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Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 13887-1213AS

Child's Name: I.W.

+Date of Birth: [redacted]

Dates of Hearing: 5/29/13, 8/26/13, 9/25/13, 10/9/13,
11/12/13, 11/13/13, 11/25/13,
12/17/13, 1/6/14, 1/28/14

CLOSED HEARING

Parties to the Hearing:

Parent
Parent[s]

School District
Philadelphia
440 N. Broad Street
Philadelphia, PA 19130

Date Record Closed:
Date of Decision:
Hearing Officer:

Representative:

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March 3, 2014
March 13, 2014
Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student resides within the District and has been identified as IDEA eligible due to specific learning disabilities and speech/language impairment. For several years, the District placed Student at a small private school that was initially identified and requested by Parent, where Student received speech/language services, as well as instruction in reading, writing and math from special education teachers. Beginning with the 2012/2013 school year, Student also participated in a vocational training program, carpentry, at a District high school. At the time the hearing ended, Student was receiving all educational services at the District high school.

Parent filed the due process complaint in May 2013, alleging that the IEP in place was inappropriate, that the District had failed to provide Student with a FAPE and that its proposed ESY program was inappropriate. The parties settled the ESY claim on the day the expedited hearing was to be held. The hearing on the remaining issues was convened in August 2013, after the parties requested an opportunity to explore a full resolution of the dispute. When that was unsuccessful, testimony began on numerous issues and concluded in late January 2014 after 9 sessions.

Based upon the full evidentiary record, and for the reasons explained below, Parent is entitled to some, but not all, of the relief requested.

ISSUES

1. Has the School District failed to provide a free, appropriate, public education (FAPE) to Student for the past two school years (2011/2012, 2012/2013) and the current school year (2013/2014), in that Student did not make meaningful educational progress in reading, writing and math, based, specifically, on the following questions:
 - a. Was the IEP of April 2012 as revised via a hearing officer decision in June 2012 procedurally and substantively appropriate and was it fully and appropriately implemented?
 - b. Did the District fail to provide Student with an appropriate ESY program during 2012?

- c. Did the School District fail to provide Student with an appropriate educational placement in that there was a lack of coordination between the private school that was to provide Student's academic instruction and the District, particularly with respect to the vocational program Student was to receive at a District high school, and/or was the split program/placement itself an inappropriate means for meeting Student's educational needs?
 - d. Did the School District fail to provide sufficient, appropriate related services to meet Student's needs for transportation, speech/language and counseling?
 - e. Did the School District fail to provide Student with appropriate assistive technology, specifically, audio books?
 - f. Did the School District fail to address all of Student's educational needs with appropriate, effective specially-designed instruction, including multi-sensory programs/methods?
 - g. Has the District failed to provide appropriate transition services for student?
2. Did the School District fail to timely reevaluate Student and if so, should the District be required to fund the independent neuropsychological evaluation conducted in September 2013?
 3. Did the District fail to comply with the *LeGare* Consent Decree in developing a high school placement for student?
 4. Did the District discriminate against Student on the basis of disability by failing to provide Student with opportunities to participate in extracurricular activities, particularly District high school level sports teams?
 5. Should the District be required to develop and provide Student with a one location public or private school educational placement, including effective integration between appropriate multi-sensory academic instruction in basic skills and content areas and a vocational program?
 6. Is Student entitled to an award of compensatory education, and if so, for what period, in what amount and what form?
 7. Did the School District fail to recognize and appropriately accommodate Parent's learning disability in IEP meetings and other matters relating to developing and implementing an appropriate program and placement for Student?

FINDINGS OF FACT

Background/History of the Dispute

1. Student, [a high school aged child], is a resident of the School District of Philadelphia and is eligible for special education services. (Stipulation, N.T. pp. 83, 84)
2. Student has been identified as IDEA eligible in the disability categories Specific Learning Disability (SLD) and Speech/Language Disorder in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 84, 85)
3. Beginning with the 2008/2009 school year, and continuing through an IEP dated July 6, 2012, the District placed Student at a private school that had initially been identified and requested by Parent. Student stopped attending the private school in November 2013, during the due process hearing, and is currently enrolled at a District vocational-technical high school.¹ (N.T. pp. 1287; S-12, S-73)²
4. At an IEP team meeting at the end of the 2010/2011 school year, Parent requested a vocational program for Student. At a mediation session on June 30, 2011 the parties agreed to work together to identify public and approved private high schools that could meet Student's special education and vocational needs. The parties further agreed that all schools providing career and technical education programs would be considered, and that Parent and Student would be offered the option for placement at all schools willing to accept Student and able to deliver the transition/special education services Student needed. The agreement also noted that any public school included as an option would be obligated to admit Student if an IEP developed by the parties determined that Student should attend that school. (S-3, S-7)
5. Several District schools were identified that could provide programs in which Student expressed an interest *i.e.*, carpentry, construction and culinary arts, including the school Student now attends. Parent and Student visited several schools, but by mid-August 2011 when Parent notified the District of her choice, the programs were full. The private school, therefore, remained Student's pendent placement (N.T. pp. 1130—1132; S-9)

¹ Neither the circumstances of Student's disenrollment from the private school nor the substantive appropriateness of Student's current high school academic program are addressed in this decision, since those changes occurred long after the due process complaint was filed, and well into the hearing on the issues identified at the 8/26/13 hearing session.

