

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

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 13256-1213 AS

Child's Name: O.R.

Date of Birth: [redacted]

Dates of Hearing: 1/11/13 2/25/13, 2/26/13

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents
Parents

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Date Record Closed:

April 3, 2013

Date of Decision:

April 18, 2013

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The Student involved in this case enrolled in the District at the beginning of the 2008/2009 school year, when the family moved to Pennsylvania from a neighboring state and began attending 2nd grade with supplemental learning support and speech/language support based upon the out of state IEP. After an evaluation in the fall of 2008, Student's IDEA eligibility in the categories of OHI and speech/language impairment was confirmed.

Although initially pleased with Student's progress in the District, Parents' concerns about Student's complex needs arising from a number of health issues in infancy that had created developmental delays and a suspicion of cognitive impairment increased during 3rd and 4th grades.

At the beginning of 5th grade, Parents enrolled Student in a private school and initially filed a due process complaint to obtain public funding for the private placement, as well as compensatory education for two years before the complaint was filed. The private placement, however, was unsuccessful and Student returned to the District. Parents' claims at the due process hearing were limited to compensatory education for the period beginning two years before the complaint was filed and continuing through the end of the 2011/2012 school year.

Based upon a thorough review of the testimony and documentary evidence compiled over a three session hearing in January and late February 2013, which established that the District did not thoroughly evaluate Student in 2011, and did not effectively and appropriately address Student's significant needs with sufficient special education and related services during 3rd and 4th grades, Student will be awarded compensatory education for the entire period in dispute, although in different amounts for the periods before and after the April 2011 reevaluation.

ISSUES

1. Did the School District appropriately evaluate Student, and did the District's evaluations appropriately identify Student's eligibility category and needs during the 2010/2011 and 2011/2012 school years?
2. Did the School District provide sufficient appropriate special education and related services during the 2010/2011 and 2011/2012 school years such that Student was reasonably likely to make meaningful educational progress during those school years?¹
3. If the School District violated IDEA in any respect, is Student entitled to an award of compensatory education, and if so, for what period, in what amount and in what form?

FINDINGS OF FACT

Background

1. Student is [a preteenaged] child, born [redacted] who resides in the School District and is eligible for special education services. (Stipulation, N.T. pp. 15, 16)
2. Student is currently IDEA eligible in the disability categories of intellectual disability (ID) and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(6), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 15, 16)
3. Parents adopted Student from an orphanage in [redacted] at the age of 10 months. Student exhibited developmental delays from an early age, including a potential cognitive impairment, and received early intervention and school age special education services in the state where the family resided until relocating to Pennsylvania and the District at the beginning of the 2008/2009 school year. (N.T. pp. 31—35, 49 ; J-3 pp. 1, 2,² P-1)
4. At the time of adoption, Student had significant digestive issues, was unable to sit or crawl and was deaf due to a bone deformity that was later surgically corrected. (N.T. p. 34; J-3 p. 2)
5. Prior to enrolling in the District, Student was determined to be IDEA eligible in the disability category of speech/language impairment and was placed in a self-contained

¹ Although evidence was taken for the entire 2010-2011 school year, Parents limited their claim for compensatory education to the period beginning two years before the complaint was filed on November 12, 2012.

² Commendably, the parties agreed to submit primarily joint exhibits in this matter, which avoided an unnecessarily long documentary record. The joint exhibits are designated by the letter "J" followed by the exhibit number. Additional exhibits submitted by each party separately are designated "P" for Parent and "S" for School District followed by the exhibit number

multiple disabilities classroom. In addition to specially designed instruction, Student received speech/language support, physical and occupational therapy (PT, OT) as related services. (N.T. pp. 32, 33, 441; J-3 pp. 1, 2, P-1)

6. Upon enrollment in the District in August 2008, Student was placed in supplemental learning support in the neighborhood school and continued to receive the same related services until the District evaluated Student in the early fall of 2008. (N.T. p. 443; J-3)

