

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
DUE PROCESS HEARING

Name of Child:
ODR #9481/08-09 LS

Date of Birth:
Xx/xx/xx

Dates of Hearing:¹
February 23, 2009
April 27, 2009
April 28, 2009
August 11, 2009
October 26, 2009

CLOSED HEARING

Parties to the Hearing:

Parkland School District
1210 Springhouse Road
Allentown, Pennsylvania 18104

Date Record Closed:

Representative:

Frederick Stanczak, Esquire
179 North Broad Street
Doylestown, Pennsylvania 18901

Joanne Sommer, Esquire
Eastburn and Gray
60 E. Court Street
Doylestown, Pennsylvania 18901

December 8, 2009

¹ Because the hearing officer was injured and could neither write nor travel for a significant period of time the last two sessions were held by teleconference. The hearing officer's condition was responsible for the need to cancel scheduled June and July sessions and for increasing the length of the time span of this hearing. The parties were most gracious in accommodating this situation.

Date of Decision:

December 20, 2009

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

Background

The Student² is currently a pre-teen aged student residing in the Parkland School District [District]. After attending kindergarten in a parochial school, Student attended public school in the District from first grade until near the beginning of fifth grade when the Parents unilaterally enrolled Student in a private school [Private School] because of their belief that Student was not receiving an appropriate education in the District. The parents requested this due process hearing under the IDEIA and under §504 of the Rehabilitation Act³ to recover the cost of tuition and transportation for the Student's enrollment in the Private School for the 2008-2009 school year. The Parents are also requesting compensatory education from the 2003-2004 school year through the date of Student's disenrollment from the District's public school for the District's alleged failure to identify the Student as eligible for special education in a timely manner and provide the Student with an appropriate education.

Issues⁴

1. Did the Parkland School District fail to identify Student as a child with a disability, and as eligible by virtue of Student's need for specially designed instruction? If so, did the District deny Student FAPE, and is Student entitled to compensatory education, in what amount and of what kind?
2. Did the Parkland School District fail to offer Student an appropriate program and placement for the 2008-2009 school year? If the Parkland School District failed to offer an appropriate program and placement to Student for the 2008-2009 school year, is the placement unilaterally chosen by the Parents appropriate? If the District failed to offer an appropriate program and placement for Student, and the placement unilaterally chosen by the Parents is appropriate, are there equitable considerations that would reduce or eliminate the District's obligation to provide tuition reimbursement?

² The name, age, gender and current school of the Student is not used in the body of this decision in order to preserve the Student's privacy.

³ Parents' articulated a claim under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §793 *et seq.* Parents, however, adduced no explicit evidence of discrimination on the basis of disability, and did not argue that the evidence established a separate and distinct claim under §504 in addition to the District's alleged violations of IDEIA. Their 504 claim was based entirely upon the same facts that they asserted in support of their IDEIA claims. They produced no evidence of intentional discrimination against Student, and would, in any event, be entitled to no more relief than they will obtain on the IDEA claims that will be allowed.

⁴ A third issue, whether the Parents should be reimbursed for a private evaluation, is not being considered as the private psychologist did not provide requested material in a timely manner and therefore was precluded from testifying.

Findings of Fact

1. On a brief cognitive assessment, the Kaufman Brief Intelligence Test [K-BIT], administered when Student was 7 years, 8 months old, Student scored in the Average Range on the Verbal measure and on the Non-verbal measure, and received a K-BIT Composite of Average Range.⁵ [P-2]
2. According to the District's assessment, at the beginning of the 2003-2004 school year, Student's first grade year, Student was reading at the pre-primer level. At the teacher's recommendation, Student received academic supports that included Title I reading instruction from a Reading Specialist and Title I mathematics instruction, as well as individual support from the regular education teacher who also holds a Reading Specialist degree. [NT 26, 632, 649-650; S-26]
3. From the fall of first grade Student received the Title One Services in reading and mathematics five days per week. Title I services are not special education services. [NT 26, 635, 667-668]
4. In addition to Student's Title I reading services, the classroom work included guided reading daily for approximately 90 minutes in small groups, and whole group instruction in the Houghton-Mifflin series for approximately thirty minutes each day. Classroom mathematics instruction was provided for about one hour daily. [NT 635-636, 669-670]
5. The mother helped in the class on a regular basis and discussed Student's performance with the teacher. At home the Parents used programs such as Hooked on Phonics and Jumpstart in an attempt to help Student. [NT 30-31, 645]
6. The first grade report card as evidenced by the check marks noted below par performance in reading, and also in math and writing. Student's first grade teacher gave Student four check-minuses out of six possible in reading in the second marking period, and five check minuses out of six possible in the fourth marking period. These check-minuses denote that Student was working below the level of an average first grader, even with Title 1 accommodations. Student's first grade teacher rated Student for the last three marking periods as having difficulty in mathematics in concepts, computing accurately, solving problems and computing mathematically. The report card also indicates the first grade teacher's concerns about some of the Student's writing skills. [NT 27-30, 637-638, 640-641, 661-662; S-8]

⁵ Of interest was that "[Student] got the general sound of a word even though the word was incorrect [e.g. sack for saddle, corn for cactus, and yank for anchor]". Additionally Student used functional descriptor words rather than precise vocabulary [e.g. eye lash picker rather than tweezers, fire hose for extinguisher, and an outlet was something you put a plug into]. P-1

