

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: XB

Date of Birth: xx/xx/xx

ODR No. 01689-10-11-KE

OPEN HEARING

Parties to the Hearing:

Representative:

Ms.

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Dates of Hearing:

December 14, 2010; January 25,
2010; February 8, 2011

Record Closed:

March 1, 2011

Date of Decision:

March 16, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The captioned Student is an eligible resident of the captioned District, (NT 14-14 to 19), and is nearing the end of Student's high school years, (NT 12-24 to 13-12.) The Student is identified with Other Health Impairment and Speech and Language Disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 *et seq.* (IDEA). (NT 13-14 to 14-14.) The captioned Parent requests due process under the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), seeking compensatory education for prior years and prospective relief. (NT 21-10 to 32-24.) The District asserts that it provided appropriate services at all relevant times and that the Parent is not entitled to relief under the law.

On the District's pre-hearing motion, I limited the scope of the matter to a two year period beginning on October 21, 2010, and ending on December 14, 2010 (in this decision called the relevant period). (NT 145-12 to 156-16.) This matter was heard in three sessions and the record closed upon receipt of written summations.

ISSUES

1. During the relevant period, did the District provide an appropriate evaluation of the Student?
2. During the relevant time period, did the District fail to provide the Student with a free appropriate public education with regard to educational needs in reading, writing, mathematics, motor skills, speech and language and post secondary transition?

3. Should the hearing officer award compensatory education to the Student for all or any part of the relevant period?
4. Should the hearing officer order prospective relief, including Wilson training, auditory reinforcement strategies, aural instructional materials, daily speech and language programming, assistive technology, counseling and post secondary transition evaluation and planning?

FINDINGS OF FACT

1. Student was born prematurely and sustained anomalies [redacted], including [redacted], as well as tracheal problems requiring insertion of an endotracheal tube from birth to age four. (J-8 p. 2.)
2. Student learned to communicate with manual signs from age two to four and began uttering single words at age four and one half in early intervention programming. (J-8 p. 2.)
3. In October 2006, the Parent obtained a private educational evaluation that found the Student to have a significant speech and language delay, with needs intensive speech and language skills, with an emphasis on language structure and form. The evaluators also found significant weaknesses in phonological processing and sequential memory, but age-level story recall. Student was achieving at a second to third grade level in reading, spelling, written expression and mathematics. (J-8.)
4. The private evaluators recommended continued Wilson training, adapted reading materials, multi-sensory approaches, a slant board for writing and keyboarding opportunities with verbal prompting, organizational assistance, accommodations, social skills teaching, counseling and careful planning for transition to the public high school. (J-8 p. 16 to 17.)
5. A District re-evaluation in November 2006, based largely upon the private evaluation in October 2006, found identification with Other Health Impairment and Speech and Language Impairment. It recommended continued Wilson training, adapted reading material, small group instruction in major subjects, functional mathematics instruction, advance notice of assignments, verbal explanations and responses, multisensory materials, and organization skills training. (J-9.)

6. The District provided Student with Wilson training when Student was in eighth grade and Student made progress in the Wilson curriculum. (J-8 p. 15. J-11 p. 2, 53.)
7. An IEP in April 2007 noted needs for increasing word attack skills, vocabulary and passage comprehension, computation skills and operations, requiring specially designed instruction in reading and mathematics, as well as speech and language support. (J-10, J-15.)
8. The April 2007 IEP placed the Student in part time learning support in the neighborhood school with small group speech and language training. (J-10 p. 36 to 37.)
9. The regular education teachers allowed Student to take tests home for several days and graded leniently in relation to the rest of the class. (J-16, 24.)
10. Reading testing using the Woodcock Reading Mastery Tests in April 2008 indicated well below average functioning in reading, including first percentile performance in word identification, fourteenth percentile performance in word attack, fifth percentile performance in word comprehension, and first percentile performance in passage comprehension. (J-20.)
11. The May 2008 IEP placed Student in part time learning support for reading and mathematics in a District high school, with related service of small group speech and language training. The IEP did not offer daily, intensive, individual (i.e. one to one) reading instruction. (NT 362-24 to 367-10; J-17.)
12. The May 2008 IEP offered goals addressing word identification, reading comprehension, mathematics computation and problem solving, speech and language services and post secondary transition. The IEP changed the method of measuring progress, which had been based upon standardized achievement testing instruments. The May 2008 IEP goals were not based upon measured base line data. Some goals had base lines that were not found in the present levels section of the IEP. Others had no base lines. Some goals had no measureable target for achievement. (J-17.)
13. The May 2008 IEP did not contain a goal to address phonological processing or fluency. The District did not provide systematic instruction to improve the Student's phonological processing or fluency, except for an additional informal after school opportunity with a special education teacher that may have included work from the Wilson program. The Student did not attend the after school opportunity due a conflict with other after-school activities. (NT 386-1 to 387-5, 396-17 to 399-7, 401-6 to 18, 404-23 to 405-5; J-17.)
14. The May 2008 IEP offered accommodations in the form of a slope board and books on tape for textbooks when available. Aural recorded materials were used

