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Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: N.M.

Date of Birth: [redacted]

Dates of Hearing:

August 24, November 15, & November 23, 2010  
January 12, & January 14, 2011

CLOSED HEARING

ODR Case # 00892-09-10-AS

Parties to the Hearing:

Parent[s]

Ms. Fran Rassouli  
Central Bucks School District  
16 Weldon Drive  
Doylestown, PA 18901

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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February 7, 2011

February 22, 2011

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is an early teen-aged student residing in the Central Bucks School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>. The student has been identified as a student with specific learning disabilities and an other health impairment. Parent claims the student has been denied a free appropriate public education (“FAPE”). As a result, parents are requesting compensatory education for a period from March 31, 2008 through March 10, 2010. Parents also seek tuition reimbursement for a private placement that has run from March 12, 2010 through these proceedings. The District counters that it has provided FAPE to the student at all times.

For the reasons set forth below, I find in favor of the District.

### **ISSUE**

1. Has the student been denied a FAPE by the District for the period March 31, 2008 through March 10, 2010?
2. If so, is compensatory education owed by the District and in what amount?
3. Are the parents entitled to tuition Reimbursement for the student’s private placement as of March 12, 2010?

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<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

## **FINDINGS OF FACT**

### Initial Evaluation

1. The student has long been identified as a student with learning disabilities. More recently, in August 2010, a re-evaluation report identified the student with another health impairment. (Parents' Exhibit ["P"]-1, P-21).
2. During the student's 5<sup>th</sup> grade year, the student was identified as a student with specific learning disabilities in reading and written expression. (P-1, School District Exhibit ["S"]-5).
3. The student's reading ability was significantly below grade level, and the student's written expression showed deficits in multiple areas. (P-1, S-5).
4. The student was rated for behavior by the student's mother and the 5<sup>th</sup> grade teacher. The student was rated by both in the clinically significant range for anxiety and depression, as well as the overall internalizing problems composite. (P-1, S-5). The report notes that "(i)n school, (the student) sometimes seems lonely, is often sad, and is often pessimistic and sometimes cries easily. Socially, (the student) sometimes complains about being teased and has trouble making new friends." (P-1 & S-5, both at page 11).
5. The evaluation report concluded that the student reveals "a youngster with overt depressive and anxious symptomology that seems to be impacting ...academic and social performance in the classroom." (P-1 & S-5, both at page 12).
6. The evaluation report, however, recommended only home-based/medical interventions with monitoring in the school environment. The report noted that "the school will be best prepared to plan accordingly if additional behavior interventions need to be implemented within (the student's) educational programming", and was hopeful that "social emotional functioning should be monitored closely as this is expected to improve with the implementation of specially designed instruction and as (the student begins to feel more successful academically." (P-1 & S-5, both at pages 13-14).

### 6<sup>th</sup> Grade (2007-2008)

7. The individualized education plan ("IEP") in effect on March 31, 2008 was drafted during the student's 6<sup>th</sup> grade year at an annual IEP review on March 6, 2008. (P-3, S-10).

8. In the March 2008 IEP, the student's present levels of educational performance in reading—word list, fluency, and reading comprehension – were all generally at the 5<sup>th</sup> grade level. The present levels in reading referenced the use of a Qualitative Reading Inventory (“QRI”), but there was no clear reporting on QRI levels. (P-3 & S-10, both at pages 5).
9. In the March 2008 IEP, the student's present levels of educational performance in writing were measured using 22 correct word sequences in three-minute writing exercises. Additionally, in editing, the student scored at the basic and below-basic levels in the rough draft stage, improving to proficiency after editing into the final draft stage. (P-3 & S-10, both at pages 6-7).
10. In the March 2008 IEP, there were no present levels of functional performance for the student's social/emotional needs. (P-3 & S-10, both at pages 6-7).
11. The March 2008 IEP contained five goals: two in written expression, one in reading fluency, one in reading comprehension, and one in self-regulation and learning behaviors. (P-3 & S-10, both at pages 9-13).
12. In the first written expression goal, the student was to achieve proficient content, style, and conventions scores from a baseline of basic/below basic. In the second written expression goal, the student was to use 47 correct word sequences in three-minute writing exercises. (P-3 & S-10, both at pages 9-10).
13. In the fluency goal, the student was to increase oral reading fluency on a 5<sup>th</sup> grade passage from 75 words-per-minute to 100 words-per-minute. (P-3 & S-10, both at page ).
14. In the reading comprehension goal, the student was to answer 10 implicit and 10 explicit questions on a 6<sup>th</sup> grade passage at an accuracy rate of 75%. (P-3 & S-10, both at page 12; P-4 & S-12, both at page 13).<sup>2</sup>

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<sup>2</sup> The March 2008 IEP contained a typo which originally listed this goal as reading comprehension at the 7<sup>th</sup> grade level. This was changed in an IEP revision in September 2008. Instruction at the end of the 2007-2008 school year, and at the outset of the 2008-2009 school year, however, was always at the appropriate instructional level. (Notes of Testimony at 1329-1330, 1474-1475).

