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Pennsylvania

## Special Education Hearing Officer DECISION

Child's Name: K.L.

Date of Birth: [redacted]

ODR No. 00440-0910 KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Ann L. Martin, Esquire  
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Red Lion Area School District  
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Date of Resolution Session

December 4, 2009

Dates of Hearing:

January 29, 2010, March 5, 2010,  
March 19, 2010, April 8, 2010, June  
11, 2010

Record Closed:

July 1, 2010

Date of Decision:

July 16, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

## **INTRODUCTION**

Student is a [a beyond teenaged] eligible resident of the Red Lion Area School District (District); Student is identified with Specific Learning Disability. (NT 13-13 to 14-13; S-44.) Student has been enrolled and attending school in the District for over thirteen years. (HO-1.) Student is diagnosed with severe dyslexia, and has a severe language based learning disability. (NT 428-8 to 9; S-47 p. 25.) Student's phonological processing skills are very weak, and Student cannot decode words for purposes of reading. (S-47.) An independent evaluation found that the Student has orthographic processing problems as well. (NT 424-9 to 10.)

Parents seek compensatory education for an alleged failure to provide the Student with a FAPE, due to failure to provide appropriate education in reading, during all of the school years beginning with the Student's fourth grade year, the 1999-2000 school year. I customarily establish an ending date for my consideration of compensatory education, and I ordinarily hear evidence and render a decision for the period up to the first day of hearing; in this matter that day was January 29, 2010. Therefore, the claim regarding inappropriate reading services extends from the beginning of the 1999-2000 school year until January 29, 2010. (NT 1074-22 to 1075-1.)

Parents argue that their claims should not be subject to the IDEA two year limitation period, 20 U.S.C. §1415(f)(3)(C), because the district misrepresented that the Student was making progress in reading, whereas the Student was not making meaningful progress. (NT 29-5 to 36-8.) In addition, the Parents argue that the District failed to provide a FAPE to the Student from November 4, 2007 to January 29, 2010 (the two year timeframe permitted by the IDEA limitations language) with regard to reading, written

expression, transition and ESY. (NT 1055-13 to 17.) Finally, the Parents request prospective relief for the Student to encompass the educational program for the coming school year, for as long as the Student is eligible for FAPE with regard to Student's age.

The District denies that it made any misrepresentation to the Parents, and moves that the complaint be dismissed for all claims arising before November 4, 2007. It asserts that at all times it addressed the Student's reading disability and that it provided Student with a reasonable opportunity to gain meaningful educational benefit in reading and that Student in fact acquired such benefit in reading. It also asserts that its program was appropriate with regard to written expression, transition and ESY.

This matter was heard in five hearing sessions from January 29, 2010 to June 11, 2010. The parties submitted written stipulations. (HO 1.) The District filed a motion to limit claims to two years of compensatory education, and I heard extensive evidence on that issue over a period of four hearing sessions. The parties filed summations on the motion, (HO 2 and 3); I reserved decision on that motion pending completion of the hearing. The parties agreed that the hearings on the motion also encompassed the evidence on the merits of those years. The record closed on July 1, 2010, upon receipt of the parties' written summations with regard to the two year period prior to filing for due process.

### **ISSUES**

1. Are the Parents barred from asserting a claim for compensatory education for the period from the first day of the 1999-2000 school year, when Student was in fourth grade, until November 4, 2007?

2. Did the District provide a free appropriate public education to the Student with regard to reading from the first day of the 1999-2000 school year, when Student was in fourth grade, until January 29, 2010?
3. Did the District provide a free appropriate public education to the Student with regard to written expression, ESY and post-secondary transition from November 4, 2007 until January 29, 2010?
4. Should the hearing officer order the District to provide compensatory education for the period from the first day of the 1999-2000 school year, when Student was in fourth grade, until January 29, 2010?
5. Should the hearing officer order the District to provide an appropriate program and placement to the Student for the 2010-2011 school year?

## **FINDINGS OF FACT**

### **THE STUDENT'S NEEDS AND SKILLS**

1. The Student has scored consistently in the low average range of cognitive functioning; more recent testing indicated scores in the low average to borderline range. (S-34, 44, 47, 79 p. 66.)
2. The Student exhibits a serious language based reading disorder. Specifically, Student evidences severe deficits in phonological awareness, phonological memory, rapid naming, and perception of symbol directionality. (S-34, 37.)
3. The Student is highly motivated to learn, and in particular is highly motivated to learn to decode words. (S-47, S-47 p. 157, S-50, S-74, S-76, S-79, S-82 p. 7.)
4. The Student has been successful in most areas of the educational program, obtaining good marks and earning praise for accomplishments. (S-48, 58, 68 to 71, 78.)
5. Throughout Student's career, Student's marks were subject to accommodation pursuant to the IEP. In particular, the comprehension marks in 2008 were based in part on accommodations including teacher prompts to the page or paragraph where comprehension answers could be found, and a reading pen that obviated or at least greatly reducing the need to decode or sight read. (S-24, 48, 58, 68 to 71, 78.)
6. The Student has been successful in part time employment and internships during Student's high school years. (S-54 to 64, 101.)

7. The Student has significant deficits in written expression, including punctuation, spelling, usage and fluency. (S-47 p. 22, 23.)

## READING

8. The student's reading skills have been consistently far below those of age level peers. In first grade, the Student exhibited serious difficulty recognizing letters and received instructional support. A multidisciplinary evaluation identified Student with a learning disability. (S-29, 34.)
9. In second and third grades, the Student was receiving learning support for basic reading skills. (S-33, 34.)
10. In third grade, the Student's decoding was at the first grade level. Student was tested with a composite reading score of 1.2, and a below average sentence imitation score. (S-34, S-94.)
11. The District's IEP for the 1999-2000 school year, the Student's fourth grade year, recognized a need in decoding and had a decoding objective as part of the reading goal. It called for using decoding skills and appeared to measure the objective by an overall reading level of "beginning to mid first grade level." Placement was in supplemental learning support and SDI called for small group and one to one instruction, without focus on decoding or phonological skills. (S-94.)
12. In March 2000, when Student was in fourth grade, Student tested at the 1.7 grade level in reading, but decoding related skills were not measured separately. Running records indicated that the Student remained at the pre-primer level, but improved accuracy and comprehension. (S-39, 47, 93.)
13. In fourth grade, the Student was receiving one to one tutoring daily and making no progress. An evaluation detected below-average spatial orientation memory, auditory memory, auditory discrimination and sound-symbol sequencing. Student was identified as having severe weaknesses in basic reading and writing skills. (S-34.)
14. The Student advanced only one step in the Wilson reading program in the first half of fourth grade, indicating that Student still had not mastered consonant sounds. Wilson "elements" were delivered, but the research-based program was not delivered with integrity. (S-34, 53, 99.)
15. In Spring 2000, the Student received a neuropsychological evaluation from the Intermediate Unit, which found that the Student showed very weak phonological processing skills, auditory-phonological perception and analysis. Student did not have the ability to decode phonologically or to reproduce the sound patterns

