

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

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: R.J.

Date of Birth: [redacted]

Dates of Hearing:

March 15, 2010

May 18, 2010

May 19, 2010

August 16, 2010

August 17, 2010

### CLOSED HEARING

ODR No. **10064-0809AS**

Parties to the Hearing:

Parent[s]

Mrs. Rita Cohen  
Secondary Special Education Supervisor  
Pottstown School District  
Administrative Annex  
940 North Franklin Street  
Pottstown, PA 19464

Representative:

Giovanni O. Campbell, Esquire  
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Philadelphia, PA 19110

Timothy E. Gilsbach, Esquire  
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Date Record Closed:

September 10, 2010

Date of Decision:

September 24, 2010

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## INTRODUCTION AND PROCEDURAL HISTORY

Student<sup>1</sup> is currently a late-teen aged former student in the Pottstown School District (District). By complaint dated May 13, 2009, Student's custodial parents (hereafter Parents) filed a due process complaint against the District claiming that it denied a free, appropriate public education (FAPE) to Student during the 2006-07, 2007-08, and 2008-09 school years.

This case was assigned to a hearing officer who dismissed the complaint without a hearing on June 18, 2009. On February 16, 2010, the case was remanded by the U.S. District Court for the Eastern District of Pennsylvania for a hearing, based upon its determinations that (1) the Parents had standing to make educational decisions for Student; (2) the Parents had standing to "seek reimbursement, or other relief, for expenditures made on behalf of [Student] ... and for monies spent by [the Parents' son] if owed by the [Parents] to [the Parents' son]"; and (3) Student had standing to commence this action on Student's own behalf.<sup>2</sup>

Upon remand, the matter was assigned to this hearing officer and a hearing was scheduled for March 15, 2010. On March 3, 2010, the District renewed its motion to limit the scope of the hearing to preclude any claims related to the time period prior to May 19, 2007. The Parents, through counsel, filed a response.<sup>3</sup> The March 15, 2010 hearing session was convened and was limited to evidence on the statute of limitations. In an interim decision on April 13, 2010, this hearing officer determined that the Parents had established an exception to the Individuals with Disabilities Education Act (IDEA)<sup>4</sup> statute of limitations, and would be permitted to present substantive evidence on all of the claims presented in their due process complaint, *i.e.*, to the beginning of the 2006-07 school year.<sup>5</sup>

Four subsequent due process hearing sessions were conducted at which the parties presented evidence in support of their respective positions. For the reasons which follow, I find in favor of the District on all claims.

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<sup>1</sup> The name and gender of the student are not used in this decision in order to preserve Student's privacy.  
<sup>2</sup> School District Exhibit (S) 41 at p. 5. The son of Student's custodial parents is variously referred to in the record as Student's advocate, mentor, and foster brother. For ease of discussion and clarity, he will be referred to as Student's advocate throughout this opinion. Student's advocate was not a party to this case before the District Court and did not appeal the determination that he lacked standing in this matter. It should also be noted that Student has returned to another city and did not participate in the proceedings before this hearing officer, and the District's efforts to subpoena Student to testify were not successful. (Notes of Testimony (N.T.) 626-27, 642-43, 648-49, 688-89; S 45)

<sup>3</sup> The Parents specifically withdrew their requests that the District be ordered to issue a diploma to Student and to improve its "child find" efforts. *See* Parents' March 8, 2010 response to the District's renewed motions for dismissal. In their closing brief, the parents reiterated the request that the District be ordered to issue a diploma to Student. (Parents' closing brief at 11) Not only do the Parents fail to cite authority from which I can conclude this is an available remedy for this hearing officer to order in this case, this claim was specifically withdrawn and was also not set forth in the opening statements of the parties as an issue for me to resolve. (N.T. 134-43) Accordingly, I will not address it further in this opinion. Similarly, the District's arguments relating to the Parents' standing have been addressed by the District Court and need not be reviewed by this hearing officer.

<sup>4</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>5</sup> Hearing Officer Exhibit (HO) 3.

## **ISSUES**

1. Whether the District denied FAPE to Student for the 2006-07, 2007-08, and 2008-09 school years;
2. If so, whether Student is entitled to compensatory education for the 2006-07 and 2007-08 school years, and whether the Parents are entitled to tuition reimbursement for the 2008-09 school year.

