ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

SARAH NANNINGA,	)	
	)	
Student,	)	
v.	)	Case No. 004498
	)	
YORKWOOD COMMUNITY UNIT SCHOOL DISTRICT 225,	)	
	)	
School District	)	

DECISION AND ORDER

JANET E. KIDD, Impartial Due Process Hearing Officer

Preliminary Information

The matter in this due process hearing involves, among other things, whether the student's receipt of special education services in the past has sufficiently improved her academic performance to the point where she no longer qualifies for such services. The undersigned Hearing Officer has jurisdiction to hear and decide this case under Section 105 of the Illinois School Code, 105 ILCS 5/14-8.02a. The parties have been informed of their rights concerning due process hearings under the Illinois School Code, the Code of Federal Regulations (34 C.R.R. Sec. 300.509) and the Illinois State Board of Education Regulations concerning special education hearings (23 Ill. Admin. Code Sec. 226, subpart G).

Procedural History

This matter comes before the undersigned Hearing Officer pursuant to a letter of appointment by the Illinois State Board of Education dated November 15, 2005 (H.O. Ex. 2). The materials accompanying the letter of appointment indicate that by letter dated August 24, 2005 the parent requested an impartial due process hearing pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA") (H.O. Ex. 1). This request was a reinstatement of a previous request for due process hearing made on April 25, 2005. The materials also indicate that the Yorkwood Community Unit School District 225 ("School District" or "District") received the August 24, 2005 request on August 30, 2005 and forwarded it to the Illinois State Board of Education (H.O. Ex. 1).

The case originally was assigned to Hearing Officer Carolyn Ann Smaron on September 6, 2005. The 45 day statutory timeline by which the case was to have been resolved would have expired on November 19, 2005. That timeline was extended by

virtue of a "hold" placed on the applicable timelines at the request of the parties by Hearing Officer Smaron's Order dated September 12, 2005 (S.D. Ex. 146). Hearing Officer Smaron subsequently was replaced by Hearing Officer Linda Mastandrea, who then was stricken at the request of one of the parties. The undersigned Hearing Officer issued a Scheduling Order on May 8, 2006 which superceded the previously issued Scheduling Order, and removed the "hold" from the procedural timelines (S.D. Ex. 150). The new Scheduling Order set forth the new 45 day deadline as July 20, 2006.

On May 11, 2006 the parent, through her lay advocate Gary Michaels, submitted an Amended Due Process request (H.O. Ex. 3). The School District filed motions to dismiss the complaint on various grounds, which motions were denied. The District filed a response to the amended due process complaint on May 19, 2006. The parties filed a Joint Motion for Continuance to extend the 45 day deadline from July 20, 2006 until September 25, 2006, which was granted by Order of Continuance dated July 20, 2006. The pre-hearing conference was held via telephone conference call on June 9, 2006. A supplemental pre-hearing conference call was held on June 14, 2006. The Pre-Hearing Conference Report (H.O. Ex. 6) was issued on July 24, 2006, with a Supplemental Pre-Hearing Conference Report and Order issued on September 6, 2006 (H.O. Ex. 7). The hearing was held on September 11, 2006 through September 14, 20006 in Monmouth, Illinois, in full compliance with the timelines established in section 8.02a of the Illinois School Code.

The parent is now represented by an attorney, Michael A. O'Connor of Mauk & O'Connor LLP, 1427 W. Howard St., Chicago, IL 60626. The School District is represented by attorneys Neal E. Takiff and Laura A. Cleary of Whitted, Cleary & Takiff LLC, 3000 Dundee Rd., Suite 303, Northbrook, IL 60062. The parent Doris Nanninga was present at the hearing, along with School District Superintendent Jane Michael as representative of the School District and Susan Crawford, Director of Special Education as representative of the Knox-Warren Special Education Cooperative which provides services to the School District. The hearing was not open to the public, pursuant to the parent's request. At the hearing, exhibits H.O.1-7 were admitted into evidence, along with P. Exs. 1-90 and A1-A32 and B1-B131. Exhibit P 89 was withdrawn. School District Exhibits S.D. 1-175 were admitted, except for S.D. Exs. 151, 152, 157 and 159 which were re-identified and admitted as Hearing Officer Exhibits.

Issues Presented

1. Whether the student is eligible for special education services under IDEA. The parent contends that Sarah, the student, is eligible under the designation of "other health impaired" and that her impairment is attention deficit/hyperactivity disorder ("ADHD"). Alternatively, the parent contends that Sarah is eligible under the "learning disabled" ("LD") designation. The School District contends that although Sarah does suffer from ADHD, that disorder does not adversely impact her academic achievement and, accordingly, she does not qualify for special education services. Rather, the School

District argues that Sarah can receive whatever supports or accommodations she might need in her general education placement by virtue of a Section 504 plan. The District also contends that the issue concerning Sarah's eligibility under a LD designation was not previously raised by the parent and can not be raised by the parent for the first time at the Due Process hearing. Alternatively, the School District contends that Sarah does not qualify under the LD designation.

2. Whether the December 20, 2005 individualized education plan ("IEP") that the School District developed for the student provides her with a free, appropriate public education ("FAPE"). The parent contends that Sarah's IEP was not appropriate, in view of her demonstrated superior intellectual ability. The District contends that the IEP was appropriate to meet Sarah's needs and that it, in fact, served to elevate Sarah's academic performance to the point where she no longer requires special education services.

3. Whether the IEP contains adequate provisions for measuring the student's progress. The parent contends that the IEP does not reflect the high expectations that the District should have had for a student with a high intellect such as Sarah, but rather was designed primarily to bring Sarah's academic performance only up to grade level. The parent contends that the achievement of average academic skills in inadequate for a highly intelligent girl such as Sarah. The School District contends that Sarah's progress, as appropriately measured by the IEP, reflects significant academic improvement commensurate with her intellect.

