

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

Pennsylvania

Special Education Hearing Officer DECISION

Child's Name: M.G.

Date of Birth: [redacted]

Dates of Hearing:

December 6, 2010

December 10, 2010

January 21, 2011

February 7, 2011

February 15, 2011

March 18, 2011

CLOSED HEARING

ODR No. 00857-0910KE

Parties to the Hearing:

Representative:

Parent[s]

David S. Thalheimer, Esquire
Thalheimer & Palumbo
1831 Chestnut Street Suite 300
Philadelphia, PA 19103

Downingtown Area School District
540 Trestle Place
Downingtown, PA 19335

Anne E. Hendricks, Esquire
Levin Legal Group
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date Record Closed:

March 25, 2011

Date of Decision:

April 9, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a middle-school aged student in the above-named School District (hereafter “District.”) Student is eligible for special education by reason of a specific learning disability in reading and a speech/language impairment. Student’s Parents filed a due process complaint on March 22, 2010 under both the Individuals with Disabilities Education Act (IDEA)² and Section 504 of the Rehabilitation Act of 1973 (Section 504),³ challenging the educational program offered and provided to Student by the District for the 2009-10 and 2010-11 school years. As remedies, the Parents sought compensatory education, implementation of an appropriate special education program, and reimbursement for an independent educational evaluation, as well as an order for the District to place Student in an appropriate private school at public expense.⁴

The hearing convened over six sessions⁵ at which the parties presented evidence in support of their respective positions. The record closed on March 25, 2011 upon receipt of the final transcripts. For the reasons which follow, I find in favor of the Parents in part, and will award compensatory education for a portion of the time period claimed.

ISSUES

1. Whether Student was provided with a free, appropriate public education (FAPE) for the 2009-10 school year, including extended school year (ESY) services in the summer of 2009;
2. Whether Student has been and is provided with a free, appropriate public education (FAPE) for the 2010-11 school year;
3. If Student was denied FAPE, is compensatory education an appropriate remedy for past deprivations and, if so, in what amount;
4. If Student was denied FAPE, is an alternative private educational placement at public expense an appropriate prospective remedy; and
5. Whether the Parents are entitled to reimbursement for an independent educational evaluation (IEE)?

¹ Student’s name and gender are not used in this decision to protect Student’s privacy.

² 20 U.S.C. §§ 1401 *et seq.*

³ 29 U.S.C. § 754.

⁴ Due Process Complaint at 5; Notes of Testimony (N.T.) 22-23, 35-36, 1941-46.

⁵ The initial hearing in this case was delayed, and subsequent sessions were continued, at the request of both parties for a variety of reasons including the unavailability of witnesses and/or counsel and a change in Parents’ counsel. One hearing session was also shortened due to inclement weather.

FINDINGS OF FACT

Background

1. Student resides with Student's family within the geographical boundaries of the District. Student presently attends a District middle school. (Notes of Testimony (N.T.) 38)
2. Student attended a private parochial school for the kindergarten through third grade school years. By third grade, Student's Parents became concerned that Student was struggling with reading even with supplemental support provided by the local Intermediate Unit (IU). Student's third grade teacher noted Student's struggles with decoding skills, mathematics skills, and homework completion. (N.T. 41-47, 51-52, 83-87, 427-29; Parent Exhibit (P) 5, P 8 at 2; School District Exhibit (S) 5)
3. Student's Parents enrolled Student in the District for fourth grade so that Student could access more resources to address reading needs. The Parents shared Student's educational records with the District including the Home Report of Student's scores on a Terra Nova (Second Edition) standardized assessment⁶ from third grade. Student's Terra Nova scores were in the borderline average/below average range on the Reading Composite, in the average range on the Language Composite, and in the above average range on the Math Composite. (N.T. 50-54, 73, 429, 446, 1606; P 1)
4. Student began receiving intensive reading support by the District at the beginning of fourth grade and was reading below grade level. Student continued to struggle with reading and required parental support to complete homework. Student also had difficulty with a grade-level Mathematics class and was placed in a basic Mathematics class sometime during the first half of that school year. (N.T. 59, 65-67; P 2; S 5)
5. The District conducted an evaluation of Student during the 2007-08 school year and issued an initial Evaluation Report (ER) in January 2008.⁷ The ER included information from Student's Parents and teachers, classroom based assessments, an observation by the school psychologist, and cognitive and achievement testing. (S 5)
6. Student's cognitive assessment using the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) reflected a full-scale IQ in the low average range with all four composite scores within the average or low average range. (S 5)
7. On the Wechsler Individual Achievement Test – Second Edition (WIAT-II), Student demonstrated significant weaknesses in Reading (Word Reading, Reading Comprehension, and Pseudoword Decoding). By contrast, in Mathematics and Written Language (with the exception of Spelling), Student's scores were commensurate with

⁶ The Terra Nova-Second Edition is an achievement test battery that provides norm-referenced measurement of a student's performance in the form of national percentiles. *See* Salvia, John & Ysseldyke, James E., *Assessment in Special and Inclusive Education* 421-23 (9th ed. 2004).

⁷ The ER reflected an incorrect typed date of January 2, 2007, which is carried through into some of the other documents introduced at the hearing (*see, e.g.,* S 10 at 7).

Student's age and grade expectations. Student did exhibit difficulty on the Spelling subtest. (S 5)

8. To assess emotional and behavioral functioning, Student's teacher and mother completed ratings scales from the Behavior Assessment Scale for Children – Second Edition (BASC-2). Student's teacher's scores revealed concern with a number of behaviors, while Student's mother's scores reflected a concern only in one area, Anxiety. (S 5)
9. The ER concluded that Student was eligible for special education by reason of a specific learning disability in basic reading skills, reading comprehension, and reading fluency. Additionally, the ER recommended that the Parents explore counseling to address emotional concerns and to improve Student's self-confidence. Student's Parents agreed with the ER. (S 5)
10. An Individualized Education Program (IEP) was developed for Student in January 2008 to address needs in reading fluency, reading comprehension, and decoding. The Parents approved the Notice of Recommended Educational Placement (NOREP). (S 7)
11. Student completed the fourth grade with a recommendation to move on to fifth grade for the following school year, having passed all classes. (P 2; S 29)
12. Student's scores on the Pennsylvania System of School Assessment (PSSA) in the spring of 2008 were in the Below Basic range in Reading and in the Proficient range in Mathematics. (P 7)
13. The District's school psychologist also recommended that Student's Parents obtain an evaluation for Auditory Processing Disorder (APD). This evaluation was completed during the summer of 2009 and identified Student with an APD. The APD evaluation made a number of recommendations for Student including trial use of an FM device, structured instructional routines, repetition and clarification of directions, preferential seating away from noisy equipment, assistance with written expression, and visual cues. (N.T. 71-72; S 8)
14. Student returned to the private parochial school for fifth grade and continued to receive reading support from the IU twice per week over the course of that school year, working on reading comprehension, reading for pleasure, study skills, vocabulary, and word identification. The Terra Nova was administered again in the fall, and Student scored squarely in the middle of the below average range on the Reading Composite; in the average range on the Language Composite; and in the below average range on the Math Composite. Student remained in that private placement for the entire school year, passing all classes. (N.T. 73, 75-78; P 4; P 6 at 6; P 8 at 1; S 10 at 7)
15. Student was enrolled in a local university reading program over the summer of 2009 which addressed reading comprehension, word study, vocabulary, reading fluency, and writing. (N.T. 78-79; S 9)

