

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. 01903-1011AS

Child's Name: A.K.

Date of Birth: [redacted]

Dates of Hearing: 2/8/11, 2/22/11, 3/9/11, 3/29/11

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

Boyertown Area
911 Montgomery Avenue
Boyertown, PA 19512

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney

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April 15, 2011

April 30, 2011

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Parents in this case seek compensatory education for an alleged denial of appropriate educational services, particularly reading instruction, for the second half of the 2008/2009 school year, the entire 2009/2010 school year and the summers of 2009 and 2010. Parents also seek private school tuition reimbursement and transportation costs for the second half of the 2010/2011 school year and an order that the District fund Students' private school tuition and ancillary services for the summer of 2011 and the 2011/2012 school year.

The four session hearing held between February 8 and March 29, 2011 centered on whether the District provided sufficient and appropriate reading instruction and related services to address Student's specific learning disabilities and to meet additional needs, if any, arising from an alleged speech/language impairment; whether the private school selected by Parents is an appropriate alternative placement, and whether there is any equitable basis for denying or reducing Parents' claim for tuition reimbursement.

For the reasons that follow, Parents' claims will be granted in part and denied in part. Parents will be awarded part of the compensatory education they requested. The District will be required to reimburse Parents' out of pocket costs for Student's private school enrollment during the current school year. Parents' claim for private school costs for the summer of 2011 and for the 2011/2012 school year will be denied. The District will be given the opportunity to determine Student's eligibility for ESY services for the upcoming summer and develop an appropriate program if warranted, as well as develop an appropriate program and placement for the 2011/2012 school year.

ISSUES

1. Did the School District appropriately identify all of Student's disabilities and resulting needs and provide sufficient, appropriate special education and related services to address all of Student's needs:
 - a. From December 17, 2008 through the end of the 2008/2009 school year;
 - b. During the entire 2009/2010 school year;
 - c. From the beginning of the 2010/2011 school year until Parents dis-enrolled Student from the District on January 3, 2011?
2. Did the School District offer Student appropriate Extended School Year (ESY) services during the summers of 2009 and 2010?
3. Should the District be required to provide Student with compensatory education for any period identified in ¶¶ 1 and 2 above, and if so, in what form and amount?
4. Should the District be required to
 - a. Reimburse Parents for tuition and related expenses, including transportation costs, associated with Student's private school enrollment from January 3, 2011 through the end of the 2010/2011 school year;
 - b. Pay Students' tuition and related expenses, including transportation costs, associated with Student's private school enrollment for the 2011/2012 school year and the summer of 2011?

FINDINGS OF FACT¹

1. Student is an elementary school aged child, born [redacted]. Student is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 13, 14, 16)
2. Student has a current diagnosis of specific learning disabilities in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 15; P-13, P-8, p. 6, P-13, P-13, p. 11)
3. Student began exhibiting difficulties with reading, math and writing skills early in 1st grade. During the fall of Student's first grade year, the District offered remedial services for writing, Title I services in reading and math and additional reading support. The District also conducted a speech/language screening, which identified no deficits in receptive or expressive language or articulation. (N.T. pp. 34—36, 228—230; P-1, P-2, S-4, p. 1)

¹ The findings of fact include a 2 page Appendix that sets forth Student's reading levels as reported in evaluation reports and IEPs, with specific references to the documents where the information is found.

4. After refusing the District's request to evaluate Student in December of the 1st grade school year, Parents consented to a multi-disciplinary evaluation in response to the District's second permission to evaluate request (PTE) issued the following March. (N.T. pp. 37, 38; S-2, P-5)
5. The District's school psychologist administered standardized assessments for cognitive functioning and achievement.² She did not report Student's full scale IQ (FSIQ) due to considerable variability in index scores, ranging from the below average range in working memory to the superior range in processing speed. Verbal comprehension and perceptual reasoning scores both fell within the average range. (S-4, pp. 3—6)
6. Student's standardized achievement test scores revealed great difficulty with reading fluency and comprehension. Student's 1st grade teacher observed no growth in Student's reading skills during the year. Although spelling and writing scores fell within the average range on the standardized tests, Student's teacher reported significant difficulties in those areas, including difficulty reading Student's writing and Student's use of invented spellings without letter-sound correspondence. In the standardized math achievement subtests, Student demonstrated average skills in calculation and automaticity of math facts, and above average math reasoning skills. The 1st grade teacher observed that Student could do math calculations and was successful at "Rocket Math" (S-4, pp. 2, 4, 5)
7. In language skills, Student scored in the below average range on the Understanding Directions subtest but in the average or above average range on the other measures of listening comprehension and oral expression. (S-4, pp. 5, 6)
8. Based upon the standardized test results, curriculum-based assessments and parent/teacher observations, the District concluded that Student was IDEA eligible due to specific learning disabilities in reading fluency, reading comprehension and writing. (S-4, p. 6)
9. At the time the evaluation report was issued on June 5 of Student's 1st grade year, Student's reading fluency was at 41 words correct per minute (wcpm), well below the expected level of 60 wcpm. Parents, Student's teacher and the District reading specialist noted that Student lacked confidence and motivation, appeared unhappy and frustrated with school. (P-8, p. 2, P-9, p. 4)
10. Student's IEP team met in June of Student's 1st grade year to develop an IEP for 2nd grade. The IEP included an annual goal for reading fluency, to read 60 wcpm at the 2nd grade Strategic Intervention level; 2 reading decoding goals, and a writing goal, to produce 3 complete sentences with correct capitalization and punctuation at a level of 80% accuracy in 4 out of 5 trials. (P-9, pp. 8, 9)

