

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: C. R.

Date of Birth: [redacted]

Date of Hearing: December 9, 2010

CLOSED HEARING

ODR No. **01669-1011JS**

Parties to the Hearing:

Representative:

Parent[s]

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Pen Argyl, PA 18072

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Date Record Closed:

December 30, 2010

Date of Decision:

January 13, 2011

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is an eligible student in the Bethlehem Area School District (hereafter District) who has been identified as eligible for special education by reason of a specific learning disability in reading. Student's Parents requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA)² based upon their disagreement with the reading program provided to Student.

A hearing convened over one session at which the parties stipulated to a number of facts and also presented evidence in support of their respective positions. For the following reasons, I find in favor of the Parents.

ISSUES

Whether the reading program provided by the District to Student is appropriate;
and,

If not, whether the Student is entitled to compensatory education.

FINDINGS OF FACT

1. Student is a resident of the District and is eligible for special education by reason of a specific learning disability in reading.³ (Notes of Testimony (N.T.) 21)
2. Student was enrolled in a private school for first and second grade. During November and December of the 2008-09 school year (second grade), the District conducted an educational evaluation of Student. (N.T. 12, 14-15; School District Exhibit (S) 1, S 3)
3. During the 2008-09 school year, Student was receiving reading support at the private school through small group instruction three times each week provided by the local Intermediate Unit (IU). (N.T. 33-34; S 3)
4. The District's Evaluation Report (ER) was completed in December 2008. Cognitive assessment using the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) resulted in the high-average to average range Full Scale IQ. On the Wechsler Individual Achievement Test – Second Edition (WIAT-II), Student's only below average score was in Pseudoword Decoding, but a discrepancy analysis revealed weaknesses in, *inter alia*, Word Reading, Reading

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

² 20 U.S.C. §§ 1401 *et seq.*

³ Reading is the only area of disability at issue in this case. (Notes of Testimony (N.T.) 21)

- Comprehension, Pseudoword Decoding, and Spelling. As is relevant to this case, the District identified needs in reading to include decoding and word recognition skills. The ER concluded that Student had a specific learning disability in reading. (S 3)
5. Following completion of that evaluation, an Individualized Education Program (IEP) was developed. However, Student remained in private school for the 2008-09 school year. (N.T. 12)
 6. Student was evaluated by a different private school in February 2009. On the Woodcock Reading Mastery Tests-Revised/Normative Update (WRMT), Student achieved below average range composite scores on the Reading Comprehension Cluster, Basic Skills Cluster, and the Total Reading Cluster. Specific reading needs were identified in letter identification, word identification, word attack, and passage comprehension. (N.T. 33; Parent Exhibit (P) 1)
 7. Student entered the second private school for the 2009-10 school year, where Student was provided reading instruction through small group instruction using Project READ, which is an Orton-Gillingham-based program. (N.T. 12, 33-34, 90-91; S 3)
 8. The second private school provided a progress report at the end of the 2009-10 school year which reflected progress in most Language Arts areas; however, Student continued to demonstrate weaknesses in decoding and encoding. (N.T. 53; S 6)
 9. Student was provided with private reading tutoring using Project READ over the summer of 2010. (N.T. 34, 45;)
 10. At the start of the 2010-11 school year, Student began tutoring twice weekly at a private learning center which uses an Orton-Gillingham-based program. In August 2010 the learning center administered the WRMT to Student. Student demonstrated progress on word attack skills when compared to the previous WRMT administration, improving from a Kindergarten grade equivalent to a 2.6 grade equivalent. (N.T. 35-36, 45-46, 48-49, 105-07; P 1, P 2)
 11. Student entered the District for the 2010-11 school year, which was fourth grade. The District obtained records from the second private school and determined that updated reading assessments were necessary. The Parents consented to those assessments which were conducted in August 2010. (N.T. 12-13, 58; S 10 at 9-10)
 12. An IEP meeting was convened on August 23, 2010 and the team developed an IEP for Student on that date. The District issued a Notice of Recommended Educational Placement (NOREP) which the Parents took home to review. (N.T. 13; S 7, S 21)
 13. A subsequent IEP meeting was held on September 1, 2010 to address the Parents' concerns, which included Student's inability to decode and a lack of