- briefly in the beginning of the school year but not for the full year. (NT 357-1 to 4; J-17.)
15. The May 2008 IEP did not offer a goal for organization. (NT 526-2 to 527-22; J-17.)
 16. The May 2008 IEP post secondary transition plan required Student to attend a transition fair and options workshop. It did not address work experience, daily living skills, functional vocational assessment, adult living skills, community experiences, related services, or travel training. A transition goal with objectives was offered, but did not provide individualized objectives requiring skill development specific to post secondary transition, except for identifying desirable transition outcomes. (J-17 p. 11, 19.)
 17. The District offered to place the Student in a half day vocational program, but the Parent declined that offer because Parent wanted the Student to take a full time academic program. (NT 318-10 to 319-4.)
 18. The District provided the Parent with Progress Evaluation Reports; however, the forms were not individualized and as returned by teachers did not report any data on progress toward attaining the goals on the IEP. (J-24, 27.)
 19. Benchmark testing during the 2008-2009 school year showed first quartile performance in aspects of English language, foreign language and science, with first quartile performance across the board in mathematics. The item analysis showed serious deficits in phonological processing, writing conventions and mathematics calculation and concepts. (J-21 p. 1, 3 to 37.)
 20. Reading testing using the Woodcock Reading Mastery Tests in March 2009 indicated well below average functioning in reading, including fourth percentile performance in word identification, thirteenth percentile performance in word attack, third percentile performance in word comprehension, and third percentile performance in passage comprehension. (J-22.)
 21. Mathematics testing with Key Math in March 2009 indicated that the Student was functioning markedly below average level in all areas of mathematics functioning. (J-23.)
 22. Teachers in March 2009 reported that the Student had made progress in all subjects. (J-25.)
 23. Student was given credit in all subjects in the 2008-2009 school year. Teachers did not grade the Student based upon the criteria set forth in the curriculum as with typical students; rather, accommodations were provided that allowed the Student to receive help with tests and grading was based upon different criteria, like lowered levels of achievement, grading only part of a test or effort rather than

- learning. (NT 337-14 to 349-25, 365-1 to 25, 413-21 to 414-13, 446-12 to 447-14; J-26, 28, 39.)
24. At Parent's request, the high school created special education classes for students with IEPs in Spanish and Chemistry, and placed the Student in those classes. (NT 560-23 to 562-25.)
 25. The May 2009 IEP placed Student in supplemental learning support for reading and mathematics in a public high school, with related service of small group speech and language training. (J-32.)
 26. The May 2009 IEP did not contain a goal to address phonological processing or fluency. (J-32.)
 27. The District offered to place the Student in a District regular education reading program called Corrective Reading, but the Parent declined because Parent wanted the District to provide Wilson training. (NT 324-14 to 325-2, 619-23 to 624-12.)
 28. The Corrective Reading program was offered because the District policy supports offering this program in the first instance, and not the various Orton-Gillingham-based programs for reading. (NT 325-3 to 329-1, 462-18 to 463-23, 552-14 to 553-24, 588-6 to 592-25, 744-7 to 23.)
 29. The Corrective Reading program is not an intensive, one-to-one reading program designed to address the needs of a student like the Student who has severe phonological processing deficits combined with attention difficulties, and who is relatively old so that the pace of learning needs to be accelerated. (NT 441-3 to 442-2, 603-19 to 604-10, 654-15 to 659-22; 676-21 to 679-25, 680-22 to 681-11, 684-8 to 688-19, 757-21 to 776-11.)
 30. The District offered a mathematics program called Corrective Math, but the Parent did not want to change the student's roster to allow for that program. (NT 1 to 15.)
 31. The May 2009 IEP offered goals addressing word identification, reading comprehension, mathematics computation and problem solving, writing and post secondary transition. A new organization goal was added. The IEP changed the language of these goals, but except for the organization goal, the skills to be taught were essentially the same as those in the previous IEP. The method of measuring progress was unclear and was not based upon standardized achievement testing instruments. The May 2009 IEP goals were not based upon measured base line data. Some goals had base lines that were not found in the present levels section of the IEP. Others had no base lines. (J-32.)

