

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.B.

Date of Birth: [redacted]

Dates of Hearing:

January 7, 2010

February 1, 2010

April 1, 2010

April 15, 2010

CLOSED HEARING

ODR No. **00500-0910-KE**

Parties to the Hearing:

Parent[s]

Mr. Ronald Tarosky
Director of Special Education
Franklin Regional School District
3210 School Road
Murrysville, PA 15668

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pamela Berger, Esquire
434 Grace Street
Pittsburgh, PA 15211

Patricia Andrews, Esquire
Andrews & Price
1500 Ardmore Boulevard, Suite 506
Pittsburgh, PA 15221

May 17, 2010

June 1, 2010

Cathy A. Skidmore

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is an elementary school-aged student residing in the Franklin Regional School District. Student is eligible for special education by reason of a specific learning disability. The parents requested a due process hearing by a complaint filed on November 23, 2009 in which they claimed that the District had denied Student a free, appropriate public education (FAPE) for the two year period immediately preceding the complaint, and also sought prospective relief in the form of development of an appropriate individualized education program (IEP) and an assistive technology evaluation, as well as reimbursement for an independent educational evaluation (IEE). The District asserted that it has provided FAPE to Student and that the parents are not entitled to reimbursement for the IEE.

A due process hearing was convened over four sessions,² concluding on April 14, 2010, and the record closed on May 17, 2010. For all of the following reasons, I find in favor of the parent on the denial of FAPE and compensatory education claims, and in favor of the District regarding reimbursement for the IEE and the request for an assistive technology evaluation.

ISSUES

1. Whether the District has provided FAPE to Student over the two-year period preceding the filing of the due process complaint (i.e., from November 23, 2007) through the present, and, if not, whether Student is entitled to compensatory education;
2. Whether the parents are entitled to reimbursement for an IEE;
3. Whether the District should conduct an assistive technology evaluation of Student in order to fully assess Student's needs.

¹ The name and gender of the Student are not used in this decision in order to preserve the Student's privacy.

² A hearing session scheduled for February 26, 2010 was cancelled because the District closed all of its schools and offices, including the administrative offices, due to inclement weather. (Notes of Testimony (N.T.) 392)

FINDINGS OF FACT

1. Student is an elementary school-aged eligible student who resides in the District. Student is currently in [redacted] grade and is eligible for special education by reason of a specific learning disability.³ (Notes of Testimony (N.T.) 28-30)
2. In September of 2007, the parents requested that the District conduct an evaluation of Student due to concerns that Student was experiencing difficulties with reading and math. The District issued a permission to evaluate form for the testing which would be conducted by the multidisciplinary team, and the parents promptly signed and returned the form. The parents also completed a Parent Questionnaire which reflected their concerns over Student's inability to read and frustration in trying to read. (N.T. 143-46, 308-09; School District Exhibit (S) 47, 48, 49, 50)
3. The District completed its evaluation and issued an Evaluation Report (ER) on November 2, 2007. The ER reflected that Student had difficulty grasping concepts in reading and math. Specifically in reading, Student showed weakness in blending sounds and remembering sight words, and the teacher was concerned about Student's progress. Classroom adaptations which had been put in place included tutoring, one-to-one instruction, extra time to complete tasks, and reteaching or repetition of directions. Student had also been provided remedial reading support, and participated in the SAFE Team process which is the student assistance program at the elementary level, providing accommodations and supports in the regular education environment. (N.T. 309-10; Parent Exhibit (P) 6; S 1)
4. On the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), Student attained a full scale IQ score of 91, in the average range, and a general ability index (GAI) score of 100, also in the average range. The GAI score was considered more reflective of Student's cognitive functioning because the full scale score was deflated by Student's performance on the subtests in the Working Memory composite. Student's working memory ability was gauged to fall in the borderline deficient range, indicating that Student may have difficulty processing complex information and following multistep directions presented verbally. (N.T. 294- 97; P6; S 1)
5. On the Wechsler Individual Achievement Test – Second Edition (WIAT-II), Student achieved low average scores in Word Reading and Pseudoword Decoding, exhibiting limited phonetic knowledge, and a borderline deficient range score in Reading Comprehension, showing poor accuracy and a limited reading speed. Student's spelling score was in the low average range, although Student "incorrectly spelled every word that [Student] generated," (P 6 at 7; S 1 at

³ As the parents do not raise any challenge to Student's educational programming addressing math (N.T. at 19), this opinion will generally omit references to that subject area.