² Although the parties did not submit joint exhibits in this matter, they agreed to use School District exhibits for most of the educational records relevant to this matter, which avoided an unnecessarily and duplicative documentary record. Most of the exhibits cited in the decision, therefore, are designated by the letter "S" followed by the exhibit number. Additional exhibits submitted by Parent are marked "P" followed by the exhibit number.

6. At the beginning of the 2011/2012 school year, Parent initiated a due process complaint seeking a vocational program and admission to a vocational technical school. Parent subsequently obtained counsel, who identified the District high school Student is presently attending as an acceptable location for the program Parent was requesting. (S-11, S-12)
7. Although the parties reached a tentative agreement before the hearing was convened, the agreement was not finalized to Parent's satisfaction. Parent requested reinstatement of the complaint, as permitted by the conditional dismissal order the hearing officer entered after receiving notice of the settlement. Parent's relationship with the attorney who had been representing her was terminated at about the same time. (S-18, S-19, S-20, S-21, S-22, S-23)
8. After several postponements of the hearing to allow for continuing settlement negotiations, the parties reached another tentative agreement that could not be finalized due to Parent's dissatisfaction with several provisions of the IEP proposed by the District as part of the parties' agreement. (S-34, S-37, S-43, S-44, S-45, S-49, S-50)
9. At Parent's request, the IEP and NOREP proposed by the District in mid-April 2012 provided for a "split" educational program, with Student continuing to receive academic instruction at the private school, but attend the District technical high school for part of the school day to participate in the carpentry program. Parent believed that the split program was the only viable option, because Student's low academic levels would make success in a regular public school difficult, but the opportunity to learn a skilled trade would help Student get a job. (N.T. pp. 1134, 1135, 1149, 1908; S-12, S-45 p. 12, S-48 pp. 1, 2)
10. In a pre-hearing statement of issues Parent prepared for the hearing officer, Parent explicitly addressed and expressed dissatisfaction with the transition goals and services to be implemented/ delivered at the District high school. She also requested additional information concerning both the construction technology and core curriculum offered at the District high school, noting that her choices to that point were based only upon the information she had received at that time, April 2012. (S-50)
11. A brief hearing session (app. 2 hours) was held in early June 2012, at which testimony was taken from Parent and one District witness with respect to the transition goals and the specially designed instruction relating to one of the transition goals. In the written decision that followed, the hearing officer concluded that the IEP the District proposed was appropriate for Student in terms of the education/training and employment transition goals, and the specially designed instruction to support the education/training goal, but ordered some changes to the wording of the transition goals and the specially designed instruction relating to transition services. (P-2, pp. 3—27, 52—55, S-54)

Private School Instruction and Services

12. Student remained in the private school placement during the 2011/2012 school year, receiving instruction in reading, writing, vocabulary/spelling, science, social studies, health/phys. ed., music and computer. (N.T. p. 1536; S-32 p. 2)
13. The private school uses the Scottish Rite Dyslexia Training Program for group reading instruction, The program is derived from Orton-Gillingham principles, but is delivered through video lessons. The reading instruction includes phonemic awareness, phonics, fluency, vocabulary and reading comprehension. Handwriting, spelling and a literacy program are also taught through that program. Teachers are present during the instruction to offer assistance, expand on the lessons and assure that the students remain focused on the lessons. The teachers who facilitate the Scottish Rite program receive little or no training. (N.T. pp. 812—815, 822, 823,1286, 1290—1292, 1482, 1537, 1990; S-135 pp. 1—4)
14. None of the private school teachers who provided reading instruction to Student at the private school ever received training in reading instruction programs based on Orton-Gillingham principles, such as Wilson. Both a private school teacher and the District’s special education liaison (SEL) acknowledged that such reading programs are research-based and effective for high school students with reading disabilities. (N.T. pp. 811, 1286, 1462, 1635)
15. The teacher who provided Student’s reading instruction during the 2011/2012 school year supplemented the Scottish Rite program with additional materials, including audio books, to further address phonics, fluency and comprehension. (N.T. pp. 1467, 1482—1486, 1537, 1538 ; S-135 pp. 5, 6)
16. In addition to the group reading instruction and literacy program, the private school schedules a separate reading block for students who need more intensive instruction. Student received 1:1 remedial instruction for 30 minutes daily. (N.T. pp. 995—1000, 1291, 1305)
17. When it was determined that Student would begin the carpentry vocational program at the beginning of the 2012/2013 school year, the private school requested the carpentry textbook and teachers began instructing Student in the vocabulary needed for the beginning carpentry class. With the assistance of the teacher, the Student created a personal reference “digital dictionary” consisting of pictures of tools/equipment and their definitions. (N. T. pp. 415, 833, 834, 866, 945, 946, 965, 966, 1309; S-134, pp. 25—29)
18. Student participated in an ESY program at the private school during the summer of 2012, where Student continued to work on the vocabulary and math skills needed for the