The 2009-10 School Year

16. Student's Parents decided to return Student to the District for sixth grade. Among the information which they provided to the District at that time were the APD evaluation, a report from the local university reading program from the summer, and a progress report from the IU reading program during the prior school year. (N.T. 72, 79-82, 88-89)
17. The District convened an IEP meeting before the start of the 2009-10 school year. The IEP included information from the 2008 ER, the university reading program over the summer of 2009, and the parochial school, and also reflected parental input. Needs were identified for reading fluency and reading comprehension, and a weakness in written expression was also noted; a need for accommodations in the classroom to decrease distractions caused by noise and activity was also indicated. Based upon information from the local university reading program indicating that Student used decoding skills to sound out unknown words, that skill was not identified as a weakness. The IEP contained goals addressing reading fluency, reading comprehension, and written expression, but not for decoding. A number of program modifications and items of specially designed instruction were included. Student's placement was regular education for all classes with the exception of a writing class and a curriculum support class which would be provided in the learning support environment. The Parents approved the accompanying NOREP. (N.T. 92-93; P 6; S 10)
18. To address Student's reading and language needs in the 2009-10 school year, Student was scheduled for three classes called Foundations classes: Foundations of Reading, Foundations of Literature, and Foundations of Writing. The Foundations classes are designed for students who are two or more grade levels below grade level in reading. It is an intervention which is not considered to be special education. (N.T. 98-102, 499, 741)
19. A student's placement into the Foundations classes in the sixth grade was based upon recommendations of teachers, academic advisors, and a guidance counselor; scores on the PSSA in fifth grade; any other relevant assessments from fifth grade; discussions at meetings; and a score on the Gates-MacGinitie Reading Test (GMRT), a standardized achievement test that reports grade equivalency scores. Parents can override decisions to place a student in a Foundations class. (N.T. 499-501, 503-04, 569-71, 626-27, 679-83, 740-41, 1124)
20. Student's scores on the GMRT at the beginning of the 2009-10 school year were, in grade equivalency, 3.6 in Reading Vocabulary, 2.5 in Reading Comprehension, and a Total Reading Score of 3.1. (N.T. 610-12; P 24 at 4; S 25 at 9)
21. Student's Parents did not override the decision to place Student in the Foundations classes at the beginning of the school year. (N.T. 570-71)
22. Student's Foundation of Literature class, taught by a reading specialist, focused on reading fluency, reading comprehension, decoding, and reading strategies, as well as elements of literature, character analysis, problem solution, conflict resolution, setting,

citing evidence, figurative language, and poetry. The students read, silently and/or orally, booklets which were at a second- through four-grade reading level, and also read one novel, one biography, scholastic magazines, and some poetry and plays. Students also completed worksheets, which were graded for accuracy in content without regard to whether the students used appropriate punctuation, spelling, and capitalization, or answered the questions in complete sentences. Student's teacher implemented a number of the items of specially designed instruction in Student's IEP including use of graphic organizers, direct instruction for drawing conclusions and making predictions, chunking of material, clarifying directions, and directions read aloud. The teacher believed that Student was appropriately placed in that class in which Student did well. (N.T. 386-87, 498, 510-20, 523-24, 530-31, 533-35, 537-40, 571-79, 580-91, 593-95, 598-99, 602-05, 606-07, 637-39, 656-58, 660-63; P 9, P 37, P 38; S 29)

23. In the Foundations of Reading class, also taught by a reading specialist, the reading materials were at a second- through fifth-grade level. The teacher used reciprocal teaching (Soar to Success) to work on reading comprehension. The students worked individually using a computer program (Academy of Reading) as one means of teaching decoding, which was used at the beginning of the class four days a week for approximately 8-15 minutes. A computer problem near the beginning of the school year meant that the students had to start the Academy of Reading program over again in mid-November 2009. Students were assessed using probes for oral reading fluency (every marking period) and reading comprehension (winter and spring) during the school year. The teacher worked on Student's IEP goals in reading fluency and reading comprehension, and also provided Student with individualized support for new vocabulary. This teacher implemented many of the items of specially designed instruction in this reading class, including use of outlines and graphic organizers; highlighting key information; direct instruction of reading comprehension strategies; chunking of larger tasks; checking for understanding; and clarifying directions which were read aloud. The class as a whole including Student worked on oral reading fluency each day. Student's teacher believed Student was properly placed in the Foundations of Reading class and was pleased with Student's performance. (N.T. 328-30, 683-85, 690-94, 699-701, 703-05, 708-11, 728-29, 733, 741-48, 751-55, 757-60, 762, 764-67, 778-81, 783-88, 811; P 24; S 29, S 30)

24. The Foundations of Writing class was taught by a certified special education teacher. Students worked on spelling, punctuation, and the overall writing process from brainstorming through editing and revising. Student's teacher also worked with Student on Student's writing goal. Student's teacher believed Student made progress in the Writing class. (N.T. 1180-82, 1194, 1197-99, 1207; S 29)

25. Student did not like the Foundations classes, and complained to the Parents that the other children in those classes were often disruptive. Student did not complain to the teachers, however, and the teachers did not believe that the students in these classrooms behaved any differently than students in other classrooms. The Parents did ask the teachers about students whose behaviors were distracting to Student. There was one child in one of Student's Foundations classes who was bothering Student regularly with negative verbal comments and some physical aggression both in class and in the hallway. Student's

Parents brought this situation to the attention of the learning support teacher and guidance counselor, and some of this other child's classes were changed. This other child soon left the District. Student was also sometimes distracted by other children in the Curriculum Support classroom but did not report that to the Curriculum Support teacher. (N.T. 129-38, 140, 316-19, 321-24, 331-33, 335-36, 344-45, 350-53, 355-56, 399-401, 404-05, 495, 541-44, 545-49, 561-63, 605, 607, 613, 619-21, 738, 770-71, 787, 1192, 1212, 1218, 1220-21; P 21 at 1)

26. Student did not have a Social Studies class during the 2009-10 school year, although portions of the sixth grade Social Studies curriculum were covered in Foundations of Reading for two week periods each quarter. The social studies reading materials were at a fifth-grade level, and Student had difficulty with those. Student's teacher would reread the material so that Student understood it, and reviewed and developed vocabulary with the class. (N.T. 346, 743, 760-71, 814-15, 831)
27. Student was in a grade-level, supported Math class during the 2009-10 school year which was co-taught. This class focused on decimals, fractions, geometry, and probability. Student achieved B grades in the class and demonstrated some difficulty with problem solving. The teacher did assign homework which was graded for completion, including showing work, but was not checked for accuracy. The Math teachers implemented some of the specially designed instruction for Student including highlighting key information, reading aloud and clarifying directions, preferential seating, and extended test time. (N.T. 1183-84, 1447-55, 1459-62, 1465-66)
28. Student also was scheduled for Curriculum Support in the learning support environment twice per six-day cycle. Sometime during the spring of that school year, the amount of Curriculum Support was increased. (N.T. 102-03, 247-48, 334, 348-49, 1206-07)
29. In Curriculum Support, Student would fill out a form that specified what activity Student would work on for the period. A paraprofessional circulated among the students and checked that the forms were completed. Although Student had an assignment book, no one checked whether it was filled out correctly. At the end of the school year, the Curriculum Support teacher focused on Science and Math classes, reinforcing concepts and reviewing study guides, and often working individually with Student. Sometimes after Student completed all assignments and tasks, Student would help the teacher organize the classroom or clean the boards. (N.T. 336-46, 350, 1180, 1185-91, 1203; P 29)
30. The District's homeroom period is approximately 30 minutes long, and students are permitted to seek out teachers' help during this time. (N.T. 124, 127, 346-47, 918-20)
31. Student rarely had homework during the 2009-10 school year, particularly in the Foundations classes. (N.T. 113-14, 116, 125, 326-27, 442, 527, 529-30, 588, 763, 818-19, 821-22)

