

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania

## Special Education Hearing Officer

### DECISION

ODR No. 2098-1112 AS

Child's Name: B.L.

Date of Birth: [redacted]

Date of Hearing: 9/6/11

### CLOSED HEARING

Parties to the Hearing:

Parents  
Parent[s]

Representative:

Parent Attorney  
None

School District  
Pennridge  
1200 N. 5<sup>th</sup> Street  
Perkasie, PA 18944-2207

School District Attorney  
Thomas Warner, Esquire  
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331 E. Butler Avenue  
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Date Record Closed:

September 19, 2011

Date of Decision:

September 26, 2011

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Although Student's family resides within the School District boundaries, Student never attended school in the District, having been enrolled in a private kindergarten, a parochial elementary school and currently in a private school for children with learning differences at all times when Parents could have enrolled Student in public school.

When Student's difficulties with reading were noted early in 1<sup>st</sup> grade, a psycho-educational evaluation was arranged by that school through the local Intermediate Unit (IU), and Parents contacted the District for services after receiving the school psychologist's determination of Student's learning disabilities in reading and writing. The District conducted its own evaluation, confirmed that Student is IDEA eligible in the category of specific learning disability and speech/language impairment, and offered an IEP that included 2 hours/day of pull-out special education services in language arts (reading and writing)s well as speech/language therapy as a related service. Convinced that Student needs Wilson reading instruction, which the District does not offer, Parents enrolled Student in a private school and filed a due process complaint seeking tuition reimbursement.

During the one day hearing session in early September 2011, Parents presented the results of their independent internet research into various reading programs, and stated their understandable concern that Student should continue to receive reading instruction using a method that has worked. Nevertheless, Parents did not establish that the District's proposed reading instruction is inappropriate for Student, and, therefore, their claim for tuition reimbursement must be denied.

## **ISSUES**

1. Has the School District offered a program and placement for Student that can effectively address Student's needs for special education in the areas of reading and writing and that is reasonably calculated to result in a meaningful educational benefit?
2. If not, should the School District be required to fund Student's tuition at the private school unilaterally selected by Parents?

## **FINDINGS OF FACT**

1. Student is an elementary school age child, born [redacted]. Student is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 26)
2. Student has current diagnoses of specific learning disability and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 27)
3. Due to expressive and receptive language delays, Student received speech/language early intervention services from the local Intermediate Unit during the pre-school years. (N.T. p. 79; S-2, p. 1, S-12, p. 1)
4. Student continued to receive 1 hour/month of itinerant learning services and weekly speech/language services through the 2008/2009 school year, and made significant progress toward speech/language goals. (S-12, pp. 1, 2 )
5. By the spring of Student's kindergarten year, Student's teacher noted progress since the beginning of the year, but limited retention of concepts and continued difficulty in acquiring the basic reading skills that had been mastered by most of Student's kindergarten classmates. (P-1, p. 2, S-12, p. 2 )
6. Student was first evaluated by the School District during the spring of 2009 in preparation for enrolling in the District after attending a private half-day kindergarten. (N.T. pp. 80; S-2, p. 1, S-12, p. 2)
7. The evaluation report recommended an IEP for learning support services during 1<sup>st</sup> grade or, in the alternative, another year of kindergarten with a half day in a typical classroom and a half day in a self-contained learning support classroom. (S-12, pp. 15, 16)
8. Parents ultimately enrolled Student in first grade in a parochial school for the 2009/2010 school year. (N.T. p. 79; S-2, p. 1)
9. Early in first grade, Parents and teacher realized that Student was struggling to acquire basic academic skills, despite receiving 40 min. of small group remedial services 2x/week in reading and math. (N.T. pp. 81, 82; P-1, p. 2)