² Cognitive ability: WISC-IV (Wechsler Intelligence Scale for Children-Fourth Edition); Achievement: selected sub-tests of the WJ-III (Woodcock-Johnson Tests of Achievement-Third Edition) (S-4, pp. 3—5)

11. The Specially Designed Instruction (SDI) consisted of the following interventions: repetition; adapted/modified tests quizzes and assignments; directions for tests/quizzes/assignments read aloud; extended time for tests/quizzes/assignments; visual reminder for reading strategies, individualized instruction and pacing; opportunities for computer-assisted instruction; review and rehearsal of vowel sounds, consonant sounds, vowel/consonant patterns, blends and digraphs. (P-9, p. 10)
12. The IEP further provided for 3.5 hours/week of itinerant learning support services delivered in a special education classroom. The remaining academic instruction was to be delivered in the regular education classroom using the SDI adaptations and modifications. (P-9, pp. 12—14)
13. Parents signed the accompanying NOREP, approving the proposed IEP. (N.T. pp. ; P-10, p. 2)
14. In February 2009, the District and Parents agreed without a meeting to revise Student's IEP by increasing Student's time in pull-out learning support by 30 min./week in order to supplement Student's reading instruction. After the learning support teacher received training in the Wilson program, the District believed that Student would benefit from Wilson's phonics-based, sequential program. (N.T. p. 545; S-6, p. 1)
15. Parents also requested a reevaluation (RE) in February due to Student's continuing struggles and Parents' perception of minimal academic progress, particularly in reading during 2nd grade. Standardized assessments were conducted in two 45—60 minutes, and a reevaluation report (RR) issued on April 23, 2009. (N.T. pp. 44, 45, 280, 281; P-12, P-13)
16. As part of the reevaluation, the District's school psychologist repeated the reading, math, spelling and writing sample subtests of the WJ-III standardized achievement tests, which placed Student at relatively the same standard score and percentile levels as the initial evaluation. (P-13, p. 2, S-4, p. 5)
17. The school psychologist administered a different language assessment, the CTOPP (Comprehensive Test of Phonological Processing), which revealed below average skills in phonological awareness, a skill critical for reading decoding, reading fluency and spelling. Student's phonological memory skills were in the low average range, which also adversely affect decoding, as well as reading comprehension and listening comprehension. Rapid Naming skills, associated with reading fluency, were poor. (P-13, p. 3)
18. Using selected subtests of an assessment of verbal and visual memory, attention and concentrations skills, the WRAML-2 (Wide Range Assessment of Memory and Learning, 2nd Edition), the school psychologist determined that Student's skills in all of those areas fell within the average range. Student's performance on the Verbal Memory Index

indicated that Student benefits from repetition, trial learning and external cues to recall verbal information. (P-13, pp. 4, 7)

