

*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

ODR No. 00751-0910AS

Child's Name: C.M.

Date of Birth: [redacted]

Dates of Hearing: 4/15/10; 6/9/10; 6/10/10

### CLOSED HEARING

#### Parties to the Hearing:

##### Parents

Parent[s]

##### School District

North Penn

401 E. Hancock St.

Lansdale, PA 19446

#### Representative:

##### Parent Attorney

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Doylestown, PA 18901

##### School District Attorney

Kyle Somers, Esquire  
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Lansdale, PA 19446

Date Record Closed:

July 14, 2010

Date of Decision:

July 28, 2010

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student received learning support services from the North Penn School District from mid-way through 2<sup>nd</sup> grade, until Student was withdrawn from the District to spend the remainder of 4<sup>th</sup> grade at the [Private School], a Private School for children with language-based learning disabilities.

Student struggled with academic and social issues since kindergarten, and received instructional support and Title I reading services in 1<sup>st</sup> grade. After the District's first evaluation in March 2007, Student was found IDEA eligible in the category of speech/language impairment and provided with speech/language services. A second District evaluation in October 2007 added learning disability as an eligibility category. Student began receiving two and then three hours of pull-out learning support services daily for reading, writing and math.

Dissatisfied with Student's limited progress in reading, Parents obtained an evaluation from an independent psychologist in April 2009 who identified a nonverbal learning disability and made suggestions for intensive, direct multi-sensory instruction in a small group, full-time learning support setting to address Student's learning needs, as well as services to address Student's social deficits. Despite an offer from the District to increase reading instruction in the learning support setting with a Wilson-based reading program, Parents continued with their plans to enroll Student in the Private School and filed a due process complaint to obtain reimbursement for the independent evaluation, tuition reimbursement, and compensatory education from February 2008.

After thorough review of the record compiled over three hearing sessions, Student will be awarded compensatory education and Parents claim for reimbursement for the costs of the independent evaluation will be granted. Parents' claim for tuition reimbursement, however, will be denied.

## **ISSUES**

1. Did the School District fail to provide Student with a free, appropriate public education at any time between February 2008 and December 2009?
2. If so, for what periods of time, in what amount and in what form is Student entitled to an award of compensatory education?
3. Did the School District propose an appropriate IEP for Student in December 2009?
4. Are Student's Parents entitled to an award of tuition reimbursement for the Private School they selected for Student for the second half of the 2009/2010 school year?
5. Are Student's Parents entitled to reimbursement for the independent educational evaluation of Student that they obtained in April 2009?

## **FINDINGS OF FACT**

1. Student is an elementary school-aged child, born [redacted]. Student is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 16, 17)
2. Student has a current diagnosis of specific learning disability in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 17)
3. During the second part of the 2009/2010 school year, Student was enrolled in Private School a Private School unilaterally selected by Parents, where Student completed 4<sup>th</sup> grade. (Stipulation, N.T. pp. 17, 18)
4. Student's difficulties with school tasks began during kindergarten, (2005/2006 school year) where Student quickly became frustrated by difficulties in sounding out words and with paper and pencil tasks, including drawing and handwriting. (N.T. pp. 27, 28)
5. During 1<sup>st</sup> grade (2006/2007), Student was referred to the District's Instructional Support Team (IST) for additional classroom interventions and supports. Student also received Title I supplemental reading instruction due to decoding, fluency and comprehension issues. (N.T. pp. 28—32, 34, 35, 294, 295, 299, 302, 436—442; P-1, P-2, P-3, P-4, P-5, P-6)
6. Student's 1<sup>st</sup> grade teacher, as well as the music, library, and physical education teachers also noted problems with spelling, written expression, math, handwriting, understanding directions, focus and attention. (N.T. pp. 28, 31, 33, 303; P-1, P-2)

7. When Student did not meet Student's IST intervention plan goals during the first half of 1<sup>st</sup> grade, the IST team suggested a deeper investigation, specifically, referral for an evaluation to determine eligibility for special education services. (N.T. pp. 306—308)
8. In March 2007, after completing a speech/language evaluation, the District recommended that Student receive services to address Student's receptive and expressive language needs. (N.T. pp. 40—42; S-3, p. 4<sup>1</sup>)
9. Student received Title I reading support during the summer after 1<sup>st</sup> grade, and Title I, IST and speech/language services resumed in 2<sup>nd</sup> grade (2007/2008). (N.T. pp. 39, 40, 42—44, 159—161, 290, 309; S-4, p. 1)
10. Because Student's academic progress remained slow and below grade level, the District conducted a full psycho-educational evaluation in October 2007 which resulted in the determination that Student is eligible for special education services due to a specific learning disability in reading comprehension and a continuing communication disorder resulting in speech/language needs. (N.T. pp. 43, 45, 290, 295; S-4, p. 7, S-6, p. 6)
11. Student's cognitive ability, as measured by the WISC-IV (Wechsler Intelligence Scale for Children-Fourth Edition) full scale IQ score (FSIQ) of 81, was in the low average range of intellectual functioning, with all index scores clustered at approximately the same level, ranging from 82 (Perceptual Reasoning) to 91 (Working Memory-average range). (S-4, pp. 4, 5)
12. A standardized achievement measure WIAT-II (Wechsler Individual Achievement Test-Second Edition), yielded scores generally in the low average range, commensurate with Student's low average cognitive potential, except for reading comprehension, which was discrepant at the .05 level of significance.<sup>2</sup> (S-4, pp. 4, 5)
13. Based upon the recommendation of an independent psychologist, Parents requested, and the District conducted, a supplemental evaluation in March 2008 to further clarify Student's learning difficulties. The District administered the Comprehensive Test of Phonological Processing (CTOPP) as suggested by Parents' consultant (N.T. pp. 46—49, 310; S-5)
14. When Student's IEP team met in January 2008, the District proposed an IEP which included goals for reading, writing, and speech/language. When the IEP team met again

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<sup>1</sup> The parties produced a considerable number of duplicate documents, including evaluation reports, IEPs/NOREPs and some correspondence. For simplicity of reference, only 1 version of each duplicated document will be cited, the exhibit offered by the party on whose behalf it was drafted or prepared.

