

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

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 01792-10-11JS

Child's Name: L.G.

Date of Birth: [redacted]

Dates of Hearing: 2/9/11, 2/25/11, 3/14/11,
3/21/11, 4/1/11

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

Central York
775 Marion Road
York, PA 17406

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney

Vivian Narehood, Esquire
Gibbel, Kraybill and Hess
41 East Orange Street
Lancaster, PA 17602

School District Attorney

Brook Say, Esquire
Stock and Leader
Susquehanna Commerce Center East
221 W. Philadelphia Street, Suite 600
York, PA 17401-2994

May 20, 2011

June 4, 2011

Anne L. Carroll, Esq

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case had been diagnosed with pervasive developmental disorder (PDD) in early childhood and received pre-school special education services. Upon enrolling in the District for kindergarten, Student was IDEA eligible based upon diagnoses of autism and speech/language impairment. During the 2009/2010 school year, when Student transitioned to an intermediate level elementary school, Parents became particularly concerned about Student's lack of academic and social progress, as well as increasing anxiety. After Student completed a summer reading program in the summer of 2010 at a private school, Parents enrolled Student in the private school for the 2010/2011 school year and filed a due process complaint to seek reimbursement for summer and school year tuition. Parents also requested reimbursement for a private psycho-educational evaluation they obtained in the late summer of 2010 and compensatory education for the 2009/2010 school year.

The evidence compiled over the course of five hearing sessions between the beginning of February and the beginning of April 2011 supported Parents' claims for the most part. Accordingly, based upon the findings of fact and discussion below, Parents will be awarded reimbursement and Student will be awarded compensatory education for the District's failure to provide Student with an appropriate special education program during the 2009/2010 school year, failure to offer an ESY program for the summer of 2010, and failure to offer an appropriate program designed to meet all of Student's needs and reasonably calculated to lead to meaningful progress for the 2010/2011 school year. Parents' claim for reimbursement for the IEE will, however, be denied because it does not meet the IDEA legal standard for a publicly funded IEE under the circumstances presented by this case.

ISSUES

1. Did the School District provide Student with an appropriate educational program and placement during the 2009/2010 school year?
2. Did the School District appropriately determine that Student was not eligible for extended school year (ESY) services during the summer of 2010?
3. If the District failed to provide an appropriate program during the 2009/2010 school year and/or inappropriately failed to offer Student ESY services for the summer of 2010, is Student entitled to an award of compensatory education, and if so, in what amount and what form?
4. Did the School District offer Student an appropriate educational program and placement for the 2010/2011 school year?
5. In not, are Parents entitled to reimbursement for the costs associated with their unilateral placement of Student in a private school?
6. Are Parents entitled to reimbursement for the costs of the independent educational evaluation they obtained?

FINDINGS OF FACT

1. [Student] (Student) is a [pre-teenaged] child, born [redacted]. [Student] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 15)
2. Student has current diagnoses of autism and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), 11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 16, 17)
3. Student was initially diagnosed with PDD (Pervasive Developmental Disorder), a disability on the autism spectrum, and an anxiety disorder as a preschooler. Student received early intervention services in a preschool communication class operated by [local] Intermediate Unit (IU), as well as recreational therapy at Easter Seal Society, provided by Parents. (N.T. pp. 149, 150; P- 2, p. 1, P-3, pp. 1, 2)
4. An evaluation conducted by [the] IU at the time Student transitioned into the School District kindergarten program indicated low average intellectual capacity, mastery of cognitive skills needed for a child entering kindergarten, low average receptive language skills and below average expressive language skills, with weak pragmatic abilities. Student was taking medication (Zoloft) for anxiety. (N.T. pp. 153, 154; P-2, pp. 2—5)
5. Based upon the IU kindergarten transition evaluation, Student was determined to be a child with a disability (autism) and in need of specially designed instruction. The District implemented several, but not all, of the recommendations included in the evaluation

- report (ER), including speech/language therapy. Student received academic instruction entirely within the regular education classroom. (N.T. pp. 155—157; P-2, p. 7)
6. The District conducted an evaluation of Student in the middle of 2nd grade due to concerns that Student was unable to complete grade level academic work, particularly in reading. (N.T. p. 157—160, 165, 166; P-3, p. 3)
 7. The District school psychologist administered the Woodcock-Johnson Tests of Cognitive Ability-Third Edition, (WJ-III COG) which placed Student, overall, in the “average” range of intellectual functioning. On the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III), Student demonstrated “low average” math, “low” written language ability and “very low” reading ability. Overall, Student’s academic skills and ability to apply academic skills were in the “low” range and academic fluency was in the “very low” range. Additional needs were noted in the areas of speech/language and social skills development. (P-3, pp. 2, 8)
 8. The District’s reading specialist noted Student’s progress with self-monitoring and problem-solving when Student’s reading of a word did not match the meaning or context of a story, as well as independence in applying corrective strategies and ability to re-tell in sequence most stories read, although with few details unless prompted. The reading specialist was particularly concerned with Student’s fluency, slowness and lack of expressive interpretation when reading aloud. (P-3, pp. 3, 4)
 9. Student’s IDEA eligibility due to an autism spectrum disability continued, with needs for specially designed instruction identified in the areas of basic reading skills, reading fluency and comprehension, and written expression. Other recommendations included continuing speech/language and occupational therapy (OT), as well as school counseling for social skills development. (P-3, p. 9)
 10. At the time of the evaluation, Student was reading on a mid-first grade level, about 1 year behind Student’s mid-2nd grade placement. (P-3, p. 12)
 11. Prior to completion of the District’s evaluation, Parents had privately obtained an evaluation by a developmental pediatrician at [redacted] Center, who considered Student’s primary disability to be a language processing and retrieval disorder. (P-19, pp. 1, 2)
 12. The District also arranged for a psychiatric evaluation of Student. The psychiatrist noted medication for anxiety (Zoloft) and to increase focus (Strattera), some resistance to engaging in non-preferred academic tasks, and difficulties with transitions, but no overt behavior difficulties in the classroom, or anxiety, obsessions, compulsions or tics. The psychiatrist also noted Student’s preference for solo activities and inability to form/maintain friendships with peers. Problems with difficult behaviors, including aggression, were evident at home but not at school. The psychiatrist recommended goals for social skills development in school, as well as involvement in pro-social community

activities, such as [redacted], therapeutic social skills groups and additional speech/therapy to be provided by Parents. (N.T. pp. 162—164; P-13, pp. 8, 9, 12, 13)

