

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

**PENNSYLVANIA**  
**SPECIAL EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING

Name of Child: K.B.  
ODR #00675/09-10 AS

Date of Birth:  
[redacted]

Dates of Hearing:  
May 10, 2010  
July 2, 2010  
August 17, 2010  
August 30, 2010  
August 31, 2010  
October 11, 2010

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Downingtown Area School District  
122 Wallace Avenue  
Downingtown, Pennsylvania 19335

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:  
Michael Connolly, Esquire  
188 North Main Street  
Doylestown, Pennsylvania 18901

Anne Hendricks, Esquire  
1402 Masons Mill Business Park  
1800 Byberry Road  
Huntingdon Valley, Pennsylvania 19006

November 6, 2010

November 19, 2010

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background<sup>1</sup>

Student<sup>2</sup> resides in the Downingtown Area School District (District). The Parents requested this hearing seeking compensatory education as they believe the District failed to offer a free appropriate public education (FAPE) through a failure to timely evaluate and identify Student and a failure to provide appropriate programming subsequent to a finding of eligibility. The District maintains that Student's evaluation was timely, that there was no denial of FAPE at any time, and that no compensatory education is due.

For the reasons presented below I find for the District in part and for the Parents in part.

## Issues

1. Did the District deny Student a free appropriate public education by virtue of failing to conduct an evaluation in a timely manner and thus delaying identification of Student as eligible for special education?
2. Once Student was identified as eligible for special education, did the District fail to provide an appropriate special education program including ESY services?
3. If the District denied Student a free appropriate public education through lack of timely evaluation and identification, and/or by subsequently failing to provide an appropriate special education program, is the District required to provide compensatory education to Student and if so in what kind and what amount and is the District required to reimburse the Parents for tutoring services they obtained for Student?

## Findings of Fact

1. Student is identified as an eligible student residing in the District, and attended public school in the District from kindergarten through 3<sup>rd</sup> grade. [NT 35]

## Evaluation

2. Student was adopted from [an Eastern European] orphanage and brought to the United States just prior to Student's fifth birthday. [NT 38, 174]
3. Born at a weight of 2.8 pounds, Student spent the first 21 months of life in a hospital. This may have been initially related to prematurity and low birth weight but the hospital stay was thought to have been extended because there was not enough room in the orphanages. [NT 38, 67, 125, 174]

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<sup>1</sup> The completion of the hearing was delayed by the emergency hospitalization of one of the witnesses, and the individual's subsequent surgery.

<sup>2</sup> The decision is written without further reference to the Student's name or gender to provide privacy.

4. Upon arrival in the United States, Student had received no formal education in [Student's native language] and spoke little or no English so the Parents communicated with gestures and "baby [native language]" in simple words and phrases. Impacted earwax may have interfered with hearing speech sounds when Student was in [the country of birth], but the wax was removed at the first pediatrician visit in the U.S. and a subsequent audiology examination found no hearing difficulties. [NT 44, 174-177]
5. At the Parents' request Student was seen at the Intermediate Unit about a month after arriving in the United States, but the evaluator(s) could not determine if Student needed services because Student wasn't conversant in English. [NT 42-43, 46; P-40]
6. In about the same early time frame the Parents obtained occupational therapy for Student. The therapist noted that Student seemed bright and the therapist attributed any delays to lack of experience rather than lack of ability. [NT 41-42]
7. A few months after arriving in this country, Student began attending a private preschool program and remained there for about six months until entrance into a District kindergarten in August 2006. Student continued half-days at the preschool during the kindergarten year. [NT 40-42]
8. Student received a private speech/language evaluation in June 2006 from A Total Approach and the results were inconclusive as to whether there was a genuine disorder or a foreign language issue. [NT 44-45, 790; S-12]
9. Upon Student's entry into kindergarten in August 2006 the Parents supplied the District with written information about Student's background. [NT 46-47, 49-52, 64-66; S-11, S-12, S-13, S-14, P-35, P-40]
10. Because they were concerned about possible misuse of the information, they redacted parts of Student's history related to a reported "institutional delay". [NT 68-70, 204-205, 207]
11. Upon Student's entry into the District the Parents immediately requested speech/language and occupational therapy evaluations under the IDEIA, which the District performed. Reports issued in November 2006 concluded that Student was not eligible for either speech/language or occupational therapy services at that time. [NT 52-54; P-2, P-4]
12. Student again received a private speech/language evaluation from A Total Approach in August 2007. Again the conclusion was that it was too early to determine if there was a speech/language disability given Student's being an early English language learner. Therapy was not recommended. [NT 696-697; S-13]

