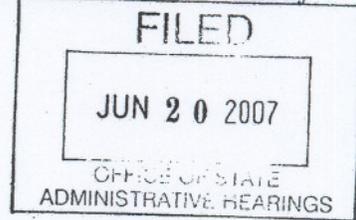


07-014051

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

_____,)
)
Petitioner,)
)
v.)
)
ATLANTA PUBLIC SCHOOLS,)
)
Respondent.)
_____)

Docket Number:
OSAH-DOE-SE-0708839-60-Kennedy



FINAL DECISION

Petitioner, by and through his parent, filed a request for due process hearing. A hearing was held on January 22, 2007 and on May 8, 2007. The parties submitted proposed orders/closing arguments on June 11, 2007. Upon careful consideration of the evidence presented, judgment is entered for Respondent.

I. Findings of Fact

1.

_____, first enrolled in the Atlanta Public Schools system in 1999, at the age of _____, at which time he was determined to be eligible for special education services by virtue of being Significantly Developmentally Delayed. (Petitioner Exhibit 5; Tr. I: 118¹; Tr. II: 32-33)

2.

Following two years of pre-school, _____ was enrolled for two years in a Primary Non-Categorical class due to his continued eligibility for special education services as a child who was Significantly Developmentally Delayed. (Petitioner Exhibit 1; Tr. II: 32-33).

¹ References to the hearing transcript of January 22, 2007, will be shown as "Tr. I:" followed by the page numbers, and those to the hearing transcript of May 8, 2007, will be shown as "Tr. II:" followed by the page numbers.

3.

Pursuant to state regulations, children may remain in the Significantly Developmentally Delayed category only through age seven. (Rules and Regulations of the State of Georgia, Georgia Department of Education – hereafter “GDOE” - Rule 160-4-7-.02/Categories of Eligibility, Appendix H)

4.

In 2003, as [REDACTED] finished the [REDACTED] grade and reached the age at which he could no longer remain in the SDD category, Respondent performed psychological and educational evaluations in order to determine [REDACTED]’s eligibility for special education services. The results of these evaluations (full scale I.Q. score of 72 on the WISC III, 80 on the K-BIT) did not qualify [REDACTED] for eligibility in Respondent’s Program for Exceptional Children, pursuant to applicable state regulations.² (Petitioner Exhibit 13 at page 9; Tr. II: 33-34 and 207-208; GDOE Rule 160-4-7-.02/Categories of Eligibility, Appendix E). Instead, Respondent classified Petitioner as a “slow learner” and decided that, as a “slow learner,” he would be monitored during second grade to see if any academic difficulties became apparent. (Tr. II: 207-210)

5.

At the end of [REDACTED]’s [REDACTED] grade year, it was determined that [REDACTED] would continue to receive speech services. (Tr. II: 207-210)

6.

During [REDACTED] grade, [REDACTED] was in the “EIP” or “Early Intervention Program”, which is designed for general education students who are in need of assistance in order to perform at grade level. [Tr. II: 81, Respondent Exhibit 1-B at page 4, GDOE Rule 160-4-2-.17/Early Intervention Program (EIP)]

² The Psychological Evaluation Report prepared by Respondent’s Psychological Services Department did not include consideration of the effect Petitioner’s health impairment, that being Soto’s Syndrome, had on his educational performance. (Petitioner Exhibit 13 at page 2).

7.

During the period of time [REDACTED] was assigned to a general education classroom in second grade, Principal Clarietta Davis took actions to help promote his success, as she did with all students who were leaving the special education environment:

I try to make sure that even though the child is not special ed, that the P[rogram for] E[xceptional] C[hildren] teacher sort of coordinates things with the homeroom teacher, and it's not putting the child back in the program, but just talking about some things that could probably help to ensure that the child is successful and probably making sure that the child is in a smaller classroom.

(Tr. II: 17)

8.

During the [REDACTED] grade, [REDACTED] continued to receive speech therapy services, and in September of 2004, he was referred to Ms. K. Russell, an Occupational Therapist employed by the Respondent, for a determination as to whether occupational therapy services were required to support [REDACTED]'s education. (Respondent Exhibit 1-A)

9.

As a result of that evaluation, [REDACTED] began receiving 60 minutes a month of occupational therapy services in October of 2004. (Tr II: 220; Respondent Exhibit 1-G)

10.

In the fall of 2004, while [REDACTED] was in [REDACTED] grade, his teacher and his parent noted that he was having academic difficulties. As a result, a reevaluation review was conducted on October 28, 2004, involving the In School Team Chairperson, a School Psychologist, [REDACTED]'s Early Intervention Program teacher, the Occupational Therapist and [REDACTED]'s general education teacher. [REDACTED]'s parent was unable to appear but participated by telephone. (Respondent Exhibit 1-B; Tr. I: 99-100; Tr. II: 80-81)

11.

The team conducting the reevaluation review determined that a new comprehensive psychoeducational evaluation was needed and J.W.'s parent gave her written consent for such an evaluation on November 3, 2004. (Respondent Exhibit 1-B, at sixth page)

12.

As a result of the October 28, 2004 meeting █. was also referred to a Specific Learning Disability Evaluator. (Respondent Exhibit 1-B, at eighth page)

13.

During that same meeting, █'s parent shared information that █'s medical doctor had shared with her concerning █'s diagnosis of Soto's Syndrome and its impact on his learning, including borderline to average intelligence with learning deficits, and widely different dates for maturation in the areas of intellectual, social and emotional development. Petitioner also provided a medical report dated September 30, 2004. (Respondent Exhibit 1-B, at fourth page)

14.

