

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEREK B., BY AND THROUGH : CIVIL ACTION  
LESTER B. And LISA B., et al. :  
 :  
v. :  
 : NO. 06-2402  
DONEGAL SCHOOL DISTRICT :

ORDER AND OPINION

JACOB P. HART  
UNITED STATES MAGISTRATE JUDGE

DATE: January 12, 2007

In this case, brought under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, and other statutes, Plaintiffs seek compensatory education from the Donegal School District, (“the School District”) alleging that it failed to provide Derek B. with a free and appropriate public education (“FAPE”), as required. They also seek reimbursement for an independent education evaluation for Derek, which they obtained at their own expense.

Having exhausted all administrative remedies, the parties in this case have filed cross-motions for summary judgment on the administrative record, and have responded to each others’ motions. For the reasons that follow, I will grant the School District’s motion, and rule that the Plaintiffs are not entitled to the relief they seek.

II. Legal Standards

A. Summary Judgment

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla

of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, *supra* at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, *supra* at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358 , 361 (3d Cir. 1987). Nevertheless, Rule 56 “mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, *supra*, at 323.

B. The IDEA

All states receiving federal education funding under the IDEA must comply with federal requirements designed to provide a “free appropriate public education” (“FAPE”) for all disabled children, including special education as well as “related services” such as physical and speech therapies. 20 U.S.C. § 1412(1); Shore Regional High School Board of Education v. P.S., 381 F.3d 194, 198 (3d Cir. 2004).

Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (“IEP”). 20 U.S.C. § 1414(d); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 173 (3d Cir. 1988), *cert. denied* 488 U.S. 1030 (1989). The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child’s abilities, outlining the goals for the child’s education and specifying the services the child will receive. Polk, *supra*.

In order to provide a FAPE, an IEP must be “reasonably calculated” to provide “significant learning” and enable the child to receive “meaningful educational benefits” in light of his or her “intellectual potential.” T.R. v. Kingwood Township Board of Education, 205 F.3d 572, 577 (3d Cir. 2000) interpreting Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, 206-07 (1982).

Additionally, the IDEA imposes extensive procedural due process requirements. Complaints brought by parents or guardians are to be resolved at “an impartial due process hearing.” 20 U.S.C. § 1415(b)(2); Polk, supra. Any party dissatisfied with the state administrative hearing may bring a civil action in state or federal court, in which the court must conduct an independent review based on the preponderance of the evidence, while giving “due weight” to the state administrative findings. Polk, supra, citing Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982).

## II. Factual Background

In May, 2002, the end of his first grade year at Grandview Elementary School, the Donegal School District had Derek evaluated to determine whether he was a student with a disability. Exhibit 26 at SD-1.1.<sup>1</sup> As reported in that evaluation, Derek had a “difficult transition” to first grade, and appeared to have difficulty learning to read, despite inclusion in a “Reading Recovery” program. Id. The evaluation contained several pages of information in chart form describing the results of testing with the Wechsler Intelligence Scale for Children, Wechsler Individual Achievement Test, and the Cognitive Assessment System, as well as a classroom

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<sup>1</sup>Citations are to the Administrative Record. Within those exhibits, however, many documents are identifiable by their designations in the administrative proceedings as either School District (“SD”) or Parent (“P”), exhibits. I have included those designations where applicable for additional help in locating the documents.

observation. Id. at 1.2 - 1.4. The results of that testing is then discussed. Id. at 1.4-1.6.

The report stated:

Derek demonstrates a significant weakness with verbal reasoning processing tasks. He has well-developed nonverbal ability and interventions should focus on using this strength to help target weaknesses in other areas. Despite numerous interventions, Derek continues to struggle with grade level language arts curriculum. Due to the significant discrepancy between Derek's overall ability and achievement levels, as well as Derek's demonstrated deficit with successive cognitive processing, the team concludes that Derek is a student with a disability. Derek's specific learning disability manifests itself in the areas of basic reading, reading comprehension, and written expression. He is also demonstrating a significant weakness with successive processing tasks.

Id. at 1.7. It concluded by identifying Derek as a student with a specific learning disability, who was eligible for special education services. Id.

Apparently, at the beginning of summer, 2002, the school district provided Derek's parents with a proposed IEP. See Letter of September 18, 2002, from Vivian Narehood, Esq., to the Donegal Coordinator of Special Education, at Exhibit 23, at SD-3 ("The parents have rejected the draft IEP they were offered at the beginning of the summer . . .").

