

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

FINAL DECISION AND ORDER

Student's Name: L.R.

Date of Birth: [redacted]

ODR No. 15236-1415KE

CLOSED HEARING

Parties to the Hearing:

Representative:

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Dates of Hearing: 09/09/2014, 09/23/2014, 10/24/2014, 11/26/2014

Record Closed: 12/19/2014

Date of Decision: 01/05/2015

Hearing Officer: Brian Jason Ford

Introduction

This matter concerns the educational rights of a student with disabilities (Student). The Student's parents (Parents) requested a due process hearing, alleging that the Penn Manor School District (District) did not give the Student a free appropriate public education (FAPE) during the 2012-13 and 2013-14 school years. The Parents demand compensatory education to remedy that denial. The Parents also allege that the District did not offer a FAPE to the Student for the 2014-15 school year. The Parents enrolled the Student in a private school for the 2014-15 school year, and seek tuition reimbursement from the District. Further, the Parents seek an order that would allow them to use any award of compensatory education to pay for the private school, in addition to the tuition reimbursement that they demand. This would enable the Parents to continue the Student's enrollment in the private school at the District's expense after any award of tuition reimbursement expired.

Findings of Fact

Background and Facts Before 4th Grade

1. There is no dispute that the Student is a child with a disability as defined by the IDEA at 20 U.S.C. § 1401(3).
2. There is no dispute that the Student qualifies under the disability category "specific learning disability" in reading, writing and math.
3. The basis for the Student's qualification is a severe discrepancy between the Student's academic ability and achievement, as described in detail below.
4. On October 1, 2010 the District sent a Permission to Evaluate (PTE) - Consent Form to the Parents. (S-1). The District sent the PTE because, "[d]espite intensive reading intervention through Academic Support, [Student] continues to make minimal academic progress, especially in the area of reading." S-1 at 1. The Parents returned the PTE to the District, granting consent for an evaluation, on October 15, 2010.
5. On December 8, 2010, the District issued an Evaluation Report (ER). In addition to a review of the Student's educational records and input from Parents and teachers, the District conducted the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), the Kaufman Test of Educational Achievement - Second Edition (KTEA-II), and a Core Phonics Survey. (P-3)
6. According to the WISC-IV, the Student's Verbal Comprehension and Perceptual Reasoning scores were in the average range, Working Memory was "low average to average," and Processing Speed was "borderline to average." P-3. Taken together, these formed a General Ability Index (GAI) of 98, squarely in the average range. (P-3)

7. On the KTEA-II, the Student scored in the 6th percentile for reading, the 1st percentile for math, and the 6th percentile for written language. (P-3).¹
8. The Core Phonics Survey showed that the Student showed deficits in (or “would benefit from in” to use the language of the report) all assessed reading and decoding skills and half of all assessed spelling skills (2/4). (P-3).
9. The ER concluded that the Student is IDEA-eligible under the Specific Learning Disability category. (P-3).
10. On January 14, 2011, the District offered a Notice of Recommended Educational Placement placing the Student into supplemental learning support to receive services under an IEP of the same date. (S-2, P-4). The Parents approved the recommendation on the same day. (S-2).
11. The January 14, 2011 IEP was to be implemented from January 18, 2011 through January 13, 2012. (P-4).
12. On October 24, 2011, the Student’s mother faxed a portion of a privately obtained educational evaluation to the District. Only three pages of the evaluation were sent, and one of those pages was almost completely redacted. (S-3).
13. The parts of the private evaluation that were transmitted show that the evaluation was completed by a doctoral level licensed psychologist. (S-3). The transmitted portion of the evaluation also includes statements about the Student’s ability to process information presented in a classroom setting, and recommendations “suggested to supplement [Student’s] IEP.” (S-3).
14. The statements and recommendations in the transmitted portion of the private evaluation were devoid of context or any basis for their conclusions. (See S-3).
15. The Student’s IEP was revised on November 10, 2011. The IEP revisions were drafted without a formal IEP team meeting, but in response to an informal meeting or conversations between school personnel and the Parents. According to the document, “The IEP team met to discuss parent concerns concerning student’s current progress in reading and math. An outside evaluation was reviewed at this time.” (S-5 at 1)

¹ Percentile scores indicate the percentage of the sample, normative population that the Student outperformed. For example, the Student’s Math Composite score indicates that that 99% of same aged peers outperformed the Student on this test.

16. Despite conflicting testimony, I find that the Parents provided a complete copy of the private evaluation to the District prior to the IEP revisions on November 10, 2011. A complete copy of the evaluation was entered into evidence at P-5.²
17. The Parents' private evaluator did not contact the District for information, but rather reviewed the District's ER and IEP. (P-5).
18. The private evaluation included several tests: select subtest of the WISC-IV (the same test administered by the District eight months prior); the NEPSY II (a developmental neurological assessment); the Developmental Test of Visual-Motor Integration, 6th edition; the Wide Range Assessment of Memory and Learning, 2nd edition; the Woodcock-Johnson Test of Achievement, 3rd edition; the Wechsler Individual Achievement Test, 3rd edition; the Clinical Evaluation of Language Fundamentals, 4th edition; the Connors Rating Scale³; the Bender Gestalt II, the Comprehensive Test of Phonological Processing; the Test of Visual-Perceptual Skills, 3rd edition; the Key Math 3 Diagnostic Assessment; the Thematic Application Test and a Sentence Completion Test. (P-5).
19. These tests, and the others, resulted in a summary that is basically consistent with what the District found, although more detailed in some aspects. The private evaluation highlighted and explained the Student's difficulties with internalizing and using new information, as well as the Student's impairments in organizing learned vocabulary in a useful way. (P-5).
20. The private WISC-IV was in line with the District's. Both concluded that the Student has good reasoning abilities but poor processing speed and short term memory. (P-3, P-5).
21. The NEPSY II showed that the Student's poor working memory placed burdens on [Student's] attention. (P-5).
22. The November 10, 2011 revisions are trivial. They include the addition of homework club and progress meetings under the Modifications and SDI section. (Cf P-4, S-5).
23. Significantly, the private evaluation illustrated that the Student was aware of [Student's] own difficulties. Despite an eagerness to learn and willingness to work, the Student was starting to believe that "[Student's] difficulties are [Student's] fault,

² Some District witnesses testified that they never received a complete copy of the private evaluation. In disregarding this testimony, I give the District the benefit of the doubt. It would have been grossly inappropriate to revise the Student's IEP in response to the portion of the report that was faxed, and without a formal meeting. Although a comparison of P-4 and S-5 show only trivial revisions, the faxed document could have done nothing more than prompt a quest for more information, certainly not trigger an IEP revision, no matter how small. In the face of conflicting testimony, I discount the District's testimony in order to avoid the conclusion that the District purposefully avoided the full report after receiving part of it.

³ The Connors is an ADHD rating scale that is typically presented to both parents and teachers. The teacher scale was not sought.

leading to the concern that [Student] is “bad” in some way.” (P-5 at 6). The record in its entirety supports the fact that the Student is both eager to learn and hard working.