- 7), and the written expression score was in the average range. (N.T. 299-300; P 6; S 1)
6. The ER also reported that, on the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) at the end of first grade, Student scored in the low risk range on Phoneme Segmentation Fluency, in the emerging range on Nonsense Word Fluency, and in the at-risk range in Oral Reading Fluency. A more recent administration of the DIBELS at the beginning of second grade (at the start of the 2007-08 school year) revealed Student's scores in the established range in Nonsense Word Fluency, and in the at-risk range in Oral Reading Fluency. (N.T. 321-24; P 6; S 1)
 7. Student was determined to be eligible for special education by reason of a specific learning disability. Relevant to this proceeding, the ER set forth needs in the following specific areas: reading with understanding, applying various strategies to unknown words, recognizing and applying vocabulary/sight words, using beginning capitalization/punctuation skills, and applying phonetic and core words in sentence composition. The ER described general needs to further develop overall reading skills including word decoding, word reading, and reading comprehension. (P 6; S 1)
 8. An Occupational Therapy (OT) evaluation was also conducted in November 2007 based upon concerns with Student's handwriting and fine motor skills. On the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), Student obtained a standard score in the average range but demonstrated difficulty with visual motor skills. OT services were recommended at a frequency of 30 minutes per week to address writing and fine motor needs. (N.T. 743-47; S 13)
 9. An IEP team meeting was held on December 6, 2007. The team developed an IEP which set forth needs in reading/language arts, spelling, written language, math, and visual motor skills. One reading goal addressed reading 3-letter a, i, o, u words; one writing goal addressed writing sentences; and two occupational therapy goals addressed letter formation and fine motor tasks. A number of program modifications and items of specially designed instruction were set forth including small group instruction and a sequentially structured, multisensory phonetic approach to teaching reading and spelling. OT was specified as a related service for 30 minutes each week. The parents approved the Notice of Recommended Educational Placement (NOREP) for resource learning support which was calculated at 13.25 hours/week. (N.T. 330-32; P 16; S 2, 54)
 10. Student's reading and language arts instruction was (and still is) provided using an Orton-Gillingham approach in a program called Preventing Academic Failure. The Orton-Gillingham approach provides a systematic, multi-sensory, structured sequence of teaching reading, writing, and spelling in an integrated program. (N.T. 104, 135-36, 151, 268-69, 343-44, 366, 379, 443-44, 623-25) The District's Director of Special Education was unaware of any other particular reading program in which staff had been trained so as to be available for elementary

special education students, although staff is trained in the Wilson Reading Program at the middle and high school levels. (N.T. 266-71)

11. When Student first began receiving special education services, the learning support teacher determined that Student could identify letters and identify the sounds for most letters, although Student had some confusion with the letters “b” and “d”. Student could identify many of the short vowels but could not decode short words with those known short vowels. (N.T. 337-38)
12. Student’s reading and language arts program has generally been provided over 90-105 minutes of instructional time in the learning support classroom. Student receives direct instruction in 2, 20-25 minute sessions involving Student and two other students, and in the remaining time, skills are reinforced through independent work, participation in small group activities, and practice with the paraprofessional. (N.T. 331-32, 335-37, 346-47, 354-59, 364-71, 510-11, 514-15, 542, 570-71, 621-23, 661, 666-68)
13. After the December 2007 IEP was implemented, Student participated in regular education in science, social studies, and all special subjects with adaptations and supports. (P 17; S 14)
14. Progress reports issued in January, April, and June 2008 on the reading goal indicated that Student continued to have difficulties with decoding. Oral reading fluency based on DIBELS scores improved from 10 correct words per minute on first grade passages in January 2008 to 26 correct words per minute on first grade passages in May/June 2008. However, Student’s DIBELS scores were variable in the spring of 2008, with May scores of 18 and 17 correct words per minute. (N.T. 348-50, 373-74, 523-26; P 8; S 3, 5)
15. Progress reports issued in January, April, and June 2008 on the writing goal reflected that Student worked toward and then attained the goal of using words on Student’s reading level in complete written sentences with 80% accuracy on 3 out of 4 bi-weekly trials using a 7-point rubric. (N.T. 533-39; S 6)
16. Progress reports on Student’s OT goals in January, April, and June 2008 indicated that Student “works hard” and “always tries to do [his/her] best” and needed fewer prompts for legible letter formation and completing fine motor tasks. Student had not achieved the goal of 80% accuracy in legible letter formation by the end of the 2007-08 school year. (N.T. 748-51, 777-80; S 7)
17. On a Stanford Diagnostic Reading Test (SDRT) administered in April 2008, Student scored in the 7th percentile rank in Phonetic Analysis, in the 62nd percentile rank in Vocabulary, and in the 2nd percentile rank in comprehension.