At the end of August, 2002, the parents obtained an independent educational evaluation ("IEE") of Derek, prepared by Margaret J. Kay, Ed.D. Exhibit 28 at SD-2. In her 29-page report, Dr. Kay discussed the results of the following testing: Early School Personality Questionnaire; FADS checklist; Test of Non-Verbal Intelligence-3; Bender Motor Gestalt Test; Assessment of Lateral Dominance; Woodcock-Johnson Psycho-Educational Battery - III; Student Rating Scale; Kaufman Brief Intelligence Test; Jordan Left-Right Reversal Test; Draw-a-Person Test; Peabody Picture Vocabulary Test; Expressive Vocabulary Test and Comprehensive Test of Phonological Processing. Id. at page 1.

Dr. Kay's report includes six pages of recommendations. These included suggested curricula, such as The Alphabetic Phonics Program, the Project READ Circle Program, and the Lindamood Phoneme Sequencing Program For Reading, Spelling and Speech. Id. at 24, 26.

The recommendations also included specifications for an appropriate curriculum, for example:

**Phenomic Awareness.** Derek must be taught how to listen to a single word or syllable and break it into individual pieces.

and:

**Direct, Explicit Instruction.** Dyslexic students do not intuit anything about written language. So, teachers must teach them, directly and explicitly, each and every rule that governs written words. And teachers must teach one rule at a time, and practice each rule until it is stable in both reading and spelling, before introducing a new rule.

Id. at 24, 25.

Dr. Kay also included recommendations for further testing, such as the following:

Derek evidences considerable difficulties with clerical speed and accuracy, visual perception of the directionality of symbols, visual closure and visual-spatial organization. He also has difficulty clearing print and tends to sight with his left eye. It is, therefore, recommended that he be referred for a comprehensive vision systems evaluation to determine if there is any sensory contribution to these difficulties that should be addressed.

Id. at 26.

Thereafter, the parents continued to work with the School District on Derek's IEP. The District's proposed IEP, dated October 3, 2002, described Derek as suffering from a "specific learning disability." Exhibit 28 at P-3. It set forth his program modification as follows:

Increased repetition; small group instruction; extra time for assignments; support for work in content areas as needed; instruction on level of achievement; use of spell checker; adapted assignments; individualized, slower academic pace; extra response time; option to take content area tests in LS classroom; highlight key

information; option to give answers for tests orally; maximum 30 mins. daily synthetic phonetic multi-sensory structured reading program with drill and practice at the end of each day as appropriate, reduction of written assignments, self-advocacy training with the guidance counselor, use of phonemic awareness computer program in LS classroom with earphones in a quiet distraction free area at least 2x/week 30 min sessions initially with the teacher fading to TA as Derek acclimates to the program, use of tasks/jobs to promote positive experiences and perceptions related to school, at least weekly communication with parents sharing results of phonetic multi-sensory structured reading program assessments and computer program progress charts.

Id. at 3.

The IEP included a reading goal, with objectives focusing on word decoding; recognizing sight words; reading comprehension; rate of reading; orally blending syllables and phonemes; identifying the sounds associated with individual letters and independent reading of monosyllabic words. Id. at 8. Each objective had an expected level of achievement of 80% accuracy. Id. There were also goals for writing and spelling, with eight similarly detailed objectives; and speech, with seven objectives. Id. at 9-11.

The IEP was the subject of a number of revisions, and there were clearly tensions between Derek's parents and the school. Derek, however, continued to attend the District elementary school through second grade.

In April, 2003, the School District proposed a new IEP for Derek's third grade year, 2003-2004. Exhibit 28 at P-2. This IEP increased the level of support offered to Derek to include more instruction outside of the regular classroom, in a resource room. Id. at 4. The Program Modifications description read:

Adapted tests and assignments; hands-on-learning activities; increased repetition; individualized academic pace; 30-minute daily synthetic phonetic multi-sensory structured reading program; 30-minute daily use of phonemic awareness computer program in LS classroom with earphones in a quiet distraction free area; weekly

communication with parents sharing results of phonetic multi-sensory structured reading program assessments and computer program progress charts; handwriting instruction; access to teacher assistant during math and content area instruction for assistance with reading tasks related to instruction; graphic organizer (framework) for word problems; social skills with counselor.

Id. at 3.

The IEP included a reading/reading comprehension goal, including this description of Derek's "present level":

Derek is able to identify and say the sound of all consonants. He is able to identify and say the sound of the short vowels. Derek is able to identify and say the sounds of diagraphs "sh, ch, wh, thi and ck." He is able to decode closed syllable words that use these diagraphs and consonants. On the K-TEA, Derek received a standard score 86/grade level 1.8 for reading decoding and a standard score 91/grade level 2.1 for reading comprehension. His overall reading grade level on the K-TEA is a 1.9. On the DIBELS, Derek read 17 words per minute on a first grade level and retold 16 words per minute on a first grade level.