7. Despite Student's having had Title 1 services for about six months, the first grade teacher had concerns that Student was "often frustrated with class work as [Student] is performing below grade level" and made an IST referral. On March 25, 2004 an Instructional Support Team [IST] meeting was held with Parents, first grade teacher and the principal in attendance. The IST plan was supposed to go into effect on or about April 8, 2004, with a mid-point assessment on April 23, 2004. The IST plan addressed reading only, and not mathematics, even though the Student was having difficulty in that area as well. In line with the IST plan Student was to receive continuation of Title I support, differentiated instruction, and supported instruction and materials. The first grade teacher testified that she did not know when the plan was implemented and did not recall if there was a mid-point assessment. The record is devoid of any information relative to a final assessment of the success of the IST plan. The director of student services did not know if outcome monitoring was done on this plan. [NT 39, 592, 634, 647-648, 1015; S-7, P-1]
8. At the time of the IST meeting no written explanation of parental rights of children with disabilities was provided to the Parents. It is unclear from the principal's testimony whether or not a verbal explanation was provided. [NT 985-986]
9. On May 25, 2004, the Parents requested in writing that Student repeat first grade because of Student's frustration with homework and difficulty in class. [NT 36-37, 42, 968-970; S-5, P-3]
10. Although the first grade teacher did not suggest nor agree that Student should be retained, the District through the principal responded in writing, "The information gathered during the Instructional Support process along with your concerns has indicated that your request [for retention] should be granted".⁶ Although the principal testified that research does not support retention,⁷ the District did not recommend that Student receive an evaluation as an alternative to or in addition to retention. [NT 665, 668-669, 671, 968-970, 973, 985-989; S-5, S-6]
11. The teacher for repeated first grade [firstR] [2004-2005] reviewed the IST plan, but did not implement the IST plan. During firstR, Student received classroom instruction daily for a half-hour with the Houghton-Mifflin reading program as well as Title 1 Reading and Title 1 Math for one-half hour each day, four or five days per week. With the support of the firstR teacher, who holds a doctorate in Reading and Language Arts and certification as a Reading Specialist, the Student was performing "satisfactorily" during the firstR year. Student was using the taught skills and strategies with teacher prompts and support but not independently. The firstR teacher testified that Student followed directions, got started right away, understood the importance of being attentive, was very

⁶ The principal testified that Student was making "adequate progress...there's always a top and a bottom of a class...[Student] was on the lower end of that range, but...was making progress". [NT 969]

⁷ The District psychologist also noted research regarding ineffectiveness of retention. [NT 817]

- focused and worked hard to apply reading strategies. [NT 594-598, 610, 613, 615; S-9]
12. The firstR teacher testified that Student asked questions when uncertain of a concept and participated during discussions, and that this indicated that Student was monitoring Student's own thinking and wanted to grasp the concept. [NT 615-616]
 13. The second grade [2005-2006] teacher did not recall whether or not he reviewed Student's records prior to beginning the school year. He did not recall knowing that Student had repeated first grade. In September 2004, in second grade, Student's reading score had slipped from the previous firstR Level 1.2 down to Primer, then only increased to Level 1.1 in April 2005. [NT 531, 533; S-26]
 14. Accommodations in second grade included guided reading material below the second grade reading level. [NT 533-534]
 15. Nevertheless, the second grade teacher told the Parents that Student did not need the private tutoring they were obtaining for Student because Student was "doing fine".⁸ The report card issued by the second grade teacher indicates that with accommodations in instruction and materials Student received checks and check-pluses indicating satisfactory and very good performance in reading, math and written expression in second grade. The fact that the teacher viewed Student as "a wonderful worker" may have served to enhance the grades Student was given. [NT 556-557; S-10]
 16. Student's "Student Profile" in second grade noted 'Some Progress' on Comprehension, Phonics and Vocabulary, Proofreading and Writing, 'Good Progress' on Comparing Texts, and 'Excellent Progress' on Reading Strategy. [S-29a]
 17. During third grade [2006-2007] Student was tutored in math and possibly reading at home by a teacher who had previously taught third grade with the Student's third grade teacher. Student also received District Remedial Program [DRP] in third grade since Title 1 did not extend beyond second grade. The Student never received individual instruction in school. [NT 679, 681, 704-705, 709]
 18. On a Mastery assessment given at the beginning of third grade, the Student missed ten of ten items on long and short vowels⁹, three of eight items on other vowel sounds, and five of five items on final blends. [NT 691; S-29a]
 19. Scores on a Narrative Essay done in September of third grade were Focus 2, Content 2, Organization 2, Style 1 and Conventions 1 with a Total of 2 [mode]. Scores on a Narrative Essay done in April of third grade were Focus 3, Content 3,

⁸ The teacher may not have considered that the tutoring might be contributing toward Student's doing fine.

