

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

Student's Name: R.E.

Date of Birth: [redacted]

ODR No. 13104-12-13-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Vivian B. Narehood, Esquire
Gibbel, Kraybill & Hess
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Lancaster, PA 17602

Downingtown Area School District
540 Trestle Place
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Dates of Hearing:

November 28, 2012; December 13,
2012; December 19, 2012; January 9,
2013

Record Closed:

January 29, 2013

Date of Decision:

February 13, 2013

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The Student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District). (NT 8.) The District has identified Student with Specific Learning Disability in written expression and Speech or Language Impairment. (S-3.) Parents assert that the District has failed to offer or provide the Student with a free appropriate public education (FAPE) for the 2012-2013 school year, as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Parents unilaterally removed Student from the District and placed Student in a private school (School). Parents request reimbursement of private school tuition and transportation costs for the 2012-2013 school year.

The District asserts that it offered and provided a FAPE for the 2012-2013 school year, and that it should not be required to reimburse the Parents for private school tuition and transportation.

The hearing was completed in four sessions. The record closed upon receipt of written summations

ISSUES

1. Did the District fail to offer or provide a free appropriate public education (FAPE) to Student for the 2012-2013 school year?
2. Is the private school an appropriate placement for Student?
3. Considering the equities, should the hearing officer order the District to reimburse to Parents for the costs of private school tuition and transportation at the School for the 2012-2013 school year?

FINDINGS OF FACT

1. Student attended private preschool and kindergarten from age two through six. No special intervention services were received during Student's preschool years. (P – 10.)
2. When Student was in first grade, during the 2010-2011 school year, Parents noticed that Student did not want to read, although Student enjoyed reviewing sight words with Parents. Student displayed some difficulty with focus and anxiety, as well as frustration with reading and writing. (P – 10.)
3. By the middle of first grade, Student was behind classroom peers in reading. The teacher instructed Student with below grade level text and materials. Student demonstrated some progress in sight word recognition, but was unable to read sight words in stories or sentences. Student struggled with writing within the lines and with forming letters. Student demonstrated mathematics computation skills, but struggled with reading and with writing numbers on paper. Student displayed a significant reduction in motivation and an increase in anxiety. (P – 10.)
4. Student received regular education interventions in first grade, including preferential seating, repeating directions, 1 to 1 provision of directions, and modifications of text and oral presentation. (P – 10.)
5. In January 2011, Parents had Student evaluated privately. The evaluator, a nationally certified school psychologist, found that Student had superior cognitive ability. However, the evaluator found significant weaknesses in processing speed, orthographic coding and spelling, phonological coding, and rapid automatic naming. Student displayed inconsistent phonemic awareness at the phoneme level. Student displayed difficulty encoding written words. Student displayed a lack of automaticity in integrating verbal name codes and visual orthographic codes. Student often made all the correct sounds for words, but did not effectively put the sounds together to read words. The evaluator diagnosed Student with a reading disorder and disorder of written expression. (P – 10.)
6. The evaluator recommended special education services, including systematic, multisensory instruction, review and practice, addressing phonemic awareness skills, phoneme – grapheme relationships, sight words, syllabification rules, structural analysis and spelling rules. The evaluator recommended a small group setting. The evaluator also recommended tracing activities, fluency training and enriched language experiences, such as listening, talking about stories and telling stories. The evaluator recommended that Student's teacher provide basic reading material at the pre-primer grade level until Student should develop independent automatic word recognition skills at that level. Recommended specially designed instruction included choral reading, and over-learning of sight word recognition skills through flash cards, instant words, flow lists and analyzing word structure. (P – 10.)
7. The evaluator recommended integration of instruction in spelling and word identification to encourage Student to make connections between phonemes and graphemes. The

evaluator also recommended using the same list of words for reading and spelling, and using reading words in writing activities. (P – 10.)

8. In March 2011, Parents had Student evaluated privately again. The evaluator was a psychologist with a doctorate, licensure, and school psychology certification. The evaluator conducted additional assessments of Student, utilizing different test instruments, and compared the results with the findings of the first evaluator, after reviewing the report of evaluation in January 2011. (NT 59-60; P – 11.)
9. Consistent with the first evaluator's findings, the second evaluator found weaknesses in Student's ability to memorize the phonemic sounds necessary for reading and to retrieve those sounds from memory with fluency. The second evaluator also confirmed the first evaluator's finding of Student's weakness in visual memory for abstract measureable forms, and for sequences of visual forms, including orthographic forms, which directly impacts Student's ability to remember and to recognize or retrieve printed letter shapes, letter combinations and words. The evaluator's test results for rapid naming fluency were better than the first evaluator's findings. Student's rapid naming fluency for numbers and letters was at age expectation, but was weaker for more semantic material, such as object naming. (P – 11.)
10. The second evaluator found that Student's basic reading skills were equivalent to a level at the end of kindergarten or early first grade, consistent with an informal reading inventory scored by the District's instructional support teacher in March 2011. The evaluator found that Student's weakness in fundamental reading skills is due to significant weaknesses in visual memory for abstract visual material and in long-term verbal memory for abstract verbal material. The evaluator found that these weaknesses are also impacted by slow retrieval from memory, which makes blending of phonemic sounds more difficult, and also impacts reading rate and, consequently, reading comprehension. The second evaluator found that Student met criteria for a language based learning disability and a significant reading disorder. (NT 648-652; P – 11; S-6.)
11. The second evaluator recommended, consistent with the current state of knowledge in the field of childhood dyslexia, immediate intervention through a research based, intensive, systematic and multisensory reading program, to be used systematically throughout the calendar year. The second evaluator recommended that programming include processing of oral phonemic sounds, repetition and practice, drill and instruction in basic sight words, spelling instruction, and fluency instruction and support. The second evaluator recommended that the research based program be provided for no longer than 30 minutes per day, five days per week, through an appropriately trained instructor, in a group of no more than four students of similar intellectual ability and reading needs. The evaluator recommended that Student be given as much exposure to repetition and practice as Student should need in order to reach mastery. (NT 60-61; P – 11.)
12. The second evaluator recommended that the program be reviewed every two months, and that if Student should fail to make meaningful progress, a second 30 minute session be added per day, or that the program be delivered on a 1 to 1 basis to Student, or that both changes be made at the same time. (P – 11.)