32. Student remained in the local university reading program through the fall of 2009 with weekly tutoring sessions addressing reading comprehension, word study, fluency, and writing skills. (N.T. 179-80; S 14)
33. In the fall of 2009, at the Parents' request, a private psychological evaluation was conducted after a lengthy delay in obtaining an appointment. Student's Parents sought this evaluation because they were concerned about Student's reading struggles and also about whether Student had Attention Deficit/Hyperactivity Disorder (ADHD). Assessments administered included abbreviated cognitive testing, portions of the WIAT-II, and the Comprehensive Test of Phonological Processing (C-TOPP). Student's full scale IQ was solidly in the average range. By contrast, Student's academic achievement scores were well below expectations in Word Recognition, Spelling, Reading Comprehension, Math Computation, and Reading Speed. The psychologist diagnosed Student with Dyslexia, and also made a provisional diagnosis of ADHD, Predominantly Inattentive Type. (N.T. 106-09, 207, 430-33; S 11)
34. The private psychologist made a number of recommendations for Student's educational program with respect to Reading, Spelling/Writing, and Mathematics, as well as to address Student's general needs. Specific suggestions included a phonics-based Reading program such as Orton-Gillingham or Wilson, the availability of reading material in audio format or through a computer program, instruction in study strategies, and homework accommodations. (S 11)
35. The Parents immediately shared this private psychological evaluation report with the District in late October 2009. However, the District's school psychologist and one of the teachers discussed the Dyslexia diagnosis with the Parents and explained that the term is not one recognized as a category of disability for purposes of special education. The private psychologist confirmed for the Parents that Dyslexia is a synonym for "reading disorder." (N.T. 111, 143-44, 436-39, 475, 1622-27; P 21 at 2-10; S 11 at 13)
36. After the private psychological evaluation, Student's Parents repeatedly requested that Student be provided with a phonics-based Reading program such as Orton-Gillingham. The District explained that it used an eclectic, multi-modal approach to teaching Reading. (N.T. 121-22, 443, 485; P 21 at 3, 9)
37. The District met with the Parents in early November 2009 to review the private psychological evaluation report. Another purpose of the meeting was to consider changes to Student's IEP including the Reading program. The District sought, and the Parents ultimately granted, permission to conduct additional cognitive and achievement testing of Student because those assessments by the private psychologist were not comprehensive. The District also wished to obtain an audiology consult, updated Speech/Language information, an assistive technology evaluation, and further social, emotional, and behavioral information, to which the Parents agreed. (N.T. 150, 154-59, 165-69, 171, 194-97, 451-54, 476-78, 481-83, 1581-89, 1591, 1607-08; P 21 at 4, 7, 46; S 13, S 18, S 32)

38. After that meeting and before the additional assessments could be completed, the District sent the Parents a revised IEP which incorporated information from the private psychological evaluation, added reading decoding and writing as academic needs, and provided several new items of specially designed instruction related to revising/editing writing pieces; preteaching Science vocabulary and small group study for that subject; clarifying directions; prompts to remain on task; provision of a rubric or written directions for long-term projects; preferential seating; ample wait-time for processing information when answering questions; and a direct, explicit, systematic, phonics-based Reading program. The Parents did not approve implementation of this revised IEP. (N.T. 160-65, 169, 171-72; S 3 at 28-29, 36, S 12; *compare* S 12 at 12-13 *with* S 10 at 13)
39. The Parents provided input into the reevaluation report (RR) which described Student's difficulties in school, and noted that Student was easily distracted due to the diagnoses of APD, ADHD, and Dyslexia. The Parents stated that other students' disruptive behavior in the classroom would interfere with Student's education. (N.T. 169-70, 468-71; S 13 at 3-4)
40. An IEP meeting convened in early January 2010 but no revisions were made because the re-evaluation had not yet been completed. The team members discussed Student's Reading program and assistive technology, but the District did not agree to begin providing any specific Reading program to Student. (N.T. 181-87; S 15, S 16)
41. The private psychologist who evaluated Student earlier in the school year made additional recommendations to the IEP team in January 2010 about the Reading program he was suggesting for Student; specifically, he reiterated his opinion that an Orton-Gillingham or Wilson program would be appropriate. (N.T. 201-02; P 21 at 53-54)
42. The local IU completed an assistive technology evaluation and issued a report in late January 2010. Recommendations included a trial of an FM system, which was briefly attempted but discontinued because Student and the Parents did not find it to be successful. Keyboarding was also suggested. Another recommendation was use of digital access to curriculum content through, *e.g.*, a text-to-speech computer program or video format. The District did obtain text-to-speech software on a trial basis, but computer problems prevented its use with Student that spring. (N.T. 173-74, 188-92, 197-99, 264-66, 599-600, 1462-63; P 21 at 36-38, 47-50; S 17, S 32)
43. The District issued its RR on February 5, 2010. This report contained background information about Student, the Parents' input, comprehensive summaries of the various outside evaluations with the full reports attached, classroom based assessments, three classroom observations, and Student's then-current grades. The RR also included the results of recent assessment of Student's cognitive ability, achievement, executive functioning, speech/language skills, visual motor integration, and assistive technology needs, as well as behavior rating scales. (N.T. 1598-1602; S 19)
44. Student's scores on the WISC-IV in January 2010 reflected a full scale IQ in the average range, with all index scores also falling within the average range. There were no

discrepancies noted among the index scores, and Student's cognitive skills were determined to be evenly developed across all domains. (N.T. 1598-1600; S 19)

45. On the WIAT Third Edition (WIAT-III) administered in early February, Student earned a Total Achievement score in the low average range. Student's scores were in the average range on the Oral Language Composite; in the below average range on the Total Reading Composite, Basic Reading Composite, and Reading Comprehension and Fluency Composite; in the average range on the Written Expression Composite; and in the average range on the Mathematics Composite but in the below average range on the Math Fluency Composite. Specific weaknesses were noted in Word Reading, Pseudoword Decoding, Spelling, and Math Fluency (Addition). (S 19)
46. Teacher and Parent forms of the Behavior Rating Inventory of Executive Functioning (BRIEF) revealed parental rating on all indices and scales within the average range, while Student's teacher rating reflected two areas of concern on the Metacognition Index: Initiation and Working Memory. (N.T. 1600-01; S 19)
47. The Parents and one of Student's teachers completed the Conners Rating Scales – 3rd Edition (Conners 3). The parent ratings reflected very elevated scores in Inattention and Learning Problems, with all other scores in the average range. Student's teacher ratings revealed a very elevated score in Learning Problems and Executive Functioning, and a high average score in Inattention. The parent and teacher checklists reflected a few symptoms of ADHD but not a sufficient number to provide a diagnosis. (N.T. 1643-46; S 19)
48. An updated speech/language evaluation using the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) revealed a language delay with noted needs in Expressive Language and auditory processing. (S 19)
49. Other assessments reflected high average functioning in visual motor integration, average functioning in motor skills, and average functioning in perceptual skills. The results of the assistive technology evaluation by the IU were also included. (S 19)
50. There were a number of recommendations in the RR. General recommendations included presentation of new material in a quiet area with decreased auditory stimulation; use of outlines or graphic organizers for written assignments; review and clarification of step-by-step directions; highlighting of key information; and monitoring of class notes and binders for both completion and accuracy. Content Area recommendations included curriculum support six times per six-day cycle for content area support; support in grade level Math and Writing classes; study guides for upcoming tests and essay questions provided in advance; pre-teaching Science vocabulary and small group study sessions for Science class; monitoring comprehension of content area reading; and re-instruction of course content area classes. To address Student's reading needs, the RR suggested support in Literature class; direct instruction to address goals and objectives in reading fluency, reading decoding, and reading comprehension; and a direct, explicit, systematic, phonetic word analytic approach to decoding, fluency, and spelling instruction. (S 19)