Id. at 8.

Derek's reading/reading comprehension objectives in this IEP included: reading at a rate of 40 correct words per minute on a 1st grade passage; accurately retelling what was read using 20 words in a minute; read at a rate of 90 correct words per minute on a 2nd grade passage; identifying fact and opinion within text with 80% accuracy to be assessed monthly; and making inferences and drawing conclusions from a variety of reading materials with 80% accuracy to be assessed monthly. Id. The IEP also included a writing goal comprising four objectives, and a speech goal with seven objectives. Id. at 9-10.

The IEP was revised on November 6, 2003, to add small group reading support with a reading specialist. However, the School District has conceded that this service stopped at some point during the year, apparently in error. Administrative Transcript at 162.

In June, 2004, the School District proposed an IEP for Derek's fourth grade year, 2004-2005. Exhibit 28 at P-1. By letter dated August 25, 2004, however, Derek's parents informed the School District that they did not approve of the proposed IEP. Exhibit 27 at SD-14. They wrote that they would be enrolling Derek in The Janus School, a non-District-approved private school serving students with learning disabilities. Id. They wrote: "We ask that the Donegal School District support this placement for Derek", continuing: "We are currently having Derek evaluated by Dr. Margaret Kay and we will supply the District with his test results upon her completion, along with a bill for reimbursement." Id.

Deborah Ault, principal of the Donegal Springs Elementary School, replied by letter dated September 10, 2004. Exhibit 27 at SD 15.1. She informed Derek's parents that the School District did not agree to reimburse them for Derek's tuition at The Janus School: "This is because the district believes that it can provide an appropriate education at Donegal Springs Elementary School." Id. Enclosed with this letter was an IEP revised from the June 2, 2004, IEP, in accordance with what the School District "believed might be their concerns." Id.

In the September 10, 2004, IEP, the following Program Modifications were offered:

Individualized academic pace; strategic phonetic decoding instruction; specific guided writing instruction; multi-sensory reading comprehension instruction; high frequency spelling instruction linked to content; fluency building strategies; frequent drill and practice to acquire advanced sound symbol relationships; reading clinic; signal before instruction begins; directions stated in simple, logical, brief format; multi-step directions broken into one-step at a time directions; have Derek repeat instructions to you; 45 minutes per day before or after school for previewing content to be taught during regular school time; multi-sensory structured language program; access to teacher assistant during content and math instruction for reading tasks related to instruction.

Id. at Section VA (unpaginated). Derek was also to receive social skills instruction with a guidance counselor, and speech therapy. Id. at VB.

The IEP provided a reading goal which described his “present level”:

On a second grade reading passage, Derek read 58 words correctly per minute and retold 36 words per minute. The benchmark for 2d grade is reading 90 words per minute and retelling at least 45 words per minute. Derek knows all consonant and vowel sounds. He also knows all of the diagraphs. He is able to decode CVC words. He is able to decode words with welded sounds and welded sound exceptions. Derek is also able to decode words with 2 and 3 letter blends. He is able to decode a closed syllable word with up to 6 sounds.

Id.

Derek’s “Measurable Annual Goal” was: “When given a second grade noncontrolled reading passage, Derek will read 90 words correctly per minute and retell at least 45 words per minute.” Id. As Plaintiffs have pointed out, that was also a part of his third-grade goal. The reading goal including 10 fairly detailed objectives, such as: “When given a list of 2 syllable words with 2 closed syllables, including the “schwa” sound, Derek will decode orally and encode (spell) in writing 14 out of 15 words with 90% accuracy on 2 consecutive weekly assignments” and “When given a controlled passage Derek will transfer his phonetic skills to read 90 words correct per minute at 90% accuracy.” Id.

The IEP also provided a writing goal. Under “present level” it provided:

Derek was given a writing prompt and timed for 3 minutes. He wrote a total of 13 words and made 11 connections (including capitalization, punctuation, grammar and spelling). Derek uses capital letters at the beginning of his sentences. He uses correct punctuation a the end of his sentences most of the time.

Id. The writing goal included six objectives, such as: “When given a topic Derek will write a paragraph with a topic sentence, three detail sentences and a closing sentence with 80% accuracy.” Id.

Finally, there was a speech goal, describing language needs “in the areas of auditory processing, semantics, pragmatics (e.g., turn taking) and understanding of auditory presented material.” Id. His measurable goal read: “Derek will exhibit age appropriate/cognitive equivalent expressive language skills as measured by informal assessments, observations, and/or standardized tests.” Id. Nine objectives were identified.