4. Whether the IEP provides the student with FAPE in the least restrictive environment. The parent contends that Sarah's placement in the section of her fourth grade class which was not the "highest functioning" level of academic achievement was not the least restrictive environment for her. The parent contends that Sarah should have been placed in the highest academic class of the fourth grade, with appropriate supports. The District contends that Sarah's placement was better for her individual needs. It contends that Sarah's class was a general education class which covered exactly the same curriculum as the "higher functioning" class.

5. Whether the student's teachers are adequately versed in the provisions of her IEP and are properly trained in the educational requirements of her disability. The parent contends that Sarah's teachers are not sufficiently well versed the intricacies of her disorder and of her particular needs, as set forth in the IEP. The School District argues that Sarah's teachers are fully qualified and trained in the area of ADHD, are knowledgeable about Sarah's needs and, in fact, have consistently met Sarah's social and academic needs over the years. The District contends that all of Sarah's teachers have significant years of teaching experience and/or experience in the special education field and that their education and experience levels have served Sarah well and will continue to do so in the future.

6. Whether the parent was permitted adequate opportunity to observe the student in her educational environment in order to evaluate the efficacy of the child's medication. The parent contends that the School District's policy of permitting parental observation only when arranged in advance and then, only for one academic period is insufficient to properly observe her daughter in the classroom, particularly when the parent wishes to monitor the effect of Sarah's various medications for ADHD. The School District contends that its policy regarding school visitation is appropriate in order to avoid any possible disruptive effect that a prolonged or surprise visit might have on the child in question, as well as on the other students.

7. Whether appropriate supplemental supports and services such as assistive technology and extended school year education should have been included in the IEP and provided to the student. The parent contends that the IEP team did not consider appropriate multi-sensory and structural supports for Sarah, nor did it consider extended school year services. The School District contends that the IEP provides numerous supports for Sarah and that her regular education classroom teachers and her Special Education teacher utilize multi-sensory techniques and supports. The District further contends that there is and was no evidence that Sarah experienced any academic regression over the summer, and that extended school year services were not appropriate for her.

8. Whether the implementation of the IEP forces the student to unfairly give up other "regular" student activities such as recess. The parent contends that Sarah was, at least for a time, routinely asked to give up recess or art class in order to complete homework assignments or, on occasion, as a punishment for failing to complete assignments or for failing to finish eating her lunch. The School District contends that although Sarah, like other students, was occasionally kept in from recess in order to complete assignments or as a punishment, upon receipt of notice from the parent that Sarah was never to miss recess or art class, it fully complied with the parent's request.

An issue previously raised by the parent and listed as issue number six in the Pre-Hearing Conference Report as "[w]hether the parent was provided with adequate training to participate meaningfully in the development of the IEP" was waived by the attorney for the parent at the outset of the hearing.

Findings of Fact

1. Sarah Nanninga was born on August 11, 1996 (P. Ex. 1). She entered kindergarten at age 5 and has always attended Yorkwood Elementary school, where she presently is in fifth grade (P. Ex. 2; Tr. S. Nanninga, dir.). Sarah is an attractive, engaging, intelligent young girl with no aggressive tendencies (P. Ex. 6; Tr. S. Nanninga, dir.). Sarah's mother noticed that Sarah was having trouble with learning to read even before she entered grade school (Tr. D. Nanninga, dir.). Towards the end of Sarah's first grade, school district officials informed Mrs. Nanninga that Sarah was having learning problems in School (Tr. D. Nanninga, dir.; P. Ex. 69). The School District recommended

Sarah's "retention", or that she repeat the first grade (P. Ex. 69). Mrs. Nanninga disagreed with that recommendation and notified Principal McKee on March 3, 2003 that "retention is not an option." (P. Ex. 7). Mrs. Nanninga strongly believed that repeating first grade would be detrimental to Sarah and requested that Sarah be tested for a learning disability (P. Ex. 7).

2. On March 27, 2003, towards the end of Sarah's first grade year, Yorkwood Elementary School Psychologist Pam Morris requested that Mrs. Nanninga attend a meeting with Sarah's "early intervention team" to discuss Sarah's academic situation (Tr. D. Nanninga, dir.; P. Ex. 8). A subsequent "domain meeting" was held in the fall of 2003, as Sarah was entering second grade to determine Sarah's precise academic needs (P. Ex. 79). Sarah started second grade without special education services (Tr. D. Nanninga, dir.). A "social developmental study" was prepared for Sarah by School Social Worker Michelle Elliott as part of Sarah's initial evaluation by the School District (P. Ex. 2). The study recommended that the early intervention team should particularly address Sarah's reading comprehension and math calculation skills (P. Ex. 2). In December 2003 (Sarah' second grade) School Psychologist Pam Morris evaluated Sarah and prepared a report (hereinafter the "Morris Report") of her findings (P. Ex. 3). The Morris Report utilized various testing methods to evaluate Sarah including the Weschler Intelligence Scale, fourth edition ("WISC-IV"), the Woodcock Johnson Tests of Achievement-III and the Gates MacGinitie Reading Tests (P. Ex. 3, p.2). Based on those test results, the Morris Report concludes that Sarah "is experiencing a significant and meaningful discrepancy between intellectual ability and achievement in the areas of basic reading, reading vocabulary and reading comprehension." (P. Ex. 3, p.2). The Morris Report makes various recommendations with respect to Sarah's academic program, noting that a "structured language" program, administered with a "multisensory" approach would be best for Sarah (P. Ex. 3). The Morris Report also notes that Sarah will need a combination of learning and behavioral strategies to assure her academic success (P. Ex. 3).

