

*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

### FINAL DECISION AND ORDER

Student's Name: F.C.

Date of Birth:

ODR No. 13322-1213AS

### CLOSED HEARING

Parties to the Hearing:

Parents

Norristown Area School District  
401 North Whitehall Road  
Norristown, PA 19403

Representative:

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Date of Hearing: 02/21/13, 02/28/13, 04/09/13, 04/11/13, 05/22/13

Record Closed: June 14, 2013<sup>1</sup>

Date of Decision: June 28, 2013

Hearing Officer: Brian Jason Ford

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<sup>1</sup> The record closed upon the Hearing Officer's receipt of the parties closing briefs.

## **Introduction**

This case concerns the educational rights of the Student, and arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* An extensive record was developed over five hearing sessions. In essence, the Parents allege that the Student was denied a Free Appropriate Public Education (FAPE) while attending the District. As a result of the deficiencies in the District's programming, the Parents enrolled the Student in a private school. In this hearing, the Parents seek compensatory education to remedy the denial of FAPE and tuition reimbursement for the private school placement.

## **Issues**

1. Was the Student denied a FAPE between December 2010 and the Student's enrollment in a private school? If so, what amount of compensatory education constitutes an appropriate remedy?
2. Are the Parents entitled to reimbursement for the cost of the Student's tuition at a private school incurred during the 2012-13 school year?

## **Findings of Fact**

At my direction, the parties submitted post-hearing briefs with proposed findings of fact. The parties' proposed findings of fact differ considerably in terms of their emphasis, detail, and phraseology. In substance, however, the vast majority of the parties' proposed findings do not contradict each other. Many of the parties' proposed findings actually overlap each other in substance. To the extent that they are substantively identical to each other, or do not conflict with each other, and are consistent with the evidence and credible testimony in this case, I have adopted some of the parties' proposed findings as my own. I have also made findings suggested by neither party, and have declined to adopt several of both parties' proposed findings.

It is noteworthy that in this case, as in the vast majority of special education due process hearings, the lion's share of the facts are not in dispute. The extent to which the parties have submitted voluminous, non-conflicting or substantively identical proposed findings of fact is part of an increasing body of evidence suggesting that stipulations are under-used in these administrative proceedings. The extent to which disputants can stipulate to non-disputed facts in advance of hearings increases efficiency, reduces costs to both parties, and enables the parties and the hearing officer to focus on those facts that are truly in dispute - of which there are several in this case.

The Parents seek remedies starting in December of 2010 – approximately half way through the Student's first grade year. A considerable record was developed about the periods before December of 2010. I agree with the parties that detailed information about the Student's education prior to the claims period is important to the analysis of

this case. This case, however, should not be taken as an invitation in other hearings to develop extensive records concerning periods of time for which no relief is sought.

## **Background**

1. Student's date of birth is [redacted].
2. Mother testified that she began to see problems with Student as early as seven months old. (NT at 1538).
3. Student was initially diagnosed with pervasive developmental disorder not otherwise specified (PDD-NOS) at the Children's Hospital of Philadelphia (CHOP) on April 16, 2008. (S-5, p. 1; S-8).
4. The CHOP referred the family to the County Intermediate Unit (CIU) for an evaluation for early intervention. (NT at 1540).
5. On April 2, 2008, the CIU evaluated the Student and found deficits in fine and gross motor skills, speech, processing, and socialization. (NT at 1540, 1541).
6. Upon determining that the Student was eligible for early intervention, CIU also prepared a Functional Behavior Assessment (FBA) to address the Student's behavioral problems, including inattention and refusals to do non-preferred activity. (S-2 p. 1; NT at 1542).
7. The Student attended a specialized, integrated, community-based pre-kindergarten program, which provided one-to-one (1:1) services per the Student's individualized education plan (IEP). (S-3; NT at 1543, 1544).
8. More specifically, the Student received support from a TSS 15 hours a week and a BSE 3 hours a week, using strategies of applied behavioral analysis, working on improved eye contact and behavior around peers. (S-5, p. 1). The TSS accompanied Student 2 hours per day 5 days per week at the school. (S-5, p. 1).
9. At this time, the Student also worked with a private S/L therapist, as well as with a school-provided OT and S/L therapist. (S-5, p. 1; S-8, p. 1).
10. The pre-kindergarten IEP addressed behavioral concerns and the Student's speech-language needs. S-3; N.T. 1544. The IEP states that the Student expressed a 25% delay in the areas of speech-language, fine motor, social, and cognitive skills. S-3 at 8.

## **Preparation for Kindergarten - The District's First Evaluation and IEP**

11. On March 16, 2009, the District completed an evaluation of the Student in preparation for transition to kindergarten for the 2009-10 school year. (NT at 182-184; S-8).

12. The District's reevaluation report (2009 RR) was prepared by M.M., a District-employed, certified school psychologist. (NT at 183; S-8). As part of the RR, a District-employed autistic support teacher observed the Student in the preschool setting. (NT at 187; S-8, p. 2-3). The Student was also evaluated for OT and for S/L services. (190; 196; S-7; S-8, p. 7-19).
13. The District's S/L evaluation identified that the Student was making various articulation errors and scored in the low average range in receptive language/auditory comprehension. (S-7, p. 7-8). The evaluator was not able to assess the Student's expressive language because the Student hid under a table. (S-8 p. 7-8). It was recommended that Student receive itinerant S/L services 1 time per week. (NT at 1104-1105; S-8, p. 7-8).
14. The District's OT evaluation identified that Student had fine motor and sensory needs, and recommended OT services during the Student's kindergarten and first grade school years. (NT at 191; S-7; S-8).
15. The information from the S/L and OT evaluations was incorporated into the District's report and was considered in the development of the Student's kindergarten program. (190-191; 196; S-7; S-8, p. 8).
16. The 2009 RR identified Student's needs to be in the academic areas of reading, math and writing. (185-186; S-8). The 2009 RR also identified needs regarding the Student's ability to follow directions within the classroom setting, impulse control, social skills, interpersonal relationships, and communicating and interacting with peers. (NT at 186; S-8 p. 18; S-10, p. 7).
17. According to the 2009 RR, the Student's General Ability Index ("GAI") was rated as 107, in the 68th percentile. (S-8 at 6). L.W., the Student's kindergarten and first grade teacher, believed this to be an accurate assessment of the Student's cognitive ability. (NT at 441). L.W.'s testimony was highly credible.<sup>2</sup>
18. At the time of the 2009 RR, the Student required small group instruction, mixed and varied activities and a highly structured classroom. (NT at 187).
19. The 2009 RR stated: "As previously noted, [Student] had difficulty consistently following directions and attending tasks. When given 1:1 assistance [Student's] attention and participation was notably better." (S-8 p. 10, 11).
20. The 2009 RR concluded that Student had a disability, specifically Autism, with a secondary disability of S/L impairment, and that Student was in need of specially designed instruction. (192; S-8, p. 18).

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<sup>2</sup> Even though she does not have the same credentials as those who conducted the various evaluations, both parties described L.W. as an excellent teacher who was, very clearly, highly knowledgeable about the Student and about the instruction of students with Autism.

21. The District's first IEP was prepared in April of 2009 prior to the start of Kindergarten in the fall of 2009 (April 2009 IEP). An IEP meeting was held on April 2, 2009 and was attended by Parents, L.W. (the Student's K and 1st grade teacher), M.K. (LEA representative), M.M (the school psychologist and principle author of the 2009 RR) and M.H. (the District's S/L therapist). (NT at 185; 192; S-10, p. 2).
22. Per the April 2009 IEP, the Student was to receive full time Autistic Support<sup>3</sup> along with speech-language services (1 time per week for 30 minutes each session, pull-out) and direct occupational therapy (2 times per week for 30 minutes each session). (S-8; S-10 p. 6, 19, 21; S-11 p. 3). The 2009 IEP contained goals for both expressive and receptive language. (S-10 p. 16, 17).
23. The April 2009 IEP contained a reading goal to address Student's identified needs in identifying letters, letters sounds and sight words. (NT at 200; S-10, p. 10). The April 2009 IEP also included SDI and program modifications in providing instruction to Student in reading, which included a hierarchy of least to most intrusive prompting and teacher-made and teacher-adapted materials. (NT at 200; S-10, p. 18-19).
24. The April 2009 IEP contained a math goal to address Student's identified needs in rote counting, number identification, and constructing sets. (NT at 200-201; S-10, p. 12). The IEP also included SDI and program modifications in providing instruction to Student in math, which included a hierarchy of least to most intrusive prompting and teacher-made and teacher-adapted materials. (S-10, p. 18-19).
25. The April 2009 IEP contained a writing goal to address Student's identified needs in letter formation, writing [Student's] name, and coloring. (202; S-10, p. 11). The IEP also included SDI and program modifications in providing instruction to Student in writing. (S-10, p. 18-19).
26. The April 2009 IEP contained two goals to address Student's needs in play and social skills, which included progressing Student's play from parallel play to cooperative play with peers as well as commenting, answering and asking on-topic questions with teachers and peers. (NT at 203-204; S-10, p. 14-15).
27. The April 2009 IEP included SDI and program modifications to address the Student's play and social skills, including modeling, visual supports, small group instruction, and positive reinforcement. (NT at 206-207; S-10, p. 18-19).
28. The April 2009 IEP contained a behavioral goal targeting the Student's ability to follow directions within the classroom setting. (NT at 226-227; S-10, p. 13). Although not specifically contained within the IEP, a weighted scoring rubric was utilized with this goal to assess the skills Student needed to follow directions. (NT at 226-228).