13. The second evaluator recommended extended school year (ESY) services to prevent regression, which the evaluator found likely for a child with Student's profile. (P – 11.)
14. In May 2011, the District provided an evaluation report to Parents. The report incorporated the two previous private evaluations. The report identified Student with specific learning disability in basic reading skills, reading fluency and written expression, as well as speech or language impairment. It listed educational needs including articulation, word retrieval, decoding, word reading, oral reading fluency, orthographic coding, rapid automatic naming and phonemic awareness. It also noted needs in written expression, organizational skills and task management and monitoring. (P – 3.)
15. The May 2011 re-evaluation report recommended learning support services, including a scientific, evidence based, systematic, and direct instructional program in basic reading and written expression, addressing phonemic awareness, phoneme – grapheme relationships, sight words syllabification rules, structural analysis and spelling. The evaluation report recommended that this be provided in a structured small group setting capable of providing systematic multisensory instruction. The evaluation report recommended that the program incorporate previously learned skills with new learning to ensure automaticity, improve sight word vocabulary and recognition, utilize tracing activities, match readability of classroom materials to Student's instructional reading level, and utilize choral reading, graphic organizers, opportunities to dictate written work, and integrated spelling and reading activities. (P – 3.)
16. The May 2011 re-evaluation report recommended 30 minutes once weekly of speech and language therapy to improve articulation and word retrieval skills. (P – 3.)
17. On May 16, 2011, the District convened an individualized education program (IEP) team meeting in which Parents participated. (P – 5.)
18. The IEP team offered three measureable goals for speech and language therapy; six reading goals addressing word reading, reading comprehension, vocabulary, sight word reading, reading decoding and fluency; a spelling goal; a writing conventions goal; and a mathematics goal. (P – 5.)
19. The May 16, 2011 IEP offered specially designed instruction including “systematic, multi – sensory, direct instruction of phonemic awareness and decoding skills”, “graduated practice, reinforcement and mastery”, “structured small group setting capable of providing systematic multi – sensory instruction”, “incorporate previously learned skills with new learning skills to insure automaticity”, tracing activities, “activities and instruction to improve sight word vocabulary and recognition”, additional processing and wait time, preferential seating, chunking reading passages, matching readability of classroom materials to instructional reading level, reduced length of reading assignments, books on tape, choral reading, dictating written work, integrating spelling and reading activities, extended time, activities to increase rate of production and word banks. (P – 5.)

20. The May 16, 2011 IEP offered speech and language therapy in a small group setting for 30 minutes per week. (P-5.)
21. The IEP provided for reading test questions to Student in order to accommodate Student's participation in state and local assessments. (P-5.)
22. On May 16, 2011, the District provided a notice of recommended educational placement (NOREP) to Parents. The NOREP offered a placement of supplemental learning support and supplemental speech and language support. (P – 5.)
23. On or about May 27, 2011, Parents returned the NOREP, requesting a meeting to discuss it. (P – 2.)
24. On June 3, 2011, Parents approved the NOREP for a revised IEP that provided an immediate start date, amended language to describe the reading program offered (“Project Read”), added a new mathematics computation and fluency goal and added a new specially designed instruction that would provide weekly progress reports to Parents. (P-6.)
25. The Project Read program is evidence based, in that its creators produced evidence of program efficacy through more than one study; however, it has not been validated by independent researchers utilizing a control group. It is considered an appropriate program for some children if delivered with fidelity. (NT 539-543; S-11, P-11.)
26. The June 2011 revised IEP provided for orally reading directions to Student for local testing. (P-6.)
27. In the 2011-2012 school year, the Student failed to meet Student's IEP goals in speech and language therapy. Progress was measured in naming categories and category members, but not in articulation or naming antonyms and synonyms. (S-5.)
28. In the 2011-2012 school year, Student failed to meet fluency goals with timed cold reading probes; however, the scores met the goal on two consecutive instead of three consecutive weeks. (S-5.)
29. In the 2011-2012 school year, Student met the spelling goal within the first trimester. (NT 788-798; S-5.)
30. In the 2011-2012 school year, Student met the reading comprehension goal in the first two trimesters. (NT 652-654; S-3, 5.)
31. In the 2011-2012 school year, Student met the story vocabulary goal in the first trimester. (S-5.)
32. In the 2011-2012 school year, Student made minimal progress toward Student's writing goal. (S-5.)

33. In the 2011-2012 school year, Student did not meet the sight reading goal, but did make some progress in test scores. (NT 788-798; S-5.)
34. An informal inventory administered in April 2012 indicated that Student had improved in reading from instructional at an end kindergarten/beginning first grade level to instructional for oral reading at a level labeled as second grade. Student improved in silent reading to independent at the labeled second grade level. (NT 652-654; S-3.)
35. In the 2011-2012 school year, Student met the goal in mathematics end of chapter tests, but not in mathematics computation and problem solving probes. (S-5.)
36. On March 1, 2012, the District issued a Permission to Re-evaluate form pursuant to parental request. The form reflected a District evaluation team recommendation to conduct further testing due to Student's reported progress in second grade. (NT 452; S-3.)
37. Test scores from the Kaufman Assessment Battery for Children – Second Edition indicated average or above average cognitive functioning in all areas. (S-3.)
38. During testing, the District psychologist observed that Student needed a longer response time for tests requiring visual processing and cognitive fluency. Scores from the Woodcock-Johnson – III (NU) Test of Cognitive Abilities were low average for cognitive fluency, decision speed (measuring visual object recognition), retrieval fluency, pair cancellation and processing speed, although the scores for rapid picture naming were in the average range. (S-3.)
39. Scores from the Wide Range Assessment of Memory and Learning – Second Edition were average or above average for memory functioning except in the subtests measuring Student's visual memory, where some low scores indicated variability. Student scored well below average in picture memory, which is a timed test. Student also scored low average in verbal learning and well below average in verbal memory recall. (S-3.)
40. On behavior rating inventories addressing attention and executive function, Parents did not identify problems at more than a moderate level for attention and organization. Overall scores for these areas of concern were not clinically significant. (S-3.)
41. The District psychologist administered the Woodcock-Johnson – III (NU) Diagnostic Reading Battery, which is a cluster of subtests that measure dimensions of phonological awareness, phonics knowledge, reading achievement and other oral language abilities relevant to reading ability. Student was scored in the average or high average range in all subtests administered by the District psychologist, including letter-word identification, fluency, word attack, and comprehension. Student's scores showed significant strength in phonemic awareness. (S-3.)
42. Student's scores in written language were below average, and evidenced slow pace and letter reversals. Student's spelling was below grade level and evidenced significant errors in non-sight words. (S-3.)