3. Upon reviewing the Morris Report, the Sarah's early intervention team (composed of her teachers, school psychologist, school social worker, special education teacher and others) determined, by virtue of a "domain meeting" that Sarah should be considered to qualify for special education services under the category of a "learning disability" (P. Ex. 79). Under the December 9, 2003 Individual Education Plan (hereinafter 12-09-03 IEP") that was initially developed for Sarah, she was to be given a minimum of 20 minutes a day of special education in reading instruction in the "resource room" (P. Ex. 79-8). Such special education is sometimes known as "resource time." (P. Ex. 79). The IEP for Sarah is based the Morris Report, classroom observation and testing data and is used to formulate a "response to intervention" model. (P. Ex. 79, Tr. Crawford, dir.) Other supports were developed for Sarah and listed in the 12-09-03 IEP including, among other things, extended time for tests, having her tests read aloud, having her seated near the teacher in the front of the room away from the windows, using a visual teaching approach and generally making her teachers aware that she may need individual attention to be kept "on task" throughout the school day. The special education

services set forth in the 12-09-03 IEP were to begin in January 2004 (P. Ex. 79-8). The 12-09-03 IEP sets out a long-range goal in reading and a short-term objective in reading with specific increases in reading fluency to be measured by "curriculum based measurement ("CBM") (P. Ex. 79-10). No math goals were established for Sarah (P. Ex. 79-10). Sarah was determined not to have any need for extended school year services (Ex. 79-8). Mrs. Nanninga attended all of the IEP team meetings, provided input to the team and fully participated in team decisions (P. Exs. 81-86).

4. On March 8, 2004 Sarah's Individual Education Team met to review Sarah's progress (P. Ex. 80). The IEP conference summary report (hereinafter 3-08-04 IEP) indicates that Sarah would continue to receive resource time in reading for 100 minutes a week, along with other supports in her regular classroom such as more visual aids like vocabulary cards and use of highlighted text books in science and social studies (P. Ex. 80-6). Her eligibility for special education was still considered as "learning disability." (P. Ex. 80-7).

5. On May 13, 2004 another IEP meeting was held to review Sarah's progress and to devise a plan for her third grade academic year (P. Ex. 81). The May 13, 2004 IEP conference summary report (hereinafter "5-13-04 IEP" was prepared as a result of that meeting (P. Ex. 81). The 5-13-04 IEP lists Sarah's eligibility for special education services as being primarily that of a "learning disability" and secondarily, as "other health impaired" ("OHI") with a specific impairment listed as ADHD P. Ex. 81-4). The 5-13-04 IEP notes that Sarah was "formally diagnosed with ADHD in spring 2003" (P. Ex. 81-2). The 5-13-04 IEP also notes that "parent requests that Sarah be sent out for recess vs. staying in to finish work. Any unfinished work is to be sent home" (P. Ex. 81-3). The 5-13-04 IEP was appended as an attachment to Sarah's 3-08-04 IEP (P. Ex. 81-1).

6. On August 23, 2004 another IEP meeting was held to review Sarah's progress (P. Ex. 80-6). The IEP team concluded that Sarah could benefit from additional time in the resource room with Special Education teacher Becky Carlson (Tr. Carlson, dir.). Accordingly, the 3-08-04 IEP report was amended to show that in third grade Sarah would receive 60 minutes per day or 300 minutes per week of special education services in reading in the resources from August 23, 2004 at least until March 8, 2005, the date of her next IEP team meeting (P. Ex. 80-6).

7. On November 9, 2004, Mrs. Nanninga participated in what she believed to be a parent-teacher conference, but what the district considered to be an IEP team meeting (Tr. D. Nanninga, dir.; P. Ex. 82-1). Mrs. Nanninga was asked to waive the requirement of prior notice of an IEP meeting, and refused to do so (Tr. D. Nanninga, dir.) At the November 9, 2004 meeting, the IEP team determined that Sarah's special education time in the resource room with Mrs. Carlson should be reduced to 15 minutes per day or 75 minutes per week, with 45 minutes per day of reading instruction in the regular classroom (P. Ex. 82-1, 82-3). The report from the November 9, 2004 meeting (hereinafter "11-09-04 IEP") notes that Sarah was already exceeding her previous IEP goals and was "doing a

wonderful job with regular third grade work." (P. Ex. 82-3). Mrs. Nanninga signed the 11-09-04 IEP along with other members of the team (P. Ex. 82-4).

8. On January 14, 2005 another IEP team meeting was held to evaluate Sarah's progress (P. Ex. 83-2). The accommodations listed in the previous IEP's were still in effect, including the 15 minutes of daily reading special education instruction in the resource room (P. Ex. 83-3). The report from the January 14, 2005 meeting ("1-14-05 IEP") notes that Sarah's reading grades are in the "B- to B+" level and that she is achieving "above aim line in 3rd grade level probes using general curriculum materials [with] comprehension 80% - 100%." (P. Ex. 83-3). During third grade, Sarah was receiving math instruction under the Title I math program at Yorkwood (P. Ex. 83-3). It was reported that Sarah's math skills were "well within the average range." (P. Ex. 83-3). The Title I math program is a federally-financed program of small group math instruction which provides instruction at a slower pace (Tr. Taol, dir.). The text book and curriculum are identical to that used for math instruction in the regular education classroom and the Title I math students acquire the same information as do those in the general education class by the end of the school year (Tr. Toal, dir.). The 1-14-05 IEP report notes that the regularly scheduled "IEP day" for Sarah would take place on February 22, 2005 and that at that time her progress would again be examined and a new IEP would be prepared on that day (P. Ex. 83-3).