13. In kindergarten and first grade Student was enrolled in regular education and received Instructional Support Team (IST) services and English as a Second Language (ESL) services. [NT 1119, 1128-1129; P-35]
14. In ESL Student learned listening, speaking, reading and writing skills, the progression by which individuals acquire language. [NT 936-937]
15. Student received IST services until the winter holiday break in second grade, just after the first IEP was in place. [1077]
16. The District continues IST as long as a child continues to make progress. [NT 1060-1063]
17. Student's IST teacher is working toward certification in special education and holds a master's degree in reading. [1017-1021]
18. The IST teacher worked during first grade with Student for 30-45 minutes each day in a group of no more than 5 children. An additional 15-30 minutes was spent with an IST instructional aide for a total of 45-60 minutes of IST daily. [NT 1032-1034]
19. Between the IST and the ESL teachers, Student received between 1¼ and 1½ hours of individual or small group reading instruction in first grade. [NT 1059-1060]
20. The Parents had been concerned about Student's not meeting certain kindergarten Dynamic Indicators of Basic Early Learning Skills [DIBELS] benchmarks in the areas of initial sound fluency, letter naming fluency, phoneme segmentation fluency, and nonsense word fluency in September 2006 [10 months post arrival in this country] and in January 2007 [14 months post arrival]. [NT 54-55, 59-67, 72-73, 75-77; P-35, P-36, P-40]
21. The Parents were also concerned about Student's beginning of the year DIBELS scores in first grade, when Student's scores as compared to benchmarks were 17/24 in nonsense word fluency, 13/35 in phoneme segmentation fluency and 36/37 in letter naming fluency. [P-36]
22. Upon administration of the DIBELS<sup>3</sup> in first grade the IST teacher was pleased with Student's progress in phonemes and nonsense word fluency. Oral reading fluency suffered from the interference of the need for vocabulary acquisition, but Student still made commensurate progress with same-age peers in oral reading fluency with a midyear 12/20 and an end of year 24/40.<sup>4</sup> The Parents interpreted

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<sup>3</sup> The normative population for Benchmarks on the DIBELS is not a population of English language learners.

<sup>4</sup> Progress is commensurate because native English speakers are expected to double their score from a 20 to a 40; Student doubled the score from a 12 to a 24.

- Student's DIBELS scores in first grade as an indication that Student had "flunked" first grade. [NT 87, 254-255, 1036-1038, 1046-1048; S-4]
23. The Parents' expert<sup>5</sup> testified that oral reading fluency is one area of reading not typically responsive to interventions and that the gap frequently remains. [NT 438-439]
  24. In first grade Student made good progress in word reading. Typical native English speaking children start out first grade knowing 35 words on a 100-word list, progress to 50 words by the middle of the year and master all 100 words by the end of the year. In the beginning of first grade Student, as an English language learner, knew only 4 words from the 100-word list. However, by February Student knew 53 words, by the end of March Student knew 65 words, by September of second grade Student knew 85 words, and by October Student had mastered all 100 words. [NT 264, 266, 269, 294-296; S-6]
  25. Although reading was difficult for Student in first grade and Student struggled with reading a sentence, by the end of the year Student was more confidently reading stories and writing sentences. [NT 277-278]
  26. As spelling was difficult for Student in first grade the teacher devised various interventions including posting spelling words around the room. [NT 278-279]
  27. Student was very particular about handwriting but showed progress throughout the first grade year. [NT 278]
  28. Student's IST teacher and first grade teacher collaborated closely and reinforced one another's instruction with Student. [NT 281-283]
  29. The first grade teacher was pleased with Student's progress and at no time during the major part of the school year thought that Student should be evaluated to determine if Student had a disability the remediation of which required specially designed instruction. [NT 287, 306]
  30. Student did well behaviorally and socially in first grade. [NT 1053-1054]
  31. Beginning in August 2008 and continuing through second grade, the Parents purchased twice-weekly one-hour private tutoring sessions for Student from a first grade teacher at the elementary school. [NT 91-93]
  32. In second grade Student received reading support from the IST teacher 45-60 minutes per day and worked on reading in ESL for 30 minutes a day for a total of 75-90 minutes per day. [NT 1073]

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<sup>5</sup> "The Parent's expert" referenced here and throughout is the second private evaluator, the individual with professional and personal experience in late-age foreign adoptions.

33. Other than in oral reading fluency Student continued to make progress in reading words and decoding, learning the Second 100 Words, and in reading comprehension. [NT 1080-1081]
34. At the end of first grade the teacher discussed an evaluation with the Parents and at the beginning of second grade the District issued a PTE which the Parents approved. Student was evaluated to determine eligibility for special education services. The Evaluation Report (ER) timely issued on November 26, 2008 found Student eligible for special education under the classification of Learning Disabled. [P-7, P-10]
35. Although they had agreed to the testing, the Parents questioned whether Student's English language abilities impacted the IQ score, and were concerned that Student would be misdiagnosed or mislabeled with a learning disability. [NT 98, 185-186; S-25, S-41]
36. The American Speech and Hearing Association [ASHA] recommends waiting two or three years before evaluating an English language learner for special education. The Parents' expert agreed with this, as testing earlier could result in an invalid assessment of cognitive and academic ability. [NT 407-411]
37. The November 2008 evaluation noted that Student tested in the Low Average Range on the Wechsler Intelligence Scale for Children –Fourth Edition, an instrument that yields a composite score that includes assessments on both verbal and non-verbal skills, but tested in the Superior Range on the Comprehensive Test of Nonverbal Intelligence which was not affected by Student's English language ability level. [P-10]
38. In addition to academic weaknesses, the District's evaluation found weaknesses in organization, attention and focus. [P-10]