51. At the time of the District's RR, Student was performing in individual classes as follows. In Mathematics, Student demonstrated average math skills with test and quiz grades ranging from 74 – 87%, and 100% homework completion. In Foundations of Reading, Student had mastered 35 of 45 specific phonics skills; and in Foundations of Literature, Student had increased oral reading fluency from a baseline of 90 correct words per minute at a fourth grade level to one probe of 109 words correct per minute at a sixth grade level; and improved reading comprehension from a baseline of 70% accuracy using third grade text to 88% accuracy using third grade text. In Foundations of Writing class, Student was completing one-paragraph essays using all required elements and stages of the process while showing a need to provide more details and organization. In Science (a regular education class), Student had an 82% average. (S 19)
52. The RR concluded that Student remained eligible for special education by reason of a Specific Learning Disability in reading, and in the secondary disability category of Speech/Language Impairment. Student's teachers recommended in the RR that Student continue with the then-current classes with the exception of Student's Writing teacher who suggested the team consider a regular education Writing class with support. Identified needs continued to be reading fluency, reading decoding, reading comprehension, and written expression skills. (S 19)
53. Student's Parents did not agree with the RR, stating that it did not "properly and accurately describe [Student's] learning disabilities and related educational needs." (S 19 at 33) The Parents also requested that the District add Dyslexia to the disability classification. (N.T. 1603; S 19)
54. The IEP team convened again in late February and early March 2010. Parental concerns at that time focused on a reading program such as Orton-Gillingham and Student's progress in the Foundations classes, as well as the initiation of Speech/Language services to which the Parents agreed on March 22, 2010. The Parents only approved the portions of this IEP relating to the Speech/Language Therapy and the change in the Writing class; they also requested an Independent Educational Evaluation (IEE). (N.T. 212-19, 228, 234, 455-58; P 16; S 19 at 33; S 20, S 21)
55. Sometime in the spring of 2010, Student was moved from the Foundations of Literature class to a regular education Literature class, and from the Foundations of Writing class to a regular education Writing class. (N.T. 123-24, 218-19, 1198)
56. Student's IEP team met again in April 2010 to revise the IEP to reflect that Student would be provided with the Wilson reading program. The Parents agreed to the Wilson program, and Student also remained in the Foundations of Reading class. (N.T. 224-35; 712-13,777, 1201-02; S 22, S 23, S 24)
57. The Wilson Reading Program focuses on decoding, encoding, oral reading fluency, and reading comprehension using a multimodal approach. Student was initially assessed before beginning the program using the Wilson Assessment for Decoding and Encoding (WADE) to determine where in the program Student should begin. All students entering the Wilson program start at either level 1.1 or 1.3. Student started at level 1.3 of the

Wilson program when the instruction began in May 2010. The Wilson teacher also worked on vocabulary with Student even though that is not part of the program. Student had Wilson instruction every day. Student made educational progress in the Wilson Reading Program in the spring of 2010, completing Book 1. (N.T. 1226-37, 1243-45; S 21, S 30 at 7, S 37)

58. Sometime in spring 2010 Student's Curriculum Support classes increased from two to four days per six-day cycle. (N.T. 247-48, 348-49)
59. Student had only two speech/language therapy sessions at the end of the 2009-10 school year. (N.T. 240-44, 362-65; P 18)
60. Progress monitoring on Student's IEP reading fluency goals during the 2009-10 school year reflected that by February 2010, Student was reading 109 correct words per minute using sixth grade text, from a baseline of 90 correct words per minute at a fourth grade level, and by June 2010, Student was reading 134 correct words per minute at a sixth grade level. (P 24 at 4; S 30)⁸ However, the instrument used to probe Student's reading fluency in the second half of the 2009-10 school year was not used with sufficient frequency to provide reliable information on progress. (N.T. 730-32)
61. Progress monitoring on Student's IEP reading comprehension goals during the 2009-10 school year reflected that by February 2010, Student answered third grade level comprehension questions with 88% accuracy, from a baseline of 70% accuracy at that grade level; and by June 2010, Student was answering fourth grade level comprehension questions with 100% accuracy. (S 30)
62. On Student's IEP goals for writing, which did not contain a baseline at the start of the 2009-10 school year, progress monitoring reports revealed progress anecdotally as well as in terms of scores on the sixth grade PSSA rubric in the spring of 2010. (S 30)
63. On the GMRT administered at the end of the 2009-10 school year, Student obtained grade equivalency scores of 4.4 in Reading Vocabulary, 5.2 in Reading Comprehension, and a Total Reading Score of 4.6. (N.T. 611-12, 725-28, 757-58; P 24 at 4; S 25 at 9)
64. On the PSSA in the spring of 2010, Student scored in the Basic range in Mathematics and in the Below Basic range in Reading. (P 12)
65. Student was determined to be not eligible for ESY for the summer of 2010. (N.T. 96-97, 244-45, 449; P 6; S 4, S 10)

⁸ The progress on this goal reported on 6/18/10 (S 30 at 6) appears to contain a typographical error. (N.T. 781-82; P 24 at 4)

The 2010-11 School Year

66. The Parents obtained another private evaluation in the spring and summer of 2010 by a neuropsychologist who issued an Independent Evaluation Report (IEE). The Parents shared the report with the District. (N.T. 231, 255-56, 1716-17; P 34; S 26)
67. The independent neuropsychologist conducted a number of assessments of, *inter alia*, Student's cognitive ability (with results in the average range on the Differential Abilities Scales – Second edition); communication, learning, and memory skills; executive functioning; and motor functioning. This evaluator also observed Student at school. (S 26)
68. Achievement testing in the IEE in the area of Reading reflected low average phonological awareness and decoding skills, with reading comprehension skills assessed at the low end of the average range on the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH). On the C-TOPP, Student demonstrated noted weaknesses in phonological working memory and rapid naming. In other reading assessments, Student's scores revealed weaknesses in oral reading fluency, decoding, and reading efficiency. (N.T. 1733-37, 1739-44; S 26)
69. In Mathematics, Student scored in the average range on skills assessed by the WJ-III ACH with the exception of Math Fluency which was a weakness. (N.T. 1738; S 26)
70. Achievement testing of Student's Spelling and Written Language skills revealed overall average range abilities in Written Expression but with noted difficulties in Spelling. (N.T. 1738-39; S 26)
71. The IEE also provided behavioral and emotional information through the BRIEF (Parents and teachers) and the BASC-2 (Parents, teacher, and self-report). The only areas which were noted as concerns were Anxiety (in the home), and executive functioning (at school) particularly with respect to working memory and the ability to problem solve and complete tasks. (N.T. 1744-45; S 26)
72. The independent evaluator made a number of recommendations for Student's educational program. Those were development study skills, independent skills, and self-advocacy with direct instruction; holding appropriate expectations of Student in accessing the curriculum in Math, Science, Social Studies, and Written Language; intensive intervention in a multisensory, phonics based Reading program such as Wilson and Orton-Gillingham to address reading and spelling weaknesses; and accommodations for Student's reading levels in content area classes with communication among Student's teachers to ensure generalization of reading skills; assistive technology to provide written materials in audio format; use of a calculator and formulas in Mathematics class; acceptance of spelling errors in written assignments; continuation of Speech/Language therapy; and regular progress monitoring. (N.T. 1746, 1749-55, 1757-59, 1768-73, 1775-77, 1780, 1783-84, 1794-1800, 1803-07, 1809-10, 1861-62; S 26 at 19-22)

73. In addition, the independent neuropsychologist recommended several accommodations, including extended time; directions read aloud and simplified; provision of teacher-made notes; review of study guides; reminders of upcoming tests and assignments; preferential seating; chunking of material provided in active learning settings; instruction in study and retrieval strategies; and modified tests, quizzes, and assignments with forced choices. (S 26 at 21-22)
74. The independent evaluator also recommended that Student be provided with ESY services based upon testing of Student's weaknesses with working memory and retrieval, placing Student "at risk for regression" (P 25 at 2), as well as Student's need for an intensive phonics-based reading program. She did not obtain any regression or recoupment data. (N.T. 1849-51; P 25; S 26 at 21)
75. The District proposed that Student take a Reading Comprehension class for the 2010-11 school year, but Student did not do so. The sixth grade Foundations of Reading teacher recommended that Student also take a supported Literature class in seventh grade based upon the GMRT and PSSA scores and other assessments. Student started the school year in a supported Literature class but soon moved, at Parents' request, to a non-Foundations Literature course. (N.T. 607-10, 756-57, 836-40, 1042, 1111-12, 1499-1500)
76. Student's schedule for the 2010-11 was (as of February 2011), and is, as follows: Writing class; Pre-algebra class; Science class; Lunch; Literature class; American History/Social Studies class; Curriculum Support or Speech/Language Therapy or an encore class; Wilson Reading. Instructional periods are 48 minutes long and there are seven instructional periods in a day. (N.T. 652, 887-94; P 26)
77. Student's IEP team met again in mid-October 2010 to revise Student's IEP. The independent neuropsychologist attended this meeting. This IEP provided for goals for Speech/Language Therapy; decoding; written expression; reading fluency; and development of study skills. New program modifications and specially designed instruction from the prior implemented IEPs included content area books and core novels provided in audio format or read aloud; a phonetic-based Spelling list; monitoring of class notes and binders for completion and accuracy; monitoring comprehension of core content class curriculum and reading materials; re-instruction of core content in Curriculum Support class; instruction in study skills and strategies; text-to-speech technology for content areas; use of a calculator in Mathematics class and provision of formulas for Mathematics assignments and assessments; limited open-ended questions; review of assessments when Student attains a score of 70% or below; and frequent communications with the Parents about Student's progress. The Parents approved the NOREP accompanying this IEP "without prejudice" (S 33 at 3), indicating that they would consent to its implementation but that they did not agree that it provided Student with an appropriate education. (N.T. 259-61, 1113, 1771-73; S 25, S 33)
78. Student's Writing class focuses on structure and organization of writing as well as parts of speech and grammar. Students in the seventh grade review one-paragraph essays before moving on to three- and five-paragraph essays. The class is instructed on different parts of speech, then students work on the concepts through worksheet packets which are

