

New Hampshire Department of Education

Student/ [REDACTED] School District

IDPH FY 23-06-033

**Due Process Decision**

The issue in this proceeding is whether the student is eligible for special education under the specific learning disability category.

**I. Findings of Fact**

1. The student attended school in the school district during the 2022/2023 school year and was in the 7th grade.
2. The student is entering 8<sup>th</sup> grade for the 2023/2024 school year.
3. The parent initially requested that the student be evaluated for special education eligibility during the 2021/2022 school year. The school district evaluated the student in May and June of 2022 and determined that the student was not eligible for services.
4. The school's 2022 evaluations and a subsequent neuropsychological evaluation obtained by the parent in March/April 2023 establish that the student has average cognitive abilities.
5. The school's 2002 evaluations included a KTEA test. The student scored in the below-average category for math and spelling (in the 8<sup>th</sup> – 10<sup>th</sup> percentile in these areas). The student scored average in reading.
6. The neuropsychological evaluation obtained by the parent in March/April 2023 reported a WIAT-IV test with numerous sub-tests in math and reading where the student scored three or more grade levels behind. The student was in the 7<sup>th</sup> grade at the time of the testing and scored in the 2nd-grade level in phonemic proficiency and the 4th-grade level for spelling, sentence composition, basic reading, pseudoword decoding, and decoding fluency. The student scored in the average range for some reading and math tasks, including reading comprehension, essay composition, and math fluency.
7. The neuropsychological evaluation also included a KeyMath 3 test where the student scored several years behind based on age in some areas of math. The student's scores were in the 10-year-old age equivalency in areas like numeration, measurement, addition, subtraction, multiplication, division, and applied problem-solving. The student

was in the 11 or 12-year-old range for basic concepts, mental computations, and foundation problem solving. The student's Total Test score was 11.2 age equivalency. The student was 13 when they took the test.

8. The neuropsychological evaluation report recommended that the student be considered for an IEP for phonology and math remediation. It also stated that the student met the diagnostic criteria for a mild specific learning disability in reading and math based on the DSM definition (which is not the same as the IDEA definition).
9. The parent submitted the report to the school in April 2023 and asked the school to consider the student's eligibility for special education services under OHI, SLD, and ED categories.
10. The school district team members initially determined that the student was not eligible under any of these categories.
11. The school district subsequently agreed that the eligibility requirements were met for the OHI category and sent the parent a written prior notice agreeing to eligibility under that category. The school district did not change their finding for the specific learning disability category.
12. The school district's specific learning disability eligibility determination form has three questions that follow the requirements for eligibility in state and federal laws. The team agreed that the student had a disorder in one or more of the basic psychological processes, which meets the first requirement. School district team members determined that the other two requirements were not met and the student was not eligible. The parent disagreed and requested due process.
13. The specific learning disability eligibility form states, "Although vulnerabilities in ■■■ basic psychological processes exist, at this time [student] is not failing to achieve adequately for ■■■ age or to meet 7th-grade level standards."
14. The school district's specific learning disability eligibility form cited average test scores on the KTEA, KeyMath, and WIAT-4 evaluations noted above, along with the student's spring test results in reading and math on the state assessment test (SAS), and the STAR results in reading and math as the reason why the student was not failing to achieve adequately or to meet state-approved grade-level standards.
15. The student scored Level 3 for ELA on the spring 2023 SAS and Level 2 for Math on the SAS.