13. After the evaluation report was completed, Student's IEP team developed an IEP that included goals for reading fluency (increase words correct/minute (wcpm) from 16 to 26); reading comprehension (based upon probes, increase comprehension at instructional level from 70 to 100%); writing (in response to writing prompt, increase total words written, correct writing sequence and correct spelling from 0 to 10); speech articulation (production of /l/, /s/ and /th/ sounds) and language fluency (decrease repetitions to less than 2/sentence with 80% accuracy over 3 consecutive sessions when producing sentences pertaining to pictures and when answering "wh" questions). (P-8, pp. 11—16)
14. Less than one page of specially designed instruction included general teaching and support strategies such as frequent review, reminders to use reading strategies, drill and practice. (P-8, p. 16)
15. Student began receiving 8 hours/week of instruction in reading and writing in the learning support resource room, with the remainder of academic instruction in the regular education classroom. Student also received 30 minutes of speech/language therapy/week. The IEP included no social skills goals or OT. (P-8, pp. 19, 20)
16. In the IEP developed a year later in mid-3rd grade, Student was not reading independently at the mid 1st grade level (DRA level 10—12) identified as Student's reading level in the previous IEP. Student increased wcpm from 12 to a high of 40. Comprehension was described as "much easier" when stories were read to Student, who demonstrated the ability to answer some higher level questions with that method. When required to read independently, comprehension was at 60-80% depending upon the difficulty of the material. Student was described as having "finally started using some strategies to figure out words as [Student] is reading." (P-9, pp. 7, 8)
17. In writing fluency, Student reached a high of 21 words correct in a three minute span, increased words spelled correctly from 2 to 13, and words in correct sequence from 3 to 7. (P-9, p. 8)
18. Student's significantly low reading level hampered Student's ability to read grade level materials, causing frustration and embarrassment when material was read to Student in the regular education classroom. Student was reported to be reluctant to ask for help when needed. (P-9, p. 9)
19. The mid 3rd grade IEP included one reading goal, to increase fluency from 26 to 38 wcpm in 3 out of 4 consecutive primer level probes. (P-9, p. 14)
20. There was one IEP writing goal, increase total words written from 23 to 30, words spelled correctly from 15 to 21, and correct word sequence from 5 to 12 on 3 out of 4 consecutive 3 minute writing prompts. (P-9, p. 15)

21. The IEP included some changes and additions to the specially designed instruction, such as providing breaks, a timer and positive reward for completing tasks, and reminders/cues/prompts for requesting help, staying on task and completing tasks. (P-9, p. 18)
22. The speech articulation goal for the same 3 sounds identified in the prior IEP was continued, for improvement of those sounds from 80 to 90% at the phrase/sentence level and from 50 to 90% at the conversation level. (P-9, p. 16)
23. Speech goals were added for word definitions (give at least 2 definitions when given 6 multiple meaning words, moving from 50 to 75% for 3 consecutive sessions); improving vocabulary and word finding skills (increasing from 50 to 75% accuracy in identifying items from descriptions read to Student) and improving categorization (increasing the ability to label categories and name items in a category from 50 to 75% accuracy over 3 sessions). (P-9, pp. 17, 18)
24. The amount of time for resource room instruction in language arts was increased to two hours/day, and the 30 minutes of weekly speech/language therapy continued. (P-9, pp. 21, 25)
25. At the end of the school year, another IEP was developed for the next school year, when Student's class was required to transition to an intermediate level District elementary school. Present levels in reading noted an improvement from DRA level 8 at the beginning of the school year to DRA level 12, the mid 1st grade level, with "slow" incorporation of strategies for decoding unfamiliar words while reading rather than asking to be told the word. Student was also noted to be working on sight words. (P-10, pp. 1, 5)
26. Student's regular education teacher noted some improvement in asking for help, a somewhat decreased need for multiple repetitions of directions, improved work completion, indications of greater comfort in the classroom and increased socializing with peers. Student performed better, particularly in writing, when working on topics of high interest. Student's need for help in managing frustration was also noted. Parents confirmed that through the efforts of the 3rd grade learning support teacher, Student likely improved in asking for help and work completion by the end of the school year. (N.T. pp. 182, 183; P-10, pp. 6, 7)
27. The new IEP included two reading goals, to increase oral reading fluency from 26 to 52 wcpm at the first grade level and increase answering oral questions at a first grade reading level from 2/10 to 8/10, both goals to be met when Student was successful on 3 out of 4 consecutive probes. (P-10, p. 13)
28. In writing, Student's goal was an increased score, from 1 to 2, on the District's 4th grade writing rubric on 3 out of 4 consecutive probes. (P-10, p. 14)

