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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: MP

Date of Birth: xx/xx/xxxx

Dates of Hearing:

February 15, 2010

March 5, 2010

CLOSED HEARING

ODR No. 00566-09-10 LS

Parties to the Hearing:

Dr. Rita Neu
North Hills School District
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Pittsburgh, PA 15229

Representative:

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Date Record Closed:

March 11, 2010

Date of Decision:

March 24, 2010

Hearing Officer:

Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

M.P. (hereafter Student)¹ is currently a 16 years old student in the North Hills School District (District) who is eligible for special education. The parents filed a complaint for due process seeking a determination that the District failed to provide a free, appropriate public education (FAPE) from the two-year time period prior to the filing of the complaint, *i.e.* from December 15, 2007, as well as whether the parents were entitled to reimbursement for an independent educational evaluation (IEE) obtained in January 2010. For all of the reasons set forth below, the parents prevail on the issue of compensatory education and the District prevails on the claim for reimbursement for the IEE.

ISSUES

1. Whether Student has been denied a free, appropriate public education (FAPE) for the time period beginning December 15, 2007? If so, is Student entitled to compensatory education?
2. Whether the parents are entitled to reimbursement for an independent educational evaluation (IEE) performed in January 2010?

FINDINGS OF FACT

1. Student began attending school in the District in first grade after having attended a private educational preschool program. Student's entry into the District was described as "a bit rocky" but Student made new friends and adjusted to the new school with the help of a reading tutor obtained by the parents. (Notes of Testimony (N.T.) 55-57)
2. Student was first referred for an evaluation during fourth grade, the 2003-04 school year, based upon a recommendation by the Instructional Support Team "due to academic difficulties and emotional concerns." (Parent Exhibit (P) 1 p. 1) The evaluation, completed in April 2004, included input from the parents,

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

- curriculum based assessments, a classroom observation, results of prior achievement testing, and standardized testing. (P 1)
3. Student obtained a full scale IQ of 91 on the Wechsler Intelligence Test for Children – Fourth Edition (WISC-IV). Student scored in the below average range on the Block Design and Matrix Reasoning subtests of the Perceptual Reasoning Index and below average on the Letter-Number Sequencing subtest of the Working Memory Index; all other subtest scores were in the average range. (P 1)
 4. On the Wechsler Individual Achievement Test – Second Edition (WIAT-II), Student demonstrated a significant weakness in pseudoword decoding suggesting difficulties in applying phonological principles to words out of context. All other scores on the WIAT-II, including Student’s reading, mathematics, and written language composites, were in the low average and average ranges. (P 1)
 5. Student’s teacher and parents completed the Behavior Rating Inventory of Executive Function (BRIEF) and the Behavior Assessment System for Children (BASC); Student also completed the BASC. One of Student’s teachers also provided information for the Adjustment Scales for Children and Adolescents (ASCA). (P 1)
 6. The April 2004 evaluation report (ER) concluded that Student was a child with a disability based upon emotional disturbance with a secondary disability category in speech/language. Specific areas of concern were identified in the areas of attention, depression, peer interactions, and adaptability, as well emotional control. The ER determined that Student’s academic and emotional difficulties were the result of an emotional disturbance and recommended academic learning support to address those needs. The parents agreed with the ER and also approved the Notice of Recommended Educational Placement (NOREP) to change the Student’s program from speech/language support to learning support with speech and language services. (N.T. 75-76; 231, 239-40; P 1; School District Exhibit (S) 3)
 7. In the fall of 2004, the parents had Student evaluated by a private psychiatrist who diagnosed Student with depression and Attention Deficit Disorder (ADD). Student began receiving weekly therapy outside of school, and a course of medication for the ADD was tried then discontinued. The weekly therapy continued until sometime during Student’s seventh grade year. The parents also arranged for private tutoring of Student in the fall of 2004. (N.T. 60-63, 74-75)
 8. A reevaluation report (RR) was completed in April 2007 (seventh grade). (P 2) The parents provided input as did Student’s teachers, and the RR included Student’s current report card grades and results of the prior year’s Pennsylvania System of School Assessment (PSSA) in math (Basic) and reading (Proficient). The RR revealed that Student was participating in the regular education

curriculum for all academic and nonacademic classes² and activities with occasional modification of assignments and learning support “monitoring.” (P 2 at 2) The speech/language pathologist reported that Student no longer needed speech/language support. (P 2)