Subsequently, the parents forwarded to the School District a 43-page report issued by Dr. Kay relating to testing which took place on August 25 and September 1, 2004. Exhibit 28 at P-4. Dr. Kay repeated the same testing she had previously administered. Id. at pages 2-5. Out of nine areas on the Wechsler Individual Achievement Test, Derek’s standard scores declined compared to his 2002 scores in four. Id. at 21. Most notable were declines in Derek’s score in reading comprehension from 80 to 56, and in written expression from 91 to 61. Id. He also declined from 79 to 71 in word reading, and from 95 to 89 in math reasoning. Id. There was no change in Derek’s score in pseudoword decoding; a 1% improvement in numerical operations; and a 9% rise from 71 to 80 in spelling. Id.

Other tests showed similarly poor or “below average” results. For example, Woodcock-Johnson tests of basic reading skills also showed declines in standard scores. Id. at 25. Grade equivalencies were primarily in the first-grade range in language skills, up from the Kindergarten range in 2002, although they were higher in math. Id. at 25.

Dr. Kay concluded: “It is the impression of this examiner that Derek’s needs have not and cannot be met in the public school setting and that he should be placed in a highly intensive, full-day program in a school specifically geared to meet the needs of children with serious language-based learning disorders (i.e., dyslexia) and attentional deficits.” Id. at 33. Derek’s parents enrolled him in The Janus School for the 2004-2005 school year.

### III. Procedural Background

On October 6, 2004, Derek's parents requested a due process hearing pursuant to the IDEA. They sought (a) compensatory education for the School District's failure to offer Derek a free, appropriate public education ("FAPE") during the 2002-2003 and 2003-2004 school years; (b) tuition reimbursement for the 2004-2005 school year during which Derek was enrolled at the Janus school; and (3) reimbursement for obtaining Dr. Kay's 2004 evaluation.

A hearing was held over four sessions, beginning on November 1, 2004, and ending on January 12, 2005. Exhibits 22-25. Initially, the hearing officer refused to hear Derek's claims predating October 6, 2003, on the basis of her conclusion that Montour School District v S.T., 805 A.2d 29 (Pa. Cwlth. 2002), *allocator denied*, 820 A.2d 163 (Pa. 2003), mandated a one-year time limitation. November 12, 2004, Decision at Exhibit 26.

In a decision dated February 18, 2005, however, the hearing officer agreed with Derek's parents that the School District had not provided Derek with FAPE in the 2003-2004 school year, with regards to his writing and spelling goal, although it upheld the adequacy of his reading goals. Exhibit 21. For this, she awarded Derek .25 hours of compensatory education in writing for every school day of that year, beginning October 6, 2003. Id.

The hearing officer also agreed that the proposed 2004-2005 IEP was inadequate to confer FAPE. Id. Essentially, she found that the goals set forth were vague, and, in reading, too moderate: "[I]n the 2004-2005 school year, Student is a fourth grader. The expectation that by the end of the school year, Student would be expected to read and comprehend on a second grade level, two grade levels behind, is simply unambitious and insufficient." Id. at 12. She therefore ordered that the parents be reimbursed for Derek's tuition at the Janus School, and for his transportation expenses. Id. at 13.

The School District appealed this decision to a Special Education Appeals Panel. In a decision dated April 6, 2005, the appeals panel reversed the hearing officer's award of compensatory education, and her award of tuition reimbursement. Exhibit 14, at 6. The panel decided that minor flaws in the 2003-2004 IEP writing goals did not render them inadequate. Id. at 4. It made an essentially similar finding with regards to the 2004-2005 proposed IEP, adding:

The hearing officer ... concluded that the reading portion of Student's proffered IEP for 2004-2005 was not appropriate. In essence, she found that goals and objectives did not go far enough because Student, who would be in the fourth grade, would only be working toward reading comprehension and fluency at a second grade level. The measure of appropriateness of an IEP for an eligible child is not, however, dependent upon the student's actual grade level. On the contrary, a special education program must be reasonably calculated to provide meaningful educational benefit based upon the child's individual needs. At the time this IEP was developed, Student was reading at well below a second grade level. By all accounts, including the most recent IEE obtained by the parents, this is a child who demonstrates significant weaknesses in reading comprehension, fluency, and word attack skills, and who was making slow but definite progress with a multi-sensory reading program and other specially designed instruction.

Id. at 5.