29. The speech articulation goal was repeated, with Student to improve articulation of the same originally identified sounds at all positions in words from 60% accuracy at the sentence level to 80% accuracy at the conversational level. A new articulation goal for “L Blends” was added, to improve from 90% accuracy at the sentence level to 90% accuracy at the conversation level. (P-10, p. 16)
30. The speech goals for definitions and word finding/vocabulary were continued, with improvement levels to increase from 60% and 65%, respectively, to 80%. The categorization goal of naming 6 items when given a category was also continued, with improvement to reach 80% from a baseline of 60%. The goal for labeling a category when members were listed was listed as a separate goal, with accuracy to reach 75% from a baseline of 40%. (N.T. pp. ; P-10, pp. 17, 18)
31. A new goal was added, for using appropriate words and behavior to convey feelings when presented with a situation Student perceived as a stressor, improving from a baseline of once out of 3 such occurrences to 3 consecutive occurrences for 3 out of 4 consecutive weeks. (N.T. pp. ; P-10, p. 10)
32. Student’s level of speech/language therapy (30 min./week) and 2 hours /day of learning support services for language arts were continued in the following school year. (N.T., pp. S-9, pp. 22, 27)
33. Specially designed instruction was expanded to nearly two full pages of the IEP, and added additional strategies, such as direct instruction in the use of graphic organizers, providing high interest writing strategies, firm and consistent messages about staying on task, preferential seating next to a calm, helpful peer, reminders/cues/prompts for handling frustration, verbalizing appropriately and direct instruction for verbalizing frustration. (P-10, pp. 20, 21)
34. When Student entered the new school for 4th grade, Parents requested more regular and frequent communications with the teachers in order to better understand Student’s functioning in school and provide extra help at home. Parents’ concerns with Student’s continued academic problems increased as the school year progressed, prompting their request to limit homework in an effort to reduce Student’s stress and anxiety related to the more difficult work and lack of improvement in reading. (N.T. pp. 189, 447, 455, 462; P-16, p. 7, P-23, pp. 1, 2, 5)
35. Student’s special education teacher noted from the beginning of the school year that Student disliked transitions, especially from the regular education classroom to special education. From review of prior records, the teacher also noted a pattern of regression in reading skills, and was aware of Parents’ concerns about Student remaining so far below grade level in reading. Student began and ended the 4th grade school year reading on a 1st grade level, and displayed frustration when encountering an unknown word. Student’s desire to be told the word rather than use problem-solving strategies was concerning to the teacher, since it showed less independence than noted in 2nd grade, and the lack of

- effective decoding strategies was surprising to the teacher. (N.T. pp. 513—516, 518, 520—522; P-3, p. 3, P-9, p. 3)
36. Student's Father met with the District members of the IEP team in early November to further discuss Parents' concerns. After the meeting, Student began receiving 30 min./day additional reading and writing instruction from the special education teacher using the Wilson reading system for approximately 15 minutes for decoding, followed by oral reading fluency practice and practice on writing skills. Student's frustration at home eased with the elimination of homework. Additional supports/strategies were also put in place during the school day to decrease Student's stress. (N.T. pp. 388, 446, 449, 450; P-11, p. 6, P-23, p. 6, S-10)
 37. Student's special education teacher used the Wilson Reading System for small group instruction from the beginning of the school year, but did not follow the publisher's protocols requiring 95% mastery before proceeding to the next sub-step level. (N.T. pp. 531; P-16, pp. 1—4, P-24, pp. 12—15)
 38. Parents and Student's special education teacher requested an observation by an autism specialist and possible placement in an autistic support class. One of the District's special education administrators who is a board certified behavior analyst (BCBA) with training and experience as an autistic support teacher, along with a District school psychologist, observed Student in early November 2009 and provided a report to Student's special education teacher. (N.T. pp. 189, 448, 841; S-10, S-11)
 39. The administrator's role was to provide consultation to support Student's teachers and to recommend intervention, with possible follow up, depending upon how successful the interventions were in the classroom. After the observation, Parents were informed that Student would not be appropriately placed in an autistic support class because Student was higher functioning than students in the available autistic support classes and needed the modeling that typical peers could provide. (N.T. pp. 189, 190, 841, 842, 857, 858)
 40. During the 20—30 minute observation of Student's small group language arts instruction in the resource room, a time and setting selected for the likelihood of seeing the worst part of the day, Student was disengaged, off-task, appeared tense and angry, made facial grimaces, needed significant prompting to complete the reading task, did not interact with peers and was obviously frustrated with reading. The special education teacher's behavior data sheet for the same date noted no signs of frustration or stress. (N.T. pp. 844—846, P-16, p. 20, S-11, p. 1)
 41. The special education supervisor made a number of recommendations to the teacher for providing sensory input, a visual schedule, regular breaks, anxiety management strategies, reducing academic demands when frustration increased, increasing peer interactions and suggested school-based behavior services, beginning with classroom interventions, and social skills training. Recommendations were also made for additional speech therapy and social skills training to be provided by Parents. (N.T. pp. 847—853, 859, 860; S-11, p. 1)