43. The March 2012 re-evaluation concluded that the Student evidences relative weakness in processing visual information quickly, with visual spatial memory improving, but processing speed and automaticity remaining as a weakness. Student continued to need extra time to recall and retrieve information from memory in order to process information. (S-3.)
44. The March 2012 re-evaluation concluded that Student had made significant progress in reading and sustained growth in mathematics, but continued to need specially designed instruction in writing. The evaluation also recommended specially designed instruction, including the Project Read program, for “consolidation of reading skills.” It also recommended reduction of learning support time in favor of increased general education for “reading comprehension activities” in third grade. (S-3.)
45. The March 2012 re-evaluation concluded that Student’s performance in mathematics and writing tasks that require fluency were an area of weakness, and spelling achievement was impeded by letter reversals and transpositions, as well as difficulty applying learned rules. (S-3.)
46. In May 2012, the District offered an IEP, based upon an IEP team meeting with participation of the Parents. For the remainder of the 2011-2012 school year, the IEP offered to place Student in supplemental learning support with direct instruction in reading and writing in the learning support classroom as well as speech and language therapy 30 minutes per week. For the first half of the 2012-2013 school year (8/27/12 to 2/28/13), the IEP offered placement in itinerant learning support for one hour per day with speech and language therapy for 30 minutes per week. The IEP offered ESY services, three hours per day twice per week for six weeks for the summer of 2012. (S-4.)
47. The May 2012 IEP provided for orally reading test instructions to Student to accommodate participation in state and local testing. (S-4.)
48. The May 2012 IEP offered support and reinforcement of word analysis and word attack skills, syllabification rules, structural analysis and spelling rules for up to 30 minutes per day. (S-4.)
49. Student attended ESY classes in reading and writing in the summer of 2012. Student did not attain 100 words correct per minute in timed word reading tests in that class. (NT 150; P-14.)
50. In July 2012, Parents obtained a third private evaluation, a neuropsychological evaluation by a school psychologist with a doctorate in school psychology, Pennsylvania licensure and school psychology certification. The evaluator had extensive experience in clinical as well as school psychology and specializes in programming for students with reading disabilities. (NT 46-55; P – 20.)
51. The third evaluator provided diagnoses of developmental dyslexia and cognitive disorder, not otherwise specified (NOS). The evaluator found significant reading impairments, with skills more aligned with those of a first to second grade reader during functional

reading tasks. Student's reading on clinical observation was significantly dysfluent, slow, and laden with errors including inaccuracies, omissions, substitutions and repetitions. The evaluator found that Student had not mastered reading past the phonetic level of reading. (NT 56, 71-73, 100-101, 120-122; P – 13.)

52. Standardized scores were at the beginning of second grade level for word reading, reading fluency and word attack skills. The most salient deficit was slow processing speed. Student struggled significantly with working memory skills. Some attentional difficulties also contributed to Student's reading and writing difficulties. (P – 13.)
53. Two additional reading tests were administered, the GORT – 4 and the TOWRE – 2, tests that are more useful in determining reading fluency and efficiency than the Woodcock Johnson subtests utilized by the District. These showed more marked deficits in fluency and accuracy, sight word efficiency and phonemic decoding. Nevertheless, Student exhibited reading comprehension ability at the third grade level, albeit at the 37th percentile. Student also exhibited difficulty with naming and memory tasks. (NT 69-70, 82-84; P – 13.)
54. Reading fluency is necessary to access the curriculum at higher grades. (NT 834-835; P-10 p. 19.)
55. The Student's graphomotor skills were weak and represented Student's lowest scores among visual motor tasks. Student's writing fluency was compromised, and Student demonstrated weak spelling achievement. Spelling errors reflected poor understanding of the code – based English language system. (NT 85-86; P – 13.)
56. In order to draw a contrast with the scores obtained in the most recent District re-evaluation, the third evaluator performed the same or similar tests of cognitive ability, achievement, and memory and verbal learning. The evaluator found reason to question the scores obtained in the District evaluation, because the Student scored lower upon this re – test in almost every area related to reading and writing. Double digit reduced scores were obtained in the rapid picture naming subtests of the Woodcock – Johnson Tests of Cognitive Ability, the Broad Reading scores of the Woodcock – Johnson Tests of Achievement, and the reading fluency, writing fluency, and passage comprehension subtests of the Woodcock – Johnson Tests of Achievement. Score differentials for Broad Reading, rapid picture naming and fluency were statistically significant (not explained by chance or factors inherent in the test itself). (NT 73-82, 91-92; S-3; P-13.)
57. The third evaluator contrasted scores from two different versions of the Woodcock – Johnson Tests. The District scores from the Woodcock – Johnson III Tests of both Cognitive Ability and Achievement were derived from the “Normative Update” edition. The evaluator's scores were derived from the third edition, an earlier edition of these tests. Nevertheless, according to the publisher, both editions can still be used, reflecting that the Normative Update did not produce such disparate scoring as to invalidate the third edition. Thus, the contrast between the scores from the two editions can raise a valid question as to the validity of the District's scores. (NT 73-82, 158-159; S-3; P-13.)