The results of the comprehensive psychological evaluation that was completed following the October 28, 2004 team meeting were written into a report dated December 6, 2004, which showed that █ had a Full Scale I.Q. score of 67 and an Abbreviated Battery/SB5 ("ABIQ") score of 70. It also showed that █'s academic achievement was "Below Average" in Reading and Written Language, "Extremely Low" in Oral Language, "Average" in Visual Motor Skills, and ranged from "Moderately Low" to "Adequate" in Adaptive Behavior. (Tr. I: 101; Respondent Exhibit 1-C, at page 3)

15.

Pursuant to state regulatory definitions, the results of this evaluation were neither sufficient to qualify █ for special education services as having an "intellectual disability" nor as having a "specific learning disability". (Tr. I: 117, GDOE Rule 160-4-7-.02/Categories of Eligibility, Appendices E and I)

16.

Respondent then determined that Petitioner qualified for services under the category of "Other Health Impairment."³ (Respondent's Exhibit 1-D).

17.

Qualification for special education services under the eligibility category of "Other Health Impairment" requires a medical evaluation, within the past year, indicating diagnosis as well as a development or educational assessment to indicate the effects of the health impairment on the student's educational performance. Among the effects of Soto's Syndrome are cognitive difficulties. (TR. I: 117; Tr. II: 79-80; Tr. II: 75; GDOE Rule 160-4-7-.02/Categories of Eligibility, Appendix G)

18.

The relevant information concerning [REDACTED]'s academic performance and his diagnosis of Soto's Syndrome were incorporated into an Eligibility Report on January 18, 2005. (Respondent Exhibit 1-D).

19.

In attendance at the January 2005 meeting were J [REDACTED]'s general education teacher Stephen Begley, school psychologist Antoinette Kamor, psychologist intern Jacqueline Horne, special education teacher Dr. Alexander, occupational therapist Monica Cainion and Special Education Liaison Risa Schaber. In addition, [REDACTED]'s parent participated by conference call. (Respondent Exhibit 1-D, final page)

³ Shortly afterwards, Petitioner raised concerns about why OHI had not been considered at the end of Petitioner's [REDACTED] grade year so that he could have benefited from services during his [REDACTED] grade year; however, Petitioner did not file a due process hearing request regarding that issue until the instant due process hearing request filed October 10, 2006. (Petitioner's Exhibit P-7, P-8 and P-10).

20.

On January 18, 2005, the team created an Individual Education Program for [REDACTED]. The team consisted of In School Team Chairperson Risa Schaber, general education teacher Stephen Begley, special education teacher Dr. Cynthia Alexander, occupational therapist Monica Cainion, a psychologist and psychologist intern, and [REDACTED]'s mother (who participated by telephone). (Respondent Exhibit 1-E)

21.

As required by federal law, a team developed an Individual Education Program for [REDACTED] (after an analysis of [REDACTED]'s then-present levels of performance, his strengths and weaknesses), which included specific goals and objectives designed to address his individual deficit areas. [REDACTED]'s IEP was adhered to by all of the student's teachers, both general and special education teachers, and necessary instructional modifications and accommodations were made. (Tr. I: 76-78; Tr. II: 67-69, 173)

22.

[REDACTED]'s IEP was reviewed regularly in order to determine whether he had "mastered" the annual goals and specific objectives established for him. (Tr. I: 108, 119-120)

23.

The January 18, 2005, IEP set out the following information:

- a. Confirmation of [REDACTED]'s status as and placement in the PEC program as "Other Health Impaired", with a secondary program of "Speech Impairment"; (Respondent Exhibit 1-E, at first and fifth pages)
- b. Provision of services to include 18.3 hours a week in special education (Language Arts/Reading, Mathematics and Communication) and 11.3 hours a week in general education (Science, Social Science, Homeroom), as well as 60 minutes a month of occupational therapy and 60 minutes a week of speech therapy; (Tr. I: 103; Respondent Exhibit 1-E, at second page)

- c. An assessment of [REDACTED]'s then-present levels of performance in eight different areas; (Respondent Exhibit 1-E, at third page)
- d. An indication that the team would meet later to discuss whether extended school year services were recommended; (Respondent Exhibit 1-E, at fourth page)
- e. The selection of a self-contained classroom delivery model, and resources to address the speech impairment; (Respondent Exhibit 1-E, at sixth page)
- f. A list of instructional modifications to be shared with [REDACTED]'s general education teacher; (Respondent Exhibit 1-E, at eighth and ninth pages)
- g. Decisions regarding [REDACTED]'s participation in required state-wide and district-wide assessments; (Respondent Exhibit 1-E, at tenth and eleventh pages)
- h. Specific instructional goals and objectives for Math, Written Expression/Language Arts, Reading, Occupational Therapy and Speech/Language Impairment. (Respondent Exhibit 1-E, at twelfth through eighteenth pages)

24.

The January 18, 2005 IEP was modified by the team shortly after it was created, in response to a letter written by [REDACTED]'s parent, dated February 1, 2005. (Petitioner's Exhibits P-7 and P-8; Respondent Exhibit 1E, thirtieth through thirty-third pages) A meeting was held on February 3, 2005, to discuss the letter and modify the IEP. (Petitioner Exhibit P-7; Respondent Exhibit 1-E, at twenty-fourth through forty-first pages)

25.

