

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

Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: M.K.

Date of Birth: [redacted]

ODR No. 13276-12-13-KE

OPEN HEARING

Parties to the Hearing:

Representative:

Parent

Mark W. Voigt, Esquire
Law Office of Mark W. Voigt
Plymouth Meeting Executive Campus
600 West Germantown Pike, Suite 400
Plymouth Meeting, Pa 19462

Quakertown Community Sch. Dist.
100 Commerce Drive
Quakertown, PA 18951

Christina M. Stephanos, Esquire
Sweet, Stevens, Katz & Williams
331 East Butler Avenue
New Britain, PA 18901

Dates of Hearing:

January 8, 2013; February 13, 2013;
February 14, 2013

Record Closed:

March 11, 2013

Date of Decision:

March 26, 2013

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District), and attended a District elementary school during the period relevant to this matter, until Parent unilaterally removed student from the District in November 2012, and placed Student in a private school (School). (NT 8-9.) Student is identified as a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), in the categories of Other Health Impairment and Speech or Language Impairment. (NT 9; S 7, 14.)

Parent named in the title page of this decision (Parent) requested due process alleging that the District failed inappropriately to identify Student with Specific Learning Disability pursuant to the IDEA and failed to provide a free appropriate public education (FAPE) as required by the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). Parent sought compensatory education, reimbursement of tuition and books at the School, and reimbursement of the cost of two private psychological evaluations.

The hearing was completed in three sessions. The record closed upon receipt of written summations.

ISSUES

1. Did the District fail inappropriately to identify Student as a child with a specific learning disability?
2. Did the District fail to offer or provide Student with a FAPE from November 17, 2010 to February 14, 2013¹, including failing to provide needed Extended School Year (ESY) services during the summers of 2011 and 2012?

¹ Parent requests tuition reimbursement for the 2013-2014 school year; thus, Parent requests prospective relief. Because any evidence related to the provision of FAPE would be relevant to the request for tuition reimbursement for the 2013-2014 school year, I heard evidence regarding denial of a FAPE for the period from two years prior to the filing of the complaint in this matter until the last day of hearings, February 14, 2013. (NT 44-47.)

3. Was the School an appropriate placement for Student in the 2012-2013 school year, and would it be an appropriate placement for Student during the 2013-2014 school year?
4. Considering the equities, should the hearing officer order the District to reimburse Parent for all or any part of the costs of tuition, books, fees and transportation paid to or required by the School for the 2012-2013 and 2013-2014 school years?
5. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from November 17, 2010 through November 4, 2012², including the summers of 2011 and 2012?
6. Should the hearing officer order the District to reimburse Parent for the cost of two private psychological evaluations and reports dated April 4, 2011, (supplemented by reports dated April 18, 2011 and August 18, 2011), and October 15, 2012, as well as the cost of the evaluator's testimony in this due process matter?

FINDINGS OF FACT

Student's Medical and Educational History Prior To Third Grade

1. Student was born in [another country], with some history of neglect at or shortly after birth. Parent adopted Student and brought Student to the United States when Student was about one year old. During the first three year of life, Student was exposed to three languages: [redacted] and English. (NT 51-53; P 1, 4.)
2. As early as preschool, Parent noted that Student was slow to develop mathematics related concepts such as simple block patterns and concepts of larger and smaller. Student also displayed some attention problems in kindergarten and first grade. Student also displayed an inability to retain concepts after long breaks without review. Parent spent many hours tutoring Student and reviewing previously learned concepts with Student. (NT 53-55; P 1, 4.)
3. When Student was in second grade, Student had great difficulty with mathematics concepts, but seemed to read and spell adequately. (NT 54-56; P 1, 31.)
4. When in second grade, Student exhibited attention problems at home. (NT 57-58; P 1.)
5. From first grade, and more intensively in second and third grades, Parent tutored Student after school and in the summers in mathematics. Parent selected a curriculum, utilized worksheets from the internet, and bought text books for Student to use while being tutored by Parent. (NT 58-61; P 1.)
6. Parent is not trained or certified to teach elementary mathematics. (NT 209; P 1, 34 p. 1, 2.)

² November 5, 2012 is the date of Student's enrollment in the School. (NT 45.)

7. When Student was in second grade and at the beginning of third grade, Parent repeatedly advised District personnel that Parent observed Student behavior suggesting an inability to understand basic mathematics concepts. During this time, Student also demonstrated difficulties with attention and focus. (NT 57-64, 96; P 1, 31, 34.)
8. The District provided regular education supports for mathematics to Student in second grade. (NT 74-77, 79-81; P 34 p. 8-9, 13-14.)

Educational Services And Progress During Third Grade (2010-2011 School Year)

9. At the beginning of third grade, Student was unable to finish mathematics homework when assisted by Parent, and struggled with basic mathematics concepts like relative magnitude, selection of addition or subtraction to solve a problem, and estimation. (NT 73-76; P 31, 34 p. 1, 4.)
10. At the beginning of third grade, Parent advised District personnel that Parent observed Student behavior suggesting an inability to understand basic mathematics concepts. During this time, Student also demonstrated difficulties with attention and focus. (NT 57-64, 96; P 1, 31, 34.)
11. Parent tutored Student at home for at least four hours per week, and sometimes as much as eight hours per week, throughout third grade. (P 35 p. 22-24.)
12. The District did not continue providing regular education supports for mathematics to Student in the beginning of fourth grade, because Student had memorized mathematics facts during the previous summer and did well on a placement assessment by being able to remember mathematics facts. In October 2011, Parent discovered that mathematics support had not been continued and complained to the Student's teacher, at which time the District resumed providing general education supports for mathematics to Student. (NT 74-77, 79-81; P 34 p. 8-9, 13-14; S 4.)
13. The District's mathematics support teacher assessed Student as having a mathematics learning disability, with a lack of understanding of basic mathematics concepts, but with an ability to memorize mathematics facts, subject to forgetting if the facts are not reviewed. (NT 79-81; P 31, 34 p. 13-14.)
14. Beginning in November 2010, the District provided Student with pull out "tier 2" instructional support in mathematics, using a different regular education curriculum that emphasized mathematics problem solving, for the remainder of the school year. At first, the frequency of support was minimal and variable. By January 2011, the support increased to twice per week, and by April, Student received support daily. (P 35 p. 23; S 7.)
15. On October 28, 2010, Parent requested information from the teacher on how to request an evaluation to be done by the District. (P 34 p. 8-9.)