24. The private evaluation included 17 recommendations for the Student’s IEP. These included direct reading instruction focused on phonological awareness and decoding (the Wilson Reading Approach is mentioned by name); multistory instruction in all areas; math instruction that focuses on the understanding of new skills as opposed to memorization of facts; test read aloud; reduced work (e.g. fewer problems assigned); extended time; and Occupational Therapy. (P-5).
25. On November 11, 2011, the District contracted with an outside agency to conduct an Occupational Therapy (OT) evaluation of the Student. (S-6).
26. On January 6, 2012, the Student’s IEP was revised to include OT services. The revised IEP was sent to the Parents with a NOREP of the same date. The Parents approved the NOREP the same day. (S-7, P-6).
27. On January 18, 2012, the Student’s IEP was revised again, with parental approval via a NOREP. (S-8). That revised IEP is described in detail below.

The 2012-13 School Year (4th Grade)

28. The Student started the 2012-13 school year under the revised January 18, 2012 IEP. (S-8).
29. Throughout the 2012-13 school year, the Student attended general (regular) education Science and Social Studies classes with accommodations. The Student received preferential seating, tests were read to [Student], and [Student] could answer tests orally. (P-7).
30. Throughout the 2012-13 school year, the Student received reading, writing and math instruction in a learning support classroom. (*passim*).
31. The Present Levels section of the January 18, 2012 IEP reports the Student’s benchmark DIBELS (Dynamic Indicators of Basic Early Literacy Skills) scores from September of 2010. These scores indicate that the Student was very significantly below grade level in reading. (S-8).
32. AIMSweb is a computer-based, regular education progress monitoring program. AIMSweb probes are not directly tied to any other curriculum that the Student received.

33. The District used AIMSweb to track the Student's progress in oral reading fluency from the start of the 2011-12 school year, and scores through January 4, 2012 are reported on the January 18, 2012 IEP.⁴ (S-8).
34. According to AIMSweb, half way through 3rd grade, the Student could read 26 words correct per minute with five errors at 84% accuracy *at the first grade level*. (S-8).
35. The District also used AIMSweb to track the Student's progress in reading vocabulary. As reported on the IEP that started 4th grade, by December of the prior school year the Student's accuracy with *first grade* vocabulary was 63%.
36. In the fall of the 2012-13 school year, the Student received reading and spelling instruction using the Dolch Sight Word List at the 1st and 2nd grade level. In the spring of the 2012-13 school year, the Student received the same at the 2nd and 3rd grade level. (S-14, S-16, S-19).
37. The Student had started using Dolch words during the prior year. In December of the prior year, the Student was moving into the 2nd grade level. (S-4). However, the January 18, 2012 IEP reports that the Student's spelling at the *first grade level* was tested at 27/39 or 69% and the Student's reading at the first grade level was 34/39 or 87%. (S-8 at 8).
38. The Student received instruction under three reading programs during the 2012-13 school year: "Foundations," "Read Naturally," and "Making Connections." (S-14, S-16, S-19).
39. Foundations is a research-based program. The District used Foundations to target phonemic awareness, decoding, and letter sound associations. (N.T. 227-28).
40. The Student had started Foundations during the prior school year at unit 1, level 1. (S-4). Each Foundations is tied to specific reading or writing skills, not any particular grade level. At the time of the January 18, 2012 IEP, the Student had progressed to unit 5 after showing mastery at the 80% to 100% level in units 1 through 4. (S-8).
41. Read Naturally is a research-based program. The District used Read Naturally to target reading fluency, and comprehension. (N.T. 229-30).
42. The Student had started Read Naturally during the prior school year. At the time of the January 18, 2012 IEP, the Student was testing at 50% on assessments at the *first grade* level. (S-8).
43. The record is somewhat ambiguous as to the research-basis for Making Connections. Regardless, Making Connections was also a reading comprehension program, but used grade-level texts. (N.T. 228).

⁴ The final date of the AIMSweb data in the IEP is 01/04/11, which is a typo.

44. The Student had started Making Connections the prior year. (S-4). At the time of the January 18, 2012 IEP, the Student was working on "Unit 3 - Main Idea." (S-8 at 8).
45. Throughout the 2012-13 school year, the Student showed strong reading comprehension skills. (P-11). The Student was able to understand grade-level reading passages if read to [Student], but was not able to read those passages [Student's] self.
46. The focus in Math class was on addition, subtraction and fluency (i.e. internalizing math facts). (S-14, S-16, S-19).
47. In the prior school year, by December of 2012, progress reporting shows that the Student could complete single digit addition and subtraction problems, but had no ability to do double digit addition or subtraction. (S-4)
48. The District used AIMSweb to monitor the Student's progress in math. As reported on the January 18, 2012 IEP, the Student was earning 87% on tests of *first grade* math calculation skills and 19% on tests of *second grade* math concepts and applications.
49. The January 18, 2012 IEP has three reading goals, all of which call for mastery of particular skills *at the first grade level*. (S-8 at 20-21).
50. The January 18, 2012 IEP has two writing goals, all of which call for mastery of particular skills at the *third grade level*. (S-8 at 20-21).
51. The January 18, 2012 IEP has three math goals. Two of those goals call for the Student to demonstrate *second grade* math skills at a 70% level. The other goal calls for mastery of "Level 2 Math Concepts and Applications" at 80%, but this is not tied to any particular grade level as written. (S-8 at 23-24).
52. The January 18, 2012 IEP has one writing goal that calls for the Student to demonstrate 67% (4 of 6) of skills targeted on a writing rubric. According to the January 18, 2012 IEP, the Student had not demonstrated any of those skills at the time of the IEP. (S-8 at 25).
53. The January 18, 2012 IEP provided modifications and specially designed instruction including preferential seating, extended time for tests, reduced homework problems, having tests read aloud, and multisensory techniques for Math. (S-8).
54. As a related service, the January 18, 2012 IEP called for two OT sessions per month, for 30 minutes per session. (S-8). The IEP did not include an OT goal. *Id.*
55. On October 1, 2012, the District issued a progress report. This was the first progress report for the 2012-13 school year (4th grade). The report indicates that the Student was unable to complete a fourth grade reading comprehension benchmark, and was able to read only four words in a fourth grade oral reading fluency benchmark. (S-14).