10. A certified school psychologist from the agency that provides diagnostic and remedial services to non-public schools through the Intermediate Unit conducted a psycho-educational evaluation that included several standardized tests of cognitive ability and academic achievement and phonological/auditory processing.<sup>1</sup> (P-1, pp. 3,
11. In a report dated November 1, 2010 the evaluator concluded that Student is learning disabled in reading (word reading, decoding, comprehension) and written expression (spelling), as defined by state special education standards. (P-1, p. 6)
12. The evaluator further concluded that based upon weaknesses in word recognition, decoding skills, phonological deficits and average to high average cognitive ability, Student meets the research based definition of Dyslexia. (P-1, p. 6)
13. The evaluator identified Student's need for direct, systematic, explicit instruction in a reading and writing program with opportunities for drill and practice. The evaluator recommended individual or small group direct instruction for 40—60 minutes/day to improve phonological awareness and phonological memory skills. (N.T. p. 32; P-1, pp. 6, 7)
14. The evaluator also noted that reading difficulties like those Student exhibits often respond well to an Orton-Gillingham approach to reading instruction, and suggested that if Student remained in the parochial school, where the type and level of instruction needed to remediate Student's identified deficits was not available, Parents should consider providing a reading tutor who could use an Orton-Gillingham approach. (N.T. p. 32; P-1, p. 7)
15. After Parents contacted the District to discuss Student's placement for the remainder of the school year, and met with District staff, the District obtained Parents' permission for its own evaluation. For this evaluation, the District adopted and used the results of the recently completed cognitive, and academic achievement standardized assessments, as well as Parent input and language assessments from its 2009 reevaluation report, supplemented by a current classroom observation. (N.T. pp. 84—86, 92, 93, 100, 101; S-1, S-2, p. 1—6, S-11)
16. Before the District reevaluation began, Parents had enrolled Student in a private school that uses the Wilson Reading System, an Orton-Gillingham approach to reading instruction, as well as other programs and services designed to address language-based learning disabilities. (N.T. pp. 51, 52, 83, 84; HO-1 pp. 4, 5)
17. In mid-April 2011, after the District reevaluation report (RR) was completed and sent to Parents, the District's special education learning support teacher for grades 1—3 at the school Student would have attended met with Student to determine present levels of academic achievement in order to establish baselines for proposed IEP goals. (N.T. pp. 101, 102, 124—126; S-4, pp. 5—7)

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<sup>1</sup> Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV); Woodcock-Johnson Tests of Cognitive Ability-Third Edition (WJ-III-C); selected subtests of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III-A) and the Comprehensive Test of Phonological Processing (CTOPP)

18. A few days after the learning support teacher met with Student, the parties participated in an IEP meeting at which the District offered a program with reading and writing goals based on the present levels determined by the learning support teacher. The baselines would have been updated, if necessary, after assessments during the first few weeks of the new school year. (N.T. pp. 102, 103, 111, 113, 114, 116, 117, 122, 127—133, 145, 146; S-3, S-4, pp. 14—18)
19. The District proposed that Student receive 2 hours daily of language arts instruction (reading and writing) in the learning support classroom, with the remainder of the school day spent in the regular grade level classroom, including homeroom activities, math, science and social studies instruction, lunch and recess. (N.T. pp. 107, 134—137; S-4, pp. 19, 20, 23, 25, S-5, pp. 1, 2)
20. The specially designed instruction (SDI) proposed for Student included direct, explicit, multi-sensory instruction in the writing process and in reading, using a phonemic-phonetic analytic approach to reading decoding and fluency with controlled texts (reading program prescribed), as well as direct, explicit, multi-sensory instruction in vocabulary, pre-reading, reading and post-reading comprehension strategies, along with reinforcing, practicing and generalizing the skills explicitly taught to mastery with guided reading using supplemental, uncontrolled (non-prescribed) reading materials. (N.T. pp. 118, 134, 135, 137, 139, 147—151; S-4, pp. 19, 20)
21. The specific reading instruction program the District proposed for Student is SRA Corrective Reading, which is based on the Orton-Gillingham “platform.” It incorporates multi-sensory instruction in the areas of phonemic awareness/phonetics/letter-sound correspondence, phonics, decoding strategies, sight word development and comprehension. The program is prescriptive and skills are taught to mastery. (N.T. pp. 105, 106, 117, 134, 135, 147, 148)
22. Teacher training for the SRA Corrective Reading Program consists of an initial, introductory training of approximately 3.5 hours provided by the IU, followed by classroom observation and coaching each school year provided by IU and District staff who received additional training in the SRA program. District teachers are also provided the opportunity for additional summer training provided by the SRA publisher. (N.T. pp. 112, 118—121, 142, 146, 147)
23. The learning support classroom for grades 1—3 at the District elementary school Student would attend currently consists of three 3<sup>rd</sup> grade students and one 2<sup>nd</sup> grade student, not all always in the classroom at the same time. There would have been two 2<sup>nd</sup> graders, for a total of 5 children, had Student enrolled in the District. More students could be identified and join the class if found to need learning support services as the school year progresses. (N.T. pp. 136, 137, 140, 141)
24. In the learning support class, students are divided into flexible small groups or provided individual reading instruction based upon their levels and areas of need, which can change during the school year. An instructional aide assists the teacher with the guided practice aspect of the reading instruction. (N.T. pp. 136, 149)

