

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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

FINAL DECISION AND ORDER

ODR File No. 2610-1112AS

CLOSED HEARING

Child's Name: K.F.¹
Date of Birth: [redacted]

Hearing Date(s):
02/06/2012, 03/07/2012, 03/12/2012, 05/01/2012,
05/16/2012, 06/11/2012, 07/30/2012, 08/01/2012²

Parties to the Hearing	Representative
Parents	Lorrie McKinley, Esquire McKinley & Ryan, LLC 238 West Miner Street West Chester, PA 19382
West Chester Area School District 829 Paoli Pike West Chester, PA 19380	David Painter, Esquire Sweet, Sevens, Katz & Williams, LLP 331 East Butler Avenue New Britain, PA 18901

Record Closed: 09/24/2012

Date of Decision: 10/05/2012

Hearing Officer: Brian Jason Ford

¹ Other than this cover page, the child and parent(s)' names are not used to protect their privacy - even if the parent(s) requested an open hearing. "Parent" and "Student" is used instead. Other identifying information, such as the Student's gender, is omitted to the extent possible. Citation to the notes of testimony (transcript) are to "N.T.". Citations to exhibits, as applicable, are "P-#" for Parents' exhibits, "S-#" for the school's exhibits, and "J-#" for joint exhibits.

² The inordinate length of this hearing should not be taken as an invitation in other cases. The inefficiencies in this case were overly-tolerated by this Hearing Officer, who bears ultimate responsibility for the progression of the due process hearing. The lessons learned in the administration of this case have already been applied in other cases, some of which have started and ended while this matter was pending.

Introduction

The Parents requested the instant matter, raising claims that the District has violated the Student's right to a free appropriate public education, as provided by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Parents' specific allegations and demands are detailed below.

Issues

As stated on the record, the only issue presented in this case is whether the Student was denied a free, appropriate public education (FAPE). (NT at 32). The Parents claim that the Student was denied a FAPE and seek various remedies for that alleged denial. More specifically:

1. The Parents claim that the Student was denied a FAPE between December of 2009 and April of 2010 and demand four hours per day of compensatory education to remedy that denial.
2. The Parents further claim that the Student was denied a FAPE between April of 2010 and the Student's enrollment in a private school in February of 2012 and demand three hours per day of compensatory education to remedy that denial.
3. The Parents further claim that the Student was denied a FAPE as a result of the District's failure to provide appropriate extended school year (ESY) services in the summer of 2010, and demand 1.5 hours per day of compensatory education to remedy that denial.
4. The Parents further claim that the District must reimburse the cost of the Student's tuition at a private school as a result of its failure to make appropriate programming available during the 2011-2012 school year and thereafter.

Findings of Fact

1. The Student, who is now [teen-aged], was adopted by the Parents [redacted]. At that time, the student was suffering from what was described only as "failure to thrive" and weighed 22 pounds. The Student spoke only [another language] at that time. Overall, testimony and evidence clearly indicates that the Student communicates in English and should not be regarded as an English language learner.
2. The Parents and Student have lived within the District's geographical boundaries at all times.
3. The Parties stipulate that the Parents received invitations to all IEP Team meetings and all NOREPs during the relevant periods of time. (NT at 1844-1850).
4. The Student attended kindergarten and most of first grade at a charter school. The Parents home schooled the Student at the end of first grade. (J-29, J-40).
5. The Student returned to the charter school for second grade. (NT at 1658).
6. The Student attended one of the District's elementary schools for third, fourth and fifth grades until November of the Student's fifth grade year. (J-29, J-40).
7. The Student qualified for and received some special education services from the District between third and fifth grades. (J-1, J-3, J-4, J-5, J-29, J-40, J-74).