9. On February 16, 2005 another IEP meeting was held to review Sarah's progress (P. Ex. 84). At that time, Mrs. Nanninga requested an independent evaluation of Sarah and signed a parental consent form for the school district to collect additional evaluation data (P. Ex. 84). The independent evaluation was to be considered at a future meeting scheduled for April 25, 2005 (P. Ex. 84-3).

10. Prior to this time on January 28, 2005 Mrs. Nanninga had taken Sarah for an evaluation by the University of Iowa Center for Disability and Development ("CDD") (P. Ex. 4). The CDD provides diagnostic evaluations of people with disabilities primarily as an advisory tool for parents or caregivers (Tr. Smith, cross). The CDD evaluation concluded, after a battery of tests, that Sarah was a "unique learner" of unusually high intelligence, who suffered from ADHD and dyslexia and recommendations for those conditions (P. Ex. 4). Dr. Angela Smith, the primary author of the CDD report, testified that the term "dyslexia" was used in the report to indicate a reading or language disorder, rather than a more narrow definition of dyslexia. (Tr. Smith, dir.). The CDD did not have the benefit of input or information from the School District when it prepared its evaluation, other than some correspondence with the District provided by Mrs. Nanninga (Tr. Smith, cross).

11. On April 25, 2005, the IEP team met to consider the independent evaluation prepared by MCA Diagnostic Services psychologist Debra Dietrich (hereinafter "Dietrich Report") (S. D. Ex. 20; S. D. Ex. 14). The IEP team also considered a re-evaluation prepared by school psychologist Pam Morris on April 5, 2005 which examined Sarah's

math progress using curriculum based math fluency measures. (P. Ex. 85-5). At the April 25, 2005 meeting the team concluded that Sarah no longer qualified for special education services, but that she should continue to receive accommodations in the regular classroom through a Section 504 Individual Accommodation Plan pursuant to the provisions of the Americans with Disabilities Act ("ADA") (P. Ex. 85-1). The IEP team considered the CDD report which Mrs. Nanninga provided at the meeting (S. D. Ex. 14, S. D. document page 90). Mrs. Nanninga objected to the proposed discontinuation of special education services and stated her view that Sarah should continue to qualify for special education services (P. Ex. 85-1). Mrs. Nanninga filed her original request for Due Process hearing on April 25, 2005.

12. In conjunction with the Request for Due Process, as part of a mediated settlement, an additional impartial educational evaluation was obtained for consideration by the School District (S. D. Ex. 21). The report was prepared by certified School Psychologist Linda L. Meloy, Ph.D., on October 12, 2005. Special Education Director Susan Crawford had contacted Dr. Meloy and had put her in touch with Mrs. Nanninga (Tr., Meloy, dir.). Ms. Crawford did not provide Mrs. Nanninga with a list of independent evaluators, as is sometimes done (Tr. Crawford, dir.). Mrs. Nanninga accepted Dr. Meloy as the independent evaluator and met with Dr. Meloy prior to the evaluation (Tr. Meloy, dir.). Dr. Meloy concluded that Sarah does suffer from "moderate to severe" ADHD which she notes is "a developmental disorder with substantial and chronic impairment across settings for which multiple interventions are needed" (S. D. Ex. 21, p.11). Dr. Meloy testified at the hearing that Sarah is "very bright" and that while testing indicates a discrepancy between her ability and her achievement, she reiterated the conclusion in her report that it does not support a diagnosis of "learning disabled" (S. D. Ex. 21, p.10; Tr. Meloy, dir.). The Meloy report does note that ADHD supports would require the "direction/coaching of a teacher, not self-monitoring approaches listed on the proposed 504 Plan." (S.D. Ex. 21, p. 10). Dr. Meloy testified at the hearing that while Sarah definitely needs instructional supports to assure her academic success, it does not matter whether the supports are provided under an IEP or under a § 504 plan as long as Sarah is able to receive adequate coaching from a teacher (Tr. Meloy, cross).

13. The IEP team met again on December 20, 2005 to consider the Meloy report and revisit the issue of Sarah's status with respect to special education and accommodations (P. Ex. 86). The report written at the December 20, 2005 meeting (hereinafter "12-20-05 IEP") states that while the IEP team agrees that Sarah has the disability known as "other health impaired" ADHD, she suffers no adverse effects from that disability and is "performing at grade level curriculum for all instructional areas" P. Ex. 86-4; 86-6). The team, however, in an effort to accommodate Mrs. Nanninga, agreed to find Sarah eligible for special education accommodations particularly with respect to organization, use of the planner designed by Mrs. Nanninga and by providing an extra set of text books for home use (P. Ex. 86-7). Mrs. Nanninga and her representative Ann Marie Robinson participated in the drafting of the 12-20-05 IEP for Sarah, particularly in the area of listing accommodations. (Tr. Crawford, dir.) Ultimately, Mrs. Nanninga

became dissatisfied with this IEP and reinstated her request for Due Process (H. O. Ex. 1). Sarah completed the fourth grade and is presently in the fifth grade while receiving special education services under the January 2005 IEP by which she is receiving 15 minutes of reading instruction in the resource room, pursuant to the "stay-put" provisions of IDEA as ordered by Hearing Officer Carolyn Smaron (S. D. Ex. 146).

14. Sarah's fourth grade classroom was divided into three learning groups for several subjects including reading and math, an advanced class, a more average class, and the class for students needing "pull-out" for substantial special education services pursuant to their IEP's (Tr. Williams, dir.). Based upon her third grade performance and various test scores, Sarah's teachers placed her in the average class of her fourth grade. (Tr. Williams, dir.) Although Sarah's teachers believed that she may have been successful in the advanced or "higher functioning" class, Sarah was placed in the "average" fourth grade class in order to give her the opportunity to receive her special education accommodations, while allowing her to thrive academically (Tr. Williams, dir.). At the present time, Sarah is in the advanced "reading circle" group of her fifth grade. (Tr. Williams, dir.)