## **FINDINGS OF FACT**

1. Student attended regular education from kindergarten through second grade in [a school district in another state]. During Student's second grade year (February 1999) an educational evaluation was performed due to concerns over Student's academic performance. Student was identified as eligible for special education in 1999 on the basis of a specific learning disability and began special education in third grade (1999-2000). (Parent Exhibit (P) 1, P 2; School District Exhibit (S) 1, S 2)
2. Student's family life underwent several major changes in 1999 and 2000 including the death of a [family member], incarceration of a parent, and Student's move to live with extended family members. Student demonstrated some emotional and behavior difficulties at school during the 1999-2000 and 2000-01 school years. (P 2; S 2)
3. An educational evaluation conducted in the spring of 2001 revealed well-below grade level academic performance in reading, math, and written language; and scores in the borderline to average range on the Kaufman Brief Intelligence Test. Based upon Student's psychiatric diagnoses of Reactive Attachment Disorder, Dysthymia, Post-Traumatic Stress Disorder, and Obsessive Compulsive Personality Disorder, the psychologist recommended that Student's classification be changed to serious emotional disturbance. Student made minimal academic progress during the 2000-01 school year. (P 1, P 2; S 1, S 2)
4. Student transitioned to middle school for sixth grade in the 2002-03 school year and reportedly "adjusted well." (P 2 at 7; S 2 at 7) Throughout middle school, Student was provided special education to address emotional disturbance as well as a specific learning disability. Student's behaviors had an adverse effect on Student's academic performance throughout this time period. (P 1, P 2; S 1, S 2)
5. Student's advocate first became involved with Student when Student was in middle school, providing support and tutoring. (Notes of Testimony (N.T.) 20-22; P 2; S 2)
6. Student entered high school at the start of the 2005-06 school year in [the other state]. An educational assessment conducted in November 2005 reflected scores in the first stanine on all subtests of the Kaufman Test of Educational Achievement, with grade equivalencies

reportedly between 1.3 (Spelling and Reading Composite) and 3.0 (Mathematics Applications). Student was not able to read any words on the second-reader level of the Mann-Suiter Developmental Word-Recognition Inventory. It was recommended that Student be referred to a non-public program with a small, self-contained, supportive environment, with a focus on an intensive reading/language program using a multi-sensory sound-symbol approach (such as Orton-Gillingham and Wilson), and development of written language and math skills, as well as counseling services. (P 1; S 1)

7. A neuropsychological evaluation was also completed in November 2005. Student's scores on the Wechsler Intelligence Scale for Children – Fourth Edition were variable and Student's overall intellectual functioning was determined to be within the low average range. The report also reflected variability in scores in assessments of Attention/Concentration and Executive Functioning, low-average to average ability in the Memory domain, deficient to average performance in Language Function, and within the deficient to average range on Visual-perceptual/Visual-spatial/Visual-motor Integration Skills. Student's Motor Function was in the deficient range. (P 2; S 2)
8. Student's adaptive functioning was also assessed using the Behavioral Assessment System for Children – Second Edition (BASC-2) and the Adaptive Behavior Assessment System – Second Edition (ABAS-II) through information obtained from Student's parent, foster brother, and a teacher, and Student's self-report on the BASC-2. The BASC-2 scores reflected general adaptive skills in the below average to extremely low range, and the ABAS-II scores ranged from Deficient to Average with the General Adaptive Composite in the extremely low to below average range. (P 2; S 2)
9. Behavioral information including the BASC-2 reflected variable concerns across settings. In the school setting, concerns were noted by the teacher on many of the Clinical Scales, including Attention, Aggression, Depression, Atypicality, Withdrawal, and Learning Problems. The evaluator suggested that Student may have met the criteria for Attention Deficit Hyperactivity Disorder (ADHD), Inattentive Type. (P 2; S 2)
10. Educational recommendations in the neuropsychological evaluation report included intensive intervention to address Student's specific learning disorder and monitoring of emotional functioning; a phonics-approach to reading such as Lindamood-Bell; a speech/language evaluation; small class settings; transition planning; teaching skills and strategies in the areas of organization, self-monitoring, coping and problem-solving, as well as social skills; and modifications to and accommodations within the curriculum. (P 2; S 2)
11. Student's Individualized Education Program (IEP) team in [the other state] developed a new IEP in March 2006 for implementation at the [other state] high school. Student's disability classification was specific learning disability. Present educational levels were set forth for reading, mathematics, and written language. The IEP included annual goals for transition, reading (including decoding), math, written language, as well as coping and social skills. The IEP contained a functional behavioral assessment (FBA) relating to verbal and physical threats to peers and staff. (P 3, P 4, P 5, P 6, P 7; S 3, S 4)