16. The District sent to Parent, and Parent returned, a Permission to Evaluate form immediately after Parent sent this letter. Parent signed and returned a Permission to Evaluate form on October 29, 2010. (P 1.)
17. The District evaluated Student and issued an evaluation report in January 2011. The District concluded that Student was not a child with a disability. (P 2.)
18. The District's evaluator has extensive education and experience in evaluating children for learning disabilities, including a doctoral degree, Pennsylvania certification, and years of experience. (S 4.)
19. The District's evaluation relied upon curriculum based assessments and standardized tests on which Student demonstrated grade level reading skills, including automaticity and fluency, as well as word reading accuracy and decoding skills. Student exhibited difficulties recalling information read to Student, resulting in substantially below grade performance in listening and reading comprehension. (P 2, 31.)
20. The evaluation relied upon curriculum based assessments and standardized tests on which Student demonstrated grade level skills in writing, but showed a lack of proficiency in written organization and capitalization. (P 2.)
21. The evaluation relied upon teacher ratings that showed that Student was exhibiting problems with organization and attention. (P 2.)
22. The District's evaluation relied upon curriculum based assessments and standardized tests on which Student demonstrated average skill in numerical operations, calculation and mathematics fluency, and difficulties with mathematics application and problem solving. In a universal mathematics screening in the Fall of Student's third grade year, Student exceeded expectations for computation but performed below expectations for mathematics problem solving. (P 2.)
23. The District's evaluation relied upon the Wechsler Intelligence Scale for Children – fourth Edition (WISC-IV) to evaluate Student's cognitive abilities, which is a standardized test of intellectual functioning consisting of ten subtests, which are scored and which contribute to four index scores and one full scale score. The evaluator relied upon same age norms. Student's scores were scattered, with average to below average index scores for verbal comprehension and perceptual reasoning, below average working memory and average processing speed. The full scale IQ was scored as 79, which was classified as "Borderline". (P 2.)
24. The District's IQ testing underestimated Student's cognitive abilities, which are within the average range. (NT 63-64, 89-90; P 1, 2, 4, 8, 31, 42; S 1, 4.)
25. The District relied upon a comparison of Student's full scale IQ score from the WISC-IV with scores from the achievement test from the same publisher, the Wechsler Individual Achievement Test – Third Edition (WIAT-III). The WIAT-III produces scores for academic development in reading, written language and mathematics, based upon same age norms. Student's performance was substantially above what would be predicted

based upon Student's WISC-IV IQ score in reading (with the exception of early reading skills, which were scored as below average), written language and written expression, numerical operations, and mathematics fluency. The WIAT-III also provided a "Borderline" score in mathematics problem solving, with a score that was described as "deficient to borderline". (P 2.)

26. The District concluded in its evaluation report that the Student did not demonstrate specific learning disability in reading and writing, because Student's performance was above predicted performance for a child with Student's borderline IQ as measured by the WISC-IV. Student's difficulty with mathematics reasoning did not demonstrate a specific learning disability because Student's "borderline" performance was not sufficiently discrepant with Student's predicted performance based upon Student's full scale IQ on the WISC-IV. (P 2.)
27. The District's evaluator determined the sufficiency of the discrepancy by reference to a District policy that provides numerical score differentials to determine whether or not a discrepancy occurs in 5% or fewer of Student's standardization sample. The evaluator selected same age standardization for this analysis. Student's lower scores for mathematics problem solving did not meet the standard for clinically significant discrepancy pursuant to the policy, in that Student's scores were not sufficiently unusual according to the policy. (P 2; S 4; HO 1.)
28. This policy is reported to the Pennsylvania Department of Education as part of the District's plan for discrepancy analysis pursuant to 22 Pa. Code §14.125. (P 2; S 4; HO 1.)
29. The District's evaluation relied upon a behavior rating scale that provided standardized scores for the presence of emotional or attention problems at home and at school. Parent's responses produced scores that were clinically significant in a broad range of symptoms indicating problems with attention and impulsivity. Teacher responses produced scores indicating an "at risk" level of problems with attention and impulsivity. The evaluator described these teacher scores as "only minor elevations" in symptoms at school. Therefore, the District did not identify Student with Other Health Impairment based upon Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD). (P 2.)
30. The District's evaluation did not consider whether Student's exposure to three languages early in life, with English being the second or third language to which Student was exposed, had any effect upon Student's receptive vocabulary and language comprehension. There was no speech and language evaluation. (NT 506; P 2, 4.)
31. Parent wrote to the District in January 2011, expressing disagreement with the evaluation report and indicating an intention to have Student evaluated privately. Parent's letter related history and other facts contradicting the District's finding of borderline intellectual functioning. (P 34 p. 15-17; S 4.)

32. The Parent met with District personnel in February 2011. Parent orally indicated disagreement with the District's evaluation report, but Parent signed agreement with the January 2011 evaluation report, indicating a desire for an independent educational evaluation (IEE) to revisit the question of Student's eligibility. District personnel indicated that an IEE would require a due process hearing with attendant expense and delay. Parent was unaware that Parent had a right to request an IEE at public expense and did not ask the District to pay for a private evaluation. (NT 68-70, 82-88; P 20, P 34 p. 16, 23.)
33. At the February meeting, the District did not offer to conduct any additional assessments in order to test its findings as to Student's IQ and any discrepancies. (NT 85-87; P 4.)
34. Parent selected a private evaluator with extensive education and experience in evaluating children for learning disabilities, including a doctoral degree, Pennsylvania certification and licensure, and years of experience. (P 38.)
35. Parent obtained a private evaluation and report from the evaluator on or about April 4, 2011, and conveyed the report to the District, asking, through counsel, for a team meeting to discuss implementation of the evaluator's recommendations. (P 4, P 34 p. 25.)
36. The private evaluator utilized the Wechsler Nonverbal Scale of Ability and the Woodcock-Johnson-III-NU/Tests of Cognitive Abilities to obtain a general intellectual ability score within the average range for children of Student's age and grade. The Wechsler Nonverbal Scale utilizes only sub-tests that do not rely upon oral language to give directions to the subject, and the evaluator selected this because of a suspicion that Student has language difficulties that caused Student to receive a borderline IQ score in District testing. The Wechsler Nonverbal Scale is not published as a brief measure of intelligence, but it relies on only four subtests and is considered less comprehensive than the full batteries used in the Woodcock Johnson-III-NU and the IQ test used by the District. (NT 720-724; P 4.)
37. The private evaluator utilized a series of tests that address orthographic processes and visual motor integration. On a left-right reversal test, Student demonstrated unstable perception of symbol directionality, resulting in frequent orthographic detail errors when trying to picture mathematics symbols in memory. On a rapid naming and rapid alternating stimulus test, Student demonstrated decreased speed in tracking and object naming when the complexity of symbolic material increases. On a test of visual-motor integration, Student demonstrated reduced ability to organize written materials and remember symbolic information, interfering with memorization of mathematics facts, organization of written work, and aligning numbers in columns in order to solve mathematics problems. These scores showed that Student's deficits with regard to numerical concepts are compounded by weaknesses in orthographic processes, further interfering with Student's ability to learn and retain numerical concepts and more complex mathematical operations needed for problem solving. (P 4.)
38. The private evaluation corroborated the District evaluation report's scores in the average range for reading decoding, fluency and comprehension, spelling, vocabulary and

writing, as well as mathematics calculation and fluency. It also corroborated the District's scores showing mathematics problem solving achievement that was substantially below age and grade expectations. (P 2, 4.)