<sup>2</sup> WISC-IV Index Scores: Verbal Comprehension (VCI), 85 (low avg.); Perceptual Reasoning (PRI), 82 (low avg.); Working Memory (WMI), 91 (avg.); Processing Speed (PSI), 85 (low avg.). WIAT-II: Total Reading, 80 (Word Reading -88, Reading Comprehension-74, Pseudoword Decoding-84); Total Math, 81 (Numerical Operations-78 Math Reasoning-88) Written Language, 82 (Spelling-78, Written Expression-89).

in March 2008, the District recommended adding math goals to the IEP. (N.T. pp. 55, 58, 108, 110, 292; S-6, S-7)

15. In January 2008, Student began receiving language arts instruction in the learning support class in a group of four (4) students for two hours each day. The special education teacher was assisted by an instructional aide who is also a certified special education teacher. At that time, Student's reading level was placed at the end of 1<sup>st</sup> grade level. (N.T. pp. 311—313; S-6, pp. 1, 2)
16. In the IEPs provided for Student from January 2008 (mid -2<sup>nd</sup> grade) through January 2009 (3<sup>rd</sup> - 4<sup>th</sup> grade), the reading decoding goal provided that when given literature and informational texts at a specified level, Student will be able to use decoding skills/strategies to decode the text with a minimum of 80% on 5 consecutive curriculum based assessments. In the January and March 2008 IEPs, the expected level was described as 1<sup>st</sup> to 2<sup>nd</sup> grade. In the two later IEPs, the goal was set at Level 21 (end of 2<sup>nd</sup> grade). (N.T. p. 347; S-6, p. 13, S-7, p.15, S-8, p.18, S-9, p. 16)
17. Each IEP also included a reading comprehension goal that was nearly identical to the decoding goal, providing that Student will comprehend the text first at a 1-2 grade level on 5 consecutive trials with 75% and later at Level 21 with a minimum of 80% on 3 consecutive curriculum based assessments. (S-6, p. 14, S-7, p.16, S-8, p.19, S-9, p. 17)
18. Student's progress in decoding was measured by a running records assessment, and reading fluency was monitored via assessments from the Read Naturally program. Between January 2008 and January 2009, Student had progressed one-half to three-quarters of a year, having moved from Level 8 to Level 13. In January 2009, Student was still instructional at the 1<sup>st</sup> grade level. In December 2009 (4<sup>th</sup> grade), Student's reading fluency was assessed at the 1.5 grade level. Decoding and comprehension, however, were assessed at the end of 2<sup>nd</sup> grade level. (N.T. pp. 311—325, 343, 344; S-6, S-8, S-24, S-25)
19. In Student's 2008 IEPs, the writing goal provided that Student would "communicate effectively in writing using use domains appropriate to Grade 1-2 to attain a minimum score of 75% or equivalent rubric on 4 writing samples/year." (S-6, p. 15, S-7, p.17)
20. In the January 2009 IEP and the IEP for summer 2009, the appropriate domains were moved to grade 3, and a second writing goal was added: "write using correct grammar, sentence structure, punctuation, vocabulary and spelling appropriate to Grade 2 to attain a minimum score of 75% or equivalent rubric on 4 writing samples/year (S-8, p. 20, S-9, p. 18)
21. After math goals were added to Student's IEP in March 2008, those goals also remained the same, providing that Student would demonstrate understanding of number systems, relationships, computation, and estimation with 75% - 80% accuracy on 5 consecutive trial when given curriculum based assessments first at the 1-2 grade level (March 2008) and later at the 3<sup>rd</sup> grade level (January 2009 IEP). Understanding of measurement was

also added in the January 2009 IEP. Student was working at a beginning 2<sup>nd</sup> grade level in math midway through 3<sup>rd</sup> grade, when the January 2009 IEP was drafted. The teacher's goal was for Student to reach a beginning 3<sup>rd</sup> grade level in Math by mid-way through 4<sup>th</sup> grade. Student's math instruction was delivered on a one to one basis in the learning support classroom. (N.T. pp. 347, 348, 396; S-7, pp.19, 20, S-8, pp.21, 22, S-9, pp. 17)

22. All of Student's IEPs included several speech/language goals, but only one goal was repeated in each IEP, following 2-3 step directions with paper and pencil tasks. Student mastered goals for labeling categories and listing items in a category, and those were replaced with more general goals for categorizing. Goals for comprehending word relationships were added. None of the IEPs included goals for developing pragmatic language skills. Explicit teaching of pragmatic language skills was discussed at the beginning of 3<sup>rd</sup> grade and may have begun. Speech/language services were increased from one to two 30 min. sessions/week in the January 2009 IEP. (N.T. pp. 407, 408; S-6, pp. 16—19, S-7, pp. 21—21—24, S-8, pp. 13, 22, 23, S-9, pp. 20, 21)
23. Teachers noted, and informed Parents, that Student was easily distracted by peers and exhibited significant anxiety and uncertainty when asked to complete tasks independently. Student needed substantial one to one support from a teacher to complete academic tasks in both the special education and regular education classrooms. The District suggested that Parents consult a medical doctor for an evaluation of Student's high anxiety level. (N.T. pp. 66, 69, 297, 298, 404, 445—451, 456, 460; S-3, pp.5, 6, S-8, p. 12, S-9, pp.10-11, S-10, p. 14)
24. Student's school counselor and special education teacher discussed the possibility of conducting an ADD/ADHD screening assessment at the IEP meeting in January 2009, but Parents appeared not to be interested in pursuing the screening at that time since they were not seeing attention issues at home. The District did not formally request Parents' permission to proceed with the screening and did not further pursue the ADD screening issue with Parents. (N.T. pp. 446—451, 455, 459—462)
25. Student's issues with becoming distracted by peers rather than remaining focused on Student's own work was addressed by putting room and desk dividers in place, a strategy incorporated into Student's IEP January 2009 IEP as part of specially designed instruction (SDI) for behavior support. The special education teacher also used verbal and visual cues to redirect Student, created opportunities for 1:1 instruction and provided preferential seating. (N.T. pp. 335, 398—400; S-8 p. 26)
26. Student's special education teacher/case manager is also a certified school counselor who coached Student in social skills in the classroom and informal school settings, such as recess, structured play situations to facilitate peer interactions, and helped Student process difficult situations and feel comfortable in order to create a better climate for academic learning to occur. In both the special education and regular classrooms, the District grouped Student with peers with whom Student seemed socially comfortable. (N.T. pp. 289, 370—374, 401—403, 463, 464)

27. During 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grades, the District assigned Student to the same regular education and special education teachers. The regular education teacher met frequently with the special education teacher to discuss and address Student's needs. The regular education teacher was well aware of Student's IEP, since she was using the same reading strategies to help Student with regular education classes that depended heavily on reading, such as social studies. In addition, the instructional aide from the learning support class accompanied Student when Student was in the regular education classroom. (N.T. pp. 150, 166—172, 290, 311, 341, 384—386, 414)
28. Progress reports on Student's IEP goals for 2<sup>nd</sup> grade (January to June 2008) noted expected progress (Level 3) toward all reading, writing and math goals, but only with considerable teacher prompting, guidance, re-teaching and one to one support. Student's special education teacher did not expect significant progress, defined as moving faster than expected, because of Student's cognitive abilities. (N.T. pp. 365, 366; S-13)
29. During the summer of 2008, Student received an hour of individual tutoring in reading, writing and math from the special education teacher once each week for 6 weeks. (N.T. pp. 66—68, 291, 406; P-10, pp. 1, 2)
30. At the beginning of 3<sup>rd</sup> grade (2008/2009 school year), Student began receiving 30 minutes of reading instruction 3x/week in a group of three students, using Foundations, a multi-sensory, phonics-based decoding program based upon the Wilson reading methodology. (N.T. pp. 326, 561, 562, 581)
31. In 3<sup>rd</sup> grade, Student continued to struggle with remaining focused and continued to experience frustration with academic tasks, despite Parents' efforts to encourage Student to practice reading strategies at home. (N.T. pp. 69—71)
32. Progress reports on Student's IEP goals for 3<sup>rd</sup> grade and the beginning of 4<sup>th</sup> grade (March 2008/January 2009 IEPs) noted less than expected progress (Level 4) on the reading comprehension goal during the third and fourth marking periods in 3<sup>rd</sup> grade (winter/spring 2009), but otherwise, expected progress was again noted on all goals. The narratives accompanying the numerical scores did not emphasize Student's dependence on one to one support, but noted a continuing need for encouragement and more difficulty in reading, writing and math at the end of the 2008/2009 school year as the work again increased in difficulty. (N.T. pp. 74, 75, 77, 78, 367, 368; S-14)
33. For ESY during the summer of 2009, the District proposed to provide Student with additional instruction in math, reading and writing, as well as speech/language services, to continue working on IEP goals. The District's ESY program was conducted over a period of approximately six (6) weeks and consisted of 2½ hours of instruction 4 days each week, for a total of 24 sessions. (N.T. pp. 81, 82; P-20, S-9)
34. Student experienced less frustration and was better able to focus and attend to instruction during the summer program, which Parents attributed to a shorter day and less material covered. (N.T. pp. 82—85; P-20)