#### November 2008-November 2009

39. Pursuant to the development of an initial IEP over two sessions in November 2008, Student began receiving special education services in early December 2008 after parental approval. The Parents did not want Student's attention and organization issues included in the Needs portion of the first IEP. [NT 473, 516; P-11]
40. Shortly after Student began receiving special education services the Parents shared concerns about their perceptions of Student's lack of progress and continued to express their concerns during the remainder of the 2008-2009 school year. [NT 118-119; P-20, P-40]
41. The Parents also however expressed not being sure that Student had a learning disability and were concerned that Student would be misdiagnosed or mislabeled

- with a learning disability because of English language acquisition issues. [NT 185-186, 562, 565; S-25, S-41]
42. After Student began receiving special education services Student was in the regular education classroom for all instruction except for language arts and ESL. [NT 832]
  43. Language arts instruction was delivered in the special education setting for 2¼ hours daily. [NT 461]
  44. The special education teacher coordinated with the regular education and ESL teachers. [NT 519]
  45. In the learning support classroom there were 11 or 12 students including Student, the teacher, and an aide; two of the students had a 1:1 aide. [NT 462]
  46. The Parents' expert testified that as long as a reading program is research based what matters is not which program is used but the intensity and frequency with which it is used. [NT 466]
  47. Student received 1:1 instruction in reading from the learning support teacher for 15 minutes each day, 15 minutes on the computer daily and instruction in small groupings for 45 minutes each day for a total of 75 minutes of reading a day. Reading was delivered in 15-minute segments using Project Read, Harcourt Brace, Reading Naturally, Success Maker, and Explode the Code. [NT 525-528]
  48. Student's reading instruction included multi-sensory materials. [NT 543-545]
  49. Student received written expression [grammar and spelling] instruction with Harcourt Brace, the Evan Moore Spelling Program and Building Spelling Skills. [NT 486-487, 529-531]
  50. In second grade Student made progress in reading including reading fluency, writing and spelling with some variability that was not unexpected. [NT 534-541, 553]
  51. On the DIBELS administered in second grade, Student again progressed on oral reading fluency commensurate<sup>6</sup> with same-age peers, doubling the score from the beginning to the end of the year. Scores related to benchmarks were 24/44 at the beginning of the year, 30/68 at mid-year, and 48/90 at the end of the year. [NT 503-504; P-36]
  52. Student's tendency to avoid writing tasks diminished in second grade. [NT 538]

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<sup>6</sup> See footnote number 4 above.

53. The learning support teacher saw improvement during second grade in Student's English including expanded vocabulary and the ability to retell stories. [NT 560-561]
54. Student was offered ESY in the form of 12 hours for summer 2009, or partial payment of a program preferred by the Parents. The Parents accepted the offer of partial payment. [NT 549; S-29, S-30, S-35]
55. Prior to the start of the 2009-2010 [second grade] school year the District offered and the Parents accepted the opportunity for an independent neuropsychological evaluation at District expense with an evaluator chosen by the Parents before revisions were made in Student's program in the upcoming November IEP revision. [NT 142-144; P-40]
56. The independent neuropsychologist conducted her evaluation in September and October 2009 and submitted the report in November 2009. Salient findings included weaknesses in reading, writing, spelling and speech/language and difficulties in organization, focus and attention, along with some emotional issues related to anxiety, perfectionism and self-esteem. [P-24]

#### November 2009-June 2010

57. On November 9, 2009 the IEP team met to consider the independent neuropsychological evaluation and conduct the annual IEP revision. The IEP, issued on November 15, 2009 incorporated many of the recommendations from the IEE. The IEP also included speech/language goals pursuant to a speech language evaluation conducted in April 2009. The Parents approved the IEP. [NT 700-708, 811-814; S-37, S-38, P-26]
58. The Parents were concerned that in third grade Student was not reading on grade level. They wanted Student's IEP goals to reflect that Student would be reading on grade level and functioning like a third grader when Student was in third grade. [NT 101, 150, 153-155, 483]
59. In third grade Student received 1:1 ESL three days per week for 30 minutes each session, reduced from the second grade daily frequency at the ESL teacher's recommendation. [NT 969]
60. In third grade Student again received language arts instruction in the learning support setting in which there were 10 students, a teacher and two aides. [NT 588]
61. Student was in the learning support setting for 140 minutes daily receiving whole group, small group and 1:1 instruction. Student received 1:1 direct reading instruction from the learning support teacher for 25-30 minutes daily. [NT 587, 590, 601-603, 620-621]



