

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

Child's Name: J. V.
ODR File No. 16887-15-16 KE
Date of Birth: [redacted]

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Downingtown Area School District
540 Trestle Place
Downingtown, PA 19335

Dates of Hearing:

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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12/14/2015, 3/29/2016, 3/30/2016,
4/26/2016

May 20, 2016

May 30, 2016

Cathy A. Skidmore, M.Ed., J.D.
Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a preteen, late elementary school-aged student in the Downingtown Area School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973³ and the Americans with Disabilities Act (ADA),⁴ as well as the federal and state regulations implementing those statutes, seeking various remedies.

The case proceeded to a due process hearing,⁵ and the matter proceeded with the first session devoted to the scope of the claims that the Parents sought to pursue based on the IDEA statute of limitations. Following a conclusion that the Parents' complaint was timely filed based on the "knew or should have known" date,⁶ the hearing addressed the special education program implemented and offered from the start of the 2012-13 school year forward. The Parents sought to establish that the District failed to provide Student with FAPE while Student attended District schools, and further failed to offer an appropriate program for the 2015-16 school year during which Student attended a private school. Remedies pursued included compensatory education

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ 42 U.S.C. §§ 12101-12213.

⁵ References to the record shall be as follows: Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the number, School District Exhibits (S-) followed by the number, and Hearing Officer Exhibits (HO-) followed by the number. References to duplicate exhibits may be made to one or the other or both; and, the specific references in the closing arguments were fully considered even if citation is not made to that party's version of an exhibit. The word Parents in the plural will be used where it appears that one or the other was acting on behalf of both Parents.

⁶ HO-6, HO-7. The hearing officer concluded that the KOSHK date was June 4, 2014 for all claims. HO-7 at 24. This case was subsequently reassigned to this hearing officer for consideration of the substantive issues; and, the District's Motion to Vacate the ruling of the original hearing officer on the statute of limitations was denied. HO-11.

and tuition reimbursement. The District maintained that its special education program, as offered and implemented, was appropriate for Student, and that no relief was warranted.

For the reasons set forth below, the Parents will prevail on most, but not all, of their claims.

ISSUES

1. Whether or not the District's special education programs for Student were appropriate during the 2012-13, 2013-14, and 2014-15 school years, as well as the summers of 2013 and 2014;
2. If any of those programs was not appropriate, is Student entitled to compensatory education and, if so, in what form and amount;
3. If any of those programs was not appropriate, are the Parents entitled to reimbursement for certain expenditures;
4. Whether or not the District's special education program for Student as proposed for the 2015-16 school year was appropriate;
5. If that program was not appropriate, are Student and the Parents entitled to reimbursement for tuition and related expenses for the private school placement Student attended during the 2015-16 school year; and
6. Are the Parents entitled to reimbursement for an Independent Educational Evaluation?

FINDINGS OF FACT

1. Student is a preteen, late elementary school-aged student who has resided in the District throughout the time period in question. Student is eligible for special education under the IDEA and is a student with a disability under Section 504. (N.T. 244-45)
2. Student entered kindergarten in the District, and was in first grade during the 2011-12 school year. Approximately halfway through the first grade year, Student was provided with Instructional Support Team (IST) services for reading, and continued to exhibit difficulty with sight word vocabulary and decoding at the conclusion of that intervention, showing no gains in oral reading fluency. (N.T. 41, 50, 259-60, 263, 267-68; P-3 p. 1; S-1 pp. 8-9, 37-38)
3. As a Response to Instruction and Intervention (RTII) initiative, the District utilizes benchmark assessments of all of its students, including Aimsweb and Fountas and

Pinnell, to identify students who are struggling with reading skills. Students are screened three times each year with Aimsweb benchmarks, with those scoring below grade level falling into Tier 2 and those well below grade level falling into Tier 3. Progress is evaluated according to a schedule, with program changes made based solely on the progress data collected through the RTII probes. (N.T. 795-96, 831, 841-42; P-29 p. 1)

4. The District initiated a special education evaluation of Student in April 2012, providing the Parents with a Permission to Evaluate form (PTE). The PTE noted academic concerns and off-task behavior. The Parents provided their consent on April 30, 2012. (N.T. 42, 351; S-1 pp. 1-2, 6)

2012-13 School Year (Second Grade)

5. The District conducted the evaluation and issued an Evaluation Report (ER) on September 12, 2012. A meeting convened in October 2012 to discuss the results of the ER. (N.T. 46, 48; P-3 pp. 1-30; S-1 pp. 6-36, S-3 pp. 1-2)
6. The ER included input from the Parents who noted that reading was difficult for Student. A thirty minute classroom observation by the District school psychologist reflected that Student was reportedly on task approximately 53% of the time, compared to a peer who was on task 88% of the time. A twenty-five minute observation by an IST teacher similarly reflected off-task behavior. Teachers reported needs for small group instruction in all areas of language arts, mathematics reasoning, and mathematics computation; they also noted sight word vocabulary, attention, following directions, task completion, and self-regulation as weaknesses. (P-3; S-1 pp. 6-38)
7. Curriculum based and IST assessments were also provided in the ER. Student's instructional reading level in September 2012 was reported as Level D (Fountas and Pinnell), with Aimsweb Oral Reading Fluency at 14 words per minute, below the 10th percentile. (P-3 pp. 3-4; S-1 pp. 8-9)
8. The District school psychologist conducted a number of assessments for the ER, noting Student's inconsistent attention, concentration, and self-regulation throughout. Assessments were of cognitive, academic achievement, social/emotional and behavioral functioning. (P-3; S-1)
9. Student's cognitive ability (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)) reflected uneven scores across Indices and variable scores among subtests. Student performed in the high average range on the Verbal Comprehension Index, with average range scores on the Perceptual Reasoning and Processing Speed Indices as well as on the General Ability Index (107) and Full Scale IQ (96). Student attained a below average score on the Working Memory Index. The GAI score was determined to reflect the best indicator of Student's intellectual functioning. Working memory, attention, and concentration were noted to be weaknesses. (P-3 pp. 5-6, 17; S-1 pp. 10-11, 23)
10. Academic achievement was assessed using the Wechsler Individual Achievement Test – Third Edition (WIAT III). Student obtained composite scores as follows: total reading in the well below average range; basic reading skills in the low/borderline range; reading

comprehension and fluency in the well below average range; written expression in the low/borderline range; and mathematics in the low average range. Listening comprehension was identified as a relative strength for Student. The District school psychologist included in the ER notations that Student had not made meaningful progress in the areas of basic reading skills, reading comprehension, written language expression, and mathematics reasoning and computation. (P-3 pp. 6-9, 21; S-1 pp. 11-14, 27-28, 30)