- carpentry program at the District high school that was to begin in the 2012/2013 school year. (N.T. pp. 1565, 1566; S-74)
19. During the 2012/20123 and 2013/2014 school years, Student received academic instruction in reading, writing and math. Student could not take gym during the 2013/2014 school year, and could not participate in science and social studies classes because of the split program schedule. (N. T. pp. 1143, 1310, 1450, 1478)
 20. Student also had a transition class during the 2012/2013 and 2013/2014 school years. The teacher worked primarily on following a daily schedule and communication skills during the 2012/2013 school year. Those are activities specified in the IEP to further the employment transition goal. (N.T. pp. 1287, 1320; S-73 p. 13)
 21. Providing Student with instructional materials to prepare for the carpentry program was also an activity listed under the employment transition goal. (S-73)
 22. Student's present levels of performance in reading/literacy included in the April 2012 IEP proposal were based upon assessments done by the private school in January, 2012. At that time, Student's instructional level in reading was identified as 3.0 on one standardized achievement test and at the 3.0—3.5 level on another. Results from a third assessment, the Slosson Oral Reading Test, indicated that Student had moved from reading words at a 2.9 grade level to a 5.1 grade level. (N. T. pp. ; S-45 p. 6, S-37 p. 7)
 23. As assessment by the reading instructor during the 2013/2014 school year placed Student's instructional level at a beginning of 4th grade level based upon the Dolch word list and comprehension. Student's independent reading/basic reading is at a 3rd grade level. (N. T. pp. 880—883)
 24. Math instruction was delivered on a 1:1 basis for 30 minutes, 4 days/week, with Fridays reserved for testing. In the 2012/203 and 2013/2014 school years, math instruction focused on skills and concepts Student needed for the vocational classes at the District high school. (N.T. pp. 1303, 1304, 1477)
 25. A Kauffman Reading and Math Assessment administered in April 2013 indicated that Student's reading comprehension and math applications were at a 12th grade level, but that is an unexplained testing anomaly. Student is not at a functional 12th grade reading or math level. (N.T. pp. 892, 900, 1313, 1316; S-136 p. 3)
 26. During the 2013/2014 school year, Student began the day at the private school with 30—45 minutes of small group instruction in writing. The program focuses on producing a paragraph from brainstorming to rough draft, to editing with good form and for different purposes, *e.g.*, letter writing, persuasive narrative. Student was expected to include a

topic sentence, several supporting sentences and a conclusion and to use correct punctuation. Student is writing on a 2nd grade level. (N.T. pp. 893, 894, 977, 978)

27. The private school teacher who instructed Student in math during the 2012/2013 school year recognized that Student has a language disorder that adversely affects Student's receptive and expressive language. Student's difficulties in understanding and speaking affected Student's functioning in all areas, including math. Student sometime grasped math concepts but was confused if the same concepts were presented in different words. (N.T. pp. 1302, 1303)
28. Student's IEP in effect for 2011/2012 school year provided for 30 minutes/week of small group speech therapy directed toward production of two sounds (/s/ in the final position and /th/ in the initial, medial and final positions, voiced and voiceless). Student received services from a certified speech/language pathologist who contracts with the private school. At the time she began working with Student in October 2011, she was given a copy of Student's speech goal from the IEP. She did not receive a speech/language evaluation, and has not conducted an evaluation. (N.T. pp. 1223, 1225, 1228, 1240, 1244, 1723, 1725, 1726, 1729, 1730 ; S-3 p. 26)
29. Approximately halfway through the school year, the speech/language therapist began providing services to Student on an individual basis because she thought Student would benefit from her undivided attention. (N.T. p; 1725)
30. The therapist also began providing 30—60 minutes/week of group therapy with all of the children enrolled in the private school as part of its curriculum. The group therapy focuses on developing functional language and social skills . (N.T. pp. 1244, 1306, 1720, 1726-1728; S-130)
31. The speech/language goal in the July 2012 IEP, written by the therapist who treated Student from the 2011/2012 school year through November 2013, is broader and directed toward improving Student's communication skills, including intelligibility and social language. There are two short term objectives for articulation (producing the/s/ and /th/ sounds in sentences), an objective for speaking slowly to be understood, and a social language objective. The speech/language pathologist continued to work with Student individually on the articulation objective for 30 min./week. Student sometimes refused to cooperate in therapy sessions and did not complete homework. Student's performance and progress with respect to articulation varied from week to week, but conversational skills have improved significantly. (N.T. pp. 1228, 1255, 1262, 1720, 1731, 1740, 1741, 1743, 1744, 1747, 1748; S-73 p. 27, S-130)

Transition Services/District High School

32. As modified by the hearing officer order in June 2012, Student's IEP includes a measurable annual transition goal relating to employment: "(Student) will develop the

skills necessary to prepare (Student) for competitive employment in a construction-related occupation through participation in the construction technology program at (the District vocational high school) setting) on a part-time basis and attendance at (the private) for the remaining part of the school day for the 2012-2013 school year.” (P-2 pp. 51, 55; S-73 p. 13)

33. The District’s carpentry program follows a nationally recognized curriculum that is designed to be completed over three school years in grades 10—12. Pennsylvania requires 1080 hours of instruction to qualify for state funding, encompassing 270 hours in carpentry related courses. The District requires 135 hours each in welding and blueprint reading, as well as 810 hours of carpentry instruction. (N.T. pp. 283, 284, 330, 384, 385)
34. The carpentry course work covers all topics tested on the NOCTI (National Occupational Competency Testing Institute) exam that Students who complete the program are required to take during the last year of the program. (N. T. pp. 283, 331)
35. One of the topics covered in the carpentry courses is construction math, which is necessary for carpentry work, and requires basic math skills ranging from approximately a 5th to 9th grade level. It is often a difficult area of the carpentry curriculum for students to master. Student had significant difficulty with the math portion of the carpentry curriculum, including fractions, converting fractions to decimals/decimals to fractions and area measurements, all of which is to be completed without a calculator. The carpentry teacher sent work to the private school and suggested that Student continue working on the math concepts after the unit ended. Student has not yet passed the math module. (N. T. pp. 336—338, 344—346, 413)
36. To achieve certification, students need to pass all carpentry module (unit) tests with a grade of at least 70. Any student who does not reach that level is permitted to retake the test, and is told which questions were answered incorrectly. The students are also provided with test questions ahead of time as an incentive to research the answers in the textbook, a skill that is needed for employment. (N. T. pp. 338, 341, 342)
37. The carpentry classwork is reading intensive and requires the ability to read at a 6th grade level, at least. The carpentry teacher has a shop training assistant who helped Student with reading. An audio version of the carpentry textbook is available. The special education liaison eventually obtained it and downloaded it to a USB drive, but the private school teacher could not access it, and replacement drives provided to Student were lost or broken. Student, therefore, did not have access to the audio of the carpentry book. The carpentry teacher does not use the on-line version of the text book. (N. T. pp. 342, 343, 349, 354, 355, 367, 368, 1468, 1469, 1688, 1689; S-102, S-109)