35. In April 2009, Parents obtained an independent evaluation of Student from a Pennsylvania licensed psychologist who is also a certified school psychologist. Parents made the evaluation report available to the District soon after. (N.T. pp. 121, 122, 478, 510, 558; P-18)
36. The independent evaluator reviewed the evaluations completed by the District and spoke to Student's special education teacher/case manager, all of which confirmed concerns about attention and focus that the evaluator believed had prompted Parents to seek the evaluation. The special education teacher reported high anxiety, shutting down in the face of challenging tasks, a high degree of need for one to one assistance and seeking opportunities to retreat to the "safe haven" of the learning support classroom. (N.T. pp. 478, 481, 482; P-18, p. 2)
37. The independent evaluator also administered the WISC-IV and the WIAT-II assessments, which were part of the District's October 2007 evaluation. Although Student's FSIQ score obtained via the most recent assessment was 77, in the borderline range and lower than obtained by the District in its evaluation, there was considerably more scatter among the four index scores in the 2009 evaluation, with verbal comprehension as well as working memory now measured in the average range. Perceptual reasoning, however, fell into the extremely low range, while processing speed remained in the low average range. Student's WIAT-II reading and writing scores declined, some significantly, in the 1 ½ years between the assessments.<sup>3</sup> Student's strongest performance was in math, which emerged as an area of relative strength in which Student was not as far behind same-age/grade peers as in reading and writing. Student's WIAT-II math scores indicated achievement commensurate with ability in that area. (N.T. pp. 486—491, 497—500, 509; P-18, pp. 4, 6, 7, S-4, pp. 4, 5)
38. Student's low score on the perceptual reasoning index reflects significant difficulty with novel problem-solving and executive functioning. (N.T. pp. 488—490; P-18, p. 4 )
39. The independent evaluator asked Parents and Student's special education teacher/case manager to complete a rating scale designed to assess attention (Brown Attention Deficit Disorder Scale-BADDS). Parents' ratings revealed no significant issues with attention at home, while the teacher's ratings fell primarily into the moderately atypical range, with "Emotion" in the markedly atypical range. That category measures tolerance for frustration and how easily a child becomes discouraged (N.T. pp. 483, 492; 493, P-18, p. 5)
40. The evaluator administered selected subtests of The Developmental Neuropsychological Assessment (NEPSY) to assess social perception based upon teacher reports of discomfort/difficulty with peer relationships. The results indicated that Student can

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<sup>3</sup> WISC-IV Index Scores: Verbal Comprehension (VCI), 91 (avg.); Perceptual Reasoning (PRI), 65 (extremely low); Working Memory (WMI), 91 (avg.); Processing Speed (PSI), 83 (low avg.). WIAT-II: Total Reading, 73 (Word Reading -73, Reading Comprehension-71, Pseudoword Decoding-81); Total Math, 85 (Numerical Operations-89, Math Reasoning-85); Written Language, 69 (Spelling-74, Written Expression-65).



recognize facial expressions, but has significant difficulty understanding the subtleties of social cues. (N.T. pp. 494—497; P-18, pp. 5, 6)

41. Parents completed an Asperger's Syndrome Diagnostic Scale. Those responses, along with the history of Student's difficulties, which does not include avoiding social contact, self-stimulating behaviors and fixating on a particular interest, effectively ruled out an autistic spectrum disorder as the source of Student's difficulties with peer social relationships. (N.T. pp. 515—517 ; P-18, p. 6 )
42. Parent, but not Student's teacher, was also requested to complete the ABAS-II (Adaptive Behavior Assessment System-2<sup>nd</sup> Edition), which placed Student's functional, everyday skills in the average range except for self-care, which was slightly below average. The results of the adaptive functioning scale ruled out mental retardation as an underlying basis for Student's academic and social difficulties. (N.T. p. 500; P-18, p. 7)
43. During the testing, the evaluator noted Student's heightened anxiety when presented with challenging tasks and novel tasks, which Student appeared to automatically consider challenging regardless of objective level of difficulty. The evaluator also noted Student's efforts to avoid such tasks by engaging her in conversation and other attempts to distract her from the assessments. In general, Student presented as a much younger child (N.T. pp. 479, 480, 484, 485, 520; P-18, p. 2)
44. Based upon the information received from Student's teacher, the prior District evaluations, the updated results of the standardized Wechsler ability and achievement measures, the BADDSS, and the NEPSY rating scales, the independent evaluator concluded that Student's academic problems and difficulties relating to peers could be attributable to Attention Deficit Disorder (ADD) and/or to Nonverbal Learning Disorder (NLD). (P-18, p. 8)
45. A nonverbal learning disorder is characterized by a wide gap between verbal and nonverbal skills (attributable to weaker visual skills), by difficulties with social functioning and by motor skills deficits. NLD is often accompanied by anxiety. (N.T. pp. 500, 501, 517, 518; P-18, p. 8)
46. Parents' evaluator recommended consultation with a neuro-developmental pediatrician or pediatric neurologist to consider a medication trial to address attention issues, but Parents did not follow that recommendation. (N.T. pp. 122, 504; P-18, p. 9)
47. The recommendations from Parents' evaluator for the school setting included direct, explicit, sequential, multi-sensory reading instruction, such as Wilson, in a very small group, chunking of information, repetition, a high degree of structure and organizing tools for writing, pragmatic/social language instruction and monitoring/opportunities to practice in unstructured situations, as well as a behavior plan to encourage social skills development. (N.T. pp. 98, 501—503, 505—509, 521; P-18, pp. 8, 9)