⁹ Assessed again in February Student missed two of ten items on long and short vowels. [S-29b]

Organization 2, Style 2, Conventions 2 and Total 2 [mode]. Student continued to show deficits in writing; although there were improvements over the course of the five months, the third grade teacher characterized Student's writing as "inconsistent". [NT 698; S-29c, S-29d]

20. The third grade teacher did not refer Student to IST because she differentiated instruction and she also decided to provide Student with accommodations. Because the mother said Student was taking too long on homework the teacher shortened Student's reading and math assignments by 50% across the board. She reduced the amount of vocabulary words Student received. She modified tests, for example giving Student three choices instead of four. As Student was having difficulty on the reading portion of the math tests, the teacher read the questions for Student and re-phrased questions.¹⁰ However, by the end of the third grade year Student received check minuses in reading strategies and in daily spelling. [NT 679, 688-689, 710; S-11]
21. In the second marking period report card the third grade teacher wrote, "[Student] is certainly trying to improve [Student's] written communication skills, but [Student] continues to struggle with mechanics and daily spelling. Practicing phonemic awareness at home/school may help Student feel a sense of success in this area. The fourth marking period comments again addressed phonemic awareness. [NT 684; S-11]
22. In third grade, Student received about two hours and 15 minutes a day in reading/language arts instruction. [NT 709]
23. On Student's "Student Profile" completed in May 2007 at the end of third grade on a scale of 0 to 8 keyed to qualitative assessment Student received the lowest scores indicating 'Needs Improvement' on Reading Strategy, Comprehension, Comparing Texts and Writing (using adverbs); Student received a notation of 'Some Progress' on Structural Analysis and Vocabulary and 'Good Progress' on Proofreading. [S-29e]
24. In third grade in math Student was either in the lowest ["reinforcement"] group or the middle ["practice"] group. The teacher testified that she believed Student did not require specially designed instruction because "the accommodations and differentiated instruction in the classroom were working". [NT 723, 727, 741, 753]
25. The third grade teacher did discuss the IST process with the mother and recalled telling her that if she wasn't happy with what was going on in the classroom this [IST] would be the next step. [NT 757-758]
26. Student was in a homogeneously grouped classroom for fourth grade [2007-2008]; there were 27-28 students in the class of which five were special education

¹⁰ This was also done for Student on the PSSAs. [NT 689, 714]

- students. In addition to the teacher, who is a certified Reading Specialist there was a paraprofessional aide and a DRP teacher who provided services. [NT 368-369]
27. Student received DRP in both reading and mathematics. [NT 399]
 28. In fourth grade Student's report card reflected a decrease in Word Study from a check plus in the first marking period to check minuses in the second and fourth marking periods with an intervening check in the third. The teacher testified that this had to do with prefix, suffix, phonemes and phonics difficulties. [NT 370-371; S-13]
 29. Materials for guided reading were below fourth grade level and Student received DRP four of every five days. Along with five or six other students who were reading below grade level, Student was instructed using the Soar to Success reading program to address all aspects of reading. Student did not attain a reading level beyond 3.2. [NT 371-374, 410]
 30. The fourth grade teacher could not explain how Student's mathematics grades were C-B-C-C over the four marking periods, although Student progressed from check-minuses to check-pluses. Student moved back and forth between the middle two of four math groups. [NT 385-390; S-13]
 31. Student's writing assessments as reflected on the fourth grade report card declined during the second half of the year. [NT 378-380; S-13]
 32. The fourth grade teacher asked for an IST meeting in April 2008 after the 3rd marking period because she was not seeing improvement at Student's guided reading levels, but an IST meeting was not convened until September 26th of the following [fifth grade] year. On the IST referral sheet the fourth grade teacher noted Student needed to develop "reading on grade level, drawing concl[usions], making inf[erences]" and in writing "the area of conventions, content, and a little of organization". [NT 394-396; S-25]
 33. The fourth grade teacher testified that during the year she taught Student, Student did not read on grade level or make sufficient progress despite the teacher's best efforts and the Student's best efforts. Student's reading decoding skills were never measured or assessed in fourth grade. [NT 396, 466, 475]
 34. The fourth grade teacher testified that in the District a teacher does not go directly to an evaluation request but must ask for an IST meeting first. [NT 397-398]
 35. The fourth grade teacher was aware the Student had received IST already and had repeated first grade, but that this was not relevant in determining that Student again receive IST support. [NT 400]

36. Although the fourth grade teacher said that the IST action plan had to be reviewed in 30 days she did not remember if this was done in Student's case. [NT 400-401]
37. On April 28, 2008 the District held an "informal" IST meeting; the Parents were not present. It was noted that Student was still making reversals, was on reading level MN, was receiving DRP 4 times a week, was in a guidance group and was receiving private tutoring. The plan was: preferential seating, adapted assignments, frequent adult support, small group differentiated instruction, support with assignment groups, study guides, speech screening and CSI 91 [a standardized test taken by students in second grade]. It was noted that a "formal IST in September 08" would be held. The fourth grade teacher testified that the IST plan was a mixture of what was already bring done and what would be done. [NT 403-406, 439-440, 465; S-16]
38. The IST plan was implemented for the remainder of fourth grade. The teacher could not remember if a 30-day review was held or not. [NT 406]
39. After the end of the fourth grade year the Parents engaged the fourth grade teacher to tutor Student in fifth grade. [NT 460-461]
40. The Instructional Support Teacher, a regular education teacher, was not contacted by anyone and asked to set up an IST meeting. The 2008-2009 school year was her first year in the IST position. She "noticed the notes" from the prior year and set the meeting up. [NT 486-489]
41. In fifth grade an IST meeting was not convened until September 26, 2008; the new IST teacher happened upon the notation in Student's IST folder that a September meeting was to be held. The IST meeting did not include the fourth grade teacher. No one who had worked one-to-one or for an extended time with the Student, other than the Parents, was in attendance. The IST plan contained many things that had already been done in previous years: reading centers [but two 15-minute periods instead of one] and reading groups, tests and math word problems to be read to Student, spelling word list reduced to fewer words, modified homework assignments, reading probes and data collection [doing this weekly was a change] and review of fluency. The new items were providing correct study guides to parents in advance of tests, providing flashcards for studying, providing a buddy to help with correct answers on study guide completion, and phonics instruction by Florida Center Reading Research. Tasks for the DRP remained the same as in previous years and tasks for Parents were the same – help with homework and studying for tests. The Parents had done these things in the past and/or had a tutor do them. [NT 202, 420, 486-487; S-18]
42. The District psychologist who participated in the September 2008 IST meeting did not recall if she was aware at the time that Student had been referred for IST previously. [NT 791, 794]