39. The private evaluator concluded that Student's achievement in mathematics problem solving was substantially below the levels that would be predicted based upon cognitive ability, utilizing the private examiner's scores in the average range for cognitive ability. (P 4.)
40. The private evaluator recommended English as Second Language services, a curriculum utilizing sequenced mnemonic strategies to help Student memorize basic mathematics facts and deal with abstract mathematics facts in a concrete way. The evaluator also recommended a research-based, structured, incremental mathematics curriculum like Saxon Math, for purposes of replacement mathematics instruction. In addition, the evaluator recommended a series of modifications, accommodations and supplemental aids and services. (P 4.)
41. During Student's third grade year, Student continued to exhibit difficulties in understanding mathematics concepts, mathematics reasoning, listening comprehension, and attention and organization. Student's achievement was substantially below age and grade expectations in mathematics problem solving. (NT 97-99, 134-136; P 4, 14, 31, 35 p. 12-14, 21; S 4.)
42. Student's achievement with regard to mathematics problem solving was part of a pattern of strengths and weaknesses characterized by a severe discrepancy between Student's intellectual ability, age level norms and grade level curricular expectations and Student's mathematics problem solving, attention and focus regarding grade level mathematics problem solving, and age equivalent mathematics problem solving. (NT 53-66, 73-77, 79-81; P 2, 4, 31, 42; S 3, 4.)
43. The District did not offer Student special education summer programming for the summer of 2011, because Student did not have an IEP and was therefore not eligible for ESY services, although Student exhibited regression during the summer months. (NT 99; P 2, 34 p. 27-30.)
44. Parent provided Student with over 100 hours of private tutoring during the summer of 2011. (NT 100-102; P 35 p. 23, 40 p. 2, 35 p. 36.)
45. The Parent caused the private evaluation report to be sent to the District on or about April 18, 2011. On May 2, the District sent to Parent a Permission to Evaluate form for a review of the private evaluation, review of educational records and ELL screening. Parent requested a meeting in order to create an IEP and incorporate the private evaluator's recommendations into the IEP, but the District insisted upon a re-evaluation before changing Student's identification, based upon its view of the legal requirements for identification. (P 5, 6, 34 p. 25-29.)
46. At a meeting on June 14, 2011, the District agreed to expedite re-evaluation and program planning if possible and as needed for Student. (NT 92-95; P 34 p. 28-30.)

Educational Services And Progress During Fourth Grade (2011-2012 School Year)

47. In May 2011, Student was diagnosed with ADHD and Student was taking medication for that disorder by the beginning of the fourth grade school year. However, administration was variable, and Student's attention problems had a negative impact on Student's performance during fourth grade, due in part to irregular administration of prescribed medication. (NT 200-204; P 35 p. 13, 36.)
48. Parent continued providing Student with private tutoring in the first two months of the Student's fourth grade year. (NT 100-102; P 14, 40.)
49. Parent obtained a private speech and language evaluation that noted that Student was displaying an expressive language disorder and recommended weekly speech and language therapy. Parent did not ask the District to pay for the private evaluation. (NT 104-105; P 14.)
50. Parent provided Student with private speech therapy, one hour per week for 12 weeks, starting in October 2011. (P 35 p. 22.)
51. The District provided a second evaluation report in September 2011. The report concluded that the Student was a child with a disability in the category of Speech or Language Impairment. The report recommended continuing Student in "tier two" general education instructional support for mathematics, and recommended specially designed instruction and accommodations to address Student's needs in listening comprehension and attention and organization. (S 4.)
52. The District evaluator rejected the private evaluator's hypothesis that the January 2011 IQ scores were erroneous because the test used was language loaded, but accepted that the scores were not an accurate estimate of Student's IQ due to variability of Student's performance in all assessment and testing. The District evaluator, based upon the new IQ scores from the private evaluation report, concluded that Student's cognitive ability is in the average range. (S 4.)
53. The evaluator accepted both teacher responses to informal and formal requests for information, as well as scores from the private evaluator indicating that Student demonstrated severe difficulty with listening comprehension. The District's speech and language therapist tested Student with three standardized tests. In addition, the District's English as Second Language (ESL) teacher evaluated student's ability to utilize English for school purposes, finding that Student was in need of "tier II" instructional support for academic language and content-specific vocabulary. On the basis of the reported speech and language scores and ESL recommendations, the evaluator found that Student was a child with a disability under the classification of Speech or Language Impairment. (S 4.)
54. The District's evaluator, who had authored the previous report in January 2011, found that the private evaluator's scores, when considered in light of Student's achievement, supported a finding that the Student had average cognitive ability. (S 4.)

55. Utilizing mathematics reasoning scores from the Woodcock-Johnson-III-NU/Tests of Cognitive Abilities reported by the private evaluator, the District's evaluator concluded that the discrepancy in Student's ability and achievement scores for mathematics problem solving did not attain the level required under the District's discrepancy analysis policy. (S 4; HO 1.)
56. The District evaluator considered this discrepancy finding along with curriculum based measures and a teacher report. The Student had made progress on District benchmark testing with instructional support, and had scored proficient on the Pennsylvania System of School Assessment (PSSA) tests given in the Spring of 2011. Student remained two points below average on District benchmarks for mathematics, and remained below proficient making change, using estimation skills to solve problems, and calculating elapsed time. Student's instructional support teacher reported continuing difficulty in conceptualizing mathematics "in general", and the teacher's responses on a behavior inventory were rated as indicating that Student was at risk for learning problems. In view of this mixed evidence, the evaluator concluded that a classification of specific learning disability was not warranted. (S 4; HO 1.)
57. The District evaluator concluded that the Student was not demonstrating orthographic processing weaknesses with significant impact on academic performance, in light of Student's progress. (S 4.)
58. The District evaluator found that Student was not eligible for special education based on attention problems, despite the instructional support teacher's responses on a clinical inventory indicating clinically significant symptoms of inattention and at risk symptoms of hyperactivity, impulsivity, and executive functioning problems. There was no medical diagnosis at the time. The evaluator found no evidence that Student's symptoms interfered with expected academic performance, but noted that Student's weaknesses in the area of attention and organization are likely to be compounded by Student's speech or language impairment. The evaluator recommended that the IEP team adopt the private evaluator's recommended modifications and accommodations including reducing environmental distractions, chunking assignments, priority seating and addressing organizational deficits. (S 4, 7.)
59. On September 15, 2011, the District IEP team met and issued an IEP. It provided placement of itinerant speech and language support through small group instruction in speech for two percent of the school day. It provided three goals addressing language comprehension and modifications and accommodations addressing attention, listening comprehension of directions, organization, speech and language weaknesses, and difficulties with mathematics problem solving. No speech or language services were provided in the IEP, but the speech and language therapist was directed to consult with Student's regular education classroom teacher to help Student apply speech and language related skills in the regular education setting. In addition, speech and language therapy was provided thirty minutes per week to address receptive language. Since expressive language is closely intertwined with receptive language, the therapy sessions focused on receptive language goals could be expected to have some effect on expressive language skills. (NT 125-128, 519-522; P 14; S 5, 7.)