8. The Parents home schooled the Student from November of the Student's fifth grade year through the end of the Student's eighth grade year. (J-40).
9. The Student attended one of the District's high schools for the ninth, tenth and eleventh grade years until February 1, 2012.
10. Before returning to the District for high school, the District reevaluated the Student to determine whether the Student was in need of special education and related services. (J-5, NT at 69). The District's evaluator understood that the Student had a history of a specific learning disability in the area of reading. (J-5, NT at 56-61). The resulting reevaluation report is dated August 6, 2009 and appears in the record as J-5 (2009 RR).
11. The 2009 RR included parental input, a Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV); a Woodcock-Johnson III: Test of Cognitive Ability (WJ III: Cog); reading subtests of the Kaufman Test of Educational Achievement - II (KTEA-II); a Woodcock-Johnson III Test of Achievement (WJ-III); a Wide Range Assessment of Memory and Learning - Second Edition (WRAML-2); and a Behavior Assessment System for Children - 2nd Edition (BASC-2). (J-5).
12. The 2009 RR includes information about the Student's reading abilities and difficulties, and concludes that the Student continues to be eligible for and in need of special education. (J-5).
13. The Parents agreed with the 2009 RR when it was presented to them. (J-5).
14. The 2009 RR was used by the Student's IEP Team (which included the Parents) to develop an IEP dated September 17, 2009 (2009 IEP). (J-7). The 2009 IEP includes much of the information from the 2009 RR.
15. Goals in the 2009 IEP indicate that the IEP Team agreed that the Student was functioning at a fifth grade reading level at the start of ninth grade. See J-7 at 14.
16. The 2009 IEP included a reading comprehension goal, a writing goal, a spelling goal and a self advocacy goal. Although none of these goals included baselines, they were congruous with the 2009 RR and were objectively measurable. See J-7 at 14.
17. As importantly, the 2009 IEP included specific program modifications and specially designed instruction that clearly explains what services the District would provide to enable the Student to meet the IEP goals. See J-7 at 15-20.
18. Based on discussions during the IEP Team meeting, the District sought parental consent to evaluate the Student's possible need for Speech/Language supports through standardized Speech/Language assessments and an observation by a Speech/Language therapist. (J-9). The Parents consented to these evaluations, which took place in October of 2009. (J-9, J-10).
19. More importantly, the IEP Team also saw a need to obtain additional information about the Student's reading ability. To obtain this information, a District evaluator administered a Qualitative Reading Inventory (QRI) assessment to the Student on October 14, 2009 to gain information about the Student's functional reading levels. (J-11). Based on the QRI, the evaluator determined that the Student could decode some words at a fifth grade level, but that the Student's instructional reading level was at fourth grade (based largely upon the Student's reading comprehension levels). *Id.*
20. After the Speech/Language assessments and QRI were completed, the IEP Team met again on November 6, 2009 and November 13, 2009. J-15. During these

meetings, the Student's reading goal was revised to have the Student move to "an instructional level of 5.0 and independent level 6.0." (J-15 at 11). The IEP was also revised to more explicitly describe the reading strategies that the District would utilize with the Student. (J-15 at 13).

21. Throughout ninth grade and thereafter, it is not disputed that the Student learned and used strategies to decode words while experiencing significant difficulties with reading fluency and comprehension. (J-11; NT at 765-766, 957).
22. Although not explicitly written into the Student's IEP, the District offered and the Student took advantage of counseling services available to all students at the high school. (NT at 544, 551-553).
23. In ninth grade, the Student received instruction in the *Read Naturally* reading program. By the end of the ninth grade year, the Student was averaging 111 words per minute with 70% comprehension in the *Read Naturally* program at the 5.8/6.0 level. (J-24).
24. The Student's IEP Team convened again at the end of the 2009-2010 school year on May 3 and 10, 2010. (J-17, J-20). During these meetings, courses were selected for the upcoming 2010-2011 school year and the Student was found eligible for extended school year (ESY) services to maintain reading levels during the summer of 2010. Specifically, the District proposed *Read Naturally* instruction during the summer break.³
25. The Present Levels section of the IEP was updated to include input from the Student and the Student's teachers.⁴ This input noted concerns over the Student's vocabulary, reading comprehension and emotional health. (J-17 at 6-8). During the meeting, the Parents indicated a preference to address the Student's emotional needs on their own, outside of the school setting. *Id.*
26. During the May 2010 IEP Team meetings, the spelling goal was removed from the Student's IEP. The other goals (reading and self advocacy) remained in place, unchanged. (C/f J-15 at 11 and J-20 at 17). However, program modifications and SDIs were revised to include daily, one-to-one (1:1) direct reading instruction. (J-20 at 26).
27. Another IEP Team meeting convened on June 14, 2010, resulting in another revised IEP of the same date. (J-24). This IEP includes a reading goal that would raise the Student's reading level to "an instructional level of 6.0 and an independent level of 7.0." J-24 at 14. The writing goal was also continued but increased, and a vocabulary goal was added. (J-24 at 14-15). The self-advocacy goal remained the same. *Id.*
28. The June 2010 IEP added SDIs, including "Direct, systematic, sequential, instruction using a researched based reading program." (J-24 at 16).