15. The student's parent testified that, in 6<sup>th</sup> grade, the student continued to experience social/emotional issues and difficulty with peer relationships. The 6<sup>th</sup> grade special education teacher, however, observed no incidents of bullying or inappropriate peer interaction and did not receive any communications from parents regarding bullying. Overall, according to the teacher, the student had a successful year, both academically and functionally. (NT at 56-58, 1364-1375).
16. It was reported to the special education teacher that the student was involved in a neighborhood issue with a peer or peers, but there was no evidence that this issue came into the school environment in 6<sup>th</sup> grade. (NT at 1374-1375).

7<sup>th</sup> Grade (2008-2009)

17. In September 2008, at the outset of the student's 7<sup>th</sup> grade year, the written expression goal centered on correct word sequence was removed because the student had moved onto middle school, and the middle school did not include the correct word sequence in its assessment of written expression. (P-4, S-12; Notes of Testimony ["NT"] at 1475-1476).
18. In 7<sup>th</sup> grade, due to a maternity leave, the student had two special education teachers. One teacher taught the student from September 2008 through January 2009, the other from February 2009 to June 2009. (NT at 784, 1467).
19. The student's IEP team met for the annual IEP review in March 2009. (P-5, S-14).
20. In the March 2009 IEP, the student's present levels of educational performance in reading show that the student, according to the QRI, was instructional at the 5<sup>th</sup> grade level. Word recognition at this level was 96%, fluency was 84 words per minute, and reading comprehension was 75%. Additionally, the student's lexile score in the Read 180 program was 466. (P-5 at page 7, S-14 at page 5).
21. Earlier in the school year, however, progress monitoring in November 2008 and January 2009 indicated that the student was fluent at 97-98 words per minute at the 6<sup>th</sup> grade level. (S-17 at page 10).
22. Earlier in the school year, however, progress monitoring in November 2008 and January 2009 indicated that the student was comprehending at 75%, 100%, and 93%. (S-17 at page 12).

23. In the March 2009 IEP, the student's present level of educational performance in writing show that the student continued to need support in content, conventions, and focus. (P-5 at page 7, S-14 at page 5).
24. The March 2009 IEP contained three goals, one each in written expression, reading fluency and reading comprehension. (P-5 at pages 9-11, S-14 at pages 7-9).
25. The written expression goal sought to have the student employ prewriting and composition strategies to complete narrative and persuasive samples of five paragraphs each, with the requisite compositional elements, all at 80% accuracy. (P-5 at page 11, S-14 at page 9).
26. The reading fluency goal sought to increase oral reading fluency "at the student's instructional level" from 84 words-per-minute to 100 words-per-minute. (P-5 at page 9, S-14 at page 7).
27. The reading comprehension goal sought to improve the student's comprehension on an unspecified number of implicit and explicit probes from a rate of 75% to 85% accuracy. (P-5 at page 10, S-14 at page 8).
28. The 7<sup>th</sup> grade special education teacher in the first half of the school year observed no incidents of bullying or inappropriate peer interaction and did not receive any communications from parents regarding bullying. (NT at 1515-1518).
29. There were instances in 7<sup>th</sup> grade, however, where the parents communicated with the student's counselor and an administrator. (NT at 500-508, 626-651).
30. In the summer of 2008, before the student began 7<sup>th</sup> grade, the counselor, responding to parents' request, scheduled the student away from two other students. In February and March 2009, the student was involved in incidents with another student which resulted in the other student being disciplined; the other student was also scheduled away from the student. Aside from the February incident, neither the counselor nor the administrator were aware, or were notified, of other incidents with the student and peers. (S-39; NT at 630-631, 636-644, 500-508, 788-790).
31. Aside from the February/March 2009 incidents, which she was involved in solving, the 7<sup>th</sup> grade special education teacher in

the second half of the school year observed no incidents of bullying or inappropriate peer interaction and did not receive any communications from parents regarding bullying. (NT at 795-798).