- Overall Student scored in the 8th percentile rank. Grade equivalence scores ranged from K.9 in Comprehension to 3.2 in Vocabulary.⁴ (N.T. 543-46; S 8)
18. Student's IEP team convened again on May 29, 2008 to develop a new IEP for the 2008-09 school year. The team noted that Student needed "a moderate degree of specially designed instruction on [Student's] instructional level in reading, language, spelling, and math." (P 17 at 3; S 14 at 5) This IEP contained one reading goal for one-syllable short vowel words with initial consonant blends and common consonant digraphs; one writing goal for writing complete sentence responses to comprehension questions; and virtually the same OT goals as in the prior IEP. Program modifications and items of specially designed instruction were expanded from the prior IEP to include provision of information to study for social studies and science tests, as well as having tests read to Student and permitting Student to dictate essay responses. Student would continue to receive 30 minutes of OT each week. The amount of time in the learning support classroom decreased from 13.75 hours per week in the December 2007 IEP to 12.5 hours per week in the May 2008 IEP. The parents approved the NOREP. (P 17; S 2,14, 55)
 19. During the 2008-09 school year Student participated in regular education in science, social studies, and all special subjects with adaptations and supports. Student also participated in the Fast Forward program after school, which was a reading preparatory program available to any student. (N.T. 222-28, 277-280, 283-84, 290-92; P 15, 18; S 26)
 20. In the fall of the 2008-09 school year, Student's parents asked for books to be sent home by the learning support teacher to reinforce Student's reading instruction. The teacher sent home "control books" over the course of the school year which contained the phonetic elements Student was currently working on and were not too difficult for Student. Although the parents wished that more control books were sent home, sometimes there were no more available for the teacher to send. (N.T. 228-29, 575-76, 664-66, 805-06; P 15 pp. 10)
 21. Progress reports in reading for the 2008-09 school year reflected improvement in word decoding speed and fluency increased from 13 correct words per minute on first grade passages in November 2008 to 37 correct words per minute on first grade passages in June 2009. Student did not master the reading goal by the end of the 2008-09 school year, achieving approximately 70% accuracy rather than the projected 85% accuracy. Student's oral reading fluency scores on the DIBELS during that school year remained variable, ranging from a low of 9 in

⁴ This hearing officer recognizes that grade equivalent scores can be misleading as they are based upon estimates only. *See, e.g.,* Salvia, J., Ysseldyke, J., & Bolt, S. (2010). *Assessment in Special and Inclusive Education* (11th ed.). Belmont, CA: Wadsworth Cengage Learning; Sattler, J. M. (2001). *Assessment of Children: Cognitive Applications* (4th ed.). La Mesa, CA: Author.