12. Student was placed into a private school for a short time at the end of the 2005-06 school year where Student reportedly adapted well but required redirection at times. Approximately one month after Student entered this private school, the family situation in [the other state] reached a point where Student could no longer reside with them. (N.T. 22-24, 36-37; S 6)
13. Student's advocate remained involved with Student and Student sometimes visited him and the Parents here in Pennsylvania. By order of July 5, 2006, the Circuit Court for [redacted] City awarded custody of Student to the Parents. (N.T. 24-25, 96-97, 108; S 7)
14. Student's advocate contacted the District during the summer of 2006 to discuss whether the District could meet Student's educational needs. He provided Student's records to the District and Student was enrolled in the District for the 2006-07 school year. (N.T. 27-32, 70-71, 143, 145-62, 251-53, 270-73, 282-83, 625-26; P 11; S 8, S 9)
15. The District convened a team to develop an interim IEP for Student before the school year began. Student's advocate participated in this meeting. The team summarized Student's educational history and needs and noted that Student did exhibit behaviors that impeded his/her learning or that of others and that Student was at-risk for emotional problems; an FBA would be conducted if behavioral problems arose. Student's Present Levels of Academic Achievement were included from the March 2006 IEP from [the other state]. The interim IEP stated that Student would receive baseline assessments from which goals would be derived. Student would be placed into special education for Reading, Computer, Science and Tutorial classes and in regular education for a Wellness class. Program modifications and specially designed instruction specified small class settings, Lindamood-Bell instruction, audio books, and dictation to a scribe. A transition outcome was included for encouragement of Student to participate in tech classes. Placement was part-time learning support, and the Parents approved the Notice of Recommended Educational Placement (NOREP). (N.T. 32-33, 41-42, 114, 144, 174-89, 254-61, 310-18, 320-24, 329-34, 336-38, 339-40, 363-65, 490; P 12, P 13, P 14; S 10)
16. Student's IEP team did not believe further evaluation of Student was necessary in order to develop an IEP. (N.T. 512)
17. The IEP team met again in October 2006 to revise Student's IEP, and the Parents and Student's advocate participated, as did Student. Student's Present Levels of Academic Achievement reflected grades of 92% in Reading, 79% in Science, 95% in Computer Foundations, and 85% in Wellness, and attendance was good. Student's advocate noted that Student had improved social skills, while a teacher indicated that Student required redirection at times to stay in task. Student's family was concerned about whether Student was making adequate progress. (N.T. 190, 191-95, 208-09, 340, 389-93; P 16; S 11)
18. Reading assessment conducted by the District in September 2006 revealed a reading fluency level of 1.5 with 64 words correct per minute, and a subsequent probe thirty days later reflected a reading level of 2.0 with 47 words correct per minute. A reading goal was developed for the IEP to increase oral reading fluency to 70 words correct per minute with 3 or fewer errors at the 2.0 level. The IEP also had new goals for math computation at the 4.0 grade level, and for written expression. Transition services again specified encouragement to

participate in tech classes. Specially designed instruction included small class settings, cuing to remain on task, extra time for completion of tests, repeated directions/directions read out loud, and dictation to a scribe. (N.T. 342-44; P 16; S 11)

