

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

**Pennsylvania Special Education Hearing Officer**  
**Final Decision and Order**

**CLOSED HEARING**

**ODR File Number:** 19503-17-18-KE

**ODR File Number:** 19535-17-18-KE

**Child's Name:** J.D.

**Date of Birth:** [redacted]

**Dates of Hearing:**

9/28/2017, 11/20/2017, 11/30/2017, 1/22/2018 and 1/23/2018

**Parent:**

[redacted]

*Counsel for Parent*

Scott H. Wolpert Esq.

Timoney Knox, L.L.P.

400 Maryland Drive

P.O. Box 7544

Fort Washington, PA 19034

**Local Education Agency:**

Abington School District

970 Highland Avenue

Abington, PA 19001-4535

*Counsel for the LEA*

Claudia L. Huot Esq.

Wisler Pearlstein, L.L.P.

Blue Bell Executive Campus

460 Norristown Road, Suite 110

Blue Bell, PA 19422-2323

**Hearing Officer:** William Culleton Esq.    **Date of Decision:** March 7, 2018

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is enrolled currently in a private school (School). Student lives within the District named in this matter (District), and attended District elementary schools from kindergarten through disenrollment after third grade. The District has classified Student under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disabilities of Specific Learning Disability and Speech or Language Impairment. (NT 20-21.)

Parents assert that the District violated both the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>2</sup> in three ways. First, they assert that a District re-evaluation report received during Student's second grade year was inappropriate and they request an Independent Educational Evaluation (IEE). Second, they assert that the District failed to offer and provide Student with a free appropriate public education (FAPE) in the second and third grades, and they seek an order for compensatory education as a remedy. Third, they assert that the District failed to offer a FAPE for fourth, fifth and sixth grades, and they seek tuition reimbursement for Student's attendance at the School during those school years.

In addition, Parents seek reimbursement of their costs for providing a private neuropsychological evaluation.

The District asserts that it has offered and provided a FAPE at all relevant times; that the School is an inappropriate placement; and that tuition reimbursement would be inequitable. In

---

<sup>1</sup> Student, Parents, the School and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality. References to "Parent" in the singular refer to Student's Mother, who participated in many interactions with the District on behalf of herself and Student's Father.

<sup>2</sup> There is no question that Student is otherwise qualified within the meaning of section 504 and that the District receives federal funds.

addition, it asserts that the IDEA statute of limitations bars Parents from seeking review of the challenged re-evaluation report delivered during Student's second grade year, and the District's offer and provision of a FAPE for that year.<sup>3</sup>

I heard evidence regarding all of Parents' claims as well as the dates of Parents' knowledge and notice of their claims. The hearing was completed in five sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District failed to offer or provide a FAPE for Student's third, fourth and fifth grade years, and I order both tuition reimbursement and compensatory education. Parents' remaining claims are dismissed.

### **ISSUES**

1. Are any of Parents' claims barred by the IDEA statute of limitations?
2. Was the District's re-evaluation report of March 2015 appropriate?
3. Did the District offer and provide a FAPE to Student for second grade (2014-2015 school year) and third grade (2015-2016 school year) in compliance with the IDEA and section 504?
4. Did the District offer to provide Student with a FAPE for fourth grade (2016-2017 school year), fifth grade (2017-2018 school year) and sixth grade (2018-2019) school year?
5. Is the School an appropriate placement for Student?
6. Considering the equities, should the hearing officer order the District to reimburse Parents for tuition and fees at the School?
7. Should the hearing officer order the District to provide Student with compensatory education on account of any services not provided in Student's second and third grades?

---

<sup>3</sup> I apply the IDEA statute of limitations to the section 504 claim as well. *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 737 (3d Cir. 2009)(IDEA statute of limitations applies to section 504 claims). The "withholding" exception to the IDEA statute of limitations, 34 C.F.R. §300.511(f)(2), is not asserted. See *Solanco Sch. Dist. v. C.H.B.*, No. 5:15-cv-02659, 2016 U.S. Dist. LEXIS 104559 (E.D. Pa. Aug. 9, 2016)("withholding" exception does not apply where claims are brought solely under section 504).

8. Should the hearing officer order the District to reimburse Parents for the cost of a private evaluation conducted in March 2016?

### **FINDINGS OF FACT**

#### **STUDENT'S DISABILITIES AND HISTORY PRIOR TO THE RELEVANT PERIOD**

1. Student has a history of diagnosed developmental delays and intervention through birth-to-three and preschool early intervention programs. Prior to enrolling in the District, Student received both speech and language intervention and occupational therapy intervention. Student entered kindergarten in the District with cognitive scores in the average range and school readiness scores in the lower end of the average range. (S 38.)
2. Student's cognitive ability is average to below average, with weaknesses in working memory and processing speed. Since first grade, Student has presented with notable difficulties in maintaining attention to task in the classroom. (S 7, 38.)
3. In kindergarten, Student exhibited delays in receptive language, verbal comprehension and following directions. Student exhibited delays regarding fine motor development and visual processing. Student was identified as a child with Autism. (S 38.)

#### **PARENTS' KNOWLEDGE OR NOTICE OF CLAIMS REGARDING MARCH 2015 RE-EVALUATION AND OFFER AND PROVISION OF FAPE PRIOR TO JULY 24, 2015**

4. Parent is a college counselor and has a master's degree in education and experience as a counselor at the high school level. (NT 609; S 38.)
5. Parents were actively involved in Student's education during Student's second grade (2014-2015) school year. (NT 609-610, 662-663.)
6. During the winter break in December 2014 and January 2015, Parents were seriously concerned about Student's reading, writing, phonetic ability, spelling, mathematics and progress in second grade in all areas, including organization. At this time, Parents believed that Student was not making appropriate progress in any academic or functional skills, and that Student was exhibiting signs of having a specific learning disability. (NT 618, 621, 655-657, 688-689, 708; P 49 p. 5; S 38.)
7. On February 18, 2015, Parent attended a meeting of Student's Individualized Education Program (IEP) team. The District offered a draft IEP placing Student in itinerant learning support receiving instruction in the general education environment except for 60 minutes per day for small group instruction in reading and 20 minutes, three times per week for supplemental mathematics instruction, all in the learning support classroom. The draft IEP provided two goals each for reading and mathematics, and one goal for writing. It provided twelve modifications. (P 16.)