11. Assessment of Student's social/emotional/behavioral functioning was conducted through rating scales. On the Conners Rating Scales – Third Edition, Student's teacher reflected clinically significant concerns with inattention, hyperactivity/impulsivity, defiance/aggression, oppositional defiant disorder, emotional lability, and Attention Deficit Hyperactivity Disorder (ADHD); with at-risk concerns for learning problems, executive functioning, and peer relations. The Parents did not report clinically significant concerns but their scales did rate Student as at-risk for inattention, learning problems, and emotional lability. On the Behavior Assessment System for Children – Second Edition (BASC-2), Student's Parents' scales did not reflect any concerns; however, the teacher scales indicated clinically significant concerns with anxiety and depression; and at-risk concerns for hyperactivity, somatization, attention problems, learning problems, emotional self-control, executive functioning, and negative emotionality. P-3 pp. 9-11, 25-30; (S-1 pp. 14-16, 31-36)
12. The ER made a determination that Student was eligible for special education under the IDEA classification of specific learning disability, with deficits noted in basic reading, reading fluency, reading comprehension, written language, mathematics computations, and mathematics problem solving. The ER deferred identification of ADHD but recommended future consideration by the IEP team and evaluation by Student's pediatrician. (P-3 pp. 11-13; S-17 pp. 16-18)
13. Recommendations in the ER for Student's IEP included preferential seating; oral reading of written directions with repetition as needed; support for organizational skills; strategies to assist with working memory, work completion, and attention; test and assignment accommodations; review and reinforcement; use of visual and manipulative instructional aids; and positive reinforcement. (P-3 pp. 12-13; S-1 pp. 17-18)
14. A meeting of Student's Individualized Education Program (IEP) team convened on October 9, 2012, the same date that the participants reviewed the ER. (N.T. 52, 96, 269, 352-54; S-3 pp. 1-2)
15. The October 2012 IEP summarized Student's present levels of academic achievement and functional performance based on the ER. Listening comprehension was reported as a strength, while needs were identified in the areas of language arts and mathematics (basic reading, reading fluency, reading comprehension, written language, mathematics computation, and mathematics problem solving), as well as positive reinforcement and specially designed instruction to address emotional manifestations, inattention, impulsivity, hyperactivity, and task orientation and completion. (S-3 pp. 16-17)

16. Annual goals addressed reading comprehension at an end of first grade level (answering literal and inferential questions); oral reading fluency (from a first to second grade level); sight word reading; spelling at an end of first grade level; written expression (writing complete sentences with prompts and graphic organizers using several appropriate conventions); and mathematics problem solving and fluency. Program modifications and specially designed instruction included direct, explicit, systematic approaches to reading, writing, and spelling instructions; preferential seating; use of manipulatives and visual aids; chunking of tasks and directions; checks for understanding and accuracy; directions and text read aloud; repetition of instructions; strategies to highlight key details; positive reinforcement; and test and written assignment accommodations. (S-3)
17. The October 2012 IEP proposed supplemental learning support, with instruction outside of regular education for language arts and mathematics instruction. The Parents approved the Notice of Recommended Educational Placement (NOREP) accompanying the IEP of the same date. (N.T. 57-58, 269; S-3 pp. 28-30, 35-38)
18. Student's IEP was revised in May 2013, without a meeting by agreement, to reflect that Student was eligible for ESY. The program proposed was two hours of academic support two days per week, and the Parents approved the placement while noting a preplanned vacation for a part of the period of time. Student's oral reading fluency goal was targeted for ESY instruction. (P-13 pp. 1-2, 28-31; S-6 pp. 7-8, 34-37, 45-47)
19. Progress monitoring on Student's IEP goals from October 2012 to October 2013 provided some anecdotal summaries without reference to grade level (e.g., spelling); various reading comprehension probes at first and second grade levels; Aimsweb data collection on reading and mathematics probes without comparison results; and additional benchmark assessment results that lacked baselines. Student's words correct per minute reflected an upward trajectory over the course of the 2012-13 school year, but only at a first grade level (with second grade level the goal). Student did read more sight words in the second trimester. (P-26; S-4)⁷
20. Student's second grade report card reflected a superior science grade, with need for improvement noted in all areas of mathematics, reading, and writing. Student's grades in special classes were proficient to superior. (S-7)
21. In June 2013, the Parents arranged for a tutor to work with Student on reading skills for the summer. The tutor was a reading specialist in a neighboring school district, meeting Student approximately once per week. She continued to tutor Student at the time of the due process hearing, at a cost of approximately \$4,350 during the time Student was enrolled in the District. (N.T. 60-61, 63, 83, 104-05, 271-72, 280, 370; P-9; S-56)
22. Student attended the District's Extended School Year (ESY) program during the summer of 2013, but only for a portion of the time that program was offered because of the scheduled vacation. The Parents did not find the ESY program beneficial for Student

⁷ For reasons not apparent on the record, the 2012-13 progress monitoring appears to include information from June 2014 (P-26) and September 2015 (S-4), respectively, that may instead relate to May 2013. The later dates likely reflect the month and year in which the reports were generated.

because they believed it to be more like camp than instruction. (N.T. 66-67, 75-76, 82, 273-74, 277-78, 365-66; P-27)

2013-14 School Year (Third Grade)

23. The Parents completed an input form in the fall of 2013. They saw Student's academic and behavioral needs to relate to reading fluency, vocabulary, and decoding, and were not aware of any behavior concerns at school. (N.T. 77-78; S-9 pp. 4-5)
24. A meeting convened in October 2013 to discuss Student's IEP. This document provided present levels of academic achievement and functional performance. Progress on IEP goals was reported in more detail than in the progress monitoring from the 2012-13 school year (P-26; S-4) and included September 2013 performance. Student had improved sight word fluency; oral reading fluency appeared to show an upward trajectory but inaccurately indicated that data was at a second grade level (*see* S-4 pp. 5-6, 8). Performance on the remaining goals is unclear because, as in the progress monitoring, the information provided did not relate to the goals. (N.T. 181-82; S-9)
25. In curriculum based measures, updated Fountas and Pinnell results from September 2013 indicated that Student was instructional at Level I (from Level D one year prior). Aimsweb results did not reflect performance near the benchmarks at any grade level. On an Informal Reading Inventory (IRI) also from September 2013, Student was instructional at the primer level on graded word lists, while reading comprehension was at a first grade instructional level (with listening comprehension instructional at a second grade level). (S-9 pp. 10-11, 14-15)
26. Student's needs mirrored the previous IEP. Annual goals addressed Aimsweb Mathematics Concepts and Application scores; reading comprehension (from second to third grade level); oral reading fluency at a third grade level; spelling to "increase" to a third grade level; and written expression (improving conventions at a third grade based on a rubric). The sight word goal was removed. Program modifications and specially designed instruction were similar to the previous IEP with the addition of direct, explicit, sequential mathematics instruction; check of the assignment book for completeness; study guides and test scores sent home; and third grade mathematics pre-tests to determine needs by chapter. Supplemental learning support remained the placement, continuing instruction outside of regular education for language arts and mathematics. The Parents approved the accompanying NOREP. (S-9)
27. Student's learning support teacher left the District abruptly in February 2014. The District shared concerns with the Parents about that teacher and her data collection during the 2013-14 school year. (N.T. 113-14, 119-20, 132-35, 185-86; HO-6 p. 7 ¶ 22; P-37 p. 1; S-19 p. 2)
28. An occupational therapy screen was conducted in February 2014 at the request of the Parents. The occupational therapist recommended monitoring of fine motor skills with some suggestions for improving control, grasp, and legibility. (P-37 pp. 26-27; S-16 pp. 1-3, S-19 pp. 3-4)