58. The third evaluator violated protocol by re-testing Student within six months of the District's testing with the same instruments. The evaluator noted this in the evaluator's report, and concluded that testing the same cognitive and achievement domains with a different test would have introduced some psychometric "noise" or misleading variability, whereas, it could be predicted that re-testing with the same instruments would have overstated Student's cognitive abilities and achievement. Therefore, the Student's lower scores when re-tested this way were useful in pointing to a question about the validity of the District's scores, although the evaluator's scores themselves were not a valid estimate of Student's functioning and achievement, because they should be viewed as an over-estimate. (NT 73-82, 152-158; S-3; P-13.)
59. The third evaluator recommended another evaluation by another independent evaluator to resolve the questions raised by Student's disparate scores on the re-test with the same instruments. (NT 89-90; P-13.)
60. The third evaluator recommended the Student receive a different research based reading program, concluding that the Project Read program, as combined with the Harcourt Trophies program, was inappropriate for Student, because Student was not making progress to close the gap with grade level peers. The evaluator emphasized that it is important that Student be instructed with peers at the same reading level, and that the program be for more than 30 minutes per day. (NT 97-98, 102-104; P-13.)
61. The third evaluator recommended that Student receive 2 ½ hours per day of specialized, research based, direct, systematic, sequential, multi-sensory reading instruction for dyslexic students. The evaluator recommended: 1) that such instruction be cumulative and require mastery to the extent of automaticity; 2) that the instruction include 45 minutes per day of guided oral reading, instruction in spelling and direct instruction in writing; 3) that texts in all classes be altered to match Student's reading level, rather than relying on an educational aide reading to Student as an accommodation; and 4) that progress monitoring be weekly to allow for alterations in methodology as needed. (NT 70; P-13.)
62. The third private evaluator recommended breaking writing instruction into two separate skills, copying and written expression, with the latter being dictated or recorded. This was based upon the conclusion that Student's thinking about writing was being impeded by Student's graphomotor and phonetics difficulties, creating a kind of "bottleneck" in the process of written expression. (NT 85-87; P-13.)
63. In word reading fluency and sentence writing goals, the third private evaluator found that the current IEP set expectations too high, based in part on baselines that were higher than current functioning, and that the goals should be reduced to be more attainable in one year. (NT 92-94; P-13.)
64. The third private evaluator recommended ESY services. (P-13.)

65. The current literature in the field of childhood dyslexia supports utilization of a single, research based (“off the shelf”) program, rather than an “eclectic” mixing of disparate programs or parts of disparate programs. (NT 61-70, 66 to 69, 87-88; P-11.)
66. On August 21, 2012, Parents, through counsel, notified the District of intent to unilaterally place Student in the School. (S-7.)
67. On September 12, 2012, at an IEP meeting attended by one of the Parents, the District offered a revised IEP to Parents. The revision continued to offer placement in itinerant learning support for the 2012-2013 school year, including one hour per day in the learning support classroom for reading and writing, and one hour per week of speech and language therapy. Students of different reading levels would be present in the same room at the same time for reading instruction. The Harcourt Trophies reading program would be provided in the regular education setting. (NT 889-891, 894-895, 900-906, 1013-1014; S-8.)
68. The revised September 2012 IEP provided for reading directions aloud in order to accommodate Student’s participation in state and local testing. (S-8.)
69. The revised September 2012 IEP provided two new items of specially designed instruction: additional assessment of reading and phonics skills and progress monitoring, and one occupational therapy evaluation. (S-8.)
70. The revised September 2012 IEP offered support and reinforcement of word analysis and word attack skills, syllabification rules, structural analysis and spelling rules for up to 30 minutes per day. (S-8.)
71. Parents enrolled Student in the [Private] School for third grade at the start of the 2012-2013 school year. [The School] is a private school that provides K to 12 education to children with learning disabilities including language based learning disabilities, dyslexia, and dysgraphia and slow processing. (NT 813-815; P-18.)
72. The School provides small classes and some individualized instruction. It employs research based practices to address educational needs arising from learning disabilities. (P-18.)
73. Based upon a review of at least three of the Student’s evaluation reports, the School recognized Student’s needs regarding spelling, orthographic coding, memory for abstract visual material, fluency of retrieval from long term memory, graphomotor skills, memory for abstract non-verbal information and working memory. (P-18.)
74. The School and the Parents had Student evaluated by the local intermediate unit for speech and language therapy, and decided that it was not a necessary service. (NT 839-840.)
75. The School prescribed an educational plan including intensive, systematic, multisensory and direct instruction to remediate reading, use of multisensory strategies, daily practice with oral reading, using Read Naturally, decoding and encoding skills, reading

comprehension and systematic writing instruction. The plan included Wilson reading instruction and guided reading. (NT 821-823; P-18.)

76. Class sizes are about twelve to fourteen (fourteen maximum) students per class with two teachers. (NT 815.)
77. The School provides Student with the Wilson reading program, a research based, systematic, sequential and multisensory program of instruction that teaches phonetics and reading comprehension, fluency and automaticity. Student began the 2012-2013 school year at the entry level of the Wilson program, based upon the program's placement test. (NT 821; P-18.)
78. Wilson programming is for forty five minutes per day, two days per week, in small group. On two days per week, Student receives Wilson instruction in a small group setting. On three days each week, the Wilson instruction is about one hour long on a one to one basis with a supervised Wilson Level One certified teacher, who is in training for Level II certification. Every day, the Wilson training is followed by a language arts program that includes reading comprehension, utilizing the School's own curriculum; reading fluency through the Read Live program, an on-line program based upon the Reading Naturally program, that emphasizes reading automaticity and fluency; and explicit instruction in writing. Homework assignments also emphasize reading fluency. (NT 816, 821-835, 845-846.)
79. The Wilson program is paired with a program of reading comprehension that supports the skill development taught in the Wilson program, emphasizing reading automaticity and fluency. Student is being taught to improve fluency by repetition and guided reading. (NT 832, 834-835; P-18.)
80. Wilson concepts and methods are reinforced throughout the school day in various classes. (NT 832-833.)
81. The School is teaching Student to use a computer for written expression. Direct instruction in writing is aimed at automaticity and increased word production. (NT 832, 835-837; P-18.)
82. All administrators at the School are trained in the Pennsylvania common core standards, and the School's curriculum emulates the public school curriculum to a significant extent. (NT 829-831.)
83. Student's third grade teachers at the School are not certified special education teachers. (NT 850.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.¹ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence² that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance

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

² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

of the evidence in support of Parents' claims, or if the evidence is in "equipoise", the Parents cannot prevail.

TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007).