32. The May 2009 IEP offered accommodations in the form of a slope board and books on tape for textbooks when available. (J-32.)
33. The May 2009 IEP post secondary transition plan was substantially the same as the 2008 plan and required Student to attend a transition fair. It also set a new goal of identifying a major or program of study in future. It did not address work experience, daily living skills, functional vocational assessment, adult living skills, community experiences, related services, or travel training. A transition goal with objectives was offered, but it amounted to no more than identifying desired post secondary activities. Specially designed instruction was offered in the form of preparing Student for changes in routine and paying attention. The goal and SDI did not provide individualized objectives requiring skill development specific to post secondary transition, except for identifying desirable transition outcomes. (J-32 p. 11, 24.)
34. The May 2009 transition goal was derived from a computer menu. (NT 292-18 to 294-15.)
35. The District provided the Parent with Progress Evaluation Reports; however, the forms were not individualized and as returned by teachers did not report any data on progress toward attaining the goals on the IEP. There was no progress monitoring on the IEP goals. (NT 216-8 to 217-8, 236-4 to 243-2, 252-5 to 253-15, 329-5 to 331-23, 367-8 to 10; J-43.)
36. PSSA testing in March 2010 showed below basic performance in reading and mathematics. (J-21 p. 2.)
37. The District provided compensatory education in the amount of 50 hours by NOREP dated June 10, 2009. This was intended to compensate for missed speech and language sessions. (J-35, 49.)
38. In November 2009, the District offered a new IEP placing the Student in supplemental learning support with related service of speech and language small group, but not specifying the school location. (J-45.)
39. The November 2009 IEP disclosed no meaningful progress toward any IEP goals, and no meaningful progress as measured by standardized testing. The plan and goal for post secondary transition were the same as in the previous IEP. (J-45.)
40. The November 2009 IEP provided a new goal for literature, and a new goal that sought to address reading fluency, writing fluency, reading comprehension, writing organization, paragraph development, level of detail in writing, punctuation, spelling, use of capital letters, sentence structure, word attack skills, word recognition and new vocabulary. An objective was provided for each of the above issues. (J-45.)

41. The November 2009 IEP provided a goal in mathematics that sought to address computation, concepts, terms and symbols, operations, and procedures, as well as problem solving. Another goal addressed solving linear equations or functions. (J-45.)
42. The November 2009 IEP provided new goals for word identification, phonological processing, speech pragmatics and organization. (J-45.)
43. In the November 2009 IEP, the method of measuring progress was unclear and was not based upon standardized achievement testing instruments. The IEP goals were not based upon measured base line data. Grading was based at least in part on effort without relation to achievement. Expectations for mathematics achievement were lowered, and the teacher's grading was subjective. Progress monitoring was not derived from a measured base line and there was no systematic progress monitoring of progress on IEP goals. (NT 411-21 to 431-17; J-45, 51.)
44. The District re-evaluated the Student in 2009 and its report is dated January 2006. The report indicated that the Student was identified with Other Health Impairment and Speech and Language Impairment. It recommended supplemental learning support. (J-50.)
45. Benchmark testing showed a decline in most scores from Spring 2009 to Fall 2009, including mathematics. (J-46.)
46. Benchmark testing showed an improvement in scores for English Benchmarks one and two, from Spring 2009 to Spring 2010, with Student scoring in the second quartile. Item analysis shows, however, nearly no achievement reflecting phonological processing skills. Student's scores in mathematics did not improve. (J-47.)
47. A Woodcock Reading Mastery test administered in November 2009, as compared with the same instrument administered in December 2008 showed a decline in Student's word identification, word attack, and word comprehension grade equivalencies. Student's passage comprehension improved by one grade level. The full scale cluster grade equivalency rose by .4 grade to 3.6. (J-50.)
48. Mathematics assessments given in the Fall of 2009 disclosed no meaningful improvement. (J-50.)
49. The District asked the Parent to sign a permission to re-evaluate so that it could do a classroom observation in connection with its consideration of the private evaluation and the Parent declined to sign the permission to evaluate. (NT 618-16 to 620-11.)