42. Student's special education teacher tried some of the recommendations from the special education supervisor but did not find them particularly helpful and did not continue them. The teacher did not request any additional observation or specific consultation, although that would have been expected if the initial recommendations were ineffective. (N.T. pp. 543, 547—549, 889, 890)
43. Parents remained dissatisfied with Student's progress during 4th grade, believing that more attention and intervention was needed to address Student's low level of academic progress, particularly in reading. (N.T. pp. 184, 214, 217, 218, 380)
44. Parents also consulted an attorney to assist them in obtaining appropriate services. Attorneys for both Parents and the District attended the meeting convened in late May to develop an IEP for the following school year. (N.T. p. 424; P-23, pp. 12, 14)
45. Although the parties engaged in extensive discussion of Student's program and needs at the IEP meeting, followed by requests from Parents for clarification of some aspects of the proposed IEP, there was no discussion of offering Student extended school year (ESY) services at that time, or at any prior IEP meeting. Student's 3rd, 4th and proposed 5th grade IEPs stated that Student was not eligible for ESY services due to no evidence of regression or difficulty recouping skills. (N.T. pp. 186, 187, 424, 425, 791, 792; P-8, p. 18, P-9, p. 22, P-10 p. 23, P-11, p. 29)
46. In the IEP proposed for Student at the end of the 2009/2010 school year, Student's then current DRA reading levels placed Student at an end of 1st grade independent level and beginning of 2nd grade instructional level. At the beginning of the school year, Student read 41 words/minute at a 1st grade level with 95% accuracy and answered comprehension questions with 87% accuracy. Assessments near the end of the school year placed Student averaged 48 words /minute and answered comprehension questions with 93% accuracy. (P-11, p. 6)
47. In math, Student scored in the proficient range in computation and application and in the basic range for problem solving. Mid-year assessments placed Student in the basic range for computation and application but in the proficient range for problem-solving. On the PSSA taken at the end of 3rd grade, Student scored in the Basic range for math and the below basic range for reading. (N.T. pp.; P-11, pp. 6, 7)
48. In writing, Student began and ended the school year with scores of 2/4 on the District's writing rubric for focus, and improved to 2/4 on content by the end of the school year. In the areas of style, organization and conventions, Student began and ended the school year with scores of 1/4. (N.T. pp.; P-11, p. 6)
49. Proposed reading goals included increasing oral fluency to 78/wcpm at a 2nd grade reading level 4 out of 5 times, decoding, understanding new words at a 2nd grade reading level using knowledge of phonics, context clues, root words, prefixes, suffixes with 80% accuracy on 3 consecutive trials and a comprehension goal to demonstrate understanding

- of second grade level texts at 90% accuracy on 3 consecutive trials. (N.T. pp. ; P-11, pp. 13—15)
50. The proposed IEP also included two writing goals: a) using conventions of language (correct spelling, punctuation, use of capital letters) when writing and editing using a 5th grade rubric, increasing the domain score from 1 to 4 out of 5; b) write paragraphs using the 5th grade writing rubric and increasing scores from 2 to 3 out of 4 on the 5th grade writing domain, both on 3 out of 4 consecutive trials. (N.T. pp. ; P-11, pp.16, 17)
 51. For the first time, the District proposed IEP math goals, focusing on analyzing and solving problems and estimating/calculating/verifying measurements, calculating perimeter, area volume and other measures of capacity at a 5th grade level. The IEP also provided for direct instruction in math in a special education class, along with reading and written expression. (N.T. p. 206; P-11, pp. 18, 19, 24, 30)
 52. Language goals centered on stating at least 2 definitions for multiple meaning words and using homonyms correctly. (P-11, pp. 20, 21)
 53. The last two proposed IEP goals were directed toward developing pragmatic language and self advocacy skills: “Improve verbal interaction skills from a baseline of 65% to a minimum of 85% mastery over 5 consecutive days” and “Using the self advocacy checklist and assessed monthly...increase self advocacy skills from 10 points to 20 points 3 out of 4 times.” (P-11, pp. 22, 23)
 54. The specially designed instruction in the proposed IEP occupied just over 3 pages and included research based, multi-sensory word study/spelling instruction, such as Wilson, daily reports to parents, frequent review of previously taught concepts, assistance with organizing, breaks, language comprehension activities, daily written schedule, language fluency practice and content area support in the special education classroom. There was no specific provision for small group or 1:1 instruction in either the regular education or special education class room. (N.T. pp. ; P-11, pp. 24—27)
 55. Speech language therapy was to continue for 1 30 minute session/week, and school counseling at the rate of once/cycle for 8 weeks was added as a related service. Pull-out special education services were to be provided for 2.5 hours/day. (N.T. pp. ; P-11, pp. 27, 30)
 56. The proposed IEP also specifically provided for weekly consultation and support for the regular education teacher by the special education teacher, monthly consultation by the speech/language pathologist with both the regular and special education teacher to support speech/language goals in classroom settings, and less frequent observation by the special education supervisor with a background in autism with the regular and special education teacher. (N.T. pp. ; P-11, p.28)
 57. Early in August, Parents notified the District of their intention to enroll Student in a private school and seek tuition reimbursement, following Student’s completion of a 4

- hour/day program at the same private school for 3 weeks during July, in which Student received reading, writing and math instruction and enrichment. (N.T. pp. 113—115, 391; P-23, p. 18)
58. At the suggestion of Student’s developmental pediatrician, Parents obtained a private psycho-educational evaluation, conducted over 5 sessions between early August and mid-September. The evaluator agreed that Student meets the diagnostic criteria for autism, but does not believe that diagnosis explains Student’s learning difficulties. The evaluator concluded that Student meets the IDEA criteria for specific learning disability and that Student’s primary disability is a speech/language impairment. The evaluator also identified executive functioning deficits related to a diagnosis of attention deficit/hyperactivity disorder (ADHD). (N.T. pp. 244, 256, 267, 301, 393; P-20, pp.16, 17)
 59. The evaluator made numerous recommendations and suggestions for supporting Student’s academic, behavior, language, organization and social skills needs, as well as for remediation strategies in both the home and school setting. (P-20, pp. 23—36)
 60. The private school Parents chose for the current school year focuses on understanding strengths and weaknesses of students with learning differences in order to develop the skills to become successful independent learners. The private school uses an integrated curriculum and collaborative approach among the teachers, emphasizing language development and social pragmatics. (N.T. pp. 30—32)
 61. Parents selected the private school after visiting and determining that it seemed like a good fit for Student’s needs because the small classes provide additional attention, Student receives tutoring and social skills development is integrated into the curriculum. (N.T. p. 398)
 62. At the private school, Student receives group reading instruction from a special education teacher who is a reading specialist, and is assigned a tutor, also a reading specialist, who provides additional reading instruction, direct instruction for interacting appropriately with peers and works on phonological processing, either individually or with one other student. The reading instructors are trained in a number of reading programs, including Orton-Gillingham methods. (N.T. pp. 46—52, 79; P-21, pp. 9, 10)
 63. At the beginning of the school year, assessments placed Student’s instructional reading level at DRA level 8, mid-1st grade level. On the most recent assessment, Student had advanced to DRA level 18, at an early 2nd grade level. (N.T. pp. 50, 70; P-21, p. 11 P-24, p. 8)
 64. The private school uses Saxon Math for Student’s math instruction, a curriculum that incorporates spiraling, repetition and manipulatives. (N.T. pp. 53, 54; P-21, p. 13)
 65. Student receives 60—90 minutes/week of individual speech/language therapy and additional push-in services. Student’s language therapy and goals include developing