- necessary for reading and spelling. It was found that Student also had slow processing of visual materials, which also slowed Student's reading rate. (S-38.)
16. During the Student's fourth grade year, the District issued two evaluation reports and the Intermediate Unit issued one neuropsychological report. The District report, dated December 1999, and the IU report, dated April 2000, found serious deficits in phonological awareness and decoding. The second District report, dated May 2000, failed to advert to these findings, instead finding that the Student's current program should be continued. (S-34, 38, 39.)
  17. The District was well aware that the Student had a serious problem with phonemic awareness and decoding. (S-26.)
  18. The District's IEP for the 2000-2001 school year, the Student's fifth grade year, recognized a need in decoding and provided a decoding objective as part of the Student's overall reading goal: to read to a level of the beginning of first grade. The decoding objective was not measurable and contained no baseline. (S-93.)
  19. It was recognized by at least one of the Student's teachers that a compensation strategy would be employed for the Student, so that Student could learn how to learn in spite of Student Student's illiteracy. (S-99 p. 13, 14, S-100 p. 3.)
  20. In September 2000, the Student was tested at the Pre-Primer 2 level with over 85% accuracy; in February 2001, the Student was tested at the 1.1 level with 90% accuracy. (S-91.)
  21. The Student was tested at a second grade level in reading in February 2001. (S-91.)
  22. The District's IEP for the 2001-2002 school year, the Student's sixth grade year, contained a decoding objective as part of the goal to read to the "end of a first grade level." The objective was to be measured by accuracy. The placement was supplemental learning support and the specially designed instruction included both one to one and small group instruction without focus on decoding or phonological skills. (S-91.)
  23. During the 2001-2002 school year, the Student was tested through curriculum based testing for reading accuracy and comprehension at a 2.1 grade level, with 93% accuracy. (S-88.)
  24. The District's May 2002 Evaluation Report did not reflect the findings of severe phonological disability found in the Student's fourth grade District and IU evaluations. It did advert to a severe language based learning disability. It recommended continuation of the Student's program for reading. (S-41.)
  25. The District's IEP for the 2002-2003 school year, the Student's seventh grade year, contained a decoding objective as part of the goal to read with "80% mastery of adapted 7<sup>th</sup> grade curricular skills." The objective was not measurable;

- the measurement criteria and grade level of material were not defined. The placement was part time learning support. (S-88.)
26. Progress monitoring for the 2002-2003 IEP consisted of percentage scores without explanation of what was being measured, and teacher subjective comments. (S-90.)
  27. Curriculum based assessments administered in April 2003 found that the Student's fluency at a first grade instructional level was 66 words per minute, contrasted with 128 words per minute for typical grade level peers. Overall reading mastery was at a "K-1st grade level." Student was reported to be "instructional on a 1<sup>st</sup> grade level." (S-86.)
  28. The District's IEP for the 2003-2004 school year, the Student's eighth grade year, omitted the decoding objective as part of the goal to "read with 70% mastery of adapted 7<sup>th</sup> grade curricular skills." A fluency objective was substituted, which was not measurable; the measurement criteria and grade level of material were not defined. This goal appears to have been reduced from the previous year's goal. The IEP noted that the Student "needs improvement with [Student's] ... sight word recognition." There was no mention in the IEP of decoding skills. The placement was part time learning support. (S-86.)
  29. In March 2004, curriculum based assessments reported the Student to be at the third grade instructional level with 91% accuracy and at the 4<sup>th</sup> grade instructional level for comprehension. Fluency was reported at 54 words per minute contrasted with 131 wpm for typical same age peers. (S-84.)
  30. The District's May 2004 Evaluation Report found the Student, in eighth grade, to be reading at the third grade level for accuracy, and at the fourth grade level for comprehension, based upon curriculum based assessment. The report erroneously referred to the District evaluation of April 2000 but noted its finding of significant discrepancy and its finding of learning disability in the area of Language Arts. It did not mention any problem with decoding. It found the current placement to be appropriate and recommended part time learning support. (S-42.)
  31. The Student scored "below basic" in reading in the 2004 PSSA. (S-9.)
  32. The District's IEP for the 2004-2005 school year, the Student's ninth grade year, omitted the fluency objective as part of the goal to "develop and improve skills in reading vocabulary and comprehension." A vocabulary building objective was substituted, which was not measurable; the measurement criteria and grade level of material were not defined. There was no mention in the IEP of decoding or sight word reading skills, except for the testing reflected in the present levels, which were not addressed in goals, specially designed instruction or placement as described in the IEP. The placement was part time learning support. Progress monitoring did not address decoding related skills. (S-84, 85.)

33. When Student was in ninth grade, a reading teacher for the District concluded that the Student had profound phonological processing deficiencies and limited word attack skills. Student had difficulty with first grade words. (NT 1189-13 to 1190-18.)
34. In October 2005, the Student scored below average in all reading categories in the Metropolitan Achievement tests. (S-11.)
35. The District's IEP for the 2005-2006 school year, the Student's tenth grade year, noted "low phonemic awareness and phonology skills" that "hinder [Student's] spelling and reading abilities." A curriculum based assessment reported a standard score of 55 in reading, grade equivalent of 1. There was no goal or objective directly addressing phonemic awareness and phonology skills. There was a goal for vocabulary building and a goal for fluency. These objectives were not measurable; the measurement criteria and grade level of material were not defined. The objectives required "60%" of an unspecified criterion. The placement was part time learning support. (S-82.)
36. Progress monitoring for the 2005-2006 school year reflected teacher-devised assessments for decoding, and a subjective conclusion that the Student had "greatly improved reading decoding this M.P." (S-83.) The District's IEP for the 2005-2006 school year, the Student's tenth grade year, noted "low phonemic awareness and phonology skills" that "hinder [Student's] spelling and reading abilities." A curriculum based assessment reported a standard score of 55 in reading, grade equivalent of 1. There was no goal or objective directly addressing phonemic awareness and phonology skills. There was a goal for vocabulary building and a goal for fluency. These objectives were not measurable; the measurement criteria and grade level of material were not defined. The objectives required "60%" of an unspecified criterion. The placement was part time learning support. (S-82.)
37. An informal assessment (QRI-4) in April 2006 scored the Student at primer level in independent decoding and at the second grade in comprehension. (S-80.)
38. In April 2006, when Student was in tenth grade, District testing found the Student to be decoding at a primer level and measured comprehension at a second grade level. Teachers reported struggles with independent reading and poor word recognition. One teacher reported severe phonological and processing deficiencies, poor discrimination between vowel sounds and confusing of consonant sounds. The teacher concluded that these deficits caused the Student's poor word recognition. (S-44.)
39. Testing in 2006 revealed significantly below average decoding skills, inconsistent phonetic analysis, poor sight reading, and deficient comprehension. Scores indicated a learning disability affecting basic reading skills. (S-44, 46 p. 5.)



40. The District's IEP for the 2006-2007 school year, the Student's eleventh grade year, provided no goals or objectives pertaining to decoding related skills. There was a goal for vocabulary building and there was no goal for increasing fluency. The IEP noted "low phonemic awareness and phonology skills" that "hinder [Student's] spelling and reading abilities." A curriculum based assessment reported a standard score of 55 in reading, grade equivalent of 1. There was no goal or objective directly addressing phonemic awareness and phonology skills. There was a goal for vocabulary building and a goal for fluency. The specially designed instruction included "spell out words for [Student] that [Student] has difficulty with." The placement was part time learning support, including reading in the learning support class along with four other subjects. Progress monitoring was negligible and did not address decoding. (S-80, 81.)
41. As measured by the QRI in 2007, the Student's decoding was at the second grade instructional level. Comprehension was at the sixth grade instructional level. Gray Oral Reading Test scores revealed rate at second grade level, accuracy at third grade level, fluency at a 2.4 level and comprehension at a 6.4 grade level. The student was reported to have a "low awareness of phonetics ... ." (S-79.)
42. In March 2007, the Student scored below basic in reading on the PSSA. At the end of the school year, the Student was reevaluated and found to be functioning within the Deficient to Borderline range on standardized achievement tests in basic reading skills and comprehension. Informal assessment indicated overall reading between the second and fourth grade levels. (S-15, 79 p. 65.)
43. The District's May 2007 IEP for the 2007-2008 school year, the Student's twelfth grade year, included decoding as part of a reading goal that included comprehension skills and vocabulary building. It was not measurable; the measurement criteria and grade level of material were not defined. There was no specially designed instruction specific to decoding related skills. The placement was part time learning support, including reading in the learning support class along with four other subjects. (S-79.)
44. The reading class to which the Student was assigned emphasized comprehension and placed only incidental emphasis on decoding. (NT 1393-18 to 1397-19.)
45. There was no progress monitoring for the 2007-2008 decoding goal. (NT 1432-13 to 1433-5.)
46. Although it was available, the Student was not given Wilson instruction in the 2007-2008 school year. Student's level did not fit that of the other students in the Wilson instruction group, so Student was excluded. The reading teacher was not sufficiently trained or experienced to conduct Wilson training with two groups at different levels. (NT 1391- 6 to 1394-4.)
47. The District's October 2007 revision of the May 2007 IEP for the 2007-2008 school year, the Student's twelfth grade year, noted the student's "low awareness