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<sup>3</sup> The AS placement was located in one of the District's elementary schools, but not in the Student's neighborhood school.

29. The April 2009 IEP included SDI and program modification to address the Student's behavioral needs, including a parent-teacher communication book, behavioral supports, a transition area, positive reinforcement (including edibles and tangibles), modeling, small group instruction, low student/teacher ratio, a sensory diet, varying activities, a token economy, a picture schedule and visual supports. (S-10, p. 18-19).
30. Some of the SDIs and modifications in the April 2009 IEP are derived from the models in place in the Autistic Support classroom. That does not, *per se*, make the SDIs and modifications inappropriate for the Student.
31. The IEP included two goals to address Student's needs in improving pragmatic skills and comprehension of WH- questions. (S-10, p. 16-17). These goals were to be addressed as part of the S/L services provided to the Student.
32. The District offered the April 2009 IEP to the Parents via a Notice of Recommended Educational Placement (NOREP), which Parents approved and signed. (NT at 198; S-11, p. 3).

### **Kindergarten (2009-10 school year)**

33. Through the entirety of the 2009-10 school year, the Student attended a full-time Autistic Support classroom. There were seven (7) other students in the Student's classroom with one (1) teacher and two (2) paraprofessionals, yielding a 3:7 adult to student ratio. (S-16; NT at 229, 452, 453, 1546, 1548).
34. Through the entirety of the 2009-10 school year, the Student received 1:1 support in reading. (NT at 283, 284).
35. On March 11, 2010, the IEP team reconvened for an annual review of Student's IEP to update Student's then-current educational levels and to create new IEP goals and objectives based on [Student's] needs. (NT at 223-224, 327, 1106; S-18). The result of that meeting is an IEP dated March 11, 2010 (March 2010 IEP). That IEP was approved and implemented for the remainder of the 2009-10 school year.
36. The March 2010 IEP team meeting was attended by the Parents, L.W. and M.K. New team members (as compared to the prior meeting) included Z.H. (replacing M.H. as S/L therapist) and L.B. (the District's OT).
37. The March 2010 IEP continued to place the Student in full-time Autistic Support with itinerant S/L services 2 times per week for 30 minutes each session and direct OT 2 times per week for 30 minutes each session. (S-18, p. 23, 25-28).
38. The March 2010 IEP reports Key-Math 3 testing, which found the Student's grade equivalent was K.0 in all areas of math. (S-18 at 6; NT at 461).

39. The March 2010 IEP reports the results of a Preschool Language Scale (PLS-4), which was administered in in January 2010. On that assessment, the Student received a standard score in Expressive Communication of 78 (the 7th percentile). The Student's Auditory Comprehension standard score was 83 (the 13th percentile). (S-18 at 6). As a result, the Student's "scores reflect a continued receptive and expressive language disorder". (S-18 at 6).
40. Immediately prior to the March 11, 2010 IEP team meeting, L.B. drafted an OT progress report, dated March 5, 2010. According to that report, the Student had made progress toward OT needs (improving attention to task and using a consistent mature pencil grip). (S-15, p. 1-2).
41. The March 2010 IEP contained two reading goals to address the Student's identified needs in phonological processing and sight word recognition. (S-18, p. 14-15).
42. The March 2010 IEP contained a writing goal to address the Student's identified needs in drawing, letter formation, spacing, capitalization, punctuation, and copying sentences. (S-18, p. 16).
43. The March 2010 IEP contained a math computation goal to address the Student's identified needs in rote counting, operational symbol identification, and constructing sets. (S-18, p. 17).
44. The March 2010 IEP contained a life skills goals to address Student's needs in play and social skills, which included progressing Student's conversations with teachers and peers and answering and asking on-topic questions. (S-18, p. 18).
45. The March 2010 IEP continued to provide S/L services in the speech classroom 2 times per week for 30 minutes each session. (S-18, p. 23). The IEP included one S/L goal to address Student's needs in remediating phonological processing errors. (S-18, p.21). Through this goal Student was able to work on blending and segmenting words as well as identification of rhyming words. (NT at 335-337). As such, the S/L services provided through the March 2010 IEP were directed towards the Student's ability to speak, as opposed to the Student's ability to participate in conversations.
46. The March 2010 IEP continued to provide direct OT services 2 times per week for 30 minutes each session. (S-18, p. 23). Three OT goals were developed in order to address Student's needs in improving visual perceptual, fine motor and sensory processing skills. (S-15, p. 1-2).
47. After some revisions, the District offered the IEP to the Parents via a NOREP, which Parents approved and signed. (NT at 198; S-11, p. 3).
48. After the March 2010 IEP meeting, the District referred the Student for a PT evaluation at Parents' request. (S-20, p. 1). The District conducted the PT evaluation in May 2010 and determined that Student's gross motor development was within typical range for [Student's] age and that [Student] did not qualify for PT services. (NT at 319-320; S-20, p. 2).

49. By the end of the Student's kindergarten school year, Student was able to use the color-coded picture schedules to enter into the classroom, unpack, follow the morning routine, and engage in the morning activities independently. (237; 247-248; S-74).
50. A token economy system and a visual behavior management system (in which Students contemporaneously assess their own behavior) was used throughout the 2009-10 school year in the Autistic Support classroom. This is reflected in the Student's IEPs. (NT at 251; 257; S-10, p. 18-19; S-18, p. 22-23). Credible, unruffled testimony indicates that these systems were beneficial to the Student. (See, e.g. NT at 255-259).

### **First Grade (2010-11 school year) – Start through Inclusion Plan 1**

51. The Student started the 2010-11 school year pursuant to the March 2010 IEP, in the same full time Autistic Support classroom with the same teacher, L.W., with the same 3 to 6 or 7 adult to student ratio. The same token economy and behavior management systems were in place. The Student continued to receive pull-out S/L and OT services by the same providers.
52. Starting in December 2010 (coincidentally, the start of the claims period in this case), the District identified the Student as a candidate for a program called "Include Me From the Start." (NT at 393-394; 396-397). I take notice that Include Me From the Start is an initiative of the Arc of Pennsylvania, with cooperation from the State, under which schools receive technical assistance to include students with significant disabilities to a greater extent.
53. Un-rebutted, credible testimony indicates that the Student was selected for Include Me From the Start based on the Student's performance in the Autistic Support classroom. (NT at 393-394; 396-397).
54. After this selection, the District (through L.W.) communicated with the Parents frequently, and coordinated with them, to develop plans to increase the Student's level of inclusion. None of these plans were drafted or implemented pursuant to the ordinary IEP process. The District, however, advised the Parents of its actions at every turn, shared the plans with the Parents, solicited their feedback, and sought and obtained their consent before implementing each of the inclusion plans.
55. Prior to the inclusion plans, the Student was included only for lunch, recess and extracurricular activities.
56. On January 24, 2011, Student began to be included in the general education 1st grade classroom for special area classes as well as instruction in social skills. (NT at 389; 391; 396-397; S-70, p. 1).
57. S.T. was the Student's regular education teacher when the Student was included in 1st grade. The Student was accompanied by a paraprofessional, Ms. T., during transitions from the Autistic Support class to the regular education class. Ms. T.



remained with the Student when the Student was educated in the regular education class. (NT at 1547).

58. Prior to the Student's increased inclusion, Ms. T. worked with the Student as a paraprofessional assigned to the L.W.'s Autistic Support classroom.
59. Ms. T. was able to redirect the Student if the Student became distracted in the regular education classroom. (NT at 1549).
60. During the implementation of the initial inclusion plan, L.W. observed the Student in the regular education classroom, coordinated with the other teachers and professionals who worked with the Student, and shared her experiences with the Student and the strategies she had implemented. (See NT at 397-400).
61. There is some ambiguity as to whether the Student also started attending a 40 minute reading period in a regular education classroom under the first inclusion plan. That ambiguity notwithstanding, the District – via L.W. and in close collaboration with the Parents – decided to increase the Student's inclusion again in March of 2011.

#### **First Grade (2010-11 school year) – Inclusion Plan 2 and March 2011 IEP**

62. A second inclusion plan started on March 7, 2011. (S-70). Like the first plan, the second plan was not part of the Student's IEP, but was developed by L.W., in collaboration with her colleagues, and with the Parents' consent.
63. Under the second inclusion plan, the Student attended a 90 minute regular education reading program, that was divided into two 45 minute blocks. (S-70 p. 6; NT at 391). Ms. T. attended the first 45 minute reading block, "to assist [the Student] with learning the new routine as well as learn how to accurately, appropriately and independently use and transition from each literacy center." (S-70 p. 4; NT at 1550).
64. There is conflicting testimony about the "smoothness" of the second inclusion plan. I find that implementation of the second inclusion plan was neither as flawless as the District would suggest nor as rough as the Parents urge. More specifically L.W. observed the Student during the 90 minute reading period. Her testimony that the Student followed classroom rules, participated in instruction, and answered questions indicating that the Student read and understood materials is all credible. (NT at 401-404). It is also true that S.T. (the regular education teacher) was aware of the transition plans, had an "at a glance" copy of the Student's IEP, and provided accommodations and modifications to the Student, including significant redirection. (NT at 1551-1555).
65. On March 17, 2011, the IEP team reconvened for an annual IEP team meeting. (NT at 1108; S-24). The March 17, 2011 IEP meeting was attended by Parents, L.W., S.T., M.H. (a LEA representative, not the S/L therapist mentioned above), and L.B.(OT). (S-24, p. 2).