32. Progress monitoring on the reading fluency goal in April and June 2009 indicated that the student was reading 99 and 91 words correct per minute at the 6<sup>th</sup> grade and then, progressively, 7<sup>th</sup> grade level. (S-17 at page 14, S-50).
33. Progress monitoring on the reading comprehension goal in April and June 2009 was gauged using the Read 180 program and indicated that the student was comprehending at 96% and 97%. Yet the student's lexile score had declined from 466 in February 2009 to 342 in April 2009 and 307 in June 2009. (S-17 at page 15).
34. Progress monitoring in written expression in April and June 2009 indicated that the student achieved 85% and 80% on two writing assessments. (S-17 at page 16).

#### 8<sup>th</sup> Grade (2009-2010)

35. In the summer of 2008, the school counselor, responding to parents' request, scheduled the student away from students with whom the student had conflicts in the past. Before the school year, the parent also spoke with a building administrator about bullying concerns, and the administrator collaborated with the student's teachers about observation and being proactive if they noticed any bullying or (NT at 509-516, 648-650).
36. In 8<sup>th</sup> grade, there were a series of incidents involving other students that required the intervention of the student's school counselor or building administration. In September 2009, the student, an accomplished [sport redacted] player, did not try out for the [redacted] team due to the teasing of peers. (NT at 652-653).
37. In November 2009, there was a bus incident involving the student where the student and another student (the neighborhood child with whom the student had feuded since 6<sup>th</sup> grade) verbally sparred. The neighborhood child then punched the student on the shoulder, and the student struck the neighborhood child on the leg. After an investigation, the student was verbally reprimanded and the other student, the neighborhood child, was given a disciplinary consequence. (S-41 at pages 2-5; NT at 518-525).
38. As a result of the November 2009 incident, through the detention report required of the neighborhood child, a suicidal

ideation by the student was related through the write-up required of the neighborhood child. As a result, the District followed up with the parents about this information. (NT at 524-530).

39. In January 2010, the student's mother called the school counselor to talk about removing the student from school because of bullying. At this time, mother also brought up the possibility of private school. (NT at 530-532, 655-657).
40. In February 2010, there were multiple incidents brought to the attention of the District. First, the parent reported that someone on the student's bus had threatened to "kill" the student. The District investigated by interviewing multiple students from the bus, including the alleged instigator, and found that the report could not be substantiated. Second, the student reported tripping and shoving on the way into a gym class, and a verbal exchange once class had begun. The District investigated by reviewing videotape of the hallway outside the gym and interviewing multiple students. The physical interaction was not verified, but the verbal exchange was. The student was involved in the exchange but was not disciplined; the other student was given a disciplinary consequence. (S-41 at page 8; NT at 530-549).
41. On February 22, 2010, the student was removed from the District on a prescription for homebound instruction issued by a psychiatrist. On the same date, the parents gave the District written notice of its intention of pursuing a private placement at District expense. (P-8, P-15).
42. Even given the incidents in 8<sup>th</sup> grade, the student's counselor did not see anything in the student's behavior or demeanor that concerned her. The administrator testified that, aside from the listed incidents, there was no other indication or report from the student, parents, teachers, or other students that the student was being bullied or having difficult peer interactions. (NT at 517-518, 530-531, 546, 548-549, 652).
43. District witnesses all testified credibly that (a) they did not perceive or observe any social/emotional issues, or bullying issues, with the student, and (b) when such incidents were reported by parents or the student, the District acted in the best interest of the student to investigate the issue and, if necessary, to address it.
44. Progress monitoring on the reading fluency goal in November 2009 and early February 2010 (before the student was removed for



homebound instruction) gauged the student as reading 104 and 117 words per minute with 99 % and 98% accuracy. (S-17 at page 14).

45. Progress monitoring on the reading comprehension goal in November 2009 and early February 2010 (before the student was removed for homebound instruction), using the Scholastic Reading Inventory for the first time, indicated that the student was comprehending at 100%. Yet the student's lexile score had declined to 260 in November 2009, rebounding to 370 in February 2010. (S-17 at page 15).
46. Progress monitoring on the written expression goal in November 2009 and early February 2010 (before the student was removed for homebound instruction) showed progress across the two samples in organization, supporting details, and most subsidiary composition elements. (S-17 at page 17).
47. Contemporaneously with the removal of the student for homebound instruction, the student's annual IEP meeting was undertaken in March 2010. (P-7, S-23).
48. In the March 2010 IEP, the student's present levels of educational performance in reading show that the student, according to the QRI, was independent at the middle school level and instructional at the upper middle school level. At the 6<sup>th</sup> grade level, word recognition was 99% accuracy with fluency at 93.5 words per minute, and reading comprehension was 75%. At the upper middle school level, word recognition was 99% accuracy with fluency at 85 words per minute, and reading comprehension was 70%. Additionally, present levels repeated the student's lexile score of 370 on the Scholastic Reading Inventory of January 2010. (P-7 at page 11, S-23 at page 5).
49. In the March 2010 IEP, the student's present levels of educational performance in written expression repeated the progress monitoring results from February 2010. (P-7 at page 13, S-23 at page 7).
50. The March 2010 IEP is largely the same as prior IEPs offered in March 2008 and March 2009. (P-3, P-4, P-5, P-7, S-10, S-12, S-14, S-23).