50. The District issued a re-evaluation report in January 2010. (J-50.)
51. The January 2010 re-evaluation report did not have input from Parent because the Parent did not return the input form, though the District sent it to Parent. (J-50.)
52. The January 2010 re-evaluation report included standardized achievement testing, District benchmark testing, curriculum based testing, grades, and teacher observations. (J-50.)
53. The January 2010 re-evaluation report identified the Student with Other Health Impairment and Speech and Language Disability and recommended supplemental learning support with related service of small group speech and language therapy. (J-50.)
54. The January 2010 re-evaluation report did not include cognitive testing, adaptive behavior testing, speech and language testing, or testing of the Student's ability to [redacted]. (J-50.)
55. In May 2010, the District offered an IEP that placed the Student in supplemental learning support with speech and language services. The transition plan was unchanged from the previous IEP. The goals, objectives and SDI were unchanged. (J-52.)
56. None of the IEPs offered by the District provided occupational therapy or physical therapy. (J-53.)
57. In May 2010, the District received a private educational evaluation. The evaluation, based upon standardized testing, found that there was no educational progress from 2006 to 2010, and that in many areas of educational achievement, the Student's functioning regressed. The Student was unable to correctly spell or abbreviate "Philadelphia." Student's reading was instructional at the third grade level. Student's attention difficulties were more observable than in 2006. The evaluators found a severe learning disability, a severe speech and language disorder, and Attention Deficit Hyperactivity Disorder. Emotional functioning evaluation indicated that the Student was experiencing clinical levels of anxiety and depression. (NT 685-14 to 688-19; J-53.)
58. The private report recommended daily, intensive, individual (i.e. one to one) reading instruction in the Wilson Language approach through a fully certified instructor. (J-53.)
59. The private report recommended continuous auditory reinforcement strategies, orally delivered or recorded instructional materials, daily individual speech and language therapy, formal voice evaluation by a voice specialist, assistive technology to address the Student's disability [redacted] leading to slow writing output, individual counseling to address emotional difficulties, a comprehensive

vocational evaluation and subsequent programming, including a formal interest inventory, transition planning for graduation, medical re-evaluation for attention difficulties, a vision evaluation, ESY services and annual standardized re-evaluation. The report recommended continued public educational services until age 21. (J-53.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.¹ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Thus, the moving party must produce a preponderance of evidence² that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810. In this decision, I refer to “preponderant” evidence, which is a quantity or weight of evidence that is at least great enough to constitute a “preponderance” of evidence.

for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claims, or if the evidence is in "equipoise", the Parent will not prevail.

EVALUATION

The IDEA obligates a local educational agency to conduct a "full and individual initial evaluation" 20 U.S.C §1414(a)(1)(A). The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors" 20 U.S.C. §1414(b)(2)(C)

The Parent asserted that the District failed to provide an appropriate evaluation under the IDEA. The only evaluation that fell within the relevant period is the January 6, 2010 re-evaluation report. (FF 50.) This report is missing numerous elements of a complete evaluation report. (FF-54.) It does not utilize a variety of assessment tools and strategies; it only reports achievement data and teacher observations. Ibid. It does not assess the relative contribution of cognitive and behavioral factors. Ibid. Thus, on its face, the evaluation report is inappropriate.

However, in this matter, the Parent had refused to sign a permission to evaluate for this re-evaluation. (FF 49.) Parent had failed to send in the parent input form, and was generally uncooperative with the evaluation effort. (FF 49, 51.) Under these circumstances, I do not find the evaluation inappropriate.

OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038,

73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

In light of my order restricting the scope of this matter, Parent asserts that the District failed to provide a FAPE from October 21, 2008 to December 14, 2010 – thus, for most of the 2008-2009 school year, all of the 2009-2010 school year, and part of the

2010-2011 school year. I conclude that the District failed to offer or implement a FAPE during that entire period of time.

The student's educational needs are well known from a private evaluation provided to the District in 2006, as well as District evaluations that relied upon and incorporated that evaluation to identify the Student's needs. (FF 3, 5.) The Student has a speech and language Disorder (partly due to Student's history of four and one half years with an endotracheal tube in Student's trachea), attention deficit hyperactivity disorder, and [redacted]. (FF 2, 3, 5.) I conclude that the Student's suspected – and indeed confirmed – areas of disability include all of these disabilities. The various reports available to the District show that these disabilities give rise to numerous educational needs. The Student has a severe deficit in phonological processing and a severe delay in reading comprehension; a serious deficit in mathematics operations and problem solving; a serious deficit in writing conventions and higher level writing skills; voice abnormalities and a speech disorder; problems maintaining attention; problems in organization; and [redacted]. (FF 3, 5, 7, 8, 10.) The District has addressed some of these needs with plans and programs that were not reasonably calculated to provide a meaningful educational opportunity to the Student. The District has failed even to address some of these needs.