62. Student received reading instruction in phonics, vocabulary, comprehension and spelling using Project Read and Harcourt Brace, and worked on a computer program, Reading Naturally, to improve reading fluency. Reading instruction was multisensory, as was writing instruction. [NT 590, 593-597, 601, 620-621, 665-669, 693-695; S-34]
63. The learning support teacher put a visual reminder on Student's desk regarding things to take, but overall was not concerned about Student's organizational skills in the school setting. [NT 711-712]
64. Student had no problem with the mechanics of handwriting in third grade. [NT 896]
65. The learning support teacher coordinated with the ESL teacher and the third grade regular education teacher. [NT 713-715]
66. In third grade social studies and science the regular education teacher worked 1:1 with Student, chunked material, made note cards and flash cards and sent them home and provided an extra book for home. [NT 902-905]
67. The third grade regular education teacher used multisensory instruction with Student as well as other techniques in accord with the IEP SDIs. [NT 905-907; S-34, S-38]
68. Student made progress in all areas of reading including reading fluency and in writing including spelling during the third grade year. [NT 671, 678-682, 686-687, 690-691, 696; P-38, P-47]
69. Student was eligible for and was offered an ESY program for summer 2010. The program ran from July 6<sup>th</sup> to August 5<sup>th</sup>, and could be accessed up to four days a week. Based on progress monitoring charts Student was offered an ESY package including goals. Student did not attend ESY in the District in 2010. [NT 647-648, 726-728; S-42, P-29]

#### Influence of Late Age Foreign Adoption on Acquisition of Literacy Skills

70. Less than a year after the district-funded independent neuropsychological evaluation the Parents had Student privately evaluated again. The evaluator, who has personal and professional experience in post-institutionalized late-age adoption from [the same Eastern European country where Student was born], raised the question of the impact of Student's background on educational progress. [NT 315-316, 345]
71. The Parents' expert, who performed the second independent evaluation of Student, testified that "it would be inappropriate to evaluate how [Student is]

- doing educationally without looking at [Student's] background" and relevant history. [NT 356-357]
72. The Parents' expert is aware of studies concluding that it takes children 7 to 10 years to develop academic language, as opposed to basic communication, and testified that this time estimate for developing academic language is a "good guideline". [NT 328-330]
73. The District's ESL teacher's testimony was roughly congruent with this estimate, putting social language at about 2 years and academic language at 5 to 10 years. [NT 941]
74. The Parents' expert testified that children such as Student who are late adoptees take longer than children who are adopted earlier to acquire the [second] language. She testified that she agrees with ASHA's stance that a child needs two to three years of English before validly taking an English language IQ test to assist in an eligibility determination, and notes that additionally performance on achievement testing could also be invalid. [NT 350, 407-411]
75. The Parents' expert testified that she would not expect someone who is learning the English language to acquire reading skills at the same rate as someone who is familiar with the English language and one would "expect delays across all language-based academic tasks initially". [NT 339-340]
76. The Parents' expert testified that she would not expect Student's oral reading skills to develop at the same rate as Student's peers who were not adopted from [the Eastern European country of Student's birth]. [NT 339-340; P-41]
77. The ESL teacher's testimony is congruent with that of the private evaluator – that Student would not be expected to make the same progress in reading as a native English speaker due to lack of previous exposure to the English language. [NT 960]
78. The Parent's expert concluded that Student had developmental dyslexia, a specific learning disability in reading that also can interfere with sound recognition or speech-sound sequencing. [NT 380-382]
79. The Parents' expert opined that Student requires from 45 to 100 minutes per day of reading instruction. [NT 384-385]

#### Focus and Attention

80. Developmental dyslexia also encompasses difficulties in the area of executive functioning, organization for example. [NT 381]

81. The Parents' expert did not diagnose Student with a separate disability in the area of attention. [NT 397-399]
82. Teachers working with Student found some difficulty in the area of focus and attention as did the Parents during homework completion. [NT 54-55, 59-63, 252-254, 470-472, 604-607; P-40]
83. The District's initial evaluation found that Student had a deficit in attention, organization and focus. [P-10]
84. The independent evaluator also found deficits in attention, organization and focus. [P-24]
85. Although the Parents' expert did not diagnose Student with an Attention Deficit Disorder, she did note that Student's developmental dyslexia and post-institutionalization status conferred a layer of difficulty in self-regulation. [NT 351-355, 381-382; P-41]
86. Neither Student's November 2008 IEP [and its May 2009 revision] nor Student's November 2009 IEP contained goals and short term objectives related to attention and focus. [P-10, P-22, P-26]
87. The Parents' expert testified that Student's early history as an institutionalized child from [the Eastern European country] would affect Student's physical self-regulation, emotional regulation, ability to attend, maturity and social functioning. [NT 351-354, 366, 369]
88. The Parents' expert testified that Student was "pretty dysregulated" and that this manifested in rocking, flapping, facial grimacing and elevated motor activity and that these behaviors increase as tasks become more challenging. [NT 354-355]

#### Speech/Language Re-Evaluation and Services

89. Student had received two private speech/language evaluations from A Total Approach [June 2006 and August 2007], a speech/language evaluation by the District at parental request in November 2006, and a speech/language screening by the District in February of first grade. None of these private or District evaluations resulted in the finding that Student required speech/language services. [S-12, S-13, S-15, P-2]
90. In its November 2008 multidisciplinary evaluation the District did not include an updated assessment of Student's speech/language needs. [P-10]
91. After reviewing the November 2008 ER, the Parents requested additional speech/language testing which was completed on April 30, 2009 with the finding that Student was eligible for speech/language services. On May 18, 2009 the IEP

was revised adding goals and SDI pursuant to the updated ER which included speech/language assessment. The Parents approved this IEP. [NT 506, 552, 757, 809-810; S-33, S-34, S-35; P-18, P-22]