19. This October 2006 IEP included a Behavior Improvement Plan (BIP) addressing interaction with peers and adults, expression of frustration and anger, and self-esteem/self-confidence. As in the interim IEP, this program stated that if Student exhibited behavioral problems, an FBA would be conducted. (N.T. 416-18; P 16, P 18; S 11)
20. The Parents approved the NOREP for the October 2006 IEP. (P 17)
21. As a related service, Student was provided counseling with the school psychologist for thirty minutes each week. Student did attend counseling sessions and any behavior concerns were addressed through this related service. (N.T. 418-19, 491, 505, 519, 524-25; P 16; S 11)
22. For reading, Student was provided with instruction using the Lindamood-Bell approach during the 2006-07 school year. Student's reading teacher had completed Lindamood-Bell training prior to Student's entry into the District. She also provided instruction to Student using the Wilson Reading Program in which the teacher was also trained. (N.T. 345-48, 380); P 20)
23. Student's family communicated with the District regularly regarding their concerns over Student's progress. In January 2007, the Parents requested a meeting of the IEP team to discuss Student's progress. (N.T. 34-38, 43, 46-47, 71-78; S 12)
24. In March 2007, Student's advocate arranged for a review of Student's records by a private center (Center) which provided Lindamood-Bell instruction. (N.T. 50-52, 545-46, 574, 603-05, 638-39; P 19)
25. Student's IEP team met in March 2007 to discuss Student's performance at school. Student's advocate was concerned that Student was not making adequate progress, particularly in reading, and asked the District to consider placing Student at the Center. By that time, Student's fluency and decoding had improved since the September 2006 baselines, and Student was reading instructionally at a second grade level. (N.T. 55-56, 80-81, 212-17, 261-64, 286-87, 395-96, 606; P 20; S 14)
26. A speech/language screening was conducted for Student at the end of March 2007 which did not reveal a need for further speech/language evaluation. (N.T. 265; S 15)
27. There were a few instances over the course of the 2006-07 school year when Student missed some assignments, and Student received a detention for talking in class and an in-school suspension for swearing. On one occasion in December 2007, Student had a "melt down" at school and the family was contacted. (P 31 at 34) Student's family communicated with the District throughout the spring of 2007, as well as with the District's Director of Career and Technical Education several times in June 2007 regarding Student's required graduation project. (N.T. 87-90, 222-24, 227-29, 238-39, 681-82, 698-700, 708-19, 724-26; P 31, P 33)

28. Student's grades at the end of the 2006-07 school year included a D in Writing Skills and math, and C or better in all other classes, with an overall grade point average of 88.1 (a C grade in the District). Student was absent 20 days and tardy on 15 occasions during this school year. (S 28, S 43)
29. The District offered to provide Reading tutoring to Student over the summer of 2007 but Student did not take advantage of that tutoring. (N.T. 264-65)
30. Student's IEP team convened in October 2007 to develop a new IEP for Student. Student's Parents and advocate participated in the meeting. At the time, Student's grades were 70% in Reading, 72% in Science, 82% in Social Studies, 84% in Math, and 80% in Economics. Needs were noted for improving overall reading fluency, written expression, math calculation, and math reasoning. (N.T. 52-55, 63, 265, 367-70, 398-400; P 23; S 17)
31. As in the prior year's IEP, there was a transition outcome for Student to participate in tech classes. Annual goals addressed reading fluency at the 3.0 reading level and math computation at the 5.0 grade level. Specially designed instruction included small class settings, preferential seating, reduced writing for assignments and tests, reduced number of tests or test items, restating/repeating directions, cuing to remain on task, extra time to complete assignments, use of a calculator, and dictation to a scribe. This IEP contained a BIP similar to that in the prior year, and counseling continued for thirty minutes each week. Parental concerns at the meeting included Student's participation in tech classes and the Armed Services Vocational Aptitude Battery (ASVAB). (N.T. 424; P 23; S 17)
32. Student's Parents approved the October 2007 NOREP. (P 24; S 17)
33. Student's behavior at school deteriorated during the fall of 2007 ("argumentative, excessive talking in class, cursing and swearing, inappropriate language" (N.T. 421)), but Student was generally easily redirected. Student was referred to the Student Assistance Program, which is a confidential program involving a team of community professionals and requiring parental consent. The outcome of that referral is confidential. Around this time, Student also began talking with the special education teacher more frequently, revealing frustration and unhappiness, and talking this over helped Student. Student's teacher believed that a reason for the change in Student's behavior was that Student missed the family in [the other city] where Student had visited over the summer of 2007. (N.T. 419-22, 434-37, 439-41, 516, 518, 528-30; P 23)
34. Student continued to attend the weekly counseling sessions with the school psychologist during the 2007-08 school year. The District's school psychologist also believed that Student's change in behavior, which the counselor did not consider to be ongoing but rather periodic, was related to missing family in [the other city]. Student occasionally saw the school psychologist for additional counseling services because of Student's behaviors that school year, with these sessions occurring either following staff referral or at Student's own initiative. (N.T. 505-07, 509, 520-21, 524-30, 536-38)
35. The family communicated regularly with the District regarding Student's academic performance and progress throughout the fall of 2007. Student was frequently absent or did

not turn in homework, and Student's advocate worked with Student to complete all assignments (N.T. 48-50; P 31; S 16, S 18)