48. Although Student's IEP team met to review the new evaluation report before the 2008/2009 school year ended, no revisions were made to Student's January 2009 IEP at that time. (N.T. pp. 580—583, 602)
49. By letter dated December 1, 2009 Parents notified the District that they were withdrawing Student from the District and enrolling Student in a Private School for children with learning disabilities. Parents requested that the District pay the Private School tuition. (N.T. pp. 86, 568; P-14)
50. The District refused and requested the opportunity to work with Parents to address their concerns. The District convened an IEP meeting on December 14, 2009 to review and propose revisions to Student's program. (N.T. pp. 568—570; S-19, S-20)
51. The District again reviewed the April 2009 independent evaluation report before drafting its IEP proposal in December 2009. The IEP in effect since January 2009 provided for two hours of instruction daily in the learning support center in an integrated reading/writing language arts block. The proposed IEP increased language arts instruction by half an hour, during which Student would have received additional instruction in reading on a 1:1 basis using the Foundations program. (N.T. pp. 558, 561, 562, 563, 572—574, 584, 587, 588; S-10)
52. The District also proposed to institute a new, mastery based program for reading comprehension with an approach similar to the Foundations direct, sequential instruction method. The specially-designed instruction (SDI) included in the District's proposed IEP added some strategies based upon the recommendations of the independent evaluation report, but multi-sensory instruction and other methods recommended by the independent evaluation report had already been included in Student's existing IEP. (N.T. pp. 564—566; S-8, pp. 24—26, S-10, pp. 27—30)
53. The reading goal in the December 2009 proposed IEP provided for moving Student from level 21 (end of 2<sup>nd</sup> grade) to Level 25 (end of 3<sup>rd</sup> grade) in decoding, fluency and comprehension. The goals proposed for writing and math mirrored the goals included in all prior IEPs, but increased expected achievement to a higher (3<sup>rd</sup> grade) level and added a math goal for problem-solving. (N.T. pp. 353—360; S-10, pp. 21—24)
54. The proposed IEP continued the speech/language goal for following 3 step directions, and added a goal for improving vocabulary through use of word relationships and an articulation goal. The proposed IEP had no pragmatic language goal. (S-10, pp. 25, 26)
55. The District renewed a proposal to conduct an occupational therapy assessment to determine Student's sensory needs, as it had first discussed with Parents during the previous school year. (N.T. pp. 567, 568; S-16)
56. Parents rejected the NOREP that accompanied the District's December 2009 IEP proposal and withdrew Student from the District as of January 4, 2010. (N.T. pp. 587, 599; S-10, p. 3, S-20)

57. Parents immediately enrolled Student at Private School, an independent special education school designed to serve students of average to above average cognitive ability with language-based learning disabilities, as well as communication, processing, attention and executive functioning disabilities. (N.T. pp. 215, 261; P-27)
58. Student participates in Wilson reading instruction via the Foundations program in a group of six (6) students. Students are grouped in all classes by skill level. (N.T. pp. 223, 224, 264, 267)
59. During the second half of the 2009/2010 school year, in addition to reading instruction, Student's classes consisted of a literature class based upon the Project Read story form and report form; math taught via the Saxon Math program; writing taught with the Write Away program and Handwriting Without Tears; science/social studies, which focused on a unit about animals in the second trimester and a unit about weather during the third trimester. The science class was described by the Private School head of school as not academically rigorous, but enriching. (N.T. pp. 227—230, 237—247; P-26, pp. 5—7, P-26a, pp. 1, 2, 10)
60. Teacher comments on Student's progress reports at the end of the second trimester marking period (the first period in which Student was enrolled) and at the end of the school year reflect continuing issues with decoding accuracy, reading fluency, struggles with adding details to writing and writing from personal experience, independence, attention, and too much focus on peers during class rather than on completing Student's own work. All of those issues are similar to the problems observed by the District. In most reports, Student's progress is reported qualitatively in a narrative that describes the curriculum and Student's strengths and needs. (N.T. pp. 239, 247, 248, 268, 269; P-26, pp. 2—6, P-26a, pp. 1—6, 10)
61. AIMSweb curriculum based objective assessments conducted in the winter and spring of 2010 revealed progress in math, although Student remains significantly below grade level, but no measurable progress in reading decoding and only slight progress in reading comprehension, as indicated by the same decoding score between the winter and spring assessments and a three point rise in the comprehension score. According to Wilson assessments, Student was working at step 2.4 of the 12 step Wilson Reading System in June 2010, with mastery at 84% for reading real words, 89% for reading nonsense words, 93% for reading sight words and 87% for spelling sight words, 535 for spelling real words and 50% for sentence dictation. At the time of March 2010 Wilson assessments, Student's class was working at step 2.3. Student's mastery levels were not reported in the March progress report. (N.T. pp. 247, 249, 250, 276; P-21<sup>4</sup>, P-26a, pp. 1, 3, 4)

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<sup>4</sup> The end of the school year AIMSweb reading assessment results had not been scored by the final hearing date (N.T. p. 285), and, therefore was supplied after the hearing session at the request of the hearing officer, along with the June 2010 literature class progress report that had inadvertently been omitted from Parents' exhibit 26a.. Those documents were received on July 14, 2010 with the hard copy of Parents' Closing Argument and were the last documents needed to close the hearing record. The AIMSweb reading assessment was given exhibit number 22, which had been left blank. P-22 is now admitted to the record along with the exhibits offered by both parties at the last hearing session on June 10.

62. Student receives no direct speech/language or OT services at Private School. Language skill-building, including pragmatic language support, is infused throughout the school day and social skills are taught informally in all classes, as well as via supervision/facilitation of recess activities. Student exhibits no need for, and does not have, a behavior plan. (N.T. pp. 228—232, 259, 271; P-22, p. 4)

## **DISCUSSION AND CONCLUSIONS OF LAW**

Parents in this case seek three forms of relief for the District's alleged failure to provide Student with a free, appropriate, public education (FAPE): 1) Compensatory education from February 2008 through December 2009, when Student was enrolled by Student's Parents in a Private School; 2) Tuition reimbursement for the unilaterally selected Private School placement; 3) Reimbursement for an independent educational evaluation of Student conducted in April 2009.

The legal standards applicable to the analysis of the appropriateness of the IEPs in effect from February 2008 and the IEP offered by the District just prior to Student's dis-enrollment from the District are, of course, the same. It should be noted, however, that although there are deficiencies in the IEPs in effect through December 2009, that determination does not automatically establish that the District failed to offer an appropriate IEP at the time Parents withdrew Student from the District. Rather, the final IEP offer must be carefully considered to determine whether it corrected deficiencies in the IEP already in effect and would have appropriately met Student's needs.

### **I. Generally Applicable Legal Standards**

#### **A. Due Process Hearings/Burden of Proof**

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by

other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009).

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parent has challenged the appropriateness of the District's services going back to February 2008, as well as the December 2009 proposed IEP, Parents must establish that the IEPs provided by the District and the District's last proposal were not reasonably calculated to assure that Student received, and would have received, a meaningful educational benefit from the services that were provided and offered by the District during the relevant periods.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

### B. IDEA Requirements

The legal obligation of to provide for the educational needs of children with disabilities was recently summarized by the Court of Appeals for the 3<sup>rd</sup> Circuit as follows:

The Individuals with Disabilities Education Act ("IDEA") requires that a state receiving federal education funding provide a "free appropriate public education" ("FAPE") to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is 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 benefits' in light of the student's 'intellectual potential.'" *Shore Reg'l High Sch. Bd. of Ed.*

*v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

*Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009).