25. The District's elementary level supervisor of special education is primarily responsible for assuring that the SRA program is implemented with fidelity throughout the school year and fulfills that responsibility through weekly observations and feedback to the special education teachers. (N.T. pp. 112, 118, 142, 146, 147)
26. Parents rejected the District's proposed IEP based upon their belief that Student would not make progress with the District's proposed services, and that the District's proposal did not effectively address Student's learning disabilities. Parents also indicated their intention to seek tuition reimbursement for the private school in which Student was enrolled. (N.T. pp. 42, 44, 50, 51, 53, 55, 68, 69, 71, 108; S-5, p. 3)

### **DISCUSSION AND CONCLUSIONS OF LAW**

The dispute between the parties in this case centers on whether the District has proposed a program of reading instruction that will meet the needs arising from Student's identified learning disabilities, and can effectively remediate the effects of those disabilities. The IDEA legal issues underlying the parties' dispute are the extent to which the parents of an eligible student may determine the details of the instruction provided as special education services and obtain a private school education at public expense when they reject the responsible school district's proposed IEP based upon a dispute over educational methods/instructional programs.

Parents in this case understandably and legitimately want to assure that Student is provided with sufficient, appropriate educational services to overcome the difficulties and deficits that interfere with Student's ability to fully develop and use reading skills essential for success in school and beyond. Nevertheless, neither Student's right to a free, appropriate public education (FAPE), nor Parents' independent right to participate in developing an appropriate program and placement for Student extend to prescribing the specific type of reading instruction Student will receive in the public school. It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011); *J.E. v. Boyertown ASD*, 2011 WL 476537 at \*4 (E.D. Pa. 2011) ("Parents do not have a

right to compel a school district to provide a specific program or employ a specific methodology in educating a student.”)

Moreover, in this case, the facts developed at the due process hearing, as well as the legal standards which must be applied to Parents’ claim do not support a decision in Parents’ favor.

#### A. Factual Issues

The record establishes that before Parents contacted the District with the results of the IU-contracted evaluation that identified Student’s specific learning disabilities in reading, they were convinced that Student needs instruction with the Wilson reading program in order to make appropriate progress in developing and applying reading skills. (FF 10, 11, 15, 16, 26; N.T. pp. 44, 46, 51—54, 68) The record also establishes that by the time Parents met with District staff, they had already decided to reject a public school placement for the remainder of the 2010/2011 school year because the District told them that it does not provide Wilson reading instruction. (N.T. pp. 85, 86)(“Well they told us that they didn’t offer Orton-Gillingham Wilson. And that was their recommendation. So that’s why we moved him to the private school.” P. 85, 1 4—7)

Parents’ position that Wilson reading instruction is essential, *i.e.*, the only program that will result in Student’s successful acquisition of reading skills is, however, based largely upon their interpretation of the November 2010 evaluation report in light of information subsequently gathered via internet research and provided by the private school in which they enrolled Student for the second half of the 2010/2011 school year. (N.T. pp. 44, 51—54, 73, 74; HO-1, pp. 4, 5) Careful reading of the recommendations in the November 2010 evaluation report establishes that the evaluator did not actually state that Student needs instruction with an Orton-Gillingham type of reading program, much less with the Wilson Reading System. Rather, although the evaluator noted that an Orton-Gillingham program would likely be effective, she concluded only that Student needs direct, explicit and systematic instruction in reading and writing with opportunities

for drill and practice. (FF 13, 14, 15) The only actual recommendation for Orton-Gillingham instruction was directed to Parents, suggesting a specific type of tutor in the event Student remained in the parochial school where a special education program was not available. (FF 14)

Moreover, contrary to Parents' arguments, the District did propose a program that meets the conclusions and recommendations of the November 2010 evaluation report, that is based upon Orton-Gillingham principles and that actually exceeds the amount of daily instruction the evaluator believed necessary for effective remediation of Student's deficits. (FF 13, 19, 20, 21)