The team meeting held on February 3, 2005, included the participation of eight of Respondent's staff, along with both of [REDACTED]'s parents. The meeting was called as a result of [REDACTED]'s mother's expressed concerns about her son's academic achievement, and the

Respondent suggested that it would monitor [REDACTED]'s progress and communicate with the parents weekly. In addition, in response to questions about whether [REDACTED] would be more appropriately placed at another school in a self-contained "Specific Learning Disability" classroom, [REDACTED]'s parent was invited to visit such a class. [REDACTED]'s parent asked and Respondent arranged for an Assistive Technology evaluation to be done. At the parent's request, [REDACTED] was moved from a special education homeroom to a general education homeroom. (Tr. I: 102; Respondent Exhibit 1-E, at twenty-fourth through forty-first pages)

26.

The team met next on March 21, 2005, at which time, [REDACTED]'s mother "expressed that she was much happier with [REDACTED]'s] progress since the last meeting . . . [that he] is having success and his self-esteem appears greater as he is proud of his accomplishments". The team indicated that [REDACTED] was using a software program in the classroom and at home that was based on the Orton-Gillingham model of reading. The team discussed the need to repair the computers in [REDACTED]'s classroom immediately. Assistive Technology evaluator Kathryn Griffith offered her evaluation of [REDACTED]'s needs, and a report indicating his progress in reading was shared. (Petitioner Exhibit 10; Respondent Exhibit 1-F)

27.

On April 5, 2005, Occupational Therapist Monica Cainion wrote an annual report indicating that his handwriting was improving, and that he should continue to receive occupational therapy for sixty minutes each month. (Respondent Exhibit 1-G)

28.

The team met next on April 21, 2005, in order to create the Individual Education Program for the 2005-2006 school year. At that time, the number of hours [REDACTED] spent in the special education classroom increased. It was recommended that [REDACTED] participate in the extended school year program in order to receive "continued instruction without disruption in service". (Tr. 106; Respondent Exhibit 1-H). Although most post-test

results were below grade level, the IEP indicates progress from pre-tests done on January 25, 2005 and post-tests completed on March 16, 2005. (Respondent Exhibit 1-H)

29.

█████ participated in the extended school year program during the summer of 2005. (Tr. I: 57-58; Respondent Exhibit 1-I).

30.

The "extended school year program" is a part of a student's Individual Education Program designed to help the student meet the critical objectives set out in the IEP. [Tr. I: 82-84; GDOE Rule 4-7-.01-3(e)/Definitions]

31.

By the end of the 2005 "extended school year program", █████ mastered all of the objectives set out for him in reading and mathematics, and he was able to perform these tasks at a second grade level, which was higher than before the summer program. (Respondent Exhibit 1-I)

32.

On November 3, 2005, the team met for a Reevaluation Review, where █████'s continuing eligibility for speech services was confirmed and further testing regarding speech was determined to be useful. The special education teacher noted █████'s progress in sight word vocabulary, reading comprehension and math computation.⁴ The general education teacher noted the various instructional modifications she made in her class and the occupational therapist noted improvements in █████'s handwriting. █████'s parent expressed concern with the rate of █████'s academic progress, and the possibility of a completely self-contained classroom for █████ was discussed with █████'s parent agreeing to think about this further. █████ was referred to the Speech Language Pathologist for an updated evaluation. (Respondent Exhibit 1-J)

⁴ █████ progressed in sight word vocabulary from a primer level to a second grade level; reading comprehension from a 1.5 grade level to a 2.1 grade level and; math computation from 1.7 grade level to a 2.6 grade level. Word problems continued to be an area of weakness. (Respondent's Exhibit 1-J at p. 3).

33.

On January 12, 2006, a meeting was held to discuss the speech evaluation, and the IEP was amended to add speech goals directly geared toward remedying his dysfluency deficits. (Respondent Exhibit 1-L)

34.

On April 12, 2006, the team met to develop the IEP for the upcoming 2006-2007 school year. It was again recommended that [REDACTED] attend the "extended school year program" for the summer of 2006. During the meeting, the occupational therapist explained that [REDACTED] had made improvement in handwriting, and submitted her annual report indicating this, the special education teacher noted [REDACTED]'s improvements in sentence structure, spelling and in using a particular method to solve math problems. The team noted that [REDACTED]'s self-esteem had improved significantly. The IEP also indicates progress in the area of Dolch Sight Words, Fluency/Oral Reading, and Math from March and November 2005 to April 2006.⁵ (Respondent Exhibit 1-M)

35.

According to the written documentation, by April of 2006, J.W. showed the following progress toward his objectives:

- a. He was "Improving" toward his annual Math goal, having "Mastered" four out of five objectives (one of them however, inconsistently);
- b. He was in the range of grade 2.5-3.0 with regard to the annual Written Expression goal, having "Mastered" one out of the four objectives and "Improving" in each of the others;
- c. He was "Improving" toward his annual Reading goal, having "Mastered" two out of three objectives;
- d. He had "Mastered" his annual Social Studies goal; and

⁵ Petitioner showed progress in Dolch Sight Words from 2nd grade level in November 2005, to 3 grade level in April 2006; Reading Comprehension from 1.0 grade level in January 2005 to 2.1 grade level in November 2005 and; Math computation from 1.7 grade level in March 2005 to 2.6 grade level in November 2005. (Respondent's Exhibit 1-M and 1-P).

e. He was "In Progress" with regard to his annual Language goal.
(Respondent Exhibit 1-H, Tr. I: 109-111)⁶

36.