- November to a high of 37 in early May, with a subsequent May score of 19 correct words per minute. (N.T. 374-76, 380-81, 557-59, 576-77, 651-52; P 8; S 15, 17) Around the middle of the 2008-09 school year, Student's learning support teacher began using a new approach or technique to improve Student's ability to blend sounds through drills and repetition since Student was not demonstrating automaticity of 3-letter short vowel words. (N.T. 364-63, 552-56, 640-47)
22. Progress reports in writing for the 2008-09 school year reflected that Student did not begin working on the goal to write complete sentence responses to comprehension questions until the second quarter and instead continued to work on writing complete sentences as in the prior IEP. According to the April and June 2009 progress reports, Student had mastered the writing goal by the end of the 2008-09 school year. (N.T. 565-66; S 19)
23. OT progress monitoring for 2008-09 reflected that Student had mastered the portion of the legible letter formation goal relating to letter size but required prompting on spacing between words, and that Student was completing visual motor and visual perceptual fine motor tasks with better accuracy and less assistance and prompting. (N.T. 781-82; S 20)
24. On the SDRT administered in April 2009, Student scored in the 40th percentile rank in Phonetic Analysis, in the 33rd percentile rank in Vocabulary, and in the 2nd percentile rank in Comprehension, with an overall 8th percentile rank. Grade equivalency ranged from 1.5 in Comprehension to 3.5 in Phonetic Analysis. (N.T. 574; S 21)
25. During the 2008-09 school year, Student also participated in the Accelerated Reader program at the elementary school, which is a library program for all students. In that program, the students read designated books then take a test and score points, working toward a goal set at the beginning of the school year. Student read some books independently, but often the books were read to Student by a paraprofessional, Student's parents, or a computer program, and sometimes the librarian would read one of the books to the whole class. Student also often had the paraprofessional read the test questions to Student. (N.T. 571-73, 635-37, 683-84, 570-72; S 22)
26. Student's IEP team met again on June 2, 2009 to develop a program for the 2009-10 school year. The present levels of academic achievement and functional performance indicated that Student's oral reading fluency had progressed from approximately 10 to 37 correct words per minute on first grade DIBELS passages, but that Student continued to demonstrate a need to improve automaticity and reading fluency and to require direct instruction and repeated practice to master reading sight words. Student reportedly had responded well to the reading program and could read 3-letter, 1-syllable short vowel words with initial consonant blends at the time of the IEP meeting. Student also continued to exhibit needs for writing and spelling including OT services, although Student had shown improvement in scores on the VMI administered in 2009 with average

- scores in visual motor and visual perceptual skills. (N.T. 579-80, 754-56; P 18; S 26)
27. The June 2009 IEP contained one reading goal for 1-syllable short vowel words with initial and/or final consonant blends, one writing goal for writing paragraphs, and three OT goals relating to completing fine motor tasks, writing sentences with appropriate spacing, and cursive writing. Once again a number of program modifications and items of specially designed instruction were set forth, particularly with respect to Student's science and social studies classes. The IEP team determined that Student would participate in regular education for 3.65 hours of each 6-hour school day (a total of 11.75 hours per week in special education) with 90 minutes/day spent on reading/language arts. The parents approved the NOREP. (N.T. 333-35, 578-80, 653-56; P 18; S 26, 43)
 28. For the 2009-10 school year Student had a scheduled daily period called TAN, "to address needs," which all students had. This period was used for OT one day a week, and on other days Student would read independently, have accelerated reader books read to Student, or work on science assignments. (N.T. 244-45, 360, 673-75, 723; S 36) Student was reading most of the accelerated reader books independently during the 2009-10 school year. (N.T. 584-85, 639-40)
 29. Near the beginning of the 2009-10 school year, the parents contacted Student's learning support teacher and reported that Student was having difficulties with science and social studies and they were unable to help Student study. The parents asked for study guides which were provided by sometime in October, as were answer keys for written assignments. Student's science and social studies teachers had also by then realized that Student was having difficulty completing assignments and could not easily copy material from the board or overhead transparencies. At some point, Student's seat in social studies was moved to the back of the room when all students' seats changed, although the social studies teacher did not believe Student was adversely affected by the seat change because there was a student teacher in the room and the teacher herself was available to stay in proximity to and help Student when needed in the class. (N.T. 168-69, 174-82, 206-08, 240-42, 245-49, 688-91, 693, 697-99, 704-07, 711-12, 715-24, 731-32, 808-10, 814-22; P 12, 14, 15 pp. 25-26; S 44, 52, 53, 58) Student takes all social studies and sciences tests and quizzes in the learning support room. (N.T. 702-03, 708, 724-25)
 30. Progress monitoring in reading as reported in November 2009 reflected that Student's oral reading fluency on DIBELS first grade passages was 31 and 30 correct words per minute in September and 18 and 35 correct words per minute in October. In November, Student read 25 and 38 correct words per minute. Scores in December 2009 and January 2010 ranged from 36 to 42 correct words per minute on first grade passages. (N.T. 375-78, 381-82, 586-87; P 9; S 33, 34) Student's learning support teacher began testing Student on second grade level reading passages in late January 2010. (N.T. 377-78, 580-83)