38. In general, Student has difficulty passing the required tests, but does well enough on the performance aspects of the curriculum to pass the course with a “C.” Student is still, however, below average in performance, and is given considerable leeway on meeting the standards to which the teacher would hold a non-disabled student in his class. Student’s grades are based on what Student is able to do (N. T. pp. 346—349, 362, 418, 423; S-232 pp. 1, 2)
39. The carpentry teacher sees little likelihood that Student will be employable as a journeyman carpenter able to work independently in a competitive and fast-paced field as a result of taking the carpentry course. Student’s chances in that regard are similar to many other students in the program. Student does, however, have a reasonable chance to be employed in a construction related field. (N. T. pp. 428—430, 439)
40. During the 2012/2013 school year, Student took the first required course, Carpentry 1. Because of the scheduling of that class, Student was also assigned to Welding and Entrepreneurship. Although an additional non-carpentry class, Blueprint Reading, must be completed during the 3 year program, there is no particular timing or order for those classes. To qualify for the NOCTI test, as a program “completer” Student needs to take only the 3 year carpentry class sequence. (N. T. pp. 385, 386, 389, 390, 392, 395—397, 421, 493, 494)
41. The basic welding course in which Student was enrolled is designed to support the other construction courses and is offered every other school day on “A” or “B” days. It has significant math and reading components. The welding textbook used for instruction is written at approximately an 8th grade level. The welding instructor provided the District special education liaison with a copy of the book to allow Student to prepare for class and tests, but was unable to acquire the book in audio format. It was, however, possible for a student to succeed in the class without the ability to read at an 8th grade level, since important aspects of the class, such as safety, are directly and explicitly taught. (N.T. pp. 444, 450, 455—459, 468, 485, 486, 503)
42. Student struggled with the academic components of the class, particularly reading, which slowed Student’s progress. but the welding course includes considerable repetition, and Student performed adequately on tests. The instructor assisted Student with math and reading, permitted extra time, provided 1:1 instruction when needed, and offered the opportunity to take tests in another room. Although the instructor believed that Student could have performed a bit better and was a bit below the average of the class, Student performed well enough to earn a “C.” Grades were based on attendance, homework completion, written tests, preparation for completing shop tasks and shop performance. In assigning grades, the teacher took into account student abilities. (N.T. pp. 461, 464, 465, 471, 473, 476, 488—491, 497—499, 501, 508, 515; S-132 pp. 3—6)

43. During the 2012/2013 school year, Student also took entrepreneurship, an elective that alternated days with the welding class. The objectives of the class are to create a business plan and earn certification in the computer programs used in the class to prepare for college and employment. The class does not have a textbook, but the teacher uses computer/web-based materials, generally written at an 11th/12th grade level. In the “observe” and “training” modes, the computer programs had an audio component that would read the material aloud. (N.T. pp. 544, 553, 554, 555, 559, 561, 564—566, 575, 576)
44. The teacher was aware that Student had an IEP and a very low reading level. The teacher assisted Student in completing required tasks for the class. (N.T. pp. 546—548, 564, 576, 577)
45. Because the tests were timed required reading at a level well beyond Student’s reading ability, Student’s grades in the class were based on effort in trainings/simulations. Student’s grades in the class ranged from “C+” to “A.” The teacher concluded that Student had acquired sufficient skills to get a good grasp of the programs, but would have struggled to pass the class had Student’s grades been based on test performance. The teacher noted that many people would have difficulty with the rigorous tests. (N.T. pp. 544, 550—552, 561—563 590, 620; S-85, S-98, S-112, S-132 p. 7)
46. The teacher did not read the tests to Student, but later considered that it might have been a good strategy. He believes that Student would benefit from repeating the class, because the focus of the class is changing from computer program certification and the teacher now has a better understanding of how to help Student acquire computer skills. (N.T. pp. 627—629m)
47. During the current school year, again because of the scheduling of the classes, Student was scheduled only for Carpentry 2 and no other construction technology electives. The schedule for the current school year does not affect Student’s ability to acquire the number of course hours/classes needed to complete the construction technology program within the three school year sequence. (N. T. pp. 328, 397)
48. Student favorably impressed the District vocational education teachers by maintaining respectful behavior and fulfilling course requirements, for the most part. The carpentry and entrepreneurship teachers noted Student’s work ethic, engagement and interest. (N. T. pp. 363, 470, 504, 508, 562, 586, 589, 591, 610, 611)
49. Student’s instructors in the vocational classes noted difficulties with Student’ spoken language/communication skills. The carpentry teacher, *e.g.*, noted that although Student is very involved in the class, Student has difficulty staying on topic when asking questions and has difficulty speaking clearly. (N. T. pp. 299, 300, 469, 504, 548)