9. In that RR, the junior high school principal reported that Student had been tardy 22 times during the 2006-07 school year, and the guidance counselor reported that Student had difficulty transitioning to the junior high school both academically and socially. Student stated, “I don’t like anything about school – just going home.” (P 2 at 5)
10. With respect to Student’s emotional needs, the 2007 RR noted weaknesses in a number of areas: self-advocacy skills, relationships with teachers and peers at school, distractibility by peers, and self-confidence. (P 2)
11. In regard to academic needs, the 2007 RR set forth several specific concerns for Student: development of study skills, motivation to complete assignments, attention to detail, personal responsibility, class participation, as well as Student’s struggles with spelling, written expression, and language retention. Significant weakness was noted in reading decoding, and Student’s Literacy Arts teacher recommended direct instruction in decoding and encoding. (P 2)
12. The April 2007 RR recommended that Student continue placement in the learning support monitor program with the disability category of emotional disturbance, and identified cognitive, behavioral, social, and emotional needs. The parents agreed with the RR. (P 2)
13. The Individualized Education Program (IEP) developed in May 2007 noted that Student was failing World Language, English, and Math. Strengths included performance in Literacy Arts, while math performance was described as a weakness. The IEP contained one goal for increasing the initiation of self-advocacy skills across all areas. Program modifications and specially designed instruction (SDI) provided for small settings for tests and assignments, modified tests and assignments, preferential seating, simplified directions, and extra time. Student’s educational placement was itinerant learning support in the regular education classroom with participation in the general education curriculum for all courses. The parents approved the Notice of Recommended Educational Placement (NOREP). (N.T. 223-25, 232; P 3; S 4)
14. During the 2007-08 school year (eighth grade), Student was in co-taught classes in math, science, social studies, and English, and reported to the resource room every morning for homework check and test preparation. Student’s attendance during that school year reflected tardiness on 22 days which was due to Student’s

² All of Student’s academic classes were co-taught during the 2006-07 school year. (P 3 at 4)

- dislike of school. Student's grades were variable throughout that school year, and Student's PSSA test results indicated performance at the Basic level in mathematics and writing and at the Proficient level in reading. Student did not receive guidance counseling services beyond those which were offered to every student. (N.T. 69, 335-36, 346, 351-52; P 3; S 1)
15. The IEP developed in May 2008 noted that Student's report card grades for the 2007-08 school year were all C or above. However, Student did not consistently complete homework assignments and was often unprepared for classes. Organization was noted as needing improvement, and Student was by then demonstrating difficulty with reading comprehension due to weakness in decoding. There was no NOREP for this IEP. (N.T. 225-26, 232-33; P 4)
 16. The May 2008 IEP contained one goal: "[Student] will participate in the general education setting and perform the necessary tasks (reading, writing, oral participation, homework completion, speech writing and presentations) at a 70% or higher level during one on school year." (P 4 at 7) Short term objectives were identified for homework completion, preparation for tests and quizzes, use of study hall, and coming prepared to class. Program modifications and SDI related to reporting to the resource room, preferential seating, extra time for written assignments and speeches, and extra time for tests with the option of having them read in an alternate setting. Student's placement was specified as itinerant learning support with participation in the regular education curriculum in all courses and extracurricular activities. (P 4)
 17. Student received the same guidance services offered to every other student during the 2008-09 school year (ninth grade), although the guidance counselor did work with Student occasionally on social skills. Student was in co-taught classes for science, American Cultures, and English, but in a regular Algebra class. Student was tardy 36 days during this school year. Student failed several final examinations, including those in science, American Cultures, and Algebra, and achieved a grade of D in three other subjects. (N.T. 328-29, 336-38, 346-47, 357)
 18. Additionally, Student was provided reading instruction in the ninth grade using the Wilson Reading Program to address decoding needs. Student was taught with one other student for 45 minutes per day, 5 days per week, and completed 11 of the 12 Wilson books during that school year. On the Gates MacGinitie Reading Assessment administered in the fall and spring of the 2008-09 school year, Student showed improvement on the vocabulary subtest (grade equivalence of 8.8 on 8/26/08 and post high school on 3/24/09) but achieved a lower score on the comprehension subtest in the spring of 2009 (grade equivalence of 7.8) than in the fall of 2008 (grade equivalence 8.8).³ (N.T. 364-68, 373, 376-77; S 8)

³ 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.