pragmatic language skills, expressive language skills and improving articulation. (N.T. pp. 75—77; P-21, p. 3)

66. Student's additional classes are writing and mechanics, using Handwriting Without Tears for cursive writing, and instruction in assistive technology, Dragon Naturally Speaking, to improve written expression; socialization and communication, taught by the school social worker and designed to promote effective communication with peers; social studies; science; computer literacy; art; performing arts; health and wellness. (N.T. pp. 51—58; P-21, pp.12—17)
67. Although Student remains unwilling to participate in games and activities with peers, the academic director of the private school observed that Student is willing to remain with the group and appears to be gaining more confidence (N.T. pp. 48, 49; P-22, p. 9)
68. Parents have noted that Student is happier, completes homework without difficulty and has begun to use organizational strategies. (N.T. pp. 400—402, 427, 428)

DISCUSSION AND CONCLUSIONS OF LAW

Underlying the identified issues in this case, *i.e.*, Parents' entitlement to reimbursement for an IEE and private school tuition and Student's entitlement to compensatory education from the beginning of the 2009/2010 school year through the summer of 2010, are two fundamental and related questions: (1) How explicit must parents be with respect to notifying the school district of their dissatisfaction with the special education services provided to their IDEA eligible child? and (2) Under what circumstances/how quickly are school districts required to fundamentally alter the special education program/placement provided to an IDEA eligible student when academic progress stalls?

In this case, the School District's theme was its willingness to work with Parents to meet their requests, and Parents' failure to state in detail what they believed Student needed. *See, e.g.*, District's opening statement, N.T. p. 572. Parents did, however, articulate their concerns about Student's academic and social progress, including Student's increasing anxiety and withdrawal from the educational process. (FF 34, 36, 43) Parents did not, however, offer specific solutions or suggest what the District might do differently to better address Student's significant needs,

rightly relying upon the District to take a closer look at Student's functioning in school, as well as the type and level of instruction and support it was providing to address the language, academic and social difficulties arising from Student's primary disabilities. Parents were justified in their belief that expressing their concerns in some detail was sufficient to fulfill their responsibilities as part of Student's IEP team, and that it then became the District's responsibility to determine how best to address Parents' concerns.

In many respects, this case represented the reverse of the more frequent type of controversy, in which the parents of an eligible student insist upon a particular type or level of special education services or the means or methods of instruction. In such circumstances, courts have emphasized that Parents are entitled only to an appropriate program/placement, reasonably calculated to assure that an eligible student makes meaningful educational progress, not a particular type or location of service. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) at *6; *J.E. v. Boyertown ASD*, 2011 WL 476537 (E.D. Pa. 2011) at *11: "Parents do not have the right to compel the District to provide a specific program...."

On the other side of that coin, however, is the absence of any obligation on the part of parents to precisely identify school district lapses that they contend resulted in a lack of progress or suggest how a school district might address their concerns. School districts, with their educational expertise and resources, are obligated to hear and consider parents' concerns, and if warranted, determine how an eligible student's educational program should be altered to address a lack of academic progress or other issues that may be interfering with the student's functioning in school.

In this case, the District was less than appropriately proactive in investigating whether Parents' concerns about Student's educational program required more or different interventions.

The District was content with Student's limited progress as long as Parents' concern were conveyed with muted courtesy, and it appeared that Parents would trust the District's representations that Student was improving academically, despite all objective evidence to the contrary. The District seriously attempted to meet Student's growing educational and social needs only when it became clear that Parents were seeking other alternatives that they might expect the District to fund. At that point, however, the District also began faulting Parents for, in essence, not being more challenging earlier, and, it appeared, for not proposing their own plan for increasing Student's progress. For its overall failure to recognize and address Student's lack of an appropriate special education program and its continuation with services and strategies that it should have recognized as ineffective, and for its specific actions with respect to the identified issues, the District is liable for both compensatory education for one school year and one summer, as well as for tuition reimbursement, as more fully explained with respect to each issue.

General FAPE Standards/Burden of Proof/Compensatory Education

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd 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 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed

to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if [his/her] 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; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

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

An eligible student who has received no more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable “remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249 (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d at 718, citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d

Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

The substantive protections of the IDEA statute and regulations are enforced via procedural safeguards available to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof. In this case, since Parents filed the complaint, it was their obligation to prove each of their claims. As is also usual in civil cases, Pennsylvania federal courts have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Appropriateness of the 2009/2010 IEP and Program Implementation

By the beginning the 2009/2010 school year, Student's progress in reading since 2nd grade was barely discernible, having never exceeded a mid 1st grade level, and it was, or should have been, obvious that Student had lost ground in reading, overall, and in terms of motivation and independence, since Student was by then more than three years behind grade level in reading. (FF 8, 10, 16, 18)