The pivotal role of the IEP has been consistently emphasized by the Court of Appeals, which describes the IEP as the “core” of an eligible student’s “entitlement to FAPE” and the “centerpiece for the implementation of FAPE.” *Ferren C. v. School District of Philadelphia*, 2010 WL 2735716 at \*3 (3<sup>rd</sup> Cir. July 13, 2010); *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3<sup>rd</sup> Cir. 2003).

The IEP consists of a detailed written statement developed for each child summarizing the child's abilities, how the disability affects performance, and measurable annual goals. The IEP specifies the special education services and supplementary aids the school will provide the child, explaining how these will allow the child to progress.

*Damian J. v. School District of Philadelphia*, 2008 WL 191176 (E.D.Pa. Jan. 22, 2008) at

\*1, FN.2 (Internal citations omitted).

### C. FAPE/Meaningful Benefit

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249. “Meaningful benefit” means that an eligible child’s program affords Student or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet

his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if Student's program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the "absolute best" education or to maximize the child's potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995).

#### D. Compensatory Education/Parameters of Equitable Relief

An eligible student who has received no more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable "remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249 (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/Student would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, slip op at \*4, citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School*

*District*, 81 F.3d 389, 395 (3<sup>rd</sup> Cir. 1996); *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

The Court of Appeals has recently noted that the remedies available for denial of FAPE to an eligible student are not limited to compensatory education or tuition reimbursement. Rather, the IDEA statute confers upon the courts broad equitable powers to fashion appropriate relief to remedy IDEA violations, subject to the requirement that any such remedy must further the purposes of the IDEA statute. *Ferren C. v. School District of Philadelphia*, slip op at \*4. The court specifically identified two IDEA purposes: 1) ensuring a FAPE which provides special education and related services designed to meet the unique needs of all children with disabilities; 2) protecting the rights of eligible children and their parents. *Id.* By extension, hearing officers who initially consider whether an eligible student has been denied FAPE are similarly free to determine an appropriate remedy that meets the appellate court standard.

## **II. Appropriateness of Student's Program/Placement 2/08--12/09**

### **A. Reading and Writing Instruction**

Student in this case exhibited academic, functional and social problems from the beginning of Student's school career. (FF 4—6) Although the basis for Student's continuing difficulties has been better identified with each successive evaluation, the nature of Student's needs has not really changed over the years and neither did the District's response to those needs between March 2008 and December 2009. The problem for the District in that regard is that there are no objective measures that demonstrate meaningful progress in reading and writing. To the contrary, a comparison of the scores of the same standardized achievement test administered in October 2007 and April 2009 show a decrease in every skill measured except math. (FF 12,



37) Curriculum based assessments conducted over the same period were consistent with the standardized test scores. Student did not move to an end of 2<sup>nd</sup> grade level in any measure of reading ability until midway through 4<sup>th</sup> grade, and was inconsistent even then, yet very little adjustment was made to the instructional methods, other than to add Foundations, the program based on the Wilson reading system, as a small part of Student's reading instruction beginning in 3<sup>rd</sup> grade. (FF 18, 30)

The special education teacher noted Student's extreme need for repetition and routine, as well as resistance to novel tasks and risk avoidance. (*See, e.g.*, N.T. pp. 345, 346, 351) The teacher also testified that change of any kind could provoke anxiety, leading to the need for additional support and potential interference with Student's progress, citing the example of Student's reaction when another student left the class. (N.T. p. 408). The psychologist who conducted the independent evaluation also commented on Student's anxiety and avoidance behaviors when confronted with novel and challenging tasks. (FF 36, 43) To minimize the effects of these universally observed issues, the District was careful to keep Student with familiar teachers and peers to increase Student's comfort and keep Student's school environment stable. (FF 26)

On the other hand, however, the special education teacher testified that for Student's reading instruction, she used four programs, the Harcourt Trophies series, Read Naturally and A to Z leveled readers in addition to Foundations. (N.T. pp. 326—328) As noted by the supervisor of special education, the spiraling curriculum of the Harcourt Trophies series, at least, was not appropriate, given Student's learning profile. (N.T. p. 564).

In the December 2009 IEP offer, the District belatedly recognized that Student is more likely to make meaningful progress in reading if instructed with one phonics-based sequential,

multi-sensory program directed primarily toward decoding and a similar program to address reading comprehension. (FF 51, 52) Foundations, the Wilson program, which provides explicit, sequential instruction and emphasizes mastery of skills before moving on, and which became the centerpiece of the District's offer to substantially revise Student's reading instruction, is clearly better suited to Student's characteristics and learning needs. Reading instruction using the Foundations program, however, was provided only three times weekly for 30 of the 120 minute daily language arts block during 3<sup>rd</sup> grade and the beginning of 4<sup>th</sup> grade. (FF 30)

The District had sufficient information at the time a learning disability was first identified to understand that Student is likely to do better with fewer and simpler ways of presenting material. The difficulties identified when Student was in 2<sup>nd</sup> grade continued to interfere with Student's reading ability, leading to slow and inconsistent progress, such that even in 4<sup>th</sup> grade, Student was not solidly and consistently at a 2<sup>nd</sup> grade level in all measures of reading ability. (*See, e.g.*, FF 18, 32, N.T. p. 295, describing Student's reading difficulties in the middle of 2<sup>nd</sup> grade and S-10, p. 6, describing Student's present levels of performance in reading near the middle of 4<sup>th</sup> grade.) Moreover, if the curriculum based assessments indicating extremely slow progress in reading were not sufficient to trigger a fresh look at Student's reading instruction between January 2008 and January 2009, at the time of the annual IEP review, the new information available from the independent evaluation report that Parent shared with the District in June 2009 should certainly have prompted the District to undertake a thorough review of Student's program and consider implementing more of the evaluator's recommendations for reading and writing instruction. The District, however, did not convene Student's IEP team after reviewing the results of the independent evaluation and proposed no changes to Student's IEP

until Parents announced their intention to send Student to a Private School in December 2009.  
(FF 48, 49, 50, 51)

Because the District failed to appropriately consider Student's universally observed and well-known need for repetition and reinforcement of concepts, and instead used a combination of reading programs that did not provide the kind of sequential, explicit instruction and teaching concepts to mastery that Student clearly needs, the reading instruction provided by the District was more likely to create uncertainty and confusion than meaningful progress. The District's IEPs between February 2008 and December 2009, did not, therefore provide for reading instruction that was reasonably calculated to result in meaningful progress in reading. Consequently, Student is entitled to compensatory education for reading from February 2008 through December 2009.

