Joint Exhibit 8)

21.

The 1999 IEP committee also developed accommodations for Petitioner in the general education classroom, for standardized, state mandated and system-wide testing. Petitioner would take the ITBS and CAT standardized tests in a small group and receive extended time. He required no accommodation to have any of the tests read to him. (Joint Exhibit 8, page 12)

22.

Petitioner's November 3, 1999 IEP, signed by his parents, was in effect from November 3, 1999 to June 2, 2000, while he was in second grade. (Joint Exhibit 8, page 1 & 13)

23.

In March 2000 Petitioner took the ITBS, a standardized test that is norm-references nationally that compares his performance with that of every other child nationwide who takes the test. (Testimony of Pettes, Vol. II, T 384; Joint Exhibit 30)

24.

Petitioner scored at the 2.0 grade level in reading and 3.8 grade level in mathematics on the ITBS. At the time of the testing he was in the second grade. Students do not take the language portion of the IBTS in the second grade. Petitioner's IEP did not require the test questions be read to him, and he therefore was required to read the test questions himself.
(Testimony of Pettes, Vol. II, T 385, Joint Exhibits 8 & 30)

25.

Petitioner's second grade report card shows he received an "S" for satisfactory in every area for every reporting period. (Joint Exhibits 34 & 38)

26.

On May 12, 2000, the School District convened its annual IEP meeting, attended by Petitioner's parents, to review his second grade year and develop his IEP for the 2000-2001 school year, his third grade year. At the meeting, the parents received a copy of their parental rights that were reviewed with them. (Joint Exhibit 10, page 10)

27.

The 2000 IEP committee, including Petitioner's parents, reviewed his current levels of functioning and determined that his oral expression and fine and gross motor skills were age

appropriate . (Joint Exhibit 10, page 3)

28.

The 2000 IEP committee reviewed the Brigance Comprehensive Inventory of Basic Skills (Brigance), administered in Spring 2000 when Petitioner was in the second grade. Petitioner scored at the second grade level in word reception, spelling and computation skills, and at the third grade level in reading comprehension and word problems. (Joint Exhibit 10, page 4)

29.

The 2000 IEP committee reviewed Petitioner's progress in goals and objectives from the previous year's IEP, November 3, 1999. Although all of his goals were determined to be met, Petitioner had a number that went from "in progress" to "met." Given his progress, the committee determined that he did not require extended school year (ESY) services. (Joint Exhibit 10, pages 10, 13-16)

30.

At the May 2000 IEP meeting, the IEP committee also developed new goals and objectives for Petitioner that raised expected competency and instructional levels from the previous year. These goals and objectives were designed to address and improve Petitioner's auditory processing skills, specifically the goals addressed phonetic decoding, word attack skills, and included providing oral answers to reading comprehension questions. The committee also developed speech goals to continue Petitioner's progress regarding articulation. (Testimony of Lydia Kopel, Vol. III, T 752-753; Joint Exhibits 8 & 10, pages 6-10, 15-18)

31.

The 2000 IEP committee determined Petitioner's educational placement for the 2000-2001 school year would include two (2) hours per day, ten (10) hours per week, in an interrelated resource classroom to address his reading disability and ninety (90) minutes per week of speech therapy. (Joint Exhibit 10, page 1)

32.

The 2000 IEP committee developed accommodations for Petitioner in the general education classroom, for standardized, state-mandated and system-wide testing. Petitioner would take standardized tests in a small group and receive extended time, have directions repeated, receive assistance in understanding directions and be given a limited amount of answer choices on tests as necessary. He required no accommodation to have any of the tests read to him. (Joint Exhibit 10, page 12)

33.

Petitioner's mother signed Petitioner's IEP for 2001 that was in effect from August 21, 2000, to June 1, 2001, Petitioner's third grade year. (Joint Exhibit 10, pages 1 & 13)

34.

On December 5, 2000, the School District convened a meeting at the request of Petitioner's parents who wanted his speech therapy services reduced to one (1) hour per week. Petitioner's mother indicated she would not attend the meeting but would receive a copy of the recommendations. It was agreed that Petitioner's speech therapy services would be reduced as requested and that his IEP for the 2000-2001 school year be amended. (Joint Exhibit 46)

35.

In March 2001, Petitioner took the Stanford-9 Achievement Test, a standardized norm-referenced test. He scored below average in areas related to reading and language arts, in reading vocabulary, reading comprehension, language and spelling. (Joint Exhibit 10)

36.

Also in March 2001, Petitioner took the Georgia Writing Assessment, a test that is sent from the school to an independent State reviewer for grading. The reviewer determined that Petitioner was a Stage 2 Developing Writer. (Testimony of Michelle Norton, Vol. III, T 547; Joint Exhibit 32)

37.

Petitioner's third grade report card shows he received a B in language arts and a C in math with modified curriculum. Petitioner used third grade reading and language arts materials throughout his third grade year. (Joint Exhibits 35 & 38)

38.

On May 9, 2001, the School District convened its annual IEP meeting, attended by Petitioner's mother, to review his third grade year and develop his IEP for the 2001-2002 school year, his fourth grade year. At the meeting, the parent received a copy of the parental rights and waived oral review. (Joint Exhibits 11 & 12, pages 12, 14)

39.

The 2001 IEP committee reviewed Petitioner's scores on the Brigance administered in Spring 2001 on which he tested at the third grade level in every category except for spelling and word problems where he tested at the second grade level. (Joint Exhibit 12, page 2)

40.

The 2001 IEP committee reviewed Petitioner's fine and gross motor skills. They found his gross motor skills age appropriate. It was determined Petitioner needed to work on correct size, formation and spacing in his handwriting. This is a typical concern for most children as they move into cursive writing. (Testimony of Pettes, Vol. II, T 413, 419)

41.

The 2001 IEP committee reviewed Petitioner's progress, on goals and objectives and determined he had mastered them and, given this progress, found that he did not require ESY summer services. (Joint Exhibits 10 & 12, pages 12, 16-18)

42.

The 2001 IEP committee also developed new goals and objectives for Petitioner in the areas of reading and language arts and increased the expected competency and instructional levels from the previous year's IEP. These goals and objectives were designed to improve his auditory processing skills, specifically the goals addressing phonetic decoding, word attack and orally answering reading comprehension questions. The committee also developed speech goals to continue Petitioner's progress regarding articulation. (Testimony of Lydia Kopel, Vol. III, T 752-753; Joint Exhibit 12, pages 8-10)

43.

The 2001 IEP committee determined Petitioner's educational placement for the 20010-2002 school year would include two (2) hours per day, ten (10) hours per week, in an interrelated resource classroom to address his reading disability and one (1) hour per week of speech language therapy to address his articulation needs. (Joint Exhibit 12, page 1)

44.