- understanding of the structure of language. The Parents' educational consultant, who has bachelor's and master's degrees in special education and is a certified Wilson Reading instructor, attended the meeting. The IEP was revised, and a new NOREP dated September 8, 2010 was approved by the Parents⁴ on September 14, 2010 while also seeking some clarification on the program and confirmation that the IEP team would reconvene in thirty days. They also provided the District with the results of a Wilson Assessment of Decoding and Encoding which the Parents' educational consultant administered on August 29, 2010. (N.T. 13, 59-61; P 4; S 8, S 10)
14. On that August 29, 2010 WADE assessment, Student demonstrated a strength in sight words presented in isolation, but significant weakness in reading/decoding nonsense words. The educational consultant concluded that Student did not understand the structure of the English language, and that Student did not exhibit any decoding strategies and demonstrated little success with encoding. (N.T. 36, 61-66, 93, 96-97; P 4)
 15. On September 1, 2010, the District also sought to reevaluate Student and issued a Permission to Reevaluate form, but the Parents did not consent to that request on the basis that it was "too broad [and] need[ed] to be narrowed." (N.T. 13; S 9)
 16. Relevant to this case, the September 8, 2010 IEP noted weakness in decoding, inconsistent sight word recognition, difficulty with tracking without use of a guide, and a failure to use strategies to read unknown words. On one word list assessment, Student was independent on a first grade level and instructional at a second grade level. Needs in reading were improvement in decoding, phonics, segmenting, blending, oral reading fluency, and passage comprehension. There were three reading goals, addressing (1) improved decoding, fluency, and comprehension to a fourth grade level with 85% accuracy; (2) use of a variety of reading strategies to decode unfamiliar words at a third grade level with 80% accuracy; and (3) answering comprehension questions on third grade level materials with 80% accuracy. (S 10)
 17. Modifications and specially designed instruction (SDI) in the September 8, 2010 IEP included "Multi-sensory strategies/activities to teach and reinforce targeted skills," "Direct/explicit skill instruction in the area of phonetic reading strategies," a tracking device to aid in reading, and small group instruction for guided reading. (S 10 at 30)
 18. The District has been implementing Student's IEP dated September 8, 2010. Relevant to this case, Student is provided two periods of Reading instruction each day. The first is in a regular education Reading class and the second is a small-

⁴ Reference is made throughout this opinion to the "Parents" in the plural where it appears both parents were acting together or one was acting on behalf of both.

group intervention period where Student is provided individual instruction. (N.T. 14, 118; S 10)

19. During the 40-minute intervention period, Student is in a class of twenty students with four teachers. The focus of that period for Student is on improvement of decoding, encoding, and developing reading strategies. Student receives individual instruction in a program designed specifically for Student which uses components of a variety of programs, some of which are Orton-Gillingham-based including the Wilson program. The District's reading specialist determined that Student should start with the very beginning of the Wilson program materials to be sure that Student understood sound-symbol relationships, and she uses a Wilson template for lessons involving decoding and encoding. As of the date of the due process hearing, Student was still working on closed, one-syllable words (consonant-vowel-consonant). (N.T. 118-19, 143-47, 165, 169-71, 178-82, 186-88)
20. In the regular education Reading class, all students are provided with a program which is multisensory, sequential, direct, and explicit, and is comprised of the five components of reading instruction: phonemic awareness, phonics, fluency, comprehension, and vocabulary. There is some whole class instruction where concepts are introduced and modeled, then children are broken up into small groups according to their needs and abilities where they engage in guided practice and independent work. The groups rotate among the four teachers every few days. Student began the school year at an "approaching" level in the reading curriculum, which was a beginning third grade level. (N.T. 120-38, 142-43, 167-68, 173)
21. The Parents asked the District to permit their educational consultant to observe Student during reading instruction but the District denied that request. (N.T. 14)
22. The District's reading specialist administered the WADE again on October 19, 2010. Student's scores on some portions of this test improved from the August administration. (N.T. 154-57; *compare* P 4 with S 11)
23. The IEP team convened again on October 20, 2010 and made some revisions to Student's IEP. The Parents' did not approve this IEP. (N.T. 13-14; P 7)
24. Student's mother did observe Student in reading instruction in November 2010, during which the teacher used a Wilson Reading System book in addition to flashcards, a whiteboard, and finger tapping activities. (N.T. 40-43)
25. At the end of the first report card period of the 2010-11 school year, Student had a B grade in Reading but was reading independently below grade level. Progress monitoring on Student's IEP goals in Reading reflected that Student had (a) nearly achieved the goal of improving decoding, fluency, and comprehension skills from a third grade level to a fourth grade level (with 98% accuracy in decoding on a Grade 3 Running Record and 97% accuracy on an unlimited time