29. The Parents asked for administration of the Comprehensive Test of Phonological Processing (CTOPP) for Student in March of 2014. The District responded with a Permission to Reevaluate (PTRE) form, which the Parents signed. The PTRE proposed a review of records in addition to assessment of academic performance (reading and written expression skills) together with the CTOPP. The Parents provided consent. (N.T. 383-84; S-15 pp. 1-16)
30. Student's IEP was revised in April 2014, without a meeting by agreement, to reflect a change in the mathematics program. Student had been participating in regular education mathematics with performance commensurate with that of peers. The provision of specially designed instruction for mathematics was removed, and the revised IEP reflected regular education placement for mathematics. The Parents approved the accompanying NOREP. (N.T. 287-89; P-16 pp. 1-3, 26, 30; S-10 pp. 1-4, 28, 32, 39-42)
31. Student's IEP was revised a second time in April 2014, again without a meeting by agreement, to reflect Student's eligibility for ESY. Academic support was proposed for three hours per day, four days per week. Goals targeted for ESY were reading comprehension, oral reading fluency, and written expression. The Parents requested an informal meeting and sought additional information regarding the proposed ESY services. (S-11 pp. 4-5, 32-34, 36)
32. The resulting Reevaluation Report (RR) included Parent input, and a significant portion of the 2012 ER was included. Current curriculum-based measurements and progress on IEP goals was also summarized, with variable performance in the areas of reading comprehension and reading fluency. A Qualitative Reading Inventory (QRI) reflected that Student was instructional at the first grade reading level on word lists, with instructional levels in reading fluency and reading comprehension in most passages beyond the first level narrative passage for most. (P-2; S-15)
33. Teacher input into the RR indicated that mathematics problem solving was a strength and that Student performed well in special classes, with needs noted in the areas of reading and written expression, as well as for attention, focus, and task completion. (P-2 pp. 10-11; S-15 pp. 26-27)
34. A new administration of a number of subtests of the WIAT-III revealed continued weaknesses in the areas of basic reading skills and written expression, with some variability among subtests. Comparison of the WIAT-III scores from 2012 reflected growth in all areas compared to same-age peers, with standard scores increasing or remaining relatively stable; however, reading skills remained deficient except for comprehension, and there was no essay composition score from the September 2012 administration. Student's performance on the Second Edition of the CTOPP (CTOPP-2) revealed average to below average scores and noted weaknesses in phonological processing skills, suggesting repetition during decoding instruction. (P-2 pp. 13-17, 24; S-15 pp. 29-33)
35. The RR concluded that Student remained eligible for special education as a student with a specific learning disability with deficits in the areas of basic reading skills including

decoding, oral reading fluency, and written expression. Recommendations included specially designed instruction in the areas of disability and support in the regular education environment. (P-2 pp. 17-19; S-15 pp. 33-35)

36. A follow-up occupational therapy screening was conducted in early April 2014. Student's fine motor, perceptual-motor, and sensory processing skills were determined to be functional at school with no need for additional follow-up. (S-16)
37. A meeting convened in June 2014 to review the RR. Student's IEP was also revised at that time for Student's entry into fourth grade the following school year. This IEP included present levels from the most recent RR with the progress monitoring on reading comprehension (variable progress on a second grade level), reading fluency (variable progress on a second grade level), and spelling goals (unknown grade level). Identified needs remained reading fluency, reading decoding, and written expression. (N.T. 127-29, 184-85, 386; S-17)
38. The June 2014 IEP contained goals for reading comprehension (from a third to fourth grade level); oral reading fluency (at a third grade level but with higher expectations on the words read correct per minute from the prior IEPs); and written expression (improving convention scores at a fourth grade level based on a rubric). The spelling and mathematics concepts and applications goals were removed. Program modifications and specially designed instruction remained essentially the same with the addition of 100 minutes of daily direct, explicit, systematic, phonemic-phonetic, word analytic instruction in decoding, encoding, fluency, vocabulary, and reading comprehension strategies. ESY goals were updated. Student's proposed program continued to be supplemental learning support with instruction outside the regular education environment for 145 minutes each day for reading and writing instruction. The Parents did not approve the NOREP, citing concerns with the proposal for ESY. (S-17)
39. Progress monitoring on Student's IEP goals from October 2013 to October 2014 noted Student's participation in regular education mathematics class with success. Reading comprehension progress was reflected using different instruments each quarter, with mastery at a third grade level using one such measure. Student's words correct per minute reflected an upward trajectory over the course of the 2013-14 school year but at a second grade level. Spelling progress was noted but also at a second grade level; and writing progress notes demonstrated variable performance with concerning behaviors [redacted] exhibited. (P-28 pp. 10-14)
40. In a discussion about ESY for the summer of 2014, the District proposed one-on-one tutoring in reading for one hour each week. The Parents were not satisfied with the ESY program that was offered, and did not approve the NOREP. Student attended a private school summer program at a cost of approximately \$1,700. The Parents believed the private school summer program was beneficial for Student. (N.T. 160-64, 282-83, 295-96, 302; P-37 p. 6; S-17 pp. 41-44)

41. Student's report card for the 2013-14 school year reflected all A and B grades in science, social studies, and special classes. In performance, Student needed improvement in using time productively, listening actively, and in organizational skills. (P-28 pp. 1-6; S-18)
42. Student achieved a below basic score in reading on the Pennsylvania System of School Assessment (PSSA) in the spring of 2014; and achieved a proficient score on the mathematics portion. (S-13)

2014-15 School Year (Fourth Grade)

43. The Parents requested Student's education records from a District administrator in June 2014. That administrator passed away in September 2014 and was replaced with an interim principal. Following a conversation with a different administrator, the District provided the records in January 2015. (N.T. 137, 152-53, 298, 315-16, 390-91; S-37 p. 16)
44. Student began to exhibit behaviors at home in the fall of 2014 that the Parents had not previously observed, particularly during homework: making self-deprecating remarks, pulling at Student's hair and face, wringing hands, crying, and hitting Student's self. By that point in time, Student often would spend three hours on homework. (N.T. 302-04, 640-41, 643-48, 664-65, 668-70; S-37 pp. 1-2)
45. Student similarly exhibited behaviors at school in the fall of 2014: [redacted]. Student also continued to exhibit inattention and lack of focus. (N.T. 304, 668-70; S-36 pp. 1-5)
46. Student attended Morning Math, a regular education intervention for students who are recommended by their teachers for review, preteaching, reteaching, and practice. Student attended 25% of the Morning Math sessions during the fourth grade school year. (N.T. 780-81; S-35)
47. An IEP meeting convened in October 2014 at the Parents' request to discuss Student's behaviors. The Parents also discussed Student's difficulties with written expression and their concern with Student's self-esteem. The teacher suggested that Student's tutor might work with Student in that area, and she soon thereafter began to do so. (N.T. 280-82, 305-11; P-21; S-20, S-21 pp. 18)
48. The interim principal was replaced in December 2014 with a second interim principal. (N.T. 311-12, 770-71)
49. Another IEP meeting convened in January 2015. At that time, the Parents requested that new QRI and IRI assessments be conducted by a reading specialist, and asked that Student be exempted from the PSSA that year. They again shared concerns with writing difficulties. The District proposed a Functional Behavior Assessment (FBA). The Parents did not approve the accompanying NOREP and requested another meeting. (N.T. 318-19, 390, 778-79; S-21 pp. 5, 20-21, 47, S-37 pp. 14-15, 20-21)
50. A meeting convened in March 2015. The reading specialist who conducted the QRI and IRI attended to explain the recent reading testing results. The QRI reflected that Student