92. The District's speech/language assessment noted needs in the areas of narrative skills, relational vocabulary, oral vocabulary, language organization and production of the voiceless /th/ and /r/ sounds. The May 2009 IEP revision included a goal for the production of the voiceless /th/ sound as this was a good starting place, and provided for 30 minutes of speech/language therapy weekly. [P-22]
93. A goal was not included for the /r/ sound because the speech/language pathologist does not work with second graders on the /r/ sound as it is not developmentally appropriate. [NT 807-808; S-34]
94. Student met the goal for the /th/ sound in December 2009. Additional goals were addressed as appropriate in logical sequence. [NT 808, 811-814; S-40]
95. Student received 2:1 speech/language therapy from May 2009 until November 2009 and then received 1:1 therapy through to the end of the third grade school year. [NT 775]
96. Student made progress in speech/language. [NT 814-818; S-18, S-44, S-50]

#### Discussion and Conclusions of Law

Our United States Supreme Court has held that in an administrative hearing brought under the IDEIA the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). Thus, the party bearing the burden of persuasion, in this case the Parents, must prove its case by a preponderance of the evidence. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, the burden of persuasion under Schaffer only comes into play when neither party introduces a preponderance of the evidence. In that event, evidence is evenly balanced, or in "equipoise" as the Court put it, and the party having the burden of persuasion failed to tip the evidence scale in its favor and thus cannot prevail. The evidence was not in equipoise on any of the issues under consideration. In large part the Parents failed to produce a preponderance of evidence to support their position on the issues and therefore the District in large part prevailed, however on two discrete issues the Parents did prevail having met their burden of persuasion.

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v.

Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003). During the course of this matter many witnesses appeared, and all brought a facet to the total picture. All witnesses were deemed to be testifying honestly and with candor. Specific credibility references will be made below as appropriate to the discussion.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The IDEIA sets forth the responsibilities (commonly referenced as “child find” responsibilities) borne by school districts for identifying which children residing in its boundaries are in need of special education and related services such that “[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated...” 20 U.S.C. §1412(a)(3). A district could violate its child find obligations and thus deny a child a free, appropriate public education (FAPE) by unreasonably extending pre-evaluation interventions rather than evaluating the child as the Parents believe was the case in this matter. Montgomery County Intermediate Unit, LRP 109, 62289 (SEA PA 2009). The initial issue then is when the District should reasonably have suspected that Student may have had an actual disability, rather than an academic delay secondary to being in the process of second language acquisition, and therefore conducted an evaluation. Referencing Interboro School District, 109 LRP 40946 (SEA PA 2007), in their closing argument, the Parents pose the question, “What did the District know and when did it know it?”

What the District knew from the outset is a central distinguishing fact in this case: Student *arrived in the United States at almost five years of age, speaking no English* and having been raised in an orphanage in [an Eastern European country]. {FF 2}

The IDEIA’s implementing regulations at 34 CFR §300.309(a)(3)(iv-vi) provide that certain factors must be ruled out before a child can be classified as having a specific learning disability, and three of these factors - cultural factors, environmental or economic disadvantage, and limited English proficiency - pertained to Student prior to entry into public school. Although each of these factors was mitigated over time through the diligence and devotion of Student’s parents, there can be no denying, and this hearing officer holds that there is no discrimination in acknowledging, that for the first five formative years Student was not a part of the culture of the United States or the culture of American or [Eastern European] single-family living, suffered economic disadvantage with limited access to enrichment and environmental stimulation relative to suburban American peers and likely relative to non-institutionalized [Eastern European] children, and had no English listening, speaking or reading proficiency. {FF 4} Although as the Parents point out Student’s birth and health history contained risk factors for learning problems, {FF 2} Student’s complete lack of exposure to spoken or written English, including its phonemes, its vocabulary, its sentence structure and even its alphabet, with the overlay of acclimating to nuclear family living in a different culture, presented a clear and compelling reason for the District to take a very cautious approach to imposing a classification of learning disabled or speech/language impaired on this child. Student’s mother herself credibly conveyed her own struggle between rightfully not wanting her child to be mislabeled or misdiagnosed as disabled because of acclimation and language

issues versus expecting the District to evaluate for and provide special education services quite early on.

Although at 22 PA Code §14.122(d) the Pennsylvania special education regulations note that “if screening activities have produced little or no improvement within 60 school days after initiation, the student shall be referred for evaluation” the earlier regulation at 22 PA Code §14.122(c)(5) specifically notes that a system of screening which may include early intervening services must include a determination of whether a student’s assessed difficulties are due to “a lack of instruction or limited English proficiency”. This important provision is wise and sound from both the neuropsychological and the pedagogical standpoints. Expecting a brand new English learner whose early literacy exposure was limited to the sounds of the [Eastern European] language and the [specific alphabet utilized in Student’s country of birth] alphabet to profit from early intervening services within the same 60-school-day time frame as a child who has heard and learned to recognize and pronounce the phonemes specific to English from birth, who has been exposed to English language children’s television programming and other entertainment media on a daily basis, and who has seen and been introduced to recognizing the standard English Latin-based alphabet is simply not reasonable or fair to the child. The knowledgeable and credible testimony of both the Parents’ expert who has professional and personal experience in the area of late foreign adoption {FF 70, 71, 72} and the District’s ESL teacher {FF 73} supports this reasoning, as does the American Association for Speech and Hearing. {FF 36} At various times the Parents themselves appeared to be cognizant of and rightly concerned about the potential for a false positive finding of disability. {FF 10, 35, 41} The individual who was Student’s IST teacher for kindergarten and first grade holds a Master’s Degree in reading, has held a position as a reading specialist, is working toward nearly completed certification in special education, {FF 17} and had a previous teaching position in a school setting geared toward early identification and remediation. Student’s time with this teacher was invaluable and offered exactly the special instruction Student needed without the label of special education. {FF 18, 19} This teacher testified credibly about Student’s progress under her care.