50. The vocational high school Student attends offers the opportunity for its students to participate in three team sports, basketball, baseball and soccer, but has no on-site sports facilities. The school has an ROTC program but no after school clubs or other extracurricular activities. Students at the vocational school are not permitted to play [a particular sport] at other District high schools because of scholastic sports rules. (N. T. pp. 149, 195, 266, 267, 622—624; P-1 p. 17)
51. Although Student was placed at the private school by the District, and began attending classes in the construction technology program at a District high school in the fall of 2012 in accordance with a District IEP, the high school's administrative staff and the District SEL did not consider Student registered at the District high school, or a District student. In their view, because Student received academic instruction at the private school, it was primarily responsible for Student's educational services. The high school staff considered Student a private school student permitted to attend classes at the high school for a limited time and purpose. (N. T. pp. 169—173, 176—178, 1672, 1675—1677 ; P-1 pp. 16—18)

Evaluations

52. The District's last evaluation of Student was completed in 2008 (S-1)
53. After Parent filed the due process complaint early in the 2011/2012 school year, the District issued a permission to reevaluate Student, proposing to assess intellectual/cognitive functioning, math, literacy, hearing and speech-language, but limited to oral communication. Parent did not return the PTRE giving permission for the evaluation. (N.T. p. 1139; S-15)
54. In June 2013, the District again issued a PTRE, seeking Parent's permission to conduct assessments of intellectual ability/cognitive functioning, academic achievement and speech/language, limited to measures of oral communications.
55. An independent neuropsychological evaluation of Student in 2008 from Thomas Jefferson University, and an independent neuropsychological evaluation completed in the fall of 2013 identify significant receptive and expressive language difficulties that impact academic tasks, as well as learning disabilities in reading, writing and math. Results of cognitive testing conducted for both evaluations yielded verbal comprehension and processing speed index scores in the low average to borderline range. Perceptual reasoning and working memory scores were in the average range in 2008 and in the low average/average range in the recent evaluation. Student's overall cognitive functioning was reported to be in the low average to average range. (N.T. pp. 1981, 1988, 1991, 1992; P-4 pp. 4—6, 10, P-6 pp. 6—11)
56. Neuropsychology is a specialty within the field of psychology that studies cognitive processes and behavior as related to brain development and functioning. Since language

is an important component of cognition, neuropsychological training includes training in identifying speech and language disorders. (N.T. p. 1984)

57. The language disorder makes it difficult for Student to comprehend verbally communicated information, formulate answers in the classroom and participate in conversations. The reading disorder makes it difficult to extract information from text, and the writing disorder makes it difficult to convey information in written form in terms of the amount of time needed to formulate a response as well as create syntactically correct sentences and paragraphs. (N.T. pp. 1993—1997)
58. The speech/language therapist who provided the speech/language services at the private school does not believe that Student’s articulation or other language impairments are severe based on language assessments included in the District’s 2008 evaluation report and her experience with Student. (N.T. pp. 1731, 1732, 1735—1738; S-1 p. 11, S-73 p. 9)
59. The private school speech therapist disagrees with the conclusion of the independent neuropsychologist concerning the extent and severity of Student’s language impairments. She concluded, *e.g.*, that the auditory discrimination problem is based on Student’s articulation disorder. She dismissed other findings that the neuropsychologist considers indicators of a significant language disorder as misinterpretations of language assessment results, or based on insufficient consideration of dialectical differences, or a lack of expertise on the part of the neuropsychologist with respect to interpreting assessment results and using such results to diagnose a severe language disorder. (N.T. pp. 1751—1760; P-6 pp. 7, 8)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009).

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

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 251 (3rd Cir. 2009); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

Burden of Proof

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

The burden of proof analysis is the deciding factor in the outcome of a due process hearing, however, only in that rare situation when the evidence is in “ equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). When the evidence on one side has greater weight, that party prevails. When the evidence is equally balanced, the party with the burden of persuasion has produced insufficient persuasive evidence to meet its obligation and, therefore, the opposing party prevails.

In this case, Parent initiated the due process complaint, and, therefore, bore the burden of persuasion on the many issues it encompassed. The extensive factual record and legal standards supported Parent’s position on some of the issues and the District’s position on others, as explained below.

Preliminary Issues

Res Judicata

The District maintained the position that all issues relating to the appropriateness of the IEP at issue in this case should have been barred from consideration/decision because it resulted from a hearing officer order after a due process hearing. The District contends that IEP was previously considered and found appropriate in the earlier case. (FF11)

The general legal standards relating to claim and issue preclusion in the context of an IDEA due process hearing are explained in a pre-hearing ruling denying the preclusion aspect of the District’s Motion to Limit Claims and will not be repeated here. The ruling is included in this decision as an Appendix.