- of phonetics ... ." There was a measurable goal for decoding, although there was no clear baseline. There also was a measurable fluency goal. The placement was part time learning support, including reading in the learning support class along with four other subjects. (S-79.)
48. In 2007, the Student was still having difficulty processing text above the second grade level. (S-47 p. 131, 157.)
  49. In 2007, the Student was in a learning support classroom for reading and language arts. The amount of direct instruction addressing decoding, and the methodology utilized, were inadequate to address Student's severe deficits in phonological processing and word reading. (S-52.)
  50. In 2007, when the Student was in eleventh grade, the Student's special education teacher referred Student to a District reading teacher for intensive, one to one instruction in decoding. The teacher provided an inadequate amount of time in explicit Orton-Gillingham remedial programming to provide the intensive instruction needed. (S-47 p. 10, 11, 25.)
  51. In January 2007, the Parents, due to the guidance of the Student's grandmother, requested a re-evaluation, including a "full-reading battery test ... ." (S-95-1,3, 8.)
  52. In 2008, the reading teacher provided instruction using an Orton-Gillingham approach during lunch periods and at home. The teacher deemed this an inadequate amount of programming time, although she noted progress. Data was not kept or reported systematically. (S-50.)
  53. Responsible District administration viewed the learning support placement to be adequate and appropriate for the Student's decoding needs. (S-53.)
  54. The teacher was reprimanded and discouraged from continuing to provide one to one instruction to the Student; school administrators concluded that the teacher exceeded her authority in providing such service, reallocated time from her assigned duties, interfered with the placement offered by the IEP by "pulling" the Student from the learning support class to which Student was assigned, and provided service without it being reflected in the IEP. (S-51, 52.)
  55. Progress monitoring in the 2007-2008 school year showed progress in reading fluency and comprehension, using third grade materials. Fluency scores increased from 47 to 70 words per minute. Comprehension also increased within third grade material. The student was reading at a fourth grade level. (S-76.)
  56. The District's IEP for the 2008-2009 school year, the Student's second twelfth grade year, recognized an educational need in reading comprehension, decoding and word recognition. The IEP included a measurable fluency goal of improving by 15 words per minute from baseline utilizing a third grade reading prompt. There was not a decoding goal. Specially designed instruction was not specific to

- decoding. The placement was resource learning support, including small group instruction in reading in the learning support classroom. (S-76.)
57. The learning support teacher did not know how to write a decoding goal. (NT 1419-1 to 1420-5.)
  58. The progress monitoring data for the years after 2007 are based upon the learning support teacher's recommendation and she is not sure that she knows how to design appropriate progress monitoring. Prior to that, there was no consistent system for progress monitoring achievement in decoding. (NT 1427-1 to 17, 1432-1.)
  59. Progress monitoring in 2008-2009 showed little progress in fluency from 75-80 words correct per minute at a third grade level. Progress was shown in comprehension from a third grade level to a sixth grade level. A decoding baseline was being developed and the District was providing Wilson training. (S-76, 102.)
  60. Wilson training began from a level based upon the level of other students in the group to which the Student was assigned. No baseline was established. (NT 1433-6 to 1434-1.)
  61. The teachers assigned to provide Wilson training to the Student were minimally trained and had not mastered essential concepts necessary for delivering Wilson training with fidelity. (NT 445-25 to 447-6, 1276-1 to 1285-19, 1313-11 to 1316-5, 1317-1 to 1320-20, 1402-12 to 1407-1, 1492-5 to 15.)
  62. The amount of time devoted to Wilson training was limited due to competing reading related skills being taught to Student in the learning support class. The intensity of the program as delivered was not governed by a data driven plan. (NT 1299-18 to 1301-4.)
  63. The District's IEP offered for the 2009-2010 school year, which would be the Student's third twelfth grade year, as revised in December 2009, recognized an educational need in reading comprehension, decoding and word recognition. The IEP included measurable fluency and comprehension goals, and offered a measurable decoding goal with the baseline yet to be determined. The placement was itinerant learning support, including instruction in reading in the learning support classroom. (S-74.)
  64. The District has not offered Wilson training for the 2010-2011 school year, and may abandon the decoding goals due to Student's perceived progress in decoding, and also due to budgetary considerations. (NT 1552-14 to 1555-24.)
  65. The programming provided by the District throughout the Student's educational career has lacked systematic, sequential and explicit instruction in letter-sound relationships to address the Student's decoding deficits. The District's programming has not been comprehensive or based upon a research based design.

- Programming has been inconsistent, and has not been data-driven. The Student's IEPs have lacked reliable baseline data for decoding related skills, and have not been measurable. Progress monitoring data have been incidental, incomplete, drawn from varying instruments and subject to error. (NT 1288-20 to 1289-2, 1305-5 to 1308-1; P-13, S-52, 53.)
66. The Student's teachers did not all identify decoding as a problem for the Student. (NT 1289-91 to 1295-22, 1313-11 to 1316-5.)
  67. The District accepted perceived advice from the PDE that only fluency should be measured, not decoding. (NT 1524-5 to 1525-16, 1554-25 to 1555-8.)
  68. In May 2008, the Student wrote a Student Perspective on the Summary of Performance sent to Student by the District because Student was considered eligible to graduate. Of all Student's learning challenges, the Student identified reading and spelling as the most challenging, and identified one to one instruction as the most helpful educational support. Student identified the learning support reading class as the least helpful. (S-78.)
  69. In March 2008, an independent evaluator tested the Student's word reading achievement and the Student scored below the first percentile on the Wechsler Individual Achievement Test – Second Edition (WIATT-II) at a grade equivalency of 2.7. In pseudoword decoding, the Student scored below the 4<sup>th</sup> percentile at a 2.8 grade equivalent. Student's comprehension score on the same instrument was below the first percentile at grade equivalent of 2.8. Student's reading composite score was below the first percentile. (S-47.)
  70. The District attributed the Student's lack of progress in decoding to Student's innate limits for learning, and concluded that the Student had reached a plateau beyond which Student was not able to succeed in decoding. (NT 898-7 to 9; 1427-19 to 1429-8.)
  71. As a result of Student's phonological deficits, and because of Student's age, the Student presently needs direct, explicit, intensive remedial instruction that explicitly teaches the connections between spoken and written language. Instruction needs to be systematic and sequential, with scaffolding. This can be termed a "synthetic, phonetic code emphasis" approach and is exemplified by the Orton-Gillingham reading programs, such as the Wilson Reading System. (NT 449-10 to 451-18; S-47.)
  72. With appropriate programming, the Student has the potential to close the gap between decoding ability and that of same age peers to about one year over a period of four years. (NT 451-23 to 455-16.)

## PARENTS' DISABILITIES

73. Parents have learning disabilities, and have extreme difficulty reading and writing. (S-34.)
74. Parents have consistently reported to the District that the Student is unable to read, but they are not able to understand much of what is discussed at IEP meetings, cannot read the District's reports or IEPs, and cannot be expected to understand the difference between a learning support placement and an intensive Orton-Gillingham type of intervention in the area of phonetic awareness and decoding skill. (S-43.)