was instructional at a second grade level on word lists, with instructional levels in reading fluency and reading comprehension at the second level in most passages with lookbacks; a Fountas and Pinnell assessment had Student instructional at Level K. A Scholastic Phonics Inventory revealed relatively stagnant scores in all areas between September 2014 and March 2015. ESY services were also discussed, as well as the District recommendations for an FBA and a referral for occupational therapy. The Parents did not approve the NOREP, indicating in writing their disagreement with the proposal for ESY, the FBA, and the occupational therapy referral. (N.T. 321-22, 784-88; S-22 pp. 4-5, 8-9, 13-16, 28, 42, 51-53)

51. The Parents were concerned when they were informed at the March 2015 meeting that Student would continue using System 44 for reading instruction. The Parents sought more information about that program at that time. (N.T. 317-18, 321, 326-27, 388-89; S-37 p. 24)
52. The implementation of the System 44 reading program was not effective for Student. (N.T. 505-06)
53. The IEP team met and discussed conducting an FBA again in April 2015, as well as the occupational therapy referral and ESY. The Parents asked that the FBA be conducted by the local IU, but ultimately withdrew consent for that FBA because they believed Student's behaviors were due to an inability to complete work rather than refusal. The Parents approved the accompanying NOREP but stated their disagreement with the use of System 44 to teach Student reading. (N.T. 330-32, 337-38, 393-94, 396, 435, 650-52, 659-60, 663, 777-79; P-15 pp. 1-2, 22, 36-37; P-36 pp. 25-9; S-24 pp. 1-2, 22, 36-37, 45-48, S-38 p. 1)
54. An annual IEP meeting convened in May 2015. The team discussed Student's Lexile scores as well as performance on other reading measures, and ESY. (N.T. 342-43, 791-800; S-25)
55. The May 2015 IEP provided current information on Student's present levels using a variety of measures. Progress on IEP goals was similarly provided: on the reading comprehension goal, probes were reported for Read Naturally, the Aimsweb MAZE at Level 3, Reading Counts, and the Scholastic Reading Inventory, with the latter reflecting Lexile scores. Oral reading fluency was still monitored at the second grade level with widely varying scores. Scores on writing assignments were provided through reference to a scoring rubric. (S-25)
56. The May 2015 IEP identified Student's needs as reading fluency, reading decoding, reading comprehension, spelling, written expression, and strategies to address work completion. Annual goals addressed reading comprehension (achieving scores on a cloze reading passage at a fourth grade level, and on passage assessments at a fourth grade level); oral reading fluency (increasing words correct per minute going from a second to third grade level); and written expression (improving organization and style based on a rubric, and improving conventions based on a rubric). Program modifications and specially designed instruction remained essentially the same. ESY goals were updated

and reflect that all would be part of that program. Student's program continued as supplemental learning support with reading and writing instruction outside of the regular education environment for 165 minutes per day. The Parents did not approve the NOREP. (S-25)

57. The local IU completed the FBA. The behaviors targeted were work refusal; being off-task; noncompliance; and [redacted]. The FBA included a screening tool, review of records, interviews with staff and family, and direct observations. Writing tasks were identified as an antecedent for the behaviors of concern, which "always" occurred when Student was presented with such an assignment. Student engaged in the target behaviors during the observations particularly during writing activities. The hypothesis of the function of Student's behavior was that Student engaged in those behaviors when directed to complete tasks or to transition in order to obtain attention or escape tasks. A number of recommendations for addressing Student's behaviors: antecedent and consequence interventions, and support of executive functioning skills. Many of the suggestions relating to executive functioning skills were already part of Student's IEPs. (N.T. 337-38; S-38 pp. 2-14 (*compare with S-25 pp. 31-33*))
58. An informal meeting convened in June 2015 at the Parents' request. The participants discussed Student's progress, ESY, the FBA, a recent IRI and the occupational therapy evaluation that had been completed, with revisions to the IEP to include the new information. The IRI revealed that Student was frustrational at level 4 on word lists and instructional on passages at levels 2 and 3. The occupational therapy evaluation revealed no concerns other than writing speed that could be addressed through specially designed instruction (extended time). Parents proposed Wilson reading instruction during the summer, and the District proposed tutoring for two hours each week by a teacher who had been trained in that program. The Parents did not respond whether they were in favor of that proposal or not, but disapproved the NOREP. (N.T. 800-03, 809-10; P-36 pp. 1-2; S-25 pp. 49-52, S-26, S-28)
59. Between August 2014 and June 2015, Student's reading performance was reported in the various IEPs based on the following.

Scholastic Phonics Inventory (SPI):

Letter/Names Accuracy	91-100%
Sight Word Accuracy	47-53%
Sight Word Fluency	10-20%
Nonsense Word Accuracy	53-93%
Nonsense Word Fluency	13%

Scholastic Reading Inventory (SRI): Lexile Levels

Beginning Reader (no numerical value) in September 2014 to 463 in May 2015 (low second grade level)

System 44: Cumulative Performance (By March 2015, 24 of 160 topics complete)

Decoding Accuracy	90%
Decoding Fluency	81%
Spelling	83%
Comprehension	94%

(P-30 p. 1; S-30, S-31)

60. Progress monitoring on Student's IEP goals from October 2014 to June 2015 provided results of SPI, SRI, and System 44 probes but no data matching the goal in reading comprehension. Progress on Student's oral reading fluency reflected that Student had not met the benchmark for second grade level, and had not moved onto the third grade criteria in the goal. Student achieved stable scores on the writing rubrics, not overall improvement. (S-32)
61. Student's report card for the 2014-15 school year reflected all A and B grades in science, social studies, and special classes. In performance, Student needed improvement in using time productively. (P-30 pp. 2-7; S-33)
62. Student did not attend ESY during the summer of 2015. (S-29)

2015-16 School Year (Fifth Grade)