66. As a result of the March 17, 2011 IEP team meeting, the District revised the Student's IEP, offering supplemental autistic support services in the self-contained autistic support classroom for all subjects and activities except for the reading block that the Student was already attending, special areas, lunch, assemblies, field trips and school-wide events, as well as itinerant S/L services 2 times per week for 30 minutes each session and direct OT two times per week for 30 minutes each session. (NT at 1108; S-24, p. 27, 32-33).
67. In essence, the IEP of March 17, 2011 (March 2011 IEP) brought the Student's IEP placement in line with the Student's actual placement, per the agreed-to inclusion plans.
68. Programmatically, the March 2011 IEP provided re-teaching or pre-teaching of reading, math and writing skills and social skills instruction within the special education classroom setting. (S-32, p. 32).
69. The March 2011 IEP updated the Student's present education levels. (S-24, p. 5-11). According to testing, the Student was performing at a kindergarten level in all math areas except for operations. (S-24 p. 6-8; NT at 473). At the same time, Woodcock Johnson testing assessed the Student to be at the first grade level.
70. [Finding omitted in original.]
71. The March 2011 IEP identified Student's educational needs as: improving academic and writing skills, improving ability to follow directions in a large group setting, and improving articulation of affricate sounds. (S-24, p. 11).
72. The March 2011 IEP updated the Student's OT needs, which included improving [Student's] attention to task and fine motor and visual perceptual skills. (S-24, p. 10).
73. The March 2011 IEP contained one reading goal to address the Student's identified needs in phonological processing and sight word recognition, and included a weighted rubric to monitor [Student's] progress. (S-24, p. 16). The IEP also included SDI and program modifications directly related to the reading goal, including "wait time", visual supports, "masking" of worksheets or books to decrease visual distractions of assignments, positive reinforcement, modeling, repetition, guided practice, and a hierarchy of least to most intrusive prompting. (S-24, p. 17).
74. The March 2011 IEP contained two math goals to address Student's identified needs in telling time, identifying and drawing lines of symmetry, recognizing patterns, describing data from diagrams, graphs and charts, representing equivalent forms of the same number, rote counting, and basic math facts in addition and subtraction. (S-24, p. 18-19). The IEP also included SDI and program modifications in providing instruction to Student in math. (S-24, p. 17).
75. The March 2011 IEP contained a behavioral goal to improve the Student's ability to follow directions in the large group setting, to complete work independently, and to raise a hand to respond and answer questions. (NT at 428-429; S-24, p. 21). The

IEP also included SDI and program modifications in to address behavioral needs, including preferential seating, allowing for wait time, visual supports such as a classroom behavior management system and a visual schedule, positive reinforcement, peer buddies, small group instruction, parent-teacher communication book, advance notice of changes in schedule or routine, and a token economy. (338; S-24, p. 25-26).

76. The March 2011 IEP included one S/L goal to address Student's needs in remediating phonological processing errors. (S-24, p. 20).
77. The March 2011 IEP included three OT goals were to address Student's visual perceptual, fine motor and sensory processing skills. (S-24, p. 22-24).
78. Through the March 2011 IEP, the District offered Extended School Year (ESY) in the full-time autistic support classroom during the summer of 2011. (S-24, p. 30-31). The ESY offer also included OT and S/L services 1 time per week for 30 minutes per session during ESY. (S-24, p. 31).
79. Pragmatic, expressive, or receptive language goals were not included in the March 2011 IEP. (S-24).
80. The March 2011 IEP stated that the Student was having difficulty following directions and suffered from test anxiety. The box indicating that the Student exhibits behaviors that impede learning was not checked. (S-24 at 5, 6; NT at 1645).
81. The Parents approved the March 2011 IEP via a NOREP dated March 17, 2011. (S-25, p. 3).

### **First Grade (2010-11 school year) – Inclusion Plan 3**

82. A third inclusion plan, separate from the March 2011 IEP, was created and implemented with the Parents' consent on March 28, 2011. Per that plan, the Student was included in the 1st grade general education classroom for the 90-minute math block. (393; 406; S-70, p. 8-10).
83. The third inclusion plan was suggested by L.W., who credibly testified that the proposal for even greater inclusion was based on her knowledge of the Student's presentation in the regular education programs and placements under the first two inclusion plans. (NT at 407).
84. Under the third inclusion plan, the Student was provided 1:1 assistance in math, "to assist [] with learning the new routine as well as be able to re-teach or pre-teach a math lesson during a math center activity." (S-70 at 8; N.T. N.T. 1552). Ms. T., again, was the assigned paraprofessional.
85. Ms. T. was never formally labeled or designated as a 1:1 aide.

86. The Parents were in agreement with the increased inclusion in math, with the appropriate supports in place. (NT at 407; S-24, p. 3; S-70, p. 8-10). This schedule continued for the balance of the Student's 1st grade school year. (408).

### **First Grade (2010-11 school year) – Overall Progress**

The progression of the Student's programs and placements throughout first grade (detailed above) is not truly disputed. There is a significant dispute about what quantum of progress, if any, the Student made during the 2010-11 school year. Regarding the Student's progress in first grade, I find as follows:

87. In broad terms, L.W. (who I find to be highly credible) testified that, in her opinion, the Student made meaningful progress during the 2010-11 school year. (NT at 351-354; 417; 425. L.W. shared this opinion with the Parents at various times during the 2010-11 school year. L.W.'s recommendations to increase the level of the Student's inclusion was based, in large part, on what she viewed as the Student's successful participation in regular education classes.

88. In reading, the District assessed the Student using a Writing and Reading Assessment Profile (WRAP). The WRAP is an individual reading assessment where students are given an oral reading passage (that is, the Student reads the passage out loud; the passage is not read to the Student) and then was asked to retell the story and then answer questions regarding the passage. As assessed on the WRAP, the Student had increased the instructional level by at least four levels during the first grade school year. (NT at 419-420). From March to the end of 1st grade the Student's WRAP level went from a level "G" to a level "I" in the general education classroom setting. (NT at 420). WRAP levels do not directly correspond to grade levels, but increasing a WRAP level indicates mastery of skills tested at the lower level.

89. Regarding math, in May of 2011, the Student could accurately answer single digit addition problems, expressively and receptively identify operation symbols, and use blocks to add 2 number sets together with sums up to 10. (S-22, p. 16-17). By the end of the 2010-11 school year, the Student was able to solve single digit subtraction problems with visual or verbal cues. (S-22, p. 25). Further, in an IEP derived from the 2011 RR, results of a KeyMath 3 test revealed that the Student was still functioning below grade level, but that scores improved somewhat. Evaluators noted that the most current KeyMath 3 results could be depressed due to the increased use of language in the KeyMath test at higher levels, and the Student's text anxiety. (S-32, p. 7-8).

90. The record as a whole generally supports the District's contention that the Student met expected progress on S/L IEP goals. (NT at 1110-1115; S-32, p. 20-21; S-22, p. 26; S-32, p. 9). The Student also made some progress towards OT IEP goals. (S-22, p. 27-29)

91. There is considerable, albeit informal and sometimes anecdotal, evidence that the Student made social and behavioral progress during 1st grade. For example, L.W. testified that the Student's ability to follow classroom directions improved over the 2010-11 school year (NT at 287-288; 332-333; 351-353; 420). Progress reports towards corresponding goals says the same. (S-22, p. 18-20). It is unclear, however, whether objective data or informal observations were used to yield these conclusions. Similarly, to the extent that objective data was collected, it is not clear how closely that data is linked with actual IEP goals. As a result, it is difficult to objectively examine the Student's progress on a goal-by-goal basis (S-22 at 7, 12; NT at 466).

### **June 2011 Reevaluation**

92. The Parents were concerned that their observations of the Student at home did not comport with the progress that the District reported. Due to that, and their belief that additional information was needed in order to develop an appropriate 2nd grade program for the Student, the Parents requested a reevaluation. (S-27; see NT at 1557).

93. There is some dispute concerning the timeline of the Parents' request. Although resolution of that dispute does not alter the outcome of this case, I find that the Parents requested the reevaluation in early April of 2011, that the District provided a PTRE form on April 11, 2011, that the Parents returned the form, authorizing the reevaluation, on April 28, 2011 and the reevaluation was completed with the submission of a reevaluation report on June 6, 2011 (2011 RR). (NT at 340-341; S-27; S-29).

94. The 2011 RR reports that the Student's FSIQ (a number expected to remain relatively constant) dropped 42 points in a little more than two years from a 107 to a 65. (S-29 at 4; NT at 1669, 1670).

95. More specifically, the Student was administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). (S-29, p. 4). Through that test, the Student's FSIQ was found to be 65, which falls in the 1st percentile compared to age-level peers. This is considered to be in the deficient range of global intelligence. (S-29, p. 4).

96. The WISC-IV also sets individual index scores that contribute to or shed light on the FSIQ. The Student's Verbal Comprehension Index was assessed to be 79, falling in the 8th percentile within the Borderline range. The Student's Perceptual Reasoning Index of 63 fell at the 1st percentile, within the deficient range. The Student's Working Memory Index of 94 fell at the 34th percentile within the average range. The Student's Processing Speed Index of 50 fell at the less than 0.1st percentile within the deficient range. (S-29, p. 4).