reviewed in class, and also take quizzes and tests. Spelling is also addressed with students taking spelling tests approximately every three weeks. Student is provided with an individualized spelling list in Writing class and continues to work on spelling in the Wilson instructional time. The Writing teacher provides graphic organizers for all writing assignments and study guides for tests, and rubrics or written directions for long assignments. The worksheet packets are checked and graded for completion but not for accuracy. The Writing teacher does not work individually with Student to ascertain whether Student knows how to use a graphic organizer, has correctly completed and understand homework or packets, or understands the reasons for being asked to make revisions to writing assignments. Through the beginning of January 2011, Student had an 85% grade average in this class. (N.T. 1248-49, 1287-94, 1308-12, 1314-17, 1320-24, 1330-32, 1334-38, 1350-53, 1361-62; P 32 at 2; P 42)

79. Student continued in the Wilson program at level 2.1 at the beginning of the 2010-11 school year. The teacher re-administered the WADE in September 2010, providing information about the skills Student maintained, but this instrument is not used to measure progress. Although Student needed some re-instruction in the fall of 2010, review is inherent in the Wilson program and Student's teacher did not see regression over the summer. By the time of the February 7, 2011 hearing session, Student was working on Wilson level 5.5. Student has continued to demonstrate weaknesses with decoding, fluency, and vocabulary, while showing improvement with encoding. Student has also demonstrated progress on the two IEP goals that the Wilson program addresses, both involving decoding goals: correct pronunciation of real and nonsense words at a 6.4 level from a baseline 3.4 level, and by November 2010, Student was working on level 4.2 of the Wilson program. (N.T. 1237-42, 1246, 1250-53, 1261-62; S 25, S 35, S 37)
80. Student's Literature class is an on-grade level, unsupported class which focuses on reading strategies, elements of literature, and genres, from short stories through a novel. Homework is graded for completion, not accuracy. The teacher implements some of the specially designed instruction in Student's IEP, including direct instruction of reading comprehension strategies; vocabulary review; reviewing and clarifying directions which are read aloud; chunking of tasks; providing written directions or a rubric for long assignments; preferential seating; modified tests; and extended test time. Rather than study guides, the teacher provides a note sheet. Student struggled with reading a biography, and obtained two different books about the same person, one of which Student could read independently and one of which was on a higher grade reading level. Student's strength in that class is comprehension. Through the end of December 2010, Student had maintained an A-B grade average in Literature class. (N.T. 1498, 1501-05, 1508-16, 1522-25; P 32 at 1)
81. Student's seventh grade American History/Social Studies class covers the time period from the late 1600s to the mid-1800s. The students' homework assignments are checked for completion, not accuracy, and reviewed as a class. Student's History teacher has observed that sometimes Student does well on assessments, and sometimes Student does not, and does not know the reason for this. On one quiz taken in January 2011, the teacher reviewed some of the questions with Student and placed boxes around certain words or parts of words to help Student decode them; an aide also provided an unknown

amount of support for that quiz, and her handwriting appears on the quiz in addition to that of Student. In this class, the teacher has highlighted key information for Student; used outlines and graphic organizers; reviewed and clarified directions; chunked materials; provided study guides reviewed with the class as a whole; and provided modified tests and quizzes with extra time. The teacher does not monitor Student's comprehension of the materials. Student met with the History teacher on one occasion during the 2010-11 school year during the homeroom period. At the end of the second marking period, Student had a B grade average, a decrease from an A grade in the first marking period. (N.T. 1371-80, 1382-97, 1399-1403, 1407, 1410-11; 1417, 1428-31, 1440-42; P 31 at 4-6, P 32 at 3; P 41)

82. Student finds History class difficult, and is distracted by several students in the class who make noise by yelling and hitting desks. Student has not told the teacher this, however. Student's study guides for History are frequently identical to the test itself. Student has been able to memorize the answers to the study guide and their placement on the page in order to achieve perfect scores on the tests. When Student's study guide is not identical to the test, Student has not passed the test. (N.T. 368-72, 395-97, 405-06, 1411-12, 1413-15; P 30)
83. Student began the 2010-11 school year in an on-grade level Mathematics class. In October 2010, the District agreed to the Parents' request to place Student in a different class and Student moved to a Pre-Algebra class. Homework is graded for completion only although students often must show work. Student is accommodated in that class through use of a calculator and the provision of formulas for assignments and tests. The teacher also implements some of the specially designed instruction in Student's IEP, including highlighting key information, reviewing and clarifying directions which are read aloud, extended test time, modified tests, preferential seating, asking content related questions to gauge comprehension. Student has struggled with some concepts in this class but was maintaining a B average. (N.T. 253-54, 270-73, 997-98, 1009, 1082-83, 1104, 1106-09, 1469-83, 1486, 1490, 1827-29; P 32 at 3-4; S 25)
84. Student has Curriculum Support two days per six-day cycle in the 2010-11 school year and continues to fill out the form described in paragraph No. 29 above. The teacher does work individually with the students in the class, but Student does not generally work with the teacher to study for tests or quizzes during Curriculum Support; the students will complete study guides as a group for Science or History class. The class sometimes finishes tests, and students work on completing homework, editing written papers, and reviewing math concepts. Student continues to find that other students in the Curriculum Support class are distracting but has not told the teacher. Student's notebooks are checked for organization and completion, and the Curriculum Support teacher has all assignments for all students on the board. No one confirms that Student has accurately written down assignments for the various classes on the days Student does not have Curriculum Support. Student's notes for content area classes are sometimes checked for accuracy. (N.T. 357-61, 374, 379-81, 390-91, 401-02, 405-06, 896-902, 969-71, 1006-07, 1027-28, 1031-36; P 23)