There is far less direct evidence in the record concerning Student's written expression skills than there is with respect to reading. In light of the 13 point and 24 point declines in Written Language and Written Expression scores on the WIAT-II assessment between the 2007 and 2009 assessments, however, there was no real need for additional evidence. (FF 12, 37) Student was clearly not provided with a program of writing instruction reasonably calculated to assure appropriate progress. Moreover, as noted by the special education teacher, reading and writing generally progress—or not—along parallel tracks. (*See* N.T. p. 306, l. 4—9 : "...[I]f a child is struggling with reading comprehension, they oftentimes also struggle with writing. It's a kind of a building block. If you really can't, you know read, then it's harder to write.") Student clearly needed the same type of sequential, explicit and consistent instruction as in reading to assure an IEP that was reasonably likely to result in meaningful progress in writing. Student,

therefore, will be awarded compensatory education for language arts instruction generally, encompassing both reading and written expression.

B. Emotional Issues—Anxiety, Dependence upon Adult Support

There is no doubt that, calling upon her training and skills as a certified school counselor, Student's special education teacher did her best to help Student with distractibility, anxiety and social issues, including peer interactions. (FF 23, 25, 26) Student's functional needs in this area, however, were and remain, significant and should have been explicitly and formally addressed throughout the period in dispute. As noted in the recent decision from the 3<sup>rd</sup> Circuit Court of Appeals, an important aspect of one of the primary purposes of the IDEA statute is to assure that eligible students receive "special education and related service designed to meet their unique needs and prepare them for further education, employment and independent living." *Ferren C.*, Slip. Op. at \*4, *quoting* 20 U.S.C. §1400(d). Student obviously needs to increase independence from adult support in the classroom, decrease the anxiety associated with novel and challenging school-related tasks and improve social interactions in order to be properly prepared for further education in the short term and ultimately employment and independent living. In light of Student's well documented deficits in these areas, the District's efforts to address such needs informally and entirely on an *ad hoc* basis was insufficient. Notwithstanding the special education teacher's specialized training that made her an appropriate person to address such needs, the District's failure to develop explicit IEP goals and specially designed instruction to address Student's needs in these areas constituted a denial of FAPE.

The District should have considered whether some emotional support services might have been appropriate, or considered another means of providing Student with coping skills, including explicit instruction in techniques to reduce anxiety and develop strategies to increase Student's

independence in completing school work. As supportive as Student's teachers and the school environment in general were, it is entirely possible that the high level of support without strategies in place to wean Student away from depending so heavily on adults created too much of a "safe haven" which did not permit Student to advance toward overcoming risk avoidance and anxiety in the face of challenging and novel tasks. The independent evaluator's suggestion that Student fell into a pattern of "learned helplessness" makes sense. (*See*, P-18, p. 2; N.T. pp. 484, 512) At some point, the District became obligated to recognize and address that issue in order to provide Student with appropriate special education services in all respects.

Although Student had exhibited dependence and risk avoidance throughout the period in dispute, the District could not reasonably have anticipated from the start that the problem would not abate with the passage of time, informal measures and improved academic skills. By the time Student's IEP team met for the annual review in January 2009, however, the District should have realized that Student's dependence, anxiety and risk avoidance had not improved. The District, therefore, should have considered goals and specially designed instruction designed to wean Student from Student's extraordinary need for adult support at that time. The District could and should have explored whether there are programs appropriate for Student that provide explicit instruction in stress reduction techniques and other coping strategies. Contrary to the suggestion of Parents' independent evaluator, a functional behavioral assessment and behavior plan do not appear to have been necessary, since Student's difficulties and in these areas are well documented throughout the record, providing sufficient information to identify and address Student's needs. The District, however, did not target these aspects of Student's functional performance for remediation, although Student was functioning well below expected levels, as

reflected in the information available to the District both before and after the independent evaluation in the spring of 2009. (FF 23, 36, 39, 43)

Because the District's efforts to address this obvious area of need were informal, and ineffective in terms of improving Student's functional performance in this area, Student will be awarded compensatory education to address anxiety and dependence on adult support, which the record establishes are school-related problems not displayed at home. (FF 39, 42)

### C. Speech/Language Services/Social Skills Training

Although the District is quite correct that Student needed, and continues to need, speech/language services, the District failed to sufficiently meet Student's needs in this regard because it did not include pragmatic language goals and skill development as a part of its speech/language services. (FF 22, 54) Student's need for assistance with peer social relationships was well known to the District, and addressed informally by the special education teacher, who facilitated such interactions. (FF 26) Development of social skills, however, is another important aspect of Student's functional performance in which Student exhibited a high degree of need that should have been explicitly and systematically addressed. Including pragmatic language skills in speech/language services is a common and well recognized means of providing social skills training to eligible students with such needs. The special education teacher testified that there had been some discussion of adding pragmatic language skills to Student's speech/language services, but the record does not establish whether such instruction was ever added to Student's speech/language services. (FF 22) Student also needed, and the District should have provided, specific opportunities for Student to practice and transfer skills developed through pragmatic language instruction to real, everyday peer interactions by

developing a facilitated lunch group or other formal opportunities for interactions, especially with typical peers.

Although the special education teacher helped facilitate peer interactions, the record does not suggest that she provided actual social skills instruction and regular, frequent practice opportunities such that Student would become more comfortable with independently initiating and sustaining peer social contacts. In addition, once the District had access to the information in the independent evaluation, which strongly suggests that social difficulties are an aspect Student's disability, the need to provide Student with skills to facilitate better peer interactions should have become even more obvious. (FF 45) Student, therefore, will be awarded compensatory education for the District's failure to provide pragmatic language skills development as part of Student's speech/language services and failure to provide additional social skills training to address Student's well known functional needs in these areas.

#### D. Math Instruction

Although Student's progress in math still leaves Student far behind grade level peers, Student did make meaningful progress as indicated by a stable score on the Total Math assessment of the WIAT-II test between October 2007 and April 2009. Although math reasoning declined by 3 points, there was an 11 point increase in the numerical operations score. (FF 12, 37) Moreover, the District provided entirely individualized 1:1 math instruction throughout the period in dispute. (FF 21) It is difficult to imagine what more the District could have done to assure greater progress, and Parents provided no evidence or argument suggesting that there is a reasonable basis for awarding compensatory education for inappropriate math instruction.

#### E. Compensatory Education Calculation

Parent requested four hours/day of compensatory education from February 19, 2008, two years prior to the date the complaint was filed, through the last day Student attended school in the District in December 2009. Parents, however, did not provide a sufficient evidentiary basis for awarding four hours daily throughout that period. Consequently, it is necessary to consider the nature and extent of the services the District should have provided to Student in each IEP period, and a reasonable amount of time for which such services should have been provided, in order to place Student in the position Student would have occupied but for the District's violation. *See, Ferren C.*, slip op. at \*4.

There is certainly a basis for awarding Student two hours/day of compensatory education for inappropriate instruction in reading and writing, which corresponds to the language arts instructional block Student received in the learning support classroom from February 19, 2008 through January 2009, the time of the annual review of Student's first IEP. As discussed above, from the information available about Student, the District should have recognized that Student would need reading instruction via no more than two direct, sequential, multi-sensory programs for decoding and comprehension. Meaningful progress in those aspects of reading would likely have resulted in increased fluency, which is generally considered to improve when decoding improves. Moreover, given the measure of Student's cognitive ability, the extent of Student's deficits in reading and writing, the pivotal nature of those skills as the foundation for further academic learning, and the approaching need for Student to be able to "read to learn" after 3<sup>rd</sup> grade at the latest, the District should have realized that Student needed the larger amount of time for language arts instruction proposed in the December 2009 IEP throughout the period in dispute. (FF 51) Consequently, Student will be awarded 2 ½ hours/day of compensatory



education for language arts instruction for every day school was in session from February 19, 2008 through the date Parents withdrew Student from the District.