36. In March 2008, Student applied to an arts and technology school for 12<sup>th</sup> grade. In addition to Lindamood-Bell instruction, Student was also provided with reading instruction using the Wilson program and the SRA Corrective Reading Program, both of which focus on decoding. The SRA program also addresses reading comprehension. (N.T. 402, 405-07, 429, 433; P 31 at 15; S 20)
37. The District gathered information in May 2008 as part of a re-evaluation. (N.T. 501-07, 522-23; P 26) Five subtests of the Woodcock-Johnson III Tests of Achievement (WJ III) were administered; however, Student's scores were based upon an incorrect birthdate (P 26 at 2) and the results are therefore of questionable value. Student's Reading teacher noted that Student was often disruptive in the classroom, was easily distracted and defensive; and the Social Studies teacher indicated that Student was defiant and oppositional. No other behavioral problems were indicated although concern with Student's attendance was noted in several classes. The Parents' input into the re-evaluation stated that Student "has made substantial progress in just about every area of school and home life", although they believed Student continued to need improvement in basic academics for job-readiness. (P 26 at 10) The Parents stated that Student's bond with the natural family disrupted Student's life here, but also stated that "[Student's] current situation in school is the best it has ever been." (P 26 at 10, 27)
38. Student's advocate communicated frequently with the District in the spring of 2008 regarding Student's academic performance and progress. In May 2008, Student's advocate advised the District that Student would be enrolled in the Lindamood-Bell program in the fall at the Center. (N.T. 287-88, 293-94, 641; P 31)
39. Student's grades at the end of the 2007-08 school year were an F in Wellness, a D in Computer Applications, Science, and Social Studies, and C or better in all other classes, with an overall grade point average of 77.63 (a C grade in the District). Student was absent 23 days and tardy on 17 occasions that school year. (S 28, S 44)
40. Student withdrew from the District at the beginning of the 2008-09 school year and was enrolled in the Center in September 2008. The Center is not a school. Student's educational program in that placement, a total of 774 hours, was limited to reading and other language instruction only with a focus on Phonemic Awareness/Symbol Imagery. Student attended five days each week, six hours each day, until May 2009. Student did not return to the District. (N.T. 266-68, 290-91; 546-51, 555-553, 576-77, 584, 589, 607, 627-28; P 27)
41. Student's advocate signed the enrollment agreement with the Center for Student, and also paid the tuition to attend there. Student's Parents had, and have, no obligation to repay the tuition to Student's advocate. (N.T. 571, 611-12, 622-23, 628-31)
42. The parties met several times over the course of the 2008-09 school year, and the District convened Student's IEP team in March 2009 to develop a program for Student. Additionally, the District's Director of Career and Technical Education met with Student in late March



2009 to discuss Student's ability to graduate and post-secondary plans, and to develop a transition plan for Student. (N.T. 266-67, 632, 647-49, 651-52, 669-71, 675-80, 683-84, 720-23; S 33, S 34)

43. Assessments by the Center reflected that Student made significant progress in reading between May 2008 and May 2009: Word Attack improved from a 1.8 grade level to a 7.5 grade level; Sight Word assessment improved from the 3.1 grade level to the 7.3 grade level; and Oral Reading Fluency improved from a 3.2 grade level to a 6.0 grade level. Comprehension also reportedly improved. (N.T. 553-55; P 30; S 35)
44. The Center did not provide any instruction in science, history, social studies, art, music, health, physical education, civics, or any subject area outside of reading and language. Student did not have an individualized behavior plan and did not receive any counseling there. (N.T. 585-90)
45. Student returned to [the other city] sometime in May 2009. (N.T. 626)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Principles

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

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D.Pa. 2009). This hearing officer found each of the witnesses to be generally credible, even if their viewpoints differed. The credibility of specific witnesses is discussed further in this decision as necessary.