## POST SECONDARY TRANSITION

75. The District referred the Student to a [technical-vocational school] pursuant to a mediation agreement dated February 1, 2008, to request a waiver of its admission criteria and admission of the Student. The school declined to waive its admission criteria and the student was not admitted, because Student was in twelfth grade rather than ninth or tenth grade, which is the grade from which high school students are admitted to the school. (S-95 p. 4, S-96 p. 4.)
76. The student has been provided support in a variety of employment opportunities through the District's transition program, and has succeeded in these opportunities. (S-103.)
77. The District's IEPs during the period from November 2007 to date have included goals and objectives addressing the Student's transition needs. The District has provided direct instruction to the Student in job search and organizational skills. (NT 1323-19 to 1337-3; S-54 to 64, 74, 103, 104.)
78. The Parents decided to continue the Student in the District even though Student was eligible to graduate, because they wanted Student to receive appropriate instruction in decoding, post-secondary transition services, instruction in writing and ESY services. (NT 1106-20 to 1107-3.)

## WRITTEN EXPRESSION

79. The Student scored proficient in writing on the March 2007 PSSA; accommodations were extended time, clarification of directions and alternative setting. Unidentified progress monitoring in 2007 reported that the Student's writing fluency increased by three words per minute. A teacher noted strength in composition and sentence structure. (S-14, 76, 80 p. 8.)

80. The District's October 2007 revision of the May 2007 IEP for the 2007-2008 school year, the Student's twelfth grade year, contained no measurable data concerning the Student's writing, though the present levels section mentions an unidentified curriculum based measure that indicated that the Student's writing is average compared with students in learning support. There were two measurable goals concerning writing, which included conventions and fluency. (S-79.)
81. The District's September 2009 IEP for the 2009-2010 school year, as revised on December 4, 2009, offered no direct writing instruction, but did offer a measurable writing goal. (S-74.)
82. Despite the absence of a goal in the IEP, the District did offer substantial instruction in writing, addressing spelling, conventions and other curriculum tested in the PSSA. (NT 1297-3 to 1297-19, 1298-11 to 1299-14, 1310-15 to 1313-8)
83. The District's May 2010 IEP for the 2010-2011 school year offered some writing instruction, but no writing goal, declaring the Student's writing to be adequate. (S-103.)

#### ESY

84. From 2007 to 2010, the applicable District IEP documents repeatedly found the Student ineligible for ESY services. (S-74, 76, 79, 80, 104.)
85. The Student's grandmother asked the District to consider the Student eligible under state regulations requiring the District to consider the extent to which the Student needs skills to support independent living. (NT 116-21 to 117-13; P-66.)
86. The District based its ineligibility determinations on the absence of significant regression or recoupment problems. (NT 116-21 to 117-13; P-66 p. 45, S-74, 76, 79, 80, 104.)
87. The District did not consider the Student eligible for ESY services on the basis of need to develop skills supporting independence, or on the basis of mastery and development of an important skill, specifically reading. (NT 1492-16 to 1495-22, 1517-22 to 1524-1; S-76 p. 27.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### RULING ON IDEA LIMITATION OF ACTIONS

The IDEA, 20 U.S.C. 1415(f)(3)(C), provides:

(C) Timeline for requesting hearing

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 accrues from the time the filing party “knew or should have known” of the events giving rise to the claim asserted in the complaint notice.

#### Burden of Proof

The movant ordinarily bears the burden of proof as to any affirmative defense asserted in the motion, Shaffer v. Weast, 546 U.S. 49, 57, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). Accordingly, the District bears the burden of proof here to show the operative facts that would require application of the IDEA limitation of actions in this matter.

ElPaso Independent School District v. Richard R., 567 F. Supp. 2d 918, 942 n. 32 (W.D. Tex. 2008), vac. in part on other grounds, 591 F. 3d 417 (5<sup>th</sup> Cir. 2009)(IDEA limitations defense is an affirmative defense). However, once the agency proves the operative facts of its defense, the burden of proof shifts to Parents to prove the applicability of the exceptions. (NT 21-14 to 22-16.)

The operative facts establishing an affirmative defense based upon the IDEA limitations section are set forth at 20 U.S.C. §1415(f)(3)(C): parents must request due process “within two years of the date the parent . . . knew or should have known about the

alleged action that forms the basis of the complaint ... .” Therefore, to establish its affirmative defense, the agency must prove the above stated “date” of parental knowledge or notice. See J.L. v. Ambridge Area School District, 2008 WL 2798306, \*9-10 (W.D. Pa. 2008).

#### What Constitutes Knowledge or Notice

The IDEA is specific as to what parental knowledge or notice begins the two year limitation period. The statute uses the word “action”. Ibid. The “action” referred to is that which “forms the basis of the complaint”. Ibid. Reading this language in context with the operative subsections of IDEA section 1415, I conclude that this word “action” refers to the statutory clause found in the provisions for prior written notice: “initiate or change ... the identification, evaluation, or educational placement, or the provision of a free appropriate public education to the child.” 20 U.S.C. §1415(b)(3)(agency initiation or change requiring written prior notice); 20 U.S.C. §1415(c)(1)(A), (B)(characterizing agency initiations or changes as “action[s]”); 20 U.S.C. §1415(b)(6)(A)(agency actions subject to complaint and request for due process); 20 U.S.C. §1415(b)(6)(B)(“alleged action” subject to due process as read in pari materia with 20 U.S.C. §1415(b)(6)(A)).

The regulations similarly equate the “actions” requiring prior written notice, 34 C.F.R. §300.503, with those that can be the subject of a due process complaint. 34 C.F.R. §300.507. Thus, I conclude that the limitation period begins to run on the date on which the parents had knowledge or notice that the agency either initiated or changed – or failed to initiate or change – its identification, evaluation, placement or provision of FAPE to the child. Cf. James v. Upper Arlington City Sch. Dist., 228 F. 3d 764, 771 (6<sup>th</sup> Cir. 2000) (Guy, U.S.C.J., concurring), cert. den., 532 U.S. 995, 121 S.Ct. 1655, 149



L.Ed.2d 637 (parental notice that services were not being provided); Hall v. Knott County Bd. Of Educ., 941 F.2d 402, (6<sup>th</sup> Cir. 1991)(applying common law “notice” rule to special education limitations case, court found that parental knowledge or notice that the educational agency was not providing certain educational services constituted notice tolling the limitation period, where record showed that parents were unaware of their rights). But see, Draper v. Atlanta Independent School System, 518 F. 3d 1275, 1288 (11<sup>th</sup> Cir. 2008)(parental ignorance of misdiagnosis by school evaluator tolls limitations period under this section).

Conversely, the statute identifies no other material fact regarding parental knowledge or notice. In particular, I find no statutory authority for a finding that the period started later due to delayed parental discovery of the Student’s learning disability or delayed discovery of harm. Nor do I see statutory grounds for starting the period late due to delayed discovery that agency actions complained of were contrary to the IDEA.

In other words, I find no language in the statute that suggests that the limitation period begins to run only when parents discover other elements of their formal “cause of action.” Thus, I do not subscribe to the view held by others, including esteemed colleagues, that the IDEA’s statutory concept of knowledge or notice is coextensive with the traditional common law notion of “discovery”. See generally, Viallo v. Cabot Corporation, 399 F.3d 536, 538 (3<sup>rd</sup> Cir. 2005).

The application of the IDEA limitations period is a “highly factual inquiry.” J.L. v. Ambridge Area School District, 2008 WL 2798306 at \*10; accord, P.P., 557 F. Supp. 2d at 660. Thus, in determining whether or not the Parents in this matter “knew or should have known” of the District’s actions in this matter, I must take into consideration all the

facts that bear upon the Parents' knowledge during the period of time that IDEA ordinarily would exclude from consideration - from the beginning of the 1999-2000 school year until November 4, 2007.

Here, the action of which the District charges Parents with knowledge is the provision of a FAPE. Hall v. Knott County, 941 F.2d above; James v. Upper Arlington, 228 F. 3d at 771. Significantly, the relevant action here is very specific: the Parents assert that the District declined to provide a very precise kind of technical educational service, namely, a direct, systematic, and intensive remedial instruction using a "synthetic, phonetic code emphasis approach." (S-47 p. 19.) This is exemplified in reading programs utilizing an Orton-Gillingham approach to instruction, including the Wilson program. (NT 447-16 to 23.) Parents assert that this very specific kind of programming is required because the Student's reading disability is caused by the combination of two very specific kinds of processing deficiencies: phonological deficits and orthographic deficits. (S-47 p. 25.)