43. The IST meeting was held at the end of September. By the time Student left the District's class at the end of October, after one month, the IST team was "just getting the ball rolling" with the Florida Center Reading Research program for phonics. [NT 285]
44. At the mid-point of the IST plan, October 22, 2008 the IST teacher called the Parents in order to find out how the Parents felt the Student was doing. She had not spoken to anyone implementing the IST plan, and in fact during the time the plan was in effect she did not follow up at all with school staff. [NT 516-517]
45. Prior to instructing Student the fifth grade teacher did not review Student's records. She likes to give her students a "brand new start", a "clean slate". [NT 194-195, 327, 349-350]
46. Fairly early on in the school year the Parents or someone else made the fifth grade teacher aware of the fact that Student had the IST process in first grade. [NT 195-196]
47. Following learning about Student's having been in the IST process, the fifth grade teacher did not review the IST document from first grade or the results of the Kaufman Brief Intelligence Test [K-BIT] administered when Student was 7 years, 8 months old. [NT 196; P-1, P-2]
48. The fifth grade teacher did not communicate with the fourth grade teacher. The fifth grade teacher participated in the September 2008 IST meeting but did not remember if the fourth grade report card was discussed. The fifth grade teacher did not remember all the conversations that took place at the hour-long IST meeting, specifically she could not remember if anyone in addition to the Parents expressed concerns about Student's reading. [NT 198, 201-203]
49. The fifth grade teacher administered a Houghton-Mifflin assessment to determine Student's reading level. The fifth grade teacher testified that Student's reading group was the lowest reading group and was working at an early third grade reading level, and "[Student] seemed to be reading fine. I didn't notice anything completely out of the ordinary, compared with the other students I had within [Student's] group". [NT 207-208, 210, 329; S-32]
50. The fifth grade teacher characterized Student as "a very, very extremely hard worker...I never, you know, rarely see someone who works so hard". The fifth grade teacher testified that Student 'paid attention very well'. [NT 294-296]
51. Of the four reading groups in the fifth grade classroom, Student was in the lowest group (MN). In that group, compared to the other groups, the fifth grade teacher testified that she did not do anything "totally out of the ordinary...usually with your lowest group you're giving more support than the others. That's just how it is." [NT 266-267]

52. The fifth grade teacher testified that based on what she was seeing in the classroom, if Student had not already been referred to IST she would not have referred Student, “No, my only concern was [Student’s] guided reading level...”. [NT 275, 286-287]
53. In a heterogeneous fifth grade class of 25 students, with 5 students having IEP’s, 21 students, including Student, had an A average in reading based on eight grades; 3 students had a B average, and one student had a C average. Student’s vocabulary average was 94, which was the fifth lowest grade in the class; Student’s comprehension average was 85, the fourth lowest grade in the class. [HO-1]
54. In Student’s fifth grade class, Student received a math grade of 79 for the 1st marking period, which was translated into a B; however, other students’ grades in the 70’s were coded as C. [HO-1]
55. In Student’s fifth grade class Student and one other student received an 89 in Science which was coded as an A; however, another student also received an 89 which was coded as a B. The teacher felt that Student’s extra effort warranted raising Student’s grade to an A. [NT 342; HO-1]
56. In Student’s fifth grade class, 19 students, including Student, received an A average in Social Studies. [HO-1]
57. Student’s Language Arts average of 91 was about in the middle of the fifth grade class. [HO-1]
58. No specific assessment of Student’s decoding skills was undertaken in fifth grade prior to Student’s disenrollment at the end of October despite the IST plan calling for implementation of the Florida Center Reading Research materials. [NT 221]
59. The fifth grade teacher was relatively inexperienced as demonstrated in many places in her testimony. [NT 192-193 – educational and experiential background; NT 194-195 – not reading Student’s records; NT 207 – belief that fifth grader working at a third grade reading level was “fine”; NT 210-211 – lack of knowledge of standardized testing; NT 211-212 - lack of understanding of basis for IST provision of reading math word problems to Student; NT 215 – not understanding question regarding whether the spelling list matched the reading level; NT 216-217 – not testing the Student’s level of spelling before reducing the Student’s spelling list; NT 236 – criteria for referring for an evaluation]
60. Title I or the District Remedial Program (DRP) were provided to Student throughout the elementary years, in addition to modification of assignments, reading of word problems in math, differentiated instruction, preferential seating