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. However, procedural violations can support a claim for relief only if those violations impeded a child's right to receive FAPE, or significantly impeded the parents' opportunity to participate in the decision-making process concerning provision of FAPE to the child, or caused a deprivation of educational benefit. 20 U.S.C.

§1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2). The *Rowley* standard is met when a child's program provides him or her with more than a trivial or *de minimis* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. For a child who is age 16 or older, the IEP team must also state transitional needs and services. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.43, 300.321.

#### The 2006-07 School Year

The Parents first claim that the District denied Student FAPE during the 2006-07 school year by failing to properly evaluate Student upon enrollment in the District, failing to adopt the content and recommendations of the March 2006 IEP from [the other state], and failing to develop and implement an IEP that met Student’s needs. (Parents’ closing brief at 6) More specifically, the Parents contend that the District failed to provide appropriate services to address Student’s specific learning disability, behavior, and transition. (*Id.*)

The federal regulations implementing the IDEA make specific provision for a school district’s obligation when a student with an IEP transfers from another state.

(f) *IEPs for children who transfer from another State.* If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child’s IEP from the previous public agency), until the new public agency—

(1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

34 C.F.R. § 300.323(f).

While the Parents suggest that the District should have undertaken an evaluation, the regulations permitted it to determine that no new evaluation was necessary. *Id.* Student had had

both an educational evaluation and a comprehensive neuropsychological evaluation in November 2005 in [the other state] which provided a wealth of information about Student. ((FF 6, 7, 8, 9, 10) The Parents do not point to any particular area which required further assessment by the District in August or September of 2006, other than a functional behavioral assessment (FBA). An FBA is a process of gathering information about a specific behavior of concern in order to identify the function of the behavior and develop strategies for “eliminating target behaviors, developing positive proactive behaviors and increasing academic achievement.”<sup>6</sup> In the interim IEP, the team noted that Student was “at risk for emotional problems” (P 13 p. 2; S 10 p. 2) and determined that, “[i]f behavioral problems arise, an FBA will be done.” (*Id.*) The Parents do not suggest, nor does the evidence reflect, that Student was demonstrating problematic behaviors at school, including making verbal and physical threats to peers and staff, which indicated a need for an FBA by the District. On the contrary, the evidence supports a conclusion that Student’s behavior at school during the 2006-07 school year was not a concern. (N.T. 392-93; Finding of Fact (FF) 21) The failure to conduct an FBA under these circumstances is, I conclude, wholly reasonable and appropriate. I further find that the District’s determination that no further evaluation of Student was necessary at the beginning of the 2006-07 school year, given all of the information provided from [the other state], was not at all inappropriate.

With respect to the District’s August and October 2006 IEPs, a brief review of the March 2006 [other state] IEP, which the Parents contend should have been essentially implemented, appears to be prudent. That IEP identified Student’s needs in reading (improving comprehension and sight word skills, and drawing conclusions and inferences), math (using computation skills and applying them to daily life, as well as deriving information from charts, tables, and graphs), and written language (using correct spelling, punctuation and grammar for various purposes including daily life and answering comprehension questions). (P 3; S 4) Annual goals and objectives addressed transition, reading (including decoding), math, and written language, as well as coping and social skills. (*Id.*) As noted, the IEP contained an FBA relating to verbal and physical threats to peers and staff. (*Id.*) The first reading goal was for Student to improve reading skills from a 2.0 grade equivalent, and objectives addressed identifying the main idea, reading along to text read orally and stating the sequence of events, and identifying main characters and their role in the material read. (*Id.*) The second reading goal was for Student to improve decoding skills from a first grade level, with objectives to decode functional and sight words. (*Id.*) The IEP recommended that Student be provided with Orton-Gillingham or Wilson Program strategies for reading. (*Id.*) The math goal was for Student to improve math skills from a 2.0 grade equivalent, with objectives addressing performing basic operations, completing number patterns, and solving basic word problems. (*Id.*) The written expression goal was for Student to improve written language skills from a 2.0 grade equivalent, and included objectives for completing forms, spelling, and writing simple sentences with proper conventions. (*Id.*) Student was also to be provided with counseling for coping skills and social skills. (*Id.*) Two hours of transition services during the school year were also specified. (*Id.*)

The District’s August 2006 interim IEP included information from the [other state] evaluations and IEP (FF 15, 16) and provided for baseline assessments which were obtained in

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<sup>6</sup> *Functional Behavioral Assessment* (2009), Pennsylvania Department of Education, Bureau of Special Education, and Pennsylvania Training and Technical Assistance Network (citations omitted), available at <http://www.pattan.k12.pa.us/files/Behavior/FBA-Flyer.pdf>, last visited on September 22, 2010.