19. An April 2009 IEP was developed when Student was nearing the end of ninth grade. Needs were identified in homework completion and reading decoding. There were two annual goals, the first of which was virtually identical to that in the May 2008 IEP except that performance was expected at the 80% level, and the other was for reaching step 12 in the Wilson Reading Program. Program modifications and SDI related to access to the resource room, use of an assignment book, preferential seating, and extra time for written assignments and speeches. The parents approved the NOREP, and a second NOREP was issued to reflect Student's transition to the high school from the junior high school. Student's ninth grade guidance counselor participated in developing this IEP. (N.T. 226-28, 233-34, 245-46, 360-61, 369-71, 385-86; P 5; S 5, 6)
20. During tenth grade (2009-10), Student was in co-taught classes for American Cultures and science but did not complete the Wilson Reading Program, as the special education teacher determined that continuation of the program was not necessary for Student. The learning support teacher to whom Student was assigned offered additional support to Student at the beginning of the school year, but aside from a few meetings which also included the guidance counselor, the offered support could not be arranged. Student also met with the guidance counselor on at least ten occasions to work on social skills and peer relationships. (N.T. 367-71, 382-83, 389-91, 395-96, 406-08, 409-13; S 1)
21. Also during the 2009-10 school year, Student was involved in a few minor verbal disagreements with other students on the bus and during the school day which were easily handled through the principal's office. Student was also disciplined on one occasion for using profanity in the school hallway for which Student received a Saturday detention. Student's habit of tardiness continued and Student also refused to attend school for 3 days in November due to difficulties with another student. (N.T. 94-95, 190-200, 201-08, 315-322, 323-25)
22. Student's grades for the first two quarters of the 2009-10 school year were reported as follows.

	<u>Marking Period 1</u>	<u>Marking period 2</u>
Photography	81	90
Health	68	49
Physical Education	74	40
English	70	64
Chorus	90	90
World History	76	73
Geometry Essentials	59	60

(S 1)

23. Near the end of 2009 or the beginning of 2010, the parents arranged for private tutoring of Student at a local learning center twice weekly. In testing performed

- there, Student demonstrated poor oral reading fluency and the executive director of the learning center described Student as exhibiting a nonverbal learning disability. (N.T. 158-59, 166-68, 172-73, 175-77)
24. Student's parents arranged for a private educational evaluation in January 2010 by an independent school psychologist. That evaluation included informal observations, the Woodcock Johnson III Test of Cognitive Abilities (WJ III COG), the Third Edition of the WIAT (WIAT-III), the Second Edition of the BASC (BASC-2), the BRIEF, a Functional Behavior Assessment Profiler (FBA Profiler), and a Cognitive Processing Inventory (CPI). (N.T. 103-05; P 8)
 25. The private psychologist found no significant mental health issues, but noted weaknesses in executive functioning (working memory and attention), visual-spatial thinking, visual processing, and long-term retrieval. He opined that Student demonstrated a nonverbal learning disability, and specifically identified learning disabilities in pseudoword decoding and math computation and math fluency. The private psychologist also made some specific educational recommendations for Student. (N.T. 109, 112-14, 122-23, 127-28, 131-36; P 8)
 26. The District conducted a reevaluation of Student in February 2010 and issued an RR on February 24, 2010. The District's school psychologist reviewed the prior RR, the IEE, Student's current grades and recent PSSA scores, and input from the parents and Student's teachers; she also administered the Stanford-Binet Intelligence Scales – Fifth Edition (SB5), the Kaufman Test of Educational Achievement – Second Edition (KTEA-II), and had Student and two teachers completed the BASC-2 and had the parents and two teachers complete the BRIEF. Student described difficulties with peer relationships to the District's school psychologist, and they also discussed Student's methods of handling conflict. (N.T. 251-59; S 1)
 27. The District's school psychologist reported Student's full scale IQ on the SB5 as low average, with relative weaknesses demonstrated in the area of quantitative reasoning. She did not find a significant discrepancy between Student's verbal and nonverbal ability as did the parent's private psychologist. (N.T. 263-65; S 1)
 28. On the KTEA-II, Student demonstrated below average scores on the reading composite, including reading comprehension, with a particular weakness in decoding. Student scored in the below average range on the math composite and in the average range on the written language composite. (N.T. 265-67; S 1)
 29. In the areas of emotion and behavior, the BASC-2 revealed Student's self-reported clinically significant score with respect to interpersonal relations as well as at-risk scores in relations with teachers and parents, attitude toward school, and anger control. The parents reported at-risk scores in social skills and activities of daily living. (N.T. 268-69; S 1)