Reading

In 2006, the Parent provided a private evaluation that recommended Wilson tutoring to address the Student's profound phonological processing deficit, without which the Student would never be able to read at Student's chronological or grade level. (FF 3,

4.) The District declined to address this need appropriately. Over the years the District offered an occasional IEP objective that called for utilizing decoding strategies, but these were incidental to comprehension – directed goals or vocabulary building objectives, and there was no specially designed instruction to target the Student’s glaring need for decoding skills. (FF 5, 11, 12, 13, 25, 26.) The District refused to offer or even consider offering Wilson training during the relevant period, even though it had provided Wilson training in the past and the Student had made progress with the Wilson program. (FF 5, 6.)

The District’s IEPs for reading and all other subjects were inappropriate. These documents did not address all of the educational needs of the Student. (FF 11 to 16, 25, 26, 31 to 34, 38 to 43, 55, 56.) Many of the goals were unclear and some combined numerous disparate areas of educational need into a single goal or objective, obscuring the goal’s purpose and making it unclear how progress was to be measured. (FF 11, 31, 40, 41.)

The goals and objectives on all of these IEPs were not measurable. They did not identify baselines of measured student achievement from which to design goals and objectives. (FF 12, 16, 31, 43, 55.) Many of the goals and objectives did not utilize a base line at all. Ibid. Some of them stated base lines that were unrelated to any measurement of the Student’s achievement; these were simply stated as percentages of correct answers on supposed probes that were not decipherable from the IEP. Ibid. The latter base lines appeared to be written to allow classroom test grades to serve as progress measures.

These non-measurable goals and objectives were not monitored, and no intelligible progress monitoring reports exist for them. (FF 18, 22, 35, 52.) Instead, the District relied upon benchmark and other testing that was unrelated to the IEPs and classroom grades. (FF 19, 20, 21, 36, 39, 45 to 48.)

The latter were purely subjective and did not even measure the Student's achievement in the District's curriculum. (FF 22, 23, 43.) Several teachers made it clear that they were grading the Student leniently because the Student was in their view unable to do the work in their classes. Ibid. Based upon accommodations in the IEPs, the teachers would allow the Student to take tests home so that it was not clear whether or not the Student's test answers were the Student's own. Ibid. Teachers also completely distorted their grading systems to allow the Student to pass tests and courses that the Student had failed objectively. Ibid. More than one teacher stated that the Student deserved to be given good marks for trying, in spite of the Student's low performance in the curriculum. Ibid.

The Student failed to make educational progress in reading. Standardized achievement testing by the private evaluators showed without question that the Student had either failed to advance or regressed in all of the skills needed to read, including decoding and comprehension skills. (FF 3, 57.) District benchmark testing revealed the same result, with the Student scoring in the first or second quartile on numerous probes that tested reading skills. (FF 19, 20, 21, 36, 39, 45 to 48.)

The District asserts several arguments in defense of its failure to teach the Student to read. It points out that it did offer a reading program, Corrective Reading, which addressed phonological awareness deficits and decoding skills. (FF 27.) It argues that its

teachers also had provided one to one tutoring both during classes and after school to the Student, thus providing a meaningful opportunity. (FF 13.) It notes that the Parent refused the former and that the Student did not cooperate with the latter, (FF 13, 27); thus, the Student's failure to make progress cannot be laid at the District's doorstep.

Corrective Reading, which is a group-based reading remediation program, offered to general education students by District mandate, that approaches reading according to levels, the earliest of which emphasize decoding. (FF 28.) While this program possibly can be offered on a one-to-one tutoring basis, it is designed to be provided in groups. (FF 29.) It does utilize multi-sensory techniques. Ibid. It is sequential. Ibid. It is designed for high school learners. Ibid.

The District argues that Corrective Reading is superior to Wilson and other Orton-Gillingham - like reading programs, because, for an older learner, it is not appropriate to separate the training for decoding and comprehension. The District presented evidence that the two should be combined in an older learner, and Corrective Reading does this. The District asserted that this methodology is research based and has been validated.

The Parent presented evidence through credible and reliable expert witnesses that Wilson is the only program indicated for the Student. (FF 29.) The Parent's expert school psychologist asserted that the severity of the Student's phonological deficit and the depth of the Student's delay in decoding skills mandates an Orton-Gillingham approach, with one-to-one tutoring that is intensive (at least once per day) and sequential. This is especially necessary because the Student experiences severe difficulties maintaining attention to tasks in a group setting, and is subject to rising anxiety and even depression that further interferes with Student's ability to concentrate on reading tasks.

The evaluator noted that the Student has made some progress whenever taught on a one-to-one basis, and this is supported by the record in this matter. Finally, the Parent's expert pointed out that the Student is "running out of time" as the Student is nearly beyond school age. Thus, the pace of instruction becomes a relevant factor in assessing the effectiveness of any program selected. The intensity of phonological and decoding training in the Wilson program makes this likely to provide meaningful benefit, while the less intense Corrective Reading approach is less likely to provide meaningful benefit.