- and small group instruction. These supports and accommodations were noted on Student's report cards. [NT 204-205, 211-213, 218; S- 8, S-9, S-10, S-11]
61. The Parents also obtained tutoring for Student during the school years, using teachers in the elementary school. Student qualified for the District's summer reading program during the summers after first grade, first grade repeated, and second grade. [NT 56-57, 62, 619-620, 623-625]
 62. As set forth in Student's Individual Reading Progress Report, in first grade Student moved from Readiness in September to Pre-Primer in May; in firstR Student moved from Pre-Primer in September to Level 1.2 in May; in second grade Student slipped down to Primer in September and up to Level 1.1 in April¹¹ [May testing was not done]; in third grade Student moved from 2.1 in September to 3.1 in February [no further testing is recorded]; in fourth grade Student started down at 2.2 in October, moved to 3.1 in February and stayed at 3.1 in May; in fifth grade in September Student again tested at Level 3.1. [S-26]
 63. Eliminating the first, firstR, and second grades given the difference in the testing process, and focusing only on third and fourth grades, Student made one year's progress [from Level 2.1 to Level 3.1] in reading in regular education from September of third grade to September of fifth grade, a span of two full years with a considerable amount of assistance through DRP, classroom work, and outside tutoring. [S-26]
 64. As set forth on Student's Leveled Reading Passages Summary at the beginning of fourth grade Student was reading at a late second grade level and at the middle of fourth grade Student was reading at an early third grade level. [S-30a]
 65. Although the results of the Leveled Reading Passages Summary at S-30a showed Student to be reading at an early third grade level at the middle of the fourth grade, at the beginning of fifth grade Student's level was still at the early third grade level [3.1] indicating no progress during the last third of the fourth grade. [S-32]
 66. Student was not reading at grade level during any year, except for a portion of the third grade year. [NT 226, 228-229, 378, 409-410, 495-497, 562, 600-601]
 67. The Student's fifth grade IST plan did not identify or address Student's deficits in reading. The fifth grade teacher in testimony could not explain how Student's decoding deficit, which the District acknowledged, was to be addressed during the 5th grade year. [NT 350-351]

¹¹ In this year, for all students, testing was on 5 criteria as opposed to the previous use of only 3 criteria. The District suggests that this is the reason for the drop, but the firstR teacher would not acknowledge that if all 5 criteria had been used in first and firstR Student's scores may have been lower at those times. [NT 600-603]

68. The fifth grade teacher testified that the Student's two-year delay in reading decoding would be addressed through the Houghton-Mifflin program, but conceded that that program is for regular education students. [NT 350-351]
69. The District psychologist testified that she would not necessarily recommend an evaluation even if the IST accommodations were not effective, but that the team would still consider revising the IST plan. She stated that the decision to proceed with an evaluation would depend on whether the Student responded to the interventions. [NT 810-811]
70. The District psychologist admitted that Student's reading scores on the Individual Reading Inventory, given the level of support Student received, would be a "red flag", and confirmed that an evaluation is the only acceptable means by which to determine if a student has a learning disability. [NT 818-819, 831; S-26]
71. The District's psychologist testified that although a student's reading one grade level below actual grade is "within grade level expectations" two levels below "would have raised more of a red flag". [NT 812]
72. The District's director of student services, noting that a student with a disability might not require specially designed instruction, conceded that these questions are answered by an evaluation and acknowledged that the only way to determine whether the Student's performance represented a "significant discrepancy" from Student's ability is to perform a full evaluation. [NT 1020-1022]
73. At the IST meeting of September 2008 the Student's father asked whether the team believed Student had a learning disability. The District did not offer an evaluation to make this determination. [NT 843-846]
74. At no time during Student's attendance in the District, did any teacher refer Student for evaluation to determine whether Student was a child with a disability in need of specially designed instruction. [NT 1006]
75. The Parents removed Student from the District at the end of October / beginning of November 2008 of fifth grade and placed Student in Private School. [NT 246]
76. The Private School is a school for students with learning disabilities. [NT 890]
77. There are at most eight students per class, which allows teachers to individualize instruction using a multi-sensory, therapeutic approach. [NT 882-883]

78. Student has difficulty with decoding, word attack & comprehension. Student is instructed through the Project Read program, a multi-sensory, synthetic phonics program, based on Orton-Gillingham method. The program specifically addresses Student's decoding deficit. The Private School addresses the needs of the Student. [NT 880, 895, 897-898; P-12]
79. Based on the review of records and having met with Student and the Parents, the Head of the Private School concluded that the Private School can offer Student an appropriate program. [NT 812-813, 892, 913]

Discussion and Conclusions of Law

Legal Basis:

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, for cases brought under the IDEA, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. In the instant matter, the evidence is not in equipoise as the Parents presented preponderant evidence on the issues.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹² Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

Not all witnesses' testimony was relevant to the question of whether and when the District met its child find obligations to Student. Only the witnesses whose testimony

¹² Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

directly contributed to the picture of Student's tenure in the District public school will be discussed in this section.

This hearing officer found the **mother** to be an exceptionally credible and sincere witness. She testified convincingly that she thought Student was already being tested and provided for, and that she did not understand how what Student was receiving was different from what the District's newsletters described regarding evaluations. Her credibility was enhanced by her willingness to praise the work of Student's teacher during the repeat first grade year [firstR]. She answered forthrightly and did not embellish unnecessarily. Her testimony was given considerable weight.