Despite the District's efforts to highlight Student's purported progress, the true picture drawn by the District's documents was of a Student unable to make academic or social progress

with the IEP goals and specially designed instruction in place during the 2009/2010 school year. It is notable, *e.g.*, that an e-mail message from Student's special education teacher to Parents at the end of October stating that Student was doing fine with peer interactions and did not appear frustrated or depressed at school was contradicted by the observation report, less than a week later, of the District's special education supervisor with significant autism experience who consulted with the teacher. *See* S-11, S-13, p. 1. Contrary to the teacher's apparent surprise at learning from Parents of Student's struggles with homework, the administrator noted a number of examples of conduct far more consistent with Parents' reports to the teacher concerning Student's behaviors at home when engaged in school work than with the special education teacher's comments, and confirms the accuracy of Parents' concerns that the school year was going very badly. (FF 40) Moreover, the special education teacher herself referred to recognizing Student's frustration during her testimony. *See, e.g.*, N.T. pp. 520, 522, 552—554.

In light of Student's continuing inability to read, and increasing academic difficulty, it is not surprising that Student was displaying more signs of frustration with school with the increased demands of 4th grade. (FF 34, 35) It is surprising, however, that the District took so little apparent interest in looking for ways to improve Student's progress. The District did not increase Student's reading instruction and add 1:1 instruction until a November 2009 meeting requested by Parents. (FF36) Moreover, the increased time was designed, in part, to provide additional Wilson instruction, yet the special education teacher did not provide the program in accordance with the publisher's protocols. (FF 37) Although the District has reading specialists available for additional assistance to teachers, neither the special education teacher nor any administrator familiar with Student's lack of progress apparently considered requesting more

than minimal and informal consultation in order to develop a comprehensive strategy to address Student's lack of progress in reading. *See, e.g.*, N.T. p. 579, 580, 752, 753.

Similarly, after the District's autism specialist observed Student in the resource room, she provided suggestions to address the issues she noted. When the special education teacher found the suggestions ineffective, however, she did not request another observation or additional assistance in developing different or better strategies or implementing the initial recommendations. (FF 41, 42) The observer's recommendations for additional speech therapy and social skills instruction were meant for the Parents to provide, with apparently no consideration given to whether Student's educational program should be altered to incorporate more of those services into the school day. Student continued to receive only 30 minutes/week of speech/language therapy, with no goals or push-in services to facilitate pragmatic language development. (FF 29, 30, 32) Despite noting Student's significant needs for pragmatic language and for improving peer social interactions, and acknowledging that she could have conducted annual assessments to measure progress, the speech therapist also acknowledged that she did no assessments, but relied on informal, unspecified "observational" data, recorded, if at all, on scraps of paper, to note Student's weaknesses in that area. *See* N.T. pp. 987, 988; P-23, p. 20.

The overall impression from the evidence produced at the due process hearing was that the District had no idea why the reading instruction provided by the District over several years resulted in so little progress for Student, and no interest in taking the initiative to determine how to improve Student's academic progress, particularly in reading. The District staff noted Student's pragmatic language/social skills needs, as well as Student's frustration as the increasing complexity of the material Student was expected to learn further highlighted Student's

academic difficulties, but did not consider what might be done to address Student's deficits in either reading or pragmatic language. The record establishes that the District it did not even fully engage its own available resources to address those issues. Because the District's special education services for 4th grade essentially continued the IEP goals that had not effectively addressed all of Student's needs in the past, as illustrated by Student's virtually flat progress in reading and the absence of any systematic effort to address Student's pragmatic/social skills needs, neither the IEP for the 2009/2010 school year nor the changes made to Student's program beginning in November of that year were reasonably calculated to result in meaningful progress. Accordingly, Student will be awarded full days of compensatory education for the entire 2009/2010 school year, since the District should have known before the school year began that Student was not reasonably likely to make meaningful progress based upon Student's limited progress in prior years with similar goals and instructional methods. Student is awarded full days of compensatory education because the evidence establishes that Student not only made insignificant progress, but also suffered frustration and additional stress because of the limited learning that occurred as a result of the inappropriate program.

ESY

Entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania special education regulations provide more specific guidance for determining ESY eligibility, explicitly requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

(i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

(ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

(iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

In addition, in §14.132(b), the Pennsylvania regulations describe the kinds of information school districts should take into account when determining ESY eligibility:

Reliable sources of information regarding a student's educational needs, propensity to progress, recoupment potential and year-to-year progress may include the following:

- (1) Progress on goals in consecutive IEPs.
- (2) Progress reports maintained by educators, therapists and others having direct contact with the student before and after interruptions in the education program.
- (3) Reports by parents of negative changes in adaptive behaviors or in other skill areas.
- (4) Medical or other agency reports indicating degenerative-type difficulties, which become exacerbated during breaks in educational services.
- (5) Observations and opinions by educators, parents and others.
- (6) Results of tests, including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.

Moreover, ESY eligibility does not rise and fall solely on the enumerated criteria. In §14.102(a)(2)(xi) and §14.132(a), the Pennsylvania special education regulations incorporate by

reference the federal ESY regulation referenced above, and §14.132(a) states that the seven factors are to be considered “In addition” to the requirements of the federal regulation. Consequently, the Pennsylvania factors provide neither exhaustive nor exclusive criteria for determining a need for ESY services. Rather, an IEP team must also consider a more global question: Are ESY services necessary for a given student to receive FAPE? Expanding that term, a district must consider whether ESY services are needed to assure that the student’s program is reasonably calculated to confer meaningful educational benefit.

In determining the need for ESY services, therefore, school districts can, and do, consider factors such as significant deficits, slow progress and functioning considerably below grade level in a given area to determine whether ESY services are needed for a student to receive FAPE. *See, e.g., In Re: A Student in the Freeport Area School District*, ODR #9015/07-08 (August 7, 2008) at 7, 8, where the school district determined that the student in question was eligible for ESY math services due to significant needs and far below grade level performance.

