

*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: N.F.

Date of Birth: [redacted]

ODR No. 13114-12-13-KE

### CLOSED HEARING

Parties to the Hearing:

Parents

Lower Merion School District  
301 East Montgomery Avenue  
Ardmore, PA 19003-3338

Dates of Hearing:

Record Closed:

Date of Decision:

Hearing Officer:

Representative:

David G. C. Arnold, Esquire  
920 Matsonford Road Suite 106  
West Conshohocken, PA 19428-2728

Claudia L. Huot, Esquire  
Wisler Pearlstine LLP  
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November 27, 2012; December 12,  
2012; January 22, 2013; January 25,  
2013

February 13, 2013

February 28, 2013

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 7.) The District has identified Student with Specific Learning Disability. (NT 7.) Student's Parents<sup>1</sup> assert that the District has failed to offer or provide the Student with a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and discriminated against Student contrary to section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). Parents unilaterally removed Student from the District and placed Student in a private school (School). Parents request compensatory education<sup>2</sup> and reimbursement of private school tuition and transportation costs.

The District asserts that it provided or offered a FAPE during all relevant times.

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 from October 3, 2010 to November 27, 2012, including failing to provide extended school year (ESY) services in the summers of 2011 or 2012?
2. Is the private school an appropriate placement for Student?

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<sup>1</sup> Throughout this decision, "Parents" in the plural refers to the Parents listed on the cover page of this decision; "Parent" in the singular refers to Student's Mother, who participated in most of the transactions of record in this matter.

<sup>2</sup> Parents do not claim compensatory education for District acts or omissions prior to two years before the Parents filed their complaint under the IDEA. Thus, their claim for compensatory education is limited to a portion of that two year period prior to their unilateral removal of Student to the School. (NT 29.) Nevertheless, I find relevant some evidence of Student's program and progress prior to the statutory two year period, as discussed herein.

3. Considering the equities, should the hearing officer order the District to reimburse Parents for all or any part of the costs of private school tuition at the School for the period January 1, 2011 to the end of the school year in 2011, the 2011-2012 and 2012-2013 school years, and the costs of transportation to private summer school programs in the summers of 2011 and 2012?
4. Did the District discriminate against the Student or fail to provide Student with equal access to or the equal benefit of the District's educational services at any time from October 3, 2010 to the date of the first hearing in this matter, November 27, 2012?
5. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from October 3, 2010 until the Student was withdrawn from the District in December 2010?

#### FINDINGS OF FACT

1. Student suffers from a language based learning disability. Student struggles in reading, writing and spelling, as well as mathematics word problems that require reading. Student also has difficulty with attention and focus in school. (NT 36-51; P 2-5.)
2. Student's disabilities in reading and spelling interfered with Student's progress and performance in the general education classroom. Student struggled every day with completion of homework assignments because Student could not read. In fourth and fifth grade, due to the need for a direct, systematic multisensory program of instruction in decoding and encoding, Student did not participate in general education for the core subjects of science and social studies. (NT 155-156, 198-199, 628-629, 635-636; P 4, 5.)
3. The District has been aware since Student's first grade year (2006-2007 school year) that Student struggled with and performed below grade level in reading, writing and spelling in every school year. (NT 36-51, 144-145; P 2- 5, 15, 16, 18, 21, 45-47.)
4. At Parents' request, the District evaluated Student in November 2007, when Student was in second grade. The evaluation classified Student with Specific Learning Disability with regard to reading and spelling. It also noted that Student exhibited some difficulties with attention and focus. It recommended a systematic, multisensory program of reading instruction, with consistency throughout the year. (P 15.)
5. The November 2007 Evaluation Report showed that Student scored low average in word reading, decoding, comprehension, and spelling, as measured by the Wechsler Individual Achievement Test, Second Edition (WIAT-II). Curriculum based assessment and teacher reports showed that Student was functioning below grade level in reading. (P 15.)