15. As part of Sarah's IEP team's efforts to measure Sarah's progress, she was given short tests known as "probes" to measure her progress in the areas reading and math (P. Ex. 82-3, 85-5; S. D. Ex. 14). These tests, along with other curriculum-based measurements ("CBM's") were routinely given to Sarah by her teachers in both reading and math (P. Ex. 3-8). On one summary of reading probes from second grade through third grade, a graph was used to chart Sarah's progress (S. D. Ex. 14, S. D. document p. 95). The graph indicates from Sarah's reading probes starting in late November of her third grade year and through the remainder of third grade that Sarah's rate of progress was substantially higher than the progress that Sarah she had previously been making (S. D. Ex. 14, S. D. document p. 95). Sarah also took other standardized tests such as the Illinois Standards Achievement Test ("ISAT"), the Prairie State Achievement Exam and the Metropolitan Achievement Test which were taken by all of the students in her class (P. Ex. 79-6). Standardized tests such as the ISAT are categorized as "norm-referenced" tests because the scores show Sarah's progress as a percentile, measured against the scores of other state-wide student test scores (Tr. McLoy, dir). Sarah has also been tested numerous times in connection with the independent educational evaluations ("IEE"'s) that have been performed for Sarah (S. D. Ex. 21, pp. 1-3). Although Sarah was not present or able to take the math portion of the ISAT in third grade, she did take the reading portion and scored in the "meets standards" performance level (P. Ex. 88-3).

16. In addition to the efforts being made by the School District to address her learning issues, Sarah's mother Doris Nanninga was also making every effort to address Sarah's needs (P. Ex. 54-1; Tr. D. Nanninga, dir.). In September 2003, Sarah's mother had Sarah evaluated at the Galesburg Clinic in Galesburg, Illinois by a psychologist named Dr. Phil Ulm (P. Ex. 54). Dr. Ulm performed an ADHD assessment on Sarah and came to the conclusion that Sarah does have attention deficit/hyperactivity disorder (P.

Ex. 1; P. Ex. 54). Doctor Ulm gave Sarah's mother various behavioral strategies for working with Sarah at home. Sarah's primary physician is Lynn Greeley, M.D., a pediatrician who also practices at the Galesburg clinic. Dr. Greeley agrees with Dr. Ulm's assessment that Sarah has ADHD (Tr. Greeley, dir). Sarah has no persistent medical issues other than the ADHD. (P. Ex. 54; Tr. Greeley, dir.) In an effort to alleviate Sarah's ADHD symptoms, Dr. Greeley prescribed various psychotropic drugs (P. Ex. 39-1; P. Ex. 55). Some of the medications have proven to be successful, but Dr. Greeley has had to make changes in medications or dosages when Sarah began to exhibit "breakthrough symptoms" (Tr. Greeley, dir.). Some of the medications also cause unwanted side effects in Sarah, in particular, a loss in appetite (Tr. Greeley, dir.; P. Ex. 55). The loss of appetite has resulted in Sarah's failure to gain weight at an appropriate rate for her height and age (Tr. Greeley, dir.). Sarah's mother gives Sarah her medications at home, not at school (Tr. Crawford, cross). Occasionally, at times such as during summer vacation from school, Sarah's mother stops giving Sarah all medications in order to evaluate Sarah's symptoms without the drugs and also to allow Sarah's appetite to recover (Tr. D. Nanninga, dir.).

17. Sarah's mother visited her fourth grade class on April 6, 2006 (S.D. Ex. 111). She wished to observe Sarah's behavior in the classroom and, in particular, to evaluate the effectiveness of Sarah's current medication (Tr. D. Nanninga, dir.). Mrs. Nanninga did not notify the school of her planned visit or receive permission for the visit ahead of time, even though she had been speaking to School District officials the previous day (S.D. Ex. 111). Sarah's mother sat in on Sarah's classes throughout the entire school day (S.D. Ex. 111). The day did not go smoothly for Sarah, as evidenced by a bathroom-related "accident" during her Physical Education class (Tr. D. Nanninga, dir.). School Superintendent Jane Michael notified Mrs. Nanninga by letter dated April 10, 2006 that school policy required prior notice for parental visits, explanation of the purpose for the visit, and limiting the visit to one or two class periods (S.D. Ex. 111). The school policy regarding visitors as set forth in the Yorkwood Elementary School Student Handbook also requests that parents inform the individual teacher of the planned visit and to "limit your visit to either one class period or about 30 minutes." (S.D. Ex. 111). The Yorkwood Student Handbook notes that "some children are easily distracted and do not learn well with visitors in the classroom." (S.D. Ex. 111). Mrs. Nanninga objected to the limitations on her ability to observe Sarah in the classroom and informed the Superintendent that intended to return for additional visits (S.D. Ex. 112). She, in fact, never returned for any additional classroom observations (Tr. D. Nanninga, cross).

18. Mrs. Nanninga was concerned about Sarah's need for physical activity and frequent breaks in order to help alleviate her ADHD symptoms (Tr. D. Nanninga, dir.). Sarah's teachers at Yorkwood occasionally kept children in from recess to finish incomplete assignments or to receive extra help with instruction. (Tr. Williams, dir.) On infrequent occasions, teachers kept children in from recess as a punishment for behavioral issues (Tr. Williams, dir.). Mrs. Nanninga asked Principal McKee that Sarah not be kept in from recess and also requested Dr. Greeley to send a letter to Yorkwood

making the same request (Tr. D. Nanninga, dir., P. Ex. 55). Dr. Greeley informed Superintendent Michael by letter dated November 19, 2005 that Sarah needed breaks for physical activity to alleviate her ADHD symptoms (S.C. Ex. 55). The letter from Dr. Greeley was discussed at the December 2005 IEP meeting (Tr. Crawford, dir.). The 12-20-05 IEP report does not contain any modifications concerning recess or exercise (P. Ex. 86). Sarah's schedule contains times for physical activity, including at least two recess periods, in addition to her physical education class (S.D. Ex. 136). Upon receipt of the request from Mrs. Nanninga and the letter from Doctor Greeley, Sarah was not kept in from recess by her teachers for any reason (Tr. Williams, dir.).