97. Despite the foregoing, the Student demonstrated average abilities with regards to word knowledge, short-term auditory memory, visuospatial imaging and attention. (S-29, p. 10).
98. Nobody on the Student's IEP team, including the school psychologist who completed the testing and drafted the report, believed that the newly-assessed FSIQ was an accurate depiction of Student's cognitive ability. L.W. testified that the new FSIQ did not accurately reflect the Student's abilities, and that the results were "shocking" and "surprising". (NT at 351, 348, 492).
99. As explained by the evaluating school psychologist in the 2011 RR itself, the FSIQ score was "significantly depressed" because of the Student's executive functioning, auditory and visual processing issues, and anxiety regarding the administration of the exams. (S-29).
100. The evaluator noted that Student demonstrated significant difficulties with executive functioning: attention, concentration, impulsivity and psychomotor agitation. (S-29, p. 2). The Student also demonstrated anxiety and frustration with tasks of increasing difficulty. (S-29, p. 2). The evaluator's diagnostic impression was that of a student with ADHD-combined type, as well as mild OCD features. (S-29, p. 2).
101. All of the foregoing executive functioning difficulties depressed the Student's FSIQ score. The evidence and testimony in this case, taken as a whole, supports a conclusion that the FSIQ reported in the 2011 RR reflects the Student's inability to take an IQ test, not the Student's actual cognitive ability.
102. The District offered no additional testing to determine the Student's actual cognitive ability. (NT at 351, 492, 503, 1563, 1670).
103. The Student's Visual-Motor ability was assessed using the Developmental Test of Visual-Motor Integration (VMI). (S-29, p. 5). The Student's performance on the VMI yielded a standard score of 60, which was considered to be in the very low range and the 0.8th percentile compared to age-level peers. (S-29, p. 5). On the Visual-Aural Digit Span Test, the Student demonstrated a 1-year, 3-month delay with regards to auditory and visual processing. (S-29, p. 5).
104. As part of the 2011 RR, the District administered a Wechsler Individual Achievement Test – Third Edition (WIAT-III) to assess the Student's academic achievement. WIAT-III scores ranged from a low standard score of 62 in math problem solving to a high of 96 in pseudoword decoding. (S-29 p. 5). Most scores were in the average range. *Ibid*. The Student demonstrated low average to average achievement on assessments of Reading Comprehension, Word Reading, Pseudoword Decoding, Numerical Operations, Spelling, Total Reading Composite, and Basic Reading Composite. (S-29, p. 10).

105. To determine if there was a discrepancy between the Student's ability and achievement, the District compared the Students Verbal Comprehension Index (assessed at 79 on the WISC-IV) with the results of the WIAT-III.
106. As with the Student's FSIQ, the Student's Verbal Comprehension Index was depressed on this administration of the WISC-IV. Previously, the Student's Verbal Comprehension Index was assessed to be a 114. Although this 35 point drop is not explicitly addressed in the 2011 RR, it is reasonably inferred that the index score is depressed for the same reasons as the FSIQ.
107. Testimony and evidence from the District concerning the validity of comparing a depressed Verbal Comprehension Index to scores from a WIAT-III for purposes of discrepancy analysis to assess a potential specific learning disability is scant and unpersuasive. At the same time, the Student's actual performance in reading and math, both on standard, normative assessments and in the classroom, indicate that the Student was average or somewhat below average compared to same-aged peers.
108. The District completed an OT Evaluation four days after the 2011 RR (June 10, 2011). The OT Evaluation reported that Student had challenges with self-regulation in the classroom setting. (S-30, p. 3). The OT noted that the Student craved a lot of sensory input and could not maintain attention on the requested tasks. (S-30, p. 3). The OT recommended that Student undergo an audiological consult at a County IU (CIU) to rule out central auditory processing disorder. (345; S-29, p. 10). This consult did not occur due to a series of miscommunications and delayed communications between the District, Parents and CIU. (345; S-73, p. 14).
109. The 2011 RR reports that the Student does not engage in self-stimulatory behavior. This is contrary to what the Parents observe at home and in other settings. (S-29 at 10; NT at 1673).
110. The 2011 RR recommends a change in the Student's disability category from Autism to Other Health Impairment (OHI). The evaluator recommended this change as a result of his diagnostic impression that the Student exhibited symptoms consistent with that of a student with ADHD-combined type, and mild OCD features. (See NT at 343).
111. In the 2011 RR, Z.H. the Student's speech therapist, stated that the Student had "a strong understanding and use of both expressive and receptive language." (S-29 p. 10). This conclusion was not based on new testing and, to an extent, is contrary to weaknesses in achievement scores in Listening Comprehension, Oral Expression, and Oral Language Composite contained elsewhere in the 2011 RR. (S-29 at 5). This conclusion is, however, based on Z.H.'s many observations of the Student, and her interactions with the Student as a trained S/L professional (NT at 1111-1112, 1172).

112. The family immediately disagreed with the 2011 RR, both generally and regarding the recommendation to change the Student's eligibility category. (P-29; N.T. 349, 1560, 1672).

### **June 2011 IEP**

113. After the June 2011 RR, the District prepared another IEP, dated June 21, 2011, which would be implemented in the 2nd grade (Jun2 2011 IEP). (S-32; N.T. 322, 372).

114. The June 21, 2011 IEP meeting was attended by Parents, L.W., S.T., M.H. (LEA representative), L.B. (OT), J.R. (school psychologist and primary author of the 2011 RR) and Z.H. (S/L therapist). (S-32, p. 2).

115. The June 2011 IEP changed Student's placement to itinerant learning support. (NT at 385-386; 412-413; S-32, p. 29-30). Specifically, Student would participate in the general education classroom setting for reading, math, science, social studies, special areas, lunch, recess, assemblies, field trips and school wide events and would receive itinerant learning support services for writing as well as itinerant S/L services 1 time per week for 30 minutes each session and direct OT 2 times per week for 30 minutes each session. (S-32, p. 26, 29).

116. The box indicating whether behaviors interfered with [Student's] learning was checked "no." Elsewhere, the June 2011 IEP notes that the Student has difficulty with following directions, requires additional teacher prompts, can be unfocused and inattentive, and can exhibit anxiety-like behaviors. (S-32 p. 5; NT at 23, 324). The IEP also noted that the Student had challenges in self-regulation in class. (S-32 p. 12; N.T. 506).

117. The June 2011 IEP reduced speech-language therapy to 1 time per week for 30 minutes and only to address articulation. The IEP explicitly anticipated that the Student would be exited from speech-language therapy in the fall of 2011 after mastery of articulation goals. (S-32 at 9, S-33; N.T. 1116).

118. The June 2011 IEP identified Student's educational needs at the time to include: improving math and writing skills, ability to follow directions in a large group setting, as well as improving articulation of affricate sounds. (S-32, p. 13). Student's OT identified [Student's] then-current OT needs, which included improving attention to task and fine motor and visual perceptual skills. (S-32, p. 11).

119. The June 2011 IEP contained a goal to work on Student's identified writing needs within the 2nd grade writing curriculum. (NT at 375-377; S-32, p. 17). The goal included a baseline for the end of the 1st grade school year and worked on using a graphic organizer, word bank, and word wall strategies that would support Student's use of lowercase letters, appropriate spacing, punctuation and capitalization. (NT at 376-377; S-32, p. 17). It contained SDI and program modifications to address Student's writing needs, including wait time in response to responding to a teacher-directed writing prompt, opportunities and reminders to recheck work, modifications



to written assignments, and re-teaching and pre-teaching of skills. (NT at 377-378; S-32, p. 24-26).

120. The June 2011 IEP contained a math goal, which included math concepts that were instructed and taught in the 2nd grade curriculum. (NT at 378-379; S-32, p. 18). Those math concepts included counting by 2s, telling time to the 5-minute interval, making tallies, counting coins, utilizing a graph as well as extending patterns. (NT at 379-380).
121. The June 2011 IEP contained a math goal based on Student's identified needs with regard to math computation. (NT at 382; S-32, p. 19). At the end of 1st grade, Student could accurately solve single-digit addition problems with 80% accuracy. (NT at 382). The computation goal called for the Student to extend computation skills through double-digit addition and subtraction without regrouping. (NT at 382). The IEP also contained SDI and program modifications in providing instruction to Student in math, which included math manipulatives, reminders to recheck work, modeling, repetition, guided practice, masking of worksheets or books to decrease the visual distraction of the assignments, and teacher-directed cueing, reteaching and preteaching. (NT at 383-384; S-32, p. 24-26).
122. The June 2011 IEP contained a S/L goal to address Student's needs in remediating phonological processing errors. (NT at S-32, p. 20). The IEP noted that if Student demonstrated articulation skills maintenance in the fall 2011 marking period, Student would be dismissed from S/L services. (NT at 1116-1118; S-32, p. 9; S-33, p. 3; S-40).
123. The June 2011 IEP contained a behavioral goal for Student to follow directions in the large group setting, to complete work independently, and to raise a hand to respond and answer questions. (S-32, p. 21). The IEP also included SDI and program modifications to address these needs, including preferential seating, allowing for wait time, increased test time, picture and/or written schedule, peer buddies, positive reinforcement, modeling, masking of worksheets to increase visual distractions, repetition, hierarchy of least to most intrusive prompting, parent-teacher communication, advance notice of changes in schedule or routine, and teacher-directed cueing to help remain on-task. (S-32, p. 24-26).
124. The June 2011 IEP contained three OT goals, targeting the Student's visual perceptual, fine motor and sensory processing skills. (S-32, p. 22-23).
125. At the June 21, 2011 IEP meeting the Parents raised concerns regarding the Student's transition to a regular education classroom for the 2nd grade year. (NT at 510, 511).