The evidentiary record compiled during the hearing in this case, however, lends further support to the pre-hearing ruling. First, in the written statement of issues provided to the hearing

officer before the due process hearing concerning the April 12, 2012 IEP, Parent limited her challenge to the IEP to the transition goals and to the services to be provided at the District high school. Parent did not state that she affirmatively agreed with the remainder of the IEP. (FF 10)

Second, the hearing transcript, entered into the record of this case as P-2, does not include evidence taken or issues raised by either party with respect to the IEP as a whole. Prior to the beginning of testimony, the hearing officer noted that the disagreement between the parties and the hearing issues were focused on several particular points on which evidence would be taken. (P-2 p. 4). The hearing officer also noted that Parent's error statement was "the basis of her complaint." (P-2 p. 6) The findings of fact and discussion in the hearing officer's decision reflected those comments and were centered entirely on the transition services. (P-4)

Consequently, it is unlikely that the general statement in the hearing officer's order that the IEP was appropriate was truly intended as a final decision with respect to the entire IEP, based upon substantive grounds/substantial evidence presented at the hearing as required by federal and state IDEA regulations. (P-2 p. 55); 34 C.F.R. §513(a)(1), 22 Pa. Code §14.162(f). Rather, it appears to reflect the hearing officer's belief, accurate at the time, that the parties had agreed on the other provisions of the IEP. (P-4 p. 7)

Based upon the evidence, as well as the legal standards cited in the pre-hearing ruling on the District's motion, Parent's claims in this case relating to the 2012 IEP that were not substantively considered and actually adjudicated in the June 2012 due process hearing decision are not barred.

The decision in this case with respect to the transition services, however, is limited to whether the IEP was appropriately implemented with respect to transition services.

Accommodations for Parent's Disability By the District, at the Due Process Hearing

Parent contended that the District limited her full participation in placement decisions for Student by failing to offer accommodations based upon Parent's own learning disability. Parent also requested specific accommodations at the due process hearing, such as a note taker, a transliterator and the ability to record the due process hearing. At the hearing, Parent was provided the opportunity to interrupt the testimony to ask questions if she did not understand something, as well as request breaks to speak to her counsel at any time.

The testimony of the witnesses at the hearing all confirmed Parent's ability to fully participate in IEP meetings and teacher meetings without the extraordinary accommodations Parent's counsel requested on her behalf, and argued should have been automatically provided based, in essence, upon diagnosis, not any demonstrated needs arising from Parent's disability.

Although the consistent testimony from District witnesses might be expected, Parent's participation in the due process hearings amply corroborated their testimony. There were many instances during the hearing when Parent not only asked reasonable clarifying questions, but demonstrated her full understanding of the testimony by her comments. The transcript of the proceedings at the prior due process hearing, entered into the record in this case, also demonstrates that Parent was well able to follow the proceedings and make her position clear. (P-2)

2013 Independent Neuropsychology Evaluation/Language Disability

The assessment results and conclusions reported by the independent neuropsychologist who evaluated Student in the fall of 2013 are consistent with the District's 2008 evaluation report, which, in turn is based almost entirely on a 2008 neuropsychology evaluation completed at Thomas Jefferson University Hospital. Although the 2013 results show somewhat lower

cognitive functioning, the variability of the component index scores of the full scale IQ (FSIQ), in the low average range in both evaluations, is similar. Notably, Student's verbal ability and processing speed index scores are considerably below the perceptual reasoning and working memory scores.

That pattern lends support to the opinion of Parent's expert witness that Student's learning difficulties, particularly in reading and written expression, are increased by a severe language disability. Although the speech/language therapist who provided Student's services at the private school disagreed with the conclusion and stated, in essence, that the opinion and conclusions of a speech/language professional should be given greater weight, that is not the case here. First, the speech/language therapist's statements concerning the independent evaluator's interpretation of language assessment results appears to miss the point of the independent evaluator's discussion of the language assessment results in her report. A careful reading of the report reveals that the independent evaluator was attempting to draw a far more nuanced portrait of Student's cognitive functioning and the effects of a language impairment, along with learning disabilities, on Student's academic difficulties. The evaluator accomplished that by looking closely at Student's performance on language assessment subtests to further tease out the components of disabilities that adversely impact Student's learning.

It is notable that when the speech therapist considered the language assessment subtest results that she believed the neuropsychologist misinterpreted, she agreed that the results indicate a severe language problem. (N.T. p. 1754) More important than the various language assessment scores, however, and what they may or may not indicate with respect to the severity of Student's language disorder is the "bigger picture," *i.e.*, the integration of the effects of Student's language disorder and learning disabilities on Student's academic functioning.

Although a speech/language pathologist may generally have greater expertise in interpreting language assessment scores, the neuropsychologist is better able to discern and suggest how a language disorder impacts overall school functioning. For that reason, the testimony and conclusions of Parent's expert was given greater weight than the contrary opinions of the speech/language pathologist.

Failure to Address Language Disability

After many years of instruction in a private school setting, Student has not reached a functional level of reading, writing and math skills. (FF 22, 23, 24, 25, 26) The underlying reason is the District's failure to assure that Student's significant language disability was addressed after it was first identified in the District's 2008 reevaluation of Student, which wholly incorporated the independent neuropsychological evaluation that diagnosed a mixed receptive/expressive language disability,

Although Speech/Language Impairment is identified as a basis for Student's IDEA eligibility, along with specific learning disabilities, and the IEP currently in effect also notes that Student has been diagnosed with a mixed receptive/expressive language disorder, Student's individual speech/language therapy sessions at the private school were limited, first to articulation only, and then to general communication skills. (FF 28, 31) Student also received group language sessions focused on functional and social/pragmatic language skills. Those services may have been helpful, but were not sufficient to address all of Student's language needs.