³ The Parents unilaterally placed the Student in a private program in the summer of 2010. The Student, consequently, did not receive the ESY services offered by the District in the summer of 2010. (NT at 1482, 1570, 1740-1741, 1863-1865).

⁴ Testimony reveals that there was disagreement between the Parents and the District about what courses the Student should take. That disagreement was resolved when the District acquiesced to most of the Parents' preferences during these meetings. The District attributes some of the Student's subsequent academic performance to the Parents' course selection. This sub-sub dispute is ultimately not determinative of any issue presented in this case.

29. The District continued to provide the *Read Naturally* program for the Student at the start of the 2010-2011 (10th grade) school year in an “Academic Literacy” class. During this time, the Student expressed some aversion to the supports and SDIs that the District was providing. (NT at 814-815).
30. Another IEP Team meeting convened on September 23, 2010, although the record is not clear as to whether or how the Student’s IEP was revised during that meeting.
31. The Parents had the Student evaluated by an independent Doctor of Psychology (Psy.D.) in October of 2010. The independent psychological evaluation is reported and is part of the record of this hearing at J-29 (2010 IEE).
32. According to the 2010 IEE, at the time of the psychological evaluation, the Student’s mother was concerned that the Student’s reading comprehension was poor and, simultaneously, that the Student’s reading class (Linguistics) was not challenging enough. (J-29 at 3).
33. The 2010 IEE included a clinical interview with the Student, a developmental history interview with the Parents, a classroom observation, and the following tests: Beery-Buktenica Developmental Test of Visual-Motor Integration, Behavior Rating Inventory of Executive Function (BRIEF)⁵, Behavior Assessment System for Children - Second Edition (BASC-2), Bender Gestalt Developmental Test of Visual-Motor Integration, Burns and Roe Informal Word Recognition Inventory, Burns and Roe Informal Reading Inventory, Conners Teacher Rating Scale - Revised (Long Version), selected subtests of the Detroit Test of Learning and Aptitude, Gray Oral Reading Test Fourth Edition (Form B), Kauffman Assessment Battery for Children - Second Edition (KABC-II), Rohde Sentence Completions, Stanford Diagnostic Reading Test - Fourth Edition (Form J), WISC-IV⁶, and selected subtests of the WJ-III.⁷
34. The 2010 IEE concluded that the Student was of average to high-average intellectual ability, but was hindered by attentional and working memory deficiencies which, in turn, were attributable to significant, combined-type ADHD. (J-29 at 22). The evaluator was clear that the Student should continue to receive “a great deal of reading and writing support” but that the Student’s “attention deficits and depressive thought pattern” must be addressed “before academic supports can have a positive effect.” *Id.*
35. The Parents believed that the 2010 IEE overstated the Student’s attentional needs and assumed that the District would use the 2010 IEE to reduce or eliminate reading services until the Student’s emotional and attentional needs were resolved.
36. The District administered another QRI in October of 2010, around the same time that the 2010 IEE was being completed. (J-30). Although there were some inconsistencies in the QRI results, the evaluator concluded that the Student was able to read independently at the sixth grade level (in both vocabulary and comprehension measures). *Id.* The evaluator concluded that the Student continues to have reading needs, noted that the Student should improve focus to read more effectively, and recommended continuing interventions to promote reading fluency and vocabulary.

⁵ The BRIEF included Teacher, Parent and Student reports.

⁶ See FF # 10.

⁷ See FF # 10.