63. On August 20, 2015, the Parents provided notice to the District of their intention to place Student in private school if no adequate offer of FAPE were made. One week later, the Parents also shared the IEE report with the District. (N.T. 246-47, 338-39, 408-09, 653; S-45, S-47)
64. Student did not attend school at the District the first few days of the 2015-16 school year. The IEP team had not yet finalized Student's IEP at the time, and the Parents did not want Student to begin the school year at the District then possibly move to a different school within a matter of weeks. (N.T. 420-21, 673)
65. The IEP meeting convened on September 3, 2015. The team reviewed the FBA and the IEP, but did not discuss the IEE. Revisions made to the IEP, in addition to goals and specially designed instruction, were to the special considerations section to note that Student did exhibit behaviors that impeded his/her learning or that of others; to the present levels section to add the results of the IRI in June 2015, the occupational therapy screening; and the hypothesis from the FBA. Parental concerns were whether the FBA accurately determined whether Student was refusing to complete tasks or was incapable of doing so. (N.T. 426, 649, 656-58, 661-62, 813-15; P-18; S-48, S-49, S-50)
66. Two new goals were added to the September IEP, both behavioral: one to use coping skills when experiencing anxiety or frustration, and one for focus/attention and task completion. New program modifications/specially designed instruction were initiation of

the SETT process⁸ to determine assistive technology needs; pre-teaching and reteaching of mathematics concepts; itinerant emotional support; and a Positive Behavior Support Plan (PBSP). The PBSP included the same behavior goals as in the body of the IEP, with antecedent strategies from the FBA: a preference assessment to identify reinforcers to be added to a menu of rewards, and a task list/visual schedule with encouragement to motivate Student to begin and complete tasks. Consequences and executive functioning support largely derived from the FBA were also part of the PBSP; consequences for exhibiting the behaviors of concern were ignoring the behavior; requiring work completion at another time; withholding of rewards; and communication with the Parents. Many of the program modifications/items of specially designed instruction from the body of the IEP were included in the PBSP. (P-18; S-50)

67. The September 2015 IEP proposed to continue supplemental learning support, with participation outside of the regular education environment for 165 minutes per day for reading and writing instruction, 30 minutes per day for mathematics support, and 30 minutes per cycle for emotional support. (P-18 pp. 39-41; S-50 pp. 39-41)
68. The Wilson Reading program was discussed to some extent at the September 2015 IEP meeting. The District had arranged for one of its teachers who was Wilson certified to begin working with Student on the first day of school. (N.T. 813-14, 816, 827)
69. The Parents disapproved the NOREP on September 9, 2015, and Student was withdrawn from the District effective September 15, 2015. (N.T. 345, 438; S-50 pp. 65-68, S-51)

Independent Educational Evaluation

70. The Parents requested an Independent Educational Evaluation (IEE) in April 2015. The District refused the Parents' IEE request in early May 2015 through a NOREP that the Parents did not approve. In early July 2015, the District agreed to fund an IEE with certain conditions, and sent the Parents a list of evaluators. The Parents contacted a few of those named, but their chosen private evaluator was not on the list and they ultimately proceeded with that evaluation and notified the District. (N.T. 248, 250, 252-53, 257-58, 404-07, 804-08, 818, 825; P-36 pp. 1-2, 17, 21; S-26, S-39; HO-16)
71. The independent evaluator, a nationally certified school psychologist licensed in the Commonwealth of Pennsylvania, evaluated Student in July 2015, conducting all testing of Student in one day.⁹ Assessments of Student's cognitive, achievement, and social/emotional/behavioral functioning, among others, were obtained. The independent evaluator reviewed Student's educational records provided by the Parents prior to conducting the assessments. (N.T. 403-04, 466-69, 528-29, 536-37, 554-56; P-1, P-32)
72. Student presented with significant distractibility and inattention when completing portions of the IEE assessments, particularly with writing tasks and more difficult

⁸ The process guides assistive technology decisions focusing on the Student, Environment, Tasks, and Tools.

⁹ It is this hearing officer's belief and recollection that the phrase "writing skills" at N.T. 555 L 21 should read "rating scales."

mathematics problems. However, the independent evaluator did not believe that Student's difficulties impacted the validity of the results. (N.T. 541-47; P-1 pp. 10-11; S-40 p. 9-11, S-60 p. 38)

73. Cognitively, Student performed well on portions of the Wechsler Intelligence Scales for Children – Fifth Edition (WISC-V), achieving an average Full Scale IQ and high average General Ability Index score. Student's scores were much stronger on the verbal comprehension and visual spatial subtests than on the working memory and processing speed subtests, with fluid reasoning in the average range. (N.T. 470-72; P-1 pp. 11-12)
74. On the WIAT-III, Student's total achievement score was in the below average range (5th percentile). Student exhibited significant difficulty with writing tasks, and did not write anything for the essay composition subtest. Student also had difficulty completing mathematics problems. The WIAT-III results reflected a strength in listening comprehension, but below average performance in basic reading skills, reading comprehension, and reading fluency; below average performance on the mathematics composite and all subtests except numerical operations (low range); and very low to below average scores on the written expression subtests and on the written expression composite. (N.T. 535-36, 539-43, 575; P-1 pp. 20-23; S-60 p. 38)
75. The independent evaluator conducted a comparison of Student's WIAT-III scores from 2012 and 2014 together with the recent administration. Although the standard scores from 2014 demonstrated growth in all areas compared to 2012, Student's 2015 performance was only minimally better in most areas of reading; and, Student did not exhibit similar gains in the areas of reading comprehension and written expression. The independent evaluator concluded that Student did not perform as well as predicted based on Student's cognitive ability, with statistically significant weakness in the following areas: basic reading skills, phonetic decoding, reading fluency, reading comprehension, mathematics reasoning, mathematics calculation, fluency of math facts, spelling, and written expression. Listening comprehension remained a relative strength. (N.T. 478, 483, 486-89, 585-86; P-1 pp. 25-27)
76. Student achieved average to superior scores on assessments of receptive and expressive language; however, Student attained very low scores on tests of letter/number/sequence reversals, orthographic ability, and visual-motor integration. (N.T. 473-76; P-1 pp. 15-17)
77. Social/emotional/behavioral functioning assessment revealed difficulties from both parent and teacher ratings with inattention, learning problems, and executive functioning (Conners Third Edition); the teacher also reported difficulty with defiance/aggression and impulsivity. On the BASC-2, parent rating scales reflected clinically significant concerns with depression, while the teacher's rating scales reflected clinically significant concerns with anxiety; at-risk concerns were noted by the teacher in the areas of attention problems, depression, learning problems, adaptability, and study skills. (N.T. 489-90; P-1 pp. 23-25)

78. The independent evaluator determined that Student had dyslexia to a significant degree, and was functionally illiterate, concluding that Student's deficits in processing information were quite severe requiring intensive instruction that a private school would be better equipped to provide than a public school. The IEE set forth special education eligibility based on an Other Health Impairment (ADHD); a Specific Learning Disability (written expression, basic reading skills, reading comprehension, reading fluency, mathematics calculation, and mathematics problem solving (mathematics reasoning); and a Speech/Language Impairment (phonological awareness, phonological memory, and rapid naming speed). A number of recommendations were made for Student's program related to deficits in working memory, phonological processing, word retrieval, basic reading skills, reading fluency, spelling, and written expression, as well as attention and focus. (N.T. 490-91, 498-99; P-1 pp. 17, 27-36)
79. The independent evaluator determined that the District's June 2015 IEP did not include sufficient intensive instruction in literacy skills in terms of duration or content. This evaluator concluded that the District's use of System 44 was inappropriate for Student because Student's basic reading skills were too deficient to benefit from that program. (N.T. 503, 506-07)
80. The Parents obtained the IEE report in August 2015 and provided it to the District. (N.T. 338-39, 408)