6. Beginning in January 2009, the District implemented an IEP for the Student's third and fourth grade years that provided placement in itinerant learning support and about one hour of instruction in the special education classroom for reading. (P 4.)
7. From September to December 2008, when Student was in third grade, Student increased words correct per minute, as measured by the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), by 18 to 54, which was below the third grade benchmark of 77. As measured by the Group Reading Assessment and Diagnostic Evaluation (GRADE), administered in October 2008, showed Student performing below average for Student's grade in word reading, vocabulary, reading comprehension and total reading. (P 4.)
8. From September 2009 to January 2010, Student increased words correct per minute, as measured by DIBELS, by 35, from 32 to 67, which is less than the mid year and end of year benchmarks (end of year benchmark was 120), utilizing second grade level reading passages. GRADE scores for October 2009 remained below average, with grade equivalent achievement below second grade in comprehension and total reading and below third grade in vocabulary. (P 4, 5.)
9. In January 2010, the District offered an Individualized Education Program (IEP) that addressed Student's needs in reading. The IEP offered a placement of supplemental learning support, three and one half hours per day, and offered goals for identifying sounds such as consonants, vowels, digraphs and welded sounds; word reading for real words and nonsense words; and reading fluency. The goals were measureable and based on base line data. The goals called for substantial progress in one year for identifying vowels (14% base line to 80% goal), welded sounds (38% base line to 80% goal), word reading at steps one through 5 of the Wilson program and fluency scores (61 words correct per minute to 118 in below grade level passages and 35 in grade level passages). (P 5.)
10. The January 2010 IEP in the middle of Student's fourth grade year, offered a systematic, multisensory program of reading instruction, which was implemented through the Wilson Reading Program, a research based program to address decoding and encoding skills. It also provided various modifications and accommodations to support Student in general education classes and address Student's needs regarding attention and focus. (NT 498-499; P 5.)
11. The Wilson program was provided as part of the training of the instructor in the Wilson program for purposes of Wilson certification. Student began Wilson training with the trainee instructor in September 2009 at Step 1.1. (NT 489; S-53.)
12. The January 2010 IEP found Student eligible for Extended School Year (ESY) services to maintain skills and continue progress, due to Student's below grade level performance in reading. The IEP offered five hours per week for six weeks of one to one tutoring to all reading goals. (P 5.)
13. At Parent's request, the District completed a re-evaluation of Student in March 2010, more than half way through Student's fourth grade year. The evaluation classified

Student with Specific Learning Disability with regard to reading, spelling and writing. It also noted that Student exhibited some difficulties with attention and focus. It recommended a systematic, multisensory program of reading instruction, with consistency throughout the year. (P 16.)

14. The March 2010 re-evaluation showed that, despite average cognitive ability, Student functioned at the beginning or middle of second grade level in word identification and word attack, and at the beginning third grade level in passage comprehension and full scale scores, as measured by the Woodcock Reading Mastery Test - Revised. Student functioned at the mid third grade level in passage comprehension on that test. DIBELS fluency scores for the Fall of 2009 and January 2010 indicated that Student was functioning at the second grade level, and well below benchmark levels for the middle and end of fourth grade. On twelve state and local assessments (Degrees of Reading Power, 4-Sight Reading, and PSSA), Student had scored at Below Basic for reading and writing in all but three of the assessments given in grades two, three and four. (P 16.)
15. Scores from the Woodcock Reading Mastery Test – Revised, administered in January 2010, showed that Student made progress in word identification from a 2.2 grade equivalent to a 2.8 grade equivalent; in word attack from a 1.2 grade equivalent to a 2.4 grade equivalent; in word comprehension from a 2.6 grade equivalent to a 4.2 grade equivalent; in passage comprehension from a 2.4 grade equivalent to a 3.4 grade equivalent; and in reading full scale total from a 2.2 grade equivalent to a 3.0 grade equivalent. (P 6.)
16. In the March 2010 re-evaluation, the District administered parts of the WIAT-II. Student's scores declined from those obtained in 2007 in the areas of word reading and pseudoword decoding; however, Student's score in comprehension increased from 87 to 97, and Student's reading composite score rose by one point. All scores remained below average, except reading comprehension, which was average. On a standardized writing measure, the Test of Written Language – Fourth Edition, Student scored poor or below average in all areas of writing except sentence combining and story composition. (P 6, 16.)
17. From first grade to fourth grade (2006-2007 school year to 2009-2010 school year), Student made less than one year's progress in each year in reading phonetics, decoding, sight word vocabulary, reading automaticity, reading fluency and spelling. Student's achievement in writing was below grade level during this time. (NT 36-51; P 2- 5, 9 p. 26-28, 16, 18, 21, 22, 28, 30.)
18. In March 2010, Student's special education teacher reported to the Parent that Student was working in Wilson Steps 3.1 and 3.2. In July 2010, the teacher reported that Student was working in Wilson Step 5.1, having demonstrated consistency in Steps 1 through 4. In November 2010, the teacher reported to the School that Student was currently working in Wilson Steps 6.4, and Step 7 for one set of sounds. (P 28, 31, 47; S-9.)
19. Most Wilson students are expected to progress at most three steps in one academic year. (NT 242; P 44 p. 6.)