█ received grades of "C" in all of his core classes on his end-of-year report card, as well as "A"'s and one "B" in classes such as Health, P.E., Music and Art. The Teacher's Comments on the report card indicated that █ was "doing better in daily oral language skills" and that he had "shown improvement in reading and math calculations".
(Respondent Exhibit 2 – page 1)

37.

█ attended the "extended school year program" again in the summer of 2006, during which time he was picked up at home, but dropped off after Respondent's program at the Sylvan Learning Center. (Respondent Exhibit 1-N; Tr. II: 87-88)

38.

After Petitioner participated in tutoring sessions at Sylvan Learning Center, Dr. Cynthia Alexander, Petitioner's special education teacher, noted that Petitioner did not lose ground as far as word recognition. (Tr. II: 133) Despite attending the ESY program and receiving tutoring through Sylvan, Petitioner did not master his goals and objectives that summer so the IEP team agreed to include his ESY goals and objectives in the IEP for the 2006-2007 school year. (Respondent Exhibit 1-N, at p. 3).

39.

The team met on September 21, 2006, and all those participating (including █'s parent) agreed to move him from the special education classroom for Language Arts into the regular education classroom, where the "SFA" ("Success for All") method was being used. The team agreed that Petitioner would get consultative services in reading via the SFA model and that Dr. Alexander would keep in contact with the teacher to ensure that Petitioner was able to maintain a level of proficiency within the general education

⁶ Exhibit 1-M actually shows the goals as of April 12, 2006.

environment during SFA. The team further agreed that Petitioner would receive language arts and math via the PEC model. (Respondent Exhibit 1-P)

40.

In December of 2006, Respondent made a special request to one of its Examiners to evaluate [REDACTED] in order to determine whether any "specific learning disability" ("SLD") existed. SLD is a distinct eligibility category and is characterized by a severe discrepancy between IQ scores and achievement scores, i.e., the student's achievement is at least 20 points lower than the student's measured ability. (GDOE Rule 160-4-7-.02, Appendix. I) Ms. Brenda Hallman's testing and evaluation indicated that [REDACTED] had no such disability, and that [REDACTED]'s achievement was within a range predicted by, and consistent with, his ability. (Respondent Exhibits 8 and 9, Tr. II: 180-183, 188-189)

41.

[REDACTED]'s final report card for the 2006-2007 school year was not admitted into evidence, but at the year's mid-point he had achieved a "C" in Language Arts, a "C" in Mathematics, a "B" in Foreign Language, a "C" in Science and a "B" in Social Studies, and his teachers noted his "improvement in word recognition". (Respondent Exhibit 2 – page 2)

42.

The team met on March 29, 2007 and again on May 16, 2007, (both dates after the outset of the instant case), to conduct an annual review and discuss the IEP. (Respondent Exhibit 11)

43.

During the meetings in March and in May of 2007, several things were accomplished:

- a. [REDACTED]'s transition to middle school was discussed;
- b. [REDACTED]'s progress was explained;

- c. Arrangements were discussed and made for after-school services to be provided to [REDACTED] by Respondent utilizing the Orton-Gillingham reading method;
- d. It was agreed that [REDACTED] should attend the "extended school year program" during the summer of 2007;
- e. Arrangements were made for this extra reading instruction to continue during that summer program; and
- f. New goals were set for [REDACTED] for the 2007-2008 school year.

[REDACTED]'s parent participated in the development of and agreed to the IEP that was developed during these meetings. (Respondent Exhibit 11)

44.

On May 7, 2007, teacher Palmer Haslam reported on the work that was being done with [REDACTED] on his reading skills using the Orton-Gillingham program. Mr. Haslam indicated that [REDACTED] was "showing progress", but that "retention of learned material remains an area of concern." (Respondent Exhibit 3)

45.

From the middle of his third grade year and to the time of the hearings in this matter, Dr. Cynthia Alexander has been [REDACTED]'s special education teacher, and Dr. Alexander kept a record of assessment data in 12 different academic areas. This Assessment Data showed:

- a. Progress from the primer level to the third grade level in word recognition as measured by the list of Dolch Sight Words, and progress from the first grade level to the middle of 2.5 grade level as measured by the Brigance Word Recognition tests;
- b. Progress in phonemic awareness from below a first grade level to a 1.4 grade level;
- c. Progress in fluency from a lower first and lower second grade level to a 2.1 or 3.0 grade level;
- d. Progress in reading comprehension from a 1.5 grade level to a 2.2 grade level;

- e. Regression in writing/composition skills from a third grade level to a 2.5 grade level;
- f. Progress in spelling from a first grade level to a 3.1 grade level;
- g. Progress in math computation/problem solving from a 1.7 grade level to a 3.4 grade level (utilizing a 5th grade math textbook);
- h. Change in a benchmark test from achieving 76% on 1st grade level math to achieving 22% on 5th grade level math;
- i. Lack of progress in reading as measured by the Success For All program from a 3;2 grade level to less than a second grade level, and regression in reading fluency from 50 words per minute in November 2006, to 31 words per minute in March 2007,⁷ which was explained by his special education teacher and by the Principal as being an expected result in the SFA program for a variety of reasons, and which was reacted to by Respondent first by placing him in a different SFA group with a different teacher (Tr. II: 1 160-161, 169) and later by removing him from the SFA program and having his special education teacher supervise his reading program. (Tr II: 19, 138-139, 155-157)
- j. An improvement in scores obtained on the CRCT test; and
- k. Continued progress in language arts as measured by the Brigance test, and gradual movement toward more complex work.

(Tr. II: 98-102; Respondent Exhibit 5)

46.