The **1stR teacher**'s testimony was clear and although she did not remember certain information, she was credible and appeared to be trying to be exact and specific in her responses. Although this teacher was a regular education teacher, she holds a doctorate in Reading and Language Arts and is a certified Reading Specialist. Because of these qualifications she was convincing when she answered that Student did not need specially designed instruction and only needed what she offered in the classroom, "at that time when I had [Student]". However, in essence it appears that despite not being in special education during firstR Student in fact, but not in nomenclature, received SDI.

The **fourth grade teacher** was clearly more credible than the first, second, third and fifth grade teachers whose testimony will be discussed below. She impressed this hearing officer as being a very bright individual. This teacher holds a master's degree in reading and is a certified Reading Specialist. The teacher did read the Student's previous records at the beginning of the school year. At the November parent/teacher conference she went over with the Parents what could be done if Student did not make progress in her class. She referred the Student for an IST meeting in April, after the 3rd marking period, but it is not clear, unless she was following District policy, why her choice of options was another IST referral rather than a referral for an evaluation but at least she was aware that Student was not making progress in light of the amount of supports being given. Her credibility was diminished somewhat on cross-examination by the District's attorney, as she seemed to shade her responses in the direction the attorney was leading and in so doing try to retract or lessen the impact of her original testimony [e.g. 406 vs. 442 (IST plan implementation), 370-371 vs. 424 (progress)].

The **Instructional Support Teacher**'s testimony was credible but added little to the weight of evidence. It was however rather disconcerting to hear that she was not specifically informed that Student was to have a formal IST meeting in September and that she only discovered this in the process of familiarizing herself with all the students' folders. It was also clear that she did not see herself as being in charge of closely monitoring the Student's IST period [NT 515-517]

Several of the District's witnesses appeared to this hearing officer to be answering in such a way as can best be described as "cagey" and this diminished their credibility. This was true of the **first grade teacher** who was a Reading Specialist. She repeatedly testified that she did not recall, and answered in an uncooperative manner when

questioned about the IST plan [NT 642-644]. Her repeated testimony that it was “not my place” to refer a student for an evaluation before taking the child’s case to an IST meeting, and that it was “not my responsibility” to assess the effectiveness of a child’s IST plan, came across as a dismissive “not my job” statement rather than an honest attempt to explain District policy. Her testimony that she did not know when the IST plan was implemented or whether or not a midpoint assessment came across as a lack of engagement in the hearing. Her style of testifying necessitated the hearing officer’s intervening and asking questions about the retention issue to move the testimony along and to attempt to elicit a straightforward answer. [NT 652-657] Nevertheless, this teacher is to be highly commended for her early recognition that Student needed additional help in the form of Title 1 services, and for her referring Student to IST after waiting for a reasonable period of time to see if Student would benefit from this service alone.

The **second grade teacher** also relied quite a bit on “I don’t recall” answers, but about the only thing he clearly remembered was his telling the Parents that Student didn’t need the tutoring Student was receiving because Student was “doing fine in second grade”. [NT 556-557] He may not make a routine practice of reviewing his students’ records before beginning to instruct them, and therefore may not have noted that during the year he taught Student, Student’s reading level in September was down from the level in the previous May, and that Student ended the year at a lower level than Student had ended the previous year. Given this data it is hard to understand why Student received checks and check pluses in reading from this teacher. In yet another demonstration of the sort of caginess that diminished his credibility, the second grade teacher, after having been pointed to a statement he made on the report card [“When decoding words, [Student] needs to make sure to use the context of the sentence to help [Student] figure the word out and not only rely on sounding out the word”] answered the question “Did Student have difficulty with decoding” with “I don’t know if I would use the term difficulty. I don’t recall”. [NT 538-539; S-27] This hearing officer was inclined to disregard this witness’s testimony as well as the documents he was responsible for preparing.

The **third grade teacher** came across in testimony as cagey and uninformed about child find and special education. Referred to Student’s report card, she did not recall why supports were added; asked if she considered a referral to IST she said that she did consider it but decided to give Student accommodations instead. In the spring the mother and this teacher discussed a referral to IST, but the teacher said that Student *did not need it because of the amount of support Student was receiving*. It is clear that this teacher does not understand the concept of child find or special education entitlement; other than any coursework she may have encountered she evidenced no training provided by the District or any other source in child find. [NT 753] Finally, when asked by District’s counsel whether Student had “learned to read” the witness said, “Yes [Student] was, yes” but looked down and bit her lip, behavior in stark contrast to her otherwise loud and confident voice. Under re-direct examination the witness became resistant to listening to and/or answering a question relating to why she needed to put supports and accommodations into place for the Student in science and social studies. [NT 759-760]

The **fifth grade teacher** seemed to be a kind but very inexperienced individual. She seemed eager to be cooperative, but she had a great deal of difficulty understanding the questions she was asked, frequently asking for rephrasing of clear questions; this may have been anxiety related to being a witness, but as a teacher she may fail to inspire confidence in parents, particularly those whose children are having academic difficulty. Particularly dismaying was her statement that because Student was doing well in everything but reading she would not have referred Student to IST. It was also telling that this rather young and inexperienced teacher did not look at her students' records before beginning to instruct them. [NT 194-195] It is fine for a seasoned teacher to wait to form her own impressions, or to give students "a fresh start" but this is not a good practice for an inexperienced teacher and it was a clear mistake in the case of the Student who is the subject of this hearing. Notably also, this witness did not know the difference between curriculum-based assessment and standardized testing [NT 210-211] The witness could not explain why she was to read Student math word problems other than it was what the IST plan said and it had been done in the past [NT 211-212] After having taught Student for about six weeks, and sitting through the Parent's testimony and enduring her own direct examination the witness described the Student as "average to above average performance-wise" across all subjects. [NT 247] A scrutiny of this teacher's roll book revealed that nearly all this teacher's students received A averages, diminishing the significance of Student's A's. [HO-1]