31. Progress monitoring in writing in November 2009 reflected that Student had achieved 48% and 52% accuracy in paragraph writing on the rubric. (N.T. 592, 596-600; S 32, 39)
32. OT progress monitoring in November 2009 reflected that Student continued to work on the goal of completing fine motor tasks with decreased verbal prompts, required prompting to write sentences with appropriate spacing, and required verbal and some physical prompting to write the letters of the alphabet in cursive writing. By January 2010, Student had mastered the goal on performing fine motor tasks, required decreased prompting for spacing between words when writing sentences, and demonstrated 80% accuracy in writing cursive lower case letters learned to date. (N.T. 783-85; S 57) Nevertheless, the legibility and neatness of Student's written work varies greatly and Student's performance on writing tasks with the occupational therapist or assistant is not necessarily representative of performance at other times, especially at home. (N.T. 169-70, 216-18, 759, 762-64, 766-67, 782-83, 787 P 12, P 14)
33. In Student's science class, Student's grade after the first marking period was 96.7% or an "A," after the second marking period was 91.8% or an "A," and on January 29, 2010 was 93.1% or an "A." In social studies, Student's grade after the first marking period was 95.5% or an "A," after the second marking period was 93.9% or an "A," and on January 29, 2010 was 91% or a "B." (S 41, 42)
34. A new OT evaluation was conducted in November 2009 and included administration of the Motor-Free Visual Perception Test (MVPT) to assess overall visual perceptual ability. Student demonstrated average to above-average visual perceptual skills on all subtests. (N.T. 756- 58; S 56)
35. In a letter to the District dated October 19, 2009, the parents requested that Student be re-evaluated out of concerns over Student's lack of academic achievement and slow progress, particularly in reading. The parents signed a permission to evaluate form on October 27, 2009, but withdrew their consent on November 5, 2009 and requested an IEE at public expense. (N.T. 158-61, 186-87, 243-44, 311-14, 318; P 10; S 27, 28, 29, 31)
36. The parents had Student privately evaluated in October and November 2009 to assess Student's lack of progress in reading. The evaluator, a certified school psychologist, reviewed educational records, obtained information from the parents, and administered the Woodcock-Johnson III Tests of Cognitive Abilities (WJ III COG) (extended battery), the Woodcock-Johnson III Tests of Achievement (WJ III ACH) (extended battery), and the Comprehensive Test of Phonological Processing (CTOPP) (including the alternate phonological awareness subtests). The private evaluator determined that Student's overall intellectual ability is in the average range and identified weaknesses in short-term memory and working memory as well as in processing speed. In achievement testing, Student had impaired scores in the broad reading and broad written language clusters. On the CTOPP, Student's scores were within one standard

- deviation of the mean on the standard battery; however, the psychologist opined that the scores indicated difficulty with working memory and suggested a weakness in phonological awareness on the alternate form. (N.T. 36-40, 43-56, 62-63, 68, 79, 83-84, 93-94, 162-63; P 2)
37. The private evaluator made specific recommendations for Student's reading program, including 90-120 minutes a day of direct instruction in reading using a sequenced, multisensory program at Student's instructional level and writing instruction at Student's level (late first- to middle-second grade) with direct spelling instruction. This psychologist also recommended an assistive technology evaluation as well as specific accommodations such as having texts read to Student, extended time on assignment, reduced quantity of work required, elimination of activities requiring Student to copy material, and repetition and extensive practice. (N.T. 62-66; P 2)
38. Also in the fall of 2009, the parents took Student to a local private learning center where the Gray Oral Reading Tests – Fourth Ed. (GORT-4) was administered. Student scored below the first percentile rank on rate, accuracy, and fluency, and in the second percentile on comprehension. Student has continued to attend the learning center to address memory, phonological processing, and processing speed, but it is not providing a reading program to Student. In the center's curriculum-based measurements at the fourth grade reading level, Student's scores ranged from 20 correct words per minute the first week to 32 correct words per minute 8 weeks later; however, the words Student was reading correctly were typically short words which would be considered at a beginning first grade level. (N.T. 118-20, 125, 129-30, 168; P 4)
39. Throughout Student's attendance in the District, the parents and school representatives have maintained ongoing communication about Student. The parents also had Student privately tutored during the summers of 2008 and 2009 and advised the District. (N.T. 143-44, 151, 154-55, 168, 218-20. 230-31; P 15)
40. The parents filed a due process complaint on November 23, 2009, and this hearing officer conducted four hearing sessions. After the second hearing session, the parents submitted an offer of proof in which they sought to recall one of their expert witnesses and the District objected. The parents' request was denied without prejudice to their right to raise the issue anew in the context of rebuttal testimony. (N.T. 395; Hearing Officer Exhibits (HO) 1, 2, 3) The parents did not request to recall this witness on rebuttal. (N.T. 828) The record was closed on May 17, 2010.