District Evaluations

7. At the time of the District's 2008 evaluation, Parents reported no behavior problems, but assessed Student's development at a year or more behind chronological age. Parents also reported that Student was happy at school and they were pleased with the District program and Student's progress. (N.T. pp. 35, 36, 56; J-3 p. 2)
8. A prior cognitive assessment on the WPPSI-III (Wechsler Preschool and Primary Scale of Intelligence-Third Edition), when Student was 5 years old, placed Student's intellectual capacity in the "borderline" range, with a full scale IQ score (FSIQ) of 74. (N.T. pp. 443, 444; J-3 p. 3)
9. As part of the 2008 evaluation, the District school psychologist administered the WISC-IV (Wechsler Intelligence Scale for Children-Fourth Edition), which resulted in an FSIQ score of 64, in the extremely low range. The school psychologist noted in the RR, however, that Student's scores should be interpreted cautiously in light of the high verbal demands of the test and primary disability category, speech/language impairment, as well as unusual variability in Student's index scores. (N.T. p. 444; J-3 p. 6)
10. Student's standard scores on the verbal comprehension Index (VCI—79), Working memory index (WMI—77) and processing speed index (PSI—71) were all in the borderline range, while Student's score on the perceptual reasoning index (PRI—59) was significantly below the other index scores, in the extremely low range. (N.T. pp. 445, 446; J-3 pp. 6, 7)
11. On a standardized achievement test (WIAT-II –Wechsler Individual Achievement Test-Second Edition), Student's scores were fairly consistent with the borderline cognitive ability index scores, yielding sub-test scores in the borderline to low average range in reading, writing and math. Reading comprehension, math reasoning and the math composite, however, were much lower than expected/predicted. (J-3 pp. 7, 8)
12. Overall, as measured by both standardized and curriculum-based assessments, Student was below grade level in reading, writing and math. Student was also described as easily distracted in the classroom. The District concluded that OHI (other health impairment) should be identified as an eligibility category and that Student should continue to receive supplemental learning support services. (N.T. pp. 55, 445; J-3 pp. 9, 10)

13. At the time of the 2008 evaluation, the District school psychologist was reluctant to identify Student as IDEA eligible in the ID category for several reasons: a) Student was [less than 8] years old and cognitive ability scores are generally not considered to be stabilized before age 8; b) the low FSIQ score resulted primarily on the very low PRI score; c) Parent had completed an adaptive skills assessment that placed Student's functioning at a level considerably higher than would be expected for a child with ID; d) Student's speech/language impairment could have led to an underestimate of Student's true ability due to the high verbal/receptive language demands of the WISC-IV. (N.T. pp. 445—449, 454, 455, 457, 615—617; J-1, J-3)
14. A different District school psychologist from the psychologist who conducted the 2008 and 2012 reevaluations conducted Student's triennial reevaluation during the winter and spring of 2011, when Student was [more than 8] years old. The April 11, 2011 RR included current classroom observations and administration of the WIAT-II, Abbreviated Form, by Student's special education teacher. Based upon the WIAT-II scores, Student's word reading and spelling levels were in the low average range (21st/12th percentiles) and the numerical operations score was in the extremely low range (.5 percentile). According to curriculum-based assessments first reported in the present levels section of the November 2010 IEP, Student's oral reading fluency was at a 2nd grade level (45 WCPM³). (N.T. pp. 601, 626; J-10 p. 7, J-16 p. 2)
15. As first reported in the November 2010 IEP, Student had scored 62% on the 2nd grade Saxon Math posttest. Another Saxon Math assessment, reported in the November 2010 IEP but not in the April 2011 RR, placed Student's math computation skills at the 1st grade level. (N.T. pp. ; J-10 p. 8, J-16 p. 3)
16. The April 2011 RR consisted primarily of a records review, including progress toward IEP goals. The District concluded that additional assessments were not necessary to confirm Student's continued IDEA eligibility and identify Student's current needs. Although the RR acknowledged that Student was not demonstrating age-appropriate self-help and social skills, no formal assessment of adaptive skills was conducted at that time. (N.T. pp. 627; J-16, J-41 p. 3)
17. The RR recommended continuing to identify Student as IDEA eligible in categories of OHI and Speech/Language Impairment. (J-16 pp. 1, 2, 4, 5, J-41 p. 3)
18. The District conducted a full psycho-educational reevaluation of Student in the fall of 2012. As part of the evaluation, the District school psychologist re-administered the WISC-IV, which yielded the following scores: VCI—61 (extremely low range); PRI—53 (extremely low range); WMI—74 (borderline range); PSI—53 (extremely low range); FSIQ—51 (extremely low range) (N.T. pp. 455; J-41 pp. 11, 12)
19. Student's scores on measures of cognitive ability decreased steadily from the pre-school WPPSI in 2006 through the first administration of the WISC-IV by the District in 2008 and the second WISC-IV in November 2012. Student's skills have now fallen

³ Words Correct Per Minute

considerably farther behind expectations for a typical child and Student is currently demonstrating significantly more weaknesses in cognitive skills than typical children of the same age. (N.T. pp. 456—460; J-3, J-41)