Derek's parents appealed this decision to the United States District Court, in an action captioned Derek B. et al. v. Donegal School District, Civ. A. No. 05-2982. Aside from seeking the reversal of the appeals panel's decision, Plaintiffs moved for a remand to the administrative level, arguing that the hearing officer had improperly applied Montour to preclude consideration of events before October 6, 2003. On November 8, 2005, the Honorable Gene E. K. Pratter of this Court granted the plaintiffs' motion, and remanded the matter to the state administrative level, for consideration of the claims predating the one-year limitation period. Id. at Document 7. The civil case was then terminated.

Upon remand, the parties agreed that no additional evidence would be taken, and the parties filed briefs based on the record as it already existed. See Exhibit 2 at page 3. The hearing officer concluded that Derek had not been denied FAPE in the 2002-2003 year, and did not grant any relief. Exhibit 6. Upon review, an appeals panel affirmed this decision, concluding:

The IEP contains present levels of educational performance in detail enough to design an education program. The annual goals are measurable and specific, and the short-term objectives contain levels of achievement and methods of evaluation. Likewise, there is specially designed instruction to guide the education of the student and the related services are detailed in terms of the type of service, its location and frequency.

Exhibit 2 at 6.

Plaintiffs thereafter filed the present action. In it they seek review of (1) the appeals panel's 2006 decision denying relief with respect to Derek's 2002-2003 school year; (2) the underlying hearing officer decision with respect to that year; and (3) the appeals panel's 2005 decision which reversed the hearing officer award of compensatory damages for the 2003-2004 school year, and her award of tuition reimbursement for the 2004-2005 school year. They also seek reimbursement for Dr. Kay's 2004 IEE (evaluation), which was denied in a December 16, 2004, hearing officer decision, and then a February 2, 2005, decision by the appeals panel. Exhibits A and B to the School District's Motion for Summary Judgment.

#### IV. The Hearing Transcript

Other than the IEPs and administrative decisions referenced above, the most influential evidence in the administrative record is the transcript of the hearings held between November 1, 2004 and January 12, 2005. This section of my opinion sets forth the most relevant testimony.

On behalf of the Plaintiff's, Derek's mother, Lisa B., testified that her impression was that, despite the favorable reports she received from school, Derek was making little progress in learning to read and write. Exhibit 25 at 36-37; Exhibit 23 at 311-312.

Dr. Margaret Kay testified that the initial School District evaluation, performed in May, 2002, was "comprehensive in terms of the IQ testing and achievement", but that it "fell flat" in failing to test Derek sufficiently to identify the components of his learning disability with specificity. Exhibit 22 at 328. She explained that this was a critical omission: "because in order to make a determination about the best practice intervention for addressing his needs, you need to adequately sort out the basis for the learning disability." Id. Her 2002 IEE was a "fill in the blanks" evaluation to "check out those other areas and then to make recommendations to the IEP team for formulation of an IEP." Id.

The School District had performed standardized testing, Dr. Kay noted: "But the other piece you want in there is to identify what your specially-designed instruction is going to be, and then set up your curriculum-based assessment with the specially-designed instruction." Id. at 334. She also criticized the School District's use of standardized testing, because it did not "repeat[] the baseline test to see if the child is making progress against the baseline." Id.

Dr. Kay testified:

You know, what we need to be doing is updating present academic achievement levels as we go along, through not only repeat of baseline testing, the norm reference testing that was done to see if the interventions are closing the gap between ability and achievement, but also curriculum-based assessment to determine how Derek is progressing in the program. And I think ... without specific present levels information that relates to those factors, it's very difficult, then, to create goals and objectives to say this is where we're heading to next, because we don't have clear statements of where we are now. It appeared that what the District was doing as benchmarks, consisted pretty much of DIBELS probes ... And that's okay as a piece ... But it's so brief and so skimpy that it doesn't give us enough information. I don't think it should be used in isolation.

Id. at 337-338.

When asked whether the October 10, 2004, proposed IEP comported with the recommendations in her own August/September 2004, IEE, Dr. Kay replied that it did not: “[A]gain, we don't have clear statements of present levels. ... What we don't have are the curriculum-based assessments.” Id. at 346-347. She added: “I still think that all of the IEPs are extremely vague and unclear. They don't give a good sense of his present level of functioning, what the specially-designed instruction is going to be, where he is in the curriculum, how he's progressing with the curriculum and whether he's closing the gap between ability and achievement with what's being provided.” Id. at 348. When questioned, therefore, Dr. Kay opined that the IEP was not appropriately designed to permit Derek to make meaningful progress. Id. at 338.

Andrew McGloshen, Derek's teacher at The Janus School also testified. He felt that the instructional levels set forth in the 2004 proposed IEP overstated Derek's abilities, as he observed them. Exhibit 23 at 281. When asked whether he believed the School District's IEPs were appropriate for Derek's needs, he responded: “I don't feel they were as accurate as they

could be.” Id. at 290. Like Dr. Kay, he opined that the IEPs were not created in a way that would permit Derek to make meaningful progress. Id. at 290-291.