DISCUSSION AND CONCLUSIONS OF LAW

At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden in this

case rests with the parents who requested the hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.⁵

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. However, procedural violations can support a claim for relief only if those violations impeded a child’s right to receive FAPE, or significantly impeded the parents’ opportunity to participate in the decision-making process concerning provision of FAPE to the child, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2). The *Rowley* standard is met when a child’s program provides him or her with more than a trivial or *de minimis* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

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

The first issue is whether Student was provided with FAPE from November 23, 2007 forward. The parents’ focus of this hearing was on Student’s reading program and the perceived lack of Student’s progress in that area since special education services were first provided.

Review of the ER and information known to the District at the time the December 2007 IEP was developed reveals that the District began using a systematic, multi-sensory, structured and sequenced approach to teaching reading, writing, and spelling to address Student’s significant needs in these areas in an integrated program. (Finding of Fact (FF) 10). The reading goal addressed reading 3-letter short vowel words which was

⁵ Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D.Pa. 2009). This hearing officer found each of the witnesses to be generally credible, except as specifically noted in this decision.

consistent with what the learning support teacher determined that Student could do at the time the IEP was first implemented. (FF 9, 11) Although the parents correctly point out that the December 2007 IEP contained only one goal and additionally lacked a baseline on Student's oral reading fluency (parents' closing brief at 3-4), the evidence reflects that the District was focusing on what it perceived to be Student's main need (word attack) while also working on Student's reading comprehension and fluency. (N.T. 349-53) Additionally, while Student's progress was variable, there appeared to be no serious dispute that when a student who is essentially a non-reader begins a program such as Orton-Gillingham, variable and slow progress is not unexpected. (N.T. 169, 490, 543) The District has continued to provide this same program to Student through the present. (FF 10)

It is necessary at this point to resolve the conflict in the testimony between the parties' respective experts on the utility of comparing standardized test scores to gauge progress, as the parties disagree on whether Student has made meaningful educational progress in the reading program. The District's expert, a certified school psychologist, testified credibly and logically that while assessments such as the WIAT-II and WJ-III are clearly useful diagnostic tools, they are necessarily very limited in scope and do not adequately assess all skills; instead, a standardized test provides merely a snapshot of a child's abilities. (N.T. 420-26, 441-42) Additionally, he explained that in order to derive a meaningful comparison between any two scores, there must be a high correlation between the two measures. (N.T. 417-18) The parents' expert, on the other hand, suggested that the scores on the WIAT-II and WJ-III are "compatible," but provided little insight into whether there was a high correlation between the two measures. (N.T. 49-50, 57-59, 98-101) Thus, while a comparison of standard scores could provide useful information about a student, I cannot accept the argument that Student's progress or lack of progress may be determined by a comparison of standardized test scores. In other words, I agree with the Western District Court in *Leighty ex rel. Leighty v. Laurel School District*, 457 F.Supp.2d 546, 561-62 (W.D. Pa. 2006), that standardized test scores cannot, in and of themselves, establish whether a child has made meaningful educational progress under the IDEA.

In any event, this record contains a wealth of information about Student's educational progress through various other forms of data collection and assessments. The District relied heavily on DIBELS scores which were included in quarterly IEP progress monitoring. (FF 14, 21, 30) As noted, the District's report of Student's DIBELS oral reading fluency scores in the spring of 2008 reflected significant variability (from a low of 10 to a high of 26, with May 2008 scores of 18 and 17), and reported that Student continued to have difficulties with decoding. (FF 14) However, Student's November 2008 progress report reflected that Student was reading only 13 correct words per minute on first grade passages on the DIBELS. (FF 21) Although the District's expert attributed the decline between May and November to the intervening summer (N.T. 478-79), even the cited 2-3 month time period for recoupment does not adequately explain Student's oral reading fluency performance in November 2008, 3 months into the school year.

Additionally, while Student's oral reading fluency score rose to 37 in January 2009, Student's DIBELS scores remained quite variable through the end of the 2008-09 school year, and Student did not master the reading goal, achieving only 70% rather than the expected 85% accuracy. (FF 21) By the middle of the 2008-09 school year, as Student's learning support teacher realized that Student was not demonstrating the ability to blend sounds consistently (a goal which had been on Student's IEP for one year), she determined to make a change of instructional approach with Student. (FF 9, 11, 18, 21) It is very evident that the learning support teacher, a dedicated professional who clearly cares very much for Student, made every effort to maximize every minute that Student spent in her classroom. Still, the District as a whole did not make any major changes to Student's educational program to address Student's continued difficulties in making progress in reading, either by providing for more time with reading instruction or providing some direct, 1:1 instruction. Whether Student's programming was hampered by time constraints (N.T. 363-64), a lack of programming options (FF 10), or other unknown factors, I find that it knew or should have known by January 2009 that the reading program provided to Student was not reasonably calculated to provide, and was not providing, consistent meaningful educational benefit.⁶ Student's continued lack of meaningful progress in reading as reported through the remainder of the 2008-09 school year as well as the 2009-10 school year serves to reinforce that determination.

I find further support for this conclusion in the testimony of the parties' experts. The parents' expert concluded that Student demonstrated weaknesses in short-term memory, working memory, and phonological processing, which would impact Student's learning ability particularly in the area of reading. (FF; P 2) The District's expert did not disagree with these conclusions (N.T. 435-37, 457), opining that further assessment was indicated to comprehensively assess Student's phonemic awareness and executive functioning. (N.T. 468, 470, 496, 498-99) The District's expert further explained that a fourth grade student with average intelligence should gain approximately one word per week in fluency rate. (N.T. 477-79) To the extent that Student's very variable oral reading fluency rates can establish such improvement, even the gain from a low of 10 correct words per minute in January 2008 to a high of 42 correct words per minute in January 2010, encompassing approximately 104 weeks, reflects improvement of far less than a 1-word gain per week. (FF 14, 30). Significantly, even the District's expert testified that "there needs to be more time devoted" to Student's educational programming in order to address Student's clear deficits, (N.T. 437-38) and he was unable to state that the District's reading program was appropriate for Student. (N.T. 475-76) For all of these reasons, I am compelled to conclude that the District was not adequately meeting Student's significant needs in the area of reading.

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not

⁶ I do not disagree with the District that it is not obligated to "close the gap" since the applicable standards under the IDEA do not require them to do so. (District closing statement at 8-10) Nevertheless, I did consider the evidence of the parents' desire for this result as I found it relevant to their claim that FAPE was denied in this case.

appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.*⁷ Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

The parents' expert opined that Student required 90-120 minutes of direct reading instruction each day. (FF 37) Throughout the relevant time period, Student was receiving approximately 45 minutes of daily direct reading/language arts instruction in the integrated program. (FF 12) The evidence supports a conclusion that this amount of time has not been sufficient to meet Student's needs. I find that the parents' expert's opinion on the amount of instruction Student requires in order to address Student's reading disability is both credible and logical in this case, and will award the difference between the lowest recommended instructional time (90 minutes per day) and the time provided (45 minutes per day). Accordingly, I shall order 45 minutes of compensatory education for direct reading instruction for each day school was in session beginning with the first day of school after the holiday break in January 2009 until such time as an appropriate IEP is developed and implemented which provides sufficient reading instruction for Student.

The IEP team will determine how the compensatory education hours are used. In the event that the IEP team cannot agree on the use of the compensatory education hours, the parents will determine how they will be used, which shall take the form of any appropriate developmental, remedial, or enriching educational service that provides direct reading/language arts instruction. The costs of the compensatory education award shall not exceed the cost of educating a high school student in the District for each day of compensatory education awarded as measured by the average daily compensation of an elementary school teacher in the District during the 2008/2009 school year, including salary and fringe benefits.