The 2001 IEP committee developed accommodations for Petitioner in the general education classroom, for standardized, state-mandated and system-wide testing. Petitioner would take standardized tests in a small group, extended time and directions repeated if necessary. Petitioner would also receive help from the instructor regarding reading of tests and assignments, reading orally by instructor of math word problems, receive study guides before tests, if appropriate, and a set of books for his mother to use at home (Joint Exhibit 12, page 13)

45.

Petitioner's mother signed Petitioner's IEP for 2002, that was in effect from August 13, 2001, to May 24, 2002, Petitioner's fourth grade year. (Joint Exhibit 12, pages 1)

46.

On September 14, 2001, the School District convened a meeting to address Petitioner's speech language therapy services and amend his IEP for the 2001-2002 school year. It was the opinion of Petitioner's speech language pathologist, Janice Guise, that he had consistently demonstrated mastery of his speech language goals and no longer needed that service. In the previous year, consistent with the parents' wishes, this service had been reduced from ninety (90) minutes to sixty (60) minutes. Petitioner's mother expressed reservation. It was agreed that Ms. Guise would monitor Petitioner for thirty (30) minutes per week for approximately one month to ensure

that he maintained his speech language skills. Petitioner's parents were sent the appropriate paperwork for their approval along with a copy of their parental rights on September 17, 2001. (Joint Exhibit 13, pages 1-2)

47.

On December 6, 2001, the School District sent Petitioner's parents its Parent Notice of Revaluation form indicating that Petitioner was no longer eligible to receive speech language services due to consistent mastery of his speech language goals and present educational performance. Petitioner's mother signed her agreement with the group's recommendation. On December 11, 2001, the IEP committee met and agreed to dismiss Petitioner from speech language therapy. Petitioner's parents were notified of the meeting, indicated they could not attend and agreed with the committee action. (Joint Exhibits 14 and 15, pages 1-2)

48.

The Georgia Criterion Referenced Competency Test (CRCT) is a state-mandated test that is subject matter related and used to measure whether students are meeting state standards and making adequate yearly progress pursuant to the No Child Left Behind law. It is particularly useful in measuring the educational progress of special education students. (Testimony of Pettes, Vol. II, T 382-383, 390)

49.

Petitioner took the CRCT in the spring of 2002 meeting the state-mandated criteria for competency in reading, English/language arts and mathematics, the three content areas tested. Petitioner would have been unable to meet these state-mandated standards without having developed and improved his academic skills. Dottie Pettes, Middle School Coordinator for Special Education could not recall a single instance where a child who could not read proficiently met requirements on the CRCT. (Testimony of Pettes, Vol. II, T 387, 390-391; Joint Exhibit 29)

50.

Petitioner's 2001 IEP did not require the CRCT test questions be read to him, and while he was to take the test in a small group, with extended time and have directions repeated if necessary, he therefore was required to read the test questions himself. (Joint Exhibit 12, page 13)

51.

Petitioner's fourth grade report card shows he received a B in language arts with a modified curriculum. Petitioner used fourth grade reading and language arts materials throughout his fourth grade year. (Joint Exhibit 36)

52.

On April 17, 2002, the School District convened its annual IEP meeting, attended by Petitioner's mother, to review his fourth grade year and develop his IEP for the 2002-2003 school year, his fifth grade year. At the meeting, the parent received a copy of the parental rights and waived oral review. (Joint Exhibits 17 & 18, page 11)

53.

The 2002 IEP committee reviewed Petitioner's level of performance, noting that math was "a strength area" and that he was "more likely to continue to achieve success and progress in reading in the structured resource setting" referring to the interrelated resource classroom in which he received two (2) hours daily specialized reading and language arts instruction continuously since the 1999-2000 school year. The 2002 IEP committee determined Petitioner's speech and language skills were age appropriate. His fine and gross motor skills were also age appropriate. The quality of his cursive handwriting was acceptable. (Joint Exhibit 18, pages 2-3)

54.

The 2002 IEP committee reviewed Petitioner's performance on the Brigance administered in Spring 2002 when Petitioner was in the fourth grade. Petitioner's grade level of functioning had increased by at least one full grade level in every area. In the areas of Word Problems and Reading Comprehension, his grade level had increased by two grade levels. His reading level was third grade. It was noted that his test scores were lower than his average daily performance on classroom, quizzes and unit tests. (Joint Exhibit 18, page 4)

55.

The 2002 IEP committee reviewed Petitioner's progress in goals and objectives. It was determined that he had mastered every goal and objective, except for one, on which he was three percentage points short of mastery. Although he was to be tutored during the summer, given his progress, the committee determined that he did not require ESY summer services. (Joint Exhibit 18, pages 7, 9 & 14-15)

56.

The 2002 IEP committee developed new goals and objectives for Petitioner to continue his progress in the areas of reading and language arts and increase the expected competency and instructional levels from the previous year's IEP. These goals and objectives also addressed and improved Petitioner's auditory processing skills, specifically the goals addressing phonetic decoding, word attack and orally answering reading comprehension questions. (Joint Exhibit 18, pages 4-7)

57.

The 2002 IEP committee determined that Petitioner's educational placement for the 2002-2003

school year would provide two (2) hours per day, ten (10) hours per week, in an interrelated resource classroom for language arts and reading. (Joint Exhibit 18, page 1)

58.

The 2002 IEP committee developed accommodations for Petitioner in the general education classroom and for standardized, state-mandated, and system-wide assessment testing. Petitioner was to use a notebook to record assignments, receive a study guide for science and social studies as needed, receive note taking accommodations and a set of science and social studies books to use at home. Petitioner would take these tests in a small group and receive extended time and have directions repeated if necessary. He required no accommodation to have any of these tests read to him. (Joint Exhibit 18, page 10)

59.

Petitioner's mother signed Petitioner's IEP for 2002, that was in effect from August 12, 2002 to May 23, 2003, Petitioner's fifth grade year. (Joint Exhibit 18, pages 1, 11)

60.

During the 2002 IEP committee meeting it was determined that Petitioner needed to undergo a comprehensive reevaluation and have his continued eligibility for special education services determined by November 3, 2002, as his previous eligibility was dated November 3, 1999. Parental consent was given approving the reevaluation. (Joint Exhibit 19)

61.

In preparation for the 2002 reevaluation, Petitioner's teachers prepared a Skills Inventory checklist on September 4, 2002, during his fifth grade year. His motor coordination, oral expression, listening comprehension and mathematics skills were all age appropriate. He had weaknesses in the areas of reading and written expression; his mastery of basic reading and reading comprehension was below the fifth grade, 5.0, grade level. (Joint Exhibit 20, pages 1-2)

62.