16. Level 3 is considered proficient on the SAS. Level 2 is “approaching proficiency,” which means “the student generally performs slightly below the standard for grade level, is likely to be able to access grade-level content....”
17. The school district’s specific learning disability eligibility form notes that the student’s STAR ELA results were in the 49<sup>th</sup> percentile in the Spring of 2023.
18. The student’s overall results show that the student’s STAR ELA score decreased during the 2021/2022 school year from a 1086 and 61<sup>st</sup> percentile on 8/31/21 to a 1073 and 40<sup>th</sup> percentile on 6/1/22. It also decreased during the 2022/2023 school year from 1110 and 61<sup>st</sup> percentile on 9/16/22 to 1107 and 49<sup>th</sup> percentile on 6/5/23.
19. The school district’s specific learning disability eligibility form notes that the student’s STAR math results were in the 24<sup>th</sup> percentile in the spring of 2023. It does not include that the student’s score decreased from a 1056/36<sup>th</sup> percentile on 9/12/22 to a 1048/24<sup>th</sup> percentile on 5/24/23.
20. The school district’s report cards use a 1 – 4 grading scale based on competency. A score of 1 means not yet competent. A score of 2 means “Progressing towards competent – The student demonstrates the emerging ability to apply and transfer essential content, knowledge, and skills in a new task.” A score of 3 means competent. A score of 4 means advanced competence.
21. The student’s 6th-grade report card has 1s and 2s in language arts and math.
22. Similarly, the student’s 7th-grade report card has 1s and 2s in language arts and math.
23. School witnesses testified that the goal is to have students reach level 3 by the end of the school year.
24. The student did not reach level 3 in math or language arts in 6<sup>th</sup> or 7<sup>th</sup> grade.
25. The student was on academic probation five times during the 2022/2023 school year and additional times during the 2021/2022 school year.
26. The school principal testified that academic probation is a consequence for students who do not do work or do not do work well enough.
27. The student received some of their academic probations for not doing well enough on summative assessments in language arts and math.
28. A witness for the parent with experience and knowledge about education and special education testified that since the student’s testing shows that they are below grade level

in basic areas in math and reading, the student requires specialized instruction in those areas because the regular curriculum for grade level material has moved beyond those basic concepts.

29. The parent testified that the school district blames the student for not trying hard enough when the student does not do well academically or receives academic probation, and it has affected the student's self-esteem and created anxiety about school.

30. The neuropsychological evaluation report states that what may appear to be a lack of trying is actually a result of the student's adaptive functioning weaknesses intersecting with the "missing pieces from earlier education."

## **II. Rulings of Law**

1. To be eligible for special education services, a student must be a "child with a disability" under state and federal law. Federal law defines "child with a disability" as follows:

A child evaluated in accordance with §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 CFR § 300.8(a)(1).

2. Specific learning disability is defined as follows:

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

34 CFR § 300.8(c)(10).

3. Federal law also has the following requirements for eligibility under the specific learning disability category:

(a) The group described in § 300.306 may determine that a child has a specific learning disability, as defined in § 300.8(c)(10), if -

(1) The child does not achieve adequately for the child's age or to meet [State](#)-approved grade-level standards in one or more of the following areas, when provided with

learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

(2)

(i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305; and

(3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of -

- (i) A visual, hearing, or motor disability;
- (ii) An intellectual disability;
- (iii) Emotional disturbance;
- (iv) Cultural factors;
- (v) Environmental or economic disadvantage; or
- (vi) Limited English proficiency.

(b) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§ 300.304 through 300.306 -

(1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

34 CFR § 300.309

4. State law adopts federal requirements.
5. Based on the evidence presented, the student meets state and federal eligibility requirements for special education under the specific learning disability category.

### **III. Discussion**

As noted on the school district's specific learning disability eligibility form, the team agreed that the student meets the requirement of having a disorder in one or more of the basic psychological processes as required by 34 CFR § 300.8(c)(10).

That leaves the requirements of 34 CFR § 300.309 regarding adequate achievement/progress and whether the student requires special education instruction as required in 34 CFR § 300.8(1).

Contrary to the school district team members' findings about achievement and progress, the evidence establishes that the student has not achieved adequately for ■■■ age and has not met 7th-grade level standards in various areas. As noted in facts, evaluation results show that the student is several grades and years behind in fundamental reading and math areas such as word reading, spelling, sentence composition, decoding, phonics, oral reading fluency, numeration, addition and subtraction, multiplication and division, and applied problem-solving. The student's report cards show that the student has not reached competency in reading or math in the last two school years. The student's STAR scores show regression or a lack of progress in some areas.

These evaluation test scores, report card scores, and regressing STAR test scores show that the student has not achieved adequately for their age, given their average cognitive abilities. They also show that the student has not made adequate achievement towards state standards in several areas, including basic reading skill, some reading fluency skills (decoding), mathematics calculation, and mathematics problem-solving.