20. An adaptive skills rating scale completed by both Parent and Student's teachers placed Student in the moderately low to low range in all domains, with teacher scores tending to fall more frequently in the moderately low range and Parent scores in the low range.⁴ (N.T. pp. 460—462; J-41 pp. 3—5)
21. The school psychologist also administered the WIAT-III standardized achievement test, which measured Student's reading level in the below average range (3rd—6th percentile) on most subtests and in the low range for reading comprehension (1st percentile) and reading comprehension & fluency (2nd percentile). (N.T. pp. 610, 611; J-41p. 13)
22. Student's math scores on the WIAT-III subtests were in the low range in math problem-solving (.5 percentile) and mathematics (1st percentile) and in the below average range on numerical operations (3rd percentile). (N.T. pp.; J-41pp. 13, 14)
23. In writing, Student's achievement levels were in the low range, (less than -.1—.3 percentile), well below the levels predicted by the WISC-IV on all subtests other than spelling, where Student's obtained score exceeded the predicted score and was in the below average range (6th percentile). The school psychologist found it very difficult to score the essay composition subtest, Student's lowest subtest because of Student's handwriting and spacing of words. [Student] was able to read only three words. (N.T. pp.611—613; J-41 pp. 13, 14)
24. Based upon the lower WISC-IV FSIQ and component index scores, as well as the lower adaptive skills revealed by the formal assessment, the school psychologist recommended changing Student's primary eligibility category to ID, while retaining Speech/Language Impairment as a secondary disability category. The school psychologist recommended a full-time learning support placement, as well as continuing speech/language services to address speech sound production, receptive, expressive and pragmatic language skills. (N.T. pp. 455, 460, 590, 598, 601; J-41 p. 25)

Speech/Language Evaluations, Services

25. The District's 2008 RR included a speech/language assessment consisting entirely of a review of the speech/language information in Student's IEP from the out of state school district. No formal assessments were completed, but progress was noted by the prior

⁴ Because Student was attending a private parochial school at the time of the District's 2012 reevaluation the teachers from the private school completed the adaptive rating scales. Parents had enrolled Student in the private school at the beginning of the 2012/2013 school year, but the private school ultimately determined that it was unable to meet Student's significant needs, particularly non-academic, behavior needs that had emerged during the summer and early fall of 2012. (N.T. pp. 100, 258, 282, 462)

- district's speech/language therapist in following directions, comprehension skills and using age-appropriate vocabulary. Needs included improving oral/motor skills to increase articulation intelligibility. The District evaluator recommended reducing speech/language services from 3 to 2 weekly sessions based upon the observation that Student displayed appropriate interaction skills in small group sessions in speech and learning support settings and had opportunities to interact socially, attend, follow directions and communicate using clear speech. (J-3 pp. 17, 18)
26. During 3rd and 4th grades, Student received two 30 minute speech/therapy sessions weekly in a small group (2:1) setting from an Intermediate Unit speech/language therapist under the IU contract with the District. (N.T. p. 395; J-6 p. 19, J-10 p. 19, J-17 p. 19, J-26 p. 27)
 27. The speech/language pathologist conducted informal diagnostic assessments during speech/language sessions throughout the time she worked with Student, as well as one or two informal observations each year outside of the speech therapy setting. She did not administer any standardized language assessments during the time she worked with Student, including at the time of the District's 2011 reevaluation. (N.T. pp. 394, 412, 413, 421; J-16 p. 6)
 28. According to present levels in April 2011 and April 2012 IEPs, Student was able to communicate with simple and complex sentences, to label familiar objects and sort them into categories and to follow simple directions as part of the daily routine. Student's performance with directions, however, was inconsistent when their complexity increased, but improved when directions were broken into smaller tasks. Student could also respond to yes/no questions about familiar events or facts about Student's immediate environment. (N.T. pp. 386, 402; J-17 p. 9, J-26 p. 13)
 29. With respect to social communication, in April 2011 Student frequently needed prompting to initiate conversation with peers and to stay on topic, but could respond with 1—2 on topic responses when given a question. In April 2012, Student's on topic responses increased to 2—4. Student sometimes began speaking about a topic without introducing it, failing to take into account the knowledge/information of a communication partner. Student could not repair/offer solutions to communication problems without heavy prompting in the form of modeling and verbal prompts. (N.T. p. 386; J-17 p. 9; J-26 p. 13)
 30. Student participated in a "Lunch Bunch" social skills group designed to provide opportunities to improve social interactions. The group, an intervention available to all students, was conducted by the speech/language therapist using a specific social skills curriculum. The targeted skills included initiating a conversation with peers to make a friend. The group met twice/month for 45 minutes between March and June in both 2011 and 2012. Student's progress within the group was described anecdotally, with examples. No data was compiled and no information provided concerning generalization and maintenance of the skills observed and reported by the speech/language pathologist during the social skills group. (N.T. pp. 386—391, 411, 420, 423, 424)