126. The Parents left the IEP meeting assuming that the Student would have a 1:1 paraprofessional with [Student] the following 2nd grade year, in a classroom with 20-23 children. (S-32; NT at 1574-1575).<sup>4</sup>

### **Second Grade (2011-12 school year)**

127. At the start of the 2011-12 (2nd grade) school year, the Student was placed in a regular education classroom with 26-28 students. The classroom teacher was D.L. The Student also received instruction in a Learning Support classroom. The Learning Support teacher was S.N.

128. Ms. T., the paraprofessional who accompanied the Student as part of the three inclusion plans in the prior year, no longer accompanied the Student in regular education classes or transitions between classes. (NT at 572-574, 579).

129. Although Ms. T.'s services were discontinued, S.N. came into D.L.'s classroom to work with the Student in the mornings at the start of the 2011-12 school year. S.N. would help the Student complete classroom activities, such as organizing a "question of the day." (NT at 943-946).

130. At the start of the school year, D.L. would bring the Student into the classroom about five minutes before the other students so that the Student could acclimate. That accommodation was discontinued in October, as D.L. perceived that the Student was comfortable entering the classroom with other children. (NT at 567, 571, 572, 781).

131. The Student participated in the small group (9 to 11 students) reading instruction in D.L.'s class from the beginning of the 2nd grade school year until October 2011 and from January 2012 until the end of the school year. (NT at 1052-1053). In October 2011, S.N. began to provide pull-out small group reading instruction to the Student in the Resource room with 5 or 6 other students. (NT at 1052-1055; S-73, p. 36). In January 2012, the IEP team decided that Student would no longer be pulled out of classroom for reading instruction with S.N. and, instead, would remain in D.L.'s general education classroom for the entire reading block. (NT at 1052).

132. The Student received pull-out math instruction from S.N. in the resource room throughout the 2011-12 school year. (NT at 928).

133. The Student missed math instruction every Tuesday to attend private occupational therapy sessions. (NT at 928-929). S.N. was concerned because the Student was missing 20% of math instruction. (NT at 931).

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<sup>4</sup> I do not find that the District told the Parents that the Student would have a 1:1, or mislead the Parents in any way. Rather, the Parents assumed that the Student would have supports in place similar to those provided in the inclusion plans, which included 1:1 support. The IEP discussed during the meeting does not include that level of service.

134. On November 28, 2011, Z.H. issued a NOREP to exit the Student from S/L services, because the Student had met articulation goals. (S-35; NT at 1202, 1600-1602). S/L services were discontinued shortly thereafter.
135. The Student exhibited behavioral difficulties at the start of the 2011-12 school year. In response, the Parents (specifically, the Student's mother) began weekly to bi-weekly meetings with S.N. and D.L. (NT at 628, 640, 1576).
136. At the same time, the Parents were in very frequent contact with the Student's teachers via email. Through email, the Parents reported that the Student was melting down at home and was unable to complete homework. On at least one occasion, D.L. reported that the Student was hiding under a table in school. (S-73 p. 1, 2; NT at 639, 640, 783, 1577, 1578).
137. From September through December, Student would sometimes try to avoid a task that [Student] didn't want to do by putting down materials and shaking [Student's] head or by verbal refusals. (NT at 685; 689-690 S44, p. 11).
138. The Student's mother believed that the Student was overwhelmed by the number of other students in the regular education classroom, and expressed this concern to the District. The Parents also learned, very early in the 2011-12 school year, that the Student did not have a 1:1 paraprofessional specifically assigned to the Student. The Parents expressed concern about the elimination of that service. (NT at 1579, 1580).
139. The Student was frequently off-task and required frequent redirection. These issues were discussed between the Parents, both teachers, and some of the Student's private therapists, via email. (P-23 p. 41-42; S-73, NT at 838).
140. In October of 2011, teachers began tracking the Student's off- task behaviors. (P-13; NT at 1593-1594). There were three different versions of the chart throughout the year. (P-3 p. 1, 44; P-13 p. 1). On some days, the Student needed as many as 20 prompts, on other days, the Student needed fewer.
141. In November 2011, the Student's mother reiterated her belief that the Student required 1:1 paraprofessional support, and requested the same from the District. (S-73 p. 13; NT at 1713).
142. In December 2011, there were three incidents occurred that greatly concerned the Parents.<sup>5</sup>
143. In the first incident, the Student fell and hit the Student's head on a chair. Accounts of the severity of the incident differ dramatically. I find that the Student did fall and the fall did break the Student's skin, but that the resulting injury cannot fairly be described using the Parents' dramatic language. The Student was escorted by

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<sup>5</sup> These incidents were, perhaps, catalysts to this much broader litigation.

another student to the school nurse. The Parents were not notified. The Student required no further medical intervention. (NT at 653, 853-854, 1617; S-23)

144. In the second incident, the Student was placed on a bus to go home when the Student was supposed to have gone to an after school program. Adults from the after school program called the Parents when the Student did not arrive as expected. Minutes thereafter, the District realized what had happened, contacted the bus, and returned the Student to the after school program. (NT at 1618).
145. In the third incident, the Student made a gingerbread house in school. At that time, it was well-documented that the Student has a peanut allergy. The Parents testified that the Student's gingerbread house had a peanut M&M on it. (NT 1618). All District personnel testified that peanuts were not permitted in the Student's classroom and that pretzel - not peanut - M&Ms were used in the project. The Student's mother testified that she knew the M&M was a peanut M&M because she ate it. I am persuaded by the Mother's testimony that the M&M was a peanut M&M. However, the Student had no allergic reaction to the M&M whatsoever.
146. In December 2011, the Student's mother met with the District's Director of Special Education, E.C. During that meeting, the Student's mother shared her concern about the Student's behavioral regression (as compared to the Student's behaviors during the 1st grade inclusion plans). (S-73 p. 21; NT at 841, 842, 1592).
147. After the Student's mother's meeting with the District's Special Education Director, D.L. and S.N. began to track the Student's behaviors in greater detail. (P-3; P-13; NT at 1594).
148. On January 12, 2012 D.L. sent an email to the Student's private OT and others stating that the Student "needs a lot of redirecting and it is very rare (I'm not sure [Student] has done it in my room) that [Student] will complete a task without some type of support." (S-73 p.28; NT at 649, 845).
149. In January of 2012, a paraprofessional was assigned to D.L.'s classroom. S.N. stopped pushing in to D.L.'s classroom at that time. The paraprofessional, Ms. P., was not assigned specifically to the Student, but did provide support to the Student, much of which was 1:1. The paraprofessional was able to redirect the Student when the Student was off-task, help with the Student's morning routine, and provide support for reading, writing, communications, science/social studies and math. (NT at 604; 674; 682, 688-693; 870).
150. D.L. testified, credibly, that with the benefit of paraprofessional support, redirection strategies used in the regular education classroom were effective in reducing the Student's task avoidance and calling out behaviors. (NT at 682-683; 688-693).
151. More generally, D.L. testified that it was beneficial for the Student to have a 1:1 paraprofessional, as it allowed the Student to remain in the general education classroom. (NT at 606; 869). This testimony reveals that, although the

paraprofessional was not specifically assigned to the Student, the paraprofessional functioned that way – much in the same way that the paraprofessional in first grade was not officially a 1:1 aide for the Student, but operated in that capacity.

152. Around the same time that the paraprofessional was added to D.L.'s classroom, the District convened another IEP team meeting for the Student. The meeting convened on January 19, 2012, and the Student's IEP was updated at that time (January 2012 IEP). (NT at 668; S-41).
153. The January 19, 2012 IEP meeting was attended by Parents, D.L., S.N., H.M. (LEA representative), J.L., (OT, but not the OT who had recommended the termination of S/L services), M.H. (principal), D.S. (special educations supervisor), J.H. (school counselor) and M.K. (program support specialist). (S-41, p. 2).
154. As reported on the January 2012 IEP, the Student's WRAP scores improved to instructional level "K" in November 2011. (S-41, p. 5). In a January 2012 WRAP administration, the Student scored a 99% on fluency and a 2/6 on comprehension on a level "L" test. At the same time, the Student was being instructed in the general education classroom at the second grade reading level. (S-41, p. 5).
155. The January 2012 IEP also reported the Student's KeyMath 3 scores from January 2012. (S-41, p. 5). According to this testing, the Student made little or no progress in math concepts, applications and total testing. (S-32 p 7; S-41 p. 5; S-50 p. 7). One of subtest score (Operations) decreased. (S-41, p. 5).
156. The January 2012 IEP reflected the fact that the Student had been dismissed from S/L services due to meeting articulation. (S-41, p. 5).
157. The January 19, 2012 IEP continued the Student's placement of itinerant learning support in math instruction. (S-41, p. 26). The Student would continue to participate in the general education classroom setting for all other subjects. The IEP also provided OT 2 times per week for 30 minutes each session and an additional OT consultation 15 minutes per month. (S-41, p. 24).
158. Academic goals in the January 19, 2012 IEP are substantively the same as those in the prior IEP. (S-41).
159. Unlike prior IEPs, the January 2012 IEP indicated that the Student was exhibiting behaviors that impeded [Student's] learning or that of others. (NT at 803-804; S-41, p. 5). As a result, the District issued a Permission to Reevaluate Consent Form to Parents to conduct a functional behavioral assessment ("FBA"). (S-41, p. 5; S-42). Parents consented to the FBA on January 24, 2012. (S-42, p. 2).
160. The January 2012 IEP was implemented from its creation through April 19, 2012.
161. The Parents requested an independent educational evaluation (IEE) at public expense, and the District agreed to fund the IEE. The parties disagree about when the request was made. The Parents argue that the request was initial made in June

of 2011. The District argues that the request was made later. For reasons discussed below, the date of the Parent's request is immaterial to this case.