- decoding probe at a fourth grade level); (b) nearly achieved the goal of using a variety of phonetic reading strategies to decode unfamiliar words on third grade level materials with 80% accuracy (with 75% accuracy on a Slosson Oral Reading Test at the third grade level); and (c) nearly achieved the goal of answering comprehension questions on third grade level materials with 80% accuracy (with 80-100% accuracy on listening comprehension and 100% accuracy on written comprehension). However, not all of the instruments used to assess progress were the same as those used for the baselines, and Student's B grade in reading did not include decoding. (N.T. 162-63, 176, 191-95, 196-98, 208-11, 216-17; S 14, S 15, S 17)
26. Progress monitoring for the second quarter of the 2010-11 school year reflected some progress on Student's reading comprehension goals, although the instruments used to probe Student's reading comprehension varied and were not all directly comparable to the baseline measures. (N.T. 198-202, 205-06, 216-17; S 16 at 1-3)
27. Student's progress during the second quarter on decoding word lists was variable, and many of the instruments used to probe Student's decoding skills differed from those used for the baselines. (N.T. 206-08; S 16 at 1-2)
28. It is undisputed that Student requires multisensory, direct, explicit instruction in phonetic reading strategies, and that Student is still learning to decode. (N.T. 16-17, 161-62; S 10 at 30)

DISCUSSION AND CONCLUSIONS OF LAW

Generally speaking, 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 persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁵ *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. Credibility is discussed further in this opinion where necessary.

⁵ 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.

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).

The sole issue is whether the reading instruction provided to Student by the District is appropriate to meet Student’s needs for a multisensory, direct, and explicit reading program. The District is using an approach that utilizes a variety of reading programs and has been characterized by the Parents as eclectic. (N.T. 22-25, 151-52) The term “eclectic,” however, does not necessarily mean that the program is not appropriate. See *Michael J. v. Derry Township School District*, 2006 WL 148882, * 25 (M.D. Pa. 2006); *J.P. ex rel. Popson v. West Clark Community Schools*, 230 F.Supp.2d 910, 935 (S.D. Ind. 2002). The burden is still on the Parents to establish that the approach that the District is implementing was not reasonably calculated to provide Student with meaningful educational benefit. *Popson* at 935.

The District’s reading specialist has an impressive educational background in the subject of reading and extensive experience in reading programs and methodologies. (N.T. 111-14) She has also taken training sessions on an overview of the Wilson reading program on two different occasions and is familiar with several Orton-Gillingham programs. (N.T. 113-14, 164-65) This witness is clearly a talented and effective teacher who is able to draw from her knowledge and experience to provide individualized reading instruction to a particular student based upon that child’s need on a given day. (N.T. 144-45; Finding of Fact (FF) 19)

Nevertheless, the Parents’ educational consultant gave highly credible testimony based upon her extensive experience with and certifications in the Wilson Reading program. (N.T. 59-60) She testified convincingly that Student requires intensive, one on one or small group instruction in reading in a sequential program which includes repetition, controlled text, and structure. (N.T. 82-85, 108-09) She also opined that even using components of different Orton-Gillingham programs could be confusing to Student because each of those programs has its own elements and techniques. (N.T. 84-88) This opinion is supported by the fact that Student has been provided with several different Orton-Gillingham programs throughout Student’s educational career, and at the start of the 2010-11 school year, according to the District, needed to begin with the very beginning of the Wilson program. (FF)

Student’s progress in the District’s program is also revealing. The Parents’ educational consultant provided credible testimony that the WADE is an assessment which should be administered only after extended periods of instruction, such as at the beginning and end of the school year. (N.T. 66-67; P 6) This testimony is consistent with information available on the

Wilson Language website (where S 19 originated).⁶ Further, this witness provided a rational explanation for the difference in the scores, and convincingly opined that the October 2010 WADE results do not truly reflect progress, because Student continued to make similar errors as on the August assessment and still demonstrated an inability to encode and decode words. (N.T. 69-73) Thus, the evidence of Student's purported progress on the WADE between the August and October 2010 administrations (FF 22) is less than persuasive.