FAILURE TO OFFER OR PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l

High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or 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), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

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

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged

prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

PROVISION OF A FAPE TO STUDENT

The issue to be decided is clearly delimited. Parents raise only one claim: that the district should reimburse them for tuition and transportation costs for Student's attendance at the School in the 2012-2013 school year. As noted above, this requires me to address the three step Burling-Carter analysis. The first step is to determine whether or not the District has offered to provide a FAPE to Student for the 2012-2013 school year. Florence County School Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). It is not necessary to determine whether or not the District provided Student with a FAPE in the previous 2011-2012 school year. It is the prospective offer that must be considered, and the test of whether or not a FAPE has been offered, as discussed above, is whether or not the proposed IEP is reasonably calculated to provide meaningful educational benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996).

Whether the IEP meets this test must be judged in light of the IDEA's mandate that an IEP must address all of a student's educational needs. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(bb). 34 C.F.R. §300.320(a)(2). Whether a FAPE has been offered must be judged in light of the child's unique constellation of educational needs, Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982), and the child's intellectual potential, Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004). I conclude that the issue in this

matter is whether or not the District addressed Student's unique constellation of reading skill deficits in a manner reasonably calculated to provide Student with meaningful educational benefit.³ I conclude that the District failed to do so, and thus did not offer a FAPE for the 2012-2013 school year.

Parents introduced a preponderance of credible and reliable evidence that the Student in second grade suffered from a substantial reading disability involving cognitive processes that resulted in struggles with decoding words, retaining knowledge of sound-symbol relationships in both short term and long term memory, and fluent reading – all of which affected Student's reading comprehension and all of which were reasonably calculated to affect reading comprehension severely as Student progressed to higher levels of demand for reading in the third and fourth grades of elementary school. While Student showed some skills in terms of understanding sound symbol relationships, and showed good skill in utilizing language orally, Student's oral reading was significantly dysfluent, slow, and laden with errors including inaccuracies, omissions, substitutions and repetitions. By the end of second grade, Student had not mastered reading past the phonetic level of reading. Student's unique disability was a lack of fluency and automaticity in reading that promised to hamper Student's academic achievement despite a high level of academic potential. This was based upon slow processing speed generally, and a specific difficulty with retrieving printed letter shapes, letter combinations and words from memory. This disability was coupled with a serious disability in writing, characterized by slow, laborious writing, frequent letter reversals and frequent spelling errors.

³ While there was some evidence with regard to District services for Student's needs in writing and mathematics, the evidence was not preponderant that the District's offered programs were inappropriate in these areas.

In second grade, Student received special education services for reading, including supplemental learning support with an evidence based program called Project Read for thirty minutes per day, six reading goals including goals for fluency, a writing goal with specially designed instruction in writing, and speech and language therapy services

The record shows that Student made progress in some areas of reading skill in second grade, the 2011-2012 school year. Student met IEP goals for spelling, reading comprehension and story vocabulary. Student came close to meeting a goal for reading fluency, based upon classroom probes, but failed to show mastery at the level designated in the IEP goal. While failing to meet the sight reading goal, Student demonstrated some progress. Little progress was noted in speech and language therapy goals, including articulation of the letter /s/ and knowledge of antonyms and synonyms. IEPs offered after Student's second grade provided for accommodating both state and local assessments by reading instructions to Student.

At the end of Student's second grade year, the District re-evaluated Student and concluded that Student had made exceptional progress in the most critical areas of need in the District's program. Its testing showed that Student was reading at least at a second grade level of comprehension and was at least instructional in reading at the second grade level. It recommended that the Student no longer be classified with a learning disability in reading, but continue classified with a learning disability in writing and speech or language impairment. It recommended that the third grade IEP provide the same special education reading program for Student with gradual reduction of special education time in the learning support classroom and gradual increase in reading comprehension instruction opportunities in the regular education classroom.

The District asserts that it provided a program reasonably calculated to provide Student with meaningful progress in reading in third grade, and that Student's measured progress in second grade in that program shows that the program was an appropriate offer of a FAPE. I do not accept that second grade progress ipso facto proves the likelihood of third grade progress in reading in the District's program, and I conclude that the preponderance of the evidence is to the contrary.

I find that the offer was not reasonably calculated to provide a FAPE for several reasons. First, the District's offered program assumed that Student's reading progress required only a "consolidation" of skills, ignoring preponderant evidence that Student's reading disability was still severe and required aggressive, specialized instruction programming. Second, the District's offer reduced the amount and intensity of special education services prematurely. Third, the IEP offered review and repetition of learned reading skills for an undeterminable amount of time, despite Student's critical need for review and repetition. Fourth, the District's program design raised questions as to its likely long term efficacy. Fifth, the evidence available to the District raised questions about the validity of the District's measurements of progress in second grade.

The evidence is preponderant that Student needed more than supports aimed at "consolidation" of reading skills. All of the evaluations in this matter agree that Student suffers from a severe reading disability that, by the end of second grade, manifested itself in marked dysfluency in oral reading, slow processing time for silent reading that required accommodation of state and local testing, and numerous errors in spelling and vocabulary that required specially designed instruction. Despite Student's progress in second grade in decoding and comprehension, as well as scores on timed cold reading probes that implied progress in fluency, the record shows preponderantly that Student had not mastered reading at a second grade level,

and in some respects was functioning at a level below second grade. I conclude that the record is preponderant that, at the end of second grade, Student needed more intensive specially designed instruction in reading, not less intensive instruction.

Nevertheless, the District's offer for Student's third grade year was aimed, not at continuing or increasing the intensive, aggressive instruction in basic reading skills that the Student needed, but at a program designed to help Student "consolidate" reading skills that the District had concluded were reaching grade level. This program was to be gradually faded while transitioning Student to general education reading instruction, beginning with reading comprehension opportunities. The record is preponderant that this plan was premature.

The Parents' experts, both in live testimony and in reports admitted into evidence and relied upon by both private and District evaluators, recommended specialized reading instruction that emphasized review of newly acquired skills, and repetition of both fresh and less recently acquired skills, due to Student's marked struggles with memory for reading skills being taught sequentially. Parent's third private evaluator credibly testified that Student needed two and one half hours per day of specialized, research based, direct, systematic, sequential, multi-sensory reading instruction for dyslexic students, including forty-five minutes per day of guided oral reading for purposes of review, repetition and fluency training.