Ms. Wendy Barker, a Certified School Psychologist with the School District, completed a comprehensive reevaluation for Petitioner in October 2002 to assist in the determination of Petitioner's eligibility for special education services. His fine motor skills, measured by an instrument commonly used by occupational therapists to determine occupational therapy needs, were tested to be in the 65th percentile, or an age equivalent of 12 years, 3 months; at that time Petitioner was 11 years, 4 months of age. Petitioner's phonological processing was within the average range for his age despite it being a personal weakness for him. Phonological processing is currently believed to be the largest indicator of a child's success in learning to read. (Barker, Vol. III, T 672-675, 680-681, 705; Joint Exhibit 21, page 8)

63.

Ms. Barker administered the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). She obtained the following scores: Verbal Quotient of 100, Performance Quotient of 130, and a Full Scale Intelligence Quotient of 115. All of these scores were considerably higher, after three years of enrollment in the School District, than they were when he had been tested in May 1999 in Illinois, just prior to his entering the Georgia school system. Petitioner's 1999 scores were: Verbal Quotient of 92, Performance Quotient of 104 and Full Scale Intelligence Quotient of 97. (Testimony of Barker, Vol. III, T 675-677, 694-695; Joint Exhibits 5, page 2 and 20, page 5)

64.

Ms. Barker noted continued relative weaknesses in Petitioner's reading and language due to his learning disability, specifically in the area of written expression, reading and reading comprehension. There was a significant difference between his verbal and performance scales indicating that his nonverbal reasoning skills were more highly developed than his verbal reasoning skills. Ms. Barker concluded that Petitioner "continued to possess many of the characteristics and criteria consistent with other individuals who have Learning Disabilities." (Testimony of Barker, Vol. III, T 677-680;
Joint Exhibit 21, pages 10-11

65.

On November 8, 2002, the School District convened a meeting and determined Petitioner continued to meet the criteria for special education services. The eligibility team reviewed Petitioner's educational history and prior interventions. It was noted that Petitioner had been receiving special education services for reading and language arts under the eligibility category of Specific Learning Disabilities continuously since November 1999, and that these services resulted in "steady progress." Both parents attended this eligibility meeting and, as concurring members, signed the eligibility report indicating their agreement. (Joint Exhibits 22 & 23, pages 1, 6-7)

66.

In March 2003, Petitioner took the ITBS standardized test. He scored at the 4.6 grade reading level in reading. When he had taken the ITBS previously in spring, 2000, he scored at the 2.0 level. Also in the March 2003 ITBS test Petitioner scored at the 5.6 reading level in language; the language tests are not given during the second grade administration, when Petitioner previously took the ITBS. He scored a composite total at the 5.9 grade level, scoring in the 51st percentile. Petitioner was in the fifth grade at the time of this testing. (Testimony of Pettes, Vol. II, T 385; Joint Exhibits 30 & 31)

67.

Petitioner did not require the ITBS test questions to be read to him, and he was therefore required to read the test questions himself. Ms. Pettes could not recall a single instance where a child who

could not read proficiently met requirements on the ITBS. (Testimony of Pettes, Vol. II, T 391; Joint Exhibit 18, page 10)

68.

In Spring 2003, Petitioner took the Georgia Writing Assessment. Michelle Norton, Instructional Support Teacher at Petitioner's school, administered the test to Petitioner in a small group setting. The students were given a topic, told to brainstorm and do pre-writing on one day in a one hour time frame. The next day, also in a small group, the students were told to edit that writing. Petitioner received no assistance; his work on the assessment was completely his own. (Testimony of Norton, Vol. III, T 509-510, 563)

69.

The Georgia Writing Assessment, a curriculum based assessment test, that the School District had no involvement in scoring. The State uses a rubric to measure the written document. The State Department of Education determined Petitioner to be a Stage 5 Engaging Writer. This test result shows Petitioner has skills that have developed and improved from the previous writing test of this type that he took, progressing as he has from stage two, through stages three and four, to stage five. (Testimony of Pettes, Vol. II, T 386-387, 392-393, and Norton, Vol. III, 547-548, Joint Exhibit 33)

70.

Petitioner's father found this designation to be a misrepresentation of his son's abilities. He was unaware that the state, rather than Respondent, graded this evaluation. (Testimony of [redacted], T 256-257; Joint Exhibit 33)

71.

Petitioner's fifth grade report card shows he earned an "A" or "B" in every subject at every reporting period with a modified curriculum in language arts. Petitioner used fifth grade reading and language arts materials throughout his fifth grade year. (Joint Exhibits 20, page 1; 25, page 13; 37 & 38)

72.

Throughout Petitioner's fourth and fifth grade years, he was given the Basic Literacy Test to test his reading abilities that measure his educational progress through the academic curriculum. His test scores steadily improved throughout this time. He received a score of 100 out of 100 at the January 2003 administration of the test. (Testimony of Pettes, Vol. II, T 399; Joint Exhibit 24)

73.

The 2003 IEP committee meeting was held later due to the scheduling needs of the participants

causing Petitioner's April 17, 2002, IEP to be extended by parental permission until the end of the school year. (Joint Exhibit 43)

74.

Petitioner's parents requested that he receive the Fast ForWord program, a language program, in March 2003. Ms. Norton then asked Ms. Guice, a speech language pathologist, to review Petitioner's psychological report and make a recommendation concerning the parents' request. Ms. Norton chose Ms. Guice based upon her particular knowledge of speech and language disabilities, her senior status on the school speech team and because she had provided Petitioner's speech language therapy in the past. After her review with Ms. Guise, Ms. Norton decided there was no need to explore eligibility or speech language therapy for Petitioner. (Testimony of Norton, Vol. III, T 507-509)

75.

The 2003 IEP committee met on May 15, 2003, to review Petitioner's progress during the year and develop a draft IEP for his sixth grade year. Among those in attendance were Petitioner's parents and their attorney, Ms. Chris Vance, and Ms. Pettes. At that time the School District believed Petitioner would be attending sixth grade in the School District.
(Testimony of Pettes, Vol. II, T 373, 378; Joint Exhibit 25, pages 1, 23)

76.

During the May 15, 2003 IEP committee meeting, counsel for Petitioner's parents asked for copies of Petitioner's "reading and assessment records." (Joint Exhibit 25, page 24)

77.

At the May 15, 2003 IEP meeting Petitioner's parents presented the School District with a speech language evaluation and central auditory processing evaluation they had privately conducted by Children's Healthcare of Atlanta in March 2003. (Petitioner Exhibits 1 & 2)

78.

No witnesses from Children's Healthcare of Atlanta were presented at the due process hearing. (Record)

79.