The **principal** was articulate and confident on direct examination by the District's attorney, but on cross examination by Parent's attorney the transcript shows that she hesitated and waffled [NT 980 – regarding whether or not the teacher in addition to the Parents had academic concerns], and parsed language to a considerable degree [NT 980 – below grade level depends on how far, a full grade level below is acceptable], [NT 983-984 – depends on what you mean by struggling].

Child Find:

The IDEIA imposes on school districts the affirmative obligation to locate, evaluate and identify all children residing within district boundaries who are in need of special education and related services. 20 U.S.C. § 1412(a)(3), 34 C.F.R. § 300.111. The "child find" obligation to evaluate includes children who are suspected of having a disability even though they may be advancing from grade to grade. 34 C.F.R. § 300.111(c)(1); 300.8.

Initially the District made entirely appropriate responses to Student's academic difficulty, first through the first grade teacher's early referral for Title 1 services, [FF 2, 3] followed by her IST referral after six months [FF 7]. However, after the IST meeting the District seems to have dropped the ball. First, there is no evidence in the record that the March 2004 IST plan was implemented or that its effectiveness was examined at the midpoint and at the endpoint. [FF 7] Second, when the Parents requested retention in first grade, the District did not offer to perform any type of assessment, let alone a multidisciplinary evaluation, although it was the principal's conviction, backed by research, that retention is not effective. [FF 10] Given the District's reluctance to honor the Parents' request, it could have issued a Permission to Evaluate instead of agreeing to retention, or in addition

to allowing retention. Fortunately for Student, for the firstR year Student was assigned to a teacher who holds a doctorate in Reading and Language Arts and who is also a certified Reading Specialist. This teacher reviewed the previous IST plan but did not implement it. Instead she continued the Title 1 program and used her own training and experience to inform Student's educational program. [FF 11] Given that the principal had not made the decision to have the Student evaluated, this was a reasonable approach. In the firstR teacher's class, in reading Student moved from the Pre-Primer level, through the Primer level and up to the 1.2 level by the end of the year. [FF 62] Student also became an active learner during that school year [FF 11, 12].

Despite this reading progress in first R, at the beginning of second grade Student had slipped down to Primer, and by April of second grade, receiving Title 1 reading and being tutored at home, Student only recovered skills up to Level 1.1. [FF 62] It is difficult to understand how the second grade teacher, knowing that Student was being given below grade level reading material, was in Title 1, was receiving tutoring at home, and was conscientious could be "doing fine". [FF 14] The second grade teacher testified that he didn't recall whether or not he reviewed Student's records prior to beginning the school year and did not recall knowing that Student had repeated first grade. [FF 13] The record does not contain any evidence that Student was monitored by anyone at the District as Student moved from firstR to second grade. Clearly the second grade teacher did not have the whole picture and no one in the District seems to have been responsible for making sure that Student continued to progress.

In consideration of the entire record, it is the finding of this hearing officer that the District should have monitored the Student closely during and after firstR grade, and evaluated this attentive, hard-working, and motivated Student when Student showed a decline of two levels in reading skills after the summer between the end of the repeated first grade and the beginning of second grade. [FF 62] Even with an exceptionally well-qualified firstR teacher, who according to the mother worked well with Student for the year, Student was still not up to grade level after having been through first grade twice and after having received Title 1 services for two years, and over the space of a summer had dropped two levels. An evaluation during the 2005-2006 second grade year should have been completed by the beginning of December 2005 and programming implemented after the winter holiday break in January 2006.

However Student did not receive an evaluation in mid-second grade and Student only partially recouped Student's summer losses during that school year [FF 62]. From third grade where the teacher decided to forego an IST referral in favor of providing multiple accommodations [FF 20], to fourth grade with a teacher who is a certified Reading Specialist and who referred Student for an IST toward the end of the year [FF 32], to the beginning of fifth grade when Student was assigned a well-meaning, kind, but naïve teacher [FF 59, FF 53-57], Student was denied a free appropriate public education [FAPE]. Despite having DRP and home tutoring Student needed significant accommodations in the regular education setting [FF 20, 37, 41] and took two full years to make one year's progress in reading [FF 62]. The mother convincingly testified that she and her husband trusted the District and thought that the assessments Student was

being given were in fact evaluations. A student's parents are not responsible for ensuring that a child receives FAPE; that is the responsibility of a school district. The District in this case failed to timely evaluate and identify Student and thereby failed to provide Student with FAPE.