8. Parent acknowledged and agreed with the District's March 12, 2015 re-evaluation report. The report identified Student with a Specific Learning Disability and Speech or Language Impairment. Parents' January 2015 input noted educational needs in reading, writing and mathematics, as well as concerns about Student's vision. The re-evaluation report recommended specially designed instruction for reading, writing and mathematics, direct speech-language therapy and seventeen modifications to instruction. (S 14.)
9. The March 2015 re-evaluation indicated that Student's needs did not include visual-spatial or fine motor skills. It noted Student's previous receipt of consultative occupational therapy and previous exit from that service. It noted that Student had passed the District's vision screening in January 2015. The District's occupational therapist did not evaluate Student for eligibility. The report made no mention of Student's sensory needs. (NT 614; S 14.)
10. Parent reviewed the March 2015 re-evaluation report with the District's school psychology intern and the school psychologist, discussing the District's change in Student's classification from Autism to Specific Learning Disability. (NT 616.)
11. On March 18, 2015, the District offered a draft IEP to Parents, revised in view of the re-evaluation report received on March 12, 2015, and in response to Parents' request to increase mathematics support. The IEP placed Student in the increased supplemental learning support. Student was to be instructed in the general education environment for all subjects, with separate instruction in the learning support classroom for approximately one hour and twenty minutes per day for both reading and mathematics. Student was to receive separate speech and language therapy for one-half hour per week. The IEP provided two goals each for reading and mathematics, one goal for writing and one goal for speech and language therapy. It provided thirteen modifications. (S 18.)
12. At the March 2015 IEP team meeting, Parent asked for contact information in order to talk to Student's speech and language therapist about the therapist's report. (P 37.)
13. On March 26, 2015, Parent understood and signed a Notice of Recommended Educational Placement/ Prior Written Notice (NOREP) which refused to provide Extended School Year (ESY) services to Student based upon a finding that Student did not meet legal eligibility criteria. (NT 706; S 16.)
14. On March 29, 2015, Parent signed the NOREP incorporating the IEP and placement dated March 18, 2015. (S 19.)
15. Parents received a copy of the Procedural Safeguards Notice, which explains their rights regarding due process, during the 2014-2015 school year. (S 18.)
16. In kindergarten, Student had been discharged from consultative occupational therapy. The District's March 2015 re-evaluation did not include an evaluation for occupational therapy. Parent requested that Student be evaluated for occupational therapy needs and this was done in 2016. (NT 615.)

17. Parents were aware of the level of services that Student was receiving and whether or not additional services were implemented to address their concerns. (NT 635-636, 714-719, 725.)
18. By the end of third grade, Parents were seriously concerned about the District's decision not to offer ESY services to Student, about Student's apparent lack of progress in second grade, and about the lack of an occupational therapy evaluation in the March 2015 re-evaluation. (NT 619-621, 638, 643-644, 708.)
19. By the end of second grade, Parents became concerned about Student's apparent anxiety about rising to third grade, and believed that Student was aware of not being ready for third grade. (NT 620-622.)

#### FIRST-TO-SECOND GRADE INTERVENTIONS (FEBRUARY 2014 TO FEBRUARY 2015)

20. On February 25, 2014, during Student's first grade year, the Student's IEP team revised Student's IEP to remove social skills services due to a team agreement that such instruction was no longer necessary. Student's IEP for the remainder of first grade and the first part of second grade placed Student in itinerant autistic support. Student was to be instructed in the general education environment for all subjects, with pull-out instruction in the learning support classroom. (S 7.)
21. To address reading, the February 2014 IEP provided approximately forty-five minutes per day in the learning support classroom for communication arts (which included reading and written expression). The IEP provided three goals for reading (word building, fluency and comprehension). The IEP provided for modification including research based instruction in decoding and encoding, as well as breaks during prolonged visual tasks such as reading and using the computer. (S 7.)
22. To address mathematics, the February 2014 IEP provided that Student would be instructed in a "spiraling" curriculum provided generally to typically developing students; the curriculum was not strictly sequential, but introduced new concepts before previous ones were mastered, then circled back to the older concepts for review. (NT 1089-1090, 1534-1538.)
23. To address mathematics, the February 2014 IEP provided Student with separate instruction in the learning support classroom for approximately 90 minutes per week (three thirty minute sessions) for mathematics review and reinforcement, not using the "spiraling" curriculum approach. It did not provide for research based instruction in mathematics operations or fluency. The IEP provided two goals for mathematics and modified assessments including untimed testing and reading mathematics problems to Student. (S 7.)
24. In addition to these services, the District provided "push-in" paraprofessional services for Student individually during the regular education mathematics instruction, to address attention to task and support Student's instruction. (NT 257-258.)

25. To address Student's difficulties with maintaining attention to task, the February 2014 IEP provided one goal for attention to task. It also provided seven modifications, including movement breaks; proactive and reactive prompting; positive reinforcement; preferential seating; and untimed testing in all subjects except reading. (S 7.)
26. The February 2014 IEP provided fourteen modifications, several of which addressed more than one of Student's educational needs. In addition to the seven addressing Student's attentional needs and two addressed to Student's reading needs, one called for modified testing applicable to all subjects. One addressed all concerns, calling for wait time in class. Two were addressed to Student's social skills needs. One addressed Student's needs with regard to following directions and anxiety by requiring chunking of longer assignments. (S 7.)
27. The February 2014 IEP found Student ineligible for ESY services. (S 7.)
28. The February 2014 IEP provided Student with related services in the form of push-in social skills group observation and intervention. (S 12.)
29. In first and second grade, Student was instructed utilizing a hybrid of the core and intervention curricula, with the intervention curriculum consisting of modified reading passages addressing sight words, comprehension and word attack. Student was instructed in decoding through an additional Response to Intervention and Instruction (RTII) level III program with a reading specialist. (S 12.)

#### FIRST-TO-SECOND GRADE PROGRESS (FEBRUARY 2014 TO FEBRUARY 2015)

30. Student made minimal progress in first grade in reading decoding, sight word vocabulary, word attack, fluency and comprehension. (S 12.)
31. Student's performance in mathematics in first grade was proficient or advanced in all areas of the curriculum except geometry and measurement. (S 12.)
32. In first grade, Student manifested significant difficulties in the area of attention to task. Student responded well to redirection. (S 12.)
33. Student's marks in first grade were satisfactory. (S 10.)
34. Student's grades declined markedly from the end of first grade to the end of second grade in the skills of reading, listening, mathematics and social studies. (S 10.)
35. By the middle of second grade, Student had not mastered Student's first –to- second grade mathematics goal of counting mixed coins with 85% accuracy; Student was able to count coins in like categories with support. (S 12.)
36. By the middle of second grade, Student had not mastered Student's first –to- second grade mathematics goal of understanding and applying concepts of place value. Student was able to demonstrate these skills with accuracy approaching mastery. (S 12.)

37. By the middle of second grade, Student had not mastered Student's first –to- second grade reading goal of word-building with three to four syllable words. Progress monitoring reports on this goal were unclear, and data were reported that did not track the data called for in the goal. (S 12.)
38. By March 2015, Student had made progress in Nonsense Word Fluency. (S 12, 13, 14.)
39. By the middle of second grade, Student had not mastered Student's first –to- second grade reading comprehension goal. (S 12.)
40. By the middle of second grade, Student had improved in reading fluency, but had not mastered Student's first –to- second grade reading fluency goal. Student was not able to display independent reading fluency. (NT 98-119, 126-143; S 12, 13, 14, 49.)
41. By the middle of second grade, Student had not mastered Student's first –to- second grade attention-to-task goal. (S 12.)
42. By the middle of second grade, Student had not shown significant progress in Student's second grade core reading program. (S 13.)
43. By the middle of second grade, Student had shown minimal progress in second grade written expression. (S 13.)
44. By the middle of second grade, Student had shown some progress in intervention program assessments for reading. (S 13, 18, 30.)
45. By March of Student's second grade year, Student's mathematics quiz and test grades declined in numbers and computation; and improved in geometry and measurement. Student's grades declined in reasoning and problem solving. Student was passing in probability and statistics and had low but improving grades in algebraic concepts. (S 13, 14.)
46. In second grade, Student's social skills improved markedly. (S 13, 14.)
47. In second grade, Student continued to struggle with reading fluency and comprehension, mathematics calculation and problem solving, encoding, attention to task and following directions. (S 14.)