Children's Healthcare of Atlanta conducted a speech language and auditory processing evaluation of Petitioner in March 2003. The speech language evaluation is incomplete because there should be three components, vocabulary, isolated language skills and an assessment of how the individual puts language together. The assessment lacks the third component. Therefore the results of the speech language evaluation are inconclusive in that they suggest a need for further evaluation. The auditory processing evaluation is also incomplete in that the symptoms of

ADHD can sometimes appear related to auditory processing problems, and evaluators may misrepresent those symptoms and erroneously diagnose a child with an auditory processing disorder. Although the Children's Healthcare of Atlanta report contains Petitioner's medical history, it makes no mention of his diagnosed ADHD and does not appear to take it into consideration. (Testimony of Kopel, Vol. III, T 744-750, 759, 778; Petitioner Exhibits 1 & 2)

80.

At the May 2003 IEP meeting, Petitioner's parents informed the School District for the first time that they had obtained private tutoring for Petitioner. (Testimony of Norton, Vol. III, T 507; Joint Exhibit 25, page 25)

81.

A review of Petitioner's progress on his goals and objectives during the 2002-2003 school year showed that Petitioner had mastered them all except for one, on which he was two percentage points short of mastery. (Joint Exhibit 25, pages 27-28)

82.

Petitioner's parents requested that, for summer 2003, Petitioner receive ESY services, specifically the Fast ForWord program and one-to-one reading instruction. Although the IEP committee determined Petitioner did not meet the eligibility criteria to receive ESY services, they agreed. (Testimony of Pettes, Vol. II, T 377, 380; Joint Exhibit 25, pages 24-25)

83.

Petitioner's parents also requested and received a private psychological evaluation performed by Dr. Marlyne Israelian at the School District's expense. (Joint Exhibit 25, page 25)

84.

Petitioner's parents also requested and received audiology and occupational therapy evaluations of Petitioner from the School District. Although Petitioner's teachers had not seen any areas for concern in the classroom of his fine motor skills nor any indication in classroom performance that he had any auditory processing needs that had not already been addressed, the School District agreed to provide evaluations in both areas. (Testimony of Pettes, Vol. II, T 379; Joint Exhibit 25, page 25)

85.

Petitioner was utilizing assistive technology at school through the use of a computer to improve his writing skills. It was determined during the 2003 IEP meeting that the note-taking requirements of sixth grade would be greater and therefore Petitioner would need an assistive technology evaluation. The School District also agreed to provide a speech language evaluation for Petitioner. (Testimony of Pettes, Vol. II, T 379-380; Joint Exhibit 25, pages 24-25)

86.

Although they left the 2003 IEP committee meeting prior to its completion, Petitioner's parents authorized the committee to complete the draft IEP, including new goals and objectives, recommendations for placement and accommodations for the general classroom and standardized and state-wide testing procedures. (Joint Exhibit 25, pages 1, 10-11)

87.

Marlyne Israelian, Ph.D., is a clinical psychologist who performed a neuropsychological evaluation of Petitioner on June 28 and 29, 2003, following referral by the School District. As instructed by Dr. Israelian, Petitioner did not take his prescribed medications for ADHD during the evaluation, consisting of ten hours of testing over the two days. (Testimony of Israelian, Vol. II, 271, 278, 334; Petitioner Exhibits 3 & 4)

88.

Dr. Israelian evaluated Petitioner is three main areas: academic achievement, intellectual abilities and cognitive functioning. Her evaluation included a complete evaluation of all areas of the brain functioning to determine how they impact the child's ability to learn, socioemotional measures, interviews of the parents and review of records. Specifically she reviewed records of the child's history, Fulton County's most recent evaluation of Petitioner in 2002, and the speech language evaluation of Petitioner through Childrens Health Care, and auditory testing. (Testimony of Israelian, Vol. II, T 272-274)

89.

Dr. Israelian found Petitioner's intellectual abilities to be in the high average range, that his reading and spelling scores were not commensurate with this and that his mathematical abilities were an area of strength for him. (Testimony of Israelian, Vol. II, T 324; Petitioner Exhibit 3)

90.

Based upon the WISC III, Dr. Israelian found Petitioner's full-scale IQ to be 105. She found his verbal IQ to be 93, which places him in the 25th percentile when compared to his same age peers and his performance IQ to be 117, which places him at the 87th percentile. She believes his true IQ score falls between the range of 107 and 123 and would place Petitioner at 117, a high average range of intellect. Significantly, Dr. Israelian found Petitioner's scores to be consistent across all three administrations of the test, including hers and those given by the Illinois school system and Respondent. (Testimony of Israelian, Vol. II, T 281-282, 284-285)

91.

Dr. Israelian's stated purposes for the evaluation were to obtain estimates of Petitioner's current cognitive functioning and to confirm his ADHD diagnosis. Only medical doctors are qualified to

confirm diagnosis of ADHD and Dr. Israelian is not a medical doctor. (Petitioner Exhibits 3, page 4 & 4)

92.

Dr. Israelian prepared a chart using Petitioner's achievement scores at the age tested, and contrasted his achievement levels from the end of first grade in Illinois with the end of fifth grade as she tested in June 2003. Based upon the chart and her analysis of it, Dr. Israelian opined that Petitioner, at twelve years of age, is reading at the level of an eight – year – eight month old level. She started with Petitioner at seven years ten months old reading at a level of seven years one month. According to Dr. Israelian's evaluations, Petitioner is performing on broad reading tests at grade level 4.3. (Testimony of Israelian, T 292-293, 295- 299)

93.

Dr. Israelian's evaluation of Petitioner was conducted while he was not taking his prescribed medication for ADHD. The School District's evaluations have all been conducted with Petitioner taking his prescribed medication for ADHD. Jennifer Schau, Coordinator in Psychological Services for Fulton County, opined that Petitioner's evaluation when he was not taking his prescribed medication for ADHD could directly impact the results of his cognitive functioning assessment due to such factors as his inattention and hyperactivity. (Testimony of Schau, Vol. III, T 590-591, 600)

94.

Dr. Israelian did not measure or intend to measure Petitioner's educational progress. Psychological testing, alone, cannot determine educational progress. Additional information from classroom teachers and others who work with a student is required for this determination. (Testimony of Barker, Vol. III, T 679; Petitioner Exhibit 3)

95.

Dr. Israelian deviated from standard practices in her administration of the testing instrument in that she gave Petitioner the WISC-III in June 2003, just eight months after the most recent previous administration in October 2002. It is standard practice to administer the WISC-III no less than one year, or at the very least nine months, after the most recent previous administration. This standard is commonly known and adhered to by practicing psychologists. (Testimony of Schau, Vol. III, T 590, 598; Petitioner Exhibit 3, page 7)

96.