19. In connection with the present Due Process proceeding, Mrs. Nanninga obtained the services of another independent evaluator, licensed clinical psychologist Elizabeth Zavodny, Psy. D., who conducted a review of the evaluations that have been performed for Sarah to date (P. Ex. 17). Dr. Zavodny testified, based on her "record review" that she believed that none of the previous evaluations were complete and that she was of the opinion that Sarah may suffer from an additional learning disability other than ADHD (Tr. Zavodny, dir.). She further testified that the criticism of the CDD evaluation set forth in Dr. Meloy's report was unfounded, and that Dr. Zavodny believed that Dr. Meloy's testing was inadequate to assess Sarah's needs (Tr. Zavodny, dir.).

20. Other findings of facts which also constitute, in part, conclusions of law are set forth below and incorporated herein by reference.

Conclusions of Law

Based upon the above Findings of Fact and the arguments of counsel, as well as this Hearing Officer's research, the conclusions of law are as follows:

1. There is no meaningful dispute as to the fact that Sarah suffers from the range of symptoms commonly known as attention deficit/hyperactivity disorder ("ADHD"). To qualify for special education services under the Individuals with Disabilities Improvement Act of 2004 ("IDEA"), a student must meet the "other health impairment" definition found in the IDEA and demonstrate that the impairment adversely affects academic performance, or be found to suffer from a specific learning disability. Because Sarah's ADHD has not been shown to have an adverse impact on her educational performance, she does not quality for special education services as "OHI" or "other health impaired". "Not every child who has a disability needs special education services as a result of that disability." Beth Corchado v. Bd. Of Education, Rochester City School District, 86 F. Supp. 3d 168 (W.D. NY 2000).

2. Similarly, there is no dispute as to the fact that Sarah possesses a superior intellect. While her intellect should be considered in determining if her academic performance is on par with her abilities, it is not the intent of IDEA to maximize the

performance of intellectually gifted students. Further, any disparity between her performance and her ability is not so severe as to warrant a designation as "learning disabled" or "LD". Sarah may have qualified as learning disabled at one time, or qualified as OHI at one time due to her ADHD. The special education instruction time that she has received in the resource room from first grade through fifth grade has served its function; that is, to improve the child's educational progress to the point where instruction in the general classroom is adequate and preferred. Sarah's academic performance in the categories of reading and math, both areas of concern for her parent and her teachers at various times, is now at or above grade level. No further special education in an environment separate from her peers is required or desirable. In Krista P. v. Manhattan School District, 255 F. Supp. 2d 873 (N.D. Ill. 2003), the court considered the case of a child with superior intellectual ability but achievement testing in the low-average to average range. The court held that the school district was correct in denying eligibility for special education services because she was receiving appropriate accommodations, her grades were at least average, and she was progressing adequately in the general education curriculum. In the instant case, Sarah is making similar or better progress and, according to the Special Education resource teacher, the district was having difficulty devising academic goals for Sarah at her last IEP conference because she had met all previous goals and is now performing at or above grade level in all areas.

The School District argued at the hearing that the parent was barred from raising the LD issue during the hearing, as it had not been adequately raised in prior pleadings. Counsel for the parent responded that issue number one in the Pre-hearing Conference Report, restating the issues set forth in the amended Due Process Request, concerning Sarah's eligibility for Special Education services adequately raised the issue. It appears that the School District has not been unfairly surprised by the LD eligibility issue, and there is adequate testimony and documentary evidence in the record to address the issue. The parent, however, has not demonstrated that Sarah qualifies under the LD eligibility designation. This conclusion is based primarily upon the Meloy and Dietrich reports, which were thorough, informative, based on scientific methods, and independent.

3. If Sarah had qualified under IDEA under either OHI or LD categories, she automatically would have been entitled to special education services. Failing to qualify for special education services, however, does not leave Sarah without supports. Because she does have the ADHD disability, the District is correct in determining that Sarah qualifies for services under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and not under IDEA. Sarah's counsel has cited Yankton School District v. Harold and Angie Schramm, 93 F.2d 1369 (1966) as support for the proposition that Sarah is entitled to continued special education services. Yankton involves a student with an orthopedic impairment and cerebral palsy who was seeking specialized instruction and services particularly in regards to transition from high school to college. The school district was attempting to dismiss the student from special education and provide services only under § 504 of the Rehabilitation Act, in view of the fact that the student received excellent grades and primarily required assistive services such as transportation. The court in

Yankton ordered the district to continue to provide special education services, finding that the student's disability fell squarely within the purview of IDEA. The court found that the student did require classroom supports to alleviate the effects of the disability on classroom performance.

By contrast, Sarah's previous special education services provided in the resource room have had the desired effect of bringing Sarah's reading skills up to the level of her peers. She no longer needs the direct special education services the way that the student in Yankton continued to require services. Further, the Yorkwood School District is willing and able to provide Sarah with the non-special education supports she is entitled to under § 504. In evaluating IEP services against § 504 services, the court in Yankton specifically notes that a "school district is not free to choose which statute it prefers" (93 F. 2d 1369) but that is not what the School District is doing in this case. The Yorkwood School District has, relying on scientifically based intervention and measurement techniques, moved Sarah out of the realm of special education and back into the general education classroom. This is not only in accordance with the letter of IDEA, but with its spirit as well.