The progress monitoring information introduced into evidence also fails to show that Student was making progress in decoding, one of the clearly identified needs for Student. (FF 25, 27) While the reading specialist did testify that she worked on strengthening encoding and decoding with Student (N.T. 143-44; FF 19), there was little evidence presented on how and when this instruction was provided at Student's level in some kind of structured sequence so that Student's progress could be monitored appropriately and understood. This lack of evidence contrasts sharply with the educational consultant's testimony on the absolute necessity for intense structure and sequence in addressing Student's needs in a reading program (N.T. 82-85, 108-09), which this hearing officer found to be very logical and convincing.

Lastly, it is prudent to address the evidence presented about the regular education reading class which Student attends every day. Student certainly can derive gains from more, rather than less, reading instruction, and undoubtedly receives educational benefit from that class. Nevertheless, Student requires specially designed instruction in reading, and this regular-education class, even though based upon ability grouping and entailing a multi-sensory approach (FF 20), does not provide the individualized instruction geared toward Student's identified and intensive reading needs, particularly with respect to decoding and encoding.

Student is now in fourth grade and demonstrates little ability to use these foundational reading skills. Clearly Student requires an intensive program to address these significant needs if Student is going to become a proficient reader. For all of the foregoing reasons, I conclude that the District's multiple-program approach to teaching reading to Student was not and is not appropriate for this individual Student. Accordingly, the District will be ordered to provide Student with a research-based, multisensory, sequential, direct, and explicit phonetics-based reading program.⁷

The final issue is what remedy is warranted to remedy the deprivation from the District's denial of FAPE to Student. 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.

⁶ See http://www.wilsonacademy.com/academy/resource/Ten_Critical_Points.pdf ("The Wilson Assessment of Decoding and Encoding (WADE) can be given twice annually to evaluate overall mastery achievement.") (retrieved on January 12, 2011).

⁷ The Parents did not seek, and this hearing officer will not order, any specific reading program to be provided. (N.T. 24)

*Id.*⁸ Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Student was first enrolled in the District at the start of the 2010-11 school year, and the District is entitled to a reasonable period of time after Student started attending school in the District within which it should have known that Student's reading program was not appropriate. By the time that the report card and progress monitoring reports were provided to the parents at the end of the first marking period, this hearing officer concludes that the District should have been aware that Student's reading program was not appropriately addressing Student's intense reading needs and required revision. This period of reasonable rectification will be reflected in the compensatory education award.

Student has been receiving forty minutes per day of reading instruction in the intervention period. (FF 19) Although it cannot be said that Student did not make any meaningful educational progress in reading as a result of this instruction, it is difficult to estimate the amount of compensatory education that should be awarded to remedy the deficiency in Student's reading program. After careful reflection, it is this hearing officer's considered determination that half of the instructional time provided to Student in the intervention period is an appropriate and equitable remedy. Accordingly, Student will be awarded compensatory education in the form of reading instruction which amounts to twenty minutes per day for each day that school was in session from the beginning of the second marking period of the 2010-11 school year until Student is provided with an appropriate, individualized reading program.

The compensatory education award is 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 reading instruction. The compensatory education must be in addition to the then-current IEP and may not be used to supplant the IEP. The hours of compensatory education created by this provision may be used at any time convenient for Student and the family. 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.

⁸ Compare *B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Commw. 2006), which rejected the *M.C.* standard for compensatory education, holding that "where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *Id.* at 650-51. *B.C.* was a case involving a gifted student, however, and is, thus, distinguishable. There was also little if any evidence at this hearing which would permit a determination of what position Student would have been in had the District provided FAPE. I therefore conclude that the *M.C.* standard is the appropriate method of determining the amount of compensation education owed to Student in this case.

CONCLUSION

For all of the foregoing reasons, the District will be ordered to reconvene the IEP team to develop appropriate reading programming for Student consistent with the foregoing and to implement that reading program. In addition, Student will be awarded compensatory education.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that

1. The District failed to provide the Student with a free, appropriate public education in reading during the 2010-11 school year.
2. The District is hereby ordered to reconvene the IEP team within fifteen days of the date of this Order to revise Student's IEP to provide Student with a research-based, multisensory, sequential, direct, and explicit phonetics-based reading program.
3. The District is hereby ordered to provide compensatory education to the Student in the amount of twenty minutes per day for every day on which school was in session during the period beginning on the first day of the second marking period of the 2010-11 school year, through the date on which the District begins to provide Student with an appropriate research-based, multisensory, sequential, direct, and explicit phonetics-based reading program. The compensatory education award is subject to the conditions and limitations set forth in this opinion.

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

01669-1011JS
January 13, 2011