Keith Newswanger, the psychologist at Derek’s public elementary school, pointed out that Dr. Kay’s conclusion in her evaluation that Derek’s abilities were declining, was true only in a relative sense, in terms of his percentile scores, but did not mean that Derek failed to progress to more difficult work. Analogizing the standardized testing upon which Dr. Kay relied to photographs of children running a race, Mr. Newswanger testified:

It only gives you – you know, in this picture he was in fifth place. In this picture he was in fifth place or fourth place, but it doesn’t say how far along you’ve come. So it doesn’t give you any kind of an indication, absolutely, of the amount of progress that was made, type of progress that was made.

Exhibit 22 at 379.

The hearing officer also heard testimony from Krista Williams, Derek’s language arts learning support teacher for second and third grades. Exhibit 24 at 118-168. She testified in detail about the special language arts instruction Derek received, even offering details as to his success on different projects. According to Ms. Williams, Derek worked in the Wilson Reading Program, which emphasized decoding (reading) and encoding (writing). The program included weekly quizzes, and exercises in which Derek would write sentences, or orally re-tell what happened in a story, to work on reading comprehension. Id. at 118-119. Derek was also given worksheets in spelling and punctuation, with activities such as providing homonyms or antonyms for each word. Id. at 150-152.

Ms. Williams went on to describe Earobics, another program Derek used, which was an auditory program focusing on phonological awareness, i.e., the ability to discriminate between

different sounds. For example, Derek would hear a word and identify its initial, middle and final sounds. Id. at 120, 126-127 and 152-158. His progress was measured by the use of a word chart. Id. at 128. Ms. Williams testified that Derek's progress was "real progress, but it was slow." Id. at 131. She testified that she did not rush Derek because (a) she wanted to make sure he mastered the material and (b) she wanted to "make sure that he felt comfortable." Id. at 131.

Derek was also evaluated by DIBELS testing, as mentioned by Dr. Kay. According to Ms. Williams, DIBELS testing showed Derek making good progress, particularly in reading comprehension. Id. at 145-148. She altered the administration of DIBELS to provide for monthly testing rather than weekly. Id. at 218.

Ms. Williams explained that, although the IEP goals remained the same, Derek was gradually given harder and harder material. She was asked: "The fact that writing complete sentences remained an objective, does that justify, in your view, the conclusion that the level of sophistication and complexity of those sentences expected of Derek is not supposed to increase?" Id. at 245. She replied: "No, the level of wording – I said it increased and it becomes more important, I mean it changes." Id.

Rebecca Gerhart was Derek's homeroom teacher for third grade. She taught him math, and then, later in the year, when he was mainstreamed for social studies and science, she taught him those subjects. She testified that Derek, supported by an assistant to help with the language aspects of the class, was "in the highest math group almost the entire second half of the year." Exhibit 24 at 76-77. When asked if Derek was anxious or fearful about testing, she testified: "No more so than the rest of the class." Id. at 86. She stated that Derek was always very well-behaved and polite. Id.

Ms. Gerhart was then asked whether she thought Derek was ready to proceed to fourth grade math. She responded that, with continued assistance with language, “Derek would have been just fine, in my estimation.” Id. at 87.

Ms. Gerhart also testified that mainstreaming Derek for science and social studies worked out well: “I think it was a good idea. He had a lot more socialization with his friends in my classroom, and that’s one thing that I know that he wanted ... He’s able to do the work as long as he has the assistance with the in-depth reading.” Id. at 100. She was asked: “As of the end of the year in science and social studies, what thoughts did you have about whether Derek was able and ready to proceed to the fourth grade?” and stated:

I know he would get the concepts down and I know that he would enjoy learning about everything with the other children, but he would definitely still need assistance in the are of language arts, of reading the actual text ... And he would probably definitely have to have more modifications on projects as far as length and research amount and so forth, but he would do fine.

Id. at 104. In her opinion, Derek made “excellent progress” in third grade. Id. at 116.

Derek’s guidance counselor, Mary Lynam, also testified. She stated that Derek was “very happy” by third grade. Exhibit 24 at 65. In a small group situation, where she usually saw him: “he was very relaxed, willing to answer, took risks, very positive, a most delightful young boy.” Id. She did not see Derek in a larger class setting, but none of his teachers voiced concerns to her about “whether he was fearful or comfortable or uncomfortable in their classes.” Id. She conceded, however, that she had never conducted any formal psychological assessment. Id. at 71.