Private School

81. The Parents explored other schools for Student in the summer of 2015. The independent evaluator had recommended the Private School that Student ultimately attended in addition to several other schools. (N.T. 339-41, 416, 515)
82. The Parents were in contact with the Private School in June 2015, and provided the IEE to its admissions director as soon as it was complete. Following an application for admission completed by the Parents between August 10 and 18, 2015, Student was accepted at the Private School on August 28, 2015 and began attending on its first day of school on September 8, 2015. (N.T. 402, 413-14, 427-28, 438, 610-13, 630; P-8 p. 1-3, 73-79; S-43)
83. When the Private School accepts a student for admission, it advises the child's family who makes a decision whether to enroll. A deposit that may be refundable and a signed contract are required for enrollment. There are several options for payment of tuition, with some amount or financial commitment due by July 15 prior to the start of the school year. (N.T. 604-07; S-43 pp. 24-25)
84. The Parents signed a contract of enrollment with the Private School on August 28, 2015. (S-43 p. 24-25)
85. The Private School is a private school serving approximately 275 children from kindergarten through twelfth grade. The Private School provides a college preparatory curriculum for children with learning differences, the majority of which are language based. (N.T. 593-94, 598-99, 623, 625)

86. The Private School does not implement IEPs, but does consider special education documents such as IEPs and RRs to guide programming. (N.T. 601-02)
87. Student's program at the Private School was as follows: a 45-minute period of one-on-one Wilson Reading instruction from a certified Wilson instructor; a 70-minute block for reading and writing instruction using a variety of programs and activities; a 75-minute block of mathematics instruction; lunch and recess; and classes that change during the course of the week to include social studies, science, physical education, art, and music. (N.T. 434, 614-17, 626-27, 633-34)
88. The Private School assessed Student's academic achievement within the first few days of the school year, using the Woodcock-Johnson Diagnostic Reading Battery – Third Edition. Student's scores were consistent with the independent evaluator's administration of the WIAT-III in July 2015. (P-8 p. 81 (*compared with* P-1 p. 48 (age based norms))
89. Student had been given extra support at the Private School for writing tasks, including scribing by a teacher and assistive technology (speech to text program and use of a keyboard) in classes with written assignments. (N.T. 620-22, 634-35)
90. Student was in a building with third through fifth grade children. Team meetings were held weekly at the Private School to discuss students, but not every child was discussed every week. (NT. 610, 628, 636)
91. Each classroom at the Private School had two teachers and a maximum of fourteen students. All of Student's teachers were certified in regular or special education or both. Classes had children of various ages grouped by ability. (N.T. 616-17, 631-32)
92. Student traveled approximately eighteen miles each way to the Private School from home. (N.T. 676)
93. Student's performance at the Private School at the end of the first trimester reflected competence or developing progress in all areas: literacy (including decoding, reading fluency, reading comprehension, and writing skills); mathematics; science; social studies; and special classes (art and physical education). Student also exhibited developing progress with work habits and social skills, and was beginning to develop skills in organization and task completion. (P-8 pp. 12-19)
94. Student's private tutor continued providing services after Student began attending the Private School twice per week. Those services were for Wilson Reading instruction. (N.T. 430-32; P-9 pp. 106-138)
95. The Parents believe that Student has been successful at the Private School. Student has not exhibited emotional difficulties since beginning at the Private School. (N.T. 347-48)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found the witnesses to be credible overall, and specific testimony will be discussed further below as necessary. The Parents presented as loving and devoted parents who clearly are concerned with, and advocated strongly for, their child’s educational and related needs. All of the District personnel presented as dedicated professionals who are qualified in their fields; however, the District witnesses at the hearing had only limited knowledge and familiarity with the educational program it provided to Student.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties’ comprehensive written

closing arguments.

IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. In this case, there is no question that Student is IDEA-eligible and has been a resident of the District throughout the time period at issue. Thus, the District was required under the IDEA to provide Student with a “free appropriate public education” (FAPE). 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. An LEA “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a ‘basic floor of opportunity.’” *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 533-534 (3d Cir. 1995) (quoting *Rowley*,

supra, at 201). In other words, the IEP need not “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Importantly, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). Relevant to this matter, the obligation to provide FAPE to a child with a disability is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Thus, the IDEA and Section 504 claims will be addressed together.

PROVISION OF FAPE: 2012-13, 2013-14, 2014-15 SCHOOL YEARS

Before addressing the substantive issues relating to the 2012-13 through 2014-15 school years, it should be noted that the District continued to challenge in its Closing Argument the preliminary ruling denying its request to limit the scope of the hearing. (District’s Closing at 1 n. 3) That ruling was issued following an evidentiary hearing devoted to that specific issue and, thus, constitutes the law of the case. Under that doctrine, a tribunal is not permitted to “reconsider[] matters actually decided ... when based on a fully developed and augmented

record that exhaustively explored all relevant factual issues.” *I.K. v. School District of Haverford Township*, 961 F. Supp. 2d 674, 705 (E.D. Pa. 2013) (citation omitted).

The exception to that general rule is limited to circumstances where “the initial ruling was made on an inadequate record or was designed to be preliminary; if there has been a material change in controlling law; if there is newly discovered evidence bearing on the question; and if it is appropriate to avoid manifest injustice.” *Id.* at 706 (citation omitted). As there exists no basis for disturbing the prior ruling on the scope of the hearing (HO-13), this contention need not be discussed further.

At the beginning of the 2012-13 school year, the beginning of the time period at issue, the District concluded its evaluation begun after IST services were less than successful. As noted above, school districts are required to locate, evaluate, and identify children who are in need of special education. These obligations must occur within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). In this case, there is nothing in the record to suggest that the District’s decision to evaluate was improper or dilatory in any respect, nor that its decision to proceed with a special education evaluation was anything but reasonable. Following completion of the ER and a determination that Student was eligible for special education, it properly convened an IEP team to develop a program to address Student’s educational needs.

Student’s ER identified needs in the areas of basic reading, reading fluency, reading comprehension, written language, mathematics computations, and mathematics problem solving;

additionally, concerns with Student's attention/focus and organizational skills were also noted. Student's October 2012 IEP addressed each of these needs through annual goals and program modifications/specially designed instruction particularly for language arts and mathematics. Following implementation of that IEP, the District was entitled to some reasonable period of time to evaluate whether its program was adequately addressing Student's educational deficits, and make changes if warranted.