85. Student has Speech/Language Therapy once per week this school year. The Speech/Language therapist has worked with Student on some organizational and study strategies. (N.T. 375, 381-83)
86. Student has been provided with the Science textbook for the 2010-11 school year in audio format. Partway through the school year, Student was also provided with a new History textbook that has an online component which can read to students. For Literature class, Student's IEP requires only that "core novels" be provided in audio format or read aloud, and other reading material for the Literature class has not been made available to Student in audio format. (N.T. 266, 929-31, 939-41, 954-55, 1389-90, 1507-08, 1530-34, 1535-36, 1549; S 25 at 28)
87. Student's Parents have obtained some books in audio format for Student's Literature class during the 2010-11 school year. (N.T. 266-69, 932-34, 937-40, 1508, 1516-17, 1533-34, 1536, 1563-65)
88. The District provided Student with a laptop for use with the text-to-speech computer program, although Student does not know how to use the program. It is Student's responsibility to determine when material should be scanned using the computer program. (N.T. 376, 923-28, 1074-75, 1078, 1423)
89. In early November 2010, Student's teachers suggested to the Parents that they meet as a group for Parent-Teacher conferences, but Student's Parents did not agree. (N.T. 391-94, 1302-04; P 20)
90. Student has achieved scores below 70% in different classes over the course of the 2010-11 school year. Student's teachers do not routinely follow up with Student when this occurs. (N.T. 275-77, 981-82, 984-87, 1007-08, 1418-19)
91. During the 2010-11 school year, Student has not and does not routinely bring home study guides for any class, and has generally only been provided with study guides in History class. Student has told that Parents that Student does not know how to study. No one is teaching Student how to study or instructing Student in studying techniques or strategies. Student does not know what a graphic organizer is. (N.T. 285, 291, 348, 365-67, 390-91, 407, 905-06, 1094-96, 1101-02)
92. Student's Curriculum Support teacher reviews most tests and quizzes for Student to ensure all accommodations in the IEP are provided, specifically appropriate modifications of the assessments. (N.T. 976-81, 1013-15, 1058-59)
93. In regression/recoupment data obtained by the Wilson Reading Program teacher, Student did not exhibit regression after the winter break in the 2010-11 school year. (N.T. 1254-55, 1269-70; S 36)
94. Student has a much better attitude about school this school year than Student had in the prior school year. (N.T. 305-06)

95. For the 2010-11 school year, the Parents were and are “mostly very satisfied” with Student’s schedule (N.T. 252) with the exception of continued concerns with the Foundations of Literature and Math classes which were changed. They are pleased with the Pre-Algebra class. They also advocated for intensive remediation to address reading weaknesses. (N.T. 251-52, 258-59, 270, 274; P 26)

96. The following exhibits were introduced and as of this date are admitted into evidence:

Hearing Officer Exhibit Nos. 1, 2, 3, 4 (N.T. 1576)

Parent Exhibit Nos. 1, 2, 4, 5, 6, 7, 8, 9, 12, 15, 16, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 31A, 32, 34, 36, 37, 38, 39, 40, 41, and 42

School District Exhibit Nos. 1 - 5 and 7 - 37

The majority of these were accepted into the record at the close of the case.⁹ (N.T. 1897-1900) P 16 was referenced during the testimony without objection (N.T. 457-58) and is deemed admitted. This hearing officer reserved ruling on P 15 and 41, to which the District objected (N.T. 486-89, 973-75, 1897-98), and admits them at this time with the following explanation. P 15 provides helpful clarification on the Parents’ due process complaint and, further, puts the testimony about ESY services by one of the Parents (N.T. 486-91) in context. P 41 is the actual History quiz about which there was extensive testimony (N.T. 971-73, 1378-83, 1429-32) elicited over the District’s objection (N.T. 973-75, 1012-13), and review of the itself document provides clarification which is not apparent from the testimony alone.

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of

⁹ The Parents did not request admission of P 3, P 10, P 11, P 13, P 14, P 16, P 17, P 22, P 33, and P 35. (N.T. 1896-99) The objection to P 43 was sustained. (N.T. 1355-57). The District did not request admission of S 6. (N.T. 1899-1900) With respect to P 21 and S 3, both of which are collections of email messages, the parties did not specify whether they sought admission of only portions of those exhibits; however, this hearing officer only gave consideration to those pages which were specifically referenced in the testimony as was discussed at the beginning of the hearing. (N.T. 14-16) It should also be noted that the District objected to any evidence related to events that occurred after the first hearing session. (N.T. 943-50, 974, 1537-45) With some exceptions, those objections were overruled, since it was clear that the appropriateness of Student’s 2010-11 program was at issue, and the additional evidence was merely corroborative, providing a more complete picture of how Student’s IEP was implemented during the 2010-11 school year. This hearing officer also determined that it was more efficient to permit the evidence and thereby avoid a second due process complaint about the same school year.

persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);¹⁰ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent. In some instances, witnesses’ recollections differed, which did not necessarily render the testimony incredible. The credibility of particular witnesses is discussed further in this decision as necessary.

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

School districts are also mandated to educate *all* children with disabilities, to the maximum extent appropriate, in the regular education environment. 20 U.S.C. § 1412(5)(A). Section 504 further prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794.

¹⁰ The burden of production, “*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

2009-10 School Year

The Parents raised a variety of challenges to the appropriateness of Student's educational program for this school year. When the IEP team met prior to the start of this school year, after Student had been out of the District for one school year, Student's identified needs were in the areas of reading fluency and reading comprehension, with an additional weakness noted in written expression. (Finding of Fact (FF) 15, 16, 17) Goals were developed to address those three weaknesses, and accommodations to decrease distractions were also noted and included. (FF 17) Information from the prior school year and from the university reading program did not indicate that Student had a continued need in the area of decoding. (FF 15, 17) Thus, despite the Parents' expert's opinion that Student did not receive sufficient instruction in reading decoding during the first half of the 2009-10 school year (N.T. 1765-69), the record does not support the conclusion that the District failed to address this need adequately from the first day of school.

The first issue is whether Student was inappropriately placed in the Foundations classes. It should be recalled that the Foundations classes are regular education classes, designed as an intervention for students who are reading two or more grade levels below expectations. (FF 18) A student's placement in these classes is determined, not by a need for special education, but through recommendations of teachers and advisors as well as scores on assessments such as the PSSA and the GMRT. (FF 19) At the beginning of the 2009-10 school year when Student entered sixth grade, the District had Student's Terra Nova scores for Reading (below average), as well as Student's GMRT scores which ranged from a 2.5 to a 3.6 grade level,¹¹ well below expectations for Student's grade. (FF 14, 17, 20) Although the Parents may not have believed Student needed to be in classes where the curriculum was far below grade expectations and, thus, may not have been challenging enough for Student (FF 31, 54, 55), the evidence available to the District at the beginning of the 2009-10 school year provided a reasonable basis to suggest that the Foundations classes were appropriate interventions to address Student's weaknesses in reading and language.

With respect to Student's needs in those areas, reading fluency and reading comprehension were a major focus of both the Foundations of Literature and Foundations of Reading classes, which were taught by reading specialists. (FF 22, 23, 51, 61) Student also worked on both of these IEP goals in these classes and made some progress toward those goals over the course of the 2009-10 school year, discussed *infra*. In Foundations of Writing, taught by a special education teacher, Student similarly made progress toward the IEP goal in this area of need. (FF 24, 51, 62)

¹¹ This hearing officer recognizes that grade equivalent scores can be misleading as they are based upon estimates only. *See, e.g.*, Salvia, John, Ysseldyke, James E., & Bolt, Sara. *Assessment in Special and Inclusive Education* (11th ed. 2010). The Parents' expert testified at length about many of the reasons that grade equivalency scores should be used cautiously, if at all, and particularly with the GMRT. (N.T. 1763-65) In any event, Student's GMRT scores were consistent with the abundant evidence in the record that Student was well below grade level in all areas of reading at the beginning of the 2009-10 school year.

The Parents' main concern with the Foundations classes is that some of Student's classmates exhibited behaviors which were distracting to Student because of the APD.¹² (FF 25, 39) There was some evidence that the Parents asked Student's Foundations teachers about classmate behaviors and how Student might be impacted. (FF 25) The District addressed the concern over one particular child whose actions were more than annoying and distracting, but overall the teachers did not find the students in the Foundations classes to behave any differently than children in any other classroom. (*Id.*) Indeed, it would be difficult to envision any classroom in any public middle school where students would not exhibit distracting behaviors from time to time. The fact that Student did not complain to any of the Foundations class teachers lends further support to the conclusion that the District had no reason to suspect that Student's education may have been adversely affected in these particular classes. Moreover, the complaint in this regard appears to suggest that the District should have excluded certain children from specific regular education classrooms based solely on their disability. This hearing officer cannot agree with this premise, and concludes that the District did not fail to provide an appropriate education to Student on this basis. The related argument about the Curriculum Support class (*id.*) is similarly rejected.