#### MARCH 2015 RE-EVALUATION REPORT

48. On March 12, 2015, the District provided a re-evaluation report. The report changed Student's identification from Autism to Specific Learning Disability in reading and mathematics, with a secondary identification of Speech or Language Impairment. It identified educational needs in reading fluency, accuracy and comprehension; written expression; mathematics computation and problem solving; and receptive language. The report noted significant difficulties with attention to task, hyperactivity and organization, but did not find that these difficulties rose to the level of an identifiable Other Health Impairment. (S 14.)

49. The March 2015 re-evaluation classified Student with a specific learning disability based upon the finding that there was a severe discrepancy between Student's cognitive ability and Student's academic performance in reading, writing and mathematics. (S 14.)
50. The March 2015 re-evaluation report found no needs with regard to vision, gross motor functioning or fine motor skills. Parent's input form for the March 2015 re-evaluation indicated that Student's strengths included gross and fine motor skills, including handwriting. Student's teacher corroborated this information. On a test of visual-motor integration, Student scored within the average range, and Student passed a District vision screening. (S 14.)
51. The March 2015 re-evaluation showed that, on standardized achievement testing in kindergarten, Student's reading (32<sup>d</sup> percentile), spelling (30<sup>th</sup> percentile) and alphabet writing fluency (87<sup>th</sup> percentile) scores were in the average range. By March of Student's second grade year, Student's total reading and basic reading skills on standardized achievement testing were below average in the 3<sup>d</sup> percentile; reading comprehension and fluency were in the below average range at the 4<sup>th</sup> percentile; and written expression was in the average range at the 18<sup>th</sup> percentile. (P 46.)

### THIRD GRADE: OFFER AND PROVISION OF FAPE

52. In March 2015, during Student's second grade year, the District offered an IEP in view of the March 2015 re-evaluation report; this IEP was intended to govern Student's special education program until March 2016, in Student's third grade year. The IEP placed Student in supplemental learning support. (S 18.)
53. The March 2015 IEP addressed Student's needs in reading through small group instruction in the learning support classroom, for an unspecified portion of 60 minutes per day, using research based interventions. It offered to provide three levels of instruction: "systematic" (direct instruction of decoding and encoding); "Intervention" (following the core curriculum in grammar, language and comprehension with a modified text) and "core" (the regular curriculum in grammar, language and comprehension). It offered two measurable goals, one for reading fluency and one for reading comprehension. It eliminated the modification calling for breaks during prolonged visual tasks such as reading and using the computer. (S 18.)
54. The District's "intervention" program was its Response to Intervention and Instruction (RTII) structure, which was not considered to be alterable for individualization purposes. (NT 163, 485-487; S 18, 42.)
55. The March 2015 IEP addressed Student's needs in written expression through an unspecified portion of 60 minutes per day in small group instruction in the learning support classroom, utilizing research based interventions. It offered one goal for informational and persuasive writing. The goal was not measurable as written. It offered modifications including graphic organizers in all classes, extra time for instruction and testing and reading prompts to Student during assessments. (S 18.)

56. The March 2015 IEP addressed Student's needs in mathematics through five 20 minute sessions of small group mathematics reinforcement instruction in the learning support classroom, utilizing research based interventions. It offered two measurable goals, one for numbers and computation, and one for mathematics reasoning and problem solving. It provided for modified assessments including untimed testing and reading mathematics problems to Student (S 18.)
57. The March 2015 IEP addressed Student's needs in receptive language by offering 30 small group sessions, 30 minutes per session, during the entire IEP year. It offered one measurable goal for following directions. (S 18.)
58. The March 2015 IEP did not address Student's needs regarding attention to task or organization through goals; the previous goal for attention to task with reduced prompting was eliminated. The IEP addressed attention and organization needs through modifications including movement breaks; preferential seating; and untimed testing in all subjects except reading. The IEP eliminated previous modifications calling for proactive and reactive prompting and positive reinforcement. (S 18.)
59. The March 2015 IEP found Student ineligible for ESY services, based upon a finding that, despite Student's regression during summer breaks, Student was able to recoup losses within a reasonable time. (S 18.)
60. In September 2015, at the start of Student's third grade year, Student's IEP team met to consider a developmental vision assessment that Parents had obtained. The District revised the March 2015 IEP to add 5 modifications, including two to address Student's visual needs. One added modification required use of visuals when providing instructions to Student; one modification required use of graph paper for mathematics instruction to help Student line up figures; and one modification required provision of paraprofessional support in the general education and special education classrooms. (S 22.)
61. For reading, Student was provided with four different programs, including the grade level core curriculum, the Wilson program to address decoding, and two intervention programs addressing fluency and comprehension. The fluency and comprehension intervention programs were designed for students that were two years below grade level in reading. (NT 160-168.)
62. Student began systematic, sequential, multisensory direct instruction in decoding and encoding through the research-based Wilson program in November 2015. Student's assigned Wilson instructor did not have a basic Level I Wilson certification. The program was provided for 35 minutes, four days per week, rather than the Wilson-recommended 45 minutes, four time per week. Student made minimal progress in the program from November 2015 to June 2016. (NT 160-184, 805-809; P 85; S 60.)
63. In November 2015, Parents requested an Independent Educational Evaluation at District expense. In December, 2015, Parents agreed to a District re-evaluation of Student. (S 24, 25.)
64. In December 2015, the District added five new modifications to Student's IEP, including added reporting of data to Parents and avoiding abstractions, idioms and inferences. (S 30.)

65. On February 5, 2016, the District provided its re-evaluation report pursuant to the permission given in December 2015. The report continued Student's identification with Specific Learning Disability and Speech and Language Impairment. It noted educational needs in receptive language, reading, writing and mathematics. (S 32.)
66. For the re-evaluation, Parents listed a number of concerns that they previously had not raised, including understanding and telling time; working memory; copying from the board in class; gross motor skills and eye-hand skills; social skills and low frustration tolerance. (S 32.)
67. The District's re-evaluation included an occupational therapy evaluation, which addressed Student's fine motor, sensory and visual-motor abilities. The evaluation found that Student's fine motor and visual-motor abilities were age appropriate, with average handwriting legibility and speed. It found that Student had sensory needs, and that accommodations in the classroom, such as a chair with wheels, were appropriate and should continue to be used. It found Student ineligible for occupational therapy. (S 32.)
68. On March 1, 2016, Parents provided the District with a January 2016 private occupational therapy evaluation that indicated a need for auditory evaluation and accommodations for Student's visual difficulties. (S 31, 37.)
69. On March 1, 2016, the District offered an IEP that made no changes to Student's placement, small group instruction or speech and language therapy. The March 2016 IEP continued Student's placement in supplemental learning support, with 300 minutes per week in small group instruction in the learning support classroom for reading and written expression, 100 minutes per week in the learning support classroom for mathematics review and remediation, and 30 half-hour sessions of speech and language therapy per IEP year. (S 34.)
70. The March 2016 IEP offered two measurable goals, one for reading fluency and one for reading comprehension, and added a goal for vocabulary building. It continued the reading-related modifications from the March 2015 IEP. (S 34.)
71. The March 2016 IEP substituted a new written expression goal for the March 2015 goal. It offered one goal for informational and persuasive writing. It continued the writing-related modifications from the March 2015 IEP. (S 34.)
72. The March 2016 IEP eliminated the mathematics computation goal from the March 2015 IEP. It retained the measurable mathematics reasoning and problem solving goal. It added a measurable geometry and measurement goal. It continued the mathematics-related modifications from the March 2015 IEP and added a specific half-hour per day one-to-one paraprofessional service during mathematics instruction. (S 34.)
73. The March 2016 IEP eliminated the March 2015 speech goal for following directions and substituted a goal for identifying elements of a story. (S 34.)
74. The March 2016 IEP did not address Student's needs regarding attention to task or organization through goals. The IEP continued to address attention and organization needs through modifications including movement breaks; preferential seating; and untimed