The school district argued that the student's performance and lack of achievement were due to a lack of student effort. The parent contested that evidence and provided evidence that how school personnel addressed the student's performance/achievement caused the student anxiety about school and decreased self-esteem. The neuropsychological evaluation report

supports the parent's position and notes that what might appear to be a lack of effort is the result of adaptive functioning and "missing pieces from ■ earlier education."

While lack of effort may be the cause for achievement/performance issues for some students without the basic psychological processing issues that the school agrees this student has, here the evidence establishes that the student's performance and lack of achievement is more likely to be a result of processing issues that hinder the student's ability to do their work. The specific learning disability category in the IDEA was designed to address those issues. As a result, the school must develop an IEP that addresses the underlying processing deficits to help the student achieve adequately and meet grade-level standards.

Similarly, the same evidence discussed above establishes that the student has not made sufficient progress in meeting age or State-approved grade-level standards in the areas noted above when using a process based on the child's response to scientific, research-based intervention. The student received some Tier 2 services through the school's RTI program and still produced the abovementioned results. The evidence also shows that the student exhibits a pattern of strengths and weaknesses in both performance and achievement relative to their age and State-approved grade-level standards relevant to identifying a specific learning disability. The assessment testing in evidence was appropriate under §§ 300.304 and 300.305, and as noted above, it shows weaknesses in reading and math that are relevant to specific learning disabilities.

The evidence does not establish that the student's achievement and progress are primarily the result of a visual, hearing, or motor disability, an intellectual disability, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency. The evidence also does not establish that the student's underachievement is due to a lack of appropriate instruction.

For these reasons, the requirements of 34 CFR § 300.309 are met.

The evidence also establishes that the student requires special education, defined as specialized instruction under federal law in 34 CFR § 300.39. Specially designed instruction means "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction - (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 CFR § 300.39(b)(3).

The evidence establishes that the student's deficits in reading and math require different instruction than the student would receive as part of the regular curriculum to meet their unique needs. As noted in the facts above, the student is at a 2<sup>nd</sup> – 4<sup>th</sup>-grade level in basic skills in reading and math, and the general curriculum will not address those issues in the 7<sup>th</sup> or 8<sup>th</sup> grade because the instruction has moved beyond those basic skills. As a result, the student

requires specialized instruction to address ■ unique needs, help ■ develop those skills, and meet educational standards. As a result, the requirements in 34 CFR § 300.8(1) are met.

Therefore, the student meets state and federal requirements for eligibility under the category of specific learning disability.

#### **IV. Proposed Findings and Rulings**

##### **Parent's Proposed Findings of Fact (attached to this decision)**

**Granted:** 1-18

##### **School district's Proposed Findings of Fact (attached to this decision)**

**Granted:** 1-7, 11-16, 18, 19, 22-28, 30, 31, 33-37,40, 41, 43, 49, 50, 51, 53, 54, 56-66, 69, 70.

**Denied:** 8-10, 17, 20, 21, 29, 32, 38, 39, 42, 44, 45-48, 52, 55, 67, 69, 71-74.

##### **School District's Proposed Rulings of Law (they started with number 75)(attached to this decision)**

**Granted:** 77-84, 92

**Denied:** 75 and 76 (both of these requested findings included the "adverse affect" or "negative effect" language that applies to some categories of eligibility, but this language and some of the other statements in these proposed findings do not apply here because the specific learning disability category has its own requirements and they do not include the "adverse affect" or "negative effect" language.), 85 - 91, 95, 96

**Neither granted nor denied:** 93 and 94 (these findings raise issues regarding which party had the burden of proof that is unnecessary to decide this case.)

#### **V. Order**

The student is eligible for special education services under the specific learning disability category. This decision shall be implemented by the school district and monitored by the department pursuant to Ed 1123 and Ed 1125.

So Ordered.

8/20/23  
Date

Scott F. Johnson  
Scott F. Johnson  
Hearing Officer

### **Appeal Rights**

Any party aggrieved by this decision may appeal to a court of appropriate jurisdiction as noted in state and federal laws, including RSA 186-C:16-b, Ed 1123.20, 20 USC § 1415(i); 34 CFR § 300.516