In this case, there is ample evidence of Student’s slow progress and significant difficulty acquiring the essential skill of reading over several successive school years. (FF 16, 17, 18, 25, 34, 35, 46) In addition, Student’s disability is among those considered “severe” under the Pennsylvania regulations. Despite that knowledge, the District never considered any factors or criteria for ESY eligibility other than regression/recoupment, and never initiated a discussion of Student’s ESY eligibility at an IEP meeting before February 28, as it was required to do under §14.132(d). (FF45) The District also identified Student’s need for more opportunities to develop and practice social skills, but expected Parents to bear the cost of all such activities and never considered whether some might be provided as part of an ESY program. (FF12)

The record amply supports Student's need for ESY services and provides no justification for the District's failure to do more than a cursory analysis based on only two of the factors listed in the Pennsylvania regulations. The belated analysis of the remaining Pennsylvania factors by the LEA representative at the due process hearing was far too little, too late, and her conclusions that Student did not meet any of the ESY criteria depended upon the assumption that Student made meaningful progress during the 2009/2010 school year. (N.T. pp. 1136—1142) The conclusions stated in her testimony, including her equivocal assertions that denial of ESY services and the data on which it was purportedly based was "probably" discussed with Parents at the May 2010 IEP meeting, are not supported by the documentary evidence or other testimony. *See* FF 16, 17, 18, 25, 34, 35, 45, 46. In addition, had there been such discussion, the District would still have been out of compliance with the Pennsylvania requirement that an IEP meeting to review data and determine eligibility for ESY services be held by February 28. §14.132(d). The District also provided no testimony that Student's IEP team, or the District ever considered whether ESY services were needed to assure that Student received FAPE in addition to any consideration of the specific factors.

Since the District failed to offer Student ESY services in reading and/or social skills development for the summer of 2010 and should have done so, Student will be awarded compensatory education for that period. Because the District never considered what type and amount of ESY services would have been appropriate for Student, and the program Parents selected provided Student with instruction in identified areas of need, that program will provide the measure for compensatory services. The District will be ordered to reimburse Parents for the costs associated with Student's attendance at the private school program during the summer of 2010, including transportation costs.

Tuition Reimbursement

With respect to tuition reimbursement, the IDEA provides as follows:

- (i) In General -- Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
- (ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. §1412(a)(10)(C)(ii).

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

In *Burlington and Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993) , the Court developed a three part test for determining whether parents are entitled to reimbursement from a school district for a unilaterally selected private school.

The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District

are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

Appropriateness of the School District's Proposed IEP

Although Parents easily established that the District's program for the 2009/2010 school year was insufficient to provide Student with meaningful progress, the IEP to be assessed for purposes of determining whether they are entitled to tuition reimbursement is the IEP offered for the current school year. (P-11) Parents, however, have also met their burden of proof with respect to the proposed IEP. In terms of being reasonably calculated to assure meaningful educational benefit, the proposed IEP is deficient, notwithstanding goals that appear to be specific and detailed. (P-11, pp.13—23) For example, with respect to the reading decoding goal, Wilson level 2.2 is used as an example of 2nd grade level reading materials. (P-11, p. 14) As the 4th grade special education teacher admitted, however, and as stated in the Present Level of Academic Achievement in reading described earlier in the IEP, Wilson levels are not equivalent to grade levels, but relate to the types of sounds and syllables that are presented at that level. (N.T. pp. 532, 533; P-11, p. 6, P-24, p. 14) In addition, there is no indication in the record when/whether Student was explicitly taught syllabication, root words, prefixes and suffixes as part of prior reading instruction, using Wilson or other instructional methods. It is, therefore, unclear whether the decoding goal is meant to indicate that Student was expected to be taught to apply Wilson Reading skills, generally, or up to and including level 2.2, when Student encounters new words, or whether the strategies listed in the goal had been taught and were to be applied as part of other aspects of Student's reading program. In any event, as the special education teacher admitted, there was no available data relating the specific strategies listed in

the goal to Student's present levels of reading performance described in the proposed IEP. (N.T. pp. 534, 535; P-11, p. 6) The details stated in the decoding goal, therefore, actually convey no more information than simply stating that Student will decode unfamiliar words at a 2nd grade reading level.

The goal for improving verbal interactions also conveys little or no meaning in terms of specifically identifying the skills Student is expected to develop/practice, where and with whom (peers or adults), who will collect the data and where/how data would be collected to measure progress toward the goal, and the behaviors the data collector would be recording. In response to a request for clarification, the speech therapist described "verbal" and "social" interactions as interchangeable terms, and described the components as acknowledging and initiating greetings, making eye contact, engaging in reciprocal conversation, and perhaps ultimately extending to showing empathy. (P-23, p. 19) The speech therapist described the data collection used to establish the baseline listed in the goal as notes taken on scraps of paper, later discarded, written during informal observations of Student when she was in Student's classroom providing services/assistance to other children. (P-23, p. 20) Both the goal as stated in the proposed IEP and the subsequent explanation, including the breadth of the social skills included in the term "verbal interactions" strongly suggest that it was meant to meet Parents' request for social skills and pragmatic language instruction, but without any real plan for systematic implementation.