Respondent developed and implemented an individualized program for ■■■■■, which was designed for and periodically adapted to suit his particular needs. (Tr II: 28, 130-131)

⁷ These results were shown in a report prepared by Alma Keen, Success for All reading program facilitator for ■■■■■'s school, that summarized Petitioner's scores from an eight-week assessment conducted during his fifth grade year. (P-12)

47.

From the time of his eligibility for special education services in the middle of third grade, to the present time, Respondent placed [REDACTED] in an inter-related classroom of exceedingly small size (seven students at the time of the hearing), where a qualified special education teacher taught him. (Tr. II: 92-93, Respondent Exhibit 4)

48.

From the time of the determination of his eligibility for special education services in the middle of third grade, [REDACTED] received speech therapy, occupational therapy and assistive technology, designed to remedy his speech problems and to aid in his education, all in accordance with the requirements set out in the team-developed IEP. (Tr II: 232-233, 220-221, Tr I: 137-141)

49.

Dr. Icey L. Johnson, Director of the Program for Exceptional Children for Respondent, testified that based on her review of the entire record, [REDACTED] had made progress in his academic work, commensurate with his cognitive abilities.⁸ (Tr. I: 82)

50.

Dr. Cynthia Alexander, [REDACTED]'s special education teacher, testified that [REDACTED] had "received benefits from his placement in the PEC program", based upon the extensive assessment data she had collected. (Tr. II: 99-102)

51.

Throughout the relevant time period, the Respondent adhered to [REDACTED]'s parent's procedural rights under the Individuals with Disabilities Education Act. (Tr I: 16), [REDACTED]'s parent signed off to indicate her agreement with and acceptance of every IEP that was written on behalf of [REDACTED], participated in the meetings for the most part, and was advised of every meeting that took place. (Tr. I: 57, 112)

⁸ The word "cognitive" was incorrectly reported as "cognizable" in the transcript.

52.

In her 2004 psychological evaluation of [REDACTED], Dr. Antoinette Kamor shared two recommendations: one of which listed ten different strategies that could be used to improve his spelling, reading and math calculation/reasoning; and the other of which stated: "After school tutorial in reading and math would be beneficial for [REDACTED].". (Petitioner's Exhibit 4; Respondent Exhibit 1-C)

53.

Dr. Kamor's second recommendation refers to after school tutorials regularly offered by individual public schools. (Tr. II: 254-255).

54.

At the elementary school [REDACTED] attends, his teachers offered after-school tutoring to him and all students on Wednesdays during after school hours, and also through an after-school program run by Hands-On Atlanta volunteers. (Tr. I: 124-127; Tr. II: 13-15, 24, 59, 149-151, 161-162)

55.

In regard to [REDACTED]'s IEP's, none of the IEP's developed between November 2004 and January 2007 contained a provision for after school tutoring. (Tr. I: 59)

56.

Decisions regarding educational services are made by the entire IEP team and the psychologist's recommendation are not mandated, though the team can incorporate or elaborate on parts of the recommendation in the instructional strategies chosen. (Tr. I: 80, 84)

57.

In response to concerns expressed by [REDACTED]'s parent and by his teachers, [REDACTED] was removed from the "Success for All" reading program in the spring of 2007. Since then, he has been instructed by Dr. Alexander in his special education class utilizing the Orton-

Gillingham reading method (some techniques of which she had been using prior to the spring of 2007 as well), and has received after-school assistance utilizing the same method at another school where he is transported to by the Respondent. (Tr. II: 22, 37-40, 85-86, 94, 110-113, 148-149)

58.

The supplemental, after-school reading services that [REDACTED] is receiving, utilizing the Orton-Gillingham method, is an atypical service for Respondent to offer, and Dr. Alexander was trained in its use specifically to address [REDACTED]'s individual reading needs. (Tr. II: 64-70)

59.

There is nothing about the Orton-Gillingham reading training that indicates its usefulness as a technique is better if offered in the morning, or in the afternoon. (Tr. II: 126)

60.

[REDACTED]'s parent requested that an Independent Educational Evaluation be done of [REDACTED], and Respondent paid for this to be done. The results were consistent with the evaluation done earlier by Respondent's staff psychologist, and indicated that "on the whole, [REDACTED]'s performance on tests of academic achievement was commensurate with the current estimate of his intellectual abilities". (Petitioner Exhibit 11, Tr. II: 54-55)

61.

[REDACTED]'s parents enrolled him at Sylvan Learning Center during calendar year 2006. The dates of his attendance were not established on the record, although it appears he was enrolled in March or April 2006. (Tr. I: 42-6; Petitioner's Exhibit 6). [REDACTED] testified that while there, he learned math (Tr. I: 63), and that he generally "learned a lot" there, that it was beneficial to his education and that he would prefer to go to Sylvan over learning in school. (Tr. 62)

62.

During the summer of 2006, Respondent provided transportation to Sylvan Learning Center, after the "extended school year program" ended in the early afternoon. (Tr. II: 88-89). Petitioner asked that the transportation services continue during the school year but it was never addressed at the IEP meetings or through other avenues. (Tr. II: 13-21; Petitioner Exhibit 6).

63.

Petitioner did not produce any receipts from Sylvan Learning Center concerning funds paid on ■■■'s behalf, although evidence was received that ■■■'s parent took out a student loan from SLM Financial Corporation in April of 2006, where the student named was ■■■, the school indicated was Sylvan Learning Center and the disbursement amount was listed as \$15,150, with enrollment being "full time". (Petitioner Exhibit 9 and 14)

64.