V. Discussion

A. The Adequacy of the IEPs

In their motion for summary judgment, the Plaintiffs discuss the IEPs for the three relevant school years separately, but their criticisms can be separated into four categories. First, Plaintiffs assert that all of the IEPs lack clear and accurate methods for evaluating Derek to ascertain whether he made meaningful educational progress over a given period. Secondly, they find the IEPs to be too vague in a number of respects, such as in their description of Derek's baseline levels of achievement, as well as in the stated goals, and the nature of his specially designed instruction and related services.

Thirdly, Plaintiffs argue that the IEPs are missing necessary goals. For example, the Plaintiffs claim that the 2002-2003 IEP should have included goals for information processing, attention, completion of written work, vocabulary, articulation and conversational speech. The 2004-2005 proposed IEP is said to lack goals for written expression, reading comprehension and improvement of Derek's slow processing speed. Finally, Plaintiffs maintain that the IEPs did not offer services of sufficient length, frequency, content or intensity to address Derek's speech and language needs, or his social skills needs.

Upon the record before me, as set forth above, I conclude that, although any one of the weaknesses Plaintiffs have pointed to could – in some circumstances – result in a legally inadequate IEP, here the appeals panel correctly concluded that the IEPs offered to Derek were reasonably calculated to permit significant learning and to provide him with meaningful educational benefits in light of his intellectual potential, as required by the Court of Appeals for the Third Circuit in Kingwood, supra, interpreting the United States Supreme Court's decision in Rowley, supra.

This is not to say that the District's IEPs were without flaws. As Dr. Kay testified, they would have benefitted from thorough and internally consistent evaluation of Derek's levels of functioning throughout the relevant period. This would have helped the District to ensure that Derek was deriving an acceptable educational benefit from the teaching methods used. As Dr. Kay testified: "without specific present levels information ... it's very difficult, then, to create goals and objectives to say this is where we're heading to next." Exhibit 337-338. Her suggestion that the IEP require "repeat of baseline testing" is only common sense. Id.

However, I agree with the appeals panel that flaws in this regard did not render the IEPs inadequate. Clearly, Derek was evaluated at frequent intervals by Krista Williams, the learning support teacher, in a number of different ways, including DIBELS testing and Wilson Reading Program quizzes. Each IEP contained detailed and specific information as to Derek's "present levels" of achievement, particularly detailing his skills. This information was used to design an appropriate program going forward, even if it wasn't information ideally designed to provide a consistent picture of Derek's progress. See, supra, at 7 and 9.

And Derek did make progress. His levels of achievement, relative to the standard for a child of his age, slipped between first grade and third grade. Nevertheless, he steadily mastered new material. See, testimony of Krista Williams at 245: "the level of wording ... increased and ... it changes". Even Dr. Kay acknowledged this: "It's not that he made no progress .. ." Exhibit 22 at 368.

The progress was not satisfactory to Derek's parents or to Dr. Kay, who called it "trivial." Id. However, this assessment does not appear to be justified. The increase in grade equivalency shown on the Woodcock-Johnson scores showed that substantial learning was taking place, and that Derek was acquiring new skills. Exhibit 28 at P-4, page 25.

Plaintiffs have taken the position that the inadequacy of the District's IEP is shown in the fact that Derek was unable to make one year's progress in one year, despite his normal I.Q. As the appeals council pointed out, that is not the standard for "meaningful educational benefit" under the IDEA. Exhibit 14 at 5. More importantly, Plaintiffs have not shown that this is the expected rate of progress where a child, even an intelligent child, has severe disabilities in the subject matter being tested.

Even to the extent that Plaintiffs have shown that Derek's rate of progress was slow, Plaintiffs have not demonstrated that this was the result of vague goals in his IEP, or inadequate testing, or the other weaknesses of which they complain. As above, Williams testified that she moved slowly to accommodate Derek's rate of learning without causing him anxiety. Exhibit 24 at 131. In any event, Derek's progress does appear to have been meaningful.

In sum, the weaknesses in the IEP to which Plaintiffs have pointed are not so serious that they prevented Derek from receiving FAPE. In fact, the IEPs do not appear vague, nor do they seem to exclude necessary goals. On the contrary, they are relatively detailed, though not as detailed as Dr. Kay's reports, and appear to have been thoughtfully designed to benefit Derek.

It is entirely possible that an IEP written by Dr. Kay would be better than the School District's, and would set forth a more productive curriculum. However, the IDEA does not ask the public schools to guarantee the very best. See T.R. v. Kingwood Township Board of Educ., supra, at 205 F.3d 577. In this case, the School District has met the standard required of it by the

IDEA and by court precedent. For this reason, I affirm the appeals panel's 2005 and 2006 decisions denying relief as to Derek's 2002-2003, 2003-2004 and 2004-2005 school years.