In short, the proposed IEP appears to be the District's attempt to give the Parents what they wanted in terms of improving Student's academic and social skills, but displays no real understanding of or realistic plan for meeting Student's still significant needs. On paper, the IEP appears to cover the issues identified by Parents, but closer scrutiny via questions directed toward the staff expected to implement the IEP goals revealed they were unprepared to do little,

if anything, more for Student than convince Parents that the District was addressing Student's needs. In light of the minimal progress Student made in reading between 2nd and 4th grades, and the increasing difficulty and complexity of grade level academic work, Student clearly needed more than a paper plan with no real commitment to changing and increasing the instruction and supports which Student obviously needed. The testimony of the School District staff concerning the details of the District's proposed IEP inspired no confidence that the District would have truly implemented a program reasonably calculated to lead to meaningful progress. When asked about the term, "non-linguistic representations" in the reading goal, *e.g.*, the special education teacher answered in terms of "my understanding," indicating a lack of certainty about the meaning of the term. Although the IEP goals may be stated in terms of Pennsylvania curriculum standards in order to comply with the District's understanding of how the Pennsylvania Department of Education expects IEP goals to be written, as explained by a District Special Education Supervisor, it is difficult to understand how the District staff working with Student would fully implement the IEP goals if they don't truly understand them, and appear to have no clear plan for systematically developing and effectively monitoring the skills listed in the various IEP goals.

The evidence produced at the due process hearing concerning the 2010/2011 proposed IEP left the definite impression that notwithstanding the more expansive and detailed document, Student's actual program would have been, in practice, a continuation of the combination of special education and regular classroom instruction Student received from 2nd through 4th grades that was largely unsuccessful. The tone and demeanor of the District witnesses who testified, as well as their statements under questioning by the District's counsel, suggested that they believed the program provided in the past was adequate and led to progress, despite the documentary

evidence to the contrary. If the District staff believed that Student's program was appropriate and effective, there is little, if any, reason to believe that the teachers and speech therapist who testified accepted the need for substantive changes in their approach to Student's instruction and therapy. Parents, therefore, have met their burden of proof with respect to the first prong of the tuition reimbursement analysis.

Appropriateness of Parent –Selected Private School

The Court of Appeals provided guidance for assessing the appropriateness of a parent-selected private school placement in *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 242:

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

In this case, the educational plan developed by the private school was far more detailed and far better linked to Student's needs than the District's proposed IEP. See FF 62, 63, 64, 65; P-21. The private school program provides considerably more speech/language therapy than the District ever provided or proposed, and includes a greater emphasis on pragmatic language, which addresses a very significant need. The description of the private school program provided in P-21 and through the testimony of the school representative at the hearing established that it is reasonably calculated to meet Student's needs in all identified areas of need, and is particularly appropriate because of the integration of language instruction/practice and social skills training

throughout the day. Although it cannot be determined whether Student's progress, particularly in reading, will greatly exceed Student's progress in the District between 2nd and 4th grades, the evidence leaves the definite impression that Student has a better chance of improved success based upon a comparison of the public school and private programs. Parents, therefore, have also met the second of the three criteria for reimbursement.

Equities

Although the District argued strenuously that Parents were not fully cooperative in the final IEP process because they had already decided upon the private school in the late spring and summer of 2010, the record does not support that conclusion. The responsibility for providing an appropriate program ultimately rests with the District. Parents are not required to re-write the entire IEP to assure that the District will meet Student's needs. Parents in this case told the District early in the school year that they were dissatisfied with Student's progress and rightly relied upon the District to investigate and correct the problems without explicit guidance from Parents.

Personally and through their attorney, Parents worked with the District at the May IEP meeting and after to attempt to develop an appropriate program. *See* P-23, pp. 14—17 It is not surprising, however, that Parents ultimately lost confidence in the District's ability to provide a program for Student that is reasonably likely to lead to meaningful progress, since the evidence presented by the District at the due process hearing was unconvincing in that regard.

In addition, through the years that the District provided less in special education and related services than Student needed, and failed to take significant action to improve Student's program in the face of very minimal progress, Parents provided additional services at their own expense in an effort to improve Student's progress. The equities in this case most certainly do

not support denying or reducing tuition reimbursement based upon a lack of parental cooperation.

IEE Reimbursement

The evidence established that the private evaluation for which Parents seek reimbursement was not undertaken as a result of Parents' disagreement with the results of a District evaluation, as literally required by the federal regulations. (34 C.F.R. §300.502(b)) In addition, there was no real suggestion that Parents came to believe that the District should have conducted its own comprehensive evaluation at the point Parents obtained the private evaluation, thereby disagreeing, in essence, with the District's failure to initiate an evaluation. The evidence established that Parents sought the evaluation at the suggestion of Student's developmental pediatrician to gain a greater understanding of Student's needs, and that the evaluation was very helpful to Parents in that regard. (FF 58, N.T. pp. 393—397) Although the evaluation is very detailed and presents a comprehensive picture of the processes underlying Student's significant needs, it was completed after Student left the District and was not used as the basis for re-designing a District program for Student. Since the evaluation was not procured to improve Student's public school education, or to determine IDEA eligibility in the face of a District failure to identify a student, there is no justification for public funding of the September 2010 private evaluation. In that respect, therefore, Parent's claim will be denied.

ORDER

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

1. Provide [Student] with compensatory education for the entire school day for every day school was in session and Student was present during the 2009/2010 school year.

The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that will otherwise assist him/her in overcoming the effects of his/her disabilities, including additional services that may be available at additional cost through Student's private school.

Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents.

The hours of compensatory education/fund for compensatory education services/products/devices created by this provision may be used at any time from the present to Student's 21st birthday, and may include reimbursement for additional services, such as speech therapy, that Parents provided and continue to provide.

2. Reimburse [Student's] Parents for the costs associated with Student's attendance at the [Private] School program during the summer of 2010, including transportation costs.
3. Reimburse [Student's] Parents for the costs associated with [Student's] attendance at the [Private] School during the 2010/2011 school year, including transportation costs.

It is **FURTHER ORDERED** that Parents' request for reimbursement for the private evaluation obtained during the summer of 2010 is **DENIED**.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 4, 2011