37. After the October 2010 QRI was completed, the District invited the Parents to IEP Team meetings scheduled to convene on October 12 and 25, 2010. (J-31, J-32). It is not clear whether a meeting convened on October 12, but a meeting did convene on October 25, 2010. (J-33 at 6). That meeting was convened to adjust the IEP based on the October 2010 QRI. The District did not know about the 2010 IEE at that time.
38. The Student's IEP was revised to include information from the October 2010 QRI. Goals were revised to include an objectively measurable reading comprehension goal.⁸ (J-33 at 15). Three related but unique vocabulary goals were also added. (J-33 at 16). Writing and self-advocacy goals remained unchanged. (J-33 at 15).
39. SDIs in the October 2010 IEP were increased to address apparent organizational needs, and 1:1 reading support was continued. (J-33 at 18-20).
40. The Parents obtained an independent educational evaluation for the Student in February of 2011 (2011 IEE).⁹ The evaluator was a Doctor of Education (Ed.D.) who is also a Pennsylvania licensed psychologist and a certified school psychologist. The 2011 IEE is part of the record of this case at J-40.
41. The 2011 IEE included a review of educational records and the following tests: Wechsler Non-Verbal Scales of Ability, Wechsler Individual Achievement Test - III (WIAT-III), Bender-Gestalt II, Comprehensive Test of Phonological Processing, Rapid Automatic Naming/Stimulus Test, Clinical Assessment of Attention Deficit, Lateral Dominance Examination, Modern Language Aptitude Test (2002), Career Interest Inventory, and Receptive and Expressive Vocabulary Test - II.¹⁰ (J-40 at 1).
42. The 2011 IEE, on the whole, notes that the Student suffers from attentional deficits, reading deficits (manifest in basic reading skills, reading comprehension, fluency and writing – i.e. the areas targeted in IEP goals), and Speech/Language deficits (receptive and expressive language, and phonological awareness).
43. Although the 2011 IEE identified mostly the same needs that had been identified by the District, standardized test results reported in the IEE indicated that the Student was performing at a lower reading level than indicated on the District's QRI. For example, on the WIAT-III, the Student's Total Reading standard score was assessed at 72, or the third percentile relative to same-age peers. The same test placed the Student in the thirteenth percentile for Word Reading (which requires reading words in isolation) and the first percentile in Reading Comprehension. (J-40 at 3). Although grade equivalencies reported on standardized tests should be interpreted with extreme caution, those sub-tests correspond to the 6.0 and 1.7 grade levels, respectively.¹¹
44. The Parents shared the 2011 IEE with the District, which convened an IEP Team meeting on March 31, 2011.¹² The resulting revised IEP includes reports of the Student's progress in reading. Specifically, the Student was scoring 100% on

⁸ The reading comprehension goal does not include a baseline, explicitly notes the lack of a baseline and explicitly describes how and when baselines will be established. Both parties agreed that the Student needed to improve reading comprehension, and so the goal was carefully crafted to promote progress from the Student's baseline at that time, which was to be established quickly and objectively.

⁹ The Student was evaluated for the February 2011 IEE on February 10, 2011 and the report was presented to the Parents on February 23, 2011.

¹⁰ The 2011 IEE also lists a Parent Input Questionnaire as a "Test Administered." (J-40 at 1).

¹¹ The District's QRIs placed the Student at the 6.0 grade level in October of 2010. See FF # 36.

¹² Evidence and testimony suggests that the District initially attempted to convene the meeting sooner.

reading comprehension probes at the 6.0 grade level, and within a range of 40% to 87.5% at the 7.0 grade level.¹³ (J-46 at 6). Further, the progress report shows that the Student was mastering vocabulary goals. *Id.*

45. As a result of the March 3, 2011 IEP Team meeting, the reading comprehension goal was eliminated and replaced with an entirely different reading comprehension goal that called for the Student to silently read and then answer questions about reading selections at the ninth grade level. (J-46 at 16). A transition goal was also added to have the Student complete a career interest survey and then participate in activities suggested by that survey. *Id.*
46. Several SDIs and modifications were removed, but 1:1 reading remained.
47. Perhaps most importantly, an SDI was added to the March 3, 2011 IEP called for the Student to receive “Direct instruction, for decoding and fluency, in reading via a multi-sensory, systematic, sequential program.” (J-46 at 18). In the context of this case, that language is code for the *Wilson Reading System (Wilson)*.¹⁴
48. **The District hired an independent, very highly-trained *Wilson* reading instructor to work with the Student, 1:1, in school, two periods per day, five days per week.** This was provided in addition to the *Read Naturally* program that the Student continued to receive in the Literacy class. *Wilson* instruction started on April 4, 2011. At one point, the *Wilson* instructor could no longer provide services due to medical reasons, and was replaced with a different, highly-trained instructor. (J-46, NT 597-603, 627-628, 681, 708, 1133-1134, 1209, 1231-1232).
49. Although not every *Wilson* session was convened (sometimes the *Wilson* instructor was absent and sometimes the Student was absent), and although there was some gap when the first *Wilson* instructor had to resign, overall the *Wilson* program was delivered as planned. (J-84). As a result, the Student was able to complete eleven of the twelve sequential parts of the *Wilson* program.
50. The Student’s IEP Team met on May 24, 2011. (J-48). Unable to complete the meeting agenda, that meeting resumed on July 7, 2011. (J-50). There were small changes in the resulting IEP. *Id.*
51. For much of the time in question, the Parents worked with a lay advocate, who attended IEP Team meetings at the Parents’ invitation. The advocate presented a *huge* amount of testimony concerning disputes about the proper way to assess the Student’s writing. Ultimately, the District agreed to assess the Student’s writing using the rubrics that the advocate suggested.
52. The Student continued to receive 1:1 *Wilson* instruction, two periods per day, five days per week during the 2011-2012 (twelfth grade) school year.
53. Several other IEP Team meetings convened, culminating on January 23, 2012. (J-77). Reading goals in the proposed IEP at J-77 are targeted to the eighth (fluency) and ninth (comprehension) grade levels.
54. During the hearing, the Parents presented exhibits that are purportedly indicative of the Student’s work product. In testimony, the Parent’s advocate challenged how