4. Sarah's previous IEP's and, in particular, her 12-20-05 IEP were adequate to meet her educational needs at the time. Sarah's counsel contends that the 12-20-05 IEP was inadequate with respect to goals, supports and progress measurements for Sarah, particularly in view of her high intellect. This is in contrast with the clear weight of the evidence. Even a cursory review of the facts in this case shows that Sarah has been tested, measured and "probed" on perhaps all too many occasions. The School District has accumulated reams of its own data on Sarah, and has engaged the services of no less than two outside educational evaluators who performed their own tests of Sarah. This is in addition to the testing that Sarah's mother arranged at her own expense. The IEP's, particularly the 12-20-05 IEP rely on the test data in reaching conclusions. The goals of the 12-20-05 IEP were drafted at the behest of Mrs. Nanninga and her representative, so it is difficult to see how she can now fault them. The previous IEP's for Sarah contained specific goals and measurements which were drafted in terms of number of words she could read aloud per minute with a minimum percent of mistakes. This type of goal is specific, measurable and appropriate.

With respect to Sarah's high intellectual ability, it is difficult to gauge exactly what level of academic achievement she is capable of. The IEP, however, is not required to attempt to raise Sarah to the full level of her possible academic potential. The IDEA assures children with disabilities of their right to a "free, appropriate public education ("FAPE")..." 20 U.S.C. § 1400 (c). In providing FAPE, the school district is required to create an individualized education program that is "reasonably calculated to enable the child to receive educational benefits." Bd. Of Education of the Hendrick Hudson Cen. Schl. Dist., Westchester County v. Rowley, 458 U.S. 176, 206 (1982). The Rowley case has since been cited extensively for the proposition that the "purpose of the IDEA is to 'open the door of public education' to handicapped children, not to educate a

handicapped child to her highest potential." Id. (quoting. Board of Educ. of Murphysboro Community Unit Schl. Dist. No. 186 v. Illinois State Bd. Of Educ., 41 F. 3d 1162, 1166 (7th Cir. 1994). As the Court noted in Rowley, the requirements of the IDEA to provide specialized educational services "generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with opportunity provided other children.'" Id. at 198.

The School District in the instant case has certainly attempted to comply with the Rowley mandate that IEP's must be "reasonably calculated to enable the child to receive educational benefits." 458 U.S. 176, 206. While there is no "bright-line" test for what satisfies FAPE for any particular child, the needs of the individual child are paramount. Courts have held that IDEA requires more than mere "minimal benefits", and have required that any analysis of FAPE requires analysis of the child's intellectual potential and an assessment of academic progress. In Kevin T., W.T., and K.T. v. Elmhurst Community School Dist. 205 and Illinois State Bd. Of Education, 2002 U.S. Dist LEXIS 4645 (2002), the court held that a student of above-average intelligence was denied FAPE when he had made little academic progress and, in fact, his IQ score had dropped by almost 20 points over nine years. This is in sharp contrast to Sarah's academic achievements. Although Sarah's mother may wish to see her earning more than the B or B+ she currently earns in many area on tests and grade reports, her progress to that level from her past below-grade level performance is, as many of Sarah's teachers testified at the hearing, remarkable. This is not just a case of finding FAPE because of Sarah's being "passed from grade to grade".

5. Sarah's placement in the "average" or "middle-functioning" fourth grade class was not a denial of FAPE in the least restrictive environment ("LRE"). IDEA and its associated regulations requiring that FAPE be provided in the least restrictive environment were adopted and approved in the Illinois State Board of Education ("ISBE") Policy Statement on Least Restrictive Environment issued in February 2000. LRE requires, to the maximum extent possible, that children with disabilities are educated with children who are not disabled. 34 C.F.R. §300.550(b)(1). The requirement that FAPE be provided in the least restrictive environment generally presupposes that a disabled child will obtain substantial social benefit from being educated with his or her peers. Mrs. Williams, Sarah's fourth grade teacher, testified persuasively that when she and Mrs. Erlandson, the other fourth grade teacher, made the decision to place Sarah in the more "average" group of fourth graders for reading, spelling and math, the placement was meant to allow them to provide Sarah with additional personal attention for her, while allowing her to "shine" in a group of her peers, rather than struggling with a more difficult "higher-functioning" curriculum. Although Sarah's group was sometimes referred to as "lower functioning" during the hearing, the curriculum is the same as that in the "higher-functioning" or more accelerated group. As is true for special education placements, as is described in the ISBE Policy Statement on LRE, placement decisions reflect a continuum of choices for the child. Sarah's teachers have used their best judgment in placing her within the middle range of her regular education class and it is

not in Sarah's best interest to force them to do otherwise. As Sarah's needs change, the York elementary teachers have responded and will continue to respond, as evidenced by their placing Sarah in the highest "reading circle" group for fifth grade. Accordingly, there is no credible evidence to the effect that Sarah has been denied FAPE in the least restrictive environment.