Notwithstanding the opinions stated after the fact by many of the District's witnesses, several witnesses indicated that the selection of Corrective Reading was based upon the fact that it is the only reading remediation program available in the District – or at least in the high school where the Student was enrolled. (FF 28.) Key decision makers like the school principal, the assistant principal, the high school special education liaison, the IEP case manager, the school psychologist and the high school division director of special education all indicated that the District prefers offering Corrective Reading, at least in the first instance, and that it was offered because of that administrative preference. (FF 28.)

Thus, the offer was not individualized to the unique needs of the Student. 20 U.S.C. §1401(29)(specially designed instruction must meet the "unique needs" of the child); 20 U.S.C. §1414(d)(1)(A)(i)(II)(aa),(bb)(IEP must meet all of the child's needs that arise from his or her disability); L.G. v. Wissahickon Sch. Dist., 2011 WL 13572 at*9 (E.D. Pa. 2011)(LEA must provide individualized program).

In reaching this conclusion, I accord greater weight to the opinion testimony of the Parents' expert. In its summation, the District invited me to examine a web site relied

upon in the discussion of the validity of the two competing programs, What Works, sponsored by the Department of Education. I find that the web site supports the use of the Wilson program, and does not support use of the Corrective Reading program. Thus, I question the School District's psychologist's knowledge of the relevant literature, and the District's psychologist's experience in assessing the relative merits of educational programs from the standpoint of research.³ In this regard, the Parent's expert's credentials as a school psychologist are superior to those of the District's psychologist, since the Parent's expert has a Ph.D. and the District's psychologist has a Master's degree.

Although the Parents' expert freely admitted a lack of information about the District and its system, the expert's opinion did not require such knowledge. Rather, what was needed was knowledge of the Student's functioning. The expert had far greater knowledge of the Student's functioning than the District's school psychologist, because the Parent's expert had the opportunity to evaluate the Student and conduct standardized cognitive and achievement testing.

Balancing the weight of the two opposing expert opinions, I give greater weight to the testimony of the Parent's expert in evaluating the appropriateness of the Corrective Reading program for this individual student during the relevant period. I also give greater weight to this expert's recommendations as to the necessary elements of a program to address reading for this Student. This finding compels the conclusion that the

³ I emphasize that I do not give weight to the web site's judgment in making a finding as to the relative merits of the two programs. Rather, I rely upon the opinions of the experts, who are more qualified than I to assess the weight to be given to the web site's pronouncements in the wider context of the totality of literature available and their personal knowledge of the two programs. My finding on the appropriateness of Corrective Reading is thus based upon a weighing of the evidence of record, including expert testimony, and not on the web site's pronouncements.

policy-based selection of Corrective reading for this Student means that the Student's IEP was not appropriately individualized for the Student.

Contrary to the District's second defense, its provision of some one – to – one tutoring to the Student during the relevant period does not cure its failures to provide an individualized educational plan that addressed all of the Student's educational needs in a form that can be implemented and measured. Given the deficiencies in the plan, the meager tutoring opportunities that the evidence discloses were not reasonably calculated to provide meaningful educational benefit. Informal and even formal tutoring demonstrably was insufficient to address the Student's severe reading disabilities, as indicated in the private and District evaluations and re-evaluations immediately preceding the relevant period.

Because these tutoring opportunities were insufficient to provide meaningful opportunity, the Parent's and Student's decisions to decline those offers were not fatal obstruction of an offer of FAPE. Consequently, they do not rise to the level of a factual defense to the Parent's claims.

Mathematics

Many of the above criticisms of the District's educational plan apply equally to its plan for addressing the Student's disability in mathematics. The vague IEP goals and objectives, the lack of measurability, and the lack of progress reporting on attainment of the goals and objectives render the educational plan for mathematics inappropriate. Thus, the District failed to provide a meaningful opportunity for educational benefit.

As with the reading program, the District did offer a remedial program called “Corrective Math.” (FF 30.) However, there is no evidence that this programming cured the lack of a systematic and measureable sequence of goals and objectives. Indeed, the Student made no progress, even with Corrective Math. (FF 21, 36, 39, 45, 48.) Thus, the District failed to offer or provide a FAPE to the Student with regard to mathematics.

Writing

As with mathematics and reading, the vague IEP goals and objectives, the lack of measurability, and the lack of progress reporting on attainment of the goals and objectives render the educational plan for mathematics inappropriate during the relevant period. Thus, the District failed to provide a meaningful opportunity for educational benefit with regard to writing, and thus denied the Student a FAPE.