Notably, at least one of the private school teachers and all of the District teachers who instructed Student during the past two school years noticed that Student had significant language needs. (FF 27, 49)

District's Failure to Propose Changes to Ineffective Instruction

The second contributing factor to Student's lack of progress in acquiring basic academic skills is the failure of the District to question why Student was making so little progress and take steps to change and/or intensify the instruction. Although Student was attending a private school, the District was not relieved of its independent obligation to effectively monitor Student's progress and propose changes to Student's educational program, since the District specified the placement in Student's IEPs.

It was obvious that even after Student began attending a District high school, the District did not believe that Student was truly part of the District school. (FF 51) In fact, however, as Student's LEA, the District should have been appropriately proactive in assessing whether Student's placement was providing an opportunity for meaningful progress.

The District suggested many times throughout the hearing that it offered, but Parent rejected, a full time placement in the District high school. It must be noted, however, that there was no actual placement offer. An IDEA eligible student is truly "offered" a placement via a NOREP, and none was issued for the District high school. In addition, the record in this case does not suggest that the District had appropriate options for the type of instruction Student needs. The District also apparently had no one assigned to follow Student's progress—or lack of progress—to assure that it was providing Student with a FAPE.

The District also suggested that its ability to provide appropriate services to Student was hampered by Parent's advocacy and her insistence on a private school placement. Parent, however, quite understandably, stepped into a void left by the District's inattention. Parent, at least, identified and requested a placement that appeared to meet the recommendations in the 2008 neuropsychological evaluation for a small group setting and direct, intensive instruction.

(P-4 p. 12) It is still the District's primary role, however, to take the lead role in identifying and proposing a placement and services that meet an eligible student's special education needs.

Implementation of Transition Services/Carpentry Program

Despite the difficulties of the "split" program, the District, both directly and through the private school, appropriately implemented Student's transition employment goal. Student was provided with the opportunity to acquire skills that can be transferred to employment, even if not at the level Student would prefer, at least at the beginning of post-high school life. Student also had the opportunity to experience the benefits that come from a willingness to work hard and persist with difficult tasks, in the respect Student gained from the teachers. The teachers recognized that much of the "book" work was beyond Student's academic abilities, but assured Student the opportunity to learn hands-on skills.

LeGare Consent Decree

Parent argued that the District violated Student's rights by not following the process that is to be used by IDEA-eligible District students to secure the same opportunity to attend a desirable high school as non-disabled students. To the extent that the *LeGare* consent decree is enforceable via a due process hearing, it would be as a component of determining an appropriate placement to deliver special education services under some circumstances, not as a "stand alone" claim. In this case, however, the procedure for selecting a high school placement for Student was governed by the June 2011 mediation agreement. (FF 4) Although that agreement did not yield the results the parties had no doubt hoped to obtain, Student was, in essence, offered the opportunity to select any high school. If there was any violation, it was procedural only.

Remedies

IEE Reimbursement, Speech/Language Evaluation

Although the District twice offered to evaluate Student, but Parent did not grant permission, the District will be ordered to pay for the IEE Parent obtained. The District's last reevaluation report for Student was the independent neuropsychological evaluation that had been conducted at that time. The District did not propose a neuropsychological evaluation in either PTRE it issued, but it is clearly needed to assess and identify Student's needs and provide educational recommendations that are likely to address Student's needs. An already completed evaluation will save valuable time.

Nothing in the record suggests that Student has ever had a truly comprehensive speech/language evaluation, and the District's requests for permission to reevaluate provided for an assessment of oral language only. The District, therefore will be ordered to provide an independent and comprehensive speech/language evaluation by a speech/language pathologist to help guide Student's IEP team in making appropriate decisions with respect to program, placement and speech/language services in the future.

The District will not be ordered to take any action to change Student's speech/language services at present, pending completion of the evaluation and consideration of any recommendation for additional or different speech/language services. The parties are, however, free to agree to changes based on the recommendations of the independent neuropsychological report in the interim.

Prospective Services/Compensatory Education

The District must immediately begin to provide Student with intensive, one to one or small group instruction in reading, writing and math based on Orton-Gillingham principles. If

the District chooses to meet that requirement by finding an appropriate private school placement, it is certainly free to do so, but that will not be required. The District must also assure that Student's right to receive special education services extends to the full IDEA statutory limits of eligibility, if Student and Parent agree.

Based upon the recommendation of the independent neuropsychologist, the District will also be required to provide Student with compensatory education equal to three hours of instruction in reading, writing and/or math for everyday that school was in session from a date two years before the complaint was filed until the last full day Student attended the private school.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

1. Pay for the independent neuropsychological evaluation of [the evaluator];
2. Provide Student with the services described in the remedies section above.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

March 13, 2014

APPENDIX

RULING ON SCHOOL DISTRICT

MOTION TO LIMIT CLAIMS

AUGUST 6, 2013

ODR No. 13887-1213

IN RE: THE EDUCATIONAL ASSIGNMENT OF

I.W.