19. In both March and May of 2009 (2nd grade) the District assessed Student's reading fluency and decoding on Fountas and Pinnell leveling assessments. Those assessments placed Student at a mid-first grade level for decoding and fluency (Appendix, p. 1; S-18, p. 1)
20. Expected progress as measured by the Fountas and Pinnell leveling assessments is advancement of four to five levels in one school year. During 2nd grade, Student advanced 3 levels, but with limited comprehension at the third level reached. (N.T. p. 555; P-15, p. 4, S-18, pp. 3, 4)
21. On Strategic Intervention passages from the District's 2nd grade reading curriculum, Student's accuracy improved from 80% to 90% between September 2008 and March 2009. (P-13, p. 4, P-15, p. 4)
22. Student's DIBELS³ scores in reading fluency began at 22 wcpm in September 2008, fell to 17 wcpm in January 2009 and rose to 32 wcpm in May 2009 (P-15, p. 4)
23. Although Student's teacher noted satisfactory performance in math, the District's benchmark assessments placed Student at the Below Basic level overall for the 2nd and 3rd quarters of 2nd grade. Student's overall performance had been at the Proficient level in the 1st quarter. (P-13, p. 5)
24. On April 2, 2009 the parties agreed to revise Student's IEP by adding three new SDIs: Reading instruction with a sequential, Orton-Gillingham based phonetic awareness program for 30 minutes 6 times/week; Homework to support the phonetically based program in use; a work sample, word list charting, sent home weekly. (S-9)
25. On May 15 and May 21, 2009 Student's IEP team met to develop Student's 3rd grade IEP. The IEP included a fluency goal at a first grade reading level (increase to 53 wcpm from a baseline of 36 on a 1st grade Aimsweb probe); a decoding goal of reading a 2nd grade passage with 95% accuracy (from a baseline of 85 % on a 2nd grade Aimsweb probe); a comprehension maintenance goal of answering questions on a grade level passage with 80% accuracy in 3 out of 4 trials (from a baseline of 73% at a mid-late 1st grade level). (P-15, pp. 9, 10)
26. The proposed IEP also included two written expression goals to be delivered during the summer, but Parents declined the District's ESY offer, preferring to provide Student with private tutoring in reading during the summer of 2009. (N.T. pp. 54, 55, 573, 574; P-15, p.10)
27. Several of the SDIs in the 3rd grade IEP focused on increasing reading skills. Small group reading instruction was specified, as well as a research based, sequential and

³ Dynamic Indicators of Basic Emerging Literacy

phonics based program, contemplating that Student would continue with Wilson reading instruction. The homework provision of the April IEP revision was retained, but not the work sample. A number of the SDIs from the June 2008 IEP were incorporated into the new IEP, some with modifications: Repetition; adapted/modified tests quizzes and assignments, directions and/or items on tests/quizzes/assignments read aloud; extended time for tests/quizzes/assignments; visual reminders and prompting for decoding and comprehension strategies. Several more SDIs were added: Written feedback provided to Parents regarding progress in decoding skills; assessments administered in a small setting; access to a high frequency word list; spelling lists to include a combination of curriculum spelling words and high frequency words. (N.T. p. S-15, pp. 12, 13)

28. Student was placed in a co-taught 3rd grade classroom, with all special education instructional services to be delivered in the regular education setting, with the exception of no more than 2 hours/week for re-teaching or assessment outside of the regular classroom. Penn Data calculations provided for 6.1 out of 6.5 hour/day (94%) in the regular classroom. (N.T. pp. ; S-15, pp. 16, 18)
29. At the beginning of 3rd grade, Student received 30 min./day of Wilson Reading instruction group with one other student. The Wilson instruction was delivered by a special education teacher who had participated in a three day Wilson overview training and was in the midst of a practicum working toward attaining Wilson Level 1 certification. (N.T. pp. 416—420, 422; P-15, p. 12)
30. In addition to the Wilson instruction, the teacher provided approximately 30 min./day of 1:1 guided reading instruction. Student began 3rd grade at a Wilson level 2.1, and had not moved past that level by late October. Due to Student's lack of progress and inability to generalize skills, the teacher discontinued Wilson instruction and began Leveled Literacy Instruction (LLI) in a group with two other students. LLI is phonetically based but also has a comprehension component. (N.T. p. 421, 426—437)
31. The IEP team met in October 2009 to update Student's achievement levels, raise expected levels of achievement for the reading decoding goal, remove the comprehension maintenance goal and revise the writing goal. Student had begun the school year the end of 1st/beginning of 2nd grade level on the Fountas and Pinnell leveling assessment. (Appendix, p. 1, P-21, pp. 3—6, S-18, p. 1)
32. Further revisions to the IEP were made in February 2010 to the writing goals, removing one and adding another. For the first time, two math goals were included in Student's IEP and information concerning Student's reading level was also updated. (P-24, pp. 5, 10, 12, 13; Appendix)
33. In April 2010, Parents had Student evaluated at a university reading clinic. The reading assessments administered by that evaluator, including several Qualitative Reading Inventory (QRI) measures, placed Student's instructional reading level at the pre-primer level, with no independent reading level. Student demonstrated particular difficulty with silent reading. Student demonstrated knowledge of decoding strategies, but did not apply