162. When it agreed to fund the IEE, the District provided a list of qualified independent evaluators to the Parents. The Parents then selected an evaluator from that list.
163. An independent neuropsychological evaluation was performed on January 17, 2012, February 9, 2012, and February 13, 2012. (NT at 675-676; S-43). The District received the IEE report in March 2012. (NT at 677).
164. The IEE reports information obtained from the Parents. Specifically, the Parents reported to the independent evaluator that the Student did not have difficulty reading, but struggled with math and writing. (S-43, p. 3). Parents also reported that Student thrived in a smaller classroom setting and had shown regression since being placed in the 2nd grade classroom with 28 students. (S-43, p. 3). The Parents reported that Student was not able to follow directions, stared at teachers blankly, and needed constant redirection. (S-43, p. 3).
165. The independent evaluator observed that Student had a high activity level and significant difficulty with attention and focus. (S-43, p. 4, 12). The evaluator concluded: "Overall, due to [Student's] distractibility, hyperactivity and language processing deficits, ... test results may be an underestimate of [Student's] true abilities; they do, however, reflect [Student's] current levels of functioning." (S-43 p. 5).
166. The IEE reported that the Student's cognitive functioning scores were quite low and similar to those scores reported by the District when the District reevaluated the Student in the 1st grade. (S-43, p. 6-7). Specifically, due to the Student's inability to complete certain tests, the evaluator calculated the Student's GAI (as opposed to FSIQ) to be 44. (S-43 p. 6).
167. The evaluator speculated that these scores were highly suspect due to the Student's distractibility and perceived language processing problems. (S-43, p. 7, 12). The evaluator noted that it was difficult to validate the Student's cognitive scores. (S-43, p. 12).
168. On academic achievement testing in reading, the Student demonstrated some basic skills. Average reading fluency, accuracy, sight vocabulary, and decoding nonsense words scores were all in the average range. (S-43, p. 7). The Student's reading comprehension skills and reading fluency rate were both in the below average range. (S-43, p. 7). In spelling, the Student's scores fell in the average range. (S-43, p. 8).
169. In math, the Student scored at the 1st percentile on math problem skills, and was unable to correctly answer questions that involved working with graphs, telling time, using a calendar, measuring with a ruler, or working with money. (S-43, p. 8).

Student was able to solve simple addition and subtraction problems using pictures. (S-43, p. 8).

170. More generally, concerning academics, the evaluator concluded that Student demonstrated some basic skills, but higher order of skills of reading comprehension and math reasoning were weaker. (S-43, p. 8).
171. The Student's scores on the Childhood Autism Rating Scale (CARS), based on an interview with the Student's father, fell within the non-autistic range. (S-43, p. 10).
172. A BASC-2 was also administered as part of the IEE. On the BASC-2, most of Student's self-reported skills fell within normal limits, although At-Risk scores were indicated in the areas of Attention Problems and Self-Reliance, and a Clinically Significant score was noted in the area of Hyperactivity. (S-43, p. 10). Parents' BASC-2 ratings indicated At-Risk and Clinically Significant scores in Hyperactivity, At-Risk scores in Atypicality (although Father's rating fell within the average range), At-Risk scores in Attention Problems, At-Risk scores in Leadership and Clinically Significant scores in the Activities of Daily Living and Functional Communication. (S-43, p. 10-11). Student's teachers' rating indicated Clinically Significant concerns in Hyperactivity, Atypicality and Functional Communication and At-Risk concerns in Attention Problems, Learning Problems, Leadership and Study Skills. (S-43, p. 11). The general education teacher also indicated At-Risk concerns in Anxiety. (S-43, p. 11).
173. Connors' 3rd Edition Rating Scales were also administered as part of the IEE. On the Connors', the Student, Parents and teachers all indicated significant levels of concern in the areas of Inattention, Hyperactivity/Impulsivity and Learning Problems. (S-43, p. 11). The Student's teachers also indicated significant levels of concern regarding Student's Executive Functions. (S-43, p. 11).
174. The evaluator concluded that the Student met the criteria for ADHD, Combined Type and recommended intervention in that area. (S-43, p. 12). The IEE also recommended consultation with a child psychiatrist, medication, education for Student and Parents and positive behavior supports. (S-43, p. 13).
175. The evaluator was not a speech and language pathologist. Despite this, the evaluator suspected that the Student may have a Semantic Pragmatic Language Disorder. Consequently, the evaluator recommended the resumption of S/L services in the areas of language processing and pragmatics. (S-43, p. 12-13).
176. The Parents requested a S/L evaluation based on [this] report. (NT at 1132). The District issued a Permission to Reevaluate for semantic-pragmatic language skills to Parents on April 10, 2012. (NT at 1133; 1136; S-49). The Parents consented to the District reevaluation related to that area on April 12, 2012. (1136-1137; S-49).
177. The evaluator recommended continued OT services to build fine motor skills and improve handwriting. (S-43, p. 13).

178. The IEE concluded that the Student continued to qualify for special education services under several classifications, including Autism, OHI and S/L Impairment. (S-43, p. 12).
179. Around the same time that the IEE was being completed, the District conducted a Functional Behavioral Assessment (FBA). (S-44; NT. 677). The FBA states that "Prior to the one on one support from a paraprofessional, [Student] would lose focus at least '20 times a day'." (S-44 at 1; NT at 813). When the District finally included a paraprofessional in the Student's program, the behaviors decreased by more than half. (S-44 at 1).
180. According to D.L. and S.N.'s behavior ratings for the FBA (S-44 at 1, 2; NT at 1038), the following behaviors were occurring "Much" or "Very Much":
1. Making unnecessary comments/odd noises,
  2. Inappropriate seat behaviors,
  3. Avoids situations/assignments/responsibilities,
  4. Needs immediate rewards/reinforcements,
  5. Uses free time inappropriately,
  6. Distractible/inattentive
  7. Constantly fidgeting,
  8. Does not follow directions from teachers,
  9. Excessive demands for teacher's attention,
  10. Too dependent upon adults
  11. Does not respond appropriately to environmental questions,
  12. Easily led by others
  13. Tense/unable to relax.
181. The Student was observed over a period of 6 days, during various times and activities throughout the school day. (S-44, p. 2).
182. Three antecedent behaviors were identified: when the Student was given an instruction/directive, when the Student was transitioning from one activity to another or throughout the building, and/or when a new task was given. (S-44, p. 3).
183. Based on the data analysis, the FBA concluded that the Student needed to find ways to stay focused and that consequences needed to be implemented more often to reduce negative behaviors. (S-44, p. 4; S-47, p. 2).
184. Overall, the Student's behaviors seemed to be triggered by setting, audience, time and circumstances. (S-44, p. 4). The consequences that worked to reduce the Student's problem behaviors included: timeouts, modeled behaviors, and being given new choices. (S-44, p. 4; S-47, p. 2),
185. New skills that needed to be introduced to the Student were: strategies for staying focused, positive ways to seek help, completing work without assistance and ways to gain positive teacher attention. (S-44, p. 5; S-47, p. 2).



186. A Positive Behavior Support Plan (PBSP) was developed, listed the teacher prevention strategies that were to be used as well as the desired replacement behaviors for Student. (S-44, p. 5; S-47, p. 2).
187. Based on the IEE and FBA, the District prepared a new RR on March 20, 2012. The March 2012 RR incorporated the IEE and FBA, and a review of the Student's records and progress to date.
188. The March 2012 RR noted that, in reading, Student was given the WRAP test in March 2012 and scored at a guided reading level "M." (S-47, p. 3).
189. The March 2012 RR noted that, in math, the Student scored 5/7, 15/15, and 12/16 on the Go-Math series chapter tests between January 2012 and March 2012. (S-47, p 3). These chapters involved addition and subtraction of numbers, which was an identified need for Student. (S-47, p. 3).
190. The March 20, 2012 RR noted that, in writing, IEP progress reporting demonstrated that the Student was writing 1-3 sentences with prompts and guidance. (S-47, p. 3). The Student was spelling frequently-used words correctly, using capital letters appropriately, and using correct grammar and sentence formation with over 80% accuracy. (S-47, p. 3). The Student was, however, still struggling with punctuation and needed to continue to be addressed. (S-47, p. 3).
191. The March 2012 RR noted that Student had been following directions given on most tasks with one-on-one prompting. (S-47, p. 3). The Student's biggest area of need with regards to following directions was in writing, which was a non-preferred activity for Student. (S-47, p. 3). Teachers also noted that they had recently seen improvement in focusing, comprehension, copying notes from the board, copying notes from an overhead, hands-on tasks, gaining information from handouts and gaining information from graphic aids. (S-47, p.4).
192. An IEP meeting convened on April 19, 2012. The purpose of that meeting was to update the Student's IEP in light of the IEE. The Student's present education levels were updated consistently with the IEE, but the services provided through the April 2012 IEP did not change in any significant way.
193. In April of 2012 through the present, the District viewed the results of the IEE as generally consistent with the results of its own previous RR.
194. After the April 2012 IEP team meeting, the District completed the requested S/L evaluation. The District's evaluator, D.L., was not the same pathologist who previously recommended the discontinuation of S/L services. The S/L evaluation is dated May 31, 2012.
195. On the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4), the Student demonstrated relative strengths in the Word Classes – Receptive and Expressive Vocabulary subtests. (S-59, p. 6). The Student scored a 77 on the

Pragmatics Profile of the CELF-4, suggesting inadequate communication abilities in context. (S-59, p. 6).