Whether and how Student was able to take steps toward remedying any of those deficits during the 2012-13 school year is impossible to discern on this record, however. The evidence of program implementation, including progress reports between October 2012 and October 2013, are vague and lacking reference to the specific IEP goals and/or baselines. Most critically, Student's oral reading fluency remained stagnant at a first grade level through the end of that school year and beyond. Student's performance on the reading comprehension and written expression goals is at best uncertain. Had there been careful and accurate monitoring of Student's programming including progress toward IEP goals, by the second half of the school year the District should have recognized that Student was not demonstrating discernable improvement in reading and written expression skills, and considered revisions to the IEP. In short, the District's ineffective approach to addressing Student's needs in all areas of language arts, without responding to its lack of success over the course of the 2012-13 school year, amounts to a denial of FAPE.¹⁰

As Student began the 2013-14 school year, the same flaws remained and, despite continued special education programming, Student's language arts needs continued to be unmet. Student's then-current present levels in reading skills are impossible to ascertain from the varied

¹⁰ To the extent there is a denial of FAPE claim for ESY during summer of 2013, the District cannot be faulted for its inability to provide all of the hours proposed due to Student's vacation plans.

information provided, none of which was consistent, but pointed to significant deficits in sight word recognition, reading fluency, and reading comprehension. In one positive respect, and despite previous needs in mathematics computation and problem solving, Student had demonstrated success in the regular education curriculum with support. However, the spring 2014 RR confirmed that Student's performance in the areas of reading fluency, reading comprehension, and written expression continued to vary widely from age- and grade- expectations despite the interventions in place. Even the WIAT-III snapshot scores reflecting some growth on that one instrument do not accurately depict Student's stagnant performance in reading and writing skills. For unknown reasons, the District continued to fail to take steps to investigate the reasons for the lack of Student's success and to revise the program accordingly. The 2013-14 school year program again denied FAPE to Student in language arts.

The summer of 2014 provided another opportunity for the District to become more proactive in addressing Student's language arts needs. Instead, it offered a mere one hour of reading tutoring each week. The Parents' rejection of this proposal is hardly surprising and reflects their recognition that that District's minimal offering would do nothing to help Student begin the 2014-15 school year in the same position as, or better than, that Student was in at the start of the summer. The 2014 proposed ESY program was inadequate and not appropriate.

The 2014-15 school year began much the same, with continued deficits in reading and writing skills, except that Student was exhibiting somewhat alarming behaviors that had not been observed in the past at home or at school. New assessments of Student's reading abilities during the school year revealed a continuation of well-below grade level performance regardless of what particular instrument was examined. Progress toward IEP goals remained minimal and inconsistent. As in prior years, the District failed in its responsibility to monitor Student's

progress, or lack of progress, and respond appropriately, particularly in light of the new concerning behaviors. All of these facts support a conclusion that Student continued to be denied FAPE during the 2014-15 school year in all areas of language arts.¹¹

Finally, the ESY program ultimately proposed for 2015 was for two hours per week of Wilson Reading instruction. While certainly a step on the right direction, that offer came at the beginning of June, one week before Student would begin that service, and cannot be considered to be a timely offer as required by state regulations. 22 Pa. Code § 14.132(e).

In summary, while the District could not be expected to guarantee any particular results or progress in its programming for Student, the lack of discernable improvement in reading and written expression skills over the course of the 2012-13, 2013-14, and 2014-15 school years without revision to the program amounts to a denial of FAPE for which a remedy shall be ordered.

OFFER OF FAPE: 2015-16 SCHOOL YEAR

The final IEP was offered in September 2015 and must be considered based on the information known at the time. The District had identified needs in the areas of reading fluency, decoding, and comprehension; spelling and written expression; mathematics; compliance and work completion; and behavior. Surprisingly, the FBA in the spring of 2015 revealed recognition, but no serious consideration, of how Student's dislike of and difficulties with writing activities were correlated with problematic behaviors. The independent evaluator had provided new assessment results that demonstrated the breadth of Student's underachievement in

¹¹ It is not insignificant that Student was referred to a remedial mathematics program during the 2014-15 school year; nevertheless, the District's understanding of Student's needs in that area clearly differs from that of the independent evaluator, who identified Student with a specific learning disability in mathematics in August 2015. Had the District had the IEE for some period of time prior to the September 3, 2015 IEP meeting, it is possible it would have considered Student to have more intense mathematics deficits and programmed accordingly, but case law dictates that its actions cannot be judged in hindsight.

all subject areas over the course of the 2014-15 school year. That IEE confirmed what the District's own data suggested: namely that Student was not acquiring the reading fluency and comprehension and written expression skills that the IEPs targeted. As the team met to finalize a program for the start of the 2015-16 school year, the District apparently began to acknowledge the extent of Student's disability in all language arts areas, and suggested programming using the Wilson Reading System, although the nature and fidelity of its implementation is unknown.¹² In any event, this proposal based upon the information known to the IEP team in September 2015 was, in this hearing officer's estimation, too little too late.

The independent psychologist provided very persuasive and compelling testimony that Student requires intensive remediation to reverse the lack of necessary foundational language arts skills, including relearning those that Student has developed that are not accurate. (N.T. 516-20) The IEE report in August 2015 reached the same conclusion. Student's age, at the end of the "critical window of language development" (N.T. 517), is also a crucial consideration. The District's offer of a direct, systematic, sequential multisensory reading program without a concomitant commitment to provide that instruction at the intense level that Student required in order to successfully learn to read and write at appropriate levels, when viewed in the context of the entire September 2015 IEP, simply was not reasonably calculated to provide a meaningful educational program to Student.

REMEDIES

Compensatory Education

It is well settled that compensatory education is an appropriate remedy where a school

¹² Student's father did not recall Wilson being discussed at the September 2015 IEP meeting (N.T. 662); although there was contrary testimony that it was, the conversation was evidently rather brief.

district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem.

M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* Compare *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Cmwlth. 2006) (rejecting the *M.C.* standard for compensatory education, and holding that “where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.”); *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). As such, hearing officers, like courts, have broad discretion in fashioning such relief. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712 (3d Cir. 2010) (relying on *Lester C.*, *supra*, and *Burlington*, *supra*). “Appropriate remedies under the IDEA are determined on a case by case basis.” *D.F. v. Collingswood Borough Board of Education*, 694 F.3d 4888, 498 (3d Cir. 2012).

The Parents’ independent evaluator provided persuasive testimony on what Student needs in order to be where Student should be had FAPE been provided throughout the time period in question: at least one year of full-time, intensive remediation in order to develop appropriate reading skills, and a longer period of time in order to attain grade expected performance in written expression. (N.T. 518-20) Student’s current program at the Private School will

undoubtedly benefit Student in this respect,¹³ but Student's learning disabilities in reading and written expression are severe. In order to ensure that Student continues to make strides toward overcoming the impact of Student's learning disability that was not adequately addressed in the District's program, this hearing officer concludes that a qualitative award is appropriate for the entire period that FAPE was denied. The District will be required to remediate the FAPE deprivation by providing compensatory education in an amount that is equivalent to one year of the intensive programming that Student is currently provided at the Private School in reading and written expression, approximately two hours per day. Using the required amount of instruction for public schools,¹⁴ Student is accordingly entitled to 360 hours of compensatory education (180 days x 1 year x 2 hours/day).