testing in all subjects except reading. The IEP added a modification to address Student's anxiety regarding homework by reducing the time required each night. (S 34.)

75. The March 2016 IEP found Student ineligible for ESY services due to a finding that Student's recoupment of summer losses was within a reasonable time. Parents rejected the NOREP indicating this and made it clear that they desired a reading tutor for Student for the summer in 2016. The District offered a general education summer program instead, but Parents sought an individualized special education summer program. (NT 274; S 34, 35.)
76. On or about March 24, 2016, Parents obtained a private neuropsychological report. The report recommended that Student receive systematic, sequential, multisensory instruction in a small group setting for reading, writing and mathematics. Parents conveyed the report to the District shortly after receiving it. (NT 655; S 38.)
77. The District provided no related services or other appropriate services to address Student's increasing symptoms of anxiety during third grade until March 2016. (NT 681-682, 762, 1285-1286; S 18, 30, 42; P 87 p. 18.)
78. In March 2016, the District addressed Student's anxiety by allowing bathroom breaks and excusing Student from [a special] class, addressing two areas that seemed to be triggering Student's anxiety. The District also offered to have the school psychologist speak with Student, an offer that Parents declined. (NT 277-278; S 52 pp. 62-85.)

#### STUDENT'S THIRD GRADE PERFORMANCE

79. Student was evaluated for reading fluency and accuracy in September 2015. Student scored well below the baseline of Student's IEP reading fluency goal, and well below the expected score for children beginning third grade. By December 2015, Student had recouped almost to the level at which Student had scored at the end of second grade, which is substantially below grade expectation. By January 2016, Student had regressed slightly. Overall, Student made some progress, but did not make substantial progress in reading fluency. (NT 1052-1055; S 18, 30, 32, 38.)
80. By December 2015, Student's curriculum based summative scores for reading had not improved substantially, and Student, while making some progress, had not made substantial progress. (NT 1052-1055; S 30, 38.)
81. In March 2016, the private evaluation found that Student was decoding at a low average range in the 21<sup>st</sup> percentile and Student's decoding fluency was in the 3<sup>d</sup> percentile; Student's letter and word recognition skills were low average at the 9<sup>th</sup> percentile; Student's word recognition fluency was in the 9<sup>th</sup> percentile; Student's silent reading fluency was in the 4<sup>th</sup> percentile; and Student's reading comprehension was low average in the 4<sup>th</sup> percentile. (S 38.)
82. By the end of third grade, Student had made some progress in reading decoding, word reading and reading comprehension. Student advanced less than one step out of nine in the Wilson decoding program from November 2015 to June 2016. Student was performing at

a “Basic” level in reading with supported assessments and below benchmark in oral reading fluency. Student was reading at a level below grade expectations. (NT 134-135, 160-184, 805-809, 1018-1024, 1130-1132, 1144; S 14, 38, 42, 49, 60; P 66, 85.)

83. By January 2016, Student’s curriculum based summative scores for writing had improved, and Student had made some progress in Student’s writing goal. Student continued to perform at a “Basic” level, below expectations for Student’s grade level. Student’s spelling was in the borderline range, 4<sup>th</sup> percentile, and Student’s written expression was low average in the 16<sup>th</sup> percentile. (S 30, 32, 38, 42, 46.)
84. By December 2015, Student’s curriculum based summative scores for mathematics had improved in the areas of numbers and computation, and mathematics reasoning and problem solving. These scores were assessed with accommodations including extended time. Student made some progress in mathematics in the first half of third grade. (S 30.)
85. By January 2016, Student had made significant progress in the receptive language skill of following two step directions. (S 30, 32.)
86. Student needs much drill and repetition to master concepts, and needs explicit explanation to recognize the relationships of new concepts to previously learned concepts. Student needs sequential organization of instruction. (NT 1010-1023, 1073-1074, 1076-1078, 1089-1092; S 32.)
87. By the end of third grade, Student had mastered Student’s previous goal for following directions as well as Student’s current goal for identifying elements of a story, both in a small group or one-to-one supported setting. Student made some progress in receptive language skills. (S 46.)
88. By the end of third grade, Student had made minimal progress in mathematics. Student continued to display a lack of mastery of basic mathematics skills in operations and computation, including the inability to perform simple subtraction problems, skills that are expected to be mastered by third grade. Student continued to show minimal gains in mathematics reasoning and problem solving, geometry and measurement. Student’s mathematics fluency was below the 1<sup>st</sup> percentile on a standardized test. (NT 1010-1017, 1059, 1100-1103; S 38, 46; P 25, 69.)
89. From kindergarten to March 2016, Student’s standard scores in numerical operations declined from 78 to 72 (3d percentile) to 67. Student’s mathematics problem solving declined from 81 to 68 (2d percentile) in second grade, then rose slightly to 72 in third grade. (S 5, 30, 38.)
90. Student needed summer programming to reinforce Student’s learning during the regular school year. (NT 1024-1025, 1075-1076, 1078-1081; S 38.)
91. Student exhibited significant symptoms of anxiety during third grade. Parents began to request special accommodations for Student due to anxiety in March 2016. (NT 277-278, 626; P 35, 41, 87 p. 18, P 97; S 26, 38, 52 pp. 62-85.)

## OFFER OF FAPE FOR FOURTH AND FIFTH GRADES

92. On April 1, 2016, the District sent a NOREP offering to re-evaluate Student for anxiety. (S 39.)
93. On June 7, 2016, the District convened a meeting to review Student's IEP and the private neuropsychological report. The District revised Student's IEP for fourth grade to add updated present levels of academic performance and to incorporate the private neuropsychological report in present levels. (S 46.)
94. The June 2016 revision did not change Student's placement or the curriculum and special education services Student was to receive in the learning support classroom. It made no changes to Student's goals. It added one modification, to make available specific reading software to encourage Student's reading. (S 46.)
95. The June 2016 revision found Student ineligible for ESY services based upon a finding that Student was able to recoup losses from summer breaks. It did not offer ESY services to Student. The IEP team did not consider seriously (S 46.)
96. At the Parents' request, the District convened an IEP team meeting in October 2016, after Student had been dis-enrolled from the District and enrolled in the School. Parents requested a change of placement, and the District did not offer any changes to the IEP. (NT 95-97; S 46.)
97. Parents filed their complaint for due process on July 24, 2017, specifically alleging that the District had failed to offer FAPE for the 2017-2018 school year, and demanding tuition reimbursement. (P 1.)
98. The District did not offer to convene an IEP team meeting or provide an IEP for the 2017-2018 school year because Student was not enrolled in the District. (NT 96-97, 821-822.)