Many young children growing up in their preschool years in this country live in non-English speaking households, but nevertheless have multiple opportunities for exposure to English including through the media; this was not the case with Student for the first five years of Student’s life. A previous decision written by this hearing officer and cited by the Parents in their closing argument, East Stroudsburg Area School District, 103 LRP 20360 (SEA PA 2003)], is easily distinguishable from the instant matter and is illustrative. That was a case in which the parents wanted their child to have regular education and intensive ESL rather than special education while the district believed that the child’s struggles in school were a function of a disability and not her level of English ability and that she required special education. The child in that case had come to the United States *at 5 months of age* with [the student’s] *own family* and although Arabic was the primary spoken language in the home because the mother spoke little English, *the father spoke English, the child’s sibling who was two years older was being educated in English and spoke English at home with the Student on a daily basis, and the children*

*watched only English language television programming and English language movies.* Unlike Student in the instant matter, that child was exposed to English well prior to entry into Head Start, and then in Head Start and at home was using more English than Arabic which situation continued into school entry. Still, this hearing officer counseled caution regarding classification, as did the school district psychologist, because the child's intellectually deficient IQ scores and comparable academic achievement scores may have been at least in part an artifact of the child's being bi-lingual and being tested in English, although there was ample evidence to support the existence of a severe learning disability at best.

This hearing officer is perplexed by and must differ with Parent counsel's written closing argument that the District's waiting to evaluate Student was "offensive, contrary to the law and discriminatory" based on Student's country of origin and English proficiency and denied Student the same rights to FAPE as any other child in this country. Rather it is the position of this hearing officer that if a very young early learner of English were evaluated in English with only one or two years of formal public education in English under his/her belt and found to be learning disabled *that would be discriminatory* given a fair chance of finding evidence to support a disability where none existed. The suggestion that alternatively Student could/should have been tested in [Student's native language] to determine special education eligibility regarding a curriculum delivered in English presumes that there are actually accurate official [language-specific] translations of standardized cognitive and achievement tests pertinent to the educational system in the United States, and that these have been appropriately re-normed to apply to the novel population of test-takers into which Student would fall. In East Stroudsburg, because the parents ardently wanted their child to be non-exceptional and because there was a fine line between a classification of intellectual disability [MR] and learning disability, this hearing officer ordered that the child receive special education services with a re-evaluation in two years by an Arabic-speaking evaluator or with translation for the entire assessment and that the assessment should include a non-verbal IQ measure; it was determined that two years of special education learning support programming and ESL programming would be sufficient to clarify the child's classification given the facts in that case.

In their closing argument the Parents also point to *Fair Lawn (NJ) School District*, 110 LRP 57339 (OCR EDNY 2010) in support of their position that the District's waiting to evaluate Student constituted discrimination. This case is not on point for our purposes. First, that matter involved a New Jersey school district's refusing a parental request for evaluation of the child's speech sound production (articulation) not an evaluation for a language disability or for a learning disability. Second, the matter involved an investigation by the Office of Civil Rights which was conducted through selective interviews not taken under oath and not subject to cross-examination. Third, in the instant matter, the District did evaluate Student's speech/language skills promptly upon the Parent's request early in the kindergarten year and evaluated Student when the Parents signed the PTE at the beginning of second grade. {FF 11}

Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a "free appropriate public education". 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefit", a principle established by nearly 30 years of case law. 381 F.3d 194, 198 (3d Cir. 2004)(quoting 853 F.2d 171, 182-85 (3d Cir.1988)); Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996); Shore Reg'l High Sch. Bd. of Ed. v. P.S. , Polk v. Cent. Susquehanna Intermediate Unit 16, Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful educational 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). An eligible student is denied FAPE if the IEP 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 (3rd Cir. 1996); Polk.

Under the Supreme Court's interpretation of the IDEA in Rowley, and in interpretations rendered in other relevant circuit court cases, a school district is not 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". There is no requirement to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). The Eastern District Court of Pennsylvania recently noted, "Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at \*7 (E.D.Pa., July 24, 2008), citing Carlisle. The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. An IEP's 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).