When the team met in late fall of 2009 after receipt of the private psychological evaluation, the team had more information about Student's needs. The Parents and District disagreed over whether Student should be classified as having Dyslexia (FF 35) and, while recognizing that the recollections and perceptions of the witnesses about these discussions differed, it is clear that this dispute caused in a rift in the family-school relationship which has not yet been closed. The family cannot be faulted for grasping hold of a diagnosis which provided insight into Student's educational strengths and needs and for which a wealth of information is available, yet at the same time the District cannot be criticized for refusing to use a label with which it is not comfortable and instead using a synonymous term that is specifically included in the IDEA as a category of disability. What is critical, and undisputed by both parties, is that Student has a specific learning disability in reading and that Student's primary needs are in phonological processing and decoding, as well as working memory and retrieval. (N.T. 1721-24, 1891-92)

The private evaluation prompted the District to request additional assessments, which was a reasonable response and also fortunately was accomplished within a relatively short period of time. (FF 37, 40, 42-49) With the completion of the RR on February 5, 2010, the team's recommendations for Student's educational program had expanded to include, among other things, direct instruction to address Student's needs in reading fluency, reading decoding, and reading comprehension as well as a direct, explicit, systematic, phonetic word analytic approach to decoding and spelling; highlighting of key information and monitoring of class notes, study guides, and monitoring of content area reading as well as re-instruction for content area classes; and speech/language services. (FF 50) Thus, by the time of the late February/early March 2010 IEP meetings, the District was in agreement that Student should be provided with special education and related services to address the RR recommendations.

¹² The objection to any evidence about the cognitive levels of other students in the Foundations classes was not permitted (N.T. 624-25), and this hearing officer hereby reaffirms the determination that that evidence was wholly irrelevant to whether Student's educational program was appropriate.

The next issue is whether the District failed to appropriately address Student's reading needs during this school year. Their expert opined that decoding was more of a need than reading comprehension, and that insufficient time was devoted to decoding instruction. (N.T. 1765-69) This testimony was credible and thoughtfully explained, and the reading specialist who taught Foundations of Reading that school year agreed that decoding was the underlying basis for Student's specific learning disability. (N.T. 723-24) While decoding was not an identified need at the start of the school year, the District clearly recognized it as a significant weakness by the time of the RR. (FF 50) Additionally, the record supports the conclusion that Student's progress on the reading fluency goals cannot be determined with any certainty since the probes used to measure that progress were not administered with sufficient frequency. (FF 60) This flaw should have been apparent at least by the time the RR was completed. This hearing officer therefore concludes that Student's programming to address reading fluency and decoding were not appropriate during the 2009-10 school year from the date of the RR through the date that the Wilson Reading Program was instituted with Student.

The Parents also challenge the appropriateness and adequacy of the Curriculum Support provided to Student during the 2009-10 school year. This class emphasized support of Student in Science and Math classes, in which Student needed reinforcement and review. (FF 29) Armed with the information in the RR, however, this class was the appropriate place to address Student's needs for highlighting of key information, monitoring of class notes, development of study guides, and monitoring of content area reading as well as re-instruction for content area classes. There was little evidence that any of these needs were addressed meaningfully and routinely in Student's Curriculum Support class after the RR, even after the number of days per cycle was doubled. (FF 58) It is also troubling that Student had only two Speech/Language Therapy sessions during the school year, despite parental approval of this related service in late March 2010. (FF 54, 59)

For all of the above reasons, this hearing officer concludes that Student was deprived of FAPE during a portion of the 2009-10 school year.

Summer 2010

The Parents also challenge the District's determination that Student was not eligible for ESY in the summer of 2009. "Extended school year services must be provided only if a child's IEP Team determines, on an individual basis ... that the services are necessary for the provision of FAPE to the child." 34 C.F.R. § 300.106. Under the Pennsylvania regulations, IEP teams must make ESY eligibility determinations through consideration of the following factors, although no single factor is determinative:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

- (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
- (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
- (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
- (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.
- (vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

22 Pa. Code § 14.132. Although the Parents' expert stated in her report and testified that Student needed ESY services in 2010 because Student needed to continue the intensive phonetic reading instruction started in May 2010, she did not base this opinion on any regression or recoupment data, mastery of any specific skill, or on Student's withdrawal from the learning process. (FF 74) There was no other evidence presented to support an ESY program for Student other than the Parents' desire for Student to receive those services.¹³ This hope is, without a doubt, understandable, particularly given the Parents' advocacy for a Wilson or similar program since October of 2009 and the delay until May 2010 of its provision. Additionally, one would certainly expect that any student would benefit from additional educational instruction over the summer, particularly in an area of weakness. Nevertheless, there are criteria for determining eligibility for ESY services, and in this case it was the Parents' burden to establish that the District denied Student an appropriate education by failing to offer and provide such services. As the Parents have not done so, this hearing officer concludes that Student was not deprived of FAPE on this basis.

2010-11 School Year

The Parents do not challenge Student's Reading or Mathematics instruction for the 2010-11 school year, particularly once Student changed to Pre-Algebra. They are essentially pleased with Student's classes and schedule. (FF 95) Their concerns are with the supports Student has been receiving in content area classes and the lack of instruction in such skills as learning how to study.

As noted, the RR issued in early February 2010 identified a number of needs that could and should have been addressed in Student's Curriculum Support class, and also could have been

¹³ The testimony by one of the Parents on Student's need for ESY services (N.T. 486-88, 490-91) was accorded little weight since it amounted to nothing more than agreement with written statements made by the Parents' former counsel, whose expertise on ESY services is unknown and could not be assessed. Additionally, that testimony failed to address the above-quoted factors for ESY eligibility. (*Id.*)

provided during the homeroom period. (FF 30, 50, 77, 84) The recommendations in the IEE, which the District has considered and taken steps to address, expounded on those in the RR and reiterated the need for content area support. (FF 72, 73) As was the case late in the 2009-10 school year, there was little evidence that Student was provided appropriate support for content area classes through preteaching, vocabulary development, review and re-instruction. No one is monitoring Student's notes or homework for accuracy on a regular basis; neither is anyone monitoring Student's comprehension of the content area materials. (FF 78, 80, 81, 84) Assistance with study guides is not consistently provided, and it is disturbing that at least some study guides in at least one subject (History) are so similar to the written test or quiz that Student is able to memorize what answers to put where, rather than learn the material, to succeed in the class. (FF 80, 81, 82, 91) When Student achieved a 70% or lower grade on a content area assessment, there was rarely any follow-up, contrary to one of the items of specially designed instruction. (FF 77, 81, 84) One of the most glaring flaws in the program is the lack of provision of content area reading materials in an alternative format so that Student was and is able to access the curriculum which Student was and is expected to master. (FF 86, 87) No one has tried to ensure that Student can and does use the text-to-speech software, nor to help Student determine how and when the program should be used with written materials. (FF 88) It is also troubling that in Student's Literature class, during which the students read numerous written works, only one "core novel" is provided in audio format over the entire school year. (FF 86, 87)

Also problematic is that, despite the recommendations in the RR and confirmed in more detail in the IEE, Student is not receiving instruction in learning study skills and techniques. (FF 91) The once weekly Speech/Language Therapy, during which Student works on some study skills in addition to other Speech/Language goals (FF 77, 85), cannot substitute for the direct instruction needed in this area. Perhaps the most revealing testimony on this topic was provided by Student, whose demeanor and response when asked how Student studies reflected an obvious lack of understanding of what the term means, or how to accomplish it. (N.T. 407) The Parents' expert provided credible testimony on how critical such instruction is for Student at this age, and the District clearly agrees by including this area of need in Student's current IEP. (FF 77) The failure to implement those portions of the IEP amounted to a denial of FAPE.¹⁴

Remedy

Having determined that Student was denied FAPE during the 2009-10 and 2010-11 school years, the next question is what relief is appropriate. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts

¹⁴ Implementation of all of these items of specially designed instruction is crucial in order to provide Student with access to the curriculum, and will clearly require consistent and continuous communication among all of Student's teachers.

have endorsed a scheme that awards the “amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

In this case, there was little if any evidence which would permit a determination of what position Student would have been in had Student been provided with appropriate instruction in reading, appropriate content area support, and instruction in study skills. Thus, this hearing officer concludes that the *M.C.* standard is the appropriate method of determining the amount of compensation education owed to Student in this case.