## PARENTS' PLACEMENT OF STUDENT IN THE PRIVATE SCHOOL

99. On June 8, 2016, Parents gave ten day notice of their intent to place Student unilaterally at the School, indicating their belief that the District's last offered IEP was not appropriate for Student. (S 43.)
100. On June 9, 2016 the District's representative sent Parents a letter declining to pay for tuition and indicating that the District would offer an IEP if Student should re-register. (P 64.)

## APPROPRIATENESS OF THE PRIVATE SCHOOL

101. The School is a small Pennsylvania licensed private school that provides individualized elementary level education to children with learning differences, including those with which Student has been diagnosed and identified. (NT 1071, 1074-1076; P 93.)

102. The School employs teachers who are certified special education teachers; teachers who are certified to deliver Wilson programming for reading decoding and encoding; and teachers who are certified in the Orton-Gillingham principles underlying this program. (NT 1076-1077, 1105, 1135-1136.)
103. The School provides small classes and individualized instruction. (NT 1125-1126, 1129, 1136, 1139-1140; P 93.)
104. The School teaches mathematics through a curriculum that is aligned with Pennsylvania curricular standards and is explicit, multisensory and sequential, rather than “spiraling”. (NT 1092-1095, 1128-1129.)
105. The School provided Student with Orton-Gillingham decoding and encoding instruction in fourth grade, and it is providing Student with Wilson instruction addressing the same basic skills in fifth grade. Both curricula have been provided five times per week, 45 minutes per day. (NT 1137, 1152-1154.)
106. In both years, Student has been provided with eighty minutes per week of additional reading instruction addressing vocabulary building and comprehension. (NT 1155.)

#### CREDIBILITY

107. District teachers’ responses to the behavior rating scale provided by the Parents’ private neuropsychological evaluator were combined. District teachers’ combined responses to the behavior inventory addressing Student’s attention to task behaviors showed no difficulties with attention to task, despite teachers’ repeated reports in re-evaluation reports and IEPs that Student exhibited significant difficulties maintaining attention to task. (NT 995-1000, 1002-1008; S 30 p. 22, S 32.)
108. During a scheduled observation by the Parents’ private neuropsychological evaluator, District personnel limited the time available for observation by engaging the evaluator in lengthy discussions. (NT 1026-1028.)
109. The Head of School for the School had taught the District’s general education curriculum program for mathematics in two public schools several years before the hearing date. The Head of School was not aware of the latest changes or literature on its efficacy for children with learning disabilities. The Head of School is not certified as a special education teacher. (NT 1080-1081, 1162-1172.)
110. The District’s specialist with knowledge of the District’s general education curriculum program for mathematics had no personal knowledge of Student and was not involved in Student’s education. (NT 1585-1590.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>4</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>5</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipose”, the Parents cannot prevail under the IDEA or Section 504.<sup>6</sup>

---

<sup>4</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>5</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

<sup>6</sup> I apply the same evidentiary analysis to section IDEA and 504 claims.

## CREDIBILITY/RELIABILITY

It is the responsibility of the hearing officer to determine the credibility and reliability of witnesses' testimony. 22 Pa. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following determinations.

Considering the testimony in light of the documentary evidence, I find that all of the witnesses were credible. With all, I noted that their manner of responding to questions, even from the adverse party, were characterized by care as to knowledge and memory and willingness to clarify and add information. I also noted that the witnesses' testimony was not contradicted in any significant way by the documents of record, except as noted below.

I accorded reduced weight to certain portions of testimony due to concerns about witness' accuracy of memory regarding their perceptions of Student's difficulties. In particular, I accorded reduced weight to teachers' testimony minimizing Student's attention issues in third grade, due to conflicting statements in District documents and those of the private evaluator. I also gave somewhat reduced weight to the Student's special education teacher's depiction of Student's progress, due to inconsistencies and errors in the teacher's progress reporting, regarding the appropriate grade-level benchmarks by which to gauge Student's progress.

THE IDEA STATUTE OF LIMITATIONS BARS PARENTS' CLAIMS REGARDING THE DISTRICT'S MARCH 2015 RE-EVALUATION AND ITS PROVISION OF SPECIAL EDUCATION DURING STUDENT'S SECOND GRADE YEAR

The District argues that the IDEA statute of limitations bars Parents' claims regarding District actions or refusals to act prior to July 24, 2015, the date that is two years prior to the date on which Parents filed their request for due process in this matter. I agree, and I dismiss Parents' claims regarding the March 12, 2015 re-evaluation report and the District's alleged failure to provide a FAPE to Student during Student's second grade year, which ended in June 2015.

The IDEA, 20 U.S.C. 1415(f)(3)(C), provides for limitation of actions as follows:

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint

....

This section provides a two year "look forward" limitations period for filing a due process complaint notice, which begins when the filing party "knew or should have known" of the "action that forms the basis of the complaint ... ." G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 611 (3d Cir. 2015). Therefore, the IDEA statute of limitations is applied forward from the time that the filing party "knew or should have known" of the alleged actionable events, so I must determine the date on which Parents knew or were fairly on notice of what they now complain about (commonly called the "KOSHK" date in this circuit. Once this is determined, I must determine whether or not the Parents filed for due process about the complaints in question within two years; if not, Parents cannot maintain their claims as to which the KOSHK date was more than two years prior to filing. Any claim for actions or refusals that occurred subsequent to the date that is two years prior to filing may proceed. G.L., 802 F.3d above at 620 (barring compensatory education for "all but the most recent two years" if complaint not timely filed).

The IDEA is explicit as to what events the Parents must know or have reason to know about before the two year limitation period will begin to run. The statute uses the word “action”. 20 U.S.C. 1415(f)(3)(C). The statute further characterizes this “action” as that which “forms the basis of the complaint”. Ibid. Consequently, I am obligated to determine each and every District “action” that forms the basis of Parents’ complaint, and then apply the IDEA’s two year “look-forward” limitation period to that action by determining the date upon which Parents “knew or should have known” of that action<sup>7</sup>.

Although the case law on the meaning of “action” in the context of section 1415 of the IDEA is not definitive, some courts have imported an expansive meaning to the statutory term “action”. Relying upon the Third Circuit’s own varied characterizations of the statutory touchstone, courts have stated that the KOSHK date is the date of knowledge or notice of the alleged fact that each such action constituted a “violation” of the IDEA, cf. 20 U.S.C. §1415(b)(6)(B); or worked an “injury” to the child, cf. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 604-5, 607-8, 611-15, 618, 620, 625, 626 (3d Cir. 2015). See E.G. v. Great Valley Sch. Dist., C.A. No. 16-5456, slip op. at 3-4, 10-16 (E.D. Pa. May 23, 2017); Avila v. Spokane Sch. Dist. 81, 852 F.3d 936 (9th Cir. 2016)(in dicta, implying that concept of “injury” should be imported into the statutory word “action”).