The District advances evidence showing that its personnel over the years provided the Parents with consultation during IEP conferences and provided them their Procedural Safeguards as required by law. It asserts that District staff made every effort to explain the Student's educational needs to Parents and to inform them of what the District was doing to address those needs.

However, when considering the Parents' knowledge or "notice" of the District's failure to provide the very technical services described above, it would be unreasonable to ignore the capacity of the Parents to understand the nature of the services that were not being provided to the Student. There is judicial authority for taking parental capacity into

consideration when applying the IDEA limitation period. Marple Newtown Sch. Dist. v. Raphael N., 2007 WL 2458076, \*4 (E.D. Pa. 2007)(native language of parents prevented them from understanding disclosures made in English). In the present matter, I find this consideration to be determinative: the parents are not capable of understanding either the nature of the Student's reading disability or the nature and prerequisites of the programming that they now assert (through counsel) is necessary to remediate the Student's reading deficit. (FF 73, 74.)

Both Parents testified in this matter, and I had the opportunity to observe their demeanor over five hearing sessions. I also heard testimony to the effect that the Parents failed to advocate for changes in the Student's educational program even when it was ineffective, until a relative entered the picture in recent years. From all of this testimony and my observation of demeanor, I find and conclude that the Parents are unable to understand the essential information that would be necessary for them either to have "knowledge" or to be fairly placed on "notice" that the District had declined to provide the Student with specific needed reading instruction directed to teaching both phonological awareness and orthographic processing skills.

It is uncontested that the Parents are themselves learning disabled. (NT 204-1 to 8, 341-4 to 8; S-38 p. 1.) It appears that their disabilities are both cognitive and specific to reading. Ibid. The testimony makes clear that the Student's Mother was the Parent who engaged in most of the communications with the District concerning the Student's education; both Parents attended IEP meetings, (NT 204-13 to 21), but the Student's Father was not always able to attend because of his demanding work schedule. (NT 235-10 to 236-7.) During the course of the hearing, I observed that much of the time, the

Student's Mother was distracted and not following the testimony – an unusual hearing demeanor for a Parent in my experience.

During testimony, each Parent demonstrated to me an inability to conceptualize many basic educational concepts. (NT 207-16 to 21, 209-9 to 210-10, 215-10 to 22, 218-6 to 15, 218-24 to 220-22, 225-1 to 10, 226-7 to 227-5, 232-22 to 24, 329-11 to 331-4, 334-4 to 6, 368-9 to 12, 383-15 to 21.) Moreover, each demonstrated an inability to process information rapidly in a meeting context. Ibid. I find that this deficit made IEP meetings unintelligible to the Parents to a significant extent. Moreover, they were incapable of formulating and writing letters adequate to convey any detail as to what services they might think that the Student needed. This was evidenced by the fact that the Student's Grandmother had to write letters for the parents when advocating for services for the Student.

The language of the IDEA limitation provision is quite concrete and specific. Under this language, the Parent becomes responsible for filing for due process within two years only if and when the Parent knows or reasonably should know that the District has (in a matter such as this) declined to provide an educational service constituting all or part of the provision of a FAPE. I find by a preponderance of the evidence that the Parents did not know this until well after November 4, 2007 – if they ever knew. The Parents knew that the Student “couldn't read” during this period of time, (S-35 p. 6), but they were quite unaware of why Student struggled, or of the fact that a specific educational strategy was available that could provide the Student with the opportunity to close the gap in reading deficiency compared with same age peers. There was never a

situation where in fairness I could find that the Parents were on notice that the Student was not receiving services from which Student could have benefited.

Unaware of the possible choices, the Parents could not have known that the District was choosing not to provide the intensive phonological instruction that could be the key to a literate life for the Student. Indeed, even if the choices were made clear to them, it is likely that they would not have comprehended the choices sufficient to form an intent to challenge the choices that the District made or to file for due process. Therefore, I find that, during the period encompassed by the District's motion, the Parents never "knew" and never "should have known" that the District was choosing not to provide the specialized, intensive phonics instruction that Parents now – with the help of other more knowledgeable persons – claim that the Student needed all along. Thus, the IDEA limitation period did not begin to run for them as of the dates on which such services were not provided; it did not begin to run at all during the period addressed by the motion.

I find further that the effect of their own disabilities on Parents' understanding was exacerbated by the District's inexplicable failure to disclose or address the findings of a neuropsychological evaluation that they received in 2000, when the Student was in fourth grade. (FF 15, 16.) In that year there were a series of evaluations or reports that raised the reddest of flags that militated in favor of direct, systematic, and intensive remedial instruction to address educational needs related to phonological processing skills. (FF 11 to 16.)

In 1999, the District completed an evaluation that identified difficulties in reading as one of two pressing problems of the Student. (S-34 p. 1.) It found a learning

disability, and pointed out the likelihood of deficiencies in “auditory sequential memory”, “discrimination of heard sounds”, “difficulty with sound/symbol sequencing” and “spatial orientation memory”. (Ibid.) I find that none of those terms was accessible to the Parents and that they could not have understood the implications of these terms for programming.

In April of the same school year, the Intermediate Unit issued an evaluation report based upon a neuropsychological team evaluation. (FF 15.) It found “very weak phonological processing skills”, “weak auditory-phonological perception and analysis” and an inability to decode words – in sum, a “severe, language-based learning disability” that required “frequent opportunities to build phonological awareness ... .” (S-38.)

In May 2000, the District issued a Comprehensive Evaluation Report (CER) for purposes of a “two year reevaluation.” (S-39.) This report does not mention the neuropsychological report in April of that year, or any of its findings. The CER notes that “Parents would like [Student] to be able to read and spell better”, noted Student’s tested frustration at a pre-primer level, and then inexplicably concluded that the Student’s “placement in a Learning Support program continues to meet [Student’s] individual educational needs.” It recommended that the Student “continue with the current course of instruction.” This report is significant in that it directly contradicts both the Neuropsychological report and the documented history of the Student’s lack of progress in reading while receiving support for reading; indeed, it contradicts its own data report of the Student’s reading achievement.

The extreme disconnect between this report and the other two reports in the 1999-2000 school year was calculated to confuse Parents who had only a superficial grasp of the Student’s educational needs. Its recommendation of the status quo in programming

constituted the choice of programming of which the Parents now complain; yet there was nothing in the report that would alert the Parents that a choice was being made not to provide more services to address the Student's deep deficits in decoding. Overall, I find that the effect of this report was to completely confuse and obfuscate both the nature of the Student's educational needs and the programmatic choices being made. Under these circumstances, I conclude that the Parents did not know, nor were they on notice, that the District was not providing the educational services required in light of the neuropsychological report or addressing the phonological deficit so clearly reported in the first two reports that the District received.

I am confirmed partially in this conclusion by the notably unreliable and in one case apparently incredible testimony of two of the key figures at the time of the multiple fourth grade reevaluation reports. Parents called a school psychologist who was a consultant from the IU at that time. This witness' memory for events was understandably minimal; however, his demeanor and changes in how he answered questions convince me that he was being deliberately uncooperative. (NT 8-13 to 42-13, 45-11 to 47-7, 50-1 to 53-6.) He was the psychologist who issued the December 1999 reports that found serious phonological issues. (P-5.) He also authored the evaluation report in 2007 that he preceded with a telephone call effectively tending to dissuade the parents from having the Student reevaluated after a hiatus of seven years. (NT 53-23 to 56-2; P-38.)

With this as the base of understanding – really misunderstanding - for the Parents, the District continued to confuse the matter by repeatedly reevaluating the Student and issuing IEPs recommending that Student's current programming was adequately addressing Student's educational needs, or needed only minor adjustments. (FF 18, 22,

24, 25, 28, 30, 32, 35, 40, 47.) The glaring facts uncovered in the IU neuropsychological report continued to be ignored; there was no attempt to explain how the conclusions in favor of the status quo could be reconciled with that report or with the Student's continuing lack of progress in reading. Ibid. Again, I find that these reiterated recommendations to continue the status quo left the Parents unable to know or reasonably ferret out the reality that the programming was ineffectual against the Student's specific type of disability.