That having been established, far from providing a “basic floor of opportunity” the program and placement the District offered to Student provided an excellent opportunity for meaningful educational benefit and in fact Student has derived meaningful benefit. {FF 50 51, 52, 53, 68} Even prior to the finding of eligibility, the Student received a rich educational experience that provided a deep immersion into understanding, speaking, reading and writing conversational and academic English language. {FF 13, 14, 15, 16, 17, 18, 19, 28} Intensive ESL and IST services in the context of language-rich kindergarten, first grade and second grade academic programs brought Student to the point where, tested in English with a cognitive assessment normed on same-age native English speaking peers exactly three years after arriving in the United States not understanding or speaking any English, Student could achieve an IQ score within the Low Average Range. {FF 37} This score is clearly an artifact of Student’s being an early English language learner, particularly in light of Student’s significantly higher [Superior Range] score on a non-verbal cognitive measure, and the most parsimonious interpretation is not that the lower score is a function of a cognitive, learning or speech/language disability.

The evidence clearly shows that Parents were expecting their child to have reading parity with same-age native English speaking peers very early on. For example, they were quite concerned about Student’s not meeting certain kindergarten DIBELS benchmarks in the areas of initial sound fluency, letter naming fluency, phoneme segmentation fluency, and nonsense word fluency as early as September 2006 [10 months post arrival in this country] and in January 2007 [14 months post arrival]. {FF 20, 21} The Parents considered Student as having “flunked” first grade even though the rate of approaching DIBELS benchmarks was commensurate with first grade expectations. {FF 22} The first grade regular education teacher with 20 years teaching experience testified credibly and confidently that she saw growth in reading in first grade, and also that Student made progress in math in first grade and that Student was speaking more confidently in first grade. The Parents wanted the third grade IEP to carry goals of Student’s achieving literacy skills at the level of a third grader. {FF 58} While a worthwhile target, Student’s inability to meet that target is neither a failure of the IEP nor of the Student. In fact Student did make meaningful progress toward the goals. Whether a school district has offered a free appropriate public education to a disabled student is a mixed question of law and fact. Heather S. v. State of Wisconsin, 125 F.3d 1045, 1053 (7th Cir. 1997). The Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP allows for significant learning and provides meaningful benefit as necessary to satisfy the IDEA’s FAPE standard. Ridgewood Board of Education v. N.E., 172 F.3d 238, 242 (3d Cir. 1999) [although lack of progress does not in and of itself render an IEP inappropriate. Carlisle].

The Parents contend that the District’s November 2008 evaluation was not appropriate because speech/language testing was not included. {FF 90} This hearing officer agrees. The IDEA obligates a local educational agency to conduct a “full and individual initial

evaluation ...” 20 U.S.C §1414(a)(1)(A). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ....” 20 U.S.C. §1414(b)(3)(A)(ii). Further, the child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs ...” 34 C.F.R. §300.304(c)(6). At the Parents’ request the District had conducted a speech/language assessment very early in Student’s public school career, barely a year after Student’s coming to the United States, and made a determination of ineligibility {FF 11} and provided a speech/language screening in February 2008 {FF 89}. Two years after its first speech/language evaluation, in the context of conducting a multidisciplinary evaluation the District should have included a new speech/language evaluation, the results of which were likely to be more reliable than those from the earlier testing although still subject to being viewed with extreme caution. While not reaching the conclusion that Student actually has or does not have a speech/language disorder, as this point is not in contention, given that Student was found eligible for speech/language services when the District conducted the speech/language assessment in April 2009, with services beginning in mid-May 2010, {F 91} this hearing officer finds that Student is entitled to compensatory education services in the area of speech/language from December 2008 to mid-May 2009 and this will be ordered.

Although in large part this hearing officer has found the District’s special education program and placement appropriate and the literacy program offered to Student well beyond appropriate, the IEPs do not sufficiently address the chronic difficulty Student experiences with attention and focus. {FF 82, 83, 84, 86} Whether this deficit arises from emotional immaturity post-institutionalization or from a neurodevelopmental deficit or a combination of these and other possible factors {FF 80, 85, 87, 88} it is important to address the issue. Whether or not the Parents wanted the issue addressed in the Needs section of the IEPs, {FF 39} the District was nevertheless obligated as the educational experts to address it, as attention and focus are pervasive throughout any learner’s day.

The IDEA authorizes hearing officers and courts to award “such relief as the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy only when a school district has failed to provide a student with FAPE. Lester H. v. Gilhool, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district’s failure. [*Id.*] In this case the District failed to offer Student FAPE in speech/language programming for a portion of the time Student was eligible for special education, and in the area of addressing attention and focus during the entire time of Student’s eligibility. B.C. v. Penn Manor Sch. Dist., 805 A.2d 642 (Pa. Commw. 2006), although a gifted education case, provides common sense instruction for awarding compensatory education, counseling against a rote hour-for-hour approach in favor of an award that would bring the student to the point where Student would be had FAPE been offered. Although hour for hour compensatory education fits well in this case regarding lost speech/language therapy, calculating an award for denial of FAPE in the area of addressing attention and concentration is difficult. Therefore this hearing officer has fashioned what seems to be an equitable solution, assigning an award based on a set

number of hours but tailoring the award to help bring Student to the point where Student may have been but for the denial of FAPE.

Given the District's failure to include a speech/language evaluation as part of its November 2008 evaluation while an April 2009 found eligibility for speech/language supportive services, Student lost 22 academic weeks of speech/language therapy. Compensatory speech/language therapy sessions will be ordered in the amount of 30 minutes per week for a total of 11 hours, delivered by the District or, if the District does not have personnel availability, by a private speech/language provider paid by the District at the usual and customary rate in the area for this service.