The IEP offered to Parents in May 2012, and as revised in September 2012, offered Student the Project Read program for one hour per day, including one half hour of direct, systematic writing instruction; thus, it offered approximately one half hour per day of direct, systematic, evidence based reading instruction for third grade. The IEP combined this with an offer, set forth in the section on specially designed instruction, to provide "up to" thirty minutes per day of support and reinforcement of word analysis and word attack skills, syllabification

rules, structural analysis and spelling rules. Overall, the IEP offered to provide “up to two hours per day” of language arts, “to include” the Project Read program.

Thus, the IEP used qualifying language (“up to”) to indicate the quantity of services to be provided to Student in third grade. I conclude that such language is inappropriate in a document that constitutes an offer of services, especially here, where the quantity of service has a direct relationship to the expected efficacy of the services, as demonstrated preponderantly by the Parents’ expert reports and testimony. Parents should not be required to simply trust to oral assurances or a presumption of good faith when trying to determine whether an offer of special education is reasonably calculated to provide meaningful educational progress. The IEP should be clear enough that a parent knows the quantity of services being offered. This IEP did not clearly offer a stated quantity of services.

The District argues that its Project Read program was appropriate for Student in second grade, as proven by Student’s progress in reading during that year. From this premise, the District argues that the program was reasonably likely to provide Student with meaningful progress in reading in third grade. The record preponderantly supports the conclusion that Student’s second grade progress did not make the District’s offer “reasonably calculated” within the meaning of the IDEA. As noted above, the District’s offer was in context of a plan to provide a less aggressive “consolidation” approach to reading instruction, the services were to be reduced in third grade, and the quantity of the services offered was unclear from the IEP. Moreover, there were questions raised in the record that reduce the weight that I accord to the evidence regarding the appropriateness of the Project Read program for Student going into third grade.

It is undisputed that Project Read is not scientifically validated as an instructional program for students with reading disabilities. It is evidence based, and is recommended in the field as one possible program for delivering reading instruction consistent with the prescriptions of the National Reading Panel - but it has not been subjected to the rigor of independent efficacy studies with control groups. Thus, its claims of efficacy must be taken with some caution; as a fact finder, therefore, I give less weight to the suggested inference that offering it as a program implies a likelihood of meaningful progress. This is especially so where, for third grade, Student needed more hours of direct, systematic and sequential reading instruction than the IEP offered through the Project Read program.

It is also true where, as here, there was persuasive evidence that the Project Read program was not going to be paired with its recommended writing and reading comprehension/literature programs. On the contrary, the program was to be paired with Harcourt Trophies, a program that is not coordinated with the Project Read sequence of phonetic teaching, and which is considered inappropriate in the field of reading disabilities intervention⁴. Moreover, it was provided in a setting in which students at different levels of reading achievement were taught at the same time, albeit in different groups; this is contrary to best practice in utilizing an intervention program for children with reading disabilities. In sum, the flawed way in which the District's programs were delivered reduces the weight which I accord to the inference that Student's success in second grade with these programs implies a likelihood of success in third grade.

⁴ Contrary to the district's argument, the record supports this conclusion without reference to the written report of Dr. Flaherty, the second private evaluator. Thus, I am not precluded from relying on this statement of the state of the art in reading disabilities intervention. (NT 96-99.)

I also accord a reduced weight to the evidence that Project Read was working for Student, as shown by the 2012 re-evaluation data on progress. Parents' expert credibly cast doubt on the results of that evaluation -- which appear divergent from the results of three private evaluations of Student's reading achievement -- even though the expert did not point to any flaws in the District evaluator's methodology. Even if the District's scores were correct, they supported the central conclusions of the Parents' expert: that Student continued to struggle with automaticity and fluency and memory for orthographic symbols. District scores did not show that Student had met all IEP goals in reading. They did not show that Student had mastered the fundamental skills addressed in the IEP. The record as a whole does not support a conclusion that Student's second grade year progress had closed the gap between Student and peers at the same grade level; rather it supports the conclusion that Student still needed intensive special education services for third grade. In reaching these conclusions, I give weight to the recommendations and criticisms of Parents' experts -- both the expert who testified and the written expert reports of the first and second evaluators.

Weighing the evidence on both sides of this question, I conclude that there is a preponderance of evidence that the District failed to offer a FAPE for the 2012-2013 school year, because it failed to offer a reading instruction program that was reasonably calculated to provide meaningful progress in the fundamental skills of reading, skills which can negatively affect a student's progress in every area of academic achievement.

APPROPRIATENESS OF THE PRIVATE SCHOOL PLACEMENT

I conclude that the Parents provided Student with an appropriate placement at the private school. The School specializes in educating children with learning differences that rise to the

level of diagnosed learning disabilities. It provides small structured classes as well as some individualized instruction, and research or evidence based practices and programs to address students' individual learning needs.

The School reviewed the District's evaluation report and at least two of the private reports obtained by Parents, developing a list of the Student's disability related strengths and weaknesses, as well as an itemized list of the interventions to be put in place. It is providing about two hours per day of reading and language arts intervention, including Wilson instruction, reading comprehension, reading fluency through an evidence based program, and a systematic explicit program of instruction in reading. The Wilson instruction is about one hour per day on three days per week, one to one, and forty five minutes two days per week, in small group. Wilson techniques are reinforced throughout the school day in all classes where reading is required. Automaticity and fluency are emphasized. Student is learning to use the keyboard.

The District argues that the School does not provide the least restrictive environment, since its student body is entirely composed of children with learning disabilities. It also notes that the School does not follow the IDEA's procedures, such as IEPs and progress monitoring data. However, this does not render the School inappropriate. A parent is not required to select a private school that provides the least restrictive alternative setting or that complies with the IDEA in order to be eligible for tuition reimbursement after a unilateral placement.

It suffices that the placement is appropriate for the child, and I conclude that the program provided by the School for the Student is appropriate. It is based upon recent comprehensive evaluations. It is small and structured, utilizing appropriate instructional programs. Its reading program is one of the most recommended and research based programs, Wilson, and it pairs this program with reading and writing instruction that reviews and repeats the skills learned in the

Wilson program. Although its teachers are not Pennsylvania certified, the School provides trained administrators and supervisors competent to maintain integrity in School programs.

The District argues that the School does not provide speech and language therapy services, and that these are important to address Student's needs. The record is preponderant that the services provided address all of Student's needs in reading, and that the Parents have chosen not to provide speech and language services, based upon advice that the services are not critical to Student at this time. I have no reason to make a contrary finding, based upon this record.

BALANCE OF EQUITIES

I find few equitable considerations in this matter. There is no suggestion that Parents failed to provide ten days' notice to the District as required by law. The District's staff and officials displayed a good faith effort to utilize the programs available to them in order to provide what they believed would be an appropriate program to Student. While the evidence is preponderant in favor of the Parents' claim for relief, the equities are more evenly balanced.

The District argues that the Parents did not give it enough time to respond to Student's needs. It points out that the Parents had established an early pattern of impatience with the sixty day evaluation period allowed the District by law, obtaining multiple private evaluations from the middle to the end of first grade, giving the District little time to respond. The District suggests that the Parents' decision to place Student unilaterally was part of this pattern of impatience with the time frames employed by the District. It argues that it was not given time to review the third evaluator's report before the Parents removed Student.

I do not find this to create an equitable bar to relief in this matter. Aside from the ten day notice rule with which Parents complied on this record, the IDEA does not constrain parents to wait patiently for the expiration of statutory time frames. When it comes to the wellbeing of a

child, there is no law or equitable consideration that blames parents for being anxious or acting with haste. Especially in the matter at hand, the Parents were concerned that the very passage of time was creating a greater barrier to Student's likelihood of ever catching up to peers. There is nothing inequitable in this parental concern, or in the Parents' decisive action to find what they felt were the necessary services before Student's learning "clock" should expire at – as they reasonably believed -- age [redacted].

While the District would have benefitted from advance reading of the third evaluator's report, its subsequent offer proved to be essentially non-responsive to that report. Thus, it cannot be argued that Parents deprived it of an opportunity to cure the defects in its program; when it revised its offer in September after receiving the report, it did not even address the report.

CREDIBILITY OF THE EXPERTS

I give greater weight to the testimony of the Parents' expert witness (the third private evaluator), when taken in combination with the two previous expert reports that were virtually uncontradicted and uncontested by either party in this record. I find that the Parents' third evaluator is an exceptionally qualified specialist in reading disorders and programming for reading disorders, with a doctorate, Pennsylvania licensure and Pennsylvania certification, a number of published articles and presentations to show recognition of the expert's knowledge, and many years of experience in evaluating and prescribing educational programs for children with reading disabilities. In testimony, the expert showed a facility with the literature and state of the art in the specialized field of reading disabilities and the programming that is available to address them. The expert also showed a thorough familiarity with the testing instruments that address reading needs, as well as with their psychometric properties. The record made through

this witness' testimony demonstrated that the witness' conclusions and recommendations were rooted in and relied upon a high level of knowledge and experience.

At the same time, I gave serious consideration to some rather blatant flaws in this evaluator's report. The evaluator purported to contrast her scores with District scores on a test that the District did not perform. The evaluator reported a whole list of scores for one test that in actuality were scores from a different test, and it was not possible to determine that the scores thus erroneously reported were really the scores from an instrument that was reported on in the body of the report – scores that were not properly labeled in the score summary at the end of the report. I conclude that these errors, while raising doubt about the evaluator's precision in practice, were essentially typographical in nature and reflected no more than a perhaps untoward haste in the preparation of the manuscript itself; I conclude that these errors do not implicate the veracity or reliability of the evaluator's conclusions themselves or her testimony.

The District argues that the third private evaluator's methods were so questionable as to undermine the reliability of the evaluation and all of the evaluator's recommendations. The District points out that the evaluator admittedly failed to read all salient District evaluations and IEPs; failed to look at District progress reporting in addition to the data included in the most recent re-evaluation report and the IEP present levels section; failed to observe Student in a District instructional setting; and failed to consult District teachers to assess Student's progress or the efficacy of the Project Read and Harcourt Trophies combination program. It points out that the evaluator may have caused fatigue in Student by combining all testing in one day.

The evaluator explained that the failure to obtain data from the District and Student's District teachers was due to the timing of the report, which was solicited and performed in the

summer, when Student's IEP goals were being implemented only in the ESY classes, which were not a useful focus for an observation or teacher input. (NT 130-131, 147-148.)

Regarding the choice to evaluate Student in one day, the evaluator explained that there is psychometric variability no matter which choice is made. If the evaluator chooses to spread testing over several days, variability in the Student's mental or cognitive as well as emotional state can create error in the scores. Similarly, if all the testing is done in one day, fatigue can skew the scores. The evaluator chose to deal with fatigue rather than variations in cognitive and emotional readiness to perform. The evaluator provided Student with numerous breaks during the testing day, and concluded that the Student's effort was sufficient to make Student's scores a representative example of Student's performance. (NT 143-145.)

I conclude that the other criticisms – concerning the documentation reviewed – do not vitiate the evaluator's findings. The District's re-evaluation report and IEPs contained detailed lists of Student's scores on local assessments relevant to the Student's reading progress, so the evaluator had adequate documentary evidence of progress.

The District also challenges the evaluator's decision to break standardization in two respects. First, the evaluator gave extra time on timed tests to derive clinical data in addition to what the timed test would provide. Second, the evaluator administered some of the tests that the District had administered only a few weeks previously, in violation of the requirements of test manuals that require no re-test within six months. However, the evaluator explained the deviation from standard conditions adequately.

As to the giving of extra time, the answers were scored utilizing the time stated in the manual; thus, the scores obtained were standard scores consistent with the publisher's instructions. The witness indicated that it is not unusual to provide extra time while testing – not

to obtain invalid scores, but to see if the subject's failure to answer is due to an inability to answer, or due to slow processing. I note that slow processing is perhaps the most prominent finding of all of the available evaluation reports, including the District's 2012 re-evaluation. Thus, the evaluator's clinical deviation from standard conditions was directed at an important issue for the Student, and did not invalidate the reported scores, which were derived from the timed tests consistent with the publishers' manuals.