The District argues that the Parents knew and understood more than I perceive them to understand. In support of this argument, they point to a conversation reported by the District's reading instructor with the Student's Mother. The instructor was providing Wilson instruction to the Student in addition to, and outside the purview of, the Student's IEP. The instructor reported that she explained her services to the Student's Mother, who stated that she "knew that this was what Student needed. She knew that [Student] had problems at the word level, that Student couldn't read words and she knew that's what Student needed." (NT 542-16 to 19.)

I do not find this testimony to contradict my finding. The record makes clear that the Student's Mother knew that the Student needed extra help in reading, and the instructor was providing extra help; this does not go to the nub of the problem, which was the type of help being delivered. As to knowing that the Student could not "read words", no doubt this would be apparent to the Mother. However, this does not demonstrate that she understood the problem, which is at the phonological processing level, not just at the word level. I also note that the instructor's patched together, volunteer programming to address the "word level" bears no resemblance to the intensive, focused programming



that would be needed to remediate the Student's difficulties at the late date of 2006; thus, the Student's Mother's endorsement demonstrates her lack of understanding of the Student's need – if she really understood the problem, she would have known that the District was not providing sufficient services through the reading teacher.

The District also suggests that I should impute the knowledge of others to the Parents, because the Parents had the assistance of many family members, and especially of the Student's Grandmother, throughout the years. I find no evidence in the record that any of these assisting individuals directly conveyed to the Parents what the Student's specific reading deficit was, what specific programs the Student needed, and whether or not the District was providing such programs. In the absence of such clear evidence, I see no basis in the language of the IDEA to support imputing another person's knowledge to the Parents.

A preponderance of the evidence demonstrates that the Parents were unable to comprehend the scope and nature of the educational questions presented as late as 2007. (FF 5, 43, 51, 70, 73, 74.) In September of that year, the Grandmother drafted a letter, co-signed by the Student's Mother, requesting an IEP meeting to discuss two issues – post secondary transition and the Student's reading program. In a subsequent message to the District's Special Education Director, the Grandmother noted that, even when directed to the issue, the Parents were unable to understand the concepts involved in choosing an appropriate reading instructional program for the Student. (S-95 p. 14 to 22.)

Even if the Student's Parents could have understood the issues, at that point no one – not even the Student's Grandmother – understood what kind of instruction would

be needed. (FF 51.) The Grandmother's messages reveal that she was focused on preserving the ad hoc instruction that the District's reading specialist was providing, rather than on the need for an intense, systematic, sequential program of remediation that is research based and aimed at phonemic awareness. Ibid. I conclude from the weight of the record in this matter that no one in the family realized what was needed at this point. This is why the Grandmother prudently requested an IEE. In short, the Parents did not know and were not on notice of the choice the District had made against the programming that the Student needed.

The District seeks to paint a picture of a staff that carefully explained the Student's reading problems and its programming to the Parents over the years, with attention to the difference between the eclectic learning support class in reading that they were offering and an intensive Orton-Gillingham approach to decoding skills. I do not find support in the record for that characterization.

The testimony that was closest to showing a specific explanation was the Student's special education teacher's description of an IEP meeting in May 2005. The IEP contained a line referring to the Student's "low phonemic awareness and phonology skills". (S-82 p. 7.) The teacher indicated that she would have explained this line to the Parents. (NT 664-9 to 18.) However, the witness, like others, admitted that she did not have specific recollection of doing so. (NT 664-1 to 19.) Moreover, the IEP itself did not address this problem directly. (S-82.) This recollection of custom and practice is insufficient to show that the District explained to Parents what they needed to know to be on notice that available services to address these needs were not being provided. At best they were given part of the information they would need.

Similarly, the Student's special education teacher testified that at an IEP meeting in May 2007 she read "parts of " the IEP to Parents and explained its goals. At that time, the draft IEP may or may not have included a decoding goal; the witness explained: "I think we added a decoding goal" in October 2007. (NT 704-6 to 11.) The witness was not sure that the Parents understood her explanation, but she attempted to read their reactions and accommodate her explanations as needed. (NT 706-18 to 23.) This testimony does not contradict my conclusion about the Parents' knowledge and notice as to the crucial information they needed to know to exercise their rights. The witness was not definite in her recollection, could not swear that the Parents understood, and the adding of the goal indicates that, at most, the Parents were identifying the general nature of the problem. It does not indicate that they had any idea of the District's choice not to provide an available, more intensive program.

### Misrepresentation

The above analysis could as easily be couched in terms of an exception to the IDEA limitation period. What constitutes "specific misrepresentations" under 20 U.S.C. §1415(f)(3)(D)(i) is "within the purview of the hearing officer." 71 F.R. §46540-01 at 46706 (declining to amend the regulations implementing the 2004 amendments to the IDEA for the purpose of defining the statutory term "misrepresentation".) There is little judicial guidance on what constitutes "misrepresentation". See, e.g., P.P., 557 F. Supp. 2d at 661 (agency "misconduct", including misleading notices, delayed evaluation and discouraging third parties from making referrals, did not constitute misrepresentation as defined in IDEA).

I rule that negligent misrepresentation is sufficient under this exception, J.L. v. Ambridge Area School District, 2009 WL 1119608 at \*12, and that the District's failure to address the red flag findings of the IU neuropsychological report in 2000 rose to the level of a negligent misrepresentation. As noted above, the multiple reevaluations and IEPs subsequent to the District's receipt of the IU neuropsychological report essentially ignored it and its findings. (FF 18, 22, 24, 25, 28, 30, 32, 35, 40, 47.) I find that there was no reasonable professional basis for doing so. Thus, the failure to address the needs disclosed in that report was negligent.

The subsequent reevaluations and IEPs contained repeated statements that the Student's current program was addressing Student's needs. The record demonstrates otherwise, by more than a preponderance of the evidence. Therefore, these statements were not correct and constituted misrepresentations.

In sum, I find that the IDEA limitation period does not bar the Parents from asserting a claim for compensatory education with regard to the District's failure to address the Student's deficit in decoding in reading. Therefore, I will include that claim as an issue in this matter during the period from the beginning of the 1999-2000 school year until the first day of the hearing in this matter, January 29, 2010.

#### 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>1</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence<sup>2</sup> to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student’s Parents, who initiated the due process proceeding. If the evidence is in “equipoise”, the Parents will not prevail.

## APPROPRIATENESS OF THE DISTRICT’S PROGRAM

### Legal Standard

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan

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<sup>1</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>2</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. Dispute Resolution Manual §810.

(“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

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

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal

level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The appropriateness of an educational program must not be judged in retrospect. Rather, its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

### Reading

The District’s program of instruction in reading was inappropriate because its program for instruction in decoding was inappropriate. The District started, then abandoned Wilson and similar programming in 2004 or 2005. (FF 13, 14, 22, 46, 50, 52, 54, 60, 61, 62, 64.) The record shows that a teacher tried to persuade the Parents to abandon Wilson programming after about one-half of a school year’s effort. (NT 157-9 to 158-25, 817-16 to 818-2.) There are serious questions as to whether or not the Wilson program ever was delivered with fidelity to this Student, who in 2004 and 2005 made almost no progress. (FF 14, 46, 52, 54, 57, 58, 60, 61.) Incongruously, the District deprived the Student of Wilson programming for years, and then reintroduced Wilson late in Student’s educational career. Ibid. I find that the District and its personnel never fully understood the Student’s need for an intensive, explicit program focused on Student’s phonological deficits and decoding skills, and never fully understood the purpose of the Wilson program. (FF 19, 61, 62, 64, 66.)