For purposes of this matter only, I consider that Parents’ KOSHK date was the date upon which Parents were aware of the District’s actions in providing certain services and refusing others, and at the same time were seriously concerned that these actions and refusals were inappropriate and

---

<sup>7</sup> This is not intended to be an application of the “occurrence” rule explicitly rejected by the Court in G.L., 802 F.3d above at 611. Rather, I apply the “discovery rule” set forth in the language of the IDEA, G.L., 802 F.3d above at 613, as directed by the Third Circuit. The issue here is the nature of what the Parent reasonably had notice about. Adhering to the language of the statute and its regulations, I conclude that I must find the date on which Parent either knew or reasonably should have known of the District’s actions which form the basis of Parent’s complaint. 20 U.S.C. 1415(f)(3)(C).

a denial of a FAPE. On this record, considering the knowledge and qualifications of Parents (Parent is an educator with a master's degree in education and did extensive research on Student's rights under the IDEA), I conclude that Parents "should have known" that the District was violating the IDEA to the detriment of Student's rights prior to the end of Student's second grade year, because Parents were well aware of their rights, had considerable knowledge of educational methods, and believed that the District was not meeting Student's needs.

In providing input to a re-evaluation after January 2015, Parents raised their concerns about Student's academic skills and their perception that Student was not making academic progress. Parents discussed the re-evaluation report with the responsible school psychologist and supervised intern. They discussed their concerns at the subsequent IEP team meeting. They asked to speak with the speech and language therapist about their concerns. They raised concerns with occupational therapy needs in the areas of fine motor skills and vision.

Parents were well aware of their rights to file for due process. They acknowledged receipt of procedural Safeguards, which gave notice of their due process rights. They obtained the services of an advocate to advise them at the IEP meeting. They offer no reason for waiting more than two years before filing for due process regarding District actions during Student's second grade year.

Thus, on the record here, Parents were aware that the District actions of which they complain were violations of the IDEA and injurious to their child during the child's second grade year. Consequently, their KOSHK date for all such actions or violations or injuries was more than two years prior to filing. Therefore, their claims are barred by the IDEA statute of limitations.

Parents did not argue that one of the exceptions to the IDEA statute of limitations applies. 34 C.F.R. §300.511(f). They do suggest that certain information was not provided to them, and they also suggest that certain facts were misrepresented, in that District officials indicated to Parents

that Student was making academic progress, when this was not accurate. Even if these allegations were true, however, the exceptions would not apply, because there is no proof that Parents were induced to delay filing their current due process request due any misrepresentation of fact, 34 C.F.R. §300.511(f)(1), or withholding of information, 34 C.F.R. §300.511(f)(2). See generally, D. K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012).

## TUITION REIMBURSEMENT

Although a parent is always free to decide upon the program and placement that he or she believes will best meet a child's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement<sup>8</sup>. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007). I employ this analysis to address Parents' request for tuition reimbursement in this matter.

---

<sup>8</sup> The weight of judicial authority in this Circuit holds that tuition reimbursement is available under section 504, and that the Burlington-Carter tests are equally applicable to section 504 claims for tuition reimbursement. See, 34 C.F.R. §103.33(c)(4); Lauren G. v. West Chester Area Sch. Dist., 906 F.Supp.2d 375, 390-391(E.D. Pa. 2012). Therefore, I so conclude.

## FIRST PART OF THE BURLINGTON-CARTER TEST: FAILURE TO OFFER OR PROVIDE A FAPE UNDER THE IDEA AND SECTION 504

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is “special education and related services”, at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an IEP. 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive appropriate services in light of the child’s individual circumstances. Andrew F. v. Douglas County Sch. Dist., RE-1, \_\_\_ U.S. \_\_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Andrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

In order to provide a FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213

(3d Cir. 1993).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Andrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544 (1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The program's appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Under section 504, federal regulations define the District's obligation to provide a FAPE differently than under the IDEA. Districts must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of [persons with disabilities] as adequately as the needs of [non-disabled] persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of section 504. 34 C.F.R. §104.33(b)(1).

Applying these standards to the above findings and the record as a whole during the relevant period, I conclude that the District failed to provide Student with an educational program for third grade – and failed to offer an educational program for fourth and fifth grades - that was appropriate

in view of Student's circumstances, and that was reasonably calculated to confer meaningful educational benefit upon Student, in view of Student's unique learning style and needs.

## READING

I conclude that the District failed to provide a program sufficiently individualized for Student to provide a reasonable opportunity for meaningful progress and progress appropriate in light of Student's circumstances. By the beginning of third grade, the District had amassed several years of data on Student, and was well aware that Student's overall intelligence was measured at the low average to average range. Yet, the District was aware also that Student's general IQ was not the best measure of Student's potential, because Student's scores on standardized intelligence subtests were divergent, indicating an uneven set of cognitive skills, and substantial deficits that could bring down the composite numbers, making the general IQ figure less reliable for programming purposes. Student's functioning was complicated further by difficulties with attention and executive functions. In short, the District knew that Student's cognitive functioning was complex and that Student had some scores that indicated possibly higher cognitive abilities than Student's overall IQ suggested.

Knowing this, the District provided Student with a placement in general education for all subjects. For reading, this placement was supplemented with two levels of intervention that utilized up to five different curricula. Student was taught in the general education, grade level curriculum, with a pull-out RTII level three curriculum that provided below-grade-level texts to work on fluency, word reading, and comprehension. This in turn was supplemented with direct instruction in decoding and encoding through a research-based program.

The record shows by a preponderance that the complexity of this program played into Student's weaknesses, not Student's strengths. Student had weaknesses in working memory, attention and executive functions. I find the testimony of the Parents' neuropsychologist to be persuasive that Student needed and still needs an educational program that is highly structured and sequential, and delivered in a small, consistent classroom environment. As the District did not provide or offer this, I conclude that the District's placement was not reasonably calculated to provide Student with an opportunity to be successful and make progress appropriate in view of Student's cognitive profile.

In second grade, the District had offered Student the same program, with minor differences. District data showed that Student made some progress, but that progress was minimal. Student essentially progressed, regressed and recouped in first and second grade at a slow rate that kept Student well under grade level benchmarks. Standardized achievement testing over time showed that Student was falling farther and farther behind grade level peers, although the data showed some gains in discrete reading-related skills. By the beginning of third grade, I conclude, the District was on notice that its placement and program were not sufficiently individualized and ambitious for Student. It should have recognized that Student needed far more robust instruction in decoding and encoding, which the evidence preponderantly shows was the root of Student's struggles with fluency and comprehension.

Instead, the District provided virtually the same program and placement for third grade. The evidence shows that the District was unwilling to consider providing more time for Wilson instruction, even though the program that it was offering was not programmed to meet the publisher's recommended 45 minutes per day, four days per week, and Student was receiving 35 minutes per session. The District was unwilling to reduce or eliminate the RTII programming built

into its system for children with learning disabilities in order to ensure that Student could receive the recommended level of Wilson instruction time.