30. The two teachers who completed rating scales for the BASC-2 noted numerous areas where scores fell within the at-risk or clinically significant range. The District's school psychologist summarized the first teacher's ratings as suggesting significant externalizing problems, particularly in aggressive behavior and hyperactive and impulsive behavior; significant internalizing problems with tendencies toward depressive characteristics and difficulty with worrying behavior and somatic complaints; and significant characteristics of withdrawal reflected in the behavioral symptom index in the clinically significant range as well as at-risk scores in all of the skills on the adaptive skills composite. This teacher also identified executive functioning weaknesses and negative emotionality. The other teacher reported clinically significant scores in the areas of social skills and study skills, and a number of at-risk scores which, among other things, suggested inappropriate socialization and withdrawal tendencies. (N.T. 269-71; S 1)
31. The BRIEF inventory completed by the parents and two teachers revealed weaknesses in several areas of executive functioning. The teachers reported concerns with managing behavior and emotions, adjusting to changes in routines, initiating problem solving, sustaining working memory, planning and organizing problem-solving approaches, shifting from situation to situation, and maintaining emotional control. The parents' report did not reflect concerns with executive functioning, (N.T. 270-71; S 1)
32. In the February 2010 RR, Student's 10th grade English teacher explained that Student usually did not want to participate in class but was a willing reader. The World History teacher reported that Student displayed strong academic skills and that difficulties arose when Student was bothered by issues unrelated to the class. Student's Geometry teacher believed that Student's greatest strength was completing computations but that Student demonstrated a lack of motivation in completing assignments and doing well in the class. The photography instructor noted that Student could be emotionally distraught, would use emotional distress "as an escape route from academic life that [Student] finds challenging," (SD 1 at 4), and that poor attendance impacted Student's grades. Students' health and physical education teachers reported Student's lack of motivation to complete work, missed classes, and withdrawal and negativity. (S 1)
33. Student's tenth grade guidance counselor provided a great deal of information about Student for the RR. She noted Student's intense emotions which resulted in an inability to carry on a discussion or accept responsibility for behavior. The guidance counselor also described in detail Student's difficulties with peers and particularly in "recognizing boundaries and nuances in relationships." (S 1 at 6) She further explained that Student was "unable to understand how [Student's] actions can dictate reactions," while also blaming the school when consequences were imposed. (S 1)

34. The February 2010 RR summarized the teacher's recommendations for Student to include behavioral support, guidance counseling, small group instruction, coping skills training, social skills training, decision making training, and academic support and interventions in reading comprehension and written expression. Additionally, suggestions were made for a systematic program for phonics and decoding strategies, including oral reading fluency; strategies for improving Student's math computation skills; school counseling; strategies for task and assignment completion; strategies for improving Student's emotional control; and a functional behavior assessment for use in developing a positive behavioral support plan. (S 1)
35. The District psychologist agreed that Student exhibited some characteristics of a nonverbal learning disability but did not conclusively determine that diagnosis was established. She found that Student met the criteria for the disability category of emotional disturbance, and opined that the variability in Student's performance in school was due to Student's emotional disturbance. Although the District school psychologist did find a severe discrepancy in Student's ability and achievement in reading comprehension and decoding fluency, she determined that Student was making appropriate progress in those areas based on state standards which precluded a learning disability in reading. This witness did suggest that Student exhibited needs in developing and building relationships as well as in executive functioning which could be addressed through specially designed instruction. (N.T. 275-284; S 1)

DISCUSSION AND CONCLUSIONS OF LAW

I. Legal Standards

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 in this case. 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.⁴

⁴ 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, and the testimony overall was essentially consistent with the testimony of other witnesses, except as specifically noted in this decision. It was very apparent that the witnesses who know and have worked with Student genuinely care about Student and Student's educational success and emotional well-being.

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).