For many years, the District appears to have chosen consciously to include decoding and phonemic awareness as part of a reading program that gave equal or greater emphasis to comprehension, fluency, sight word reading and listening comprehension. In doing so, the District chose a less intensive approach to the Student's essential reading deficit, as opposed to a thorough and intensive, research based approach that focused directly on that deficit. (FF 65.) In effect, the District chose to let this motivated and resourceful Student find a way to get around Student's deficit, rather than giving Student the support needed to eliminate or reduce it, and conversely to develop the decoding skill of which Student had been deprived through a neurological insult at an early age.

In addition to choosing the wrong programming approach, the District's IEPs were deficient with regard to decoding in terms of goals and specially designed instruction. (FF 18, 22, 24, 25, 26, 28, 30, 32, 35, 40, 47.) I find surprisingly that the District recognized an educational need for instruction in decoding and phonological awareness in some years, (FF 11, 15, 17, 18, 22, 43, 47, 56, 63) – but in some years the District simply ignored that need, (FF 28, 30, 32, 35, 36, 40). Yet this need never abated; the Student's decoding barely improved by any measure for seven years. (FF 12, 14, 17, 20, 21, 23, 27, 29, 31, 34, 35, 36, 37, 38, 39, 41, 42, 48, 55, 58, 59, 65, 67, 69.)

The District points to the Student's grades to demonstrate that the Student was able to succeed in school despite Student's illiteracy. The grades do not carry enough evidentiary weight in this case to obviate the District's failure to address the Student's decoding issues. The record preponderantly demonstrates that the Student's grades were obtained with the help of accommodations that were not systematically defined, operationally prescribed in written protocols, or measured in a data-driven system. (FF



5.) There was no data on fading of supports. (FF 58, 65.) Standardized testing contradicted any implication that the Student's academic achievement was unaffected by Student's decoding deficit. (69.) Thus, neither the nature nor the extent of these accommodations is knowable – at least on this record. Consequently, I give little weight to the Student's grades, since they do not reliably indicate Student's true level of academic achievement.

Viewing the program over several years leads to a picture of a meandering program with no sense of purpose and no research based scheme for addressing the Student's dyslexia. (FF 54, 57, 61, 62, 65, 66, 67, 70.) Where there was a program of sorts for decoding, it was not research based, and in particular, it was not data driven. (FF 58, 59, 60, 62, 65, 67.) After years with the Student, the District in 2007 had no baseline for a decoding related goal. (FF 63.)

I find that the testimony of the District's witnesses was incongruous and somewhat self-contradictory. The District argues that the IU neurological evaluation was useful to them only in ruling out neurological impairment – almost an incidental finding. Yet this report emphasizes the Student's difficulties with phonological awareness, and District witnesses emphasized that there was a meeting to discuss the results, although not a single witness could remember the meeting. Memories were much improved when District witnesses, especially the special education teacher for fourth through sixth grades, were asked about the Parents' knowledge of the Student's educational needs. The teacher was able to provide detail on a single conversation in the Fall of 1999, at which she suggested to the Student's Mother that Wilson training be abandoned. However, like

other District witnesses, she could not remember a team meeting to discuss the District's evaluation at the end of that school year in Spring 2000.

In finding the District's reading program inappropriate for this Student, I rely upon the testimony of the District's special education teacher for the Student's reading instruction in tenth grade through the present. (NT 668-24 to 669-8.) This teacher's demeanor was relaxed and open; she showed no signs of defensiveness or partisanship. She volunteered information, and made significant admissions against her own interest and that of the District. I conclude that this witness was telling me what she really believed, and her candor in this matter is highly appreciated. Her testimony contradicted various District witnesses, and I give her testimony greater weight than that of the Special education administrators, who, though apparently sincere, were visibly defending their program and whose answers often revealed a limited knowledge of reading deficits, remedial reading instruction techniques, and the day to day implementation of the Student's program.

On one hand, the District argues that it provided instruction related to decoding; on the other hand, it nowhere appears in their IEPs for most years. The District argued that the Student's progress in decoding of approximately one half year for each year for a period of two years was significant; yet, it had no explanation why I should consider a widening gap with same age peers to be significant progress. In contrast, the Student's independent evaluator stated that the gap could be closed to within one year with appropriate programming. (FF 71, 72.)

The District admits that its IEP goals have been designed with heavy attention to the "whim" of PDE. (FF 67.) Thus, they argue that the goals did not specifically address

decoding because PDE kept changing its doctrines on what things should be covered in reading goals. I do not accept this explanation. The IDEA does not require school districts to design IEP goals based upon the latest state doctrine; it requires goals to be individualized to the unique needs of each student. Moreover, I find it incredible that PDE would require anything different. I attribute this testimony to a fundamental misunderstanding by the District regarding its responsibilities under the law with regard to IEP writing, and to a misunderstanding of PDE policy.

Similarly, I do not accept the District's seeming argument that IEP baseline data on decoding does not matter. The District suggests that there was baseline data, but it was not in the IEPs. This is not acceptable. A fundamental requirement is that IEP goals must be measurable. This allows the parent to gauge whether or not the educational program is effective. It is the foundation for data based, reliable progress monitoring. The argument that data existed but no one has shared them is a reliance upon subjective judgment and veracity. This is not a reliable data based program.

The District reported nearly miraculous progress in the last two years of the Student's high school career. (S-103.) The Student was said to have jumped from a fourth grade to a ninth grade level in one academic year. Ibid. I give no weight to this reported data. The record before me is replete with failures to properly monitor the Student's progress in decoding. I find the sudden progress data to be unreliable because their source is not specified in the 2010 Re-evaluation report, the data were prepared in the midst of litigation, and the District personnel have admitted to incorrect data reporting, thus calling into question their system for progress measurement.

In assigning little weight to these data, I rely in part upon my estimation of the reliability of the school psychologist's findings. In demeanor during his testimony I found him to be less forthcoming than most district witnesses to whom I have listened. His memory lapses were many and varied, and I note that he was more forthcoming with District questioning than with Parent questioning. I found him wary and wooden throughout, and I conclude that his presentation was partisan at least. Therefore I accord less weight to his findings.

### Post Secondary Transition

Parents complain that the District did not place the Student in a regional school of technology. (FF 75, 78.) They argue that this program would have been more appropriate to the Student's transition needs than what the District offered in the Student's IEP. I do not accept the Parents' argument, because the District has offered an appropriate program for transition, and because the District made a reasonable effort to place the Student in [the school of technology], which rejected the Student's application. (FF 76, 77.)

The District boasts, with some justification, a substantial program for post secondary transition. (FF 76, 77.) It includes preference and aptitude testing, career researching, direct instruction and internship-like opportunities. Ibid. The Student was involved in work that Student desired, and allowed to make a number of choices. Student's work history was generally successful. (FF 6.)

In finding that the District's program was appropriate, I rely upon the testimony of the District's transition program coordinator. This witness was knowledgeable,

motivated and familiar with the details of the Student's program and success in it. I found the witness' demeanor to be straightforward and clear in answering questions.

The Student was not accepted to [the technology school] because Student did not meet the age criteria for that school. (FF 75.) The school accepts only students in their ninth and tenth grade years. When the Student applied, Student was in [Student's] second twelfth grade year; thus, Student was ineligible.

Parents argue that the Student was not accepted when age appropriate because Student could not read sufficiently to meet the admission criteria. They attribute this to the district's inadequate reading program. I do not find it either practical or equitable to order compensatory education or other relief regarding transition because of this unfortunate history. I do not have authority to reverse [the school's] admission decision in the Student's case; [the school] is not an LEA, and it is not responsible for special education programming for the Student. Moreover, as stated above, I find that the District provided an appropriate post secondary transition program to the Student, and that Student received meaningful educational benefit from it. Therefore, the Parents' request for relief regarding transition services is denied.