196. On the Comprehensive Assessment of Spoken Language (CASL), the Student demonstrated average skills in the Paragraph Comprehension and Nonliteral Language subtests and challenges in the Antonyms, Syntax Construction, and Pragmatic Judgment subtests. (NT at 1143; S-59, p. 5-6). The Student's overall score fell within 1.5 standard deviations from the mean. (S-59, p. 7).
197. In the Test of Pragmatic Language (TOPL), the Student's scores fell in the extremely low range for [Student's] chronological age. (S-59, p. 7).
198. The Student's articulation was not addressed as part of the reevaluation due to the fact that Student spoke clearly at the conversational level. (1148; S-59, p. 7).
199. The Systematic Analysis of Language Transcripts 2010 (SALT 2010), a norm-referenced tool assessing narrative language skills in a standardized fashion, was administered to Student as part of the reevaluation. (1149; 1178-1181; S-59, p. 8). On the SALT-2010, the Student scored in the average to low average range of abilities across all measures. (1150-1151; S-59, p. 7-8). The evaluator noted that any utterances with errors suggested that they may have been due to test anxiety and distractibility. (S-59, p. 8).
200. As with all prior evaluations, the S/L evaluation noted that the Student was highly inattentive and fidgety during the reevaluation. (NT at 1142). The Student needed prompts to focus to task, to sit still, and to engage what was required of [Student]. (NT at 1142; S59, p. 5-6). Both the evaluation itself, and credible testimony, indicate that the results of the S/L testing should be interpreted with the same caution as the Student's intelligence testing, and for the same reasons.
201. As a result of the S/L evaluation, the District recommended itinerant S/L services one time per week for 30 minutes each session to address pragmatic and abstract language skills (1153-1154; S-59, p. 8)
202. Z.H., the pathologist who previously recommended the discontinuation of S/L services, testified that pragmatic and abstract language skills to be targeted through S/L therapy could also be addressed purely in the classroom setting without S/L services. (NT at 1154). This evaluator, who had worked with the Student previously, generally testified that the results of the S/L evaluation were depressed as a result of the Student's inability to perform in a clinical testing environment, and are not reflective of the Student's actual ability.
203. By the end of second grade, the Student moved from level "I" on the WRAP to a level "M" (NT at 704; 706-707; 1472-1474). Testimony reveals that the Student made some progress in writing organization in second grade, particularly when 1:1 support was provided. (NT at 704-705; 714-715; 950-951; 976-977). In math, KeyMath-3 tests in January 2012 and June 2012 show that the Student regressed in

Operations over that period of time but otherwise showed some improvement in most other areas tested. (S-72).

204. An IEP revision meeting was held on June 14, 2012 (718; 722; 988-989; S-63). The IEP meeting was attended by Parents, M.H. (LEA representative), D.L (S/L therapist who completed the evaluation), D.L. (regular education teacher), S.N., E.C. (special education director), and H.M. (special education supervisor). (S-63, p. 4).
205. The June 2012 IEP offered itinerant S/L services one time per week for 30 minutes each session and itinerant learning support services in math. (S-63, p. 36, 39). The June 2012 IEP added an additional IEP goal to address active listening and responding to others in small and large group situations. (S-63, p. 33). The June 2012 IEP also added SDI related to Student's S/L needs, which included the use of social strategies (social stories, scripts, and visual cues) and small group instruction for S/L with positive reinforcement, models of target behaviors, and auditory/visual cues and prompts to elicit target behaviors. (S-63, p. 34-35). The IEP also, for the first time formally, included a Positive Behavior Support Plan based on the FBA conducted during Student's second grade school year. (S-64).
206. The Parents rejected the June 2012 IEP, placing the Student in a private school (Private School) instead.

#### **Private Placement (2012-13 school year)**

207. By letter dated August 16, 2012, the Parents informed the District that the Student would attend the Private School, and asked for the District to support (in context, fund) the placement. (P-26; NT at 1630).
208. The Private School is a small elementary school for students with language-based learning difficulties. (NT at 40). The program for K-6th grades is team based, ungraded, and grouped by age and ability. (NT at 40, 82).
209. Regarding core academics (reading, writing, and math), students are grouped by specific needs. (NT at 40).
210. The Private School is an accredited private school. (NT at 80). It is affiliated with the Religious Society of Friends (Quakers).
211. Children who enter the Private School are first assessed in math and reading and they are assigned a placement based on those needs. (NT at 41). On September 12, 2012, the Student was assessed by the Private School using the Woodcock Reading Mastery Test and the GMADE Assessment for math. (S-77 p. 21, 29, P-2: NT at 47, 48). Based on the GMADE, the Student scored a grade equivalent of less than 1st grade in math. (NT at 126, 161). On the reading assessments the Student scored at or slightly above grade level. (P-2; NT at 116, 119).
212. The Student receives S/L therapy from a certified speech pathologist at the Private School. (NT at 50, 136-137).

213. The private school conducts ongoing curriculum-based assessments and children are discussed every two weeks in team meetings. (NT at 52, 53).
214. At the Private School, the Student receives the “Making Math Real” curriculum, a research based program that is incorporated into an additional math program called Saxon Math. (NT at 56, 1242).
215. The Student’s classroom consists of 11 children with two teachers. (NT at 1234). For reading and math class there are only 6 students. (NT at 1235). The students are positioned so that the teacher (who is certified) can physically touch each student if necessary for redirection and for multisensory instruction. (NT at 1236).
216. The Parents are exceedingly pleased with the Student’s academic, behavioral, and social progress since attending the Private School.

## Legal Principles

### The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

### Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student’s potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v.*

*Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988)  
*Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir.  
1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa.  
Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

## **Compensatory Education**

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA."))  
Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

*M.J. v. West Chester Area Sch. District*, ODR No. 01634-1011AS (Skidmore, 2011)

## **Tuition Reimbursement**

To determine whether parents are entitled to reimbursement from their 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 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993).

The first step is to determine whether the program and placement offered by the District is appropriate for the child. The second step is to determine whether the program proposed by Parents appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

## **Discussion**

### ***Entitlement to Compensatory Education***

Although the focus of the Parents' argument concerns tuition reimbursement, the Parents demand compensatory education to remedy a denial of FAPE from December of 2010 through the Student's matriculation in the Private School. This period of time covers the second half of first grade and all of second grade. The crux of the Parent's argument is that the Student's IEPs during this time all flow from deficient evaluations.<sup>6</sup>

The Parents are correct that the June 2011 RR and the neuropsychological IEE included testing that, on the face of those documents, underestimated the Student's actual abilities. I do not, however, accept the Parents' argument that the suspect testing (which was completed at the end of first grade) resulted in a substantive denial of FAPE during first grade. Preponderant evidence supports the District's claim that the Student received a FAPE in substance during this time. Behaviorally, the Student received appropriate, 1:1 paraprofessional support. This support enabled the Student's increased inclusion without behavioral incidents. The evidence and credible testimony, described in great detail above, also supports the District's argument that the Student made meaningful academic progress in first grade.

A similar analysis applies at the start of second grade, but I reach a different conclusion. It was appropriate for the June 2011 RR to cautiously report the results of testing, while clearly explaining that the testing was very likely not indicative of the Student's actual ability. It was inappropriate, however, to make significant changes to the Student's program and placement based on testing with such questionable validity. As a result of the June 2011 RR, the District removed the Student's Autism classification, changed the Student's placement to Learning Support at an itinerant level, and removed the 1:1 paraprofessional. I agree with the Parents that the paraprofessional who worked with the Student in first grade was the key to the Student's success in regular education

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<sup>6</sup> The Parents also argue that the inclusion plans in first grade constituted changes in placement that occurred outside of the IEP process. In a literal way, the Parents are correct. Even if I were to accept this argument, the violation would be procedural in nature, and would not, by itself, establish entitlement to compensatory education. The Parents were fully involved in the inclusion plans. Their primary, contemporaneous objection to programming in second grade was that the second grade program differed from the inclusion plans, all of which they were in agreement with.

settings. It was inappropriate for the District to remove that support with no evidence that the Student could attend classes outside of Autistic Support without it.

It is not surprising, therefore, that the Student's behaviors worsened at the start of second grade. Preponderant evidence, described in detail above, illustrates that the Student's off task behaviors increased at the start of the 2011-12 school year. It would be reasonable to expect some behavioral changes, or even a brief, quickly remediated period of regression, in response to the new, second grade environment. But the behaviors continued – largely at the same rate and intensity – throughout the first half of the 2011-12 school year. It is also striking that the Student's behaviors became manageable again once the level of support was increased to the same levels as under the first grade inclusion plans (i.e. the return of 1:1 paraprofessional support). It is practically undisputed that the return of this support yielded an immediate, significant, positive change for the Student.

The re-introduction of 1:1 support was never properly reflected in the Student's IEPs. The behavioral problems box was never checked until the IEP at the end of the 2nd grade year. This is more than a paperwork error. Checking the box triggers certain substantive requirements, such as the completion of an FBA. It is troubling that the Student, who required 1:1 support to manage behaviors, did not have an FBA or PBSP until the very end of the 2011-12 school year. There is a substantive difference between providing services to manage behaviors, and systematically targeting behaviors for reduction or elimination. In this case, the District provided services to manage behaviors when 1:1 support was re-introduced, but did not appropriately develop a strategy to reduce those behaviors until the very end of the school year.