II. Determination of the Issues related to FAPE

The parents challenged the provision of FAPE to Student for the two-year period prior to the filing of the due process complaint (i.e., December 15, 2007 forward) on two bases: the failure to program for Student’s emotional disturbance and the failure to address Student’s specific learning disabilities. Student requested compensatory education to remedy these deficits, and in their complaint and closing argument, the parents appeared to seek full days of compensatory education. (Due Process Complaint, p. 3; N.T. 422) Student’s needs related to emotional disturbance will be addressed first.

The District’s first ER in 2004 identified a number of areas of concern with respect to Student’s emotional disturbance, specifically attention, depression, peer interactions, and adaptability, as well as emotional control. (Finding of Fact (FF) 6) The 2007 RR which also predates the relevant time period similarly identified emotional needs in several areas, including improvement in self-advocacy skills, relationships with teachers and peers, and self-confidence. (FF 10) The IEP implemented during the 2007-08 school year did include one goal to address Student’s emotional needs in the area of increasing the initiation of self-advocacy skills across all areas. (FF 13) There were no program modifications or specially designed instruction which would indicate how Student would be expected to demonstrate an increase in self-advocacy skills, nor was there any provision for guidance or other counseling services to address relationships with peers and teachers. (FF 13, 14) It is therefore somewhat surprising that despite some variability in Student’s performance over the 2007-08 school year, Student achieved passing grades in all subjects by the time of the May 2008 IEP meeting, suggesting that Student’s emotional disturbance was not interfering with Student’s

education and were, perhaps, not as significant as at the time of the 2004 ER. Overall, Student's emotional needs for the 2007-08 school year appear to have been appropriately addressed.

The 2008-09 school year, however, was much less successful for Student. The IEP implemented for that school year contained one goal related to Student's academic performance. (FF 16) As in the prior year, there were no goals to address Student's emotional needs. (FF 16) One addition to this IEP was the listing of the guidance counselor as a support for school personnel (P 4 at 11), and the guidance counselor did work on social skills with Student on a few occasions. (FF 17) Nevertheless, Student's educational performance over that school year was extremely poor, as Student was failing several final exams and achieving several final grades of D, and arriving to school tardy on 36 occasions. (FF 17) Indeed, by the time of the April 2009 IEP meeting, Student's teachers were reporting variability in completing assignments, "marginal effort" on Student's part, and a "negative attitude." (FF 19; P 5 at 5) The inescapable conclusion is that Student's emotional disturbance, well known to the District and the basis for Student's eligibility for special education, was significantly impacting Student's education during the 2008-09 school year.

For the following school year (2009-10), the IEP which was implemented similarly contained no goals, program modifications, or SDI related to Student's emotional needs. (FF 19) The record as a whole demonstrates that Student continued to have difficulties with peers, and the guidance counselor did meet with Student that school year on a number of occasions to work on peer relationships and social skills. (FF 20, 21) Student was in a new setting at the high school, was demonstrating very poor academic performance (FF 22) and, unfortunately, the guidance counselor's well-intentioned efforts were, quite simply, too late for Student. One need only review the comprehensive and detailed evaluation report issued by the District in February 2010 to appreciate the significant and longstanding emotional needs exhibited by Student during the 2009-10 school year, and this hearing officer concludes that those needs were present and evident well before the February 2010 RR encompassing both the 2008-09 and 2009-10 school years. In other words, I find it implausible that the District would not have reason to recognize Student's emotional needs during the 2008-09 and 2009-10 school years and to have taken steps to address them appropriately through individualized emotional support services provided on a regular basis, rather than through sporadic opportunities to work on social skills. The provision of emotional support to Student during those school years was not reasonably calculated to address those needs meaningfully and, accordingly, this hearing officer finds that the District's failure to do so denied FAPE to during the 2008-09 and 2009-10 school years.

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 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.*⁵ Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This hearing officer finds it reasonable to conclude that Student should have been provided with a minimum of 30 minutes per week of counseling and emotional support for the 2008-09 and 2009-10 school years to address Student's need to improve emotional control as well as social skills training to include development and maintenance of positive peer relationships. While ordinarily the District would be given credit for the social skills and counseling which did occur during those school years (FF 17, 20), the record does not establish with any certainty when or how much of those services were provided. Accordingly, I will not take any deduction from the award for the provision of those or similar services during 2008-09 and 2009-10. Additionally, with respect to executive functioning, there appears to be agreement between the parents' and District's psychologists that Student has exhibited weaknesses in these areas. (FF 25, 31, 33, 35) I find that the District did address many of these needs through the program modifications and specially designed instruction contained in Student's IEPs,⁶ and that any failure to further remedy these deficits should have been accomplished through Student's emotional support programming, for which compensatory education will be awarded. Thus, this hearing officer determines that no further compensatory education is warranted for executive functioning weaknesses.