Having denied relief under the IDEA, I must also deny relief under the other statutes Plaintiffs have invoked. The Third Circuit Court of Appeals has said in several cases that there are few differences, if any, between the IDEA's affirmative duty to educate a handicapped child and the Rehabilitation Act's prohibition in § 504 of discrimination against a handicapped individual. Ridgewood Bd. of Education v. N.E., 172 F.2d 238, 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995). Therefore, I conclude that Plaintiffs have not shown a violation of § 504 of the Rehabilitation Act.

The Civil Rights Act, 42 U.S.C. § 1983, does not, by its own terms, create substantive rights. Baker v. McCollan, 443 U.S. 137, 145 n. 3 (1979); Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006). Instead, a § 1983 plaintiff must demonstrate that the defendant, acting under color of state law, deprived him of a right created by either the federal Constitution or a federal statute. Id. Plaintiffs here have not demonstrated this with respect to their IDEA or Rehabilitation Act claims. Therefore, they can not obtain relief under § 1983.

B. Compensation for Dr. Kay's 2004 IEE

The IDEA regulations provide that a public entity, here the School District, must pay for an independent expert examination ("IEE") of a child if "a parent disagrees with an evaluation obtained by the public agency" and the School District cannot show at a hearing that its own evaluation was appropriate. 34 C.F.R. § 300.502(b)(1)-(4). Plaintiffs seek reimbursement for Dr. Kay's August/September 2004 IEE under this code provision.

The School District argues that the Parents never disagreed with its initial, May, 2002, evaluation, and that the code section, therefore does not apply. I agree that the section is inapplicable. I am not persuaded by the School District that Derek's parents' feeling that the School District evaluation was insufficiently detailed could not amount to "disagreement." Nevertheless, it is clear from the record – particularly the timing of Dr. Kay's second evaluation and the parents' use of it in the administrative proceedings – that the purpose of Dr. Kay's 2004 report was to determine Derek's status at that time, and compare it with his condition in 2002. It was not to challenge or oppose the May, 2002, School District evaluation.

The Plaintiffs cite authority suggesting that parents are entitled to reimbursement for an IEE, where it gives the IEP team new and important insights not revealed by the School District's evaluation. Warren G. v. Cumberland County School District, 190 F.3d 80, 87-88 (3d Cir. 1999); Special Education Opinion No. 1107, (Spec. Ed. Due Process Appeals Review Panel, March 7, 2001), attached to Plaintiffs' Motion as Exhibit A, (in this case, the panel denied reimbursement, but wrote: "[The IEE's] relatively limited and rather standard recommendation for SLD students is not substantively sufficient in terms of an individually useful insight to warrant reimbursement").

It is entirely possible that IEPs subsequent to Dr. Kay's August, 2002, evaluation were informed by, and benefitted from, her report. The record does not contain the Summer, 2002, proposed IEP for purposes of comparison. However, Plaintiffs are not seeking reimbursement for Dr. Kay's 2002 evaluation. Rather, they seek reimbursement for the 2004 evaluation, submitted to the School District at about the same time Derek began his studies at The Janus School. Appeals Panel Decision of February 2, 2005, attached to the School District's Motion as Exhibit B.

Moreover, the District Court in Warren G. found that the School District's evaluation was inappropriate because it failed "to discover the specific areas of [its subject's] learning disabilities." 190 F.3d at 87. I cannot reach the same conclusion here. As set forth above, the School District's evaluation of Derek was fairly detailed and identified his disabilities with adequate specificity. Accordingly, I will also affirm the December 16, 2004 and February 2, 2005, decisions denying reimbursement.

VI. Conclusion

For the reasons discussed herein, I will issue the following:

ORDER

AND NOW, this 12<sup>th</sup> day of January, 2007, upon consideration of the Plaintiffs' Motion for Summary Judgment, filed in this case as Document No. 15; the Defendant's response thereto; the Defendant's motion for summary judgment, filed as Document No. 14; and the Plaintiffs' response thereto, as well as the parties' supplemental submissions, I hereby

ORDER that Plaintiffs' Motion for Summary Judgment be DENIED; and I further

ORDER that Defendant's Motion for Summary Judgment be GRANTED and

JUDGMENT ENTERED in this case in favor of the Defendant, the Donegal School District; and it is further

ORDERED that the Clerk of Court is directed to close this case for statistical purposes.

BY THE COURT:

/s/Jacob P. Hart

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JACOB P. HART  
UNITED STATES MAGISTRATE JUDGE