Dr. Israelian administered the Woodcock-Johnson Achievement test to Petitioner. This test is not used to track academic achievement or educational progress over time nor is it designed to measure such progress. (Testimony of Norton, Vol. III, T 544-546; Petitioner Exhibit 3, page 8)

97.

Dr. Israelian opined, based upon using the results she obtained from the Woodcock-Johnson test, that Petitioner had not made any measurable difference (gain) in his abilities from March 1999 to June 2003. (Testimony of Dr. I, T 303)

98.

Dr. Israelian reported grade equivalent scores on the Woodcock-Johnson tests, rather than age equivalents. Because Dr. Israelian reported grade equivalents, she could not permissibly compare the results on the Woodcock-Johnson test to results obtained on the WISC-III, which is based on age equivalents. The two measures are not comparable to each other. (Testimony of Schau, Vol. III, T 593; Petitioner Exhibit 3, page 8)

99.

Dr. Israelian presented what she described as a comparison between test scores on the Woodcock-Johnson test she obtained from Petitioner and the test scores on an earlier version of the Woodcock-Johnson test obtained by an Illinois school district from Petitioner in March 1999. Comparisons between an earlier version of the Woodcock-Johnson and the later version are impermissible as one cannot make a direct comparison between differing test versions and the differences were not noted in Dr. Israelian's report. (Testimony of Israelian, Vol. II, T 297; Schau, Vol. III, T 594; Petitioner Exhibits 3 & 34)

100.

Dr. Israelian presented a document described as a summary of her report but it is an incomplete summary of, and differs from, her report. It contains information; such as age equivalents on the June 2003 test scores, that does not appear in her report. It also omits relevant information that is contained in her report. For instance, Petitioner's Exhibit 34 contains age and grade equivalents for certain subtests from the Woodcock-Johnson test, but omits others, such as Reading Fluency, on which Petitioner tested in the 59th percentile, and Writing Fluency, on which Petitioner tested at the 63rd percentile. (Petitioner Exhibits 3 & 34)

101.

Dr. Israelian prepared this summary document the week before the hearing, specifically for litigation. It was not a part of her report, but she would have included this document in her report if she had believed it to be relevant to her evaluation. She usually does not generate this type of summary document because it can be easily misconstrued. (Testimony of Israelian, Vol. II, 339, 340-342; Petitioner Exhibit 34)

102.

Dr. Israelian thought Petitioner would be a good candidate for one-on-one intensive intervention; suggested that he participate in a study at Georgia State; obtain a reading program that will come

out in the fall of 2003; and receive individual instruction concurrent with his pull-out resources; that he would be a good candidate for the Lindamood-Bell; for ADHD he get quiet time in a quite room; visual aids such as outlines, diagrams, work banks, illustrations; a note-taker; and access to textbooks on tape. (Testimony of Israelian, Vol. II, T 325-326; Petitioner's Exhibit No. 3)

103.

Among the assistive technology recommended by Dr. Israelian for Petitioner's use were visual scanning techniques, available school facilities, voice recognition software, a word processor with spelling and grammar check, and mechanicals like videotapes and computer software. She suggested Petitioner be placed close to a teacher and paired with a positive learning partner. (Testimony of Israelian, Vol. II, T 327-328; Petitioner Exhibit No. 3)

104.

Dr. Israelian also recommended accommodations to include a speech language evaluation with potential speech language services if appropriate, an occupational evaluation and a neurological evaluation. (Testimony of Israelian, Vol. II, T 328-329; Petitioner Exhibit No. 3)

105.

Petitioner received eighteen hours of one-on-one reading instruction from Ms. Lisa Gray, a certified special education teacher. She is well qualified, possessing both undergraduate and master's degrees in learning disabilities and has taught special education for 22 years, primarily to fourth and fifth grade students with specific learning disabilities. (Testimony of Gray, Vol. III, T 817-820, 841)

106.

During their sessions, Petitioner did not take his ADHD medication and Ms. Gray noted his having a high degree of activity and distractibility. (Testimony of Gray, Vol. III, T 826-827, 850; Joint Exhibit 26)

107.

Ms. Gray found Petitioner could easily read fourth grade level materials. She estimated his reading ability to be at the beginning fifth grade level. (Testimony of Gray, Vol. III, T 821, 827, 831-833; Joint Exhibit 26)

108.

Ms. Gray used a fifth grade text and two novels Petitioner selected, *Captain Underpants* and *Holes*, to work on vocabulary, decoding unfamiliar words, word structure and comprehension. Petitioner demonstrated a strong knowledge base in vocabulary and was able to define and describe most of the words he encountered. He was able to recall the meanings of unfamiliar

words at a 90% or better accuracy rate. His decoding abilities were strong and he was able to read word lists typically with an 80% accuracy. (Testimony of Gray, Vol. III, T 822; Joint Exhibit 26)

109.

Ms. Gray also addressed Petitioner's reading comprehension abilities and found his comprehension skills to be very strong at the fifth grade level. Petitioner also exhibited a high degree of mastery of oral reading fluency. He read at a rate of more than 130 words per minute. A rate of 100 words per minute is considered "fluent" for the reading series used. (Joint Exhibit 26)

110.

Interestingly, Petitioner's father testified that earlier in the year, his son wanted to read the book *Holes*. He described Petitioner as being able to read some words out of the book but not able to read the book. Ms. Gray determined that *Holes* would be a challenging book for a fifth grade reader. She found that Petitioner made decoding errors and stumbled over words to a minor extent while reading *Holes* but this did not interfere with his comprehension. The *Holes* publisher suggested the book was for 4.5 grade reading. Ms. Gray stated that *Holes* typically was read in middle school. Testimony of [redacted], Vol. I, T 145; Gray, Vol. III, T 823, 843-844; Joint Exhibit 26)

111.

Ms. Gray described Petitioner's writing ability, based upon her analysis of the writing Petitioner wrote in their sessions. She found that Petitioner was able to develop a topic, write fairly freely, have strong editing skills and could write in cursive as a final copy. (Testimony of Gray, T 836)

112.

During the summer of 2003 the School District also provided Petitioner with the Fast ForWord program, a computer program designed to address reading comprehension and reading skills. The version used by Petitioner focused on phonics, phonological skills, semantics and reading. Petitioner used his own computer and sent his work online to the Fast ForWord organization to generate data. (Testimony of [redacted], Vol. II, T 257; Kopel, Vol. III, T 724-726)

113.

The School District administered a pre-test to Petitioner before he began the computer Fast ForWord program. After completion of the program, the School District was to administer a post-test and then complete an evaluation to determine the effectiveness, if any, of the program, by measuring Petitioner's skills both before and after he completed the program. Petitioner met the 90% criteria for mastery for 28 out of 33 testing objectives. The School District had no opportunity to administer the post-test, as Petitioner was unavailable. (Testimony of [redacted], Vol.