¹³ The Student’s scores were generally higher on literal comprehension questions than they were on inferential comprehension questions. This pattern is consistent through much of the documentation of the Student’s actual performance.

¹⁴ That language could be code for any number of Orton-Gillingham based reading programs. In this case, those words in the IEP mean *Wilson*.

certain assignments were scored. (See, e.g. P-1). Even if there was preponderant evidence to demonstrate that particular assignments and course-work was graded incorrectly, such a finding would not alter the outcome of this case. Moreover, no such evidence exists.¹⁵

55. On February 1, 2012, the Parents unilaterally placed the Student in a private school.

56. The Student has attended a private school since February 2, 2012.

57. The following charts, originally presented in the Parents' and District's closing briefs respectively, lay out scores on some of the tests that the Student has taken:

CHART A: Full Scale IQ

	J-1 03/08/04	J-3 02/2005	J-5 08/06/09	J-29 10/10	J-40 01/11
Full Scale IQ	99	98	92	96	101

CHART B: Ability and Achievement Scores (Standard Scores)

Skill Area	02/10/05 WJ-III & WIAT-II J-3	8/6/09 K-TEA II J-5	10/10 WJ-III J-29	02/10/11 WIAT-III J-40	04/05/11 WRMT-R/NU J-47	09/12/11 WRMT-R/NU J-47	09/12 WIAT-III J-74
Word/Reading Recognition	80 81	86	90	83	80	92	86
Nonsense Word Decoding	80	85	88	75	93	97	102
Reading Comprehension	90	84	85	65	90	90	91
Reading Fluency	85		93	76			87

¹⁵ The advocate's fixation on how assignments were graded, and which rubric should be used to grade which assignment, is indicative of the advocate's tendency to focus on the individual leaves, let alone the trees, while completely ignoring the forest. The letter or numeric grade that the Student received on any particular assignment is far less important than whether the Student was actually learning how to read. This, and similar testimony from other witnesses on both sides of this case, went on *ad nauseam*. Unfortunately, my tolerance for such testimony resulted in an overly-long due process hearing. The length of this hearing has served as an object lesson for this Hearing Officer.

Reading Vocabulary			86		88	93	
Spelling	79	94	87	86			89
Written Expression		87	90	85			111

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

Students with disabilities who are in need of special education are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988); *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002).

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

M.J. v. West Chester Area Sch. District, ODR No. 01634-1011AS (Skidmore, 2011).

Discussion

The Parents argue that the District's 2009 RR, completed upon the Student's return from being home-schooled was inappropriate, and that the programming that flowed from that RR was also, *per se*, inappropriate. The Parents claim that the 2009 RR was inappropriate because it was not comprehensive, did not assess all areas of suspected disability, and provided "confusing and inaccurate" information. The Parents also argue that the evaluator did not consider all existing sources of information when conducting the evaluation.

The evaluator did not closely scrutinize IEPs that the Student received from the District before the Student was home schooled – IEPs that, at the time, were over four years old. Instead, the evaluator took a broad view of the Student's educational history, and reported that history in the RR. The evaluator then went on to assess the Student's cognitive abilities and achievement levels, particularly in reading, using standardized, normative assessments. The evaluator relied upon the most current information, provided thorough standardized assessments, to reach the conclusion that the Student qualified for special education on the basis of a reading disability.