With regard to whether the District denied FAPE to Student in related areas including spelling, written expression, and OT, I conclude that Student's programming in all of these areas is and has been appropriately integrated, and that the remedy set forth

⁷ Compare *B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Cmwlth. 2006), which rejected the *M.C.* standard for compensatory education, holding that "where there is a finding that a student is denied a FAPE and ... 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." *Id.* at 650-51. Here there was no evidence produced on what position Student would have been in had FAPE been provided and, upon consideration of Student's significant needs which are as yet not sufficiently determined, this hearing officer elects not to speculate. I therefore conclude that the *M.C.* standard is the appropriate method of determining the amount of compensation education owed to Student in this case.

above will also address any inadequacies in Student's programming in these areas. Further, although some portions of the IEPs in question may have required some effort on the part of the parents to ensure compliance, such as the study guides in science and social studies, it is apparent that the District did provide appropriate accommodations and adaptations for Student as set forth in the IEP. (FF 29) The IEP team may, however, wish to consider for future IEPs whether Student requires any further accommodations, program modifications, and adaptations in regular education classes as Student moves into higher grade levels.

The next issue is whether the parents are entitled to reimbursement for the IEE obtained in November 2009. The relevant regulation provides:

§ 300.502 Independent educational evaluation.

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

* * * *

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

34 C.F.R. § 300.502. One critical consideration for reimbursement for an IEE is that the parents must disagree with an evaluation of the District. *See, e.g., P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009).

The record does not demonstrate that the parents in this case indicated any disagreement with any prior evaluation conducted by the District. Rather, the parents requested that the District conduct a re-evaluation, then withdrew their consent and arranged for an IEE. Even acknowledging that the parents' reason for withdrawing their permission may have been perfectly reasonable and understandable, I cannot conclude that their conversations with the District about possible negative results from a re-evaluation can serve to obviate the disagreement requirement. This is particularly so in light of the fact that there was apparently no such concern with any results that the private evaluator might expose.

Of course, the IEE must be considered by the IEP team as provided by 34 C.F.R. § 300.502(c). Nevertheless, in order for an IEE to be obtained at public expense, the law requires compliance with the above regulations. Accordingly, this hearing officer concludes the parents have not established a right to reimbursement for the November 2009 IEE.

The last issue is whether the District should be ordered to conduct an assistive technology evaluation. The only evidence in this regard is the parents' expert's unexplained statement that such an evaluation is recommended, and the parents' stated open-mindedness to assistive technology. (P 2 at 19; N.T. at 169) While the IEP team certainly may wish to consider whether such an evaluation would provide useful information and recommendations as Student moves into higher grade levels, I cannot conclude that the parents met their burden of proving that this remedy should be ordered.

Lastly, this hearing officer will not order the IEP team to reconvene as it appears that Student's 2010-11 IEP should be in the process of development, and any claims related to that educational program are not the subject of this proceeding. The IEP team has suggestions and recommendations by experts from both parties and can make an informed decision on what additional evaluations or assessments might assist it in future educational programming for Student. Further, as an observation, it was very apparent that all of the witnesses who know and have worked with Student genuinely care about Student and Student's educational success and emotional well-being. The parties are encouraged to maintain their prior history of ongoing, open communications and cooperation in developing and providing an appropriate educational program to Student.

CONCLUSION

For the foregoing reasons, I find that the District denied FAPE to Student and that the Student is entitled to compensatory education of 45 minutes of direct reading/language arts instruction per day from the first day school was in session at the beginning of January 2009 until such time as an appropriate IEP which provides for sufficient reading and language arts instruction is implemented. I also conclude that the parents' are not entitled to reimbursement for the IEE and that the District will not be ordered to conduct an assistive technology evaluation.

ORDER

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

1. Provide compensatory education to Student as follows: 45 minutes per day of direct reading/language arts instruction beginning with the first day of school in January 2009 and continuing through the 2009-10 school year and until such time as an appropriate IEP is implemented which includes these services for a total of 90 minutes of direct reading instruction. The determination of what services will constitute the compensatory education hours will be decided as set forth in this opinion.
2. The parents' claim for reimbursement for the January 2010 IEE is denied.
3. The parents' request for an ordered assistive technology evaluation is denied.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Date of decision: June 1, 2010