September 2006 for reading and math. (FF 17) Special education and related services were provided immediately to address Student's needs based upon the information from [the other state] including the most recent IEP. (N.T. 336-37; P 13; S 10; FF 15) The subsequent October 2006 IEP included the current baseline information (which was different from that set forth in the March 2006 [other state] IEP) and goals and objectives were developed based upon those current assessments, and a BIP was also implemented. (FF 18, 19, 21) Although the October 2006 lacked detailed information for transition planning (P 16, S 11) and could have been more detailed, the evidence establishes that the District and Student worked on career exploration particularly with respect to developing a proposal for Student's graduation project (FF 15, 27), and Student was taking two vocational class during that school year consistent with the IEP. (S 28, S 43)

Based on the foregoing, I cannot conclude that the District denied Student FAPE by failing to provide necessary special education and related services at the beginning of, or during, the 2006-07 school year. The Parents' major complaint is that Student's reading teacher was not sufficiently trained in the Lindamood-Bell approach. The evidence does not support this contention. This teacher has an undergraduate degree in special education and a reading specialist certificate, and was or is completing a master's degree in urban education. (N.T. 379-80) She participated in and completed the requisite Lindamood-Bell training program to provide this instruction (FF 22) and was also trained in the Wilson Reading Program. (N.T. 380; FF 22) She used Lindamood-Bell and Wilson Program strategies with Student during the 2006-07 school year, during which time Student's reading fluency and decoding improved, and by March 2007 Student was reading instructionally at a second grade level. (FF 22, 25) There are many multisensory structured approaches to teaching reading and language, of which Lindamood-Bell is one, as is the Wilson Program and Orton-Gillingham. The record simply fails to demonstrate that the reading teacher was not able to, and did not, provide appropriate reading instruction to Student during the 2006-07 school year. Moreover, aside from some complaints about incomplete or incorrect math homework for which Student received credit (N.T. 39-40, 88-90), the record is devoid of evidence suggesting that Student's math and written expression instruction was in any way inappropriate. Based upon a consideration of the record as a whole, the Parents have not established that Student was denied FAPE for the 2006-07 school year.

### The 2007-08 School Year

The main contention by the Parents for this school year is that the District failed to respond appropriately to Student's behavioral needs. The family did present testimony that Student's behavior was a significant concern and that the parties were in continual communication as a result. (N.T. 52-55) Nevertheless, Student's Reading teacher and school psychologist, the persons who were most familiar with Student's behavior at school, provided credible testimony that Student's problematic behavior was effectively managed at school. (FF 33, 34) There is no suggestion that the referral to the SAP was in any way inappropriate, or that the outcome of that referral was less than positive for Student. The evidence does indicate that Student's behavioral problems, both at home and in school, were related to Student's desire to return to [the other state] (*id.*) which is a circumstance the District could only address to a limited extent in the school setting. Even assuming that by the time of the May 2008 re-evaluation

process, the District should have conducted further assessment and/or begun developing programs to address Student's behavior and declining grades (FF 37, 39), Student's advocate advised that Student would be enrolled at the Center in the fall (FF 38), leaving no time for the District to do so.

The Parents' other significant complaint about the 2007-08 school year is that they did not believe Student was making adequate progress in Reading. In addition to the explanation provided above regarding the District's reading instruction during the 2006-07 school year, this issue is best addressed through a review of Student's progress in Reading, or lack thereof, between the fall of 2006 and the end of the 2007-08 school year.