- them while reading. When read to, Student could easily comprehend grade level materials. (P-25, pp. 14, 15, 17)
34. At the end of March 2010, the District proposed ESY services for reading to work on Student's fluency and decoding reading goals. Parents rejected the ESY NOREP as lacking supportive data, inappropriate and non-responsive to Student's needs. (N.T. pp. ; P-26, P-27, p. 3)
 35. In May 2010, Student's IEP team met to develop an IEP for 4th grade. The IEP included a reading fluency goal for reaching 70 wcpm for 3 consecutive probes on a 2nd grade Aimsweb reading passage; a reading decoding goal of 95% accuracy for 3 consecutive probes on a 3rd grade Aimsweb reading passage; a goal for writing mechanics and conventions—capitalization, punctuation and spelling; a written expression goal for writing a 5 part paragraph; a math goal for solving single step problems in addition, subtraction, multiplication and division with 85% accuracy across 3 consecutive probes. (S-24, pp. 9-11)
 36. The SDIs were the same as in the 3rd grade IEPs with two additions/adjustments: the option for an adult scribe in the graphic organizer for the first draft of writing assignments; visual reminders, prompting and positive reinforcement for self-correcting while decoding. (S-24, pp. 12, 13)
 37. Due to a rise in anxiety and avoidance behaviors observed by Student's special education teacher, including absences from school and frequent trips to the nurse during the second half of the 2009/2010 school year, the District sought and received Parents' permission for a psychiatric evaluation, and added 30 minutes/week of school-based counseling to Student's IEP as of May 11, 2010. (S-26, S-28, p.10)
 38. After the District received the psychiatric report, the District incorporated the results into a reevaluation report issued on September 1, 2010. The psychiatrist diagnosed an anxiety disorder, NOS, as well as a depressive disorder, NOS partially in remission, and made recommendations for supports in the school setting. (P-36, pp. 3, 4, P-43)
 39. Student's IEP team was re-convened on September 13, 2010 to revise the SDI section to add supports recommended by the psychiatrist, such as scheduled breaks at a designated area; alternate recess setting; pass to check-in with staff regarding school concerns; teachers to call on Student to answer questions only when Student's hand was raised. Parents also requested adding pre-teaching of reading and writing skills that would be taught during the school day. That was provided during a period of 10 min/day not to exceed 2 hours/week as part of the 10 period previously provided for re-teaching. (P-45, pp. 10—13)
 40. In June 2010, at Parents' request, the District had agreed to fund an independent educational evaluation. Standardized tests and other assessments were administered at the end of August and the report was completed and transmitted to the District after the evaluator's school observation in mid-September. (P-37, S-27)

41. The independent evaluator characterized Student's learning disabilities in reading and writing as "double deficit dyslexia" and identified an additional learning disability in math, as well as a speech/language impairment due to deficits in phonological awareness, phonological memory and rapid naming speed. (P-37, p. 27)
42. The evaluator made a number of recommendations for changes or additions to Student's special education program, notably for 120 minutes/day of intensive instruction in reading/language arts. The evaluator recommended the Wilson Reading System, an additional program such as RAVE-O for improving reading fluency, and developing strategies for improving Student's reading comprehension, a systematic, research-based writing program and consideration of keyboarding instruction and other assistive technology to address Student's difficulties with both the mechanics of writing and written expression. The evaluator advised against using Read Naturally for Student. (N.T. pp. 670, 672, 690, 698, 699; P-37, pp. 28—33)
43. To improve phonological processing, the evaluator recommended a program such as Fast ForWord or Earobics delivered by a qualified speech/language therapist, as well as a program for improving Student's difficulty with word retrieval. The evaluator also recommended instruction in Saxon Math. (P-37, pp. 27, 28, 33)
44. Student's IEP team met again in early October 2010 to review the independent evaluator's recommendations and revise the IEP. The reading fluency goal from the May 2010 IEP was altered to 60 wcpm over 3 consecutive probes, on a 3rd grade instead of a 2nd grade Aimsweb reading passage, from a baseline of 36 wcpm; the reading decoding goal was unchanged at 95% accuracy for 3 consecutive probes on a 3rd grade Aimsweb reading passage, but a baseline of 91% was added; the goals for writing mechanics and conventions, written expression, and solving single step math problems were also unchanged, except for the addition of baselines. (S-29, pp. 9—11, S-39, pp 13—15)
45. A math goal was added for fluency in math facts (to 12) on single digit subtraction problems, providing for an increase to 40 digits correct in 2 minutes on 4 consecutive trials, from a baseline of 25. (S-39, p. 15)
46. Goals for silent reading comprehension and listening comprehension were added. The reading comprehension goal provided for answering questions about a 3rd grade reading passage, either verbally or in writing, with an average accuracy of 80% over 3 consecutive trials from a baseline to be determined. The listening comprehension goal provided for responding orally to questions about an orally presented 3rd grade level reading passage with 80% accuracy over 3 consecutive bi-weekly probes. (S-39, pp. 15, 16)
47. Some additional details were added to the SDI section : opportunities for periodic comprehension checks during small group reading instruction; math problems read aloud; staff to check homework folder and agenda; prompts and cues when Student is answering questions; adult to review/assist Student with editing rough drafts of written