During the 2009-10 school year, Student had both Foundations of Reading and Foundations of Literature, during which Student received reading instruction and worked on the IEP goals related to reading. While Student did derive educational benefit from some of that instruction, this hearing officer concludes that it is equitable to estimate that, as of the date of the District’s RR when Student’s needs were clearly recognized, which also allows the District a reasonable rectification period, approximately half of that instructional time was necessary, or one class period, to adequately address decoding and reading fluency. Generously estimating that 45 of the 48 minute class periods (FF 76) would be instructional time, this hearing officer determines that Student is entitled to 45 minutes per day of compensatory education in reading instruction beginning with the date of the District’s RR until the date the Wilson Reading Program started to remedy these deficiencies.

With respect to the failure to provide Student with appropriate content area support in the 2009-10 school year (through highlighting of key information, monitoring of class notes, development of study guides, monitoring of content area reading, and re-instruction for content area classes), this hearing officer estimates that Student is also entitled to compensatory education for half of the four Curriculum Support classes per six-day cycle in the spring of 2010, or ninety minutes/cycle, for the time period beginning with the date of the RR through the end of the school year. Student is also entitled to all sessions of missed Speech/Language Therapy for that school year.

Turning to the 2010-11 school year, having concluded that needs for instruction in study techniques and strategies and content area support were not adequately addressed despite their inclusion in the October 2010 IEP, compensatory education is also warranted for this deficiency. With the exception of the Pre-Algebra class, however, it is impossible to determine with any certainty what portions of the school day Student did or did not derive meaningful educational benefit during the 2010-11 school year, since Student had almost all regular education classes with written materials which, with limited exceptions, Student was not able to access. It is, therefore, the conclusion of this hearing officer that Student was denied FAPE and is entitled to compensatory education for the entire school day except for Pre-Algebra class. *See Keystone*

Cent. School Dist. v. E.E. ex rel. H.E. 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education).

Considering seven class periods of forty five minutes of instructional time every day, plus a thirty minute daily homeroom period when students are able to meet with and get help from teachers, minus the forty five minute Pre-Algebra class, amounts to three hundred minutes, or five hours, of instructional time each day for which compensatory education will be awarded. The time period for this award begins with November 1, 2010 (the date of implementation of the October 2010 IEP, S 25) until Student is provided with appropriate special education addressing all of these needs.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. There are financial limits on the parents' discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

Private School Placement

The Parents seek a prospective private school placement for Student, contending that the District is not capable of providing Student with FAPE and that such a remedy is warranted to make up for the deprivation over the 2009-10 and 2010-11 school years. While such a remedy is arguably permitted as a form of equitable relief under the IDEA, the record in this case does not support such an award. Despite having determined that the District denied Student FAPE in several respects, as discussed above, there was no evidence that it is unable or unwilling to develop and implement appropriate IEPs for Student that address all needs such that a prospective private placement at public expense is warranted.

IEE Reimbursement

The Parents also seek reimbursement for the IEE conducted in the summer of 2010. When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); *see also* 20 U.S.C. § 1415(b)(1). When a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, the District did not have an opportunity to consider the IEE

request or file a due process complaint, because the Parents rejected the proposed March 2010 IEP, requesting due process and an IEE at the same time.

In conducting an evaluation, a local education agency must ensure that it uses procedures to determine whether the child has a disability and to determine the child's educational needs. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c)(2). Re-evaluations are also subject to specific requirements and limitations. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303. The IDEA regulations provide further guidance for conducting the evaluation or re-evaluation.

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the Parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. § 304(b); *see also* 20 U.S.C. § 1414(b)(2). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Assessments must be administered in a manner which is nondiscriminatory, in a form designed to yield accurate information, and for the purpose for which the assessments were designed, by a trained professional, and in accordance with the test maker's instructions. 20 U.S.C. § 1414(b)(3); 34 C.F.R. § 300.304(c)(1). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Further, the team must ensure that it considers existing information about the child through the following.

(a) *Review of existing evaluation data.*

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—

- (1) Review existing evaluation data on the child, including—
 - (i) Evaluations and information provided by the Parents of the child;
 - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child's Parents, identify what additional data, if any, are needed to determine—
 - (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
 - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
 - (ii) The present levels of academic achievement and related developmental needs of the child;
 - (iii)(A) Whether the child needs special education and related services; or
 - (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

34 C.F.R. § 305(a); *see also* 20 U.S.C. § 1414(c)(1).

After review, this hearing officer concludes that the District's RR of Student was appropriate according to the applicable law. The evaluation included functional, developmental, and academic information from a variety of sources about Student. (FF 43-49) Specifically, the evaluation included a review of prior records and evaluations, information from the Parents, classroom based assessments, and three classroom observations. The school psychologist administered both cognitive and achievement testing using appropriate norm-referenced, technically sound instruments; obtained appropriate social/emotional and executive functioning ratings; and arranged for a Speech/Language and assistive technology evaluation. (*Id.*)

All of this information was summarized in detail in the RR and, taken together, comprised a thorough assessment of Student's present levels of academic achievement and functional performance from which Student's eligibility for special education could be and were determined. Appropriate recommendations for Student's educational program based upon

Student's needs were also included. (FF 50) The Parents' expert also testified that the District's evaluation was consistent with her IEE and other outside evaluations. (N.T. 1727) In sum, this hearing officer concludes the District's RR was appropriate.

There can be no doubt that the IEE also provided valuable information about Student and Student's learning disability which supplemented what was known to the District. This is exemplified by the testimony that the District has made efforts to implement all of the recommendations in the IEE. (N.T. 1116-19) The independent neuropsychologist clearly has a great deal of expertise in language-based learning disabilities, and provided credible and detailed testimony about her recommendations and the reasons for them. Nevertheless, reimbursement for an IEE is not determined by whether the IEE was helpful, or even whether it was arguably better in some respects than a school district's evaluation. Having determined that the RR was appropriate, the Parents are not entitled to reimbursement for the IEE.¹⁵

Section 504 Claims

The obligation to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the District did deny FAPE to Student for a portion of the 2009-10 school year and a portion of the 2010-11 school year, and that Student is entitled to compensatory education; that the Parents are not entitled to reimbursement for the IEE; and that an alternate private educational placement for Student at public expense is not warranted.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not provide FAPE to Student in its reading program for a portion of the 2009-10 school year, and Student is accordingly entitled to, and the District is ordered to provide, compensatory education in the form of forty five (45) minutes of reading

¹⁵ In their closing argument, the Parents also sought reimbursement for the Parents' fees for testifying as an expert at the hearing. (N.T.) This request is outside this hearing officer's authority, as well as contrary to existing law. *See Arlington Central School District v. Murphy*, 548 U.S. 291 (2006).

instruction for each day that school was in session that school year, beginning on February 5, 2010, and continuing through the date that the Wilson Reading Program began.

2. The District did not provide FAPE to Student in curriculum support for a portion of the 2009-10 school year, and Student is accordingly entitled to, and the District is ordered to provide, ninety (90) minutes of compensatory education for each six-day cycle beginning on February 5, 2010, and continuing through the last day of the 2009-10 school year.
3. The District did not provide FAPE to Student for missed Speech/Language Therapy Sessions in the 2009-10 school year, and Student is accordingly entitled to, and the District is ordered to provide, one (1) Speech/Language Therapy session for each session missed during that school year.
4. The District did not provide FAPE to Student, and failed to implement Student's IEP, in a portion of the educational program for the 2010-11 school year, and Student is accordingly entitled to, and the District is ordered to provide, five (5) hours of compensatory education for the time period beginning November 1, 2010 and continuing through the date that an appropriate educational program is implemented for Student.
5. The compensatory education hours are subject to the conditions and limitations set forth above.
6. The District is not ordered to take any further action.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: April 9, 2011