### Writing

I find that the District's writing program for the years 2007 to 2010 was appropriate. (FF 82.) There were deficiencies in the IEPs during those years, (FF 80, 81), but the programming was offered, and the Student demonstrated some progress, (FF 79, 81, 82, 83). In this matter, the issue regarding writing is not the same as the issue of reading. The latter issue extends (by my ruling on limitations) beyond the two year

period for which the writing program is challenged. With writing, I am not called upon to consider FAPE in as lengthy a time span, nor would the record inform such an extended assessment of the Student's receipt of a FAPE. Limiting my horizon to two years, I find that the degree of progress, in context of the degree of need, while low and somewhat subjective, nevertheless is meaningful in light of the Student's abilities, especially Student's somewhat low rate of acquisition due to short term memory deficits. (FF 1, 2, 7.)

### ESY

The federal regulations implementing the IDEA require local educational agencies to provide ESY services to an eligible student if necessary to assure that he or she receives a FAPE. 34 C.F.R. §300.106. Pennsylvania special education regulations provide additional and more specific guidance. 22 Pa. Code §14.132. Almost 30 years ago, in Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, 452 U.S. 968 (1981), the Third Circuit Court of Appeals declared unequivocally that school districts must determine ESY services on an individualized basis and consider all components of a student's educational needs.

Pennsylvania regulations and the Pennsylvania Department of Education Basic Education Circular on Extended School Year services specifically direct the IEP team to consider the extent to which students have mastered and consolidated specific skills. 22 Pa. Code §14.132(2)(iv); Basic Education Circular, Extended School Year Eligibility (April 1, 2003)(BEC). Further, the team must consider the extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency or independence from caretakers. 22 Pa. Code §14.132(2)(v); BEC, above.

I find that the Student was eligible for ESY services during the relevant period from November 4, 2007 to January 29, 2010. The Student, as I have found, had not mastered or consolidated the fundamental skill of reading during this period of time. It is clear from the testimony that the District in making its determination of ineligibility relied upon the traditional analysis regarding regression and recoupment. (FF 84, 86.) The documentary evidence and the testimony of the Special Education coordinator make it clear that the above factors were not considered. (FF 85, 87.) I find further that the available evidence is convincing by more than a preponderance of the evidence that the Student indeed was eligible under the above criteria.

#### COMPENSATORY EDUCATION

Compensatory education is a remedy designed to cure the deprivation of a child's right to FAPE. Lester H. v. Gilhool, 916 F.2d 865, 873 (3d Cir.1990) cert. den. 499 U.S. 923, 111 S.Ct. 1317, 113 L.Ed.2d 250 (1991). An eligible student who has been denied a FAPE can receive compensatory education beyond the age of twenty one. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 249 (3d Cir.1999). The common award of compensatory education is for a period of time equal to the period of deprivation, excluding a reasonable period for discovery and rectification of the deficiencies in the district's program. M.C. ex rel. J.C. v. Central Regional Sch. Dist., 81 F.3d 389, 397 (3d Cir.1996).

In a matter involving a student with a gifted exceptionality, the Pennsylvania Commonwealth Court recently propounded a more flexible, more equitable approach to awarding compensatory education:

[W]here there is a finding that a student is denied a FAPE and the Panel determines that an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE....

[B.C. v. Penn Manor Sch. Dist., 906 A.2d 642, 650-651 (Pa.Comm. Ct. 2006).]

The Court noted that this standard differs from the one-for-one approach, because it can require awarding either more or less than would be awarded one-for-one.

Ibid. This standard has been applied in IDEA cases in federal courts. Marple Newtown School District v. Rafael N., No. 07-0558, 2007 WL 2458076 (W.D. Pa. 2007).

I find that the B.C. approach is especially appropriate to this matter. The two areas on which I found a failure to provide appropriate programming are both related to a single area of instruction: the Student's need for intensive instruction in phonemic awareness and decoding. Moreover, there is reliable expert evidence that indicates where this Student should be expected to be, should Student been afforded appropriate instruction. (FF 71, 72.) Therefore, I will order the District to provide educational services that will enable the Student to attain the level that Student should have attained in reading.

I find that, as of September 1999, the District was aware that the Student was suffering from a severe language-based learning disorder, (FF 11, 17), and by March 2000, the District knew that the Student had very weak phonological awareness and processing skills, and auditory-phonological perception and analysis, (FF 15). The District knew that the Student did not have the ability to decode phonologically or to reproduce the sound patterns necessary for reading and spelling. It also knew that the



Student also had slow processing of visual materials, which also slowed reading rate. As of this time, the District should have provided the Student with direct, explicit, intensive remedial instruction that is systematic and sequential, with scaffolding. This can be termed a “synthetic, phonetic code emphasis” approach and is exemplified by the Orton-Gillingham reading programs, such as the Wilson Reading System. (FF 71.)

I find that, with appropriate programming, the Student has the potential to close the gap between decoding ability and that of same age peers to about one year over a period of four full calendar years. (FF 72.) Therefore, I will order up to four years of Orton-Gillingham or comparable instruction, at least 90 minutes per day, (NT 446-21 to 22). The District’s obligation will terminate if and when the Student reaches a level in reading decoding that is one year below that of same age peers on an appropriate standardized achievement test, or the tutoring company or school reports that the Student has reached the highest feasible level of achievement in reading decoding, or the Student voluntarily withdraws from the company or school’s program without just cause.

The District will provide this programming by contract with a reputable and qualified tutoring company, local college reading lab school or comparable school at the company or school’s usual tuition or rate of compensation. The company or school will be chosen by the Parents, with the consent of the Student’s grandmother. The District will be required to pay the company or school’s rate or tuition, but only for the services specified above; the District will not be liable to pay for any residential costs or costs of additional instruction not directly related to the Student’s phonemic awareness and decoding skills. The District will be required to pay the full cost of transportation to and

from the location of instruction, either the actual cost or mileage at the current Internal Revenue mileage rate plus parking.

## **CONCLUSION**

For the reasons set forth above, I find that, from September 1999 to January 29, 2010, the District denied the Student a free and appropriate public education by depriving the Student of appropriate programming in the areas of reading decoding and ESY services directed to decoding. I find further that, from November 4, 2007 to January 29, 2010, the District did not deprive the Student of an appropriate program in writing or in post-secondary transition instruction and preparation. Any claim by the parties not addressed in this decision and order is denied.

## **ORDER**

1. The Parents are not barred from asserting a claim for compensatory education for the period from the first day of the 1999-2000 school year until November 4, 2007, with regard to reading.
2. The District failed to provide a free appropriate public education to the Student with regard to reading from the first day of the 1999-2000 school year until January 29, 2010.
3. The District did not fail to provide a free appropriate public education to the Student with regard to post-secondary transition and writing from November 4, 2007 until January 29, 2010.
4. The District failed to provide a free appropriate public education to the Student with regard to ESY for reading from the first day of the 1999-2000 school year until January 29, 2010.
5. The District is hereby ordered to pay for Orton-Gillingham or comparable instruction that provides direct, explicit, intensive remedial instruction with a

- synthetic, phonetic code emphasis. This programming must be provided for at least 90 minutes per day, during up to four calendar years, subject to the following limiting provisions. The District's obligation will terminate: a) if and when the Student demonstrates mastery of decoding at a level that is one year below that of same age peers as determined by administration of an appropriate standardized achievement test; or b) the tutoring company or school reports that the Student has reached Student's highest feasible level of achievement in reading decoding; or c) the Student voluntarily withdraws from enrollment without just cause.
6. The District must provide this programming by contract with a reputable and qualified tutoring company, local college reading lab school or comparable school, at the company or school's usual tuition or rate of compensation. The company or school will be chosen by the Parents, with the consent of the Student's grandmother. The District will be required to pay the company or school's rate or tuition, but only for the services specified above; the district will not be liable to pay for any residential costs or costs of additional instruction not directly related to the Student's phonemic awareness and decoding skills. The District will be required to pay the full cost of transportation to and from the location of instruction. The District must pay either the actual transportation cost or mileage at the current internal Revenue mileage rate plus parking.

*William F. Culleton, Jr. Esq.*

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

July 15, 2010