### Private Placement

51. The student formally withdrew from the District on March 10, 2010. On March 11, 2010, the student began to attend the private placement. (S-25; NT at 901).
52. The private placement is a licensed academic school in Pennsylvania providing services to students identified with various disabilities and some students who are not identified as students with any disability. (NT at 896-898).
53. At the private placement, the student receives formalized reading curricula taught by a reading specialist, as well as a formalized curriculum in written expression. All teachers hold a Pennsylvania teaching certificate or a Pennsylvania private school teaching certificate. (NT at 907, 910-911, 915-916, 940).
54. The student's classes include English, reading, math, history, science, and gym. Additionally, there are elective classes. The student also engages in a social skills course twice weekly. (NT at 904).
55. The student underwent an informal reading inventory when the student started at the private placement. The informal reading inventory placed the student at the late 5<sup>th</sup> grade/early 6<sup>th</sup> grade reading level. (NT at 911).
56. Parents credibly testified that the student has adjusted to the private placement and is enjoying the school environment. (NT at 106).

### Evaluation & IEP – August 2010

57. The District sought and, eventually after some miscommunications, received permission to evaluate the student (P-10, P-11, S-48, S-49).
58. The District issued a re-evaluation report on August 12, 2010. The re-evaluation report identified a new specific learning disability in mathematics and a new identification of an other health impairment due to diagnoses of post-traumatic stress disorder and general anxiety disorder. (P-21).
59. Additionally, the re-evaluation included behavior rating scales by the student's parents, special education teacher, and regular education science teacher. The parents and science teacher rated the student as clinically significant for anxiety, depression, and withdrawal scales. The student's special education teacher

did not rate any behavior as clinically significant. (P-21 at page 13-17).

60. The student's IEP team met on August 23, 2010. This IEP contained significant changes to address the social/emotional needs of the student. In addition to reading and written expression goals, two goals were drafted to address frustration or feeling overwhelmed in the school environment. There was also new goal to address mathematics. The August 2010 also included a behavior intervention plan geared toward coping skills, social skills, and self-regulating for breaks when necessary. (P-22, S-44).

#### Private Counseling Services

61. The student saw two private counselors over periods relevant to the complaint. One counselor saw the student from September 2008 through January 2010; the second counselor saw the student intermittently from February 2010 through October 2010. (NT at 355, 364-365, 411, 449-450).

62. The counselors testified credibly that the student described to them bullying in school and related anxiety and depressive manifestations. But neither of the counselors had any contact with the District to discuss independently the student's affect in the school setting. This is problematic because both testified that the student may have been prone to misperceive interactions with peers, or to exaggerate the details related to peer interactions. Therapeutically, addressing the student's perceptions were the tasks of both counselors. From a credibility perspective, however, neither witness had verifiable information about the student's social/emotional needs in the educational setting. (See generally NT at 346-408, 408-490).

## **DISCUSSION AND CONCLUSION OF LAW**

### Burden of Proof

The U.S. Supreme Court has held that in a special education due process, the party seeking relief holds the burden of proof.<sup>3</sup> The burden of proof entails two aspects—the burden of production (which party

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<sup>3</sup> Schaffer v. Weast, 546 U.S. 49 (2005).

brings forward evidence at certain points in the hearing) and the burden of persuasion (which party “loses if the evidence is closely balanced”<sup>4</sup>). The burden of production may be shifted to suit the needs of the hearing. But since the IDEIA does not explicitly address the issue of the burden of persuasion, the Court found that it lies with the party seeking relief.<sup>5</sup> In the instant case, this means the burden of persuasion rests with the parents.