- work; clear, concise directions; preview of material to be taught in math and language arts; chunking of assignments and test items; 45 minutes of direct, intensive reading instruction 3 times/week in an extended school day, along with transportation; use of self-regulation strategies; specifying that extended time for tests, quizzes, assignments could be double the normally allotted time; alternate location for art class. Many of the additions were based upon accommodations and assistance suggestions in the independent evaluation report (P-37, pp. 33—35, S-30, pp. 17—20)
48. The District completed an occupational therapy (OT) evaluation of Student in mid-November 2010, based upon standardized assessments, clinical observation and visual-motor tasks. The results indicated no deficits in visual-motor, visual-perceptual or fine motor skills, from which the evaluator concluded that Student's ability to function effectively in the school setting in those areas was not negatively impacted by any of those issues. (P-52, pp. 6—9)
 49. The District also completed a speech/language evaluation. Based upon standardized assessments and an observation the evaluator concluded that Student had below average word finding skills but average expressive language and semantic skills. (P-52, pp. 9—11)
 50. Student's IEP team met on November 24, 2010 to consider the evaluation results. The only changes made were the addition of providing a copy of the teacher's notes when students were required to copy lecture notes and use of word retrieval strategies as part of the SDI section. Consultative speech language services of 40 minutes/month were also added as a related service. (S-43, pp. 23, 26)
 51. Beginning with the October 2010 IEP revision, Student's level of special education services was changed from itinerant to supplemental learning support, and Student began receiving approximately 1.5 hours/day of instruction in skills outside of the general education curriculum for reading interventions. (S-39, pp. 22—24, S-43, pp. 28—30)
 52. By letter dated October 28, 2010, Parents requested, through their attorney, that the District fund Student's enrollment in a private school recommended by their independent evaluator. Parents unilaterally enrolled Student in the private school in January 2011 and filed a due process complaint. (N.T. pp. 92, 99, 102, 133; P-56, P-66, P-69)
 53. Students at the private school receive 2 periods/day of reading instruction, including both Wilson reading and a fluency or comprehension program. Student is in a class of 14 students with 2 teachers, but instruction can be delivered in smaller groupings. Student is in a math group of 2. The private school also provides a structured, multi-sensory program for writing (N.T. pp. 119, 121, 122, 133, 134, 139, 147, 157)
 54. Student receives one 45 minute period of Wilson instruction each day on a 1:1 basis from a teacher in the midst of her training practicum for level 1 Wilson certification. Student also receives 45 minutes/day of instruction in the Read Naturally program to develop

fluency or in a comprehension program, and a daily 45 minute writing block. (N.T. pp. 121, 129, 133—137, 147—151, 156—158, 163—165)

55. Student receives speech/language and occupational therapy at the private school. The speech/language services offered by the school can include developing skills in word retrieval, phonological awareness, reading comprehension, spelling and written language, as well as aspects of receptive/expressive language and pragmatic language/social skills. Student's language program is directed toward phonological processing and word finding (N.T. pp. 125—127, 159, 160; P-69, pp. 15—18)
56. To enable Student to participate in 4th grade level classes, written materials above Student's 2nd grade reading level are read aloud. (N.T. pp. 161, 162)
57. The private school has a half day (3.5 hours) summer enrichment program that is held for approximately one month during July, with a theme directed toward building background knowledge. The daily program is divided into four blocks that includes a period for the themed club program, a period of Wilson Reading, a period of math and a period of writing. (N.T. pp. 124, 125; P-69, p. 13)

DISCUSSION AND CONCLUSIONS OF LAW

IDEA Legal Standards

The statutory obligation of school districts to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act ("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). 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).