This hearing officer is in agreement with the Parents' closing argument, quoted as follows:

"The parents do not have a duty to identify, locate, or evaluate their child pursuant to IDEA. This obligation falls squarely upon the district. *Hicks, ex rel. Hicks v. Purchase Line School Dist.* 251 F.Supp.2d 1250, 1253 (W.D.Pa., 2003), citing, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.1996). (noting that "[a] child's entitlement to special education should not depend upon the vigilance of parents who may not be sufficiently sophisticated to comprehend the problem). A district is on notice of the possibility of a disability where a student is experiencing failing grades, or where it has notice that the student has been identified for ADHD. See, *S.W. v. Holbrook Public Schools* 221 F.Supp.2d 222, *226 -227 (D.Mass.,2002). The possibility that the student's difficulty *could* be attributed to something other than a disability does not excuse the district from its child find obligation. See *Richard V. v. City of Medford*, 924 F.Supp. 320, 322 (D.Mass.1996) As District witnesses have admitted, the very purpose of the evaluation process is to allow the District to determine whether the child's deficit in school performance is attributable to a disability and whether the child needs specially designed instruction. *M.C. v. Central Regional S.D.*, 81 F.3d 389, 397, (3d Cir. 1996); *Lamoine Sch. Comm. v. Ms. Z.*, 353 F. Supp. 2d 18, 35 (D. Me. 2005), *S.W.v Holbrook Pub Sch.*, 221 F Supp 222, 227 (D. Mass 2002)."

The Student had received extensive interventions over the course of enrollment in the District, and remained nonetheless significantly below grade level in reading. This hearing officer strongly agrees with the Parents that the District's use of the IST process in this case "operated to obstruct the execution of its child find obligation". One witness testified in such a manner as to severely diminish her credibility and the District's position when in response to questions as to whether she would ever refer a student for an evaluation [Q: "Is there ever a case where you might suggest to anyone else in the district, a principal or school psychologist, that maybe you should go right to an evaluation as opposed to [IST]"; A: "No, this is the avenue we take." [NT 398]

Compensatory Education: Compensatory education is a remedy designed to provide a student with the services he or she should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that he/she should have received, compensatory education is an in-kind remedy. *Lester H. v. Gilhool*, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991) A child is entitled to compensatory education services if through some action or inaction of the District the child was denied FAPE.

Student is entitled to compensatory education for the District's violation of its child find obligation and denial of FAPE in the amount of two hours per day for every day Student was present in school from the first school day in January 2006 until the Student's last day in the District in September 2008. Although this hearing officer generally prefers to fashion equitable relief in ways other than an hour-for-hour formula, given the Student's age and the number of years Student still has in elementary and secondary education, an hour-for-hour award that can be used as needed for additional educational services is appropriate.

Tuition Reimbursement:

Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA's implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency enroll the child in a private...school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment...”

The United States Supreme Court in Forest Grove School District v. T.A., 129 S. Ct. 2484 (2009) recently concluded that a student need not have received special education services in a public school before being eligible for tuition reimbursement. The Court ruled that, when a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.

Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

Then, in 1997, a dozen years after Burlington, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if

that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Discussion:

With regard to the first prong for tuition reimbursement under Carter, the District did not timely evaluate Student and did not offer Student an appropriate educational program and placement to address significant reading difficulty that, at the time Student left the District, represented a reading level two years below grade level. Student had struggled with reading throughout Student's tenure in the District despite retention in first grade, two IST plans, Title 1, DRP, and having several regular education teachers who were also certified Reading Specialists. Teachers made significant accommodations for Student in the regular education program including reading math word problems to Student and reading test directions as needed. For fifth grade Student was going to receive more of the same, with a young teacher who while meeting state qualifying standards had the least training and experience¹³ of any of Student's previous teachers. Even though Student had a second IST plan, notably the portion of the IST plan dealing with phonics instruction was just getting under way as of the end of October. Although Student's grades seemed to be good in that Student received A's, the teacher's roll book revealed that most of the students in the heterogeneous group also were receiving A's. The Parents had every reason to conclude that their child could not be appropriately educated in the District and their removal of Student to the Private School was warranted.

Since the District did not fulfill its obligation to offer Student an appropriate program and placement, the second prong of the Carter analysis must be reached. The program and placement unilaterally selected by the Parents is appropriate. The private school offers a program that includes small classes and specific programs and methods to address Student's areas of need. The unilateral placement chosen by the Parents is appropriate under the Act.

¹³ Several of the previous regular education teachers were also certified Reading Specialists.

Since the District did not fulfill its obligation to offer Student an appropriate program and placement, and the program and placement unilaterally chosen by the Parents is appropriate, the third prong of the Carter analysis must be considered. There are no equitable considerations to remove or reduce the District's obligation for tuition reimbursement. The Parents are therefore entitled to reimbursement for Student's tuition and transportation for the Private School.

Order

It is hereby ordered that:

1. The Parkland School District failed to identify Student as a child with a disability, and as eligible by virtue of Student's need for specially designed instruction. By so doing, the District denied Student FAPE. Student is entitled to compensatory education, in the amount of 2 hours per day for every day the Student was present in school from the beginning of January 2006 to the day Student left the District's public school.
2. The Parkland School District failed to offer Student an appropriate program and placement for the 2008-2009 school year. The placement unilaterally chosen by the Parents is appropriate. There are no equitable considerations that would reduce or eliminate the District's obligation to provide tuition reimbursement. The District must reimburse the Parents tuition and transportation costs of Student's attendance at Private School for the 2008-2009 school year.

December 20, 2009

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

Pennsylvania Special Education Hearing Officer

NAHO Certified Hearing Official