Motor Skills

The private and District evaluations reported that the Student had [redacted] yet the educational plan barely adverts to this obvious area of concern. The Student experienced difficulty with handwriting and writing in general, yet this second red flag did not lead to a proper evaluation of the Student’s motor functioning during the relevant period. (FF 56.) The only reference to this problem in the IEPs was the provision of a “slope board” for writing. (FF 14, 32.) There was no evaluation as to whether or not this was the appropriate assistive technology for the Student, and the record suggests that it fell into disuse. Thus, the District failed to address a disability that may have interfered with the Student’s ability to progress in writing, and this constituted a denial of a FAPE.

Speech and Language

Although this was the secondary identified disability and was referenced in every evaluation, the IEP provided little programming for this disability. As with reading, mathematics and writing, the IEPs contained no measurable goals or objectives. There was inadequate progress monitoring linked to attainment of the meager goals set forth. This constituted a denial of a FAPE.

Transition

While the IEPs ostensibly addressed post secondary transition, they were derived from a computer program and required only initial attempts to have the Student identify future post secondary goals and objectives. (FF 16, 33, 34, 39, 55.) The same identical goals were repeated in subsequent IEPs. Ibid. There was no identification of particular transition-related skills to be addressed – other than simply the attainment of the IEP goals and those set forth in the curriculum itself. Ibid. At the late stage of the Student's high school career, these goals were no more than a transparent pretense of transitional planning. They failed to provide a FAPE with regard to post secondary transitional planning.

The District argues that it offered a one half day vocational setting for transition purposes, with one half day in academic programming. (FF 17.) Parent declined this offer because Parent wanted the Student to remain in a full time academic setting. Ibid. Under the circumstances of inadequate programming by the District, the Parent's position

is especially reasonable in declining the prospect of having the Student relegated to a non-academic future when Student's full potential had not been given a chance to flower academically. Moreover, offering a generic vocational program is no substitute for the transitional planning that the law requires. Thus this deprivation too was a denial of a FAPE.

SECTION 504

Generally, section 504 protects students with disabilities from discrimination in access to and equal opportunity to benefit from educational services from kindergarten through twelfth grade. 29 U.S.C. §794 ; 34 C.F.R. §104.4. To establish discrimination under Section 504, a student or parent must prove that (1) he or she is disabled or has a handicap as defined by Section 504; (2) he or she is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he or she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of his or her disability. 29 U.S.C. §794; 34 C.F.R. §104.4; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

The Commonwealth of Pennsylvania protects the student's right to be free from discrimination on the basis of handicap or disability, through Chapter 15 of the Pennsylvania Code, part of the regulations implementing the educational statutes of the Commonwealth. 22 Pa. Code Chapter 15. A "protected handicapped student" under these regulations is entitled to those related aids, services or accommodations which are needed to afford that student equal opportunity to participate in and obtain the benefits of

the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities, without cost to the student or his or her family. Chapter 15 by its terms is intended to implement students' rights under section 504, and it does not expand or limit those rights. 22 Pa. Code §15.11(c).

In the instant case, the findings with regard to denial of a FAPE under the IDEA apply equally to the section 504 claim. Thus, there is no basis in the record for a separate finding of discrimination under section 504.

COMPENSATORY EDUCATION

I will order the District to provide compensatory education to the Student during the period from October 21, 2008 to December 14, 2010. However, compensatory education is an equitable remedy, and I must balance the equities in determining the amount of relief. 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. B.C., 906 A.2d at 648; 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. Compensatory education is an equitable remedy. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). I conclude that the District was on notice that the Student required IEPs that addressed all of the disabilities discussed above, and it failed

to address them appropriately. Therefore I exercise my equitable authority to deny a period for discovery and remediation.

In addition, I must consider what relief would be appropriate to restore the Student to the level of attainment that would have been reached if the District had implemented an appropriate educational program from May 10, 2008 to September 14, 2009. See, B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006). I find that the record is very sparse regarding what would be an appropriate award of compensatory education. Taken as a whole, it supports only an award based upon an hour-for-hour deprivation of educational services, M.C., 81 F.3d supra., and does not support a finding as to the position the Student would have been in if provided with a full year of FAPE, B.C., 906 A.2d supra.

I award compensatory education on a full day basis. The failure to provide a reasonable opportunity to learn to read, write, perform basic mathematics, improve the Student's speech and language and prepare for post-secondary transition is both profound and extensive, calling into question whether the Student was able to receive any meaningful benefit during the school day. There is little evidence - and certainly not a preponderance of evidence - suggesting that the Student benefitted from Student's school day. Student's marks and promotions are no such indication.