The Parents further argue that the 2009 RR failed to identify the Student's disability, described in the 2011 IEE as "double deficit dyslexia" (meaning that the Student has difficulty with both phonological and orthographic processing). The IDEA does recognize dyslexia as a disability under the category of specific learning disability (SLD). If a student is dyslexic (double deficit or otherwise) then the Student has a qualifying disability: SLD. If the student has a qualifying disability and is in need of special education, the student is entitled to FAPE. In this case, without saying the words "double deficit dyslexia" the District found that the Student had an SLD in the area of reading and required special education. The fact that the RR concludes that the Student had an SLD but did not say the word "dyslexia" matters for purposes of compensatory education only if that failure resulted in a substantive denial of FAPE.

This is not to say that errors in the 2009 RR are unimportant. It is disturbing that the evaluator felt that his only role was to determine whether the Student qualified for IDEA services. The purpose of any RR is not just to determine whether a student qualifies, but to provide the IEP Team with information that will help the Team determine what services the Student needs. See 20 U.S.C. § 1414(a)(2), (b)(3). The 2009 RR falls short in that regard. Although the 2009 RR provides information about the Student's reading ability, it does not provide information or recommendations about how the IEP Team can address the Student's needs in a meaningful way.

The Parents also correctly argue that not all reading disabilities should (or can) be remediated in the same way. Simply identifying an SLD in reading without providing information about how the SLD can or should be addressed does not satisfy IDEA evaluation criteria.

For the foregoing reasons, the 2009 RR was inappropriate.¹⁶ The Parents are correct that the information contained therein was necessary but insufficient when held against IDEA standards. However, the inappropriateness of the 2009 RR does not mean that the Student was denied a FAPE *per se*.

It is important to understand how the District used the 2009 RR. The 2009 RR was the starting point for a larger IEP Team discussion that culminated in the Team concluding that additional information was needed; both in the areas of Speech/Language *and in reading*. The District then obtained that information, reconvened the IEP Team, and adjusted the Student's IEP accordingly. The IEP Team made similar adjustments throughout the 2009-2010 school year. As a result, the 2009 RR was flawed to the point of inappropriateness but was not the only source of information for the IEP Team in

¹⁶ The Parents also argued that the 2009 RR was inappropriate because they were denied an opportunity to participate in its development. The Parents make similar arguments about IEP development at all times pertinent. These arguments are without merit. The Parents were highly involved with every aspect of the Student's education and attended all IEP Team meetings, often with an advocate. The Parents attended the meeting in which the 2009 RR was used to develop an IEP and in which the Team determined that additional information beyond what is written in the 2009 RR was necessary. Moreover, time after time, the District clearly responded to and revised the Student's IEP in response to information provided by and requests made by the Parents and their advocate.

program development. The ultimate question, therefore, is whether the Student actually received an appropriate education.

The Parents argue that the actual services that the Student received, as detailed in the 2009 IEP and its multiple revisions, were not individualized to meet the Student's needs. The Parents are correct that the *Read Naturally* program was generally available in the Student's school building. The IEP Team's decision to place the Student in the *Read Naturally* program, however, was not arbitrary. As importantly, the District monitored the Student's progress in the *Read Naturally* program to make sure that the program was working for the Student. That monitoring, as reported on IEP present education levels (and in other reports of progress presented to the Parents at the time), generally shows that the Student's reading comprehension and fluency were improving over time.

Perhaps more importantly, the Student's progress in reading is reported in objective, standardized, normative assessments, including those obtained through the independent evaluator. See *Chart B*. On such assessments, students are measured against same-aged peers to produce a standard score (as opposed to a raw score).¹⁷ If a student is tested using a normative assessment at a point in time, makes no progress over time, and then is tested again at a later date, the student's standard score will be lower. This happens because the student has stayed in place as his or her peers have made an average amount progress over time. In this case, the Student's standard scores on various tests have varied only slightly (the 2011 IEE notwithstanding), generally showing that the Student has made progress over time.¹⁸

Just as an inappropriate RR does not mean that FAPE was denied *per se*, progress over time does not mean that FAPE was provided *per se*. IEPs must be reasonably calculated to provide a meaningful educational benefit. FAPE may be denied despite the fact that that the Student made some progress if that progress was only trivial or *de minimis*, and if the Student's IEP was calculated to provide nothing more when it was issued.¹⁹

Determining the meaningfulness of the Student's progress is the most difficult aspect of this case. By all accounts, objective and anecdotal, the Student is of average to high-average intelligence and wishes to pursue a college degree. At the same time, the Student has quite severe learning disabilities that, even with optimal programming, would likely manifest in objective achievement measures.