Reading probes by the District's reading teacher revealed that Student's fluency improved from a 1.5 reading level in August 2006 to a 3.0 reading level in May 2008, and Student increased the number of correct words per minute by 1.27 words per week over that period of time. (N.T. 352-53, 404-05, 426; P 28) The Parents claim that the 1.5 grade level improvement in reading is not adequate over a period of two full school years. Additionally, they elicited testimony during the hearing that the administration of the WJ III in May 2008 revealed a grade equivalency score in Basic Reading Skills of only 1.5. The Parents assert that the record demonstrates that Student made little if any reading progress over the two-year time period Student attended school in the District. (Parents' closing brief at 8-9)

I cannot agree. Not all students will make one year of academic progress in one school year. This is a student with low average cognitive ability who has, historically, presented with significant needs to improve reading decoding and fluency. (FF 3, 6, 7, 11, 15, 18, 25, 30, 43) Consequently, it is my determination that Student's progress in the areas of reading need, while not year for year, has been significant and meaningful during the time period in question. Furthermore, any asserted lack of progress based upon a single standardized test score in May 2008 is not persuasive. Grade equivalency scores derived from standardized tests can be misleading as they are based upon estimates only.<sup>7</sup> Further, while the testimony by the Parents' reading expert from the Center did suggest on direct examination that Student did not make meaningful progress in reading (N.T. 563-64), she wavered from that assertion on cross-examination (N.T. 581-82), and clearly lacked sufficient information about Student's reading program at the District to make such a determination. (*Id.*)

The Parents also argue that Student's reading "improved dramatically" after attending the Center program. (Parents' closing brief at 12) This is not surprising, particularly given the intensity of the specific instruction provided to Student which focused on reading and language. (FF 40) Schools are required to provide an education in all academic areas, while the Center did not. (FF 40, 44) That Student was successful at the Center in one specific academic area does not mean that the District denied Student FAPE. Accordingly, for all of the foregoing reasons, I conclude that the evidence of Student's improved reading skills after leaving the District fails to

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<sup>7</sup> See, e.g., Salvia, J., Ysseldyke, J., & Bolt, S. (2010). *Assessment in Special and Inclusive Education* (11<sup>th</sup> ed.). Belmont, CA: Wadsworth Cengage Learning; Sattler, J. M. (2001). *Assessment of Children: Cognitive Applications* (4<sup>th</sup> ed.). La Mesa, CA: Author. It merits repeating that the WJ III scores were based upon an incorrect birthdate. (FF 37)

demonstrate a denial of FAPE by the District for the two-year time period before Student enrolled in the Center.

### Remedies

The Parents seek compensatory education and tuition reimbursement to the Center for all three school years. Compensatory education is an available remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. In other words, compensatory education provides relief due to a District's denial of FAPE. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996); *B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Commw. 2006).

Similarly, tuition reimbursement is an available remedy for parents<sup>8</sup> to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is appropriate. *Florence County Sch. Dist. v. Carter*, 510 U.S. 10 (1993); *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra*. A parental placement need not satisfy all of the requirements imposed on school districts; the standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

As I have concluded that the District did not deny FAPE to Student, I find no basis to award compensatory education or tuition reimbursement.<sup>9</sup>

## CONCLUSION

For all of the foregoing reasons, I conclude that the Parents have not met their burden of establishing that Student was denied FAPE by the District during the 2006-07, 2007-08, or 2008-09 school years. Accordingly, no remedy will be awarded.

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<sup>8</sup> As noted, the District Court remanded this matter to address, *inter alia*, whether the Parents could obtain reimbursement for expenditures made on behalf of Student and those owed by the parents to Student's advocate. Even if a denial of FAPE were established, the Parents cannot obtain tuition reimbursement for the cost of Student's enrollment at the Center since they are not obligated to repay Student's advocate for those expenses. (FF 41)

<sup>9</sup> Even if I had reached the question of whether the Center program was appropriate for Student, I would not conclude that it was. This program addressed only reading and language, failing to provide instruction to Student in any other academic area, and, significantly, did not provide either a behavior plan or counseling to address what were clearly specific needs for Student. (FF) *See Fairfax County School Board v. Knight*, 2006 Westlaw 6209927, 2006 U.S. Dist. LEXIS 96337 (E.D. Va. 2006) (concluding that, "[a]n educational program which addresses only one academic area cannot be deemed appropriate under the IDEA.").

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parents' claims in the above case are **DENIED** and the District need take no further action with respect to this matter.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

September 24, 2010  
10064-0809AS