31. Student's IEPs from the end of the 2009/2010 school year (2nd grade) through April of 2012 (4th grade) included one expressive language goal, for independently sequencing 6 pictures and stating the events depicted in 9 out of 10 trials. Student was reported to have met the goal by March 2012. Extension activities available for the sequencing goal can also address pragmatic language/conversational skills and functional knowledge, but the extension activities were used infrequently, since the speech/language therapist did not consider those activities to be integral to speech/language therapy. (N.T. pp. 392, 393, 399, 400; J-9 p. 5, J-10 p. 17, J-17 p. 17, J-31 p. 2)
32. A pragmatic/social language goal was added in the April 2011 IEP, to initiate a conversation and remain on topic through several exchanges. (N.T. pp. 399, 400; J- 17 p. 20)
33. In the April 2012 IEP, the sequencing goal was replaced by a goal for independently answering "wh" questions with 90% accuracy, from a baseline of 10%, when given a short passage of 3—5 sentences. The goal was developed from the speech/language therapist's observation that Student was having difficulty with comprehension. In the November 2009 IEP, Student had a goal for answering three "wh" questions (who, what, where) with 80 % accuracy and in the present levels section of the November 2011 IEP, Student was reported to be performing at 70% on that goal. (N.T. pp. 403—405; J-6 pp. 9, 17, J-26, p. 21)
34. The pragmatic language goal was also eliminated from the April 2012 IEP due to Student's reported mastery in the speech/language setting and replaced with a goal for identifying and repairing communication breakdowns in scripted or role-play situations. (N.T. pp. 403, 420; J-26 p. 25, J-31 p. 3)
35. As part of the District's reevaluation in the fall of 2012, a different speech/language therapist conducted a number of standardized assessments, including the CELF-4 (Clinical Evaluation of Language Fundamentals-Fourth Edition), the EVT-2 (Expressive Vocabulary Test-2nd Edition), PPVT-IV (Peabody Picture Vocabulary Test, Fourth Edition), TOLD-P-4 (Test of Language Development-Primary-Fourth Edition, and Arizona-3 (Arizona Articulation Proficiency Scale, Third Edition). Student's scores were two standard deviations below the norm on the receptive and expressive language measures (PPVT-4 and EVT-2), and three standard deviations below the mean on the CELF-4, a measure of general language ability. The assessments and information received from Student's teachers disclosed significant expressive, receptive and pragmatic language needs, as well a need for services to improve sound production in order to increase communicative effectiveness. (J-41 pp. 18—25)

3rd Grade and 4th Grade IEPs—Academic Goals, Instruction

36. The IEP developed in October 2009, as modified in May 2010, was in effect at the beginning of Student's 3rd grade school year. The background/present levels information in the 10/09 IEP noted no concerns in the areas of functional, social, fine motor and gross motor skills. Initially, Student received instruction in the regular education classroom for

most of the school day, with push-in support by a special education teacher who also served as Student's case manager. Student received 30 min./day of pull-out direct reading instruction. Student was on a first grade instructional reading level at the beginning of 3rd grade and remained on a first grade reading level at the end of 3rd grade. (N.T. pp. 204, 205, 210, 249; J-6 pp. 5, 21, 23)

37. The October 2009 IEP included a writing goal (3—5 sentences with a graphic organizer), a math computation goal (double digit addition, subtraction with and without regrouping), a math problem-solving goal, a reading comprehension goal and a spelling goal. (J-6 pp. 14—18)
38. In writing, as of October 2009, Student was reported to be able, with prompting, to complete a pre-writing graphic organizer that included a main idea and supporting details. By the end of 3rd grade, Student was reported to be able to write 3—4 sentences on a topic. Student had a hard time making sure that all words were in the sentences and was working on remembering to go back and edit. (N.T. pp. 237, 238; J-6 p. 5)
39. In a May 2010 IEP revision, math goals were added for using coins to count money to \$1.00 and telling time on an analog clock to the nearest 5 minutes. The writing, math, and spelling goals were repeated. An hour of pull-out direct math intervention and two 30 minute periods of direct reading instruction were added, reducing Student's time in the regular education classroom by two hours daily. Student had significant difficulty with addition and subtraction using regrouping. (N.T. p. 238; J-9 pp. 2—5, 7, 8)
40. A new IEP for 3rd grade was developed in October 2010. In that IEP, the writing, spelling and telling time goals were eliminated. The math problem solving goal was continued (complete 3 consecutive probes, inserting correct operations and solving the problems with 80% accuracy from a baseline of 45%), as was the double digit computation goal, but without regrouping (baselines: addition, 60%, subtraction 30%). The money goal was also repeated, but the target amount was reduced from \$1.00 to \$.50 (baseline: 52%). There was also a reading comprehension goal for answering direct and inferential questions after reading a selection on Student's instructional level (not specified) (baseline: 45%). (J-10 pp. 15—18)
41. The two 30 minute periods of pull-out reading instruction (one period for fluency intervention and one period for comprehension) were continued, but the period of pull-out math instruction was reduced from 60 to 45 minutes daily. (P-10 pp. 7, 21)
42. Student's next IEP was developed in April 2011, after the April 2011 RR was issued. All of the goals from the October 2010 IEP were repeated with updated baselines and some minor changes, except the math problem solving goal, which was entirely the same, including the 45% baseline. The math computation goal specified double digit addition and subtraction with regrouping (baseline : addition, 40%, subtraction 0). The coin counting goal restored the \$1.00 target (baseline remained at 52%) The baseline for the reading comprehension goal moved to 50% with instructional level still not specified. (J-17 pp. 15, 16, 18, 19)