20. When screened for admission placement through the School's procedures, which include the Wilson placement test, called the WADE, the School placed Student in Wilson Step 3, with significant gaps in knowledge of basic phonemic concepts at lower levels. Student needed a substantial amount of review and repetition of concepts in Steps 1 through 3 before Student could move to higher steps. Subsequent experience with Student in the Wilson program at the School confirmed this analysis. (NT 210, 245, 265-266; P 32, 33, 53.)
21. Student did not meet any measureable annual goals in fourth or fifth grade while in the District. (NT 338-356, 507-508; P 6, 29.)
22. Student's PSSA scores were below basic in Student's third and fourth grade years. (P 21, 22.)
23. The District accommodated state and local testing by having test questions read orally to Student in all of Student's IEPs. (P 4, 5, 6.)
24. In April 2010 the District offered an IEP that revised the present levels to include new data from the March 2010 re-evaluation and that added a writing goal addressing fluency and correct word sequences. (P 6.)
25. Student's report card at the end of fourth grade reflected lower scores in reading and writing than those attained in third grade: Student's scores regressed from "developing" to "beginning." (NT 156; P 18, 20.)
26. Student attended ESY in the summer of 2010. (NT 56-57.)
27. Student did not attain any of the IEP goals by December 2010, although Student made modest progress in identifying sounds, word reading, and fluency at a second grade level of text. In writing, Student also made modest progress in total words written and correct word sequences, without attaining the IEP goal. (P 7, 20.)
28. Parent began looking for private schools in the Fall of 2010, applying for enrollment at two schools, including the private School to which Student eventually was admitted. (NT 129- 134; P 30, 31.)
29. Parent caused reference forms to be forwarded from two private schools to two teachers at the District's elementary school, and the teachers filled out the forms in November 2010. (P 30, 31.)
30. On December 1, 2010, at Parent's request, the District convened an IEP team meeting at which Parent notified the District of her intention to remove Student from the District and enroll Student unilaterally in the School. Parent also indicated that homework was not as difficult in the current school year, and that Parent was concerned with Student's impending transfer to middle school in the District. (NT 134-135; P 7.)
31. At the December 1, 2010 IEP team meeting, the District offered an IEP with the same kinds of services offered in April 2010. Total time in special education was reduced by

forty-five minutes, to three hours per day, including one and one half hours per day in structured, systematic, multisensory reading instruction for decoding and encoding. (P 7.)

32. Student continued at the District's elementary school until the last day of school in December. Parent notified the District when Student was enrolled in the School, effective January 3, 2011. (NT 136; S 24.)
33. From January 2011 to June 2011, Student did not make progress relative to peers in reading comprehension or word reading, as measured by a standardized instrument. Student made some progress in mathematics as measured by a standardized instrument. (P-38.)
34. From January 2011, the School placed Student in Wilson Step 3.2. From then until to June 2011, Student progressed to master Wilson Step 4, and was being instructed at Wilson Step 4.1 by May 2011. (NT 150-153; P 37.)
35. In the 2011-2012 school year, Student progressed from Wilson Step 4.1 to mastery of Step 6, and was being instructed in Step 6.2. (P 39, 40, 44.)
36. By the end of the first quarter of the 2012-2013 school year, Student had progressed to instruction at Wilson Step 7.4. (P 53.)
37. When Student began at the School, Student's fluency on grade level text was 63 words per minute, well below average for mid fifth grade. By May 2011, Student was reading fourth grade level text at 78 words correct per minute. From January 2011 to the end of first quarter in 2012, Student improved to 84 words per minute on grade level, an improvement from the 10<sup>th</sup> percentile to the 15<sup>th</sup> percentile on a standardized measure. (P 37, 53.)
38. Student's writing improved from January 2011 to the first quarter of 2012, as measured by writing rubrics in which Student's scores improved for content, organization, grammar and sentence variety. (P 53.)
39. Student made some progress in all academic areas in fifth, sixth and the beginning of seventh grade at the School. (NT 210-211, 250-255; P 34, 44, 53.)
40. Parent agreed to all evaluations proposed by the District during Student's tenure in the District. (NT 138.)
41. Parent attended an IEP team meeting at the District in September 2011. As a result of that meeting, the District offered an IEP with placement in supplemental learning support, located in the District's Middle School for the 2011-2012 school year, Student's sixth grade year. The IEP offered to provide reading instruction in the learning support classroom for about one and one half hours per school day, including a multisensory reading program and learning support for reading comprehension. Parents expressed concerns about scheduling Student's core academic subjects earlier in the day, and the District agreed to attempt to adjust Student's schedule. (NT 138-143; P 8.)