#### Denial of FAPE

To assure that an eligible child receives FAPE,<sup>6</sup> an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”<sup>7</sup> “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,<sup>8</sup> not simply *de minimis* or minimal education progress.<sup>9</sup>

In this case, the evidence is very closely balanced. Indeed, in deliberating over the evidence and crafting this decision, this hearing officer has been conflicted over the evidence presented by both parties. On the parents’ side of the ledger, there is much evidence pointing toward a conclusion that the student has been denied FAPE. On the District’s side, there is also much evidence supporting the position that the District has

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<sup>4</sup> Schaffer at 56.

<sup>5</sup> Schaffer at 58.

<sup>6</sup> 34 C.F.R. §300.17.

<sup>7</sup> Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>8</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

<sup>9</sup> M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

proposed and implemented a program reasonably calculated to yield meaningful education benefit and was appropriately implemented to do so. It is closely, closely balanced. With the burden of persuasion in such a case clearly with parents, it is the considered opinion of this hearing officer that the parents' evidence is not preponderant that the District denied the student FAPE.

The most compelling evidence pointing toward a denial of FAPE centers on instruction in reading. Parents argue that from 5<sup>th</sup> grade onwards, the student's reading level never advanced beyond 5<sup>th</sup> grade. (FF 8, 20, 44, 55). Overall quantitative measures of reading also seem to support a decline in reading skill over time. (FF 33, 45). But arrayed against this is a weight of evidence that indicates that the student made progress in reading, and arguably quite meaningful educational benefit. First, the day-to-day instruction as gauged through progress monitoring indicates that the student was instructional at levels beyond 5<sup>th</sup> grade. (FF 14, 21, 48). Second, reading comprehension, while a significant need, has been generally been reported as strong. (FF 14, 20, 22, 33, 45, 48). Third, each of the student's special education teachers testified credibly that the student made progress in reading, and changes in the student's reading goals from year to year would seem to bear that out. (FF 13, 14, 26, 27, 50). This is not to say that the District's reading program was perfected for the student. Indeed, the myriad goals, assessments, progress monitoring, and teacher testimony makes it difficult to pin down exactly what the student's standing in reading is. But,

on this record, the evidence is too close to conclude that the student was denied FAPE in reading. And, as such, the legal conclusion is that parents have not carried their burden.

There is also an argument to be made that the student was denied FAPE in the way the District handled the student's social/emotional needs. District personnel who worked with the student had rated the student for clinically significant behaviors in anxiety, depression, withdrawal , and internalizing problems. (FF 4, 59). There is clearly a pattern of student-reported incidents with peers. (FF 16, 29, 30, 31, 35, 36, 37, 38, 39, 40). And, ultimately, the District added goals and programming to support social and emotional needs for the student. (FF 60). But, again, there is compelling evidence that the District did not deny the student FAPE in its handling of the student's social/emotional needs. First, the District was proactive in every regard in its response to those needs when such needs were brought to its attention. (FF 30, 35, 37, 38, 40, 43). Second, each District witness testified quite credibly that they saw no school-based difficulties with the student in terms of bullying or peer relations. (FF 15, 16, 28, 31, 42, 43). Indeed, the District was never dismissive of any parent or student inquiry or request in this regard; but the District witnesses were all quite credible when they testified that such reports surprised them because they observed no incidents as suggested in the reports and the student's general affect was engaged, pleasant, and seemingly not affected by the reported incidents.

This is not to say that the reports were fabricated or in any way misleading. While there was testimony that the student may be prone to misperception or exaggeration in reporting events (FF 61, 62), nothing in the record suggests that events did not unfold as parents and student reported them. But on this record, parents have not carried their burden that the student was denied FAPE as the result of acts and omissions on the part of the District or that the District failed to provide FAPE through its educational programming regarding the student's social/emotional needs.

Finally, the record does not preponderantly support the claim that the student was denied FAPE through the District's programming in written expression. The baselines, goals and progress monitoring weigh in favor of a finding that the District provided FAPE in this regard. (FF 3, 12, 17, 23, 25, 34, 46, 49, 50, 58).

Because the parents have not carried their burden of persuasion in regarding denial of FAPE, there is no remedy due to them in the form of compensatory education or tuition reimbursement.

## **CONCLUSION**

The evidence in this case is extremely close. Strong evidentiary arguments exist for both the parents and the District in terms of their differing views on the denial or provision of FAPE. Taken as a whole,

though, the record does not preponderantly weigh in favor of parents. As such, the parents have not met their burden of persuasion.

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**ORDER**

In accord with the findings of fact and conclusions of law as set forth above, parents have not met their burden of persuasion in this matter.

Any claim not explicitly addressed by this decision and order is denied.

*s/Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

February 22, 2011