During the 2009-2010 school year, the Student was working to move from a 5.0 to 6.0 reading level. By May of 2011, the IEP Team was drafting goals that targeted the Student's reading comprehension of passages at the ninth grade level, indicating four

¹⁷ A similar process is used to derive a percentile rank.

¹⁸ Chart B reports standard scores on several different assessments, not all of which yield an apples to apples comparison. Even so, comparing the same tests to each other over time supports the conclusion that the Student made progress.

¹⁹ Actual *de minimis* progress, in turn, does not always yield a denial of FAPE. If an IEP is reasonably calculated to provide a *meaningful* benefit, it should not be judged in hindsight. A school district's response to progress monitoring is critical in such cases.

years of progress in two years as measured by grade level. Grade level may be the least accurate or meaningful indication of progress, but objective testing also indicated progress at the same time. Further, the District was providing a very high level of 1:1 *Wilson* instruction. The District's argument that the level of services provided to the Student is "unprecedented" is not hyperbolic. Progress through *Wilson* is not equatable to grade-level performance but, by all accounts, the program was delivered with fidelity. The *Wilson* program requires mastery of one part before moving onto another part. Moving from part to part in *Wilson* is proof of progress within that program, if the program is delivered with fidelity.

For these reasons, I find that the amount of progress that the Student actually made is both meaningful and commensurate with the amount of progress anticipated in the various IEPs. The District's ESY offer in the summer of 2010 was appropriate for the same reasons.

The Parents argue that the Student would have made more progress had the District provided *Wilson* in ninth grade. Assuming that argument is correct does not change the conclusion that the District provided FAPE to the Student. The District is not obligated to provide an optimal education to the Student or to maximize the benefit of educational services such that the Student achieves potential. But, in this case, the District provided more than the "floor" of FAPE required by the IDEA. The Student's slow, consistent progress prior to the introduction of *Wilson* very likely would have satisfied the District's obligations. The fact that the District added extraordinary services beyond what it is ordinarily required to provide, combined with the evidence of the Student's actual, meaningful progress, compels me to conclude that the IDEA has not been violated in this case.

The Parents also argue that the Student was denied a FAPE in more discrete areas such as written expression, and that the District failed to provide appropriate levels of counseling and similar services. Evidence in support of these arguments is not preponderant, but shows that the District made counseling services available to the Student, and was responsive and sensitive to the Student's emotional needs. In fact, some of the disagreement between the District and the Parents concerning course selection was prompted by the District's belief that certain courses of study would benefit the Student's emotional wellbeing.

Finally, as I find that the District has provided FAPE throughout, it is not necessary to determine whether the Parents are entitled to tuition reimbursement. As a pure matter of *dicta*, I note that there is preponderant evidence to demonstrate that the private school selected by the Parents would have passed the second part of the *Burlington-Carter* test.²⁰ The District's offer of FAPE (as evidenced in its IEPs up to and including J-77), however, would require a finding in favor of the District on the first part of the same test, precluding an award of tuition reimbursement in this case.

²⁰ The *Burlington-Carter* test is the three-prong test for tuition reimbursement in IDEA cases, named for *Sch. Comm. of Burlington v. Dep't. of Educ.*, 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 532 U.S. 942 (2001).

Conclusion

This hearing officer admires the Parents' sincere efforts to provide the Student with the best possible education. Their unquestionable love for the Student and their unrelenting advocacy on the Student's behalf were evident during the hearing. Their heartfelt belief that the District did not provide an optimal education for their child is grounded in reality, and their position that the Student is receiving a better education in the private school that they have selected may be correct. Despite all of that, the District has met and exceeded its legal obligations to the Student in this case. There is preponderant evidence that the Student made meaningful progress at all times. The District provided a FAPE to the Student, and so the Parents are not entitled to the relief that they demanded.

ORDER

And now, October 5, 2012, it is hereby order as follows:

1. The District's 2009 RR was inappropriate, constituting a procedural violation of the IDEA and its federal and state implementing regulations.
2. Defects in the 2009 RR did not result in a substantive denial of FAPE.
3. At all times pertinent to this matter, the District provided a FAPE to the Student.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER