

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

**PENNSYLVANIA**

**SPECIAL EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING

Name of Student: E.G.

ODR #13618/12-13AS

Date of Birth:  
[redacted]

Dates of Hearing:  
May 7, 2013  
June 4, 2013

CLOSED HEARING

Parties to the Hearing:  
Parents

Downingtown Area School District  
540 Trestle Place  
Downingtown, PA19335

Date Record Closed :

Date of Decision:

Hearing Officer:

Representative:

Vivian Narehood, Esquire  
Gibbel, Kraybill and Hess  
41 East Orange Street  
Lancaster, PA 19380

Sharon Montanye, Esquire  
Sweet, Stevens, Katz & Williams  
331 E. Butler Avenue  
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July 14, 2013

July 25, 2013

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is an elementary-school-age student who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the current classification of learning disabled, and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504] as well as the federal and state regulations implementing those statutes.

This matter concerns a due process request from the Parents who are seeking compensatory education for an alleged denial of a free appropriate public education [hereinafter FAPE] and tuition reimbursement for Student's unilateral placement at a private school [hereinafter Private School]. The District maintains that it has offered Student FAPE in its public school and that compensatory education and tuition reimbursement should be denied.

## Issues

1. Did the District offer Student a free appropriate public education in the areas of reading and written expression?
2. If the District did not offer Student a free appropriate public education in the areas of reading and written expression is Student entitled to compensatory education and if so in what form and in what amount?
3. Must the District reimburse the Parents for tuition and transportation costs for Private School beginning January 14, 2013?

## Findings of Fact

Note for Reference: Student was in District schools in kindergarten for the 2009-2010 year, in 1<sup>st</sup> grade for the 2010-2011 year, repeated first grade [1<sup>st</sup> R] for the 2011-2012 year, began 2<sup>nd</sup> grade in the 2012-2013 school year, and on January 14, 2013, was parentally placed in Private School.

1. Very early in the kindergarten year the teacher noticed that Student was not retaining previously learned information, such as the letters of the alphabet, even those appearing in Student's name. The Parents<sup>2</sup> remembered that the teacher's statement was to the effect that Student "only knows four letters, and they're not the ones in [Student's] name. And every time we test [Student], it's a different set

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<sup>1</sup> This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

<sup>2</sup> The plural "Parents" is used throughout; although mother alone testified, and took the lead in dealings with the District, she acted on behalf of both the father and herself. Father attended the hearing sessions with mother.

- of letters that [Student] knows." Student received Title I services and Response to Instruction and Intervention [RtII]<sup>3</sup> Tier 3 programming; Student made inconsistent progress. At the March 2010 RtII follow up meeting the District suggested retention in kindergarten for the next year. [NT 128, 383; P-2, P-3]
2. Since the elementary school was a Title I school with a full day kindergarten the Parents asked for a full-day kindergarten program if Student was to be retained but the District did not offer this as it concluded Student did not qualify for full day kindergarten. The District offered only a repeat of the regular education half-day kindergarten program Student had already received. The Parents considered but declined retention in kindergarten on the advice of a neuropsychologist who evaluated Student privately. [NT 31-32, 374]
  3. At the end of the kindergarten year despite RtII services Student received a score of 66 percent on the Harcourt end-of-year test, the next lowest score in the class being a 75. [NT 130]
  4. In July 2010 Parents had a private neuropsychological evaluation conducted. Cognitive functioning was assessed with the WPPSI-III at the middle to upper end of the Average Range while processing speed was in the High Average Range [Verbal IQ 104, Performance IQ 103, Processing Speed 113, Full Scale IQ 107]. Achievement was assessed with the WIAT-III to be at the bottom of the Average Range to the top of the Low Average Range [Total Reading 91, Basic Reading 89, Mathematics 93].<sup>4</sup> [P-3]
  5. The Parents gave a copy of the neuropsychological report to the District and requested an evaluation from the District as Student had immediately began struggling in reading again at the beginning of 1<sup>st</sup> grade. [NT 132]
  6. Pursuant to the Parents' request the District agreed to evaluate Student. The District obtained additional information and issued its ER on October 20, 2010. [P-3]
  7. Student's 1<sup>st</sup> grade teacher's responses to a structured inventory [Conners 3] resulted in Clinically Significant scores on the Learning Problems/Executive Functioning Total scale and an At-Risk score on the ADHD probability index. The Parents' ratings were somewhat more elevated but there was overall consistency between home and school in these areas. [P-3]

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<sup>3</sup> RtII is designed as a 6-week intervention strategy; Tier 3 students are monitored weekly. At the end of the 6 weeks progress was to be reviewed and a decision made as to whether RtII should be continued with the same intervention program, or continued with a different intervention program, or another intervention put in place; Tier 3 is for the lowest performing pupils.

<sup>4</sup> On the bell shaped curve based on a standard deviation of 15, ranges for standard scores are: Below 69 Deficient, 70-79 Borderline, 80-89 Low Average, 90-109 Average; 110-119 High Average; 120-129 Superior, 130 and above Very Superior.

8. The Parents followed up on the ADHD finding and Student began trials of medication. [NT 122, 227, 522]
9. Despite Student's notable lack of progress during RtII in kindergarten [including consideration of retention], and ongoing struggles from the beginning of 1<sup>st</sup> grade, the District used only the private neuropsychologist's WPPSI-III and WIAT-III scores to apply the "discrepancy model" [which statistically compares the test-taker's standard score achievement levels with cognitive functioning levels], and concluded that Student did not have a disability and was not in need of specially designed instruction. The District did not consider Student's day-to-day struggles even after one year of extra intervention. [NT 291, 311, 380-381; P-3]
10. At the time the District made its determination of non-eligibility for special education it did have objective benchmark data supporting the fact that Student was struggling, as demonstrated by the DIBELS characterization of Student as needing "intensive" work, Student's score of 66 percent on the Harcourt end-of-kindergarten year assessment test, and going down to well below target goals on AimsWeb monitoring. [NT 130, 423; P-3]
11. The Parents were erroneously informed that although Student had ADHD, ADHD was not a disability. The District also informed the Parents that given the results of the discrepancy model Student did not qualify for specially designed instruction. [NT 138]
12. Incongruously, although the District found Student ineligible for special education, the District's evaluation report raised the concern that Student might have to be considered for retention in 1<sup>st</sup> grade. [NT 138; P-3]
13. Meanwhile, although the Parents were not informed of such, Student's name "came up frequently" in core team meetings of the school principal, school psychologist, RtII teacher, and guidance counselor; these were meetings in which students whose progress was of concern to the team were discussed. [NT 297-298, 377-378, 384]
14. Student was again receiving RtII in 1<sup>st</sup> grade. Although during the RtII sessions Student was able to make some progress during group lessons, Student "was unable to retain new learning and apply skills learned in (sic) while reading texts...[Student] was unable to recognize sight words that [Student] had learned...therefore [Student's] progress was less than what would be expected". Student was continuing to experience difficulty with letter naming fluency, letter sound fluency, nonsense word fluency, and phoneme segmentation fluency. Student's AIMSWeb scores indicated the need for further assessment and additional intervention. [P-2, P-3, P-13]

15. The principal recalls becoming concerned toward the middle or end of the first trimester in 1<sup>st</sup> grade that despite interventions Student was not making appropriate progress. [NT 378, 383]
16. In December 2010 Parents provided that District with a letter of dissent to the evaluation report, having researched the IDEA and having found that ADHD indeed qualified as a disability, In early January 2011, fewer than three months post-issuance of its ER, the District reconsidered its findings, and concluded that Student had a disability under the classification of Other Health Impairment [ADHD] and was eligible for special education because the continued lack of response to RtII indicated the need for specially designed instruction.<sup>5</sup> On February 3, 2011, over a year and a half from a teacher's registering concern about Student's inability to retain reading skills, Student received an IEP. [NT 139-141, 382; P-3, P-4, P-23]
17. The February 3, 2011 IEP provided for specially designed instruction in the form of a "direct, explicit, systematic, phonemic-phonetic word analytic approach to decoding, fluency, and spelling instruction..." [P-5]
18. Despite nearly a year and a half of extra reading intervention, the learning support teacher testified that at the time Student received the first IEP Student would see a first letter or a shape of a word and just impulsively say it and not necessarily look at the whole word and all the parts to decode it. Sometimes Student was "lucky" and it was accurate, but it was obvious that Student wasn't necessarily focused on the strategies or the elements of decoding the whole word. [NT 560]
19. Although Student was in a learning support classroom for 57% of the day, the class contained from 8 to 15/16 students ranging from kindergarten to 3<sup>rd</sup> grade with disabilities in the areas of ADHD, Specific Learning Disabilities, Autism and Emotional Disturbance; the class was staffed with one teacher and an aide when there were 8 children and another aide was added when eight more children entered. The children received different programs on various levels depending on their needs. [NT 578-580, 598-601]
20. The learning support teacher nevertheless estimated that given Student's level of need she devoted approximately 45 minutes of either one-to-one reading instruction or small group [two-to-one] instruction to Student during the reading period; the other pupils were also in the classroom but left to work with the aide[s]. [NT 603, 605-606]
21. Having read the IEP and approved it, Parents believed that Student was receiving a specialized program. However, the primary program used to instruct Student in the learning support class was Harcourt Trophies, the core curriculum for regular

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<sup>5</sup> In order to be eligible for special education services a child must have a disability AND require specially designed instruction; a disability alone, without the need for specially designed instruction, could entitle a child to accommodations under a 504 service agreement.

- education, which had not been effective for Student, modified by Harcourt Intervention which offered the same program as Harcourt Trophies but at a six-month delay designed to enable struggling students to “catch up”. Parents were unaware that the learning support teacher was using the same Harcourt program for reading and writing that had previously been used and had not been effective. [NT 164, 357]
22. Parents’ expert in dyslexia testified that none of the regular education “basal readers” such as Harcourt have been peer reviewed for their effectiveness for use with children with dyslexia<sup>6</sup>. [NT 46-47]
  23. The principal testified that the programs [or parts of programs] the District used that had “some research-based evidence” [although not necessarily for use with dyslexic children] included Waterford, Fountas & Pinnell, Fast ForWord, Lindamood Bell’s Seeing Stars and Visualizing & Verbalizing, Project Read, and Read Naturally. He testified that as far as he knew, none of the programs used were peer reviewed. Student did not do well with Waterford or Fountas & Pinnell; Fast ForWord was offered for a time and then withdrawn in favor of Read Naturally [now Read Live] which was also withdrawn. Lindamood Bell was not tried. In accord with the learning support teacher’s testimony, none of the programs that were used with Student were implemented in their entirety and/or with fidelity. [NT 358-359, 371-372, 388-389, 400, 406-407, 519-520, 524-536, 620, 629-631, 641-642; P-13]
  24. Fountas and Pinnell had been used for progress monitoring, and when the District concluded that Harcourt was not being effective with Student, Fountas and Pinnell was introduced again despite Student’s unsatisfactory experience with it in regular education first grade. Further, Fountas and Pinnell was taught by the learning support teacher who had no training in the program other than how to do assessments and for whom it was not the “go to” choice. [NT 295, 385, 420-421, 614-615, 635, 656-657]
  25. The school principal, who received his doctorate in reading intervention, candidly testified that to his knowledge the Harcourt and Fountas and Pinnell programs were not peer-reviewed for effectiveness with children with reading disabilities. The principal has not done much research into dyslexia and is not familiar with the standard treatises in the area. [NT 354, 371-372]
  26. Although two of the team members who participated weekly in team meetings where Student’s progress was frequently discussed were certified as reading specialists, the District did not use them to instruct Student in reading because of

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<sup>6</sup> The District was previously advised by another expert cited by this hearing officer that Harcourt Trophies is not peer reviewed for students with reading disabilities and is a “generic” reading program. [See *M. D. v. Downingtown Area School District*, 1530/10-11; HO Decision modified by Federal Court in the Eastern District, No. 2:11-cv-6685- LDD on August 6, 2012 solely with regard to removal of monetary cap on compensatory education]

- changes in staffing titles/needs, nor did the District call in a consultant reading specialist to assess or to work with Student. [NT 407-408, 410-411, 504-505]
27. The Parents noted Student's regression over summer 2011 during the Extended School Year [ESY] program, and so chose to follow the District's previous suggestion to allow Student to be retained. Student repeated first grade. [NT 148-153; P-3, P-19]
  28. During Student's 1<sup>st</sup>R grade year, IEP meetings were held on 10/17/11, 11/1/11, 2/2/12, 3/12/12, and 6/12/12. The IEP team was working to find a program that would work for Student but Student continued to present the same difficulties in acquiring and retaining reading and writing skills that had been evident since kindergarten. [NT 450; S-3, S-6, S-7, S-8, P-6]
  29. Student received ESY services for the summer following 1<sup>st</sup> R grade [Summer 2012]. When its data validated Parents' concerns about regression the District authorized ten additional ESY hours. The teacher providing the additional ESY hours was trained in the Wilson Reading Program, a peer-reviewed, research-based, systematic, multisensory program. However, when instructing Student she did not use the Wilson program per se, but only did a Wilson assessment [WADE] and used some Wilson techniques. [NT 258, 430-431, 433; S-10]
  30. Prior to the beginning of 2<sup>nd</sup> grade the Parents were encouraged because the topic of possibly using the Wilson Reading Program with Student came up. Although there was no Wilson-certified teacher in Student's elementary school, the principal spoke about perhaps having someone trained. However, the Supervisor of Special Education informed the Parents that Student was not going to receive Wilson, and Wilson never materialized for Student. [NT 179-185, 394-396, 405]
  31. At the beginning of 2<sup>nd</sup> grade, given Student's lack of notable academic progress over the 3-year period of time from initiation of RtII in kindergarten, through RtII in the first half of 1<sup>st</sup> grade, through an IEP from the second half of 1<sup>st</sup> grade, and finally through 1<sup>st</sup>R grade and summer ESY, the Parents requested a full neuropsychological assessment at District expense to which the District agreed. The District psychologist testified the District agreed to support this re-evaluation because, "...it was clear from all the data and evidence that [Student] was not responding to the interventions that had been put in place and that we needed to do a more in-depth assessment of what was going on with [Student] and [Student's] learning.....". A private neuropsychologist administered neuropsychological testing described in a September 10 & 13, 2012 evaluation report, and the District performed the more typical assessments and data synthesis reported in the October 29, 2012 Re-Evaluation Report. [NT 182-183, 282-283; P-18, P-19]
  32. In September 2012, at the time of the re-evaluation, Student had finished the 1<sup>st</sup> R grade and was starting second grade. The neuropsychologist assessed Student's

- Full Scale IQ at 99 [middle of the Average Range<sup>7</sup>] while the speech/language therapist assessed core Composite Language Skills at 117 [High Average Range]. Alarming, on the Woodcock-Johnson Test of Achievement–Form A, the neuropsychologist found Student’s word attack skills to be at a standard score of 59 [Deficient Range], which translated to an early kindergarten level three years after Student had begun kindergarten and after nearly that many years of reading intervention. [NT 66-67; S-12, P-14]
33. The neuropsychologist found a “marked deficit in phonetic decoding” with difficulty identifying vowel sounds correctly; with adding, transposing, and substituting letters despite the fact of having learned some sight words; and with a tendency to look “at the first letter or two of the word and then guess the end” as Student had been doing back in February 2011 at the very beginning of instruction under an IEP. [NT 560; P-14]
  34. Student’s spelling was assessed at a standard score of 76 [Borderline Range]. Letter-word identification was assessed at 86, and passage comprehension at 83, all at a mid-first grade level [S-12]
  35. The neuropsychologist was concerned that Student’s deficits could “continue to emerge or become exacerbated over time”. [S-12]
  36. The neuropsychologist recommended a neuro-optometric evaluation given Student’s severe visual processing and visual memory deficits. The Parents followed up on this recommendation and took Student for an examination then and a second opinion. Neither specialist found that Student had a vision problem that would be a significant contributing factor to Student’s learning deficits. [NT 124-126, 239-242; S-12, P-14, HO-1, HO-2]
  37. The District’s ESY reading tutor noted that Student would “create words due to [Student’s] hasty reading” and that while Student could successfully read or decode unknown words in isolation, Student stumbled and struggled with paragraphs and sentences, guessing or making up words, sometimes with little relationship between the word Student read and the word Student said<sup>8</sup>. [S-12]
  38. The District’s October 2012 re-evaluation report noted that based upon additional District testing with the San Diego Quick Assessment List, Student was “demonstrating significant achievement deficits in [Student’s] phonological awareness and basic reading and decoding skills relative to [Student’s] general

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<sup>7</sup> The 8-point drop from the previous Full Scale score of 107, while noted, may not be significant given that two different testing instruments were used.

<sup>8</sup> A good illustration is Student’s being given the prompt "Please answer the telephone in the kitchen. It has been [blank] for some time" and reading “Please ask a teapot in the kitchen to be helpful for some time." Parents’ expert witness noted that Student could be tested on another day and have a completely different result because Student has a haphazard perception of symbol directionality. [NT 73]



- intellectual ability, chronological age expectancy and grade level placement”. [S-12]
39. The District’s October 2012 re-evaluation report noted that based upon the WIAT-III, Student’s “Basic Reading, Total Reading, and Reading Comprehension and Fluency composite scores all fall significantly below [Student’s] general intellectual ability and indicate that [Student] is not making meaningful progress in [Student’s] basic reading skills and reading fluency, which are beginning to affect [Student’s] independent reading comprehension”.<sup>9</sup> [S-12]
  40. The District’s October 2012 re-evaluation report noted with regard to written expression that although Student “is able to spell real words correctly in isolation, and adequately combine/copy model sentences provided...in [Student’s] spelling of unknown words and [Student’s] formulation of independent sentences [Student] evidences extremely poor spelling in context, limited use of proper writing mechanics, poor sentence structure and poor grammar/syntax.”. [S-12]
  41. The District’s October 2012 re-evaluation report notes that taken cumulatively, Student’s performance on writing tasks “indicates that [Student’s] writing encoding falls well below [Student’s] general intellectual ability and [Student] does not appear to be making meaningful progress in [Student’s] written expression at this time”. [S-12]
  42. The Parents’ expert, having reviewed Student’s entire educational record, and having reviewed the September/October re-evaluation including a comparison of Woodcock-Johnson and WIAT-III achievement scores with past achievement scores, agreed with the District’s conclusion that Student had not made meaningful progress, and noted that in fact had experienced regression when compared with national norms. [NT 77-81, 96-100]
  43. In developing the District’s Re-evaluation Report the District’s psychologist concluded that Student has "developmental dyslexia" because of the nature and severity of the areas of specific difficulty as well as the input of the neuropsychological evaluation. The District psychologist testified that she would use the term "dyslexia" rather than “reading disability” in cases where there is a more significant reading disability based on neurocognitive deficits. [NT 280-281]
  44. Oral reading fluency [ORF] involves being able to decode with automaticity in order to derive meaning. The District’s Supervisor of Special Education testified that Student’s ORF was an area of concern. [NT 472-473]

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<sup>9</sup> Given the average-level WIAT-III achievement scores on the first neuropsychological evaluation in July 2010, Student’s October 2012 WIAT-III scores clearly represent regression.

45. The tables below represent AIMSWeb probes for ORF<sup>10</sup> from the beginning of Student's first IEP at the latter half of 1<sup>st</sup> grade, through the entire 1st R year to the end of September at the start of 2<sup>nd</sup> grade. Although far from the only assessments of Student's reading in the record, because the probes were repeated so often the scores are a good example of Student's failure to sustain gains, or as the principal testified, Student's progress had "flatlined". Notably at the end of September of 2<sup>nd</sup> grade, Student's words-per-minute [wpm] score was identical to that from November of the repeated 1<sup>st</sup> grade year, with a reduction in percentage of accuracy [see shaded portion]. These scores illustrate the severity of Student's disability, the pattern of Student's struggling and making good effort, and the ineffectiveness of the District's programming.<sup>11,12</sup> [NT 57-58, 386; P-14, P-19]

<b>Gr</b>	1	1	1	1R	1R	1R	1R	1R	1R	1R	1R	1R	1R	1R	1R	1R	1R	1R	1R	1R	
Date	F 2011	Mar 18	May 27	S 2	N 18	D 1	D 16	D 23	J 6	J 13	J 20	J 27	F 3	F 10	M 9	M 15	M 23	M 30	A 13	A 20	A 27
wpm	11	16	25	22	56	64	45	65	30	40	60	51	55	50	53	59	56	67	52	71	64
Acc%	45	50	80	64	95	94	89	93	63	88	83	94	90	94	91	95	95	99	96	95	98
Lev Text	Pr	Prim	1st	1st	1st	1st	1st	1st	1st	1st	1 <sup>st</sup>	1 <sup>st</sup>	1st	1st	1st	1	1	1	1	1	1

1R	1R	1R	1R	1R	2nd	2nd	2nd	2nd	2nd
May 4	May 11	May 18	May 21	May 24	Aug 30	S 7	S 14	S 24	S 28
52	64	67	60	67	50	52	45	58	56
94	92	94	98	94	85	95	88	96	92
1sr	1st	1st	1st	1st	1st	1st	1st	1st	1st

46. The Parents presented a school psychologist with specific expertise in dyslexia. This expert testified that there is a need to evaluate whether "the child (is) getting these basic skill sets down...and retaining those skill sets...what stuck to the wall", and when a child does not retain skills learned "it's an immediate indication that what you're doing isn't working, so you have to investigate". [NT 48-49; P-17]

<sup>10</sup> The Parents' expert witness raised some concerns about the AIMSWeb-type of progress monitoring that uses timed passages for children generally, not only Student, because it seems to send the message that speed is more important than correct decoding and understanding. The AIMSWeb results for Student are presented here in detail to illustrate Student's lack of progress notwithstanding whether the monitoring tool is a best practice. [NT 55-56]

<sup>11</sup> The expectation on this assessment tool is that a child will improve at the rate of one-and-a-half words per week. [NT 617]

<sup>12</sup> Note that some of the dips in scores followed breaks in programming for summer, holidays, etc. While Student made up the dips, Student did not progress forward on an upward trend.

47. The Parents' expert in dyslexia reviewed Student's entire educational record and concluded that Student "needs a mastery program, as [Student] is clearly not retaining what [Student] learns...and you don't go to the next step until you've really consolidated that knowledge".<sup>13</sup> [NT 89]
48. The Parents' expert explained that aside from ADHD, Student has "double deficit" dyslexia, a concept that was defined and researched by Maryanne Wolf of Tufts University and the National Institutes of Health. The core deficit of dyslexia is a problem hearing the phonemes in words and forming sound and symbol connections, however there has always been a group of children who have more than just phonological processing problems; these children also have orthographic processing problems, that is they get the written symbols mixed up as they scan and track across print. These children can read a word correctly in one place and several lines later not be able to read the word. [NT 38-39, 44, 94]
49. "Double-deficit dyslexia" is the subtype of dyslexia that is most difficult to remediate; because "you're not only dealing with phonological processing problems, you also have orthographic processing problems". [NT 39]
50. The Parents' expert witness testified that "what happens as the academic demands increase, a child like [Student] will have more and more problems because of [Student's] difficulty with orthographic aspects of processing". [NT 69]
51. The District's last offered IEP provides for "up to 30 minutes per day" of reading instruction. Although as in the first IEP "direct, explicit, systematic, phonemic-phonetic word analytic approach to decoding, fluency, and spelling instruction" was put forth, there was no indication that the District was going to deviate from its previous eclectic approach and use a peer-reviewed research-based instructional program designed for dyslexic learners. [P-5, P-12]
52. The Parents' expert testified that 120 minutes per day of a peer-reviewed, intensive remedial *mastery* program is required for Student, given that despite over three years of attention to reading skills Student has not been retaining and consolidating skills. [NT 88-90]
53. Even with double-deficit dyslexia, ADHD [and a possible interfering vision problem which Student does not have], a combination that is not uncommon, if a child is taught appropriately one would still expect to see one year's progress in one year and you would not expect to see regression. [NT 116-119]
54. The Parents' expert testified that the District had enough information in the record to be able to develop an appropriate IEP but concluded that it did not do so. [NT 104-106; P-12]

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<sup>13</sup> The District psychologist agreed with the Parents' expert's testimony, with the exception of finding that Student exhibited more social adjustment problems than the Parents' expert found. [NT 297]

55. The District's learning support teacher who had Student from identification [middle of first 1<sup>st</sup> grade] to disenrollment [middle of 2<sup>nd</sup> grade] used the following programs with Student: February 2011, kindergarten and first-grade Harcourt Intervention; September 2011, first-grade Harcourt Intervention; mid-September 2011 Fast ForWord; October 2011 overlapped these with the Harcourt Trophies first-grade series; end of the school year, Read Naturally; September 2012 Fountas & Pinnell, and continuation of the Harcourt Intervention and Harcourt Trophies [for assessment] and Read Naturally. Additionally, the methodology and the strategies that were being implemented came from Project Read, and then in September of Student's 2<sup>nd</sup> grade the teacher was trained in and utilized the Wilson strategies. The learning support teacher testified that she presented the programs in sequence, but not always paced according to the program. [NT 562-569, 611-612]
56. The learning support teacher candidly testified that delivering the various programs to Student was "very challenging". [NT 601]
57. The learning support teacher consulted informally with an IST teacher who had been a reading specialist about strategies but that individual did not make any suggestions about specific programs for Student. [NT 587-592]
58. Parents decided to withdraw Student from the District as of December 17, 2012. [P-15]
59. Children have a "critical window" of language development from birth to about ten or eleven years of age during which the language centers of the brain are going through rapid development of brain cell connections. This period is called the "critical window of language development"; if a child has any type of language-based learning disorder, the key is identifying it early and doing intensive intervention early to try to remediate the disability. [NT 39-40]
60. The Parents' expert explained that in many cases, if you identify a dyslexic child who does not have double deficit dyslexia early and you do the right kind of intervention early, "by the end of third grade that child is going to be in pretty good shape". If a child is at the end of third grade and hasn't developed basic precursor literacy skills, the child is likely to always have a problem in life with reading, spelling, and writing. [NT 40]
61. The critical window is universally understood in the area of dyslexia such that many schools for dyslexic children won't take those children who have been identified late, because they realize that the chances of being successful to remediate the problem, decreases significantly once the child is out of the critical window. [NT 41]
62. When the concept of dyslexia was first being better understood, there was an evolution in working with children with language-based learning disabilities. Two

- schools that arose early on in this history were the Benchmark School and Gow in New York. Both of these schools used Samuel Orton's theories about teaching dyslexic children to develop their own methodologies to deliver this instruction to children that would have an appeal to children and work for them; Gow called its method "Reconstructive Language," and Benchmark called its method "Word Detectives." These two schools developed the path for many of the research-based programs that exist today, such as the Wilson Reading System in which Barbara Wilson took the principles of Orton and put them into a format that was very structured, very mastery-based, and very sequential, such that the approach is like teaching reading mathematically. [NT 41-42]
63. Whereas some schools, public and private, use the programs that were developed through research, using guiding principles that are available now, other programs historically developed over many years, again, conforming to the principles that have been discovered through research and also adapting and reformatting their programs; Benchmark is one of those schools, using the "Benchmark Method" that was designed by Irene Gaskins. [NT 43]
64. Having observed Student at Private School, having been at Private School many times, and having worked many times with children who have gone to Private School, the Parents' expert witness testified that Private School is "clearly" appropriate for Student. Private School is "one of those really solid schools" that understands language-based learning disability. Private School has taken the continuing research and reconfigured their methodology with the new information that's been coming in, but developed a program that keeps children from becoming bored with phonics. [NT 100-101; P-21]

#### Discussion and Conclusions of Law

**Burden of Proof:** The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof. As the evidence was not in equipoise, *Schaffer* was not applied except for the issue of ESY.

**Credibility:** During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express,

qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

The Parents offered an expert witness to whose credentials and expertise in the area of school psychology the District stipulated. [NT 35; P-17] The witness conducted a thorough review of Student’s educational records as well as evaluating the orthographic aspect of Student’s deficits, and testified in detail about the nature of Student’s disabilities and their impact on Student’s ability to learn to read. [NT 43-44] I found this witness’ testimony very instructive, clearly stated, and highly credible and gave considerable weight to her testimony.

Student’s mother testified in detail and with good recollection of the chronology of events. Her descriptions of Student while in the District and while at Private School presented a picture that was consistent with what would be expected given the documentary evidence and the testimony of Parents’ expert witness. I found her to be a credible witness and judged her testimony to be reliable.

The principal’s testimony overall was instructive, and I found his responses to questions about Student’s failure to make progress refreshingly candid. His forthrightness is noted with appreciation.

The District’s psychologist’s justifications for not finding Student eligible at the time of the first District evaluation [because of ADHD and chronological age – see NT 292-295, 339] were simply not credible, and I gave little weight to her explanations in this regard. Her candid admission that Student was not making progress and that this led to the District’s agreement to fund a neuropsychological evaluation at the beginning of second grade was supported by the record and her testimony in this regard was valuable. I did not find the Supervisor of Special Education’s reinterpreting the District psychologist’s report that Student was not making meaningful progress to be credible, as her testimony on this point as well as on other points [e.g. what the re-evaluation report said about Student’s behavior versus what teachers had reportedly said in meetings, or that Student’s main problem was fluency] was contrary to the documentary evidence, to the testimony of the District psychologist, to the testimony of the learning support teacher, and to the testimony of the principal. The learning support teacher clearly tried very hard to teach Student and her testimony regarding the array of programs Student received was helpful. While I found her to be credible, I did not rely on the guidance counselor’s testimony as it was extraneous to the central issue of whether Student received FAPE in the areas of reading and writing.

**Legal Standards:** The IDEA statute and federal regulations require states to identify, locate, and evaluate all potentially disabled children, including those who may be “advancing from grade to grade.” 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1); *G.D. v. Wissahickon School District*, 2011 WL 2411098 (E.D.Pa 2011) at \*6. In Pennsylvania, that obligation is fulfilled by school districts, and in some cases,

intermediate units, in compliance with 22 Pa. Code §§ 14.121–14.125, as well as the federal requirements.

Within a reasonable time after a district is on notice of facts likely to indicate a disability, it must “conduct an evaluation of the student's needs, assessing all areas of suspected disability,” *P.P. v. West Chester Area School District*, 585 F.3d 727, 730 (3d Cir.2009), citing 20 U.S.C. § 1414(b); *O.F. v. Chester Upland Sch. Dist.*, 246 F.Supp.2d 409, 417 (E.D.Pa.2002), citing *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir.1995). “Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE.” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C.2008), quoted in *G.D. v. Wissahickon School District* at \*6.

With respect to the necessary evaluation, the IDEA further requires districts to conduct a “full and individual initial evaluation” ...using “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining whether the child is a child with a disability.” 20 U.S.C §1414(a)(1)(A), (b)(2)(A)(i). A district may “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. §1414 (b)(2)(B). The purpose of the evaluation is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii).

FAPE: Having ultimately been evaluated and found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or student progress; and provided in conformity with an Individualized Educational Program (IEP).

The IEP must be “reasonably calculated” at the time it was created to enable the student to receive “meaningful educational benefit”, a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist*, WL 2682741 (E.D. PA. July 8, 2011)

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the student only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk*. The Third Circuit explains that while an “appropriate” education must “provide ‘significant learning’

and confer 'meaningful benefit,'" it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District noted, [LEAs] "need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at \*7 (E.D.Pa., July 24, 2008). ). The U.S. District Court for the Middle District of Pennsylvania has noted, 'the standard is virtually minimal, indeed, "modest.'" *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 1:11-CV-574, 2012 WL 2979038 at 27 (M.D. Pa. July 20, 2012). The law requires only that the plan was reasonably calculated to provide meaningful benefit at the time it was created.

The IEP for each student with a disability must include a statement of the student's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum and meeting the student's other educational needs that result from the student's disability; a statement of the special education and related services and supplementary aids and services to be provided to the student...and a statement of the program modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other students with disabilities and nondisabled students; an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class... CFR §300.347(a)(1) through (4).

Compensatory Education: Compensatory education is an equitable "remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> Cir. 2009) (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3<sup>rd</sup> Cir. 2010), citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005); *B.C. v. Penn Manor Sch. Dist.*, 805 A.2d 642 (Pa. Commw. 2006). An hour-for-hour replacement for the period of deprivation is not the only appropriate equitable remedy for calculating a compensatory education award. Compensatory education requires the court to consider all relevant factors. Indeed, "[p]arsing out the exact number of hours a child was not benefitted by FAPE during the time period would place an arduous and



near impossible task upon the administrative bodies.” *Central School District*<sup>14</sup> v. *K.C.*, 2013 U.S. Dist. LEXIS 94065 (E.D. Pa. 2013) citing *G. D. v Wissahickon Sch. Dist.*, 832 F.Supp.2d 455, 46E (E.D. Pa, 2011).

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

#### Discussion

By its own admission in writing and in testimony during the hearing, and as thoroughly supported by the complete case record, Student did not make meaningful educational progress before or during the relevant period in this matter. The District was late in evaluating Student; once Student was evaluated the District found Student ineligible. Once the District corrected its error and found Student eligible it failed to deliver an appropriate educational program in the areas of reading and written expression instruction. Once proposed, of course, an IEP must be implemented with fidelity; if an IEP meets the statutory standards in writing, but the actual services delivered are not consistent with what is written into the IEP, the child is denied FAPE. The best IEP undelivered is nothing more than pieces of paper, and perhaps less, as parents can, as in this case, be lulled into a belief that their child is receiving an appropriate special education program.

Had the District conducted an early enough and thorough enough evaluation, and/or had the District actually provided what the initial IEP of February 2011 promised – a “direct, explicit, systematic, phonemic-phonetic word analytic approach to decoding, fluency, and spelling instruction...” delivered with fidelity, Student might have gleaned the educational benefit that the IDEA contemplates. At this point both parties recognize that Student’s dyslexia is severe – “double deficit dyslexia” as described by the Parents’ expert – and the parties and this hearing officer recognize that the severity of Student’s disability makes remediation difficult. Had the District actually delivered with fidelity what it proposed to offer – that systematic step-by-step program of instruction – it would find itself in a very different position today. A potential turning point for Student could

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<sup>14</sup> The District was Central Bucks School District but the Court’s Opinion carries the title Central School District.

have been provision of a program such as the Wilson<sup>15</sup> program, a prospect which seemed encouraging to the Parents but which never came to be. An IEP is not a performance contract, and there is no guaranteed outcome. However, by failing to offer Student an appropriate explicit and systematic program delivered with fidelity, the District allowed Student to try very hard during the two-and-a-half years of that critical window for remediation with very little to show for it. Student is entitled to and will be awarded compensatory education in an amount that is designed to bring Student up to the place where Student would have been but for the denial of FAPE. In light of the 2 year limitations period applicable to IDEA claims and the conclusion that the District had sufficient reason to evaluate Student at least by the start of 1<sup>st</sup> grade, there would ordinarily be a significant issue concerning the scope of the remedy that Parents can obtain. In this case, however, those issues do not need to be determined in light of the legal standards applicable to compensatory education and the evidence.

The Third Circuit has determined that a student's demonstrated progress in an educational program is sufficient to show that a school district's IEP allows for significant learning and provides meaningful benefit as necessary to satisfy the IDEA's FAPE standard. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). Given that progress is relevant to the determination of whether a student with a disability received an educational benefit, progress or lack thereof is therefore also relevant to determining whether a reimbursement award is due. Student failed to make meaningful educational progress.

Having determined that Student was denied FAPE in the areas of reading and writing as discussed above, I must now decide what form compensatory education will take. In this matter, although I am awarding compensatory education hours, I am not using an hour-for-hour approach but rather am fashioning an award that I believe will bring Student to the place where Student would have been but for the denial of FAPE. In the July 3, 2013 *K.C.* decision, a case with a strikingly similar fact pattern to the instant matter, the federal court in the Eastern District of Pennsylvania looked favorably upon this method of awarding compensatory education for a denial of FAPE.

Based upon the testimony of the Parents' expert witness that Student requires 120 minutes per day of appropriate intervention in the areas of reading and written expression, and with the intent of bringing Student up to where Student would have been but for the denial of FAPE during the critical developmental period, I am awarding 2 hours per day of compensatory education for 2 years<sup>16</sup> [2 hours x 180 days

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<sup>15</sup> Although the neuropsychologist in the September 2012 evaluation opined that Wilson would not be appropriate for Student based on possible vision problems, two vision specialists concluded that vision per se was not contributory to Student's reading issues. [NT 124-126, 239-242; S-12, P-14, HO-1, HO-2]

<sup>16</sup> The Parents also contested the appropriateness of the two summers of ESY provided to Student. The record is not developed fully enough regarding ESY for me to determine whether the programs were appropriate or not. In both summers the District offered less than what the Parents were eventually able to have the District agree to provide and I have no evidence that what was provided did not meet minimal

x 2 years], a total of 720 hours of compensatory education. These hours are to be used for a parentally-selected appropriate remedial intervention program in reading and writing, and may also be used for periodic consultation with and reassessment by Parents' expert or another similarly credentialed and experienced psychologist with expertise in dyslexia. Additionally, the hours may be used to assist Student in content areas where reading and writing deficits adversely affect Student's performance. Finally, the hours may be used to provide counseling services around issues related to Student's history of poor school performance. These hours are to be used in addition to and not in place of any services that may appear in future IEPs at such time as Student may return to the District. They may be used in the evenings, on weekends and during the summer. The services provided must be billed at the usual customary rate charged by peer-professionals in the geographic area. The hours are to be used prior to Student's 21<sup>st</sup> birthday.

As the District did not deliver an appropriate program to Student and Student continued to fail to make meaningful educational progress in the District program, the Parents were entirely justified to seek an appropriate private placement for Student. The timing of their decision was particularly fortunate given that Student is only a few years short of reaching the age when the "critical window" of language development closes. Additionally Student is one grade short of the usual 4<sup>th</sup> grade turning point when children no longer "learn to read" but instead, having mastered reading, "read to learn". The testimony of the Parents' expert witness was persuasive that the parentally-chosen Private School is appropriate under the IDEA and provides exactly the kind of instruction that the severity of Student's dyslexia demands. Tuition and costs of transportation will be reimbursed to the Parents, and will continue to be reimbursed until such time that the District proposes, with intent and ability to actually *deliver with fidelity*, an appropriate program for Student.

### Conclusion

Student was denied FAPE and is entitled to compensatory education. As was recently discussed in *K.C.*, the federal court recognizes a hearing officer's authority to, and expresses its preference for, awarding compensation to the child to bring the child up to where the child would be but for the denial of FAPE, as opposed to a strict hour-for-hour calculation. Accordingly, Student shall receive 2 hours per day of compensatory education services for a two-year period, an equitable remedy designed to bring Student up to the point where Student would be but for the lack of FAPE. As the District failed to offer an appropriate program, and the Parents' unilateral placement is deemed appropriate under the Act, with no intervening equitable considerations that would affect reimbursement, tuition reimbursement and transportation costs will be ordered from the date Student began Private School until such time as the District is prepared to offer and deliver an appropriate program to Student.

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standards for ESY FAPE. As the Parents did not meet their burden of proof on their ESY claim, no compensatory education services will be awarded for ESY.

## Order

It is hereby ordered that:

1. The District did not offer Student a free appropriate public education in the areas of reading and written expression instruction.
2. As the District did not offer Student a free appropriate public education in the areas of reading and written expression during the relevant period, and with the intent to bring Student up to the place Student would occupy but for the denial of FAPE, Student is awarded 2 hours per day of compensatory education for 2 full years [2 hours x 180 days x 2 years], a total of 720 hours of compensatory education. These hours are to be used in accord with the description above.
3. As the District's program was inappropriate, and the Parents' unilateral placement is appropriate, and there are no equitable considerations that would affect reimbursement, the District shall reimburse the Parents for tuition and transportation costs for Private School for the 2012-1013 school year as of January 14, 2013 and until such time as the District proposes and is prepared to implement with fidelity an appropriate program for Student.

Any claims not specifically addressed by this decision and order are denied and dismissed.

July 25, 2013  
Date

*Linda M. Valentini, Psy.D., CHO*  
Linda M. Valentini, Psy.D., CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official