It is not clear that the Wilson program was provided with fidelity because of this reduced time slot for the program. In addition, the assigned teacher was not Wilson certified, and had not been trained since the program increased its training requirements to increase the amount of mandatory supervised time required.

Similarly, not all of the RTII time was devoted to word reading, vocabulary building, fluency and reading comprehension. The time slot was also devoted to intervention for Student's written expression.

Progress monitoring shows that Student's program produced minimal results, as should have been expected from a program that had produced minimal results in the previous grade. The evidence is preponderant that Student did not master IEP reading goals and continued to perform well below grade level in reading.

The District's view was that this very slow progress in reading was to be expected from a child with Student's cognitive profile. Yet, Student's scores did not clearly show below-average cognitive ability, as discussed above. In second and throughout third grade, Student showed the cognitive ability to do very well in other academic subjects such as science when accommodated for reading deficits. Student was able to make much greater progress in speech therapy when instructed in a structured, small group or one-to-one setting. Student quickly learned social skills when taught to Student explicitly in earlier grades. Parents' neuropsychologist testified that Student is capable of learning to read. In sum, the record is preponderant that Student's slow progress was not consistent with Student's cognitive ability, and that Student's slow progress in reading was more likely due to the inadequacies in Student's program and placement.

## MATHEMATICS

Similarly, the District failed to individualize Student's placement and program appropriately in view of Student's abilities and needs in mathematics. The District provided Student with the same curriculum that it provides for most of its students, according to its curriculum specialist. This curriculum adopts a "spiraling" approach, which introduces new skills without requiring mastery of previous skills, then returns to review and/or remediate the previously taught skills repeatedly over time. The evidence was persuasive that this approach is successful with most children, even including those with learning differences. Yet the evidence is preponderant also that this approach is not appropriate for Student, because Student needs a structured, sequential approach to basic mathematics skills. The District's data show that over two years in the "spiral" curriculum left Student with virtually no progress to show, and disabling gaps in Student's most fundamental mathematics skills. The District was aware of this prior to third grade, yet insisted on continuing Student in this curriculum. The evidence is preponderant that this program and placement was not reasonably calculated to provide Student with success and progress. Not surprisingly, Student failed to progress in third grade mathematics in any meaningful way.

The District argues that it provided additional supports for mathematics, including a paraprofessional "push-in" service for prompting and helping Student attend to classroom instruction and activities. It also added about ten minutes to Student's already-provided "pull out" learning support for review of mathematics instruction and remediation of Student's considerable gaps in calculation and mathematics concepts. The record shows by a preponderance that this did little to help Student make progress. It also shows by a preponderance that the flaw in this approach

was in failing to provide structured, sequential instruction in basic mathematics skills. I conclude that the District program and placement for mathematics failed to provide Student with a FAPE.

## ESY

School districts are required to provide ESY services to their identified students if such services are needed in order to provide a FAPE. 34 C.F.R. §300.106(a). In deciding whether ESY services are necessary, Pennsylvania regulations in Chapter 14 of the Pennsylvania Code require them to consider the child’s pattern of regression and recoupment, along with four other factors. 22 Pa. Code §14.132(a)(2). The Pennsylvania regulation requires that “no single factor shall be determinative.” Ibid.

On this record, the District considered only one of the required factors, and this was determinative of its refusal to offer ESY services. The District knew that Student’s progress in previous years had been slowed by serious regression over the summer months, and lengthy periods of the school year in which Student struggled to slowly recoup those losses. Nevertheless, it concluded in multiple IEPs during Student’s third grade year that there was no evidence of regression sufficient to justify ESY services. I infer from the sparse evidence of its deliberations on this issue that the District considered Student’s recoupment data to be acceptable in years where the data showed severe regression.

Yet the Pennsylvania regulation requires more specific consideration of whether or not the child is able to recoup lost skills “prior to the interruption of educational programming.” 22 Pa. Code §14.132(a)(2). I conclude that the District had data showing that Student’s recoupment was slow, leading to interruption of programming in the beginning of the school year. Moreover, the weight of the data in this record shows that regression was a significant factor in Student’s very

slow growth in reading and mathematics; thus, the District inappropriately failed to recognize that Student's regression made it unlikely that Student would maintain the skills relevant to meeting Student's IEP goals in reading and mathematics. 22 Pa. Code §14.132(a)(2)(iii). Therefore the District's refusal of ESY services for the summer of 2016 was inappropriate.

Moreover, the Pennsylvania regulation requires consideration of other factors. In this matter, the District failed to consider three of them. First it failed to consider the extent to which summer breaks would interfere with Student's struggle to consolidate basic skills in reading and mathematics, 22 Pa. Code §14.132(a)(2)(iv). Second, it failed to consider the extent to which Student's slow progress and constant awareness of being behind other regular education peers would lead Student to withdraw from the learning process, 22 Pa. Code §14.132(a)(2)(vi). It was well aware of Student's anxieties and burgeoning school phobias and avoidance by the end of third grade. Finally, the District failed to consider whether or not Student's "severe" discrepancy between cognitive ability and achievement, coupled with serious difficulties in attention to task and executive functions constituted a "severe" disability within the meaning of 22 Pa. Code §14.132(a)(2)(vi). The District's failure to consider these additional factors was inappropriate.

On this record, I conclude that the District's failure to provide Student with ESY services for the summer of 2016 was a denial of FAPE. It clearly violated the procedural requirements pertaining to this service. The record is preponderant that, due to Student's severe discrepancy and complicating difficulties with attention and executive functions, Student needed consistent summer programming in order to reduce regression, consolidate basic skills and remain engaged in Student's difficult struggle to overcome Student's disabilities and succeed in school. Therefore, the procedural violation was a contributing cause of the deprivation of a FAPE, 34 C.F.R.

§300.513(a)(2)(i), (iii)(procedural violation is substantive if it impedes the right to a FAPE or deprives a child of educational benefit).

#### SPEECH AND LANGUAGE

Parents argue that the District failed to address all of Student's speech and language needs in third grade, and that it failed to provide goals for all such needs. I find the evidence unpersuasive on this point, and that it does not prove a substantive violation preponderantly. Some educational needs were identified in Student's evaluations and IEPs that were not reflected in IEP goals. This was a procedural violation. 34 C.F.R. §300.320(a)(2)(i)(IEP must have goals addressing all of child's educational needs). Nevertheless, I conclude that there is not preponderant evidence that this violation either impeded Student's right to a FAPE, 34 C.F.R. §300.513(a)(2)(i), or caused a deprivation of educational benefit, 34 C.F.R. §300.513(a)(2)(iii). On the contrary, Student made progress in speech and language therapy as the data shows, and the Parents have not proven by a preponderance of the evidence that such progress was inappropriate progress in view of Student's cognitive ability.

#### ATTENTION AND EXECUTIVE FUNCTIONS

Parents argue that the District denied Student a FAPE by failing to address Student's difficulties with attention and executive functions. I disagree. Although Parents correctly point out that the District failed inappropriately to provide goals for these educational needs, 34 C.F.R. §300.320(a)(2)(i), I conclude that this deficiency did not cause a deprivation of a FAPE, 34 C.F.R. §300.513(a)(2)(i), (iii), above. Here, the District's IEPs demonstrate that the Student's IEP teams considered Student's attention and executive function needs and addressed them through

modifications. Parents did not show by a preponderance of the evidence that the District's modifications were inappropriate. Thus, I find no substantive violation in this regard.