42. The IEP offered goals for sound recognition, word reading and fluency that were identical to those offered in the December 2010 offered IEP. The IEP offered new goals for writing, reading comprehension and completion of projects. The IEP offered new specially designed instruction for reading comprehension strategies, vocabulary building, written expression skills, attention, focus, organization and the use of a tracking device such as a reading stripe to assist student in reading. The IEP offered an assistive technology evaluation upon Student's return to the District. The IEP offered use of a computer for lengthy written assignments. The IEP offered ESY tutoring services of undetermined quantity with goals expanded to include reading comprehension goals. (NT 138-143; P 8.)
43. District officials requested that Parents provide updated information from the School on Student's program and progress, but it was not available in September 2011. After some delay, the District received information from the School prior to January 2012. (NT 188-191, 196-198; P 8, 9.)
44. Parents did not accept the District's offered IEP due to the need for updated information from the School on Student's program and progress, and a pending occupational therapy evaluation; Parents requested a meeting to discuss the offered IEP after the School data and the evaluation data should be received. (NT 138-140; P 11.)
45. Parent did not expect to return Student to the District during the 2011-2012 school year. (NT 191-193.)
46. In December 2011, the District evaluated Student for occupational therapy; the evaluation report identified visual motor and visual perceptual deficits and recommended both assistive technology in the form of training in use of keyboard, as well as accommodations with the support of the occupational therapist. (NT 137; P 17.)
47. Parent attended an IEP team meeting at the District on January 29, 2012. As a result of this meeting, the IEP offered in September 2011 was revised. Data from the School and the occupational therapy report were added and baselines were added to the reading comprehension reading fluency and writing goals. Two new specially designed instruction were added to support keyboarding and word processing. The IEP offered occupational therapy services thirty minutes per week, push in. ESY frequency was not addressed. (P 9.)
48. Parents did not accept the District's offered IEP due to the absence of rostering data from the District and incorrect information about the provision of data from the School to the District. Parents requested a meeting to discuss the offered IEP. (NT 141; P 9; S 38.)
49. Parent attended an IEP team meeting at the District on April 20, 2012. As a result of this meeting, the IEP offered in September 2011 and revised in January 2012 was revised further. The IEP offered three hours of instruction in the learning support classroom, including forty five minute classes on reading (with structured, systematic, multisensory decoding and encoding instruction), reading comprehension and fluency instruction and practice, writing and instructional support lab. (P 10.)



50. The offered increase in special education services was over twice the number of hours previously provided and offered to Student for fifth grade. (NT 824-827; P 8, 9, 10.)
51. The April 2012 IEP added language reflecting Parental concerns about the roster. It revised the baseline on the writing short term objective for focus and changed a reading comprehension goal to a vocabulary goal. It increased testing accommodations and added a second meeting for assistive technology assessment to the specially designed instruction section. It expanded ESY to include the IEP writing goal, and specified the quantity at two hours per day, five days per week. (P 10.)
52. On May 28, 2012, Parents rejected the offered IEP and Notice of Recommended Educational Placement. Parents' reasons included unattainable goals and objectives, the offer of the same programming that had been inadequate previously, the lack of a systematic program implemented throughout the school day, an inadequate level of intensity of services, asserted ineffectiveness of co-teaching model for Student, a lack of attention to executive functions, the lack of speech and language related services, the failure to address mathematics systematically through specially designed instruction, and the failure to more specifically delineate assistive technology to be provided to Student. (NT 141-142; P 12, 48.)
53. Parents cooperated with all of the District's requests for releases and information regarding Student's program and progress at the School. (NT 143-144, 997-1000.)

## 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.<sup>3</sup> 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

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<sup>3</sup> 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).

relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>4</sup> 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 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

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<sup>4</sup> 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.

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 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> 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).

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).

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 – HISTORICAL CONTEXT

The issue is narrow: prior to Student’s unilateral withdrawal from the District in January 2011, did the District offer to Parents an IEP and placement that was -- at the time it was offered -- reasonably calculated to provide Student with meaningful educational benefit? Under this rule, I consider the history and context of the offer in order to reach a conclusion as to whether there was a reasonable basis for District officials to believe that it was calculated (or, essentially, likely) to result in benefit. I must also consider history and context in order to determine whether or not any benefit likely to result from this offer would have been “meaningful.” Given Student’s educational history in the District, I conclude that the offer was not reasonably calculated to confer meaningful benefit when offered.

Student’s previous progress or lack of progress, Student’s age and grade, and the programming offered to Student prior to the offer at issue is relevant to this determination. I admitted such evidence with the express proviso that I would not pass any judgment or reach any conclusion or decision as to the appropriateness of any District action or inaction prior to October 3, 2010. However, I admitted evidence of events prior to that date as relevant, and I find that the evidence of Student’s program and progress prior to that date is relevant to the issues of reasonable expectation of progress and the meaningfulness of any progress expected. In short, history informs my conclusions about the reasonableness of the District’s offer in December 2010, since that history is what the District knew when it made its offer in December 2010.

The evidence is preponderant that Student suffers from a disability of reading, in which Student has difficulty with the basics of reading – sound-letter and sound-word association, decoding and encoding, memorization and retention of high frequency and non-decodable words,

and consequently automaticity and fluency in reading words. This disability is severe and Student can be expected to make slow progress in basic reading unless provided with the highest level of intervention. This has serious consequences for Student's ability to read with adequate comprehension, and has a severe impact on Student's performance in the rest of the curriculum, especially in mathematics applications involving the reading of text, performance on tests and assessments requiring the reading of questions, and other parts of the curriculum that depend on reading fluency and comprehension. In fourth grade, the curriculum is designed with the assumption that students have mastered the basic skills of reading, and the reliance on reading for purposes of learning increases. Thus, the context of the present matter is a Student in the middle of fifth grade – well beyond the point where the curriculum begins to demand fluent and effective reading skills.

The record also demonstrates preponderantly that Student suffers from a disability of writing. This includes difficulty encoding sounds, and thus spelling, as well as production of written product fluently, and utilizing conventions appropriately. I find that Student's writing was far below grade level in December 2010.

The historical context shows that, in December 2010, Student was not demonstrating any likelihood of advancing to grade level in basic reading skills in the foreseeable future. The numerical data from standardized testing did not evidence movement toward grade level performance in basic reading skills; Student seemed mired at a second to third grade level in most measures, with some even showing regression. Non-standardized measures showed modest progress through the lower grade levels of basic reading skill.

Student's writing was similarly deficient and laborious, according to the evidence. Student's scores on rubrics were consistently below grade level. There was little evidence of improvement.

As Student approached the end of third grade, the District's educators concluded that there was not satisfactory progress, and began providing added reading instruction at the beginning of Student's fourth grade year. This was in the form of the Wilson Reading Program<sup>5</sup>, which addresses basic reading skills, especially decoding, and also addresses basic skills needed for writing by teaching encoding of language sounds. In the next IEP in January 2010 – half way through Student's fourth grade year - the District provided an increase from about one hour per day of special education services to about three hours per day, including the Wilson program. Student was not offered a specially designed curriculum for writing other than the Wilson program, although there were some specially designed instruction and accommodations to instruction to be provided in the general education classroom.

During fourth grade, Student's teacher for reading was a certified special education teacher who also was in training to deliver the Wilson program, working towards the teacher's Wilson certification. The Wilson program was offered to Student as part of this teacher's training. The teacher started Student at Step 1 of the 12 step Wilson curriculum. The teacher found and reported that Student was making remarkable progress in Wilson. From September 2009 to November 2010, the teacher reported that Student had advanced from Step 1 through mastery of Step 6 and instruction at Step 7.2.

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<sup>5</sup> Wilson is a structured, systematic, sequential and multisensory program of instruction in which a student proceeds at the Student's own pace through a set curriculum, but must master each "step" or sub-step before proceeding to the next step. It is research based and is frequently recommended among educators.

Successful Wilson students are not expected to make such progress in the Wilson program. Two steps per academic year is considered to be good progress, according to the evidence of record.

Outside the classroom, Parent was observing Student's reading at home, and was seeing no noticeable improvement. Student struggled with homework because Student was unable or painfully slow to read instructions, questions and assignments. Parent repeatedly brought this to the attention of District educators. Parent could see no progress in Student's reading or writing during Student's fourth grade or fifth grade years in the District.

Parent requested a re-evaluation in fifth grade, and the District provided one in March 2010. I conclude that it showed minimal progress in reading and writing. While some measures showed increased numerical scores, taken as a whole the re-evaluation report did not disclose meaningful movement toward grade-level performance in basic reading and writing skills. I conclude that, given the context of Student's history of very slow advances in decoding and fluency, the report and the curriculum based measures reported from the classroom did not support a reasonable conclusion that Student's program was helping Student to make meaningful progress. Rather, it showed a continuation of the pattern of marginal improvements in reading scores with below-grade performance overall.

The District emphasizes two areas of evidence that imply a contrary conclusion. First, the District points out that the Student's reading comprehension scores improved substantially. Second, it relies heavily upon the Wilson teacher's reports of remarkable progress. I conclude that this evidence does not outweigh the countervailing weight of the evidence as a whole.

The comprehension scores must be given limited weight. While comprehension is the purpose of reading instruction, it does not demonstrate that basic skills are attained, as the record



overwhelmingly demonstrates in this matter. The evidence shows that Student had learned to use comprehension skills to devine meaning from text without decoding. Student also had memorized whole words as a way around Student's decoding deficit. However, the expert evidence in this matter shows that these strategies cannot substitute for decoding, and they do not permit automaticity and fluency, especially at grades four and above. According to Parents' expert's credible testimony, the inability to decode and encode becomes a severe liability at higher grades in school. Moreover, improved comprehension scores do not imply any improvement in encoding or writing. Thus, I conclude that Student's improved comprehension scores in the presence of ongoing severe basic reading skill deficits is not sufficient evidence of progress to outweigh the record evidence that no meaningful progress was made in fourth and fifth grade in reading and writing.

I give little weight to the Wilson teacher's reports of progress in that program during fourth and fifth grade. As noted above, it is facially implausible, because the program itself, as evidenced by documents of record and the testimony of Parent's expert on Wilson implementation, considers three steps per academic year to be a relatively high rate of acquisition. Parents' expert credibly testified that the District's reported progress was implausible, since it asserted mastery of six steps and instruction through seven steps in less than one and one half years.

This facial assessment was confirmed when Student applied to enroll in the School and scored at Step 3 on the Wilson screening and placement instrument<sup>6</sup> with severe gaps in Step 1

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<sup>6</sup> The district argues that this screening is unreliable because it was partial; however, the Parents' Wilson expert explained credibly that the School's tester omitted the writing part of the screener, because Student's writing was obviously deficient and did not need to be screened. I find nothing in this fact that detracts from the reliability of the School's screening of Student for Wilson placement.

and Step 2 material that needed to be remediated. The School's testing was corroborated through over two years of instructing Student daily in the Wilson program at the School, in which Student made about two steps per year of progress.

This conclusion is bolstered by weighing the relative evidence provided by the competing experts on this point, the District's teacher and the Parent's expert in implementing Wilson. I accorded less weight to the testimony of the District's teacher, because the teacher is palpably less experienced in providing Wilson instruction than the Parents' expert, who lectures, teaches and trains others in addition to several years' experience implementing the program. I also accord reduced weight to the District teacher's evidence because that teacher was a trainee while providing Wilson to Student for several months initially.

Additionally, I considered the reliability of the two experts as witnesses, and I found reasons to question the reliability of District teacher's evidence. The documentary evidence contradicts the teacher's lengthy testimony asserting Student's substantial progress during fourth and fifth grade. An ESY recommendation from sometime in fourth grade states that Student did not meet any goals and made no progress. The witness, when confronted with this directly contradictory language, responded with avoidance and hedging, rather than forthright explanation. Only later, in redirect examination, did the witness produce a rather convoluted retrospective explanation of what the witness meant by the assertions in the document, seeking to harmonize the prior inconsistent statement with the witness's testimony. Considering both the witness's way of answering questions and the witness's demeanor during testimony, I found all of this unconvincing. Moreover, I note that the witness's reports for the various evaluations and IEPs in evidence never once stated to Parents what Wilson step Student was on, even though progress through the Wilson steps later formed the keystone of the witness's argument that

Student had made meaningful progress. I conclude that the witness's testimony on the point of Student's progress was unreliable, and therefore I accord it reduced weight as against the Parents' Wilson expert and the record as a whole.<sup>7</sup>

#### FAPE FROM OCTOBER 3, 2010 TO DECEMBER 31, 2010

In light of the above, I conclude that the District failed to provide Student with a FAPE from October 3, 2010 to December 31, 2010. Accordingly, I will order the District to provide Student with compensatory education for that period of time. As the basic reading skills pervade all learning, and as the remediation of Student's deficits in this area substantially impeded Student's progress throughout the school day, I will order full days of compensatory education.

#### THE DECEMBER 2010 OFFER OF SERVICES

I conclude that the IEP that the District offered to Student in December 2010 was not reasonably calculated to provide meaningful educational benefit in light of the above history of minimal progress. The IEP offered similar services, including the Wilson program coupled with a variety of language arts programs to address reading comprehension and writing. Total time in special education was reduced, rather than increased, for purposes of inclusion in the least restrictive environment. The placement level did not change. There is no evidence that the IEP team or the District considered changing Student's placement to a specialized private school; increasing the amount of repetition and review of basic reading skills in coordination with the Wilson program; or reviewing the fidelity with which the Wilson program was being delivered.

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<sup>7</sup> In weighing all of the evidence, I give reduced weight to the testimony of Parent's first expert witness. I found that this witness proceeded from limited facts to criticize the District's programs; evidenced some bias against the District and contradicted herself in testimony.

No related services were offered; no after school services or homework monitoring services were offered. The offered goals were essentially the same as those offered in April 2010. Thus, in spite of Student's lack of meaningful progress under the April 2010 IEP, the District did not materially change its offered program in response.

#### THE SEPTEMBER 2011 OFFER OF SERVICES

I conclude that the IEP and placement offered by the District in September 2011 was not reasonably calculated to provide meaningful benefit. It was not materially different from the December 2010 offered IEP. It offered the same amount of time in special education, with the same amount of time in the Wilson program. Its goals for basic reading skills were the same as those offered in the December 2010 IEP. While it offered new reading comprehension goals and assistive technology, and offered to evaluate Student for occupational therapy services, it was essentially the same as the December 2010 IEP in its methodology to address basic reading skills, and it was incomplete since the occupational therapy evaluation and data from the School on current progress were pending.

#### THE JANUARY AND APRIL 2012 OFFERS OF SERVICES

I conclude that the IEPs offered in January and April were materially different and I conclude that these were reasonably calculated to provide meaningful benefit. Goals were changed, baselines were updated and the Wilson program was coupled with reading review and practice in the learning support environment. Related services in the form of occupational therapy were added. Assistive technology was offered to address Student's reading and writing. With these substantive changes in addition to the new goals added in January, it was reasonable

for the District to expect that Student would have meaningfully improved success in their program.

#### APPROPRIATENESS OF THE SCHOOL'S PROGRAM FOR STUDENT

I conclude that the School was an appropriate placement for Student. The evidence shows preponderantly that it offered small class sizes that would enrich the amount of instruction delivered to Student in a school day and ameliorate Student's attention difficulties. The staff were highly trained and state certified. Reading instruction was reinforced throughout the school day by staff schooled in the Wilson methodology and enabled by smaller class sizes. Direct reading programming was not provided at the expense of other academic courses.

The District argues that data from the School show that Student made the same slow progress in basic reading and writing that District data showed when Student was in their program, thus undercutting the Parents' assertion that Student made meaningful progress at the School. I have considered the District data and compared it to the School data and find by a preponderance of the evidence that the Student made greater progress at the School than at the District. Part of my weighing of the evidence is that I give reduced weight to the District's data from the Wilson program, as discussed above. Thus, I conclude by a preponderance that the Wilson progress was meaningful at the School.

The District also argues that the School is a segregated facility that does not offer the benefits of the least restrictive environment. I reject this argument, because a Parent does not have to show that a private school complies with the IDEA, including its least restrictive environment requirement, to show that the private school is appropriate. I find that the School's

environment for Student better addressed Student's individual needs and was therefore appropriate.

## EQUITIES

I conclude that there is no equitable reason to deny Parents tuition reimbursement for the year and one half in which the District failed to offer or provide student with a FAPE. The record shows preponderantly that the Parents cooperated with the District throughout, never obstructed its efforts to address Student's needs, and gave the District years in order to adjust its services to the levels that Student needed in order to succeed. Parents took unilateral action only when Student reached fifth grade, a time when basic reading deficits increasingly impeded Student's academic progress. I find no merit in the argument that the Parents delayed provision of the offered January 2012 IEP by delaying provision of a private report that the District never requested, or by slow return of releases when the District's promised (and on this record belated) occupational therapy evaluation was not even started until after the data were received from the School.

Likewise, the evidence is preponderant that the Parents did not pre-determine continuing Student at the School for the 2011-2012 and 2012-2013 school years. Parent frankly admitted that it would have taken a substantially different and augmented offer to get her to reverse course at that point, and I find that the District failed to provide an appropriate offer until April 2012. I find no fault in a Parent being reluctant to pull a child from a private school with possible loss of some or all remaining tuition, only months after Student had become acclimated to the new environment. Such a move would makes little sense from either a financial or educational

standpoint unless the District offer were materially different and much greater than it turned out to be.

On the other hand, I conclude that the District's offer in April 2012 was a substantial effort to address Student's needs and previous lack of progress, and that the Parents' reasons for rejecting the offer boiled down to the fact that the offer did not include placement at the School. I cannot find on this record that such a placement was the necessary condition for an offer of FAPE.

#### ESY –TRANSPORTATION

I find the record inadequate to support Parents' claim for transportation to and from the School during the summers of 2011 and 2012. The District offered appropriate ESY services for both summers, and there was no evidence as to why Student could not have taken advantage of it. Since the District offered tutoring in the Wilson curriculum for those summers, there is no evidence that the different providers for ESY could not have coordinated their curricula to fulfill the purposes of ESY.

#### SECTION 504

The parties admit that the IDEA standards suffice to decide all Parents' claims in this matter. There was no evidence that a separate section 504 violation required separate remedy. Therefore, I reach no additional conclusions under section 504, but rest my conclusions on both IDEA and section 504.

## CONCLUSION

I conclude that the District failed to offer Student a FAPE from January 3, 2011 to the end of the 2010-2011 school year and for the 2011-2012 school year. I further conclude that the District offered a FAPE for the 2012-2013 school year. The Parents' private placement was appropriate for Student. Equity does not bar or require reduction of the Parents' entitlement to reimbursement for the cost of tuition at the School for the above time periods. I find no basis to order reimbursement of transportation to the School for summer programming. I order the District to provide compensatory education to Student for the period from October 3, 2010 to December 31, 2010. 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 or provide a free appropriate public education (FAPE) to Student from October 3, 2010 to April 21, 2012.
2. The private school is an appropriate placement for Student.
3. Considering the equities, the hearing officer hereby orders the District to reimburse Parents for all tuition that they have paid to the School for the period January 3, 2011 to the end of the school year in 2011, and the 2011-2012 school year.
4. The District failed to provide Student with equal access to or the equal benefit of the District's educational services from October 3, 2010 to April 21, 2012.
5. The hearing officer hereby orders the District to provide full days of compensatory education to Student for all days in which school was in session from October 3, 2010 until December 31, 2010.

*William F. Culleton, Jr. Esq.*

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

February 28, 2013