Petitioner submitted evidence of a Progress Assessment Report from Sylvan Learning Center (Petitioner Exhibit 2), indicating that ■■■'s grade equivalent in vocabulary and comprehension was higher in October of 2006 than it was in March of 2006, but Petitioner failed to provide any evidence concerning the substance of what ■■■ learned at Sylvan, nor any evidence establishing whether his progress during this period was tied to Sylvan as opposed to education received through Respondent, including the "extended school year program" conducted by Respondent during the summer of 2006. (Tr. II: 133-134, 141)

II. Legal Authorities

This case arises under the Individuals with Disabilities Education Act ("IDEA") and corresponding federal and state rules and regulations, 20 USC § 1400 *et seq.*, 34 CFR Part 300, GDOE Rule 160-4-7. The primary purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their

unique needs and prepare them for further education, employment, and independent living”, 20 U.S.C. § 1400(d). There is no dispute in this case that [REDACTED] is currently eligible as a disabled student under the IDEA.

To determine whether an eligible child has received a FAPE under the IDEA, two questions must be answered. Board of Educ. v. Rowley, 458 U. S. 176, 206-07 (1982). The first question is whether the school district complied with the procedural requirements of the IDEA, and second is whether the IEP’s developed pursuant to these procedures were “reasonably calculated to enable the child to receive educational benefits”. If the answer to both inquiries is yes, the district has complied with the IDEA and there is no violation of law. Id. at 206-07.

In the case at hand, Petitioner agreed at the outset of the hearing that she was not bringing a claim that Respondent had violated any of the procedural requirements of the IDEA. Therefore, only the second question regarding the substantive content of the IEP’s need be addressed here.

A. Claims Advanced by Petitioner and Relief Sought

During the hearing, Petitioner raised five claims: allegations that Respondent failed to put forth efforts to reduce a gap between [REDACTED]’s chronological age and his academic achievements (particularly by failing to provide him with special education services during the second grade); allegations that Respondent failed to provide tutoring as recommended in 2004 by Dr. Kamor; allegations that Respondent failed to provide a certain type of reading program (and to provide it during the regular school day); a claim for reimbursement of fees paid to Sylvan Learning Center; and a claim for relief in the form of evaluations of J.W. to identify previously unidentified disabilities. Each of Petitioner’s claims is more fully addressed below.

Petitioner’s post-hearing summary reiterated the claims mentioned above, and further requested that the Administrative Law Judge create a definitive education plan and

placement that will remain in effect until Petitioner completes his education with Respondent. This request for relief can not be granted. The IDEA places responsibility for the development of an education plan and placement with the IEP team rather than the Administrative Court. 34 C.F.R. § 300.324.

B. Burden of Proof

In Schaffer v. Weast, 546 U.S. 49 (2005), the Supreme Court held that in the IDEA context, “the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief”, *Id.* at 62. See also M.M. ex rel. C.M. v. School Bd. of Miami-Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006). This rule is reiterated in the state regulatory scheme in this state as well: “the party seeking relief shall bear the burden of coming forward with the evidence and the burden of proof at the administrative hearing” GDOE Rule 160-4-7-.18(1)(g)(8).

Petitioner has failed to meet the burden of proof as to any of the claims made. Petitioner presented insufficient evidence to establish that Respondent failed to provide [REDACTED] a FAPE. Little to no evidence was proffered to refute Respondent’s evidence that Petitioner received some educational benefit, or to prove that certain services should have been offered that weren’t, or even that attendance at the Sylvan Learning Center made an appreciable difference in [REDACTED]’s achievement.

C. Applicable Statute of Limitations

The limitations period for an IDEA claim is the two-year statute of limitations that applies to personal injury actions. Mandy S. ex rel. Sandy F. v. Fulton County Sch. Dist., 205 F.Supp.2d 1358, 1366 (N.D.Ga.2000), *aff’d*, 273 F.3d 1114 (11th Cir.2001); W.C. ex rel. Sue C. v. Cobb County School Dist., 407 F.Supp.2d 1351 (N.D. Ga. 2005). The right of action accrues when the parent of a child knows or has reason to know of the injury or event that is the basis for the claim, and in a situation where the parent was an active and

assertive participant in the creation of IEP's, having signed and accepted them, the right of action accrues at the time the IEP's were created. Mandy S., at 1367.

The relevant time period in this matter begins two years prior to [REDACTED]'s due process request, which is dated October 10, 2006. Therefore, events occurring prior to October 10, 2004 may not be considered by the Administrative Law Judge. K.C. v. Fulton County School Dist., 2006 WL 1868348 (Slip Opinion, N.D. Ga., June 30, 2006) Accordingly, [REDACTED]'s program during [REDACTED] grade, from the Fall of 2003 to the Spring of 2004, is not a matter before this Administrative Court. Petitioner's parent had full knowledge of Respondent's determination at the conclusion of Petitioner's first grade year that resulted in his program for second grade and the statute of limitations operates so as to completely preclude consideration of events during that school year.

The purpose of the statute of limitations is to assure that claims are not brought up for disposition years after they have become stale. The time for Petitioner to have brought a due process action concerning the events of the 2003-2004 school year would have been prior to the spring of 2006. Having failed to do so, these events cannot be examined now, and it would be legal error to do so. The facts relevant to this claim were included for the purpose of providing an overview of [REDACTED]'s school career, and to provide context for Petitioner's untimely claims regarding the second grade.

D. Educational Benefit

Petitioner asserts that [REDACTED] is not performing academically at his grade level, nor in accord with his chronological age, and that this somehow establishes that Respondent failed to provide Petitioner a FAPE.

IDEA, however, does not require that the school maximize a student's potential, only that it provide a "basic floor of opportunity." Rowley, 458 U.S. at 201. "The FAPE described in an IEP need not be the best possible one, . . . rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by

services that will permit him to benefit from the instruction.” Loren F. 349 F.3d at 1312 n. 1.

Petitioner, by and through his parent, fully participated in and approved each of the IEP’s that were created and which constituted the blueprint for [REDACTED]’s education. Each was developed by a full team of teachers and other experts employed by Respondent, based on [REDACTED]’s individual levels of achievement and based upon the individual needs he had due to his disability.

Petitioner has admitted that Respondent adhered to all of the procedural requirements of the IDEA. The Supreme Court observed that such procedures are designed to ensure that the IEP’s created give the student the opportunity to derive the educational benefit mandated by the law. The Court noted, “adequate compliance with procedures prescribed [in the IDEA] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” Rowley, 458 U.S. at 206. In essence, compliance with the first prong of the Rowley test leads directly to the inference that the IEP’s are reasonably calculated to confer educational benefit on the student. The educational services set out in the properly developed IEP’s were given to J.W., and Petitioner has not claimed otherwise.⁹

Additionally, the IEP’s and the services given to [REDACTED] meet the second portion of the Rowley test, in that they have been designed to give [REDACTED] “some educational benefit”, *Id.* at 200. The Eleventh Circuit cited Rowley when it opined that the legal obligation on school districts was to provide instruction and services that cause a child to receive “the basic floor of opportunity”, but that it need not act so as to “maximize the child’s education”, JSK v. Hendry County School Board, 941 F. 2d 1563, 1572-1573 (11th Cir. 1991).

⁹ The issue of tutoring is discussed *infra*, but it should be noted here that tutoring was never a service that was required by any of [REDACTED]’s IEP’s.

The IEP's here were designed to confer some educational benefit on J.W. They addressed the deficiencies in his achievement, and took into account the observations of experts and teachers who had observed the specific areas of disability that he exhibited. They included specific goals and objectives in reading, math and other areas, and the IEP's included supplemental services directed toward removing obstacles created by his speech dysfluency and by his handwriting problems. Moreover, as evidenced by Dr. Alexander's summaries, J.W. made progress from the middle of the third grade forward in nearly all of the measurable areas set out for him in his IEP's. Although at times Petitioner may have shown regression, these periods were followed by progress.

Petitioner incorrectly argues that Respondent is somehow legally required to design IEP's that "close the gap" between J.W.'s chronological grade and his achievement. As stated by the Eleventh Circuit, the law is satisfied "as long as the student makes 'measurable and adequate' gains in the classroom, JSK at 1573. See also, Todd D. v. Andrews, 931 F. 2d 1576 (11th Cir. 1991); Doe v. Alabama State Department of Education, 915 F. 2d 651 (11th Cir. 1990). Under IDEA, a school need not guarantee a particular outcome. Rowley, 458 U.S. at 192.

No single measure of educational benefit should be examined in isolation, or should be conclusive alone. See K.C. v. Fulton County School District, 2006 WL 1868348 (Slip Opinion, N.D. Ga., June 30, 2006). Although scores obtained on standardized tests, grade-level equivalents and report cards are all indicators of benefit, even a lack of educational progress by a student would not, in and of itself, show a violation of the IDEA. See Fuhrmann, *supra* at 1039-40 (IEP must be judged by what it proposes, not by child's after-occurring performance). The nature of the services required by the IDEA are individualized, and it is just as relevant to review the extent to which J.W. mastered individual goals set for him by the team (Tr. II: 103).

Review of all of these measures (and more, including reports by his speech therapist and occupational therapist) demonstrates that J.W. received some educational benefits from the IEP's developed by the team and approved by the parent.

E. Tutoring

Petitioner asserts that the Respondent failed to provide FAPE because it did not implement Dr. Kamor's recommendation in her November 2004 psychological evaluation that: "After school tutorial in reading and math would be beneficial for [REDACTED]."

There is nothing in any law, rule, regulation, policy or practice that requires specific recommendations made by psychologists be included in an IEP. The evaluation itself, in the previous paragraph states:

Decisions concerning the appropriateness of special services are the responsibility of an eligibility committee. The information from this evaluation, along with information obtained from parents, teachers, and other school personnel would also be used in determining any educational alternatives.

Although Dr. Kamor recommended that Petitioner would benefit from participation in after school tutorials offered by his school, unrebutted testimony offered during the hearing confirms that the content of the IEP itself is a team decision and that no single recommendation by the psychologist or any other individual team member carries a mandate. Tutoring was never made one of the required elements of [REDACTED]'s IEP at any point. Petitioner was involved in the creation and approval of each IEP and did not clearly object at that time that it was not included in them.

Petitioner's parent observed that Petitioner's progress improved while he attended Sylvan Learning Center and argues that this also shows that Respondent's failure to implement the recommendation of after-school tutoring in reading and math resulted in a denial of FAPE. Petitioner's progress while attending Sylvan Learning Center does not, in and of itself, rise to the level of proof that FAPE has been denied.

Petitioner also asserts that the offering and implementation of after school tutoring during the course of this hearing proves that Respondent, prior to the Spring of 2007, failed to provide Petitioner a FAPE. A change in the IEP or offered services does not, in and of itself, rise to the level of proof that FAPE has been denied. IEPs are intended to change over time in response to information known to the IEP team at that time and as Petitioner's needs change. 34 C.F.R. 300.324 through 34 C.F.R. 300.328.

F. Reading Instruction

Petitioner argues that Respondent's failure to provide Petitioner instruction and/or after school tutoring by a teacher certified in the use of Orton-Gillingham prior to Spring 2007 is a denial of FAPE.

It is well-settled that once the IEP is developed in accordance with the procedural requirements of the IDEA, questions of implementation, including choice of methodology, are left to the schools. The Supreme Court held it was "highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to" the IDEA, and concluded that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." Rowley, *supra* at 207-208.

The Circuits have consistently held that parents (and courts) do not have the right to dictate the choice of educational methodology. See, e.g. Todd D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991) ("the district court must pay great deference to the educators who develop the IEP" at 1581); Cerra v. Pawling Central Sch. Dist., 427 F.3d 186, 195 (2nd Cir. 2005); E.S. v. Indep. Sch. Dist. No 196, 135 F.3d 566, 569 (8th Cir. 1998); Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648 (8th Cir. 1999); Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1987). However, Petitioner's parent correctly points out that she influenced Respondent's use of Orton-Gillingham. This does not, however, rise to the level of proof required to establish a denial of FAPE

as a parent is an integral and essential member of the IEP team in the development of a child's IEP.

For this decision, the issue is not whether the Success for All reading program, or the Orton-Gillingham reading program, was better. Rather, the issue is whether the special education and related services put into place for [REDACTED], and recorded in his IEP, were reasonably calculated to allow him to achieve some educational benefit and whether Respondent's implementation of the IEP using, *inter alia*, the Success for All program, and later the Orton-Gillingham program, supported J.W.'s goals and objectives. Under this standard, Petitioner submitted insufficient evidence to establish that there was a denial of FAPE.

Dr. Alexander and Ms. Keen both described the content and purpose of the reading programs used with [REDACTED] and explained how they and the other members of the team were attentive to [REDACTED]'s progress under each program, customized and supplemented the programs to fit his needs, assessed his progress, and changed them as necessary for his educational benefit.

G. Sylvan Learning Center

Petitioner seeks reimbursement for tuition paid to Sylvan Learning Center. Petitioner submitted documentation showing an educational loan was obtained on [REDACTED]'s behalf, with the educational institution listed being Sylvan.

In regard to the services themselves, there was no evidence submitted as to the dates of [REDACTED]'s attendance, the content or frequency of the educational services provided,¹⁰ the methods used, an explanation of the efficacy of the services, or whether the assessment tools used were reliable or professional in any way. There was no evidence submitted by any educational professional to meet the burden of showing that [REDACTED] made any progress

¹⁰ Petitioner's parent did testify that the tutoring had been reduced to three days a week at the time of the hearing. (Tr. I: 60-19)

directly attributable to classes taken at Sylvan (at least a portion of which occurred during the same summer that he was attending the "extended school year program" conducted by Respondent). It is unknown what type of testing or assessment tools were utilized, whether they were standardized or normed, or what the testing conditions were while at Sylvan. Even if Petitioner had demonstrated significant educational progress at Sylvan, this is not enough to justify requiring the state to reimburse tuition paid to a private institution. W.C. v. Cobb County School District, 407 F. Supp. 2d 1351, 1363 (N.D. Ga. 2005), (citing Berger v. Medina City Sch. Dist., 348 F. 3d 513, 522 n. 6 (6th Cir. 2003) for the proposition that "reimbursement under the IDEA does not depend on the 'mere happenstance' of whether the child 'does well' in a private placement").

Although parents may be entitled to reimbursement for the costs of services procured for their child when the school district has failed to provide FAPE, the chosen placement must be appropriate to fit the student's needs, 20 U.S.C. Section 1412(a)(10)(C), and the Supreme Court has made it clear that the private services must be "reasonably calculated to enable the child to receive educational benefits", Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 11 (1993). It is the parents who bear the burden of demonstrating that the private placement is appropriate. W.C. v. Cobb County School District, *supra*, citing M.S. ex rel. S.S. v. Board of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F. 3d 96, 104 (2d Cir. 2000); Linda W. v. Indiana Dept. of Educ., 200 F. 3d 504, 506 (7th Cir. 1999); and Carlisle Area Sch. v. Scott P., 62 F. 3d 520, 533 (3rd Cir. 1995). In Summer 2006, when Petitioner attended Sylvan and Respondent's ESY program, he did not master the goals set for him. Without additional evidence to meet his burden of proof, Petitioner is not entitled to reimbursement for any tuition paid to Sylvan. See generally K.C. v. Fulton County School District, 2006 WL 1868348 (Slip Opinion, N.D. Ga., June 30, 2006).

H. Evaluations

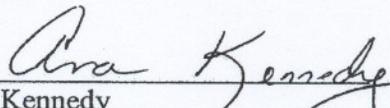
In the initial request for due process, Petitioner requested an independent evaluation of ~~_____~~. Since the time of that filing, Respondent has both paid for an independent

educational evaluation, and has utilized the services of a learning disability evaluator who administered two separate tests and concluded that [REDACTED] did not meet the eligibility standards to be classified as a special education student with a learning disability. This issue is now moot.

III. CONCLUSION

For all of the foregoing reasons, Petitioner has not proven that FAPE was denied, or that there is any entitlement to relief or reimbursement under the IDEA or applicable rules and regulations. Judgment is entered for Respondent.

This 20th day of June, 2007.



Ana Kennedy
Administrative Law Judge