An IEP is "reasonably calculated" to enable an eligible student to receive "meaningful benefit" if the program/placement affords him or her the opportunity for "significant learning."

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 at 249 (3rd Cir. 2009); *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 student 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 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, a school district 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).

Due Process Hearings/Burden of Proof

In addition substantive educational benefits for an eligible student, the IDEA statute and regulations provide procedural safeguards 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 persuasion. Consequently, in this case, because Parents have challenged the appropriateness of the District's program/placement, Parents must establish that the District IEPs in question were not reasonably calculated to assure that Student received a meaningful educational benefit, and of course, that Student did not receive an appropriate program.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in " equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

Compensatory Education

An eligible student who has not received more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable "remedy is 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 not defined within the IDEA and is a judicially created remedy. It is intended as "a remedy to compensate [the student] for rights the district already denied ... because the School District violated [the] statutory rights while [the student] was still entitled to them." *Lester H. [v. Gilhool]*, 916 F.2d [865]...872 [3rd Cir. 1990]. The Court of Appeals for the District of Columbia has stated that compensatory education serves to "replace[] educational services the child should have received in the first place" and that such awards "should aim to place disabled children in

the same position they would have occupied but for the school district's violations of IDEA.” *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005).

Ferren C. v. School District of Philadelphia, 612 F.3d 712, 717-718 (3rd Cir. 2010)

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.

Tuition Reimbursement

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 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.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is

applied based upon *Burlington* and *Florence County School District v. Carter*, 510 U.S. 7, 114

S.Ct. 361, 126 L.Ed. 2d 284 (1993). 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. .

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)

Appropriateness of School District’s IEPs

The District first began providing special education services to Student in September 2008 at the beginning of second grade after an evaluation in the spring of Student’s 1st grade year. (FF 4—10) Parents, however, challenge the District’s program beginning in December 2008, two years prior to the date they filed their due process complaint. (P-56)

Parents’ primary issue is with Student’s language arts instruction, particularly reading.⁴

The District argued throughout the hearing that Student made appropriate progress in light of

⁴ Although there was some suggestion in the record that Parents believe Student should be identified with a learning disability in math, Parents did not pursue a claim for compensatory education for lack of appropriate instruction in math.

Regardless, Student made meaningful progress in math. Although the grade level Benchmark assessments at the end of the 1st and 2nd quarters of third 3rd grade placed Student at a Below Basic level, Student’s performance improved to proficient at the end of the 3rd and 4th quarters after math goals were added to Student’s IEP. (S-35, p. 3) Student also scored at the proficient level on the math portion of the PSSA test given at the end of the 3rd grade. (S-35, p. 3) The record, therefore, supports the conclusion that although there may have been periods of difficulty and below grade level achievement during the period in dispute in this case, the District implemented appropriate interventions to address Student’s needs such that by the end of 3rd grade, Student was making grade level progress

Student's significant learning disability in reading. The District defined that purported progress as a year's growth in reading for each year Student received special education services. The record, however, does not support that contention. It was extraordinarily difficult to determine how the District was actually measuring progress, since it used at least three different kinds of assessments for reporting Student's decoding and fluency levels and there is little in the District's documents that establish the Student's comprehension level. After charting the various measures used at various times, however, it is clear that at the beginning of 4th grade, Student had not moved beyond the mid to late 2nd grade instructional level for decoding and barely reached an early 2nd grade level for fluency. *See*, Appendix, pp 1, 2

Most important, after numerous IEP meetings and revisions and pages of progress monitoring data, the District records provide nothing from which Student's functional reading ability can be discerned. Evidence produced by the Parents, however, strongly suggests that after more than two years of special education services, Student has no true, functional reading ability. The university reading clinic assessment in March 2010 found Student to be instructional at a level below first grade, with no independent reading level. (FF 33) Since there is nothing in the District's documents or testimony at the hearing to challenge that conclusion and the record as a whole supports it, that assessment was given considerable weight.

Student's lack of significant learning in reading is also confirmed by the avoidance of school behaviors Student began demonstrating to a marked degree in the middle of the 2009/2010 school year that led to a District recommendation for a psychiatric evaluation and school-based counseling services. (FF 37—39)

commensurate with non-disabled peers. Consequently, there is no basis for finding a denial of FAPE with respect to math.

The District should have begun to realize that Student needed more intensive reading instruction, and possibly language services, after the District's reevaluation of Student in the spring of 2009, which revealed some phonological processing issues in the areas of phonological memory and rapid naming. (FF 17) That testing in addition to Student's very slow and limited progress in reading should have prompted the District to increase the level and intensity of reading instruction even if that meant additional time out of the regular education classroom. Learning to read is an absolutely essential skill that will increasingly hamper Student's educational progress in the regular education curriculum if not corrected, and for that reason must take precedence over contact with non-disabled peers in the instructional environment if that's what is necessary to improve Student's reading ability.

The independent evaluator's opinion that Student should have received at least 2 hours/day of intensive language arts instruction is reasonable, and the Student will need that amount of compensatory education to reach the level that Student might have attained if that level of intensive instruction had been timely provided. Since the District is entitled to a reasonable period to realize that its program is insufficient and correct it, the compensatory education award for the 2008/2009 school year will begin on April 2, 2009, the date the IEP was revised after completion of the District reevaluation. (FF24)

It must be noted that in October and November 2010, the District was proposing more intensive services, but was not proposing to add the programs suggested by the evaluator for addressing Student's phonological issues, or the full amount of time recommended for language arts instruction. Consequently, the District's program was still inadequate

Student will be awarded 2 hours of compensatory education for every day school was in session from April 2, 2009 until the end of the 2008/2009 school year. Student will also be

awarded two hours of compensatory education for every day school was in session from the beginning to the end of the 2009/2010 school year until school closed for the year, and two hours/day of compensatory education from the beginning of the 2010/2011 school year until school closed for the Christmas/winter break in December 2010, but in addition to excepting days school was not in session, any days that Student spent visiting the private school in which Student enrolled in January 2011 are also removed from the compensatory education award.

Tuition Reimbursement

Having concluded that the District failed to provide Student with appropriate instruction in reading, the first factor in tuition reimbursement is determined in favor of the Parents.

Although the District argued that the private school is not appropriate, and, indeed, it provides some questionable instruction in the form of the Read Naturally program that Parent's evaluator specifically explicitly did not recommend for Student, the school overall meets Student's needs and, therefore is appropriate under the standards articulated by the Court of Appeals in *Ferren C.*

Finally, there is no basis here for an equitable reduction in the tuition reimbursement award. Parents worked cooperatively with the District over the course of more than 2 years to seek appropriate reading instruction. Parents moved Student out of the school only after their child experienced increasing anxiety and possible depression, as diagnosed by the psychiatrist the District hired to conduct an evaluation of Student and after the District refused to add some of the significant instructional and language programs recommended by their independent evaluator.

ESY

For the summer of 2009, the District proposed 2 ESY goals for written expression but not for reading despite Student's limited progress in reading as indicated by the Fountas and Pinnell leveling assessments. (FF) The elementary school principal testified that the District would have addressed "other areas of literacy instruction within ESY to include reading as well." (N.T. p. 638) No details were provided, however, concerning a reading program in terms of the skills that would have been practiced or re-taught. There is also no indication anywhere in the record which, if any, of Student's reading goals would have been addressed in the summer program. Finally, the principal mentioned that there was no regression/recoupment data of the kind the District "typically" uses to determine ESY eligibility. (N.T. pp. 637, 638)

The District's vague assertion that reading would have been included in the ESY program offered to Student in 2009 is far too insubstantial to support a conclusion that the District could and would have effectively addressed Student's need to continue with reading instruction and/or practice during the summer of 2009. In addition, in failing to explicitly include reading in the ESY proposal for 2009, the District obviously did not sufficiently consider the full legal criteria for determining an appropriate offer of ESY services.

Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives FAPE. 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, 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 this case, there is ample evidence of Student's slow progress and significant difficulty acquiring the essential skill of reading, supports the need for an ESY reading program in accordance with §14.132 (a)(2)(iv).

Since the District failed to offer Student ESY services in reading for the summer of 2009 and should have done so, Student will be awarded compensatory education for ESY for the summer of 2009. The record establishes that Parents provided Student with successful 1:1 tutoring over the 2009 summer, in that Student was able to maintain and consolidate reading skills, and indeed, progress in reading, since the IEP revision in October 2009 placed Student at Level I on the Fountas & Pinnell assessment at the beginning of 3rd grade, an improvement from Level G in June 2009 at the end of 2nd grade. Appendix. Parents, therefore, will be awarded reimbursement for the amount paid to the summer tutor during the summer of 2009.

The District offered ESY reading instruction for the summer of 2010 that Parents declined, (FF 34) and the record does not establish that the program Parents selected provided Student with any discernible benefits similar to the reading instruction during the summer of 2009. Consequently, neither reimbursement nor compensatory education will be awarded for the summer of 2020.