As discussed above, there is a sufficient basis in the record for additional compensatory education for the District's failure to provide explicit instruction and/or other specific and regular services designed to address Student's functional needs in the areas of developing independence from adult support and coping strategies to reduce anxiety in the school setting. In the absence of any evidence concerning a reasonable amount of time that such services should have been provided on a daily or weekly basis, the compensatory education award for these services will be based upon the amount of time devoted to Student's speech/language therapy, *i.e.*, two 30 minute periods/week, or approximately 12 minutes/day, which will be rounded up to .25 hrs./day for every day school was in session from January 12, 2009, when Student's second annual IEP was approved through the date Student was withdrawn from the District.

Finally, Student will be awarded compensatory education for the District's failure to provide pragmatic language instruction for furthering development of social skills, including specific opportunities to practice social skills in real settings after instruction. A reasonable estimate for such instruction is 30 minutes per week as part of the time devoted to speech/language services, as well as structured and facilitated daily opportunities to practice pragmatic language skills in real settings for 20 minutes/day. Student, therefore, will be awarded an additional 30 minutes/day of compensatory education from February 19, 2008 through Student's withdrawal from the District.

In summary, Student will be awarded 3.5 hours/day of compensatory education for every day school was in session from February 19, 2008 through January 12, 2009 and 3.75 hours of

compensatory education from January 13, 2009 through the date of Student's withdrawal from the District.

### **III. Tuition Reimbursement**

#### A. Legal Standards

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible student's right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE or otherwise acted appropriately.

The *Burlington* principle was subsequently codified in the IDEA statute and regulations, which currently provide as follows:

Reimbursement for Private School placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

34 C.F.R. §300.148(c), based upon 20 U.S.C. §1412(a)(10)(C).

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington* and *Florence County School District v. Carter*, 510 U.S. 7, 114

S.Ct. 361, 126 L.Ed. 2d 284 (1993). *See also, Lauren W. v. DeFlaminis*, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007). The first step is to assess whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. A decision against the parents at any step of that process results in a denial of reimbursement.

The Court of Appeals for the Third Circuit has made it clear that the Private School selected by parents is not held to the same special education standards as a public school:

A parent's decision to unilaterally place a child in a private placement is proper if the placement “is appropriate, *i.e.*, it provides significant learning and confers meaningful benefit...” *DeFlaminis*, 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the “parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a Private School placement may be proper and confer meaningful benefit despite the Private School's failure to provide an IEP or meet state educational standards. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)

*Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 242.

#### B. Appropriateness of North Penn School District's Proposed IEP

The IEP at issue for this aspect of Parents' claims is the revised IEP the District offered at the December 14, 2009 IEP meeting, which Parents rejected prior to withdrawing the Student from the District as of January 4, 2010. (FF 56)

With respect to reading instruction, the District's proposal corrected the deficiencies in the reading instruction in prior IEPs. The proposed IEP, however, was not explicit with respect to different or additional instruction to improve Student's writing, and still included nothing to address Student's needs for independence training, developing coping strategies and social skills.

(S-10) The proposed speech/language services still did not include pragmatic language instruction. Consequently, the IEP proposed by the District in December 2009, although an improvement over previous IEPs in terms of reading instruction, is still not entirely appropriate because it fails to meet all of Student's needs.

C. Appropriateness of the Private School Selected by Parents/  
Equitable Considerations

This case is somewhat unusual in that the reason for denying Parents' claim for tuition reimbursement does not fit as neatly into the legal standards framework as is usually the case. Generally, either the school district's current or proposed program is clearly appropriate or not, and if inappropriate, the private placement selected by parents is either clearly appropriate or clearly inappropriate. Here, however, the facts defy such a relatively simple analysis. Consequently, the decision turns primarily upon equitable factors, but in the sense of fulfilling the IDEA goal of assuring that an eligible student receives a public education from his/her school district of residence, not simply a publicly funded education.

In this case, the equitable considerations do not implicate wrongdoing or lack of cooperation by Parents in any sense. Rather, resolution of the ultimate issue whether to order tuition reimbursement depends upon a combination of the appropriateness of the private placement and equitable factors in terms of the relative abilities of the District and the private placement to provide an appropriate education for Student. In more than most circumstances, this case requires balancing the relative advantages and disadvantages to the Student of both placements.<sup>5</sup> The ultimate decision comes down, most simply, to the fact that the public school is subject to far more oversight in terms of assuring that Student receives appropriate special

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<sup>5</sup> A simpler analysis could, perhaps, rely on the *Schaffer v. Weast* formula and conclude that because Parents' evidence did not push the balance in favor of the Private School, tuition reimbursement must be denied for Parents' failure to bear their burden of proof on an essential element of the claim. Although that is technically the case, the circumstances of this case require a more nuanced analysis.

education and related services. In short, if the Private School falls short of providing an entirely appropriate program, the Student is denied important services. The District, however, can be ordered to correct the deficiencies of its program. *See T.Y., K.Y. v. N.Y. City Board of Education*, 584 F.3d 412, 417 (2<sup>nd</sup> Cir 2009), where the court affirmed the hearing officer's decision denying parents' claim for tuition reimbursement, although the hearing officer also concluded that the school district's program was partially deficient and ordered the district to provide additional services to correct the problem.

The Private School selected by Parents provides the kind of academic instruction for Student recommended by Parents' independent evaluator, particularly in reading, but the District has also proposed to offer the same phonics-based reading instruction, Foundations, following the principles of the Wilson reading system. (FF 52, 58) In addition, the Private School instructs Student in a group of 6, while the District's past instructional group for Foundations was 3 students, and the District has proposed an additional half hour daily of one to one instruction. (FF 30, 58) The AIMSweb progress report submitted by the Private School shows no measurable progress in reading between January and June 2010, so in terms of objective measurement, the Private School has not yet proved to be more advantageous for Student than the District's program with respect to reading instruction. (FF 61)

More important, the Private School provides no direct speech/language services for pragmatics or otherwise, no explicit social skills training, no systematic strategies for developing coping skills and strategies to foster independence. (FF 62) The Private School, therefore, offers Student no advantage over the similarly informal means used by the District to address Student's functional needs. (FF 25, 26) Teacher progress reports from the Private School in March and

June 2010, show that Student still exhibits the same issues with task avoidance, independence and focusing on peers that were noted by the District. (FF 60)