56. On the October 1, 2012, progress report, the Student was showing mastery of Read Naturally level 1.5 skills.
57. On the October 1, 2012, progress report, the Student was showing mastery of Dolch Sight Words at the *second grade level*.
58. On the October 1, 2012, progress report, the Student was showing mastery of two and three digit addition and subtraction.
59. The Student's IEP was revised on December 20, 2012. The revisions were approved by the Parents via a NOREP of the same date. (P-7, S-17, S-15).
60. The December 2012 revisions included updates to the Student's present levels. At that time, the Student was reading 46 words correct per minute with four errors with 92% accuracy at the *first grade level* according to AIMSweb. At the same time, the Student scored five points with three errors for 63% on AIMSweb vocabulary tests. Both of these scores showed an improvement from testing at the start of the school year. (P-7).
61. Progress reported on the December 2012 revised IEP also shows that the Student could master spelling lists on weekly tests, but could not retain those words on review. (See P-7 at 10).
62. Progress reported on the December 2012 revised IEP shows significant variability in math progress as measured by AIMSweb (computation and concepts and applications were both measured at the *second grade level*).
63. The Student's IEP was revised again in late February or early March of 2013. (P-7, S-17). The IEP and NOREP proposing the changes were issued on February 22, 2013, and the NOREP was signed on March 13, 2013.
64. The February 2013 revisions updated the Student's present levels. As reported at that time:
 - A. The Student could study and learn 10 new spelling words per week using the Dolch Sight Words at the *second and third grade level*.
 - B. The Student had reached level 2 in both Foundations and Read Naturally. Reading comprehension via Making Connections was at the *fourth grade level*.
 - C. AIMSweb data showed that the Student was at the same place as was reported in December of 2012. However, the District was proposing to move the Student to the second grade level despite the fact that the Student could only read 45 words correct per minute on average. This suggestion was made because the Student consistently scored 90% or higher for accuracy, suggesting that the Student could read first grade words, but very slowly.

- D. AIMSweb math data was variable again. At times, the Student achieved slightly above the 70% goal set by the IEP in both computation and concepts. At times, the Student was under the goal. All progress was measured at the *second grade level*.
65. By February of 2013, the IEP included revised goals. The record makes it difficult to determine which goals in the February 2013 IEP were originally added in December of 2012. Regardless, the goals were as follows:
- A. Reading Fluency: the Student was to read 36 words correct per minute with 95% accuracy at the first grade level (the Student had already reached this goal according to the February 2013 present levels). Once that was achieved, the Student was to achieve 62 words correct per minute with 96% accuracy at the *second grade level*.
 - B. Reading Comprehension: the Student was to choose four correct responses with 100% accuracy based on a non-controlled passage at Level 2. Then the Student was to choose 13 correct responses with 80% accuracy at Level 3.
 - C. Writing: the Student was to achieve *fourth grade*, 50th percentile norms on two of three consecutive writing probes. At the same time, the Student was to score 14/20 (70%) as measured by rubric developed for the PSSA on two of three consecutive probes.
 - D. Math: the Student was to score 70% math computation probes and 80% on math concepts and applications probes, both on two out of three consecutive probes at the *second grade level*. At the same time, the Student was to demonstrate mastery of *fourth grade* math concepts as measured on unit assessments.
 - E. Occupational Therapy: OT goals focused on five handwriting writing skills, so that the Student could receive a total of five points on each handwriting probe. At the time the goal was written, the Student's baseline was 2/5. The goal called for 4/5 over three consecutive months.
66. The OT goal in the February 2013 IEP was the only goal that included a baseline. Baseline data for others could be extrapolated, but with difficulty and errors, from the present levels. It is not possible from the IEP itself to determine if the goals were carried over from December of 2012, and so it is not possible to properly align the present levels with the goals for purposes of determining a baseline.
67. The modifications and SDIs in the February 2013 IEP did not change significantly from prior IEPs, except as noted below. To the extent that new SDIs were added, they are a more detailed breakdown of what was already listed in prior IEPs.
68. The most significant change in the SDIs from prior IEPs is that the District started "supplying content area information to [Student] at the 1st-2nd grade level." This means that the Student would receive *first and second grade level* content in all

classes, including the regular education classes that the Student participated in. (P-7 at 30).

69. The February 2013 IEP concludes that the Student is eligible for extended school year (ESY) services. The IEP provided 20 hours of ESY, but did not include ESY goals. (P-7 at 32).

70. The Student's IEP was revised again on May 30, 2013. (S-20).

71. Updates to the Student's present levels in the May 2013 IEP were:

- A. Spelling: The Student was still mastering 10 new words per week on the *second and third grade* Dolch list.
- B. Reading: The Student was still at Level 2 in Foundations and Read Naturally, but had advanced from unit to unit at those levels. Reading comprehension, as measured by AIMSweb put the Student in the 12th percentile as compared to students in the fall of *third grade*.
- C. Writing: Scores were reported for a few prompts. Although the reporting was detailed, it is not clear how these reports relate to the goals in the IEP.
- D. Math: AIMSweb data show that the Student was approaching the IEP's AIMSweb-measured, *second grade* goals, but was having significant difficulty with the *fourth grade* curriculum (which was also tied to a goal).

72. Updates to the Student's goals in the May 2013 IEP were:

- A. The goal for the Student to achieve 62 words correct per minute with 96% accuracy at the *second grade level* was continued. Then, the Student was to achieve 87 words correct per minute with 93% accuracy at the *third grade level*.
- B. The reading comprehension goal was increased to the *third grade level* but the accuracy was reduced to 80%
- C. Some writing and spelling goals were also increased to the *fifth grade level* while others remained unchanged.
- D. All math goals were increased to the *fifth grade level*.
- E. The OT goal (and its baseline) remained unchanged.

73. SDIs and modifications in the May 2013 IEP were not changed in any significant way. (S-20).

74. Goals in the IEP were selected for carryover in to ESY. (S-20 at 34).

The 2013-14 School Year (5th Grade)

75. The Student started the 2013-14 school year under the May 2013 IEP.
76. On September 30, 2013, the District sought the Parents' consent to initiate the Student's three-year evaluation. The Parent provided consent on October 18, 2013. (S-22).
77. The reevaluation resulted in two documents: a reevaluation report (RR) from the District dated November 25, 2013 and an OT report from the third party that the District contracted with for OT services dated November 18, 2013. (P-8, S-23).
78. The OT report included the Developmental Test of Visual Perception, 2nd edition and a clinical observation. At the time of the OT report, the Student was able to meet the OT goal in the May 2013 IEP if cued by teachers while writing. The Developmental Test of Visual Perception, 2nd edition revealed significant improvements over prior testing, suggesting that the Student improved [Student's] ability to understand and use what [Student] is seeing. (S-23).
79. The OT report suggested working on having the Student apply learned OT skills independently, and recommended direct OT services for 30 minutes per month with an additional 30 minutes for consultation with classroom teachers. (S-23).
80. The November 2013 RR included a detailed summary of the Student's current performance. On *fifth grade* oral reading fluency benchmarks, the Student scored 24 correct words per minute with 60%. On *fifth grade* fall vocabulary benchmarks, the Student scored 11 correct responses with a 34%. (P-8).
81. The November 2013 RR included a detailed summary of the Student's progress monitoring data. *Third grade* AIMSweb oral reading fluency was fairly consistent probe to probe, with the Student reading 54 correct words per minute with 96% accuracy. *Third grade* AIMSweb reading comprehension was less consistent, but scores improved when answer choices were highlighted in different colors. (P-8)
82. The November 2013 RR reports the Student's progress on Read Naturally probes, but does not report what level the Student obtained in that program. (P-8)
83. At the time of the 2013 RR, the Student had started to receive the "Language!" program, which is a literacy curriculum. The Student's progress within that curriculum was not reported, as the Student had only recently completed benchmark testing. At the same time, the Student was receiving *fifth grade* vocabulary via Making Connections. (P-8)
84. At the time of the 2013 RR, the Student was still learning Dolch words at the *second and third grade level* but had increased to 12 words per week. (P-8)