The award of compensatory education is subject to the following conditions and limitations. Student's Parent may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs in the areas of reading and written expression. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress, should Student return to the public school of residence. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the

¹³ While this remedy does not provide the entire amount of compensatory education to which the independent evaluator testified, that testimony also suggested that the Private School program was part of the calculus. Since Student and the Parents will be awarded tuition reimbursement *infra*, the two remedies together comprise the relief to which the evaluator testified was appropriate.

¹⁴ 22 Pa. Code §§ 11.1 – 11.3.

present until Student turns age sixteen (16).

Tuition Reimbursement

The Parents seek reimbursement for tuition and related expenses for the 2015-16 school year at the Private School. The law permits Parents who believe that a public school is not providing FAPE to unilaterally remove their child from that school and place him or her in a private school, and seek tuition reimbursement for the cost of the alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra*; see also *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice). In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*.

Having concluded that the program offered for the 2015-16 school year was not appropriate for Student, the next question in the tuition reimbursement analysis is a consideration of the Private School program. As noted, a private program need not meet all of the elements of a public school program in assessing its appropriateness for a child.

The Private School provides a college preparatory curriculum to children who have learning differences. Although the Private School does not implement IEPs for its students, it does consider relevant special education documentation to guide its program for individual students. Student was provided with one-on-one Wilson reading instruction for one period per day in addition to a reading and writing and mathematics blocks, all in small class sizes taught by certified teachers. Student made significant strides as of the dates of the due process hearing in all subject areas in addition to social and organizational skills and emotional regulation, and no longer exhibited the problematic behaviors that were evident in the District in the spring of 2015. As such, the Private School meets the appropriateness prong of the test.

The District contends that Student had not made significant gains in reading at the Private School, and also points to the fact that Student continued to receive Wilson Reading instruction from the private tutor. Neither of these circumstances counter the evidence that the Private School was meeting Student's needs. As the independent evaluator noted, Student needed to relearn many skills that had not been learned correctly; and, the mere fact that Student was receiving supplemental programming in a critical area of need does not discount the value of the Private School instruction; rather, it illustrates the family's commitment to Student and the skills Student needs to acquire before Student is able to return to public school.

In arguing against reimbursement, the District further suggests that the Parents did not provide it with the ten-day notice contemplated by the IDEA. That statute and the implementing regulations do permit a reduction or denial of tuition reimbursement if adequate notice was not provided by parents. 20 U.S.C. § 1412(c); 34 C.F.R. § 300.148(d). The notice provision is permissive, rather than obligatory, and in this matter the District was certainly well aware of the Parents' disagreement with many of its programming decisions as early as the spring of 2015

when multiple IEP meetings were held. At least as of August 20, 2015, the District understood that the Parents were considering a private placement. Moreover, the parties continued to meet after the District's 2015-16 school year began, and just before the Private School's first day of school, with all IEP team participants working diligently to finalize the program. The Parents did not refuse to cooperate with IEP development even as they contemplated their options should the District's final proposal fail to adequately address Student's needs; and the father persuasively testified that they had not made the decision on placement until after the September 3, 2015 IEP meeting (N.T. 672-73). Thus, no equitable considerations exist to justify a reduction or denial of reimbursement.

The Parents also claim reimbursement for the private tutor, and for ESY programming in 2014. Student is fortunate to have had a tutor who provided appropriate reading instruction while Student attended school in the District, supplementing the development of Student's reading skills and undoubtedly helping Student to not fall farther behind than Student was. As such, the hours of instruction the tutor provided were appropriate; and, there are no equitable considerations present to limit or deny reimbursement for those expenses. Accordingly, the Parents are entitled to reimbursement for the cost of the tutor. However, as there is little information in the record to evaluate the program provided by the Parents during the summer of 2014, this hearing officer concludes that reimbursement for that expense is therefore not warranted.

Independent Educational Evaluation

The final issue is the Parent's request for reimbursement for the IEE. When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Following a parental request for an

IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). In this case, the Parents did request an IEE and the District responded in a manner that placed conditions on the evaluation that did not cite to its criteria as a basis for rejecting the independent evaluator chosen by the Parents. Nonetheless, the Parents' request for the IEE was not directly based upon their disagreement with a District evaluation; and, the IEE report was not shared with the District as information for the IEP team to carefully consider in drafting the program for the 2015-16 school year. *L.M. ex rel. M.M. v. Downingtown Area School District*, 2015 U.S. Dist. LEXIS 49336 *75, 2015 WL 1725091 (E.D. Pa. 2015) (denying reimbursement of an IEE that was not pursued as part of the collaborative IEP process). The IEE may not be reimbursed for this reason.

Moreover, the District's most recent RR conducted prior to the IEE met all of the requirements of an appropriate evaluation. In conducting a special education evaluation, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained. Specifically, a variety of forms of assessments must be conducted to "gather relevant functional, developmental, and academic information about the child," so that the child's eligibility may be determined and to inform the development of an IEP. 34 C.F.R. §§ 300.304(b). The evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]" 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been

classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

While there was disagreement between the psychologists who testified at the hearing as to the value of District test protocols that were no longer in existence, this hearing officer concludes that the information in that RR adequately addressed Student’s eligibility and educational programming needs, thereby serving the purpose of an evaluation. Accordingly, because the District’s May 2014 RR met all criteria, it was appropriate; and for all of the above reasons, reimbursement for the IEE must be denied.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District denied Student FAPE during the 2012-13, 2013-14, and 2014-15 school years, and Student is entitled to compensatory education; and that the program proposed for the 2015-16 school year was not appropriate, and the Parents and Student are entitled to tuition reimbursement at the Private School for that school year. The District is not obligated to reimburse the Parents for the cost of the IEE or ESY program in 2014, but shall reimburse them for the tutor expenses.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District’s educational programming provided to Student during the 2012-13, 2013-14, and 2014-15 school year were not appropriate in addressing Student’s needs in reading and written expression.

2. Student is entitled to 360 hours of compensatory education to remediate the FAPE deprivation. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs in the areas of reading and written expression. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress, should Student return to the public school of residence. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16).
3. The District's proposed program for the 2015-16 school year was not appropriate for Student.
4. The Parents are entitled to reimbursement for tuition, transportation, and related expenses for Student's attendance at the Private School for the 2015-16 school year. Within 15 calendar days of its receipt of an itemized invoice for all expenses associated with Student's attendance at the Private School, the District shall provide the reimbursement to the Parents.
5. The Parents are entitled to reimbursement for the cost of the private tutor Student has had for reading instruction between June 2013 and August 2015. Within 15 calendar days of its receipt of an itemized invoice for those services in an amount not to exceed \$4,350, the District shall provide the reimbursement to the Parents.
6. The District is not required to reimburse the Parents for the cost of the IEE or for ESY services in 2014.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are **DENIED** and **DISMISSED**.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: May 30, 2016