II, T 257-258, Kopel, Vol. III, T 731, 782, 785; Joint Exhibit 27, pages 8, 12, 15, 18-19, 22, 25-26)

114.

Ms. Norton described the resource classroom in which Petitioner received special education instruction throughout his enrollment in the School District. While Petitioner's resource room contained students with a variety of disabilities all required specialized instruction regarding reading and language arts. (Testimony of Norton, Vol. III, T 503)

115.

Because Petitioner's resource classroom contained at least one student with a behavior disorder, his classroom could contain a maximum of seven students with one teacher and no assistant. It could contain a maximum of ten students with one teacher and one assistant. (Petitioner Exhibit 28)

116.

There were four months where it appears there were eight students without an assistant in the classroom: November and December 2002, and February and March 2003. For these months an eighth student, who did not always attend, was counted as a participant in the classroom. When he did attend he came with an assistant. His IEP mandated that an assistant accompany him to the classroom. When he was present in the classroom, there were eight students in the classroom, with one teacher and one assistant. When he was not present in the classroom, there were seven students and one teacher. (Testimony of Norton, Vol. III, T 517- 518, 558; Petitioner Exhibit 28)

117.

Petitioner's father believed there were eight to twelve children in class with Petitioner in his resource classroom. The evidence supports the conclusion that there were never more than eight children in Petitioner's resource classroom. (Testimony of [redacted], Vol. II, T 207; Norton, Vol. III, T 518)

118.

Ms. Norton, the on-site special education coordinator and Instructional Support Teacher, observed Petitioner's resource classroom approximately four times during Petitioner's fourth and fifth grade years. These observations were unannounced. She observed a well- synchronized environment in which children were learning. (Testimony of Norton, Vol. III, T 501, 503-505)

119.

Petitioner's father is seeking reimbursement from Respondent for services his son received at [redacted] Learning Center totaling $10, 611.00 over the course of two years. The printed Payment History introduced into evidence, consist of two pages that are pre-printed with handwriting on

them and the text does not indicate that the payments were made for Petitioner. (Testimony of [redacted], Vol. II, T 210- 212, 259; Petitioner Exhibit 33)

120.

Petitioner failed to present any witness from the [redacted] Learning Center. There was no evidence regarding the training of [redacted] tutors in teaching, assisting or instructing learning disabled children. (Testimony of [redacted], Vol. II, T 246)

121.

Students with learning disabilities do not typically use [redacted] Learning Centers for assistance. Learning disabled students require specialized instruction and intervention that is marked differently from typical tutorial or remedial approaches. (Testimony of Baker, Vol. III, T 681-682)

122.

It would have been appropriate for Petitioner's parents to coordinate tutorial instruction with school instruction, as this maximizes instruction. (Testimony of Baker, Vol. III, T 683)

123.

Petitioner requests that the School District pay for the services of the Lindamood-Bell program in the future, in the amount of $18,630. Petitioner's father researched the program and found that it cost $65 per hour and offered a consecutive three-month program. However, Petitioner failed to provide documentary evidence regarding the content of the Lindamood-Bell program or why it might be useful for him. The School District employs individuals who are trained to provide the strategies used in the Lindamood-Bell program. (Testimony of [redacted], Vol. II, T 214; Baker, Vol. III, T 709)

124.

Petitioner's father testified that his wife prepared her own quizzes and outlines to help Petitioner study. None of these materials were submitted into evidence. (Testimony of [redacted], Vol. II, T 244)

125.

Petitioner's father testified that the parents engaged [redacted] to assist Petitioner in writing a school report. Petitioner's parents never approached Ms. Norton about his needing help to write the report that was not one assigned in the resource classroom. (Testimony of [redacted], Vol. II, T 206-207; Norton, Vol. III, T 551-553)

126.

Petitioner is not a resident of the School District. Petitioner's family purchased a home in New

Jersey on July 11, 2003. Petitioner will attend public school in New Jersey for the 2003-2004 school year. [6](Testimony of [redacted]., Vol. II, T 242-243; Stipulation of the Parties, Vol. I, T 36, 39, 60-62)

127.

On June 17, 2003, Ms. Kopel, at the request of Petitioner's parents, loaded the Fast ForWord program onto Petitioner's computer at his father's office in Norcross, Georgia. During a July 7, 2003 visit Ms. Kopel attempted to set up an appointment to see Petitioner at his father's office. It was scheduled for July 22, but when she attempted to confirm, the day before, she was told by Petitioner's father that the child was on vacation and unavailable. The School District post testing was never completed for the Fast ForWord program. (Testimony of Kopel, Vol. III, T 725, 729-730)

128.

Ms. Gray never provided the ESY one-on-one instruction to Petitioner at his home but met him at a clubhouse and once at the home of a friend of the family in their neighborhood. (Testimony of Gray, Vol. III, T 828)

129.

Petitioner's father testified that he first learned that Petitioner might have dyslexia in July 2003. Dr Israelian recommended in her report that Petitioner receive an occupational therapy assessment to determine the potential benefit of occupational therapy services. (Testimony of [redacted]., Vol. II, 134; Petitioner Exhibit 3)

130.

It is Dr. Israelian's opinion that Petitioner has difficulty writing and that his pencil grip is immature for his age; instead of a dynamic tripod he uses a static tripod. Petitioner refers to his left hand as his weakling hand and avoids its use. She opined that due to Petitioner's significant trauma at birth, the meningitis and the intravascular coagulation its likely there was brain damage that would translate into subtle differences between left and right functioning, that she found in measuring his left and right hand motor speed and accuracy. It is noted for the record that Petitioner is right handed. Based upon Petitioner's scores in the sensory perceptual exam and his self-characterization, she determined that his scores merited a referral for an occupational therapy evaluation. (Testimony of Israelian, Vol. II, T 310-312, 320-321; Petitioner Exhibit No. 3)

131.

It is the father's opinion that Petitioner is not reading at grade level. Petitioner's father states child reads at a low pace, has to concentrate very hard in order to read words, and that his

[6] Counsel for Petitioner's request to Respondent for the due process hearing is dated July 24, 2003 and states that Petitioner is a resident, residing at an address in [redacted], Georgia, who will be attending [redacted] Elementary School. (Joint Exhibit 40)

comprehension of a significant amount the information he has read is not retained. (Testimony of [redacted], Vol. I, T 180-182, Vol. II, T 226-227, 229)

132.