For the foregoing reasons, I find that the Student was denied a FAPE during the entirety of the 2011-12 school year, resulting from the District's failure to assess the Student's behavioral needs and then address them through an IEP. The services that the District re-introduced during the second half of the 2011-12 school year were a boon to behavioral *management*, but the IDEA requires more. The Student is entitled to compensatory education to remedy this denial. The record, as comprehensive as it is, does not readily reveal the number of hours of behavioral interventions that the Student either should have had, or that would put the Student in the position that the Student would be in but for the denial. Based on the record as a whole, I find that the Student is owed two (2) hours of compensatory education for each day that school was in session during the 2011-12 school year. Based on the record as a whole, the Student should have received 1:1 support throughout the year, that support should have targeted (not just managed) behaviors. This service also required coordination with the other services that the Student was receiving. The 1:1 support person would not likely have enacted behavioral strategies at every movement of the day, and some of the strategies that were enacted did yield a positive result. This is why I find that two (2) hours per day of compensatory education for this violation is an equitable remedy, given the facts of this particular case.

The District's termination of S/L services is also concerning, but this is a more difficult issue. Z.H., the pathologist who worked with the Student, testified credibly. According to that testimony, the Student met all articulation goals when S/L services were removed. It is clear, however, that S/L covers much more than articulation (Z.H. tends to agree). The Language part of Speech and Language, very generally, concerns the ability to communicate reciprocally, using expressive and receptive language – skills that students with Autism may lack. Even so, Z.H. did not see a need in these areas to an extent that required direct S/L services or SDIs. This opinion runs contrary to the District's S/L evaluation. Although the scores of that evaluation are very likely depressed, nothing in the record suggests that they are meritless. I find, therefore, that throughout second grade, the Student required the S/L services that were offered by the District at the very end of second grade, and those services should have targeted more than articulation. The Student was denied a FAPE as a result of the District's failure to offer these services, and the Student is owed compensatory education as a result. I therefore award the Student thirty (30) minutes of compensatory education for each week that school was in session during the 2011-12 school year.

The question of the Student's academic progress is even more difficult. The record clearly demonstrates that the Student made meaningful progress in reading. Even the Private School determined that the Student was above grade level upon entry. Regarding math, the evidence suggests some progress. The problem in this case is determining whether the amount of progress that the Student made in math is meaningful. KeyMath-3 levels do not closely correlate with grade levels, but moving from level to level does indicate progress. The meaningfulness of progress is typically measured against a student's potential. In this case, there is no clear measure of the Student's potential. Both parties agree that standardized testing is a poor measure of the Student's actual ability. Therefore, I look to testimony concerning the Student's actual ability. Broadly speaking, preponderant evidence in the form of credible testimony from the Student's teachers establishes that the Student was doing grade level math work with accommodations during the 2011-12 school year. This, combined with evidence of progress (in an absolute sense, if not relative to ability) on KeyMath-3 assessments persuades me that the Student did make meaningful progress in math.

Based on the forgoing, I find that the Parents did not satisfy their burden to show that the Student was denied a FAPE in regard to academics. I, therefore, will not award any additional compensatory education on that basis.

### ***Entitlement to Tuition Reimbursement***

As explained above, the first step in a tuition reimbursement analysis is to determine the appropriateness of the IEP offered by the District at the time that the Student was placed into the Private School. That IEP was the June 2012 IEP. This IEP was similar to prior IEPs, but incorporated an FBA and PBSP, and added S/L therapy to address the Student's needs beyond articulation.



As noted above, I found that the Student made meaningful progress academically in second grade (2011-12). The June 2012 IEP would have continued and expanded the program that enabled this progress. Therefore, I must find that the last-offered IEP was academically appropriate for the Student. Further, as noted above, I found that the Student was denied a FAPE because prior IEPs failed to provide S/L services beyond articulation. The June 2012 IEP corrects this error. Similarly, as noted above, I found that the Student was denied a FAPE because prior IEPs failed to provide appropriate behavioral interventions. The June 2012 IEP includes a FBA and a PBSP.

The June 2012 IEP, however, does not explicitly include 1:1 paraprofessional support - an unambiguously necessary service for the Student to be successful in the regular education, public school classrooms. (See, e.g. S-63 p. 3). As noted in detail above, none of the paraprofessionals who have worked with the Student one-to-one have ever been designated as *the Student's* support but, instead, have been assigned to the Student's classrooms. As such, the need for (and actual provision of) 1:1 support is not reflected in the IEPs.

It would be reasonable to assume that the District would simply continue to provide 1:1 support, but this is the same assumption that the Parents made – incorrectly – at the very start of the 2011-12 school year. This yields a troubling predicament. 1:1 paraprofessional support was necessary for the Student to be successful in the third grade placement offered by the District. In reality, the Student received 1:1 paraprofessional support in second grade, despite the fact that is not reflected in the Student's IEPs. Historically, under similar circumstances, the District discontinued 1:1 paraprofessional support at the start of the 2011-12 school year. A holistic reading of the record of this case in its entirety suggests that the District is unlikely to make that mistake twice. But, as noted, based on its actions at the start of the 2011-12 school year, the District may not be entitled to the benefit of the doubt. Moreover, case law suggest that the actual offered IEP is controlling, not the services that I suspect the District would have provided, had the Student attended during the 2012-13 school year. Current tuition reimbursement jurisprudence, noted above, calls for an examination of the last-offered IEP as the last-offered placement. Case law strongly suggests that I should not look beyond the four corners of the last offered IEP when assessing the appropriateness of the placement in question.

In light of current jurisprudence, I look first and foremost to the June 2012 IEP. That IEP does not require the District to provide a necessary service: 1:1 paraprofessional support. The gestalt of the evidence tends to suggest that the District may have provided this support if the Student actually attended, but concrete, specific evidence reveals that the District historically removed this support absent an obligation to provide it. These contradicting factors are secondary to the IEP itself, which does not include a necessary service – *the* service that enables the Student to participate in and benefit from the regular education programs and placements that would have made up over 80% of the Student's school day. For this reason, I find that the District failed to offer a FAPE to the Student prior to the Student's placement in the Private School.

Moving on to the second prong of the *Burlington-Carter* analysis, I find that the Private School was appropriate for the Student. Importantly, to satisfy this part of the test, the Private School must provide a meaningful benefit to the Student, but need not satisfy the standards of appropriateness otherwise required of LEAs by the IDEA. See, e.g., *Mary Courtney T. v. School District of Philadelphia*, 574 F.3d 235, 242 (3rd Cir. 2009). For this reason, I do not give credence to the District's argument that the Private School is inappropriate because it is more restrictive than the District's placement. Were this the standard, tuition reimbursement could not exist as a remedy.

The evidence in this case, described in detail above, establishes that the Student did derive a meaningful benefit from placement in the Private School. The Student's areas of need were recognized by the Private School, and the Student received beneficial instruction and remediation in those areas. The Private School's services were not provided pursuant to an IEP and, consequently, were not monitored to the same extent that they would be in a public school setting. This is immaterial to the analysis in light of the compelling evidence and testimony of the Student's actual progress in the Private School. The second prong of the *Burlington-Carter* test is, therefore, satisfied.

Moving on to the third prong of the *Burlington-Carter* analysis, I turn to the question of whether the equities favor reimbursement. As the District notes in its closing brief, other jurisdictions have paid very close attention to the third prong of the *Burlington-Carter* test: courts can deny reimbursement if a parents' own actions frustrated the school's efforts. *Loren F. v. Atlanta Independent School System*, 349 F.3d 1309 (11th Cir. 2003); *M.M. v. School District of Greenville County*, 303 F.3d 523, 533-35 (4th Cir. 2002)(School district not liable for its failure to timely complete an IEP where parents failed to cooperate in IEP completion, preferring instead to place child in a private school); See *Doe v. Defendant I*, 898 F.2d 1136, 1189, N. 1 (6th Cir. 1990). Courts may deny or reduce tuition reimbursement if parents otherwise act unreasonably. 20 U.S.C. § 1412(a)(10)(C)(III); 34 C.F.R. § 300.403(d)(3).

Even so, there is no evidence that the Parents failed to cooperate with the District before the initial Private School Placement. There is some suggestion in the record that the Parents had decided to place the Student in the Private School before telling the District of their decision. There is no evidence, however, that the Parents inhibited the District's ability to offer a FAPE in June of 2012 when the last placement offer was made before the Student enrolled in the Private School. Consequently, I find that the equities do not compel a reduction or elimination of a tuition reimbursement award.

I note that the District offered another IEP on April 2, 2013 to be implemented during the Student's fourth grade (2013-14) school year. The Parents have not demanded compensatory education for the 2013-14 school year, and so I decline to assess the appropriateness of the April 2013 IEP.

An order consistent with the foregoing follows:

## ORDER

And now, June 28, 2013, it is hereby **ORDERED** as follows:

1. For reasons set forth in the foregoing Decision, the Student is awarded two (2) hours of compensatory education for each day that the District was in session during the 2011-12 school year to remedy a denial of FAPE resulting from the District's failure to provide appropriate behavioral special education.
2. For reasons set forth in the foregoing Decision, the Student is awarded 30 minutes of compensatory education for each week that the District was in session during the 2011-12 school year to remedy a denial of FAPE resulting from the District's failure to provide appropriate speech and language special education.
3. The Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product, or device. In the event that the Student returns to the District for programming before the exhaustion of the compensatory education award, the compensatory education shall be in addition to, and shall not be used to supplant, the services that the District would otherwise be obligated to provide. Compensatory education shall not be used as tuition reimbursement.
4. For reasons set forth in the foregoing Decision, the Parents are awarded tuition reimbursement, equal to the full cost of tuition and required materials for the Private School, less any credits, grants or scholarships that the Parents or Student would otherwise be entitled to, during the 2012-13 school year.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER