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

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 13126-1213 KE

Child's Name: M.D.

Date of Birth: [redacted]

Dates of Hearing: 4/8/13, 4/24/13, 5/1/13, 5/22/13

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents Parents	Parent Attorney Lorrie McKinley, Esquire McKinley & Ryan, LLC 16 West Market Street West Chester, PA 19382
School District Downingtown Area 540 Trestle Place Downingtown, PA 19335	School District Attorney Andrew Faust, Esquire Sweet, Stevens, Katz & Williams 331 Butler Avenue, P.O. Box 5069 New Britain, PA 18901
Date Record Closed:	May 22, 2013
Date of Decision:	June 12, 2013
Hearing Officer:	Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, who is IDEA eligible due to a specific learning disability in reading, resides within the boundaries of the School District. For the past two years, however, Student was enrolled in a private school selected by Parents, who initiated the complaint in this case to obtain tuition reimbursement for the 2011/2012 and 2012/2013 school years. Parents are also requesting reimbursement for an independent educational evaluation (IEE) they obtained in the spring of 2012.

After a settlement was reported in February 2013, the case was provisionally closed for 60 days. Because a final agreement was not satisfactorily completed, however, the case was reinstated at Parents' request and proceeded to a hearing, which was conducted over 4 sessions in April and May 2013. For the reasons explained below, Parents claims are denied.

ISSUES

1. Did the School District offer an appropriate IEP to Student for the fifth grade (2011/2012 school year?

2. Did the School District offer an appropriate IEP in accordance with all procedural and substantive requirements for the sixth grade (2012/2013) school year?

3. If not, are Parents entitled to tuition reimbursement for the fifth grade and/or sixth grade school year?

4. Should the District be required to reimburse the Parents for an IEE that they obtained during the summer of 2012?

FINDINGS OF FACT

1. [Student is a pre-teenaged] child, born [redacted] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 16, 17)

2. Student has been identified as IDEA eligible in the category of specific learning disability in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 16)

3. Parents filed a due process complaint during Student's 4th grade year challenging the appropriateness of the District's special education program for the 2009/2010 (3rd grade) and 2010/2011 (4th grade) school years. The hearing officer issued a decision on July 27, 2011 concluding that the District's reading instruction during 3rd grade denied Student a FAPE, but was appropriate in 4th grade. Student was awarded 1.5 hour/day of compensatory education for the 3rd grade school year. (S-2 (HO Decision dated 7/27/11—ODR # 1530-1011 AS (Valentini))

4. The hearing officer also found that the District's reporting of progress monitoring information during the period in dispute was so difficult to understand that it denied Parents a full opportunity to participate in Student's educational programming because they could not readily determine whether Student was making progress in reading. The hearing officer concluded that the appropriate equitable remedy for that IDEA violation was an order requiring the District to reimburse Parents for the cost of an independent educational evaluation that they had obtained to get a "clearer picture" of Student's progress. (S-2 pp. 28, 29)

5. Although the District had offered a new IEP in February 2011 for the remainder of 4th grade/beginning of 5th grade, the hearing officer decision noted that the proposed IEP had not been approved by Parents. Technically, therefore, the educational program which the hearing officer found appropriate for 4th grade was governed by the prior IEP, dated June 2010. (S-2 p. 12 [Ftnt. 14])

6. The parties considered the February 2011 IEP a reflection of the reading instruction the District had actually provided to Student during 4th grade, and, therefore, acknowledged that the decision concerning the provision of FAPE in 4th grade assessed the appropriateness of the February 2011 IEP proposal. (N.T. pp. 1189, 1190 (Parents' Closing Argument); S-3 p. 1)

7. Parents' claims for ESY for the summer of 2011, which had been included in their 2011 due process complaint, were resolved by the District's agreement to fund a summer program at a private school serving children with reading difficulties. (N.T. pp. 137, 183, 280, 281, ; S-3 p. 2)

8. During the summer of 2011, Parents also enrolled Student in an intensive reading program offered by the independent school psychologist/reading specialist who had evaluated Student several times. Parents also worked with Student at home on a daily basis to practice reading. (N.T. pp. 281—285, 978, 979)

9. Parents were very pleased with the positive change in Student's attitude toward reading that they observed during the summer of 2011, and believed that Student had made significant progress through the intensive reading services Student received over the summer. (N.T. pp. 300—302, 981—983, 997, 1003)

10. After receiving the hearing decision in late July 2011, Parents notified the District, via e-mail of their intention to enroll Student in the private school where Student received the

2011 ESY services for the 2011/2012 school year. During the February 2011 IEP meeting, Parents had also requested a private school placement, which the District had denied. (N.T. pp. 1000, 1001; S-1 p. 14, S-3)

11. In an August 1, 2011 e-mail response to Parents' notice of unilateral private school placement, the District again refused Parents' request for a private school placement during 5th grade, noting the hearing officer's conclusion that the District had offered Student an appropriate educational program during the 2010/2011 school year. The District offered to schedule an IEP meeting prior to the beginning of the 2011/2012 school year at a mutually convenient time to discuss changes to the February 2011,IEP, which it noted would otherwise remain in effect until February 2012. (N.T. pp. 757, 758, 1000, 1001; S-3 p. 1)

12. Parents did not accept the offer of an IEP meeting, and did not otherwise communicate with the District during the early part of the 2011/2012 school year. Parents did not share with the District the results of assessments taken after Student's summer reading programs. (N.T. pp. 1005—1007, 1077, 1078)

13. Parents engaged different attorneys after the July 2011 administrative hearing decision. New counsel initiated an appeal of the decision concerning the 3rd grade school year but not the portion of the decision relating to 4th grade.[1] The appeal resulted in a July 2012 federal court decision affirming the substance of the hearing officer's decision, in particular, the number of hours of compensatory education awarded for 3rd grade, but striking the cost cap placed on the compensatory education award. (N.T. pp. 1069, 1070; *M. D. v. Downingtown Area School District*, No. 02:11-cv-06685-LDD, slip. op at pp. 7—10 {E.D. PA. Aug. 6, 2012])

14. Parents next contacted the District concerning Student's special education program on March 30, 2012, when they requested that the District issue a permission to reevaluate (PTRE) in order to obtain an updated evaluation prior to discussing Student's potential return to the District. (N.T. pp. 1020, 1021; S-4)

15. On April 9, 2012 the District issued the PTRE, on which it listed the types of assessments the District intended to conduct. Parents approved and returned the PTRE on April 13, 2012.[2] (N.T. pp. ; S-5)

16. The District's evaluation included standardized assessments of cognitive potential and academic achievement, language, social/emotional functioning, executive functioning, and curriculum-based reading assessments, as well as separate speech/language and

[1] Parents' counsel in this case was not involved in either the prior administrative hearing or in the subsequent civil action seeking review of the July 2011 decision in district court. Parents' current counsel began representing them in September 2012. (N.T. pp. 1280, 1281)

[2] During the 2011/2012 school year, the District was closed from April 5 through April 9 for spring break. (P-1 p. 2)

occupational therapy (OT) evaluations. The District's evaluation also included two observations of Student in classes at the private school, (N.T. pp. 132—136, 615—620; S-7 pp. 10, 11, 13—26)

17. In addition to the standardized reading assessments administered by the school psychologist, the District reading specialist conducted additional reading assessments, particularly directed toward determining Student's needs in reading instruction and whether reading programs offered by the District would meet Student's needs. (N.T. pp. 1087—1094; S-7)

18. In planning and conducting the reevaluation, the District's school psychologist was particularly interested in determining why, despite average reading comprehension and good phonological awareness, reading fluency remained an area of significant weakness in which Student continued to struggle. The results of a sub-test of the Comprehensive Test of Phonological Processing (CTOPP) assessment included in the District's evaluation indicated that despite good sound recognition, Student has difficulty organizing the sounds to rapidly name a word, which significantly impacts reading fluency. Working memory issues that can adversely affect academic performance in many areas were also identified in the District's evaluation (N.T. pp. 40, 172, 622—625; S-7)

19. On June 18, in the course of an e-mail discussion about additional information needed to complete the District's evaluation report, Student's Mother asked when a meeting would be scheduled to review the District's RR. Approximately a week later, after the District school psychologist requested to meet with Parents for their input to the evaluation report, Mother requested that the meeting include everyone who contributed to the evaluation in order to fully discuss the evaluation results. (N.T. p. 1030; P-4 p. 13, S-6 p.1)

20. After the school psychologist clarified that the meeting she was requesting was not for the purpose of reviewing the RR, but only to assure that it accurately reflected Parents' concerns, Student's Mother met with the school psychologist and sent written input via e-mail on June 27. The school psychologist incorporated Parent's input into the RR. (N.T. pp. 62, 308, 593, 1031—1036; P-4 p. 15, 16, S-6 p. 1, S-7 pp. 7, 8)

21. The District completed the evaluation report on June 28 and mailed it to Parents on July 5. In an e-mail message dated July 16, Parents disagreed with the evaluation report based on what they described as "discrepancies" in reading scores and "omissions of necessary evaluation data," neither of which were further described. Parents requested an IEE to be performed by the independent neuropsychologist who had previously evaluated Student. (N.T. pp. 313—317, 1039; P-5, S-8)

22. Although they did not inform the District, Parents had already arranged for an independent evaluation of Student, which was conducted during the same period that the District was evaluating Student, but included different assessments of cognitive and academic achievement. The IEE assessments were completed by May 25, but the IEE

report was not completed and provided to Parents until August 20. Parents transmitted it to the District on the same day. (N.T. pp. 88, 89, 317—319, 347—350, 1024, 1040, 1044, 1050, 1075; P-15, S-7 p. 13, S-9 p. 1)

23. On July 24, 2012 the District issued a NOREP denying the IEE request. Although Parents disapproved the NOREP, they also withdrew their IEE request and asked for a meeting to discuss the District's evaluation results. (N.T. pp. 79, 80, 1041—1043; S-9 pp. 9, 10)

24. During the summer, District staff discussed developing an IEP based upon the RR. Due to vacations and contract matters, it was difficult to identify a teacher to write an IEP and to assemble all IEP team participants during the remainder of July and most of August. (N.T. pp. 60, 61, 584—586)

25. On August 2, in response to Parents' request, the District offered an RR review meeting/IEP team meeting during the week of August 20, 2012, the teacher in-service week prior to the first day of the 2012/2013 school year for Students, August 27. (N.T. pp. 65, 66, 86, ; P-1 p. 1; S-9 p. 3)

26. Parents followed up with an e-mail on August 13 concerning a meeting date, to which the District responded that it was working on scheduling a specific date during the following week. (N.T. p. 1045; S-9 p. 2)

27. On August 17, 2012 Parents notified the District in writing of their intention to enroll Student in the private school for the 2012/2013 school year and requested payment of tuition. (N.T. pp. 321, 322, 1046, 1047; S-10)

28. On Sunday August 19, the District middle school supervisor of special education e-mailed Parents with an IEP team meeting invitation for the afternoon of August 21 to review both the District's RR and its IEP proposal for the 2012/2013 school year. (N.T. pp. 86, 1047, 1048; S-9 p. 1)

29. Although Parents had previously indicated that they were "flexible" with respect to scheduling an IEP meeting during the week of 8/20, they planned a long weekend visiting family in a different state, including Monday and Tuesday, 8/20 and 8/21. Student's Mother intended to participate in the IEP team meeting via telephone, but was unable to do so because of a medical emergency involving a family member the family was visiting. (N.T. pp. 65, 88, 95, 323, 324, 327, 328, 1058, 1049; S-9 p. 1)

30. The District transmitted a draft IEP to Parents on the morning of the IEP meeting. Student's Father attended the IEP meeting via telephone, but was unable to thoroughly review the draft IEP due to his work schedule. Nevertheless, Parents proposed some changes to the draft IEP, which the District incorporated into a final IEP proposal e-mailed to Parents, who received it on Saturday August 25. (N.T. pp. 91, 92, 97, 327—329; P-1 p. 1)

31. The IEP that the District offered in August 2012 included goals for reading decoding, fluency, comprehension, memory, writing, editing/executive functioning math problem solving and organization. (N.T. pp. 660—668, S-11 pp. 29—37)

32. The proposed IEP also included intensive reading and language arts instruction in a learning support setting for nearly 2.5 hours each day with several research-based reading programs designed to support reading, decoding and comprehension. The IEP also provided for Student to receive math and science in the grade regular education classes, with specially designed instruction directed toward developing organizational skills. (N.T. pp. 736; S-11)

33. In order to provide Student with additional reading instruction, the IEP the District proposed in August 2012 did not include a 6th grade social studies class. Part of the proposed reading instruction would have included a modified social studies curriculum based upon the content provided in regular education 6th grade social studies classes. (N.T. pp. 730, 731, 734; S-11 p. 44)

34. The proposed IEP also replaced "Encore" classes, more generally known as "specials" (art, music, gym) with additional reading instruction. (S-11 p. 44)

DISCUSSION AND CONCLUSIONS OF LAW

The circumstances underlying Parents' claim for tuition reimbursement are a bit unusual in that the District has not actually provided educational services to Student since the end of the 2010/2011 school year (4th grade). Moreover, a due process hearing decision evaluating—and approving—the District's program for Student during that school year was issued approximately a month before the 2011/2012 school year began. (FF 3, 4) Nevertheless, the current dispute over tuition reimbursement arose only days after the parties received the prior decision, when Parents requested and the District refused a private school placement for 5th grade. (FF 10, 11) The parties then had no contact concerning Student's ongoing educational needs for the next seven months, until Parents requested an evaluation at the end of March, 2012.

The parties' dispute took on more usual and familiar contours after the District's evaluation was completed at the end of June 2012. Although the 60 calendar day period for completing an evaluation was suspended when the school year ended on June 11, 2012 Parents

contended that the evaluation report and subsequent IEP proposal were not provided in sufficient time for review and discussion prior to the start of the 2012/2013 school year. Consequently, in addition to their disagreement with the appropriateness of the District's proposed IEP for the 2012/2013 school year (6th grade), Parents argued that the District continued a pattern of denying them the opportunity to fully participate in developing and reviewing Student's educational program and services.

Parents' claim for reimbursement for the IEE they obtained during the summer of 2012 is also presented in a somewhat unusual posture, since Parents had arranged for the evaluation to be conducted during the same time as the District evaluation without informing the District of the independent evaluation. (FF 22) Parents requested reimbursement for the IEE after receiving the District's RR, but withdrew the IEE request before reasserting it as a claim in this case.

Regardless of the somewhat unusual circumstances underlying the tuition reimbursement claim for 5th grade and the IEE reimbursement claim, the usual and familiar legal standards apply to all of Parents' claims and the relevant aspects of the framework that guides consideration of the facts will be set forth first.

Legal Standards

FAPE/ Meaningful Benefit

The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of*

Philadelphia, 575 F.3d at 249. "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, an LEA is <u>not</u> required to provide an eligible with services designed to provide the "absolute best" education or to maximize the child's potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

Tuition Reimbursement Standards

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

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *In Re: The Educational Assignment of Cindy D.*, Special Education Appeals Panel Decision No. 994 (June 27, 2001) A decision against the parents at any step of that process results in a denial of reimbursement. *Id.*

Evaluations/Reevaluations

The federal IDEA regulations include specific requirements for evaluations and reevaluations for disabled students. 34 C.F.R. 300.301, *et seq*. The regulations require that the district must provide a reevaluation in accordance with the evaluation procedures listed in 300.304 through 300.311 "if the district determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if the student's parent or teacher requests a reevaluation. 34 C.F.R. 300.303(a). In addition, the district must ensure that "assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient," 34 C.F.R. 300.304(c)(2), and assessments must be selected and "administered so as best to ensure that if an assessment is administered to a child

with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills, . . ." . 34 C.F.R. 300.304(c)(3). The child must be assessed in all areas related to the suspected disability, including social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. 300.304(c)(4). The evaluation must be sufficiently comprehensive to "identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified," 34 C.F.R. 300.304(c)(6), and assessment tools and strategies that provide relevant information to determine the education needs of the child must be used. 34 C.F.R. 300.304(c)(7).

Independent Educational Evaluations

The IDEA provides that Parents have the right to obtain an independent educational evaluation (IEE) and, if the private evaluation meets the standards of the local education agency (LEA), and parents share it with the LEA, to have the evaluation considered in making decisions concerning the provision of FAPE to a child. 34 C.F.R. §300.502(a), (b)(3), (c)(1). Parents can obtain an IEE at public expense if they disagree with an evaluation obtained by the LEA and it either agrees to fund the independent evaluation or the LEA evaluation is found inappropriate by the decision of a hearing officer after an administrative due process hearing. 34 C.F.R. §300.502(b)(1), (2)(ii). Once a parent has requested an IEE, the LEA "must, without unnecessary delay," file a due process complaint to show that its evaluation is appropriate or assure that the IEE is provided. 34 C.F.R. §300.502(b)(2)(i), (ii).

Burden of Proof in Due Process Hearings

In *Schaffer v. Weast,* 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the U.S. Supreme Court held that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, a component of the burden of proof, which also includes the burden of production or going forward with the evidence. The burden of persuasion is the more important of the two burden of proof elements, since it determines which party bears the risk of failing to convince the finder of fact that the party has produced sufficient evidence to obtain a favorable decision.

The burden of proof analysis is the deciding factor in the outcome of a due process hearing, however, only in that rare situation when the evidence is in "equipoise," *i.e.,* completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). When the evidence on one side has greater weight, it is preponderant in favor of that party, which prevails. When the evidence is equally balanced, the party with the burden of persuasion has produced insufficient persuasive evidence to meet its obligation and, therefore, cannot obtain a favorable decision. In that event, the opposing party prevails. Here, because Parents have not produced sufficient evidence to prevail in light of the legal standards applicable to their claims, allocating the burden of proof to Parents did not determine the outcome.

<u>Parents' Tuition Reimbursement Claim for the 2011/2012 School Year</u>

To support their claim for private school tuition reimbursement for Student's 5th grade year, Parents relied in large part on what can only be described as a reinterpretation of the extensive and detailed findings of fact included in the prior administrative hearing decision. Parents characterized the prior decision as establishing that the District significantly interfered

with their right to participate in developing and reviewing an appropriate educational program for Student. Parents' position, however, does not comport with the proverbial "bottom line," *i.e.*, that in her July 2011 decision, the hearing officer identified two IDEA violations, each warranting a very limited remedy. (FF 4) Most important for this case, however, was the hearing officer's conclusion that the District provided Student with a FAPE during 4th grade, which the District had embodied in an IEP proposed in February 2011. The parties acknowledged that the February 2011 IEP proposal was substantively approved via the July 2011 due process hearing decision. (FF 6) In response to Parents' complaint that the District had not initiated an IEP meeting for the 2011/2012 school year, the District indicated that it intended to implement that IEP through the middle of 5th grade, since it had been developed in February 2011, and, therefore, would remain in effect until February 2012 (FF 6, 10, 11)

In light of the hearing officer's conclusions and order, based on the same evidence that Parents contend so compellingly establishes procedural violations significant enough to constitute a denial of FAPE for 5th grade, it is somewhat puzzling that Parents relied so heavily on the findings of fact in the July 2011 decision to support their tuition reimbursement claim for the 2011/2012 school year. Parents cannot reasonably expect that in a subsequent due process hearing, the next hearing officer will ignore the conclusions of the prior decision, and, in effect, reinterpret the findings of fact to conclude that the District's extant IEP did not constitute an offer of FAPE for 5th grade. That, however, is the only way that Parents could prevail on the first prong of the tuition reimbursement analysis for the 2011/2012 school year.

Parents noted in their closing argument that certain findings of fact in the prior decision that they perceive to be favorable to their position are binding in this matter, but that is not the case. Only the decision is binding, and by the time Parents commenced this case, the prior

hearing officer's decision and order constituted a final order, having been affirmed by a district court decision that was not further appealed. More important, the prior hearing officer's conclusion that Student had made meaningful progress during 4th grade was not even part of the district court action, thereby making it a conclusive determination even before the civil action seeking review of the prior hearing decision was concluded.

When Parents notified the District of their intention to enroll Student in a private school and requested that the District fund the private placement, the District responded by noting that the hearing officer found that the 4th grade educational program it had provided Student was appropriate. At the time of its August 2011 response to Parents request for a private school placement, the District was amply justified in maintaining the position that private school was unnecessary because the District was offering Student a FAPE. The District's response was based upon the most important information it had at the time, *i.e.*, a hearing officer decision reviewing and approving the educational program it had provided to Student in 4th grade. Although Parents may have firmly believed that the hearing officer's decision was wrong in concluding that Student had made meaningful progress in 4th grade, as suggested in their July 28, 2011 e-mail message to the District stating that the hearing officer's conclusion contradicted her findings of fact, the decision was nevertheless in effect from the date it was issued until and unless reversed. The District, therefore, had no reason not to stand on its existing IEP in August 2011. The District could not reasonably or realistically have been expected to consider funding a private school placement at that time under the circumstances.

Nevertheless, when Parents complained that the District had not scheduled an IEP meeting to review Student's program for the beginning of the 2011/2012 school year, it promptly offered to do so, although it was unaware that Parents had additional information about Student's

progress in reading from the summer tutoring and private school summer program. Notwithstanding that information, which Parents had not provided to the District, Parents testified that they didn't see the need for an IEP meeting, since they had been asking for a private placement since February 2011 and the District was adamant in refusing it.

To have any hope of persuading the District to a different view, however, Parents absolutely needed to provide the District with updated information concerning Student's summer reading instruction. Although during the due process hearing in this case, the District questioned the accuracy of the results of the summer reading programs, and such information still may not have convinced the District to fund the private school placement, the District's response can only be a matter of speculation at this time because it is impossible to know how the District would have received the reading progress information in August 2011. In the absence of such information, however, the District had no reason to consider Parents' request to fund Student's private school placement. Parents cannot hold the District responsible for failing to take into account information that Parents did not share with it at the time.[3]

Ultimately, of course, Parents' July 2011 prediction of a reversal of the hearing officer's decision was wrong: the district court affirmed the substance of the portions of the prior hearing decision that had been appealed, which did not include the appropriateness of the 4th grade educational program. That outcome, however, is actually irrelevant to whether the District acted reasonably and in accordance with IDEA procedural requirements when it offered an IEP

[3] After the complaint was filed win this matter, the District submitted a motion to dismiss contending *inter alia.*, that the issues concerning the 2011/2012 school year should not be considered based upon the prior hearing officer decision. Even if the District was aware at the time that the progress information compiled after the summer 2011 program had not been provided to the District, it was not a matter of record until the hearing in this case and, therefore, could not be considered as a basis for a pre-hearing dismissal of the claim. As noted in the ruling denying the motion, the complaint suggested that information relevant to the appropriateness of the District's offer of FAPE for 5th grade became available after the prior hearing record closed and the decision was issued, and, indeed, that is accurate. There was, however, no way to determine from the face of the complaint that the information had not been provided to the District prior to the 2011/2012 school year.

meeting in response to Parents' 10 day notice of private school placement in early August 2011. Parents did not act reasonably in ignoring the offer to meet and in not otherwise providing the District with information that may have prompted the District to consider changes to the IEP in place, although it had just been approved after a full due process hearing.

There is, therefore, no basis for awarding tuition reimbursement for the 2011/2012 school year, since the IEP that would have continued into 4th grade had been found appropriate by a hearing officer decision, and the District had no information suggesting that changes to the IEP might be warranted.

Parents' Tuition Reimbursement Claim for the 2012/2013 School Year

In reviewing the evidence relating to Parents' claim that the District failed to offer a FAPE to Student for the 2012/2013 school year, it was striking to realize that Parents presented virtually no evidence to establish that the District's IEP offer in August 2012 was substantively inappropriate. Rather, to establish the first and most essential requirement of their tuition reimbursement claim for the 2012/2013 school year, Parents relied most heavily on purported procedural violations by the District, which they contend amounted to a substantive denial of FAPE. Parents' arguments centered on the amount of time it took for the District to complete its reevaluation report, the lack of opportunity for a review meeting, and the District's provision of a draft IEP and scheduling of an IEP meeting less than a week before the District school year began, all of which they contended significantly interfered with their right to participate in the development of an appropriate program and placement for Student for the 2012/2013 school year. Although the timing of the IEP meeting so close to the beginning of the school year was certainly not ideal, it did not amount to a procedural violation, much less constitute a denial of FAPE, since an appropriate IEP offer was made prior to the first day of school. Parents had the

opportunity to request adjustments before the school year began, as well as afterward, had Parents been willing to meet with the District to work out their objections to the IEP. Parents, however, showed little more inclination to do that at the beginning of the 2012/2013 school year than they had the previous year.

Moreover, the timing of the evaluation was affected by Parents' actions both as the evaluation was beginning and just before the RR was completed. Although it may have appeared to Parents that requesting an evaluation of the District on March 31 would provide sufficient time to complete it by the end of the school year, that was not really the case. First, as the District pointed out, it needed a few days after the request to determine the scope of the evaluation based on a review of Student's records before issuing the PTRE in response to Parents' request. That request, however, came just a few days before spring break, when the District was closed for several days. In addition, Parents took several more days to return the PTRE. By the time Parents signed and returned it, the 60 calendar days the District had to complete the evaluation extended past the end of the school year. At that point, the 60 day timeline was suspended in accordance with Pennsylvania regulations. (22 Pa. Code §14.123(b)). Finally, completion of the evaluation report was delayed from the middle to the end of June due to the lack of Parent input and some records requested from the private school. (FF 19, 20) Under Pennsylvania standards, the District committed no procedural IDEA violation by not completing the reevaluation until late June, and as a matter of equity, cannot be faulted for not completing it sooner under the circumstances.

In addition to the procedural issues relating to the timing of the District's evaluation and of the August 2012 IEP meeting, Parents raised questions about the reading instruction in the proposed IEP, whether District staff could have appropriately implemented it and the proposals

that Student not participate in the regular 6th grade social studies curriculum or in "specials," art, music and gym in order to receive additional reading instruction.

Parents' concerns about reading instruction and implementation of the IEP the District proposed for the 2012/2013 school year do not establish that the IEP was not likely to yield meaningful educational benefit. On its face, the proposed IEP provided for goals and specially designed instruction reasonably calculated to appropriately address Student's identified needs and yield a meaningful educational benefit. (FF 31, 32) Moreover, based upon the thorough evaluation the District conducted, Student's continuing deficits in reading, particularly reading fluency, were placed in the broader context of deficits in working memory and executive functioning skills that have the potential for a much broader negative impact on Student's academic functioning than the reading deficits alone. (FF 18) The District's proposed IEP also included goals and specially designed instruction to address the effects of Student's working memory and executive functioning deficits.

Parents' concerns about eliminating classes for Student that are available to non-disabled peers in order to provide additional reading instruction have much more substance, but still do not establish that the District's IEP proposal was either a denial of FAPE or discrimination on the basis of disability. Although participation in the general education curriculum is an important IDEA goal, the statute also provides for modifications to the curriculum and replacement instruction as necessary to meet disability-related needs. Here, as Parents certainly recognized, Student continues to have significant needs in reading, but has shown good potential for improvement with intensive instruction, as the District proposed in its August 2012 IEP proposal. In addition, Student would have received some social studies content in the context of some of the additional reading instruction. (FF 32) Student receives all content instruction in a

similar fashion in the private school, while the District proposed to modify only social studies instruction for 6th grade.

Parents provided much testimony concerning Student's academic success and improvement in emotional functioning in the private school. It is certainly understandable that Parents would prefer to keep their child in a setting in which they have noted improvement in many areas other than academics, including increased satisfaction with school. The IDEA, however, does not provide for a comparison of the relative benefits of public and private school in determining whether parents may obtain public funding for a private school placement.

Once a public school district makes FAPE available to an eligible child, evidence tending to support the appropriateness of the private school--or to establish that it is not, becomes irrelevant. As noted above, an eligible student is entitled to an appropriate, not an ideal education. Because the District offered an appropriate IEP for the 2012/2013 school year, Parents are not entitled to tuition reimbursement for their unilateral private placement.

IEE Reimbursement

Parents initially met the IDEA procedural requirement for obtaining an IEE by objecting to the District's evaluation after receiving it in July 2012, but they subsequently withdrew their IEE request, thereby removing the District's obligation to proceed with a due process hearing to support the appropriateness of its evaluation. Although there are some circumstances in which equitable considerations would support payment for an IEE, such as when a school district uses otherwise unavailable information from an IEE to develop an appropriate IEP or does not need to conduct its own evaluation because parents provided a comprehensive evaluation, no such circumstances exist in this case. As both Parents testified, their initial purpose in arranging for a private evaluation in addition to the District evaluation was simply to obtain a second opinion.

Parents are certainly free to obtain an IEE at their own expense for that purpose, but cannot obtain public funding for it unless the District's evaluation is inappropriate, or when there is a compelling equitable basis for it.

Here, the District's evaluation was comprehensive and certainly assessed Student in all areas of suspected disability. (FF 16, 17, 18) The District's evaluation also identified the underlying basis for Student's continuing difficulties with reading fluency, and identified needs in a number of areas that affect academic performance, such as weaknesses in attention, executive functioning and working memory. The District's evaluation, therefore, certainly met IDEA standards for an appropriate evaluation and was far more comprehensive than the IEE for which Parents requested reimbursement. There is, therefore, no basis for ordering the District to reimburse Parents for the costs of the IEE.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claims in this matter are **DENIED.** The School District is not required to reimburse Parents for private school tuition paid for the 2011/2012 and 2012/2013 school years and or for the independent educational evaluation Parents obtained in 2012.

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

Anne L. Carroll

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Anne L. Carroll, Esq.
HEARING OFFICER

June 12, 2013