PROSPECTIVE RELIEF

I conclude that prospective relief is warranted, because the District's previous educational plans were so wide of the mark that the IEP team needs direction for future planning. Therefore, I will order that the District provide an Orton-Gillingham - type

reading program; this program must have the same attributes of the Wilson Reading program that meet all of the criteria set forth in the Parent's private evaluation, (J-53). The program must be provided by a person or agency that is fully certified by the sponsors of the program. This program will be at public expense, and will continue for the remainder of the Student's eligibility for education within the District. This program will be provided daily for one hour.

I will order the District to conduct an appropriate occupational therapy evaluation, and implement the recommendations of that evaluation.

I will order that the District convene an IEP team meeting within ten days of the date of this decision and order. The team will consist of the personnel mandated by statute, and all participating staff must be fully trained in the preparation of IEPs according to law.

The team will develop an educational plan for the remainder of the Student's eligibility for education within the District. The plan will address all of the educational needs of the Student, as set forth in the private evaluation, (J-53), including reading decoding and comprehension, mathematics operations and problem solving, writing conventions, speech and language therapy, organization and post secondary transition needs.

The team will take into consideration all of the recommendations of the private evaluation, (J-53). IEP goals will be sequential and measurable, and will provide for appropriate progress monitoring and reporting to the Parent. The team will give full consideration to provision of appropriate related services, including daily speech and language services and counseling, as well as specially designed instruction and program

modifications, including aural and oral presentation of curricular material and instructions and assistive technology.

CONCLUSION

For the reasons set forth above, I conclude that the District's evaluation during the relevant period was not inappropriate because the Parent obstructed the District from meeting all of the requirements of the IDEA. I conclude that the District failed to provide a FAPE to the Student during the relevant period, with regard to reading, mathematics, writing, speech and language needs and post secondary transition needs. Therefore, I will direct the District to provide compensatory education as set forth above. In addition, I conclude that prospective relief is warranted, and I order prospective relief. Any claims not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. During the relevant period, the District provided an appropriate evaluation of the Student.
2. During the relevant time period, the District failed to provide the Student with a free appropriate public education with regard to educational needs in reading, writing, mathematics, motor skills, speech and language and post secondary transition.
3. The District hereby is ordered to provide compensatory education to the Student in the amount of a full school day for every school day during the period from October 21, 2008 to December 14, 2010. For purposes of this Order, a school day is any day on which school was in session in the District during the above stated period of time, not including ESY sessions.
4. The compensatory education ordered herein shall take the form of any appropriate developmental, remedial or enriching instruction or other educational services, including counseling. Compensatory

education may occur after school, on weekends and/or during the summer months, when convenient for the student and the family, and may be utilized after the Student attains 21 years of age. Compensatory education must be in addition to the then-current IEP and may not be used to supplant the IEP or the speech language related services hours that are currently owed by the District to the Student. The hourly cost for compensatory education shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.

5. The hearing officer hereby orders prospective relief as follows:
 - a. The District shall provide an Orton-Gillingham - type reading program; this program shall have the same attributes of the Wilson Reading program and meet all of the criteria set forth in the Parent's private evaluation, (J-53). This program shall be provided by a person or agency that is fully certified by the sponsors of the program. This program shall be at public expense, and shall continue for the remainder of the Student's eligibility for education within the District. This program shall be provided daily for one hour per day, five days per week, regardless of whether or not school is in session, consistent with the recommendation of the provider.
 - b. The District shall conduct an appropriate occupational therapy evaluation, and implement the recommendations of that evaluation.
 - c. The District shall convene an IEP team meeting within ten days of the date of this decision and order. The team shall consist of the personnel mandated by statute, and all participating staff shall have been fully trained in the preparation of IEPs according to law.
 - d. The IEP team shall develop an educational plan for the remainder of the Student's eligibility for education within the District. The plan shall address all of the educational needs of the Student, as set forth in the private evaluation, (J-53), including reading decoding and comprehension, mathematics operations and problem solving, writing conventions, speech and language therapy, organization and post secondary transition needs.
 - e. The team shall take into consideration all of the recommendations of the private evaluation, (J-53). IEP goals

shall be sequential and measureable, and shall provide for appropriate progress monitoring and reporting to the Parent. The team shall give full consideration to provision of appropriate related services, including daily speech and language services and counseling, as well as specially designed instruction and program modifications, including auditory and multisensory presentation of curricular material, and instructions and assistive technology.

William F. Culleton, Jr. Esq.
WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

March 16, 2011