85. The November 2013 RR includes a detailed description of the Student's writing quantity and quality. In general, this reveals that the Student was *not* applying spelling or OT skills when writing independently. (P-8)
86. The November 2013 RR reports the Student's math progress as measured by AIMSweb. These show that the Student was performing well under the *third grade* goals established by the IEP. (P-8)
87. In a few instances, the November 2013 RR notes that the Student's performance is hampered by distractibility. (P-8). This is consistent with other reports from teachers, and testimony from nearly every witness who worked directly with the Student. (NT *passim*).
88. As part of the reevaluation, the District administered the Test of Memory and Learning, on which the Student scored poorly. The Student's Verbal Memory Index was rated in the 2nd percentile, Nonverbal Memory Index was in the 6th percentile and Delayed Recall Index was in the 2nd percentile. This resulted in a Composite Memory Score of 72, in the 3rd percentile. (P-8).
89. As part of the reevaluation, the District also administered the Kauffman Test of Educational Achievement, 2nd edition (KTEA-II). This test was also administered as part of the District's original evaluation. (P-8)
90. On its initial evaluation, the Student's Reading Composite score fell in the 6th percentile. On the RR, the Student had fallen into the 2nd percentile. (P-8).
91. On the RR the Student's Math Composite score was tested in the 3rd percentile. This is a small increase from prior testing, which placed the Student in the 1st percentile. (P-8).
92. The Student's KTEA-II Written Language Composite also fell from 6th percentile to the 3rd percentile. (P-8).
93. According to the KTEA-II, as compared with same age students, the Student had regressed in both reading and writing, and made trivial gains in math. (*Cf* P-3 and P-8).
94. The District attempted to conduct an ADHD assessment using the Connors' Teacher and Parent Rating Scales. The teacher ratings suggested ADHD symptoms impacted upon the Student's learning, but no conclusions could be drawn as the Parents did not return their scale. (P-8 at 11).
95. The 2013 RR concluded that the Student continued to be a student with a specific learning disability, in need of specially designed instruction. The same document suggested that the Student continue with [Student's] current program. (P-8 at 15).

96. The Student's IEP team (including a parent) agreed with the conclusion regarding the Student's specific learning disability classification. (P-8 at 19).
97. Following the 2013 RR, the Student received a new annual IEP dated December 16, 2013. (P-9, S-25). That IEP draws from the 2013 RR for its present education levels.
98. As compared to the May 2013 IEP, the goals in the December 16, 2013 IEP are completely unchanged. (Cf S-20 and P-9).
99. There is only one change in the modifications and SDI section from the May 2013 IEP to the December 2013 IEP, but it is a significant change. The December 2013 IEP included a Personal Care Assistant (PCA) to provide prompts for attention, reading and writing. (P-9 at 27).
100. Testimony reveals that the Student had become increasingly reliant upon a building-level aide assigned to the Student's classroom, and that the Student would often seek the assistance of the aide for help with assignments. Through the December 2013 IEP, the aide was reclassified as a PCA, and assigned specifically to the Student.
101. Testimony also reveals that the PCA's work with the student changed slightly when the designation shifted from aide to PCA. The PCA would not simply respond to the Student's request for help, but would actively prompt the Student to remain focused and apply reading and writing skills.
102. The District contracted with its local Intermediate Unit (IU) to conduct a literacy assessment resulting in a report from March of 2014 (P-11).⁵ The purpose of the evaluation was to determine what progress the Student had made, what the Student's current level is, what programs the student needs, and how those needs can be met in the school day. *Id.*
103. The IU report was based on AIMSweb data, a Phonological Awareness Test (PAT), a CORE Phonics Survey, a CORE Vocabulary Screening, and a Burns-Roe Informal Reading Inventory. (P-11).
104. Results of each of the individual sub-tests of the PAT were reported along with subtest totals (equivalent to index scores in other assessments). All subtest totals were above average as compared to same age peers (in the 60th to 95th percentile range). (P-11).
105. The Student scored perfectly on the CORE Phonics Survey test of alphabet skills and letter sounds in isolation. (P-11). Results of the CORE Phonics Survey test of reading and decoding skills are presented as a number correct out of 15 with a corresponding percentage, and break into three descriptors: Benchmark, Strategic

⁵ Testing dates were 3/25/14 and 3/28/14. The report itself is not dated.

and Intensive. The Student scored in the Benchmark range for two skills, the Strategic range for two skills, and the Intensive range for four skills. (P-11).

106. The IU report included an analysis of AIMSweb data and testing at the first through third grade level. This testing revealed that the Student was instructional at the *second grade level*, and [Student's] work at the *third grade level* fell below 25th percentile norms for the fall of *third grade*. (P-11).
107. The IU's AIMSweb testing was mostly consistent with its Burns-Roe test, which found that the Student was instructional at the *third grade level* on one form of the test, but frustrational at the *third grade level* on two other forms of the test. (P-11).
108. Despite the Student's clearly impaired ability to read, the Student's listening comprehension as measured by the Burns-Roe was comparatively strong, meaning that the Student was able to understand what was read to [Student], especially when [Student] could look back at whatever text was being read from. (P-11).
109. The results of the Burns-Roe listening comprehension notwithstanding, the AIMSweb comprehension tests placed the Student at the *second grade* instructional level. (P-11).
110. The CORE vocabulary screening placed the Student at the Benchmark level in *fifth grade*. (P-11).
111. Writing samples placed the Student in the 8th percentile for total words written as compared to typical students in the winter of *fifth grade*, and in the 7th percentile for correct writing sequences. (P-11).
112. The IU's evaluation did not opine on the progress that the Student made, but did include a number of recommendations to improve the Student's reading and writing. (P-11).
113. At the District's request, the IU assessed the Student's math abilities using AIMSweb on April 28, 2014. On a *third grade* computation assessment, the Student achieved within the 25th percentile as compared to peers in the fall of *third grade*. On a *fourth grade* computation assessment without a calculator, the Student scored well below the fall 25th percentile as compared to peers in the fall of *fourth grade*. On a *fourth grade* computation assessment with a calculator, the Student scored just above the fall 25th percentile as compared to peers in the fall of *fourth grade*. (P-12). Program recommendations were offered based on this assessment. *Id.*

114. After both of the IU's assessments were complete, the District drafted an IEP of May 12, 2014. (P-13). It was intended that the IEP would be implemented for the remainder of 5th grade (2013-14) and nearly all of 6th grade (2014-15). (P-13 at 1).⁶
115. The May 2014 IEP includes an updated present levels section that reports ESY data, Read Naturally data indicating that the Student had reached Level 3, and data from Six Minute Solutions (another reading program that was started in 5th grade). The present levels also include data from the IU assessments. (P-13).
116. Goals in the May 2014 IEP are significantly different from its predecessors. Four goals target discrete phonics skills without reference to grade level (which is an appropriate omission as such skills form the foundation of reading itself, regardless of grade level). (P-13).
117. The May 2014 IEP includes two reading comprehension goals at the *fourth grade level*. (P-13).
118. The May 2014 IEP includes three writing goals. These are not targeted at any particular grade level, but are based on PSSA rubrics and/or target the Student's quantity and quality of writing, seeking improvements from current levels. (P-13).
119. The May 2014 IEP includes three math goals. Two of those goals call for mastery (80% accuracy over time) of computation and applications skills at the *third grade level*. (P-13). The other math goal focuses on time, money and graphing skills. *Id.*
120. The Modifications and SDIs in the May 2014 IEP were also revised to reflect the programs that the District had either put into place in 5th grade, or intended to put into place in 6th grade: Megawords, 6-Minute Solutions, and SRA math programs. (P-13). Other accommodations such as use of a calculator were also added. For the most part, however, the SDIs and Modifications were substantively unchanged – including 2.15 hours of PCA support per day. (P-13).
121. In late June of 2014, the Parents had the Student reevaluated by the private school psychologist who examined the Student in October of 2011. (P-14).
122. The June 2014 private evaluation included the following tests: the WISC-IV; the NEPSY II; the Wide Range Assessment of Memory and Learning, 2nd edition; the Woodcock-Johnson Test of Achievement, 3rd edition; the Wechsler Individual Achievement Test, 3rd edition; the Bender Gestalt II, the Comprehensive Test of Phonological Processing; the Test of Visual-Perceptual Skills, 3rd edition; the Key Math 3 Diagnostic Assessment; the Thematic Application Test and a Sentence

⁶ An IEP can be revised by any time, at the request of either the District or Parents, in response to the Student's actual progress. The fact that the IEP was expected to have a one year duration does not mean that the IEP would have been implemented for an entire year, but does illustrate the District's expectations at the time of the meeting.

Completion Test. (P-14). This list is nearly identical to the tests administered in October of 2011. (Cf P-5, P-14).

123. WISC-IV yields a General Ability Index (GAI) which is a measure of overall reasoning and Cognitive Proficiency Index (CPI) which is a measure of visual speed and mental control needed for efficient learning and problem solving. (P-14). The Student's GAI was in the 32nd percentile - within the average range - while [Student's] CPI was in the first percentile, a split found in less than 1 percent of the sample population. (P-14).
124. The WISC-IV also revealed that the Student's verbal comprehension, perceptual reasoning, and GAI were all in the average range, while [Student's] working memory, processing speed and cognitive proficiency were all well below average. (P-14).
125. A comparison of the District's WISC-IV and both of the private WISC-IVs yields the conclusion described by the private evaluator: "reasoning abilities [over time] continue to be in the average range. In contrast, the growth of [Student's] working memory and the growth of [Student's] visual processing speed have not kept pace with that of [Student's] peers..." (P-14 at 3).
126. By comparing the 2011 NEPSY-II to the 2014 NEPSY-II, the evaluator noted strength in the Student's ability to use categories to recall vocabulary, but that motor sequencing and control declined relative to peers along with the ability to manage multiple facts in short-term memory. (P-14).
127. Comparison of the 2011 WRAML-2 to the 2014 WRAML-2 showed an improvement in the Student's auditory memory for short stories. (P-14).
128. The WIAT-III was the primary test of the Student's academic achievement in both the 2011 and 2014 evaluations. Scores in 2014 were consistent with the 2011 administration. The Student scored in the 1st or 2nd percentile as compared to same age children on WIAT-III math assessments. The Student was tested in the 1st percentile in Word Reading, the 3rd percentile in Pseudoword Decoding, the 4th percentile in Reading Comprehension, and the 5th percentile in spelling. The Student's highest score was in sentence building (13th percentile). (P-14)
129. Comparing the WIAT-III scores from 2011 and 2014 shows that, on this test, the Student made progress only in sight vocabulary and phonics skills – but that progress was small over a three year period. (P-14)
130. The private evaluation included many recommendations to the IEP team. (P-14).

The 2014-15 School Year (6th Grade)

131. In the summer of 2014, the Parents enrolled the Student in the [Redacted] School ([Private School]), a private school for children with learning disabilities.

132. A primary practice at [Private School] is to integrate Orton-Gillingham (a research based reading methodology) into every aspect of the entire instructional day. (NT at 69, 473-476, 486, 509-510).
133. At [Private School], the Student receives private tutoring in reading and math three times per week. (NT 481-502).
134. At [Private School], the Student receives direct instruction that explains the Student's strengths and weaknesses to [Student], so that [Student] can understand [Student's] own disability. (NT at 473-480).
135. At [Private School], the Student receives direct instruction in reading, writing and mathematics, as well as curriculum based courses like science.
136. At [Private School], the Student receives language therapy two times per week. Language skills are applied to reading, writing and math instruction so that the Student has better access to and understanding of what is being taught. (NT at 501-508).
137. At [Private School], all of the other students also have a learning disability.

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 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 (3d 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

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). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and 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.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence

is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount of what type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the “same position” method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

“... the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district’s deficiencies.”

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student’s school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA’s “failure to provide specialized services permeated the student’s education and resulted in a progressive and widespread decline in [the Student’s] academic and emotional well-being” *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. See also *Tyler W. ex rel. Daniel W. v. Upper Merion Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. However, if a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. In the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Tuition Reimbursement

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the “*Burlington-Carter*” test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Use of Compensatory Education as Tuition Reimbursement

In this case, the Parents seek an order allowing them to apply any compensatory education to the cost of tuition at a private school. Such an order would allow the Parents to pay the private school out of a compensatory education award even if tuition reimbursement is not awarded. Alternatively, such an order would allow the Parents to continue to pay the private school out of a compensatory education award after tuition reimbursement expires.

As discussed above, there are various methods to determine how much compensatory education is owed when FAPE is denied. All of those methods, however, formulate compensatory education as an award of a number of hours of educational services. In general, after the amount of compensatory education is established (in hours), parents are given broad discretion as to how those hours can be used. Common language is as follows:

“Student’s Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student’s current or future IEPs. The Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student’s IEP to assure meaningful educational progress.”

M.J. v. West Chester Area Sch. District, ODR No. 01634-1011AS (Skidmore, 2011). The foregoing language makes a few things clear: 1) parents have unilateral discretion to select how compensatory education will be used; 2) compensatory education must be used for educational purposes; and 3) LEAs may not spend down compensatory

education awards to provide what they would otherwise be obligated to provide in satisfying their FAPE obligations.

Sometimes, financial restrictions are placed on compensatory education awards. The above-quoted passage continues:

“There are financial limitations on the parents’ discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full costs of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid the District professionals who provided services to the Student during the period of the denial of FAPE.”

Id. I, however, do not typically include such a dollar-per-hour cap on compensatory education awards. Such caps, though common, assume that parents and LEAs can purchase services at the same price – an assumption that I consider fundamentally flawed. Without a cap, parents may purchase educational services that go above and beyond what the District must otherwise provide, no matter the dollar-per-hour cost of those services.

In 2009, the Third Circuit had reason to consider whether compensatory education award could be reduced to a dollar amount and then used to pay the cost of tuition at a private school. In that case, *P.P. v. West Chester Area School District*, 585 F3d 727 (3rd Cir. 2009), the parents unilaterally removed their child from a public school, enrolled in a private school, and then demanded tuition reimbursement. Their theory was that tuition reimbursement was an appropriate remedy for a denial of FAPE that occurred while the student still attended public school. The Third Circuit disagreed, holding:

“[T]uition reimbursement and compensatory education are two distinct remedies. They are not interchangeable. Tuition reimbursement is a remedy to parents who have unilaterally placed their child in a private school when a district offers their child an inappropriate educational placement and the proposed IEP was inappropriate under the IDEA thereby failing to give the child FAPE. In contrast, compensatory education is a retrospective and in kind remedy for failure to provide an appropriate education for a period of time.”

P.P. ex rel. Michael P. v. West Chester Area School Dist. 585 F.3d 727, 739-740 (3rd Cir. 2009); quoting *In re The Educational Assignment of J.D.*, Pa. Spec. Educ. Appeals Panel 1120 at 14 (2001).

The *P.P.* decision unambiguously stands for the proposition that compensatory education, and not tuition reimbursement, is the appropriate remedy for a denial of FAPE. In fact, the *P.P.* decision holds that unilateral enrollment in a private school may

be the starting point for a tuition reimbursement claim, but it is also the ending point for a compensatory education award. See *id.* In contrast, tuition reimbursement becomes available only when parents assume the financial risk of enrolling their children in private schools, and then establish the three factors of the *Burlington-Carter* test.

The decision in *P.P.* is consistent with other courts that have considered the issue. In *Ms. M. ex rel. K.M. v. Portland School Committee*, 360 F.3d 267 (1st Cir. 2004) the First Circuit held that permitting compensatory education in the form of tuition reimbursement would enable families to circumvent statutory restrictions on compensatory education. Similarly, the threshold for a compensatory education award (i.e. a finding that FAPE was denied) is significantly different from and lower than the standard for tuition reimbursement that have been established by the United States Supreme Court in *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 15 (1993).

At the outset of this case, I indicated to the parties that I had previously addressed this issue in a different case. See *H.C. v. School District of Philadelphia*, ODR No. 3158-1112KE (Ford, 2012). I explained my understanding that compensatory education could not be used as tuition reimbursement, but I invited the Parents to brief the issue to educate me if the law had changed since that time. The Parents filed a brief along with their written closing statement. Therein, they cite to a Third Circuit decision that came one year after *P.P.*, *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010), and two Pennsylvania due process decisions.

In *Ferren C.*, a student with significant disabilities was attending a private school. While attending the private school, the student was also accessing a compensatory education fund established through prior litigation. The student turned 21 years old and, at the end of the school year, the school district refused to offer an IEP.⁷ The private school (and agency from which the Student accessed compensatory education) required an IEP in order to provide services. Therefore, without an IEP, the student was unable to access the previously-awarded compensatory education. The Third Circuit held that the school district must offer an IEP to a student who has aged out of eligibility so that the student can access previously awarded compensatory education.

I do not read *Ferren C.* as an abrogation of *P.P.* Rather, *Ferren C.* supports the notion that hearing officers may fashion one-of-a-kind orders to remedy denials of FAPE in response to the unique circumstances presented in any given case. The court demonstrated this by awarding the only remedy that would ensure access to a previously awarded remedy. In crafting this order, the court did not convert compensatory education into tuition reimbursement. This surely indicates that hearing officers may show some creativity in response to unusual circumstances, but are not free to replace the standard for tuition reimbursement with the lower standard for compensatory education.

⁷ IDEA eligibility expires at the end of the school year in which a student turns 21.

In this case, the Parents argue that compensatory education may be “individually fashioned to meet the unique needs of the student.” *Ferren C.* supports this argument, but does not permit using compensatory education for tuition reimbursement. At the very best, *Ferren C.* suggests that compensatory education could be applied to tuition reimbursement only if private school placement is necessary to remediate a past denial of FAPE. But even that logic is shaky. LEAs must make a continuum of services available to IDEA-eligible students. It is well established that LEAs must place students into private schools when such placements are necessary for the provision of FAPE. As such, when private school is required for FAPE, students can obtain private school at the LEA’s expense through the IEP process, and can challenge IEPs for failing to include private school on the same basis. For these reasons, compensatory education will almost never be the *only* way that a student can obtain a private school placement that is necessary for the provision of FAPE.⁸

In addition to *Ferren C.*, the Parents in this case cite to two due process decisions: *A.D. v. Colonial Sch. Dist.*, ODR No. 13224-1213AS (Carroll, 2013) and *A.A. v. Harambee Institute Charter School*, ODR No. 14846-1314AS (Valentini, 2014).⁹ In both of these cases, hearing officers issued exactly the type of order that the Parents demand in this case. In addition to those two, I am also aware of *N.H. v. Central Bucks Sch. Dist.*, ODR No. 1442-1011KE, (Carroll, 2011), which also includes an order that compensatory education can be used as tuition reimbursement. To whatever extent those decisions are incompatible with Third Circuit precedent, I cannot give them credence. To the extent that they are distinguishable from *P.P.* on the facts, they do not represent any overarching rule that can be applied to this case.

In sum, when a student requires a private placement in order to receive a FAPE, the student’s LEA is obligated to offer a private placement through an IEP. If the school fails to make that offer, the student (or parents) can request a hearing to change the IEP and/or seek compensatory education as a remedy for the period of time that the student should have been in the private school but was not. Further, when taken to an extreme, *Ferren C.* may suggest that compensatory education can be used for tuition reimbursement if doing so is *the only way* to remediate a past denial of FAPE. Otherwise, the Third Circuit has unambiguously precluded the use of compensatory education that the Parents seek in this matter with its decision in *P.P. ex rel. Michael P. v. West Chester Area School Dist.* 585 F.3d 727, 739-740 (3rd. Cir. 2009).

Discussion

⁸ For example, the only reason why *Ferren C.* could not obtain a private placement through an IEP is because she had aged out of programming – the impetus for the entire case.

⁹ The Parents also cite to an unpublished memorandum resolving a question of law in a specific case, concluding that compensatory education cannot be used to fund tuition at post-secondary institutions but can be used to fund classes at institutions offering the same programs that are available at secondary schools. *Q.M. v. School District of Philadelphia*, ODR No. 2393-1112 (Culleton).

Compensatory Education

The appropriateness of the Student's education is not measured by the quantity of services that [Student] received. Rather, the starting question is whether the District had reason to believe that the Student would make meaningful progress under the IEPs that were offered. An equally important question is what the District did with data indicating that progress was or was not made. A large amount of raw or nearly raw progress data was made part of the record of this case. Although I read and seriously considered all of it, the Student's progress or lack thereof is accurately reported in IEPs and testing reports. Moreover, unlike raw progress data, IEPs answer the question of what the District did with the data it generated.

The District's programming decisions when the January 2012 IEP was drafted were generally in line with the recommendations from the Parents' private evaluation of October 2011. The recommendations were not incorporated verbatim, but the Student did receive direct instruction in phonological awareness, math concepts and multisensory instruction. Assignments were reduced and tests were read out loud. These services were not provided with the intensity that the private evaluation implies, nor were they integrated across the curriculum as the private evaluator suggests, but it is not as if the District disregarded the private evaluation and took actions contraindicated by the Parents' evaluator.

When the January 2012 IEP was put into place, the District had every reason to expect that the Student would receive a meaningful educational benefit. If the Student achieved the goals in the IEP as written, the gap between the Student's ability and potential would start to close.

Despite this reasonable calculation, the Student was reading at the first grade level by some measures at the start of fourth grade. At this point, the Student was more than three years behind [Student's] peers. This means that either: 1) the student made no progress under the January 2012 IEP for the half year it was implemented, or 2) the Student completely regressed in the summer of 2012. Either way, the District did nothing to assess the Student or revise the IEP.

Despite this warning, the District continued to implement the program and collect data until the IEP was revised in February of 2013. At that time, the Student's spelling list was mostly at a 2nd grade level (two years behind), and could read no more words correctly per minute than at the start of the IEP – now more than a year old. This, in combination with the Student's improved accuracy, shows that reading fluency was significantly impaired, and whatever the IEP offered to address reading fluency was simply not working. The Student's progress in math showed that the Student could not consistently complete *second grade level* work.

Comparing the reported progress to the goals and SDI in the February 2013 IEP, the District's solution was to keep the same basic program in place, while adjusting expectations. More than half way through 4th grade, the Student's goal going forward

was to master 2nd grade math and 2nd grade reading. As written, the IEP basically expects the Student will remain in place.

Considering the fact that the program that the Student actually received under the February 2013 IEP is not significantly different than the program that the Student received under the prior IEP, the District had no basis to believe that the February 2013 IEP was reasonably calculated to provide a meaningful benefit. Rather, the District should have known that the same program would have yielded the same trivial progress, which is exactly what happened. By the time that the District offered the May 2013 IEP at the end of 4th grade, the Student's spelling list was mostly still at the 2nd grade level, the Student's reading had barely broken into the 3rd grade level (minimal progress in light of the Student's potential), and the Student had just mastered 2nd grade math (and could not grasp 4th grade math concepts).

It is not surprising, therefore, that the District's reevaluation half way through 5th grade (2013-14 school year, on November 25, 2013) showed that the Student performed poorly on 5th grade benchmark testing, could only complete 21 correct words per minute at the 3rd grade level, and had yet to master the 3rd grade math goals written into [Student's] IEP. Further, standardized testing as part of the reevaluation is disturbing at two levels. First, standardized academic tests showed that the Student made *de minimis* progress or actually regressed in core academic areas. Second, (and not for the first time) testing revealed significant problems with the Student's working memory – a deficit that the District did nothing to address. In fact, the *only* action of substance that the District took in response to the 2013 RR was to formalize the relationship between the Student and the building aide by converting the aide into the Student's PCA. The District's own progress monitoring illustrates that this change had no impact upon the Student's academic performance.

At the end of 5th grade, the District sought assessments from the IU for reading and math. Overall, these assessments illustrate that the Student had learned some phonics, but was unable to apply those skills to reading tasks. The Student was still reading at a 3rd grade level. The same testing revealed that the Student had a 5th grade vocabulary and strong listening comprehension. This is not at all surprising, considering that the majority of work that the Student was called to do in school required the Student to listen to text and then answer questions. It is striking, however, that a student with such strong vocabulary and listening comprehension had a reading comprehension score three years below grade level (instructional at 2nd grade as tested at the end of 5th). In math, the Student was doing worse at the end of 5th grade than 75% of students in the fall of *third grade*, and could show *fourth grade* skills only with a calculator.

In sum, the District had actual knowledge that the Student had not made progress under the January 2012 IEP when the 2012-13 school year (4th grade) started. The District made no change to the Student's IEP until February of 2013. Those changes did not substantively alter the Student's program, and so the Student continued to make trivial progress through the end of 4th grade. In 5th grade, the only change of note was the addition of the PCA, which had no demonstrable impact. Research based, normative,

objective testing at the end of 5th grade showed regression and stagnation. All of this is derived by the District's own data, or testing that the IU completed on the District's behalf. Results from the second private evaluation are, unfortunately, consistent. This is not FAPE and compensatory education is owed.¹⁰

I am compelled to note that the District argues that the appropriateness of an IEP must be measured at the time it is offered; that actual progress is irrelevant, provided that the IEP was reasonably calculated to provide a meaningful educational benefit at the time it was offered. The District's argument is valid, but only to a point. IEPs are appropriate if they are reasonably calculated to provide a meaningful educational benefit, but schools are also obligated to track students' progress and correct IEPs if the initial calculation proves wrong. If data illustrates that an IEP is not working, and a school does nothing, the school cannot escape liability even if the IEP was appropriate at the time it was offered. Consequently, the Student's actual progress and the District's response thereto are essential inquires in this case.

The District further argues that the Student's significantly impaired working memory and processing speed are factors in the Student's overall academic potential, and that the meaningfulness of the Student's progress must be weighed against that potential. This argument is supported by case law. *See, e.g. T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3rd Cir. 2000). However, through IEPs, the District offered only to accommodate the Student's deficits in working memory and processing speed (at best), but put nothing forward to target those deficiencies for remediation. I am persuaded that such deficits are remediable (at least to a degree). For example, the District's heavy focus on testing reading comprehension by having the Student respond to stories read aloud improved the Student's ability to understand stories read aloud (as the private testing reveals, see FF128, but not much else). I am further persuaded that the District's failure to even try to improve these areas contributed to the Student's overall poor performance. Finally, I am persuaded by the District's own intelligence testing which, consistent with private testing, shows that the Student has average intellectual ability on measures that appropriately compensate for the Student's processing speed.

Similarly, the District points to the consistency in both rounds of private testing to show that the Student made progress. For example, if the Student's percentile score stays the same between the tests, it means that the Student has not fallen further behind compared to peers. In order for a student to not fall further behind, the Student had to have moved forward, as peers were also moving forward. This logic is sound, but for the huge gap between the Student's academic abilities and those of [Student's] peers. Such

¹⁰ The record indicates that various reading and math programs were introduced throughout 4th and 5th grade. The record says very little about how those programs were selected, and tends to indicate that most of those programs were not implemented in strict accordance with the publishers' guidelines. Moreover, schools have broad discretion regarding methodology, but also become liable for compensatory education when they know that their curriculum is ineffective.

a gap may be expected for a student with an impaired intellectual ability, but not for a student with average intellectual ability.

The lack of meaningful progress in reading, writing, and math certainly permeated every aspect of the Student's education. Despite strong oral comprehension, classes like science and social studies were brought down to the Student's reading level for reasons unsatisfactorily explained in the record (despite this hearing officer's probing). There is no reason why the Student could not absorb grade level content, but such content was never presented. The Student is owed full days of compensatory education for the entirety of the 2012-13 and 2013-14 school years.

Tuition Reimbursement

Applying the three part *Burlington-Carter* test to this matter is straightforward. The first step is to determine the appropriateness of the last offered IEP, the IEP from May 2014. The goals of this IEP improved. However, after two years of minimal progress, the IEP does not reflect how the District will change the Student's program in order for the Student to make meaningful progress. As such, the May 2014 IEP contains the same fundamental flaws as its predecessors: it does not clearly explain what the District will do to get the Student from point A to point B. Even if an IEP clearly explains the progress that the Student is expected to make via measurable, objective goals, the IEP must still say what the District will do to enable the Student to reach those goals. For the most part, the May 2014 IEP, as drafted, is a continuation of the same inappropriate program that was in place during the prior two years. It is inappropriate for the same reason.

The Parents have proven the first part of the *Burlington-Carter* test. The second part of the test examines the appropriateness of the parentally-selected school: [Private School]. The record overwhelmingly supports a finding that [Private School] is appropriate for the Student.

The Parents have put on ample evidence that the Student fits the profile of children who are served by [Private School], and that [Private School's] curriculum is directly responsive to the Student's needs. I find that [Private School] will target the Student's individual needs in accordance with the program described in the hearing and outlined above.

I note that the District argues that [Private School] is not appropriate for three reasons: 1) the other students who attend [Private School] all have disabilities, 2) [Private School] has not developed a plan for meeting the Student's goals or needs; and 3) there is no evidence that the Student is making any progress at [Private School]. Regarding the latter two points, this is easily explained by the timing of the hearing. [Private School] was clearly in the process of individualizing its program to the Student (something that it does as a matter of course) at the time of the hearing, and had not produced its own progress monitoring. Further, and also responsive to the first objection, appropriateness for the *Burlington-Carter* is not the same appropriateness that is used to determine whether a student received FAPE. Most private schools that cater to students with

special needs are segregated. Such segregation would be inappropriate in a public school. But that does not render all private schools inappropriate *per se*. Such logic would make tuition reimbursement unavailable in nearly all cases.

The Parents have passed the second part of the *Burlington-Carter* test. The third part of the test examines whether any equitable considerations weigh against tuition reimbursement. Here, they do not. The District points to three instances to argue that equities mitigate against reimbursement. First, the District points to the fact that the Parents faxed only a redacted portion of the 2011 private evaluation. This is correct, but I have found that the District considered the full evaluation before the following IEP revision. To hold otherwise would be to charge the District with a willful if not malicious ignorance that the record does not reflect. Second, the District notes that the Parents refused to return a Connors rating scale, as noted above. This is true, but does not mitigate against reimbursement. If the District could not program for the Student without the Connors, than the District could have requested a hearing to compel compliance. The fact that the District did not do so reflects a belief on the District's part that it had what it needed to develop a program for the Student. Third the District argues that the Parents' refusal to consider a life skills placement weighs against reimbursement. This argument may be compelling had the District offered a life skills program. Said simply, if the Student needed life skills, the District was required to offer life skills, even if the Parents would be insulted by that offer.¹¹ Regardless, all of the District's offers were for learning support. The Parents cannot be faulted for failing to consider a program that was never offered in an IEP.

Having satisfied all three prongs of the *Burlington-Carter* test, tuition reimbursement for the 2014-15 school year will be awarded.

Use of Compensatory Education

The temptation in this case is to allow bad facts to form bad law. The record justifies the conclusion that additional time at [Private School] would remediate the denial of FAPE that occurred in 4th and 5th grade. I will not prohibit the parties from coming to their own agreement to reduce any compensatory education to a dollar amount and apply those dollars towards [Private School]. However, I cannot order the District to convert the compensatory education ordered here into two additional years of tuition reimbursement. As discussed above, even the theoretical possibility of using compensatory education to offset tuition reimbursement is not on solid footing. In this case, the Parents have not established that compensatory education in the form of tuition reimbursement is the *only* way to remedy the denial of FAPE.¹² Consequently, I will not order that use of compensatory education.

¹¹ I make no explicit findings about the District's offer for the Parents to visit a life skills classroom. *But see* NT 133, 267-268, 374-375.

¹² I have also *not* been asked to decide whether the Student requires placement at [Private School] in order to receive a FAPE on an ongoing basis.

Conclusion

The District denied the Student a FAPE for the entirety of the 2012-13 and 2013-14 school years. The District knew or had reason to know that the Student was not receiving a FAPE from the start of the 2012-13 school year. Full days of compensatory education are awarded to remedy that denial, but that compensatory education may not be applied to the cost of private school tuition except as ordered below.

Further, the District's offered program and placement for the 2014-15 school year is not appropriate, [Private School] is appropriate, and equities do not mitigate against tuition reimbursement. Consequently, the Parents are entitled to tuition reimbursement for [Private School] during the 2014-15 school year.

An order consistent with the foregoing follows.

ORDER

Now, January 5, 2015, it is hereby **ORDERED** as follows:

1. The Student is awarded one hour of compensatory education for each hour that school was in session from the start of the 2012-13 school year through the conclusion of the 2013-14 school year.
2. The Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device. The Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP, or via dual enrollment or equitable participation should the Student remain in private school, to assure meaningful educational progress.
3. Compensatory education may not be applied against private school tuition. However, nothing herein prohibits the parties from agreeing to reduce any or all awarded compensatory education to a fund, and further agreeing to the acceptable uses of said fund. Any such agreement shall be in writing.
4. The District shall reimburse the Parents for the cost of tuition at the [Private] School for the 2014-15 school year. This includes tuition paid by the Parents or tuition debts incurred by the Parents, less any scholarship or financial aid that the Parents or Student received.

5. On or before April 3, 2014, the District shall convene the Student's IEP team for the purpose of developing an appropriate IEP for the Student for the 2015-16 school year. The Parents are ordered to cooperate in this process by complying with any effort made by the District to evaluate the Student, and by transmitting all records from [Private School] to the District.

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

/s/ Brian Jason Ford
HEARING OFFICER