43. The two 30 minute periods of direct reading instruction were continued and direct math instruction returned to 60 minutes daily. At the end of 3rd grade, Student was working at an end of 1st grade level in the Saxon Math program (N.T. pp. 305, 306; J-17 pp. 24, 26)
44. When Student's 4th grade special education teacher noticed that Student was having difficulty with reading decoding, she added phonics instruction to Student's reading program. Student's 4th grade IEP was revised in November 2011 to add a goal for correctly blending and segmenting sounds using the Phonics for Reading Program. Student met the program goals by the end of the school year. (N.T. pp. 509—513; J-23)
45. The IEP developed in April 2012 included a math goal for solving word problems with correct computation that included whole numbers, fractions, rounding, money and measurement. (baseline, 67% average, presumably combined, but unspecified types of problems). A goal for computation of double digit math problems was also included (compute problems with an average of 80% accuracy on three consecutive probes of double digit addition and subtraction facts; baseline: 40%) In the present levels, the IEP noted that Student was being instructed in Saxon Math 2. Student was instructional at the 2nd grade level in reading during 4th grade. (N.T. p. 514; J-26 pp. 10, 19, 24)
46. The reading comprehension goal in the April 2012 IEP was more detailed than in prior IEPs, specifying answering questions relating to main idea and supporting details, sequencing, fact and opinion, cause and effect and drawing conclusions after reading a selection at a 2nd grade reading level. (baseline: 50%.) (J-26 p. 22)
47. Student's pull-out direct reading instruction remained at 60 minutes daily, but direct math instruction was increased to 75 minutes daily. (J-26 pp. 29, 31)
48. Although there were no writing or spelling goals in Student's IEPs beginning in November 2010, and none of Student's IEPs from November 2010 through June 2012 included reading fluency or reading decoding goals, results of curriculum-based assessments of Student's reading and writing levels were reported in the present levels section of each IEP. (J-10 pp. 7, 8, J-17 pp. 7, 8, J-26 pp. 9, 10)
49. In each of the IEPs, Student was reported to be able to complete a pre-writing graphic organizer using the 4-Square Writing Method that included a main idea and details, but only with significant teacher support. In 3rd grade, Student could not write more than one paragraph and the teacher could not remember whether Student could produce any sentences. By the end of 4th grade with a "skeleton" of a writing piece prepared by the teacher that required Student to fill in key words in each sentence, Student could write a 2—3 sentence paragraph and 3 paragraphs. (N.T. pp. 310, 311, 530, 532; J-10 p. 8, J-17 p. 8, J-26 p. 10)
50. Student's oral reading fluency based on DIBELS assessments was reported to be 45 WCPM in September 2010, 51 WCPM in December 2010 and 55 WCPM in April 2012. (J-10 p. 7, J-17 p. 7, J-26 p. 9)

51. In 3rd and 4th grades, when all Pennsylvania public school students participate in statewide assessments, Student took the PASA (Pennsylvania Alternate System of Assessment) instead of the PSSA taken by most students. The PASA is presented orally and requires no reading or writing. School districts cannot obtain credit for the PASA for more than 2% of their student population. The state guidelines provide that the PASA is appropriate only for students with significant cognitive impairments who require intensive instruction in order to learn, require extensive adaptation and substantial modifications to the general education curriculum, and whose participation in the general education curriculum differs substantially in form and substance from most other students. (N.T. pp. 473, 474, 484, 489—491, 641; J-18, J-27, P-6)

Self-Help/Motor Skills

52. Although Student had received OT services while enrolled in the prior school district, the District concluded in the 2008 reevaluation that Student was functioning adequately in the classroom in the area of fine motor skills, and, therefore, was not eligible for OT services. That conclusion was reaffirmed after another OT reevaluation in November 2009, in which Student's fine motor skills were described as "good." (J-3 pp. 13, 14, J-7)
53. Student's functioning with respect to fine motor skills was not addressed in the records review reevaluation conducted by the District in the spring of 2011, despite concerns first noted in the November 2010 IEP and reiterated in the April 2011 IEP, that Student was not demonstrating appropriate self-help skills based upon Student's inability to manage clothing buttons, snaps and zippers, wetting pants during the school day and difficulties in the classroom with handwriting and cutting with scissors. (N.T. p. 212; J-10 p. 6, J-16, J-17 p. 8)
54. Information included in the present levels section of the November 2010 IEP described Student's gross motor skills as "well below age appropriate." Student's functional and social skills were also described as "not age appropriate." Student was reported to be struggling in the classroom with both adult and peer relationships, such as thinking that teachers/peers were being mean when they asked Student to do something Student did not want to do. Student was also reported to be competitive with peers, always wanting to be first in line, and to seek attention from adults and "shut down" if Student's expectations for being first and for complete adult attention were not met. Student was more immature than classroom peers. (N.T. pp. 212, 218, 308, 318, 319, 321; J-10 pp. 8, 9)
55. The identical information concerning Student's functional and self-help skills was repeated in the IEP developed in April 2011, after the 2011 reevaluation report was issued. Similar information relating to attention-seeking and shutting down behaviors was included in the April 2012 IEP. The District concluded, however, that the behaviors no longer occurred, and did not impede Student's learning or the learning of others (J-17 pp. 8, 9, J-26 p. 13)

56. Student's difficulty with fine motor skills and was addressed in the classroom by monitoring the development of Student's ability to operate snaps, buttons and zippers, by transcribing Student's written work when it was difficult to read and by providing Student with adaptive supplies such as a larger pencil and paper with lines that were farther apart than usual. (N.T. pp. 229, 231)
57. In December 2010, the District developed a Functional Behavioral Assessment (FBA) to address the reasons for the behaviors and subsequently developed a positive behavior support plan targeting the pants wetting behavior. Other behaviors were addressed through the classroom and school-wide behavior plans. (N.T. pp. 220—222, 232, 233; J-12, J-14)

DISCUSSION AND CONCLUSIONS OF LAW

Before considering the facts in light of the parties' contentions, it is helpful to set out the familiar legal framework that governs consideration of the issues in dispute.

The legal obligation of to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act ("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). 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).

"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 (3rd Cir. 1999). Consequently, in order to properly 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, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204

(3rd Cir. 1993). An eligible student is denied FAPE if his 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; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

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

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). In practical terms, allocating the burden of persuasion actually affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012)

Here, the question of which party bears the burden of persuasion does not affect the outcome. The record in this case contains more than sufficient evidence to establish that the District failed to appropriately address Student’s significant needs in the areas of academics, language, social skills and fine motor skills with sufficiently intense services, and that such failure rests, in part, on the District’s failure to thoroughly evaluate Student when it conducted a reevaluation in 2011.

Evaluations/Identification

One of the central issues in this case was whether the District should have identified Student in the ID eligibility category before its most recent evaluation in the fall of 2012. Both parties' arguments in that regard centered on whether the District should have made that identification at the time of its initial evaluation in 2008, when Student first enrolled in the District. The District's argument that Student did not meet the criteria for identification in the ID on the basis of assessments completed before age 8, and at a time when no significant adaptive deficits were evident is well-taken based upon the testimony of its school psychologist. (FF 13) That rationale for not identifying Student's intellectual disability was no longer viable, however, at the time of the triennial reevaluation in 2011. By that time, Student was [well] past the age when cognitive ability stabilizes, according to the District's witness, Student was making little academic progress and Student's 3rd grade special education teacher had noted significant issues with self-help skills and emerging personal relationship issues with peers and adults. *See* FF 36—41, 54. Notwithstanding those issues, however, and the trend of falling cognitive ability scores based upon the WPPSI score in 2006 compared to the lower WISC-IV FSIQ obtained by the District in 2008, the District elected to complete only a records review in 2011 rather than conduct a comprehensive reevaluation. (FF 8, 9, 16) Neither party attempted to elicit from District witnesses, including the school psychologist who compiled the 2011 RR, why that decision was made, so the record is devoid of any reason for that decision by the District. In light of the questions raised by the 2008 evaluation, the decision to forego a full reevaluation and rely solely upon a records review in 2011 was surprising.

Although the IDEA statute and regulations certainly provide for a reevaluation based only upon a review of records if additional information is not needed, it is difficult to conceive of

a situation in which a need for further information was so clearly established. There is no question that the District had sufficient indications of a need to repeat a cognitive assessment in 2011, and very little question that a comprehensive reevaluation would likely have resulted in Student's identification in the ID category at that time.

Parents, therefore, are correct in arguing that Student should have been identified in the ID disability category earlier than the fall of 2012, even assuming that the District is entirely correct in its contention that there was insufficient basis for making that determination based upon the District's 2008 evaluation. On the other hand, however, Student's disability category is important only to the extent that the District did not provide appropriate services reasonably calculated to allow Student to make meaningful progress, and that identifying Student in the ID disability category would have prompted the District to provide Student with more intensive services. The true question underlying all claims for compensatory education is whether the District provided sufficient appropriate services to address Student's needs, regardless of disability category.

Before turning to a discussion of the District's program and placement for Student, however, some additional comment is warranted concerning the District's evaluations in this case.

Although speech/language impairment was identified as a disability category establishing Student's IDEA eligibility after the 2008 evaluation, the District did not conduct a comprehensive speech/language evaluation until the fall of 2012. The speech/language assessment in the District's 2008 evaluation consisted entirely of a review of Student's records from the out of state transferring district, and the 2011 District evaluation included only a paragraph relating to speech/language services. (FF 25; J-16)

Although the speech/language therapist testified that the informal assessments she conducted were sufficient for her to accurately identify and address Student's speech/language needs, a "yes" answer when asked those questions was the entirety of her testimony concerning the adequacy and accuracy of her assessments. (N.T. p. 395, 397) The speech/language therapist was not asked to elaborate with supporting details and offered none. Because speech/language impairment was the basis for Student's IDEA eligibility, the failure to conduct a full evaluation in both 2008 and 2011 was a serious procedural violation.

In addition, although Student was also identified as IDEA eligible in the OHI disability category, the District's evaluations in 2008 and 2011 included no assessments that would have provided objective information concerning Student's issues with attention and focus. The lack of assessments to support the disability categories in which Student was identified during the period in dispute is, perhaps, more concerning than the District's belated determination that Student's primary disability category is ID.

Appropriateness of the District's Placement/Services for Meeting Student's Needs

The primary problem with the District's provision of FAPE to student in this case was its failure to recognize and address the full range Student's needs, including a need for more intensive academic instruction, for additional language services, particularly in the area of pragmatic language and social skills, and for occupational therapy to address Student's fine motor skill deficits. Looking beyond progress-monitoring on Student's IEP goals, the basic question is whether Student made any real, substantive progress, and more important, whether the IEP goals were reasonably calculated to afford Student the opportunity for meaningful progress in Student's most significant areas of need.

Academic Goals/Instruction—Reading, Writing, Math

Student began and ended 3rd grade at a 1st grade reading level and according to the District's documents, did not move to a 2nd grade level, at least in reading comprehension, until sometime after the April 2012 IEP was written, since Student was still at Level A in the Comprehension Plus reading program, according to the information in the present levels section of the April 2012 IEP. (J-26 p. 9) Although Student's 3rd grade special education teacher testified that Student was at a 2nd grade level in fluency, when asked about the grade levels that corresponded to Student's DIBELS oral reading fluency scores, she testified that she could not remember. In general, the District witnesses were clear on their conclusions about Student's progress and the appropriateness of the District's services, but their conclusions were expressed by "yes" answers to the questions of District counsel on those issues, providing no supporting details, and memories often failed when asked for details. Consequently, the documents prepared by the District, particularly information in the IEPs, provide a more reliable source of information concerning Student's progress and functioning in all areas during the period in dispute.

Based upon the IEPs, Student made incremental progress in reading. Nevertheless, it must be noted that the District provided the most intensive instructional services in reading, with an hour of pull-out instruction daily, for most of the period in question. Results of the standardized achievement tests reported in the November 2012 RR show that Student benefited from that consistent and more intensive instruction, since Student's highest scores were in areas of reading, although the scores were still very low in comparison to typically developing peers. The benefits to Student of more intensive instruction in basic skill areas was implicitly recognized in the recommendation in the 2012 RR for learning support in all academic areas,

which resulted in changing Student's placement from supplemental learning support to full-time learning support.

Although Student also received pull-out, intensive math instruction from 45 minutes to an hour daily during most of 3rd and 4th grades, Student made far less progress in math than in reading, reflecting even greater needs in math. Again, however, the District implicitly recognized that Student was likely to benefit from more intensive services by increasing Student's pull-out math instruction to 75 minutes daily in the April 2012 IEP. It is unclear why the District reduced Student's intensive math instruction to 45 minutes for part of 3rd grade, but it is clear that reducing the intensity of instruction was not appropriate for Student.

For reasons that were not explained by any of the testimony or documents, Student did not have any writing goals for most of 3rd and 4th grades, and did not receive intensive specially designed instruction in writing, with predictable results. There was little evidence that Student made progress in producing sentences and paragraphs, even with significant teacher support.

Speech/Language

Based upon Student's identification as IDEA eligible due to a speech/language impairment, significant needs described in Student's IEPs and the testimony of the speech/language therapist who worked with Student during 3rd and 4th grades, maintaining the same IEP goal in the area of expressive language during most of Student's 3rd and 4th grade years was inadequate to address Student's needs. (FF 25, 28, 29, 33) Information provided by the speech therapist for Student's IEPs, as well as her testimony at the due process hearing, establishes that although Student may have shown progress on the limited speech/language goals included in the IEPs, Student still had significant communication difficulties.

That conclusion is confirmed by the results of the assessments conducted for the 2012 reevaluation, which revealed significant needs in the all areas of communication, including articulation and pragmatic language skills. (FF 35) That information would have been available to identify Student' significant language deficits and needs from the beginning of Student's enrollment in the District had an appropriately thorough speech/language evaluation with language assessments been conducted at the time of the District's first evaluation.

Social Skills

The minimal social skills training that the District provided to Student was insufficient to adequately meet Student's needs to develop appropriate peer interactions. Comparing the IEPs prepared by the District in November 2009 and November 2010 rather dramatically demonstrates a significant increase in Student's needs in the areas of social skills. The increase in Student's maladaptive behaviors and interpersonal relationship issues reported in the November 2010 IEP is particularly noteworthy, since Student had the same case manager for the two previous school years, and she had noted no problems in those areas in the November 2009 IEP. Consequently, the issues reported in the present levels in the IEP must have been significant to the teacher, despite her testimony at the hearing in which she sought to minimize the issues and suggest that classroom behavior management techniques were sufficient to eliminate the issues.

Fine Motor Skills

The information included in the November 2010 IEP also demonstrates Student's significant needs with respect to fine motor skills, particularly in managing clothing and common classroom tasks, such as cutting with scissors. Despite Student's continuing difficulties with fine motor skills, the District did not re-visit Student's potential need for OT services after the 2009 OT evaluation. Student, however, clearly had unaddressed OT needs, and the record disclosed

no reasonable basis for the District's failure to provide those services during Student's 3rd and 4th grade years.

Remedy/Compensatory Education Award

An eligible student who has received no more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable "remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249 (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3rd Cir. 2010), citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

In this case, the record establishes that the District saw no reason to increase the intensity of Student's special education services during the entire period in dispute, despite significant needs and minimal progress that was evident by the time the November 2010 IEP was drafted, as revealed by information in the present levels section of the IEP. In connection with developing goals and determining Student's need for specially designed instruction and related services, the District should have provided Student with an additional hour of pull-out services to address

written expression as well as provide more intensive math instruction. Student, therefore, will be awarded an hour of compensatory education from November 12, 2010, two years before the complaint was filed, through the date of the IEP meeting held in April 2011.

Because the District's 2011 evaluation should have included at least cognitive and adaptive skills assessments that would have surely provided important information concerning Student's cognitive functioning and identified a need for even more intensive academic instruction, the compensatory education award will be increased from April 2011 through the end of the 2011/2012 school year to equal a full-time special education learning support placement for that period rather than the supplemental learning support placement Student received during that period. That conclusion is based upon the recommendation for increased services in the 2012 reevaluation report and Student's current full time learning support placement, which suggest that the District would have recommended a change of placement to full-time services if it had conducted an appropriately thorough evaluation in the spring of 2011.

Since Student was already receiving two hours of pull-out instruction during that period and Student could reasonably be included in the regular education setting for 1 hour daily, the compensatory education award for that period will be 4 hours/day based upon a 7 hour school day.

In light of Student's significant language needs and the lack of formal language assessments prior to the November 2012 evaluation, there was no rational basis for the District's decision to reduce Student's speech/language services from three to two 30 minute sessions/week at the time Student enrolled in the District. (FF 25) Student will be awarded 30 minutes of compensatory education/week based upon an additional 30 minutes of speech language services from November 12, 2010 through the end of the 2011/2012 school year. That

award provides sufficient compensation for the District's failure to provide specific social skills training during that period.

Finally, because the District should also have provided Student with OT services during 3rd and 4th grades, Student will be awarded an additional 30 minutes of compensatory education/week from November 12, 2010 through the end of the 2011/2012 school year.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

1. Provide Student with 1 hour of compensatory education for each day that school was in session and Student attended school from November 12, 2010 through the date the District received a signed NOREP from Parents in April 2011.
2. Provide Student with 4 hours of compensatory education for each day that school was in session and Student attended school from the date the District received a signed NOREP from Parents in April 2011 through the last day of the 2011/2012 school year.
3. Provide Student with 1 hour of compensatory education for each week that school was in session from November 12, 2010 through the last day of the 2011/2012 school year.

It is **FURTHER ORDERED** that Parents may choose how to use the compensatory education award.

The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs and/or will otherwise assist Student in overcoming the effects of his/her disabilities.

The compensatory education shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the School District through Student's IEPs to assure meaningful educational progress.

Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents. The hours of compensatory education may be used at any time from the present to Student's 21st birthday.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

April 18, 2013