At a minimum, if a public school district is to be required to fund a private placement because it did not provide or offer FAPE, the Private School should be expected to fill in the gaps left by the school district's program and provide necessary services that the school district either couldn't or wouldn't offer. In a remarkably similar situation, the 2<sup>nd</sup> Circuit Court of Appeals affirmed the district court's decision approving the state review officer's decision that a parentally selected Private School was not appropriate because it did not offer the kinds of services recommended by Parents' evaluator. *Matrejek v. Brewster Central School District*, 293 Fed.Appx. 20 (2<sup>nd</sup> Cir. 2008) This case presents the same issue. Parents' evaluator recommended direct, systematic, sequential instruction in a small group in a full-time learning support setting. (P-18, p. 9) Both the private and the public school can meet those recommendations, so both are appropriate instructional settings. The evaluator further recommended social skills training, which both settings provided informally rather than via a definite plan. Finally, the evaluator recommended pragmatic language instruction, which neither placement provided. The Private School did not see a need to provide such services and unlike the public school, cannot be ordered to do so. Consequently on balance, the record supports denying tuition reimbursement based upon the second and third *Burlington-Carter* factors. Neither the public nor the Private School is entirely appropriate or inappropriate, and both settings have relatively the same advantages and deficiencies in terms of providing for Student's needs. There is no basis for concluding that the District's program cannot be made appropriate, however, by correcting the identified deficiencies. Parents' claim for tuition reimbursement for the Private School from January to June 2010 will, therefore, be denied.

#### **IV. Reimbursement for Independent Evaluation**

The District argues that Parents' request for reimbursement of the costs of the independent educational evaluation (IEE) they obtained in April 2009 must be denied because the claim does not conform to IDEA standards, in that Parents expressed no disagreement with the District's evaluation, a necessary first step in obtaining an IEE under the explicit provisions of the IDEA regulation. 34 C.F.R. §502(b)(1). Although Parents attempted to conjure disagreement with the District's October 2007 evaluation, such arguments are too attenuated to support a statutory right to an IEE. Moreover, the IDEA also requires notice to the District in the form of an IEE request, followed by the District's opportunity to decide whether to grant the request or support the appropriateness of its evaluation via a due process hearing. 34 C.F.R. §502(b)(2). There is no evidence in the record of this case that could reasonably support the conclusion that Parents disagreed with the District's initial evaluation or requested that the District provide an IEE.

Nevertheless, although the record does not support Parents' statutory/regulatory right to an IEE, there is an equitable basis for ordering reimbursement for the IEE. Parents sought the evaluation 1½ years after Student's eligibility for IDEA services had been established by the District's evaluation and more than a year after special education services had begun, yet Student's progress in reading and writing was hardly discernible, while Student's IEP goals for reading, writing, math and speech/language remained virtually identical. (FF 16, 17, 18, 19, 20, 21, 22, 28) In addition, anxiety, attention/focus and social skills issues also remained serious concerns despite virtually constant teacher support. (FF 23, 25, 26, 27, 31) By April 2009, there was clearly reason to question whether the District was appropriately meeting Student's needs and whether it had sufficient information to effectively meet Student's needs. Although

the IDEA regulations provide for reevaluations every three years as a matter of course, the regulations also provide that a District must assure that a reevaluation occurs whenever an eligible child's academic or related services needs require it. 34 C.F.R. §300.303

The District obviously believed that more information would be helpful in further identifying and meeting all of Student's needs, since it suggested conducting a screen for ADD/ADHD, but Parents appeared to be disinterested since they were not seeing such issues at home. (FF 24) Parents likely would have been interested in a further evaluation directed toward Student's academic issues, but the District was content to wait for the three year evaluation, due in the fall of 2010, to re-administer standardized achievement tests. (N.T. p. 381) There is no evidence that the District suggested assessments for anxiety or to rule out other disabilities, despite District concerns about Student's functioning in school. As demonstrated by the measures administered as part of the IEE, however, there are numerous assessments available to a school psychologist for preliminary exploration of issues such as whether another, as yet undetected disability was the an underlying cause for the anxiety, risk avoidance and social skills problems observed by Student's teachers.

Rather than approaching those issues in a piecemeal fashion by proceeding with the limited screening assessment the District proposed, Parents turned to an independent school psychologist to conduct a comprehensive evaluation designed to either identify or rule out a number of potential disabilities, as well as to reassess Student's cognitive functioning and academic achievement. In the process, the independent evaluator identified an underlying nonverbal learning disorder that could account for Student's anxiety and attention issues, and strongly suggests that additional services are required to meet Student's functional needs, such as pragmatic language instruction as part of Student's speech/language services. (FF 47) The



District could and should have ordered similar assessments when Student's progress and functioning in school showed only minimal and inconsistent progress. Instead, however, the District continued to address Student's continuing difficulties with anxiety, task/risk avoidance and social skills without considering whether the diverse symptoms might have a unifying principle. The District also saw no need for standardized achievement measures, although a year of special education had yielded far less than a year's progress, particularly in reading and writing as measured by curriculum based assessments. Although Parents should have approached the District first to seek a further evaluation, it is nevertheless difficult to find anything more important to furthering the purposes of the IDEA than a through evaluation to provide additional information concerning Student's needs and how to meet them.

Moreover, in this case, the District used the information compiled through the independent evaluation process to propose a revised IEP when Parents notified the District that they were enrolling Student in a Private School. The District's acceptance of many of the recommendations in the report helped the District propose significant improvements to Student's program in the December 2009 IEP, such as an increase in reading instruction and reducing the number of programs through which it proposed to instruct Student in reading to Foundations and a similar program for reading comprehension. (FF 51; N.T. pp. 580, 581, 586) The District, therefore, benefited from the evaluation report that Parents obtained at their own expense, and in essence used it as one basis for defeating Parents' tuition reimbursement claim.

For the foregoing reasons, the District will be required to reimburse Parents for the costs of the IEE they obtained in April 2009.

## **ORDER**

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

1. Provide Student with compensatory education in the amount of 3.5 hours/day for every day school was in session from February 19, 2008 through January 12, 2009;
2. Provide Student with compensatory education in the amount of 3.75 hours/day for every day school was in session from January 13, 2009 through the date of Student's withdrawal from the District.
3. Reimburse Student's Parents for costs of the April 2009 independent educational evaluation performed by Dr. K.
4. Convene Student's IEP team to develop an IEP for the 2010/2011 school year that corrects the deficiencies identified in this decision, unless Parents notify the District by August 16, 2010 that they do not intend to re-enroll Student for the 2010/2011 school year.

It is **FURTHER ORDERED** that the compensatory education ordered above shall be provided in accordance with the following terms and conditions:

- a. The cost of the compensatory education award shall be measured by the total amount it cost the School District to provide learning support services for the number of hours awarded;
- b. Student's IEP team shall determine the specific type of compensatory education services, which will be limited to reading/written expression, pragmatic language/social skills training and/or psychological services designed to meet Student's identified needs;
- c. If there is a dispute between the Parents and the School District members of the IEP team with respect to specific compensatory education services, the Parents shall make the final decision;
- d. If Student re-enrolls in the School district, the District shall ensure that the compensatory education services are in addition to, and not used to supplant, educational or related services that should appropriately be provided by the School District through Student's IEP to assure meaningful educational progress;
- e. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents;

It is **FURTHER ORDERED** that any claims or issues not specifically addressed in this decision and order are denied and dismissed.

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

July 28, 2010