60. The September 2011 IEP modifications section included “tier 3” mathematics support, apparently a reference to a general education intervention addressing Student’s needs in mathematics problem solving. This support included the same curriculum that had been used with Student in second grades, including supplementary curricular material that did not directly address Student’s weaknesses in mathematics problem solving. After a trial of the supplementary curriculum, the Student was returned to support with the general education curriculum that had been used in second grade. Programming did not focus on Student’s individual area of need in mathematics. (NT 162-164; P 35 p. 33; S 4, 7.)
61. Parent disapproved the IEP initially, because certain data in it was inaccurate or incomplete, but eventually approved it on November 14, 2011. (NT 130-132; P 35 p. 22-24; S 5.)
62. Mathematics support was provided on a pull out basis, often during mathematics classes, creating some confusion in the program. (NT 114-116, 162-163; P 36 p. 7-8.)
63. Speech and language therapy did not start until after November 29, 2011, and the amount of services provided, thirty sessions per year, one half hour per session, was inadequate to address the Student’s needs. Speech and language therapy was provided on a pull out basis, and often Student was pulled from mathematics class, at Parent’s request. (NT 112-113, 130-133, 370-371, 569.)
64. The District did not offer ESY services for the summer of 2012, and did not report any data on regression and recoupment. Parent provided summer programming for two weeks provided by the School. (NT 145-146, 151-153; P 37.)
65. Parent provided eight to ten hours per week of tutoring for Student during Student’s fourth grade school year. (P 14; S 7.)
66. Student made some academic progress in fourth grade, as measured by District benchmarks and curriculum based measures; however, Student’s grades indicated continuing performance below proficiency in classroom subjects. (NT 818-823; P 31; S 7.)
67. Student attained the IEP language comprehension goal of categorizing by April 2012. Student did not attain the language comprehension goal of stating the main idea by June 2012; moderate progress was reported. Student did not attain the language comprehension goal of identifying keywords, but did attain the language comprehension goal of answering “wh” questions. (P 14.)
68. Student continued to struggle with mathematical concepts like time, calendar, measurement and money, and mathematics problem solving during fourth grade. (NT 119-120, 139-146; P 35 p. 31.)
69. Parent reported being pleased with Student’s progress in vocabulary and organization fourth grade, and communicated approval of District educational services, but reported no progress in mathematics concepts and problem solving, increased difficulties with reading comprehension, and a need for more speech and language services to work on

Student's receptive and expressive speech. (NT 139-140, 223; S 7; P 35 p. 31, 35 p. 36A-D; 36 p. 2-3.)

70. Student experienced difficulty with reading comprehension in non-fiction texts throughout fourth grade. Student's reading comprehension at the end of fourth grade was below average at a fourth grade level. (NT 102-103, 136-137; P 35 p. 29-31; S 7.)
71. Student's mathematics problem solving was measured to be below average at a fourth grade level by the end of fourth grade, with substantial supports. Standard score retesting revealed a significant increase in mathematics reasoning scores with a significant reduction in mathematics fluency scores. (P 24; S 7.)
72. Student exhibited serious difficulties with attention and focus during fourth grade. (NT 166-168; S 7.)
73. At Parent's request, the District conveyed to Parent a Permission to Re-Evaluate form in July 2012. (NT 153-159; P 17, 36.)

Educational Services, Offers And Progress During Fifth Grade (2012-2013 School Year)

74. In September 2012, the District completed a re-evaluation at parent's request by a qualified school psychologist with a doctorate, state certification, and several years of experience in evaluating children for educational purposes. The evaluation classified Student with Speech or Language Impairment and Other Health Impairment due to ADHD. It recommended modifications and accommodations but not a change in curriculum offered. It recommended learning support in small group settings or a push in format for mathematics problem solving and reading comprehension, as well as continued speech and language therapy for receptive and expressive language weaknesses. (NT 157-161; S 7.)
75. The District evaluator administered a different standardized cognitive test battery, the Kaufman Assessment Battery for Children – II (KABC-II). The District evaluator selected this cognitive test because it can be given with the verbal reasoning part left out, thus making it more useful for subjects with low language ability; the evaluator also considered it more valid than the nonverbal ability test given by the private evaluator. This test yielded scores of low average cognitive functioning, but was reported with caution because of Student's poor effort and distractibility during testing; thus, it was considered to be an underestimate of Student's ability. (NT 808-816; S 7.)
76. The evaluator concluded that the Student demonstrated strength in long term memory and learning skills, and weak achievement in reading comprehension and mathematics problem solving and reasoning. The evaluation also identified clinically significant problems in attention and executive functioning. (S 7.)
77. Curriculum based measures indicated that Student's reading comprehension was instructional with fourth grade level material. Listening comprehension was frustrational with fourth grade level material. (S 7.)

78. Curriculum based measures in mathematics showed that Student continued to struggle with probabilities, calculating volume, transformations and long division. (S 7.)
79. Student's composite scores for reading and mathematics, along with some curriculum based measures, indicated overall reading and mathematics achievement that was commensurate with Student's ability. Remedial mathematics scores for fourth grade indicated performance above benchmark levels. These scores reflected grade level achievement in basic reading and mathematics skills. (S 7.)
80. Standardized testing of language skills placed Student in the low range of functioning for receptive and expressive language skills, as well as language content and memory. Scores for expressive language were substantially lower than those for receptive language. (S 7.)
81. The District offered an IEP at a team meeting on October 3, 2012, with a NOREP provided by October 5, 2012. The IEP placed Student in itinerant speech and language and other health impaired support. It offered systematic, sequential, research based reading instruction in a small group setting and push in support during regular education mathematics classes most likely by a paraprofessional. It offered goals addressing attention and on-task behavior, reading comprehension, mathematics reasoning and problem solving, expressive language and receptive language. It also offered modifications and accommodations addressing attention and focus, comprehension of directions, organization, language components of mathematics assessments, comprehension of abstract concepts, test taking, hyperactivity, and understanding of figurative language. It offered speech and language therapy as a related service, thirty sessions during the year, one half hour per session. (NT 176, 487-490, 895-896; P 21.)
82. Parent did not approve the IEP or sign the associated NOREP. The previously agreed IEP programming, goals and codifications and accommodations remained in effect. (NT 177; P 19.)
83. Student's performance and achievement declined during fifth grade. Student began to develop feelings of inadequacy. (NT 179-189; P 31, 32 p. 1-8.)
84. Parent obtained a private evaluation from the same private evaluator on or about October 15, 2012. Parent, through counsel, asked the evaluator to provide any opinion concerning the appropriateness of the District's offered IEP dated October 3, 2012, Student's need for private placement, and the adequacy of the District's re-evaluation report dated September 14, 2012. (P 24.)
85. The private evaluator obtained teacher input indicating that Student struggles on days on which Student is not attending well and on task. On testing, Student exhibited some confusion, uncertainty about the meaning of directions, and significant difficulties with abstract reasoning and higher order language comprehension. Student exhibited significant difficulties with mathematics word problems. (P 24.)
86. Testing revealed that Student has good vocabulary skills but continues to struggle with auditory reasoning and symbol directionality. Student demonstrated academic

achievement in passage comprehension and general reading and mathematics skills. Student continued to struggle with reading comprehension, listening recall, understanding directions, mathematics problem solving and listening comprehension. (P 24.)

87. The private evaluator recommended that IDEA classification include specific learning disability with regard to reading comprehension, mathematics reasoning and listening comprehension. The evaluator recommended learning support and the utilization of research supported curricula that address these needs in a small group setting. (P 24.)
88. In November 2012, after Student was placed in the School and withdrawn from the District, the District performed a re-evaluation consisting of a review of the private evaluator's second report and additional observations. The evaluation continued not to identify Student with specific learning disability, calculating discrepancy based upon any IQ score obtained by Student in three years of repeated testing with different instruments. The District's conclusion was based upon the criteria in the District's policy for discrepancy analysis, which requires a discrepancy to be present in five percent or less of the population in order to find a discrepancy. (NT 831-843, 925-926; S 14, HO 1.)
89. The November re-evaluation disagreed with the private evaluator's recommendation of a small group setting for learning support interventions, recommending that the itinerant level of support is appropriate for Student, including either pull out or push in services in addition to the speech and language services. The re-evaluation disagreed with the private evaluator's recommendation of different mathematics and reading curricula because Student's needs are in higher level reasoning skills and the recommended curricula do not address these with research support for effectiveness. The evaluation recommended supplemental reading instruction that is scientifically based and systematic, but did not identify the recommended program. (S 14.)
90. The re-evaluation indicated that push-in learning support for mathematics would address Student's needs for assistance with prediction, inferencing, repetition of directions, organization, and regular redirection back to task. (S 14.)
91. The re-evaluation addressed every modification and accommodation recommended by the private evaluator and agreed with some while disagreeing with some. (S 14.)

Private Placement at the School in Fifth Grade

92. Parent placed Student in the School as of November 5, 2012, at Parent's own expense. The School offered a setting including small class size and multisensory instruction. The School provided Student with research supported direct instruction in reading comprehension skills, a different, incremental mathematics curriculum that emphasizes repetition and mastery of sequential material (a research based curriculum that the Parent's private evaluator had recommended for Student and that Parent had purchased privately and tried to use in tutoring Student at home), and one hour per week of group speech therapy to directly address Student's expressive and receptive language disability. (NT 189-192; P 37, 40.)

93. The School placed Student in fourth grade rather than fifth grade, with reading and mathematics curriculum at a fourth grade level. Student performed to expected levels in mathematics reasoning and problem solving, expressive and receptive language skills, and reading comprehension at the School. Parent noted significant progress in speech therapy and mathematics problem solving, telling time, elapsed time problems, and reading comprehension. Student's self-confidence has improved since beginning at the School. (NT 193-196; P 32.)
94. The private evaluator opined that the School was an appropriate placement because it offers the curricula and speech therapy services as recommended by the private evaluator. (NT 392-394; P 24.)
95. In December 2012, the District offered an IEP revision for the current school year. It did not change the goals, modifications, accommodations or services offered in the October 2012 IEP. (S 16.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).³ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁴ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

³ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

⁴ A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, the Parent requested due process and the burden of proof is allocated to the Parent. The Parent bears the burden of persuasion on all issues. If the Parent fails to produce a preponderance of evidence in support of her claims, or if the evidence is in “equipoise”, then the Parent cannot prevail under the IDEA.

IDENTIFICATION WITH SPECIFIC LEARNING DISABILITY

Parent asks this hearing officer to enter an order declaring that Student is identified with a specific learning disability. I decline to do so. It is not necessary to do so, and I do not find the record preponderant that Student should be so classified. Although the record is preponderant that the District’s discrepancy analysis is limited to an algorithm that confines specific learning disorder to cases that occur in less than five percent or less of the standardization sample, and I find no basis in the federal or state statutes for an “unusual” criterion, 34 C.F.R. §307, 22 Pa.Code §14.125, the record is insufficient to support any conclusion on the validity of this procedure, nor was that an issue defined in this matter. Hence I decline to reach any conclusion on this matter and I decline to enter the requested relief.

FAILURE TO OFFER OR PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg’l High Sch. Bd. Of Ed. V. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

However, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

Whether the IEP meets this test must be judged in light of the IDEA's mandate that an IEP must address all of a student's educational needs. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(bb). 34 C.F.R. §300.320(a)(2). Whether a FAPE has been offered must be judged in light of the child's unique constellation of educational needs, Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982), and the child's intellectual potential, Shore Reg'l High Sch. Bd. Of Ed. V. P.S., 381 F.3d 194, 198 (3d Cir. 2004).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996) (appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

Student's Third Grade Year (2010-2011)

I conclude by a preponderance of the evidence that the District's failure to identify Student as a child with a disability was inappropriate. The evidence is preponderant that the

initial evaluation report in January 2011 underestimated Student's IQ to a significant extent. The District report relied entirely upon one IQ test for determining Student's cognitive ability, without accounting for the possible effect of language disorder on performance on the single IQ test that was utilized. Ultimately, the District abandoned its lower estimate of Student's cognitive ability, adopting the private evaluator's estimate of average ability one year later. Although later, in anticipation of a due process hearing, the District's psychologist receded from that position, the District's motile positions on IQ bely a flawed approach in the beginning.

Less than a year later, the private evaluator's first report showed significantly higher scores, placing Student in the average range of functioning. The private report relied upon two tests, both of which were selected in view of Student's apparent language difficulties, in order to minimize any depressing effect on scores that might be caused by language difficulties. While there was some question as to the comprehensiveness of the Wechsler Nonverbal test, because it only utilizes four subtests, the private evaluator appropriately reported that this instrument showed much higher functioning, and that Student's IQ was average when this instrument was considered together with the results of the second test, a full scale IQ test battery.

The Student's family and educational history, known at the time of the initial evaluation report, also show that the initial District estimate of Student's intelligence was incorrect. Parent reported extensive history of normal cognitive and functional development. Moreover, Student's achievement in school was uniformly above levels predicted based upon the District's IQ score, a pattern that the evaluator reported to be unusual.

The record is preponderant also that the District failed to detect Student's language difficulties in its first evaluation. There was no speech or language evaluation. The hypothesis of a language processing disorder did not seem to be entertained at this point.

The District argues that the evaluator's lack of suspicion or inquiry into the possibility of a language based disorder was appropriate based upon the scores derived from testing. The District argues that scores in tests that pull for language dysfunction were normal in the third grade testing, but, based on test design, increased in difficulty in fourth grade, so that Student's scores for the first time revealed language difficulties in fourth grade. I do not accept this defense. The record is preponderant that there was considerable anecdotal information suggesting language problems, but that the third grade evaluation failed to provide testing specific to that possible cause of Student's academic problems. See 34 C.F.R. §300.304(c)(2) (assessments must be tailored to address specific areas of need).

The District argues that the evaluator had no reason to identify Student with attention deficit disorder in third grade, but had every reason to do so in fourth grade. I do not accept this argument. While the Connors behavior inventory for third grade did not indicate attention difficulties in school that advanced to clinically significant range, again anecdotal evidence from teachers painted a much different picture. At the very least, the anecdotal history should have generated more specific inquiry into this possibility.

Given the limited scope and incorrect estimate of intelligence, the District declined to identify Student as a child with a disability, and the evidence is preponderant that the regular education interventions that the District provided were inadequate to address the disabilities that were interfering with Student's ability to perform mathematics reasoning or problem solving in third grade. Student showed no meaningful progress in this area in third grade.

The District argues that the District's benchmark scores showed appropriate progress in the curriculum, and that PSSA scores corroborated this. However, Student's report cards, also purportedly measuring progress in the curriculum, showed a much more mottled picture.

Weighing the benchmark scores against all of the contrary evidence on the question of progress, I conclude that the Student did not make meaningful progress in third grade, because Student did not improve in the areas impacted by Student's disability.

Given that the District did not provide an IEP for third grade, the record is preponderant that the District failed to provide a program to Student that was reasonably calculated to provide meaningful educational gain. Thus, the district failed to provide a FAPE to Student for third grade.

Student's Fourth Grade Year (2011-2012)

At the beginning of fourth grade, Parent conveyed to District personnel her concerns for Student's functioning and her suspicion of a disability. Parent conveyed a private evaluation with diagnosis of Attention Deficit Hyperactivity Disorder and a private speech and language report indicating both receptive and expressive language difficulties. Pursuant to Parent's request in the preceding Spring and Summer, the District accepted the private evaluator's IQ estimate and identified Student for special education. It thereupon convened an IEP team meeting which offered an IEP in September. Due to some disagreements with the text of the IEP, Parent began seeking some alterations of the IEP and eventually signed a NOREP in November 2011. The District did not offer special education services for mathematics, continuing Student in regular education with mathematics support, contrary to the private evaluator's advice. A modest amount of speech and language therapy was provided. Goals addressed only receptive language; modifications and accommodations addressed attention and language. Tier 3 mathematics support and speech and language services were on a pullout basis, interfering with Student's instruction in mathematics. No ESY was offered.

The evidence is mixed as to whether or not Student made some progress in fourth grade. Curriculum based measures suggested grade level performance in the District's curriculum, as well as on some tests of general reading and mathematics ability. Student's report cards showed proficiency in several areas of the curriculum, but below proficient performance in a substantial number of subjects covered in Student's classrooms.

The question is whether Student's very uneven academic progress was meaningful. In view of the IDEA's requirement that school agencies must provide specially designed instruction that addresses each child's unique array of educational needs, I conclude that the District failed to provide Student with meaningful educational gain. There was little progress in the Student's areas of unique disability and need.

Student's mathematics problem solving skills did not improve meaningfully; Student continued to be unable to solve problems involving time, money, estimation and measurement. Thus, Student was unable to apply to real life situations many of the mathematics skills learned in the classroom.

Student's listening comprehension progress was modest; Student learned to answer "wh" questions and met the IEP goal for that skill, but did not meet the goals for identifying the main idea of a grade level text, or finding key words in grade level text.

Student's reading comprehension, which had been an area of low performance in previous evaluations, but had not risen to the level of an identified disability, emerged as a visible problem area, yet the District did not initiate a re-evaluation or modify the IEP to address this in any systematic, data-driven way.

Thus, the District failed to address all of Student's unique constellation of needs during fourth grade. I conclude that Student's progress was not meaningful in fourth grade within the

meaning of the IDEA. Moreover, what progress could be shown must be seen in light of the thousands of dollars of private tutoring and the many hours per week of personal tutoring that Parent provided in addition to District services. Any progress that Student made in fourth grade must be viewed in light of the IDEA's requirement that a public education must be "free" to the Parent. The record is preponderant that any progress during the fourth grade year was attributable as much to privately provided educational services as to "free" publicly provided services. This further reduces the evidentiary support for any contention that District services were "appropriate" under the IEP.

Lack of meaningful progress, however, is not the test for the delivery of a FAPE. The IEP and programming implemented during fourth grade are to be considered, not in hindsight, but based on what the District knew at the time. Here, the District had ample evidence from Student's performance in second and third grades that Student had serious needs with regard to mathematics concepts and problem solving, as well as language comprehension, especially listening comprehension. Still, the District failed to provide programming reasonably calculated to provide meaningful educational benefit in these areas of need.

The District's programming was not reasonably calculated to provide meaningful benefit because it did not provide specially designed instruction for Student's serious problem with mathematics concepts and problem solving – including problems involving time, money, estimation and measurement. Rather, the District continued Student in regular education instructional support for mathematics, in programming that did not focus on these unique needs. Even that regular education support was not provided consistently throughout at least half of the school year, and it was scheduled in such a way as to reduce - by half - the time that Student spent in the regular education mathematics classroom, by pulling Student out of the class and

apparently relying upon Parent to supply missed instruction by privately tutoring Student at night.

The District's programming was not "reasonably calculated" with regard to language processing. The District was aware that Student was exhibiting serious problems with language processing, particularly receptive language. It provided speech and language support, and progress was limited, with Student failing to attain most of Student's IEP goals in this area, and with no adjustments in the programming to enable attainment of the goals. I conclude that the amount of service thus provided was at best grudging, and was not calibrated with the aim of intervening to allow Student to make meaningful progress, as Student's later scores on standardized measurements attest.

Regarding deficits in expressive language and reading comprehension, the District had ample historical data indicating that these problems might be present, but not yet emerging at a level that interfered with access to the curriculums of second and third grade. Moreover, the District was on notice at the beginning of the school year that these problems were interfering with curricular access. Parent conveyed Parent's own observations of expressive language difficulties at the beginning of the school year. Moreover, Parent forwarded a private speech and language report that found expressive language problems and recommended a higher level of intervention than the IEP called for in the beginning of the year. (Indeed, the IEP did not call for any speech and language therapy at that time, although the District was providing some therapy sessions.) Yet, the District did not assess this problem or provide a systematic specially designed instruction to address it during the entire year.

Student's Fifth Grade Year (2012-2013)

The District's October 2012 offer of services was inadequate to address Student's needs with regard to mathematics problem solving, listening comprehension, expressive language and reading comprehension.

Regarding mathematics reasoning and problem solving, the District proposed to continue Student in the general education curriculum with push in support. This curriculum had been confusing to Student for most of Student's school career, and there was no basis in the RR that push-in support could help Student. Student did not need someone to translate instructions or test questions to Student in the general education setting; rather, Student needed a specially designed curriculum that teaches mathematics concepts differently, and a small group setting to deliver that curriculum. The District was well aware of this recommendation from the private evaluator, but steadfastly ignored it. Consequently, the District followed an incoherent instructional program in fourth grade with an unexplained support system for fifth grade that eschewed the recommended appropriate specially designed instruction.

The evidence was mixed regarding student's progress or lack of progress in mathematics concepts and problem solving during fourth grade. The private evaluator noted standardized test-retest scores that indicated a marked increase in these skills from testing in 2011 to testing in 2012. District benchmark scores showed progress but not proficiency, and support was reduced from tier three to tier two, purportedly due to Student's progress. However, teacher reports and curriculum based measures contradicted these data suggesting progress, and testing at the end of the year and the beginning of the following year also showed contrary evidence. The private evaluator concluded that the offered program was inappropriate. On balance, I conclude that the

program offered in October 2012 for mathematics reasoning and problem solving was inappropriate.

ESY

Pennsylvania regulations provide the criteria and procedures for determining whether or not a student needs ESY services in order to provide that student with a FAPE. 22 Pa.Code §14.132. The regulation requires consideration of seven factors and requires that no single factor be determinative. 22 Pa.Code §14.132(a)(2). These factors include regression and recoupment, 22 Pa.Code §14.132(a)(2)(i) (ii) and (iii); interruption of instruction on a newly attained skill, 22 Pa.Code §14.132(a)(2)(iv); importance of a skill for self-sufficiency or independence, 22 Pa.Code §14.132(a)(2)(v); the effect of interruption on student withdrawal from learning, 22 Pa.Code §14.132(a)(2)(vi); and severity of disability, 22 Pa.Code §14.132(a)(2)(vii). The regulation also requires districts to consider need for ESY services each year, based upon data including parental observations of negative changes in behavior or skills, assessments and tests. 22 Pa.Code §14.132(b).

Parent proved by a preponderance that Student needed ESY services in the summers of 2011 and 2012. Student frequently forgot what Student had learned when material was not reviewed frequently. Student also regressed over summer breaks, as report card and other evidence showed. Parent provided tutoring after school and in the summers, at great personal expense, in order to address Student's inability to retain skills already learned. Thus, Student met the criterion of regression and poor recoupment set forth in the regulations.

The District was well aware of Student's difficulties with retention of information and skills, especially in the areas of mathematics reasoning and problem solving and comprehension

skills. Nevertheless, after third grade, the District did not provide ESY services because it had erroneously failed to identify Student as a child with a disability as to whom it owed a duty to provide a FAPE. As to fourth grade, when Student had an IEP, there is no evidence that the District collected data to assess whether or not Student was eligible for ESY services, as required by state regulations for students with IEPs.

I conclude that Student needed and was not provided ESY services during the summers of 2011 and 2012.

COMPENSATORY EDUCATION

Compensatory education is an appropriate remedy when a school district has failed to provide a student with a FAPE. Lester H. v. Gilhool, 916 F.2d 865, 781-783 (3d Cir. 1990). I conclude that the District should provide Student with compensatory education; therefore, I must determine the nature and amount of compensatory education to be provided. Compensatory education is an equitable remedy ordered for the purpose of replacing the educational services that should have been provided. Ibid. This can be either an hour by hour compensation or restoration of the student to the position student would have been in if appropriate educational services had been provided. The record in this matter contains no evidence showing what position the Student would have been in if provided with a FAPE during the relevant time period; therefore, I conclude that compensatory education should be measured on an hourly basis.

A reasonable period must be accorded for rectification of the problem. M.C. v. Central Regional Sch. Dist., 81 F.3d 389, 397 (3rd Cir. 1996), cert. den. 519 U.S. 866 (1996). In the present matter, I conclude that further allowance for rectification would not be reasonable with

regard to the District's failure to provide a FAPE with regard to mathematics reasoning and problem solving, as well as receptive language deficits. I accord a reasonable rectification period for expressive language and reading comprehension.

Regarding the District's failure to provide specially designed instruction for mathematics concepts and problem solving, I accord no period for identification and remediation. The District was on notice during second grade that Student had a need in this area, and when it evaluated for third grade, it erroneously concluded that the Student's performance in this area (which was negligible and well below both age and grade expectations) was commensurate with Student's cognitive ability. For fourth grade, while it amended its erroneous estimate of Student's cognitive ability, the District again failed to identify Student's mathematics deficits as requiring specially designed instruction. Again prior to fifth grade, the District again declined to provide specially designed instruction for Student's difficulties in this area. Thus, I will order the District to provide compensatory education for full school years in third and fourth grades, and for part of fifth grades until Parent withdrew Student from the District on November 5, 2012, with regard to mathematics concepts and problem solving.

Regarding the District's failure to provide programming for Student's receptive language disability, I will similarly order the District to provide compensatory education for full school years in third and fourth grades, and for part of fifth grades until Parent withdrew Student from the District on November 5, 2012. Again, the District was on notice that Student was experiencing serious difficulties in this area of functioning, yet, its evaluation for fourth grade was not comprehensive enough to identify this disability. It provided neither specially designed instruction nor related services for this problem during fourth grade, and its fifth grade IEP,

while it addressed the problem through goals and some modifications and accommodations, did not provide a clear or sufficient therapy service to address it meaningfully.

Regarding the District's failure to provide services to address Student's expressive language disability and reading comprehension problems in fourth grade, I accord a period of sixty days for discovery and remediation, and will order the District to provide compensatory education from the sixty-first calendar day of Student's fourth grade school year until Parent withdrew Student from the District on November 5, 2012. While there was historical evidence that Student had some disability in these areas, the District's substantial volume of evaluation data did not support a conclusion that Student needed specially designed instruction to address them in third grade, or when evaluated for the first time as reported in January 2011. I conclude that the "red flag" did not emerge for these problems until September 2011, when Parent focused on these areas of concern. In particular, regarding expressive language, Parent conveyed the private speech and language report identifying it as a serious need. Regarding reading comprehension, Parent corresponded with the Student's fourth grade teacher, who recognized Student's struggles as early as September, as the weight of the evidence shows. The District did nothing to address the issue of specially designed instruction for these needs for the entire year. Thus, the reasonable period for discovery and remediation is appropriate for this disability, but compensatory education will be ordered for the remainder of the Student's tenure with the District.

There is evidence on the amount of compensatory education to be awarded on account of the District's failure to provide a FAPE in the above four areas of need. The private evaluator opined that the appropriate amount would be three hours per day on account of the failures with regard to mathematics, language comprehension and higher level thinking skills.

Unquestionably, the District should have provided Student with one hour per day of special education with regard to mathematics reasoning and problem solving. In addition, the Student should have received at least one hour per day of learning support with regard to language skills and reading comprehension. In addition, there was evidence that Student should have received one hour per week of speech and language therapy to address both receptive and expressive language; instead, the District provided only thirty half hour sessions for an entire year. The total of these hours would come close to, but fall somewhat short of, the figure stated by the private evaluator. I conclude that this approach addresses the private evaluator's criteria and is the appropriate formula for compensatory education, subtracting for date of District notice of reading comprehension and expressive language needs, and reasonable rectification time, as indicated above.

TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15,

114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007).

As discussed above, I conclude, based upon a preponderance of the evidence, that the District failed to provide Student with a FAPE in third and fourth grade, and failed to offer a FAPE for fifth grade. Thus, the first step of the Burlington Carter analysis is satisfied.

I find by a preponderance of the evidence that the parental placement was appropriate. The School is an established private school for children with language based learning disabilities, and Student's disability is certainly sufficiently language based to fit that description of the School's program. The School provides small class settings and utilizes research supported curricula that address needs that Student has exhibited for structured, systematic and sequential learning in mathematics and reading. It provides speech pathology services that can address Student's difficulties with expressive and receptive language. Its programs are recommended by the private evaluator.

The District argues, based upon the testimony of its expert psychologists, that the curricula provided at the School and recommended by the private evaluator are inappropriate for Student, because those programs are prescribed for students with difficulties in basic mathematics and reading skills, whereas Student's difficulties are displayed in higher reasoning aspects of reading and mathematics. While I have considered this testimony, it is very much a matter of judgment, and I find that the private evaluator is much more knowledgeable about these programs, thus giving her opinion more weight. I note that, while Student displays good skills in basic mathematics, the overall structure and sequential nature of the School's program is one of the reasons for the private evaluator's opinion, and this is consistent with the evidence of Student's needs. The criticism regarding the reading program at the School demonstrates a

lack of knowledge in the District's experts about this program, because the record shows that the program offered at the School includes a reading comprehension curriculum that does address Student's needs for higher reasoning skill development in reading, and this was recommended by the private evaluator.

The District argues that the School is not the least restrictive environment. However, legally the Parent does not have to establish that the unilateral placement meets the requirements of the IDEA in order to prove appropriateness. Thus, I conclude that the Parental placement was appropriate.

In balancing the equities, I find considerable weight on the side of the Parent, given the history recounted above. On the District side, I find some weight, because the District asserts that it did not have time to show that its 2012 offer of program could be effective, because Parent removed the Student before the program could be implemented. Also, the district points out the delay from September 15, 2011, when the fourth grade IEP was offered, to November 2011, when Parent signed the NOREP. I find neither of these considerations to outweigh the equitable basis of Parent's claim for tuition reimbursement. Therefore, I will order reimbursement of tuition and transportation costs for Student's attendance at the School for the 2012-2013 school year.

I find no authority, and the parties have cited none, for reimbursement of books and fees associated with a private unilateral placement, and I do not order reimbursement for books or fees.

Parent requests reimbursement for tuition and costs for the 2013-2014 school year. I decline to order it. The district plainly has not had a chance to offer a FAPE for the upcoming

year, nor has the Parent requested it to do so. Equitably, then, this request for relief fails at the third step of the Burlington-Carter test for tuition reimbursement.

PRIVATE PSYCHOLOGICAL REPORTS AND TESTIMONY

Parent argues that section 504 authorizes reimbursement for expert fees for reports and testimony, and that this hearing officer should do the same. I consider such an award to be equitable in nature, if authorized at all at the administrative level (a legal basis not established by the briefs in this matter). The record does not support the conclusion that such unusual relief at the administrative level is warranted, and I deny this request.

Parent did not ask the District to pay for private evaluation in February 2011. While the District discussed this and made statements discouraging Parent from seeking public payment, the Parent was able to deal with them and Parent's suggestion that the legal situation overwhelmed Parent is not convincing. Parent made a free choice to eschew any legal right to the evaluation and went ahead with private payment. Therefore, there is no basis under the IDEA or section 504 to require reimbursement on this record.

CREDIBILITY

I find that the Parent's testimony was credible and reliable, and I gave significant weight to this testimony. I based this on corroboration by the documentary record, the Parent's way of responding to questioning during lengthy testimony, and the overall balance and thoughtfulness that the Parent brought to the very confused history and record of curriculum based and clinical assessments. In general, I found that the Parent approached the District with an attitude of vigorous involvement (which at times may have been excessive in comparison with the usual involvement of parents in educational decision making, but which was proven to be correct by

the preponderance of this record) and ultimate respect for the educational judgments of District personnel. While the District points to some inconsistencies with the documentary record, these are miniscule compared to the overall corroboration of this testimony in the record.

I give ordinary weight to the testimony and reports of the Parent's private evaluator. The evaluator evidenced some leaning in favor of Parent's position in this matter, and the evaluator was hired by Parent for a not negligible fee, in order to provide impartial opinions; these opinions, once provided, were enlisted in support of Parent's position. However, even discounting the testimony for this factor, the evaluator's opinions and conclusions have solid weight, for several reasons. First, the evaluator is highly trained and experienced as evidenced by the evaluator's resume in evidence. Second, the evaluator's methodology, based on this record, was consistent with appropriate practice in the field of school psychology; the District's well qualified and experienced evaluator for the January 2011 and October 2012 evaluations endorsed the validity of the private evaluator's findings and accepted her conclusions that the District estimate of Student's IQ was incorrect, and that Student was functioning in the average range of cognitive ability. Third, the private evaluator's testing strategy and conclusions were much more consistent with the great weight of the anecdotal and historical information, as well as the preponderance of curriculum based measures, in the record. Fourth, the evaluator's conclusions essentially were adopted by the District, and Student was given special education services, ostensibly to address the clinical disabilities that the evaluator found. Fifth, the evaluator was not constrained by adherence to a policy aimed at compliance with a legally required numerical standard that has as its foundation the assumption that specific learning disabilities are found in only five percent or less of the Student's standardization sample; thus, the private evaluator was free to use some clinical judgment in applying the legal definition of

specific learning disability (which is not expressed in numerical terms) to the myriad and conflicting facts of this matter.

The District argues that the private evaluator's judgment and credibility are to be given less weight because her conclusions support the Parent, and because of certain flaws in the private evaluator's reasoning that they showed through the testimony of their two very qualified and experienced school psychologists. I have carefully considered these objections to the private reports, which include suggestions that some test scores were ignored because they contradicted the private evaluator's conclusions, and that the private evaluator ignored the fact established by these District psychologists that the discrepancy between ability (as measured by IQ and other cognitive ability scores) and achievement test scores was not large enough to be significant. While these arguments effectively defend the District's repeated decision not to classify Student with a specific learning disability, they do not, in my view, impeach either the credibility or the reliability of the private evaluator's conclusions in this case and based upon this record.

I give slightly less weight to the opinions of the District's two school psychologists. Their qualifications give considerable weight to their opinion evidence, even discounting for the fact that they are employed by one of the parties, and that their testimony was overtly aimed at defending the District and defeating the opinions of the private evaluator. Their methodology was not impeached on this record. However, as to the issue of specific learning disability, I conclude that their adherence to District policy, as described above, constrained their clinical judgment as contrasted with the private evaluator's ability to rely more heavily upon clinical judgment. In this regard, I find it significant that the District experts devoted much attention to showing that the test scores did not support a specific learning disability because the IQ scores were not impacted by a language disorder; yet they effectively adopted the private evaluator's

clinical diagnosis of a language disorder by identifying Student with a Speech or Language Impairment and giving Student speech and language therapy. Thus, I conclude that the District's experts, most appropriately and skillfully adhering to District policy on discrepancy analysis, capably and reliably described the psychometric trees in the forest of conflicting data in this matter. My conclusions, however, are based upon the larger view of the forest itself.

I found the other District witnesses to be similarly credible and reliable.

CONCLUSION

I conclude that: 1) The evidence does not warrant a declaratory order regarding the appropriateness of Student's present classification; 2) the District failed to provide a FAPE for third and fourth years and failed to offer a FAPE for fifth grade; 3) the School was appropriate and the equities support an order for tuition reimbursement for the 2012-2013 school year; and 4) reimbursement is not due for expert fees.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The hearing officer will not order that the Student should be identified as a child with a specific learning disability.
2. The District failed to offer or provide Student with a FAPE from November 17, 2010 to February 14, 2013, including failing to provide needed Extended School Year (ESY) services during the summers of 2011 and 2012.
3. The School is an appropriate placement for Student in the 2012-2013 school year.
4. Considering the equities, the hearing officer hereby orders the District to reimburse Parent for costs of tuition and transportation actually paid out of pocket by Parent, and

not reimbursed by reason of any scholarship credited by the School or any agency, for Student's attendance at the School in the 2012-2013 school year.

5. The hearing officer hereby orders the District to provide compensatory education to Student for every day that school was in session, beginning November 17, 2010 through November 4, 2012, including six weeks of summer programming, five days per week, for the years 2011 and 2012.
6. Compensatory education shall be provided in the form of any remedial or instructional service that addresses Student's educational needs. The number of hours shall be calculated as follows: From November 17, 2010 to the last day of school in the 2010-2011 school year, one hour per day. From the sixty first calendar day after the first school day in the 2011-2012 school year until November 4, 2012, two hours per school day and one hour per school cycle.
7. The above services shall be provided by instructors selected by Parents and qualified to provide the services described above. The cost of such services shall be limited to the comparable cost that the District would incur to provide such services through qualified instructors, including salary and fringe benefits. The services may be provided at any time, including after school hours or in the summer, until Student reaches 21 years of age.
8. The hearing officer does not order the District to reimburse Parent for the cost of two private psychological evaluations and reports dated April 4, 2011, (supplemented by reports dated April 18, 2011 and August 18, 2011), and October 15, 2012, as well as the cost of the evaluator's testimony in this due process matter.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

March 26, 2013