6. Sarah's regular education and special education teachers were adequately versed in the provisions of her IEP's and were properly trained in the educational requirements of her disability. Special Education resource teacher Becky Carlson testified that she provided Sarah with multi-sensory reading instruction, and even Sarah's counsel commented his approval of her approach. The regular education teachers, including Mrs. Williams, Ms. Erlandson and the Title I math teacher Mrs. Toal, have many years of teaching experience and undisputed academic credentials. All testified that they are comfortable teaching children with ADHD. There was no evidence in the record of any credible challenge to their teaching methods. Further, a review of the numerous IEP's shows that all of Sarah's teachers attended the IEP meetings, and the fourth grade teachers attended the IEP meeting at the end of Sarah's third grade in order to better prepare themselves to meet Sarah's needs in the coming year. Special Education Director Susan Crawford became personally involved in Sarah's case once she became aware of Mrs. Nanninga's dissatisfaction with Sarah's IEP. Mrs. Crawford has stellar credentials in the field of special education, many years of teaching experience in the field, as well as experience in the area of special education administration. The credible testimony of these School District officials at the hearing combined with the records of the IEP meetings, can lead only to the conclusion that the teachers and District officials were remarkably well versed in the intricacies of Sarah's IEP's and her ADHD disability.

7. The School District policy requiring prior notice and limiting parental classroom visits to one or two periods is adequate to allow Mrs. Nanninga to observe Sarah. Although Mrs. Nanninga is a devoted and concerned parent, and Sarah's ADHD gives her more reason for concern than the average parent of a non-disabled child, Mrs. Nanninga can not be permitted to disrupt the educational environment for Sarah, her teachers, and the rest of the school children. Although Mrs. Nanninga seems to feel that she was being personally penalized by having her visits limited by the School Superintendent, the school policy was clearly set forth in the Student Handbook prior to Mrs. Nanninga's visit. Mrs. Nanninga has adequate opportunity to observe Sarah's response to medical treatment at home, or during summer vacation. She may take advantage of the school policy to observe Sarah for one or two periods with prior notice, as permitted by school policy. But the needs of Sarah, her teachers and the other school children to go about their school day undisturbed by the presence of visitors must supersede the needs of parents to monitor their child's behavior at school.

8. The IEP's were adequate in providing supplemental services for Sarah. The assistive technology which the parent contends was not considered for Sarah was in fact considered, and found not to be appropriate or useful for her. The same is true with

extended school year ("ESY") services. Sarah did not demonstrate any of the summer vacation academic regression which is indicative of a need for ESY services. Resource teacher Becky Carlson was thoroughly versed in the needs of ADHD children generally, and with Sarah's needs in particular. It was through her "resource minutes", along with the services and accommodations provided by Sarah's regular education teachers, that allowed Sarah to progress to the point where she no longer requires special education services. Although it is entirely possible that some additional technology exists which might boost Sarah's academic performance even higher, the same could be said for virtually any child. That does not require the School District to purchase or employ every form of assistive technology which might be available.

8. Sarah was not denied FAPE or otherwise impeded by having been kept in from recess or by missing art or other regular education classes. Sarah apparently complained, as any child would do, that she missed recess or art on occasion in order to receive additional time to complete an assignment or to receive personal instruction. It is unclear whether Sarah was ever kept in from recess as a punishment. Sarah's mother and her pediatrician Dr. Greeley instructed the school that Sarah was not to miss recess for any reason. The testimony from Sarah's teachers, along with the written notes in the IEP's, was completely credible to the effect that once everyone had gotten the message from Sarah's doctor and mother, Sarah was never kept in from recess for any reason. Although Sarah's mother suggested that she was told that Sarah might have to miss art class in order to have her planned § 504 accommodations, there was no additional evidence of this in the record. Accordingly, the School District, in implementing Sarah's IEP's, did not deny Sarah FAPE or otherwise unfairly impact Sarah's need for physical activity in order to alleviate her ADHD symptoms. It is hoped that the District would continue to observe this laudable policy in implementing Sarah's proposed § 504 Plan.

Decision and Order

Sarah Nanninga is not eligible for special education services because her ADHD does not adversely impact her academic achievement. Further, her ADHD does not qualify her for special education services as "learning disabled". Although Sarah is a very bright girl and may, in fact, be considered as academically gifted, any perceived discrepancy between her high intellect and her generally average school performance is not sufficient, at her level of performance, to find her to be learning disabled. One of the stated goals of IDEA is to move children away from special education classifications and to allow them to function fully in the general education classroom with appropriate supports. IDEA goals include "providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports...[to] reduce the need to label children as disabled in order to address the...needs of such children." 20 U.S.C. 1400 § 601. This is exactly what has happened in Sarah's case, thanks to the support she receives at home as well as the expert intervention of the School District special and general education teachers and

administrators. Further, the label that is placed on Sarah should not be determinative of the supports she receives. As at least one independent evaluator observed, the supports that Sarah can and will receive in a § 504 Plan will address her ADHD issues as well as they can be addressed by an IEP. The goal of the supports is to gradually move Sarah to self-monitoring and self-control of her ADHD symptoms.

Accordingly, and for the reasons set forth above, based on the Findings of Fact and Conclusions of Law it is hereby Ordered:

1. That Sarah Nanninga be placed in a regular education classroom for full-time academic instruction;

2. That Sarah Nanninga be provided with supports and accommodations pursuant to a Section 504 Plan;

3. That a new Section 504 Plan meeting be convened at the earliest possible date to evaluate Sarah's present academic performance and present and future educational needs.

Within five days of the receipt of this Decision and Order, either party may request a written clarification. The request for clarification must be specific as to precisely which elements of the Decision and Order are the ones for which the moving party seeks clarification. After the Decision is issued, the undersigned Hearing Officer retains jurisdiction only for purposes of clarification. Any request for clarification must also be mailed to the Illinois State Board of Education and the opposing party.

This Decision is binding on the parties. The parties may appeal this decision through a civil action in a judicial court of competent jurisdiction. The Illinois School Code provides that appeals must be filed within 120 days of the mailing of the de ision to the parties (105 ILCS 5/14-8.02a(1)). If the appeal is not filed within that statutory period, the right to appeal is lost.

Issued this 25th day of September 2006.

Janet E. Kidd

JANET E. KIDD
Impartial Due Process Hearing Officer