## ANXIETY

Parents argue that the District deprived Student of FAPE by failing to provide Student with support for Student's anxiety during third grade. I conclude that they have failed to prove this by a preponderance of the evidence. The record shows that Parent sent emails to the District in the first months of third grade indicating that Student was experiencing anxiety. Parent also made some reference to frustration or anxiety in a November 2015 IEP team meeting. There is evidence that certain members of the team did not get the messages. Yet there is evidence also that Parents did not raise anxiety needs at more than one IEP team meeting during third grade. The issue became a substantial one in March 2016, when Parents informed District officials that Student had an incident in school that month, and was developing a phobic emotional response, causing resistance to going to school. At that point, District personnel offered psychological counseling and other measures to deal with the issue. Weighing all of this evidence, I find that the Parents have failed to prove a failure to offer or provide appropriate services for anxiety during third grade.

Parents also argue that the District failed to offer services for anxiety for Student's fourth grade and fifth grade years. I conclude that the evidence supports this assertion by a preponderance. The June 2016 and October 2016 offered IEPs do not offer any goals or related services to address this need. Given the severity of Student's reported symptoms at the end of third grade, I conclude that the June and October 2016 offers failed to address this need appropriately, a substantive failure to offer FAPE for the fourth and fifth grades.

In sum, I conclude that the District failed to provide Student with appropriate instruction in reading and mathematics, and failed to provide Student with ESY services, in Student's third grade year and the summer of 2016. This constituted a deprivation of FAPE. I also find that the District failed to offer Student appropriate instruction in reading and mathematics, as well as ESY, for Student's fourth and fifth grade years, and that it failed to offer to address Student's anxiety related needs appropriately. Thus, it failed to offer a FAPE for those years.

#### SECTION 504 VIOLATION

I conclude that the District, by failing to offer or provide a FAPE as defined in the IDEA for Student's third, fourth and fifth grades, the District also failed to offer or provide a FAPE as defined by section 504, which requires a district to provide appropriate services and accommodations to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1). On this record, noncompliance with the IDEA is preponderant evidence that the District also failed to comply with section 504. Cf. 34 C.F.R. §104.33(b)(2).

#### APPROPRIATENESS OF THE PRIVATE SCHOOL

I conclude that Parents have proven by a preponderance of the evidence that the School was an appropriate placement. The School is properly state licensed and employs state certified special education teachers and certified reading specialists. It provides structured, sequential, multisensory instruction in a small group setting, and the evidence is preponderant that this is what Student needs in order to have an opportunity to make appropriate progress in reading and mathematics.

For reading, the School provides Student with Wilson instruction for decoding and encoding skills, through a properly certified Wilson teacher, for the recommended 45 minutes, four times per week. It also provides reading instruction to address other reading skills such as comprehension.

For mathematics, the School provides sequential instruction, not “spiraling” instruction. Student is taught by certified teachers in a structured, small group setting. The District argues that this instruction is inferior to what it offers because the curriculum is developed by teachers and the head of School, rather than being research-based. It is well established that a parent does not have to show that a unilateral private placement is as good as or superior to the district’s offered placement. Lauren W. v. DeFlaminis, 480 F.3d 259 (3d Cir. 2007). Rather, the parent must prove that the private placement is appropriate, ibid.; Parents have done so here by showing that the sequential approach is provided, and that this approach addresses Student’s needs in mathematics appropriately.

## EQUITY

I conclude that Parents provided proper and timely notice of their intent to place Student unilaterally in June 2016. The District has not shown equitable grounds for reduction of tuition reimbursement. Parents’ demeanor at the June IEP meeting, as reported by District staff, does not prove predetermination. Nor does a hearsay report that Student believed Student was going to another school; this report is entitled to no weight as it is double hearsay, is uncorroborated, and does not prove anything more than the impression of a child from unknown perceptions.

## COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a “make whole” approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

Here, there is not sufficient evidence to support a “make whole” remedy, so I will order compensatory education on an hour for hour basis. For reading, I conclude that the Student’s special education placement was inappropriate, but the evidence shows that Student did derive some benefit from it. In third grade, what was missing was Wilson programming delivered with integrity. Wilson recommends 45 minutes per week, four days per week. Student is receiving such services now, and I am ordering tuition reimbursement for those services. I will order the number of hours of compensatory education services that is equivalent to the Wilson instruction that Student should have been receiving in third grade.

In mathematics, the evidence shows that Student should have received at least one hour of small group, sequential, explicit instruction, five days per week. As with reading I will order the equivalent number of hours of compensatory education.

I have concluded that the District should have provided Student with ESY services for the summer of 2016, although the evidence does not indicate the number of hours that should have been provided. Parents’ neuropsychologist recommended that services be provided “year-round”. In addition the neuropsychologist recommended that any summer services be consistent with the intervention program provided during the school year. I will order Wilson and sequential mathematics tutoring for the full summer, except for three weeks’ vacation, a total of nine weeks.

I will order the Wilson instruction for four days per week, 45 minutes per day. I will order an hour per day of sequential mathematics instruction.

### **CONCLUSION**

I conclude that the Parents' claims regarding the appropriateness of the District's March 2015 re-evaluation and the appropriateness of its special education services in Student's second grade year are barred by the IDEA statute of limitations. Therefore I will not enter any order regarding these services.

I conclude that the District failed to offer an appropriate IEP to Student for Student's fourth and fifth grade years, and that Parents' choice of the School for unilateral placement of Student for those years was appropriate. Therefore, I conclude that Parents are entitled to reimbursement of their expenditures for the School's tuition and fees for instruction provided by the School in Student's fourth and fifth grade terms. I find no equitable grounds to reduce this reimbursement. I find no basis to order reimbursement beyond the current school year.

I conclude that District failed to provide Student with a FAPE in Student's third grade year, by failing to offer appropriate services for Student's disabilities in reading and mathematics, and by failing to provide ESY services. Therefore, I will order the District to provide compensatory education services on account of the deprivation of FAPE.

I find no basis to order reimbursement of the costs of the March 2016 private neuropsychological evaluation that Parents obtained.

## ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District shall reimburse Parents for the tuition and fees that they have expended for instruction provided by the School in Student's fourth and fifth grade terms.
2. The District shall provide compensatory education to Student in an amount equal to one hour and forty-five minutes per day, four days per week, plus one hour per day, one day per week, of educational services for the following weeks: every week during the 2015-2016 school term in which Student's assigned school was open for students (pro-rated for weeks on which Student's school was open for only a partial week) plus nine full weeks.
3. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parent, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parent. Such services may be provided to Student until Student reaches twenty-one years of age.
4. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
5. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service within a radius of fifty miles from the District administration building.

It is **FURTHER ORDERED** that the parties may alter any of the terms of this Order by agreement of the District and Parents.

It is **FURTHER ORDERED** that all other relief requested by Parents is hereby **DENIED and DISMISSED**.

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

*William F. Culleton, Jr. Esq.*

---

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

DATED: March 7, 2018