The re-test within the manual's waiting period was not performed for the purpose of obtaining valid scores; the evaluator recognized that the re-test scores would be subject to a practice effect that would tend to inflate the scores by a predictable amount. Nevertheless, the evaluator explained that there was a different purpose for the re-test: to see if the results would confirm the District's scores, or call them into question. If the scores were comparable, the District's scorers would be confirmed; if the scores were lower, the District's scores would be called into question. Thus, the deviation from standard conditions did not render the procedure invalid for the purpose for which it was being used – which was not to validly predict Student's performance (the usual purpose of such scores), but to test the validity of the District's scores (an unusual but not invalid use of the tests).

The District pointed out that the evaluator was unsure about the differences between the Woodcock-Johnson Tests of Achievement and the Woodcock-Johnson Diagnostic Reading Battery – both as to the differences in the subtests and the differences in the norms on which the scores are based. (NT 134-136, 473-474.) However, the evaluator testified with certainty that it made no difference. The record supports this testimony. The subtests that the evaluator re-administered are the same as those which the District had administered, so apples were compared with apples. At best the re-norming of these subtests created a slight difference in the scoring,

(NT 473-474), but nothing in the record shows that it accounted for the discrepancy in scores that the evaluator found.

The District also noted some errors in the evaluator's score reports. It noted that the evaluator had not performed all of the subtests of the Wide Range Assessment of Memory and Learning (WRAML2), whereas the District had performed all of the subtests. It also noted that there was a reference to a District score for "spatial relations" that the District had not reported or obtained.

The evaluator's explanation regarding the WRAML2 was that time constraints were considered and the evaluator chose to administer those subtests that addressed contextual verbal memory, rote visual memory and verbal memory. (NT 130, 147-148.) There was no evidence to show that these choices violated standardization; the District's school psychologist did testify that a cluster score could not be obtained with fewer than four subtest scores, but the third private evaluator did not purport to obtain a cluster score; the purpose of re-testing was to compare or contrast with the scores derived by the District.

As to the obvious errors in the third private evaluator's report, including the comparison score for a test not conducted by the District, and the listing of incorrect scores for one of the test batteries administered, the evaluator explained that the comparison score was simply an error, and that it was not material to the evaluation or its purposes. As to the wrong test scores in the listed scores, two sets of scores were placed in the wrong columns and this explanation showed that the correct scores were listed, but just mislabeled.

While I conclude that the various flaws -- alleged and real -- in the Parents' expert witness' report did not reduce the weight of the testimony, I had some concerns with the

reliability of the District's school psychologist's conclusions. Therefore, I accord reduced weight to the testimony of the District's psychologist.

It appeared from the record as a whole and from the psychologist's testimony that the District was convinced that Student was making very significant progress in reading, including decoding, sight word vocabulary and fluency; yet, the psychologist testified that it was necessary to take the less than usual step of conducting a full formal educational re-evaluation of Student within about one year, because of that progress. I find this testimony as to the reason for the re-evaluation to be implausible.

The psychologist's testimony is also self-contradictory, as were the District's actions in this matter. On one hand, the Student did not need special education services because the Student's comprehension was at grade level – justifying no longer considering Student's specific learning disability to include reading. On the other hand, Student still needed special education services due to Student's ongoing weaknesses in automaticity and fluency. The District's provision of special education services inherently contradicts the psychologist's conclusion that the Student was no longer eligible in the area of reading.⁵

I also factor in the fact that the District's psychologist did not have the academic or practice credentials of the Parents' evaluator, whose report the psychologist heavily criticized. As I have tried to demonstrate above, most practitioners who appear before me cannot boast

⁵ The District's psychologist argued that her conclusion was defined by state law which requires the finding of a discrepancy between intellectual ability and achievement. 22 Pa. Code §14.125(2). This does not explain why Student's achievement in comprehension was the only apparent basis for finding no discrepancy, or why the Student's below-grade achievement in oral reading and known deficits in fluency and automaticity were not considered sufficient to find a discrepancy, 22 Pa. Code §14.125(1)(iv), (v), which factors led all of the private evaluators to conclude that a specific disability in reading was clearly present.

these credentials⁶ or the specialized knowledge in reading disabilities that the Parents' evaluator possessed. Nevertheless, the persuasiveness of the evidence on both sides turned to a not negligible extent on the credibility and reliability of the testimony and conclusions of the two opposing experts in this matter. I conclude that the Parents' evaluator's opinions, recitation of the state of the art in reading disabilities⁷, and ultimate professional judgments about Student's needs must be given greater weight on the basis of the opposing experts' differing knowledge, experience and training with regard to reading disabilities. (NT 46-70, 97-98, 144, 152-160; 438-444, 526-530; S-2; P-20.)

I find that the Parent's testimony was credible. I base this on consistency with the rest of the record, how the Parent answered the questions, and demeanor. There is some indirect support in the record for this conclusion: when given a behavior inventory addressing Student's attention issues among other things, Parent's responses indicated a tendency not to exaggerate or emphasize problems with Student's behavior, suggesting to me that the responses were not driven by an ulterior motive or litigious motives. (NT 469-470.)

I find the other witnesses' testimony in this matter to have been credible and reliable. It is the ultimate conclusions that might be drawn from their testimony that I do not accept, based upon the considerations set forth above.

⁶ I conclude that the District's psychologist is well qualified to offer opinions helpful to the fact finder in this matter. This professional's education, training and experience are given weight and respect; nothing in the comparison with the District's evaluator is meant to diminish this. (NT 438-444; S-2.)

⁷ I note that the expert's testimony was based upon knowledge of the literature that was demonstrated in the testimony itself by reference to learned treatises in the field.

CONCLUSION

I conclude that the District failed to offer Student a FAPE for the 2012-2013 school year. The Parents' private placement was appropriate for Student. Equity does not bar or reduce the Parents' entitlement to reimbursement for the cost of tuition and transportation to the School for the entire 2012-2013 school year, and I will order that reimbursement. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District failed to offer a free appropriate public education (FAPE) to Student for the 2012-2013 school year.
2. The School is an appropriate placement for Student.
3. There is no equitable bar to reimbursement of tuition and transportation costs for the 2012-2013 school year.
4. I hereby order the District to reimburse Parents for the entire cost of tuition and transportation of Student for attendance at the School for the 2012-2013 school year.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ., CHO
HEARING OFFICER

February 13, 2013