As noted above, Parents' conviction that Wilson Reading is essential for Student to make progress in reading is based on their own subjective conclusions. The District's witnesses testified convincingly that they can provide the type of instruction Student needs in reading and writing. It must be noted, also, that with no history of Student having received educational services in the District, and in light of the applicable legal standards discussed below, there is no rational factual basis for concluding that the District would be unable to provide Student with appropriate reading instruction. This isn't a situation in which the District provided services that did not result in sufficient progress. Here, the District had no opportunity to provide reading or any other type of instruction to permit a comparison of Student's progress with two different programs, or even to challenge the District's evidence that it can and would provide a reading program that meets Student's need for direct, explicit, systematic multi-sensory instruction. In light of the relevant legal standards and the evidence in the record concerning the proposed instruction, which is based upon the District's resources, knowledge and extensive experience in providing special education services to students with language-based specific learning disabilities, it would be factually unsupportable to conclude that the District cannot appropriately instruct Student in reading. Neither the diagnosis of Dyslexia, nor any other label, controls the determination whether the District can provide appropriate services. That determination is based



upon the Student's identified needs and the evidence of how the District proposes to meet those needs.

B. Legal Considerations

With respect to tuition reimbursement, the IDEA provides as follows:

- (i) In General -- Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
- (ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court of hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. §1412(a)(10)(C)(ii).

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993) , the U.S. Supreme Court developed a three part test for determining whether parents are entitled to reimbursement from a school district for a unilaterally selected private school.

The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

Here, the decision to deny Parents' claim for tuition reimbursement rests entirely upon the first criterion. As discussed above, Parents have provided no evidence to suggest that the District has not fulfilled its obligation to offer an appropriate program and placement, or that the District's proposed program for reading instruction, as delivered, would not appropriately meet Student's needs. Parents have the obligation to prove that the District has not offered, and in this case, cannot provide an appropriate program for Student.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof, specifically the burden of persuasion. As explained during the hearing officer's opening remarks at the due process hearing, if the evidence at the hearing is evenly balanced, the decision must be in favor of the District. N.T. p. 15) Since Parents filed the complaint, it was their obligation to prove the first part of their claim by producing evidence that the District's proposal is not appropriate for Student. As in other civil cases, Pennsylvania federal courts have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence, also explained during opening remarks at the hearing with the analogy of a balance scale. (N.T. p. 15) *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

To meet the legal standard, Parents needed to produce relevant and admissible evidence that the District could not meet its obligations under the IDEA to provide Student with an IEP, including appropriate goals, specially designed instruction and related services reasonably likely to assure that Student would make meaningful progress. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> Cir. 2009). "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d

238 (3<sup>rd</sup> Cir. 1999). *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his/her program is not likely to produce progress. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, a school district is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995).

Here, as discussed in detail above, the evidence was far from equally balanced. Parents had no convincing evidence to support their belief that there is only one type of reading instruction that can meet the legal standard for providing FAPE to their child, including the evaluation report on which they relied. Moreover, as also noted above, there is no provision in the legal standards for concluding that the District’s proposal is inappropriate because the District has not offered the program Parents requested, even if there were evidence that the Parents’ proposal is better and would assure a greater level of progress, as long as there is evidence that the District’s program is reasonably likely to produce meaningful progress.

Because Parents were unable to establish the first element of a claim for tuition reimbursement, there is no reason to continue with an evaluation of the appropriateness of Parents’ private school placement or a weighing of the equities in this matter. The record concerning the District’s proposal and the reasons Parent rejected it clearly establishes that

Parents did not prove that the District should be required to fund Student's private school placement.<sup>2</sup>

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents claims are **DENIED**. The School District is not required to either reimburse Parents for private school tuition paid during the 2010/2011 school year or pay Student's private school tuition for the current school year.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

September 26, 2011

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

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<sup>2</sup> It should be noted, however, that there may be two different private schools involved. Parents' closing argument suggests that Student is enrolled in a different private school than the school Student attended from the middle to the end of the 2010/2011 school year. (September 19 Attachment at p. 3) If that is the case, Parents clearly could not prevail on the second element of a tuition reimbursement claim for the current school year, since no evidence was presented at the hearing concerning the program Student is currently receiving.

In addition, it should be noted that there would be no basis for awarding tuition reimbursement for anything more than a few weeks during the 2010/2011 school year, since the District did not identify Student as IDEA eligible and offer an IEP until mid-April 2011. (S-5) Finally, the equities in this case would not support an award of tuition reimbursement for the 2010/2011 school year, since the District had recognized Student's need for a reading program delivered in the learning support setting in its 2009 evaluation and was prepared to offer special education services for the entire 2010/2011 school year if Parents had enrolled Student in the District instead of the parochial school. See FF 6, 7, 16; S-12, pp.15, 16.