Given the District's failure to adequately address the area of attention and focus despite the Parents' reservations, this hearing officer will award equitable compensatory education in the amount of 1 hour per week for 68 weeks [40 academic weeks from December 2008-November 2009 and 28 academic weeks from December 2009-mid June 2010] for a total of 68 hours to be used to assist Student in enhancing self-regulation through learning and practicing strategies to apply across settings. The award may be used, for example, for such things as behaviorally-oriented therapy and/or biofeedback, purchase of professionally-authored computerized programs including age-appropriate game-format programs designed to shape focus and attention, participation in group skills training for children with similar attentional needs, purchase of children's literature addressing attention issues, parent training materials and/or attendance at training seminars for parents. The cost of this award may not exceed the cost to the District of one hour per week of a certified school psychologist or certified behavioral specialist consultant's salary and benefits or the average of the two if the salaries are discrepant. The District has the right to challenge the reasonableness of expenditures in terms of the content and the cost.

There was very little testimony regarding the private tutoring {FF 31} Student received for which the Parents seek reimbursement. Given that Student received an appropriate academic program both prior to and after being identified as eligible for special education there is no obligation on the District's part to reimburse the Parents for tutoring services. Likewise there was little offered to elaborate on the reasons the Parents concluded the ESY {FF 54, 69} offered to Student was inappropriate, and therefore no compensatory education or reimbursement in this area is warranted.

In testimony, Student's mother acknowledged that Student has accomplished a great deal since coming to this country and that Student's progress has been remarkable. [NT 178-179]. This hearing officer agrees. The Parents' expert made a statement during her testimony about young English language learners in an English language academic environment that resonated throughout this hearing officer's consideration of the evidence, "*So basically we're double dutying them. We're asking them to be competent in the English language which they're not, and now we're asking them to learn using as a modality the English language*". [NT 405] The independent evaluator raised concerns about Student's self-esteem and perfectionism {FF 56} although the Parents find that Student is now becoming less perfectionistic [NT 63]. While an objective conclusion

would have to be that Student has been doing remarkably well, Student's subjective self-assessment needs to be monitored and moderated by the adults around Student.

During the course of this hearing Student had been in this country under five years, yet had been able to thrive physically, to transition from living in an institution to becoming a member of a family and bonding with loving parents, to replace recognizing and producing the sounds of the native tongue with the sounds of American English, to recognize and associate sounds to letters in the English Latin-based alphabet, to read, to write, to do calculations, to make friends, to play sports - and to expend all the effort these accomplishments required while remaining in the concordant view of Student's Parents and teachers a kind and likeable child. Student's successful journey from a long-term hospitalization to an orphanage in [the Eastern European country] to full integration into an American suburb can be described in no other way than "remarkable", except perhaps "miraculous". To the Parents, to the District, but most importantly and above all to this Student should be given high praise and warm congratulations. The Parents' biggest concern is that Student is not reading on grade level [NT 37-38]; although this concern is not to be minimized, given Student's transformation into an English listener, speaker, reader and writer in less than five years much more patience with and faith in Student is warranted. Student has demonstrated a positive literacy trajectory, with no notable regression, and there is no reason to believe that this progress will not continue.

## Order

It is hereby ordered that:

1. The District did not deny Student a free appropriate public education by virtue of failing to conduct an evaluation in a timely manner.
2. As the District did not deny Student a free appropriate public education through lack of timely evaluation and identification, the District is not required to provide compensatory education to Student for any time prior to December 2008.
3. Because the District failed to conduct an appropriate evaluation in November 2008 by virtue of omitting a speech/language assessment, Student is entitled to compensatory speech/language services from December 1, 2008 through May 17, 2009, a period of 22 academic weeks. This compensatory education shall be 30 minutes per week for a total of 11 hours, delivered by the District or, if the District does not have personnel availability, by a private speech/language provider paid by the District at the usual and customary rate charged for this service in the area.
4. Because the District failed to specifically address Student's difficulties in attention and focus in its IEPs Student is entitled to 1 hour per week for 68 weeks [40 academic weeks from December 2008-November 2009 and 28 academic weeks from December 2009-mid June 2010] of compensatory education to assist in enhancing self-regulation through learning and practicing strategies to apply across settings. The award may be used, for example, for such things as behaviorally-oriented therapy and/or biofeedback, purchase of professionally-authored computerized programs including age-appropriate game-format programs designed to shape focus and attention, participation in group skills training for children with similar attentional needs, purchase of children's literature addressing attention issues, parent training materials and/or attendance at training seminars for parents. The cost of this award may not exceed the cost to the District of one hour per week of a certified school psychologist or certified behavioral specialist consultant's salary and benefits, or the average of the two if the salaries are discrepant. The District has the right to challenge the reasonableness of expenditures in terms of the content and the cost.

Any claims not specifically addressed by this decision and order are denied and dismissed.

November 19, 2010

Date

*Linda M. Valentini, Psy.D., CHO*

Linda M. Valentini, Psy.D., CHO  
PA Special Education Hearing Officer  
NAHO Certified Hearing Official