It is the father's opinion that both his wife and [redacted] are responsible for any meaningful progress that Petitioner has made in his schoolwork. Petitioner's father characterizes the educational evaluations that his son has received, including the testing data in his two IEPs, as misrepresenting the child's true abilities. (Testimony of [redacted], Vol. II, T 244, 250, 253-254, 255-266) (Testimony of [redacted], T 244, 253-254)

133.

Petitioner's father felt that he had no choice and that no services would be provided to his son if he did not sign his son's IEP. (Testimony of [redacted], T 208)

IV. Conclusions of Law

1.

The pertinent laws and regulations governing this matter include the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq.),* 34 C.F.R. § 300 *et seq.,* the Family Educational Rights Privacy Act (FERPA) (20 U.S.C. § 1232g), O.C.G.A. § 20-2-152, and Ga. Comp. & Regs. at Chapter 160-4-7 *et seq.* (DOE Rules). Other statutes and rules that may apply include, but are not limited to, the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.),* the Rehabilitation Act (29 U.S.C. § 700 *et seq.),* the Georgia Quality Basic Education Act (O.C.G.A. § 20-2-130 *et seq.),* and the compulsory attendance provisions of O.C.G.A. § 20-2-690 *et seq.*

2.

Claims brought under IDEA are subject to a two-year statute of limitations. *Mandy S. v. Fulton County Sch. Dist.,* 205 F. Supp. 2d 1358 (N.D. Ga. 2000), *aff'd without opinion, 273* F.3d 1114 (11" Cir. 2001). Petitioner filed this due process hearing request on July 24, 2003. Accordingly, any and all claims relating to any events occurring prior to July 24, 2001, are barred. Therefore events occurring only during the 2001-2002 and 2002-2003 school years, Petitioner's fourth and fifth grade years are at issue. (August 28, 20003 Order of the Court, Vol. I, T, 40).

3.

Petitioner bears the burden of proof in this matter. In *Devine v. Indian River County Sch. Bd.,* 249 F.3d 1289 (11"' Cir. 2001), the Eleventh Circuit held that when "the parents.. are seeking to attack a program they once deemed appropriate, the burden rests on the parents in the IEP challenge." *Id.* At 1292; *see also Tracey T v. McDaniel,* 610 F. Supp. 947 (N.D. Ga. 1985); *Burger v. Murray County Sch. Dist.,* 612 F. Supp. 434 (N.D. Ga. 1984). Petitioner, through his parents, signed and agreed to every IEP that was developed and implemented by the School District. Petitioner, as the

party now attacking these same IEP, bears the burden of proof in this matter. Petitioner, therefore, has to establish by a preponderance of the evidence that the District has failed to provide him a free appropriate public education (FAPE). *Devine,* 249 F.3d 1289 (11^{0} Cir. 2001). (August 28, 2003 Order of the Court; Transcript, page 28, lines 15-18.)

4.

Petitioner shall bear the burdens of persuasion and going forward with the evidence. OSAH Rule 616-1-2-.07 The standard of proof on all issues in a hearing is a preponderance of the evidence. OSAH Rule 616-1-2-21 (4)

5.

The hearing shall be *de novo* in nature. OSAH Rule 616-1-2-.21(3)

6.

The Individuals with Disabilities Act (IDEA), and its regulations require a free and appropriate education (FAPE) must be provided to any student who is identified as having a disability as defined by the Act, 20 U.S.C. 1412 (a)(1); 34 C.F.R. 300.4, in the least restrictive environment. The FAPE requirement has been interpreted to mean that the education to which access is provided is sufficient to confer some educational benefit upon the handicapped child. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). The court established a two prong test to determine the appropriateness of an Individualized Education Plan (IEP): first, has the State complied with the procedures set forth in the Act and secondly, is the individualized educational program reasonably calculated to enable the child to receive educational benefits.

7.

In *Rowley,* the United States Supreme Court considered the meaning of the IDEA's requirement of a free appropriate public education and held that an appropriate education is one which is provided pursuant to an IEP that has been developed in compliance with the procedural requirements of IDEA, is designed to meet the student's specific needs, and is calculated to enable the student to receive educational benefit.

8.

In determining whether an IEP provides an opportunity for a student to receive educational benefit, the Supreme Court in *Rowley* specifically held that the Act does *not* require that the education services provided to the disabled student "be sufficient to maximize each child's potential." *Id.* At 3046. The Court further stated that "to require .the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go." *Id.* At 3047. The Court held that the IDEA requires a school district to provide a "basic floor of opportunity" for the disabled child. *Id.* At 3048.

9.

The Eleventh Circuit Court of Appeals in *J.S.K. v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991), addressed the issue of the level of educational benefit required under EAHCA (now IDEA). Following *Rowley*, the Eleventh Circuit held:

> [W]hen measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity. *Todd D. v. Andrews*, 933 F.2d 1576, 1580 (11th Cir. 1991). This opportunity provides significant value to the handicapped child who, before EAHCA might otherwise have been excluded from *any* educational opportunity. The IEP and the IEP's educational outcome need not maximize the child's education. *Id.; Doe v. Alabama State Dept ofEduc.*, 915 F.2d at 665. If the educational benefits are adequate based on surrounding and supporting facts, EAHCA requirements have been satisfied. While a trifle might not represent "adequate" benefits, *see, e.g., Doe. V.. Alabama State Dept of Educ., 915* F.2d at 655, *maximum improvement is never required.* Adequacy must be determined on a case-by-case basis in the light of the child's individual needs.

Id. At 1572-73 (emphasis added). The Eleventh Circuit also noted that in determining whether an IEP provided adequate educational benefit, courts must pay great deference to the educators who develop the IEP. *Id.* at 1573. The *J.S.K.* decision continues to be the standard in the Eleventh Circuit for determining the educational benefit required under IDEA. *See, e.g., Devine.*, 249 F.2d 1289 (11th Cir. 2001).

10.

Petitioner has failed to prove by a preponderance of the evidence that the School District did not comply with every procedural requirement of IDEA. Upon his arrival in the School District, Respondent honored his IEP from Illinois. It then promptly conducted its own eligibility determinations and developed its own IEP that provided the appropriate level of service while still providing Petitioner with maximum access to the general education curriculum. It timely reevaluated Petitioner to determine his continuing eligibility for special education services and agreed to every request for additional evaluations made by his parents.

11.

Petitioner has also failed to show by a preponderance of the evidence that the School District failed to provide FAPE. Indeed, every indication suggests that the School District consistently provided Petitioner FAPE in the least restrictive environment. Under the standard described in *Rowley* and *J.S. K.*, Petitioner made adequate, measurable educational progress while enrolled in the School District. The resource classroom in which [redacted] received specialized instruction for his

reading and language arts skills provided the appropriate level and type of instruction.[7] Throughout his enrollment in the School District, Petitioner mastered, or very nearly mastered, every goal and objective developed to ensure he made adequate educational progress.