Prospective Tuition Payment

Parents' request that the District fund another year at the private school, as well as the private school's summer program, are denied. The private school's summer program does not provide an intensive level of reading instruction and there is not basis for concluding that Student needs summer math instruction. (FF 57)

Moreover, Student is entitled to a free, appropriate public school education, not a private education at public expense, unless the District cannot provide an appropriate program. Here, although the District fell considerably short in the past, there is no reason to believe it cannot correct that situation in the future.

The District is entitled to the opportunity to develop an appropriate program and placement for the 2011/2012 school year, based upon Student's current educational needs when the parties meet for an IEP meeting and whether Student made reasonable progress in the private in the areas of reading decoding, reading fluency and reading comprehension.

Similarly, the District will be given the opportunity to determine Student's eligibility for ESY services for the upcoming summer and develop an appropriate program if warranted.

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 as outlined above.
2. Reimburse Parents for the out of pocket expenses incurred in Student's placement at their unilaterally selected private school from January 3, 2011 until the end of the current school year, including transportation costs for every day Student attended or will attend school

3. Reimburse Parents for the out of pocket expenses incurred in providing Student with reading instruction during the summer of 2009.

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

April 30, 2011

APPENDIX—READING CHART (BASED ON ACHIEVEMENT LEVELS REPORTED IN ERs OR IEPS)

<u>Date</u>	<u>Level</u>	<u>Fluency</u>	<u>Decoding</u>	<u>Comments/Notes</u>
<u>Fountas & Pinnell Probes</u>				(% Accuracy)
<u>1st Grade</u>				
<u>6/08</u> (P-8, p. 2)	D	41 wcpm	Not reported	Struggles w/ Phonemic awareness
<u>2nd Grade</u>				
<u>3/09</u> (S-8, p. 4)	E	51 wpm	96%	Satisfactory Comprehension
	F		96%	Limited Comprehension
<u>5/09</u> (S-14, p. 4)	F	46 wpm		Satisfactory Comprehension
	G	39 wpm	95%	Limited Comprehension; Instr. Level
<u>3rd Grade</u>				
<u>10/09</u> (P-21, p. 3)	I	Not reported	Not reported	As of beginning 3 rd Grade
<u>2/2/10</u> (P-24, p. 5-IEP Revision)	K	22 wpm	Not reported	Accuracy improved but below expected level
		(66-76 wcpm expected; S-18, p. 1)		
<u>3/19/10</u> (S-24, p. 4)	L (Fiction)	29 wpm	89%	Limited Comprehension
<u>5/5/10</u> (S-24, p. 4)	M (Non-Fiction)	30 wpm	89%	Satisfactory Comprehension
<u>6/4/10</u> (S-35, p. 3)	L			
<u>4th Grade</u>				
<u>10/1/10</u> (S-39, p. 5)	M (Non-Fiction)	28 wpm	86%	Satisfactory Comprehension
	L (Non-Fiction)	36 wpm	90%	Satisfactory Comprehension—Instr. Level
<u>DRA/Dibels</u>				
<u>2nd Grade</u>				
<u>5/09</u> (S-14, p. 4)		32 wcpm		
<u>3rd Grade</u>				
<u>1/31/10</u> (S-35, p. 3)		30 wpm		
<u>5/31/10</u> (S-35, p. 3)		21		
<u>4th Grade</u>				
<u>10/1/10</u> (S-39, p. 5)		20wcpm		Grade Level Passage (4 th Grade)

<u>Date</u>	<u>Level</u>	<u>Fluency</u>	<u>Decoding</u> (% Accuracy)	<u>Comments/Notes</u>
<u>Aimsweb</u>				
<u>3rd Grade</u>				
<u>10/09</u> (P-21, p. 4)		36 wcpm	85%	Fluency Goal Baseline Decoding Goal Baseline
<u>6/3/10</u> (S-39, p. 5)		41 wcpm	93%	2 nd Grade level 3 rd Grade level
<u>4th Grade</u>				
<u>09/10</u> (P-45, p. 8)		44 wcpm	94%	2 nd Grade level 3 rd Grade level
<u>09/15/10</u> (S-39, p. 5)		40 wcpm	91%	2 nd Grade level 3 rd Grade level
<u>10/1/10</u> (S-39, p. 5)		48 wcpm (Avg. 44)	89% (Avg. 91%)	2 nd Grade level 3 rd Grade level