With respect to whether Student was provided an appropriate educational program by reason of the failure to address specific learning disabilities, the record demonstrates that Student consistently demonstrated a significant weakness in reading decoding since April 2004. (FF 4, 11, 15, 18, 23, 25, 28) In the 2007 RR, Student's weakness in reading decoding and phonics skills were again noted and Student's Literacy Arts teacher suggested direct instruction in decoding and encoding. (FF 11) Nevertheless, decoding was not addressed during the 2007-08 school year and, by May 2008, Student's weakness in that area had begun to impact Student's reading comprehension. (FF 15). Setting aside for the moment the question of whether Student exhibits any specific learning disabilities, and given that the District was aware of Student's significant decoding needs since long before December 15, 2007 (the start of the relevant time period), I conclude that the District should have addressed Student's reading decoding needs through direct,

⁵ 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. I conclude that the *M.C.* standard is more appropriate for determining the amount of compensation education owed to Student in this case.

⁶ For example, the private psychologist emphasized Student's difficulty with working memory and attention (FF 25), and made recommendations to the IEP team such as using short and simple oral directions with paraphrasing by Student (P 8 pp. 19-20). The May 2007 IEP included simplified directions as one form of SDI (FF 13).

systematic, specially designed instruction as of that date through the end of the 2007-08 school year, and that it denied FAPE to Student in failing to do so.

The provision of the Wilson Reading Program during the 2008-09 school year, in which Student received 45 minutes of instruction every day and completed 11 of 12 books (FF 18), was clearly appropriate for Student. Indeed, the parents did not contend that this program was not meaningfully calculated to address Student's decoding needs. It merits mention, however, that the parents did present expert testimony regarding the fidelity of the Wilson Reading Program provided to Student during the 2008-09 school year which conflicted to some degree with the testimony of a District witness on what is required to demonstrate mastery. (*Compare* N.T. 164-66 with N.T. 365-68, 373-74) The parents' expert was highly credible and demonstrated a thorough knowledge and understanding of Orton-Gillingham approaches including the Wilson Reading Program. The District witness who described the actual reading program provided to Student was also convincing. I do not find that either witness' testimony on this subject was not credible, and instead conclude that they each offered differing opinions on what level of performance an instructor should require of a student before moving on to the next step or book. The circumstances under which each of these witnesses has had training and experience in implementing the Wilson Reading Program necessarily impacts their respective opinions but both are in apparent agreement that the program itself was appropriate to address Student's decoding needs. I do not find their seemingly inconsistent opinions on how to judge mastery renders the reading program provided during 2008-09 inappropriate for Student.

Both the parents' independent psychologist and the District's school psychologist agree that Student continues to demonstrate a need for explicit instruction to address reading decoding needs. The record also establishes that Student did not complete the Wilson Reading Program and that no direct, specially designed reading decoding instruction has been provided during the 2009-10 school year. I have found this significant weakness should have been addressed at least by December of the 2007-08 school year, and, while there was evidence presented that the District reasonably believed Student no longer required reading decoding instruction to finish the program in tenth grade (N.T. 367-69), there was also preponderant evidence that decoding remained a weakness for Student. (N.T. 377; FF 19, 22, 28) On balance, I conclude Student's decoding weakness should also have been addressed during the 2009-10 school year,⁷ until Student completed the Wilson Reading Program and no longer demonstrated a need for specially designed instruction in this area.

Based upon this record, I find that Student is entitled to compensatory education for the denial of FAPE with respect to Student's reading decoding and comprehension needs in the amount of 45 minutes per day for every day that Student attended school from December 15, 2007 to the end of the 2007-08 school year, as well as for the time

⁷ The efforts by Student's learning support teacher to provide additional supports, while well-intentioned and certainly appropriate, were largely unsuccessful (FF 20) and, thus, cannot substitute for direct, specially designed instruction in Student's areas of need.

which Student should have been provided with the remainder of the Wilson Reading Program during the 2009-10 school year. Calculation of the 2009-10 school year portion of the compensatory education award is as follows. Student completed 11 books in the program during 2008-09 with 45 minutes of instruction per day. Dividing 180 school days by 11 books equals 16.4 days per book. To complete book 12, I estimate that Student would require 12.3 hours (45 minutes per day for 16.4 days) and Student shall be awarded additional compensatory education of that amount.