12.

Petitioner's performance on standardized and system-wide testing, evaluated by individuals outside the School District show educational progress. On the Georgia CRCT, Petitioner met state-mandated requirements. On the ITBS, he went from a level 2.0 in reading in the second grade to a level 4.6 in the fifth grade. Petitioner showed similar progress on the Georgia Writing Assessment, progressing from a Stage 2 Developing Writer in the third grade to a Stage 5 Engaging Writer in the fifth grade.

13.

Petittioner presented the private evaluation conducted by Dr. Israelian in an attempt to show he had not made educational progress. The evidence indicated that some of this testing deviated from standard practices routinely adhered to by the profession in that the particular test was administered too soon after the most recent previous administration of the instrument and that Petitioner was not taking medication for ADHD when he was evaluated. Nevertheless, some of Dr. Israelian's findings were consistent with those of the School District. It did implement many of the recommendations Dr. Israelian suggested in her report prior to her evaluation being done. Specifically, Dr.Israelian recommended that he receive a speech language evaluation, an occupational therapy evaluation, one-to-one reading assistance, and possible enrollment in the Fast ForWord program. The School District had already agreed to provide all of these elements, and more, to Petitioner before Dr. Israelian evaluated him.

14.

Dr. Israelian is not an educator and never intended to measure educational progress with her evaluation. The instruments she used are themselves unable to measure educational progress. She never consulted or sought any information from any of Petitioner's teachers. Her findings do not counter the strong evidence, through his grades, performance on standardized and system-wide testing, and progress on his goals and objectives, that Petitioner made good educational progress.

15.

Given Petitioner's demonstrated academic achievements through his grades, progress on goals and objectives, and his performance on standardized and system-wide testing, it is clear that Petitioner made educational progress. Therefore, the School District has satisfied the standard set out in *Rowley* and *J.S.K.*, as Petitioner made adequate educational progress and received educational benefit while enrolled in the School District.

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[7] Petitioner had an opportunity during the hearing to question Ms. Fleming, his resource classroom teacher, via telephone. Counsel for Petitioner elected to forgo that opportunity. (T 350) OSAH rules specifically provide for conducting administrative hearings by telephone.

16.

Petitioner has also failed to show that the School District failed to evaluate him in any area of suspected disability. Petitioner's teachers noted no problems with Petitioner's classroom performance regarding handwriting, language, or auditory skills. Given his consistent educational progress and good academic performance, there was no reason to suspect that Petitioner's disabilities extended beyond his learning disability related to reading and language arts, for which Petitioner was already receiving appropriate services.

17.

Even if Petitioner had shown that the School District failed to provide him FAPE, Petitioner has failed to show that he is entitled to reimbursement for private tutoring services unilaterally obtained by him from [redacted] Learning Center. Parents have the right to unilaterally seek private services for their children. In order to seek reimbursement from the School District for expenses related to those private services, however, the parent must prove by a preponderance of the evidence that (1) the District failed to provide FAPE; and that (2) the private services offer an appropriate education. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.403(c); *School Committee of the Town of Burlington v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S.* 359,105 S. Ct. 1996 (1985).

18.

As already determined, the School District provided Petitioner FAPE. Further, Petitioner has failed to show the appropriateness of the services provided by Sylvan Learning Center. As acknowledged by all parties, Petitioner has a learning disability that affects his reading and language arts performance. As a child with a learning disability, Petitioner requires specialized instruction from educators specifically trained to teach children with learning disabilities. There is no evidence that anyone from [redacted] who assisted Petitioner had this necessary and appropriate training. Additionally there is no evidence that the tutoring activities [redacted] employees undertook with Petitioner were appropriate or provided him any educational benefit. No one from [redacted] testified. Indeed, Petitioner did not even notify the School District that he received his tutoring until May 15, 2003. Petitioner's parents withheld information of the tutoring thereby precluding coordination of services or changes to his IEP. Petitioner has failed to prove the appropriateness of the services for which he now seeks reimbursement.

19.

Further, Petitioner has failed to prove the amount he paid for the services for which he seeks reimbursement. Petitioner presented two preprinted bills with only his parent's name printed on them, along with dollar figures reflecting payments. None of the preprinted text on these bills refers to Petitioner in any way. As such, the dollar figure requested by Petitioner for reimbursement is but an allegation, and he has failed to show by a preponderance of the evidence either the appropriateness of the services received or the amount of services received.

20.

The Petitioner's request that the School District fund his future receipt of private services in the Lindamood-Bell program, in the amount of $18,630, must be denied. Petitioner did not present any evidence regarding the content of the Lindamood-Bell program or why it is necessary and appropriate for him. There is some suggestion that the Lindamood-Bell program is a program designed to remediate speech and language disabilities. Dr. Israelian's evaluation does not indicate that Petitioner requires speech and language services; it suggests that he needs further evaluation.

21.

Petitioner is not entitled to any future educational services, private or otherwise, provided by the School District because he is not a resident of the School District. IDEA and its implementing regulations, along with applicable state and local provisions, require a school district to provide special education services only to children who reside within that school district. 20 U.S.C. § § 1412(a)(1) and 1413 (h)(1); 34 C.F.R. § 300.300(a)(1); O.C.G.A. § 20-2-152(b); Ga. DOE Rule 160-4-7-.03. As stipulated by the parties, Petitioner is not a resident of the School District. He lives in New Jersey and will attend school in New Jersey. As Petitioner is not a resident of the School District, he is not entitled to any educational services provided by the District.[8]

In the instant case, there is no dispute that Petitioner has learning disabilities. While his parents would understandably seek to maximize his potential, this is not the standard required by law. The School District must provide a reasonably appropriate education for Petitioner. This was done as evidenced by his educational improvement and attainment of IEP goals and objectives. Objective testing, both on state-mandated and national tests, showed Petitioner made improvement. Petitioner offered evidence concerning his intelligence level. However, it is unclear from the psychological testing what potential to which the child has to advance. Such evidence would have been important. Once the School District has shown it provided Petitioner with FAPE, Petitioner would have to show that the independent tutoring was a service necessary to accomplish FAPE. The evidence does not support such determination. Finally, even had it been determined that Respondent failed to provide Petitioner FAPE, Petitioner would be ineligible to receive compensatory services since he no longer resides in Georgia.

V. Decision

For the reasons stated above, Petitioner's requested relief is denied.

SO ORDERED, this 30th **day of October, 2003.**

Mary Shannon Rauh-Ference

Mary Shannon Rauh-Ference
Administrative Law Judge

[8] It appears that Petitioner may not have been a resident of the School District when his counsel filed the hearing request on July 24, 2003.