The parents also presented evidence that the District failed to address Student's math needs. As with reading, the private psychologist and the District's school psychologist appear to agree that Student demonstrates weaknesses in math computation and math fluency which, particularly at Student's grade level, require specially designed instruction. (FF 25, 34) As before, I conclude that the District knew or should have known of Student's continuing difficulty with these math areas at least since the spring of 2007, and Student's ongoing struggles in math classes during the 2007-08, 2008-09, and 2009-10 school years serve to reinforce this conclusion (FF 13, 17, 22). Accordingly, I find Student was denied FAPE with respect to math computation and math fluency from the time period of December 15, 2007 forward. Although there was little evidence suggesting the amount of time required to address Student's math needs, compensatory education to remedy this deprivation is calculated by considering Student's coursework during those school years and estimating that 15 minutes per week is a reasonable amount of time to have provided support to address Student's math weaknesses for the relevant time period.

Lastly with respect to the District's provision of FAPE to Student, this hearing officer finds it unnecessary to determine whether Student has a nonverbal learning disability. The parents' expert opined that Student presented a cluster of characteristics suggesting a nonverbal learning disability, including math weaknesses, social skills deficits, anxiety, difficulty with written expression and reading comprehension, as well as a discrepancy between verbal and nonverbal subtests on an IQ test. (NT 167-68, 182-84) By contrast, the District's school psychologist did not find a significant gap between Student's verbal and nonverbal abilities, but did opine that Student exhibited several characteristics of that disability category including weaknesses in math calculation and arithmetic skills, relatively strong encoding (spelling) skills, poor reading comprehension, and socialization issues. (N.T. 271-75) As explained above, Student's educational and emotional needs are well documented and well known to the parties, and the opinions of the parties' experts on those needs are more similar than conflicting. Regardless of how Student's weaknesses are characterized, both the parents' IEE and the District's 2010 RR provide sufficient information to guide the IEP team in developing an appropriate program for Student. Accordingly, this hearing officer declines to determine whether Student has a nonverbal learning disability.

III. Determination of the IEE issue

The final issue for resolution is whether the parents are entitled to reimbursement for the IEE obtained in January 2010. 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, it appears that they sought and obtained an independent evaluation on their own, which they as concerned parents are certainly entitled to do. The January 2010 IEE was performed before the District's February 2010 re-evaluation and, hence, there could not have been disagreement with that report. Of course, the IEE must be considered by the IEP team as provided by 34 C.F.R. § 300.502(c), and in fact it was referenced in some detail in the District's February 2010 report. Nevertheless, in order for an IEE to be obtained at public expense, the law requires compliance with the regulations. Accordingly, this hearing officer concludes the parents have not established a right to reimbursement for the January 2010 IEE.

CONCLUSION

The parents' claim for compensatory education for denial of FAPE to Student will be granted for the District's failure to provide appropriate programming to address Students' needs in reading, math, and emotional support. The parents' claim for reimbursement for the IEE will be denied.

The IEP team will be directed to meet and consider the District's February 2010 evaluation as well as the January 2010 IEE and to develop an appropriate program for Student which addresses all of Student's needs.

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. Convene Student's IEP team within 15 days of the date of this decision to consider the District's February 2010 evaluation and the January 2010 IEE, and to develop an IEP which meets Student's identified needs in accordance with those reports and with this decision.
2. Provide compensatory education to Student as follows:
 - a. 30 minutes per week of counseling and emotional support services for the 2008-09 school year, as well as for the 2009-10 school year until such time as an appropriate IEP is implemented which includes these services;
 - b. 12.3 hours plus 45 minutes per day of specially designed reading instruction for every day that Student attended school from December 15, 2007 to the end of the 2007-08 school year; and
 - c. 15 minutes per week of specially designed instruction in and reinforcement of math computation and math fluency skills from the time period of December 15, 2007 until such time as an appropriate IEP is implemented which includes these services.
3. The parents' claim for reimbursement for the January 2010 IEE is denied.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Date of decision: March 24, 2010