A STUDENT IN THE
SCHOOL DISTRICT OF PHILADELPHIA

DECISION OF THE HEARING OFFICER

RE: THE SCHOOL DISTRICT'S MOTION TO LIMIT CLAIMS

Dated: August 6, 2013

Anne L. Carroll, Esq.
Hearing Officer

The School District has moved to limit Parent's claims in the above case based upon principles of administrative claim preclusion and the IDEA two year limitations period. In the spring of 2012, Parent litigated an IDEA complaint challenging the appropriateness of Student's transition plan, including the post-secondary education and training goal, the goal for instruction in the vocational education placement the district offered, and the specially designed instruction the District proposed to support the transition goal. Parent also objected to Student's employment goal. The challenged provisions were all included in an April 2012 proposed IEP, as supplemented and modified by District proposed revisions, which the hearing officer incorporated into the decision and order finding in favor of the District. *See In Re: I.W., No. 3111-1112KE* at pp. 3 (FF 4, 5, 6), 7 (Ftnt. 2) (McElligott, 6/18/12)

In the current complaint, Parent challenges the appropriateness of aspects of the April 2012 IEP other than the transition goals, as well as the District's implementation of the transition goals/provision of SDI that the prior hearing officer found were reasonably calculated to result in meaningful progress. Parent also alleges that prior IEPs denied Student a FAPE; that the District violated legal standards related to non-discrimination in high school selection for students with disabilities; that Student has not received sufficient speech/language therapy; that Student was denied effective assistive technology; that progress monitoring/progress reporting to Parent was inadequate. Parent also appears to challenge the appropriateness of Student's transition plan going forward. *See* Complaint, ¶¶51—58, 61—68. Parent also asserts claims in her own right under IDEA and §504. Complaint, p. 16.³

For the reasons explained in more detail below, the District's motion based on general claim preclusion principles is **DENIED**. Based upon the complaint, which did not explicitly assert IDEA claims for more than two years, (Section V ¶1), and Parent's argument concerning

³ Parent also asserted an ESY claim, which was resolved by the parties in May 2013 without a hearing and decision.

her basis for asserting that the IDEA/§504 two year limitations period should not be applied, the District's motion to limit claims based upon the statute of limitations is **GRANTED**, provided, however, that this ruling does not foreclose evidence or arguments concerning the scope of any remedy.

Res Judicata

As explained by the Court of Appeals in *Gregory v. Chehi*, 843 F.2d 111, 115 (3rd Cir. 1988), *res judicata* broadly describes two related principles, claim preclusion and issue preclusion. In that decision, The Court of Appeals also explained an important difference between the two principles:

Although sharing the common goals of judicial economy, predictability, and freedom from harassment, *see* Ginsburg, *The Work of Professor Allen Delker Vestal*, 70 Iowa L.Rev. 13, 20 (1984), these two concepts may have different consequences. Claim preclusion prevents a party from prevailing on issues he might have but did not assert in the first action. *Riverside Memorial Mausoleum, Inc. v. UMET Trust*, 581 F.2d 62, 67 (3d Cir.1978); *Duquesne Light Co. v. Pittsburgh Rys.*, 413 Pa. 1, 5, 194 A.2d 319, 321 (1963), *cert. denied*, 377 U.S. 924, 84 S.Ct. 1221, 12 L.Ed.2d 215 (1964).

In issue preclusion cases, however, the earlier judgment forecloses only a matter actually litigated and essential to the decision. The first judgment does not prevent reexamination of issues that might have been, but were not, litigated in the earlier action. *Riverside Memorial Mausoleum*, 581 F.2d at 69. *See also*, Restatement (Second) of Judgments § 27 comment a (1982). *See also* *Melikian v. Corradetti*, 791 F.2d 274, 277 (3d Cir.1986) (applying New Jersey law).

See also, *Guider v. Mauer*, 2009 WL 4015568 at *1 -2 (M.D. Pa. 2009).

As noted in preliminary remarks sent to the parties via e-mail after receiving the District's motion, the only aspect of *res judicata* that applies in an IDEA administrative due process hearing is issue preclusion, barring relitigation only of issues that were actually litigated in the prior case involving these parties, not issues that could have been raised in the prior proceeding but were not. This conclusion is based primarily upon 34 C.F.R. §300.513(c), which provides that, "Nothing [in the procedural safeguards/due process hearing provisions] shall be

construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.”

Here, Parent has not asserted a claim, or requested a finding, that Student was denied a FAPE during the 2012/2013 school year based upon the appropriateness of the transition goals and SDI considered in the prior decision. (Complaint, Section V ¶1) Since those issues have already been decided in favor of the District, the appropriateness of the transition goals and of the SDI in the April 2012 IEP, as modified by the hearing decision, will not be considered in the upcoming due process hearing. That does not mean, however, that Parent will be precluded from presenting evidence and arguing that the same goals and SDI are not appropriate for the 2013/2014 school year, or that the goals were not appropriately implemented and the SDI not appropriately provided during the last school year.

Parent will also be permitted to present evidence that other aspects of the April 2012 IEP were inappropriate, and/or that Student did not receive sufficient, appropriate speech/language services and assistive technology, either as independent claims or as aspects of a claim for failure of, or inappropriate, implementation of, the transition goals and SDI found to be appropriate in the prior decision.

The parties should take note that the foregoing ruling on the District’s motion is based upon rejecting the argument that claim preclusion applies to limit the subject matter of the due process hearing. No other procedural or substantive arguments concerning the viability of Parent’s claims in this case are foreclosed or precluded by denying the *res judicata* aspect of the District’s motion.

Statute of Limitations

Parent asserts, in essence, that the IDEA/§504 two year limitations period should be waived with respect to the claims she brought on her own behalf, based upon Parent's own learning disability. Parent alleges that the District failed to take into account her disability in its dealings with her concerning Student's special education services, including allegedly failing to notify her that she could receive accommodations for her disability. Parent contends that the District's actions and communications with her should be assessed in terms of a "knew or should have known" standard, meaning that because the District had reason to know of Parent's disability, it was required, at least, to meet a high notice standard with respect to assuring that Parent was aware of her rights.

There is no explicit or implied basis in any of the authorities cited by Parent for imposing such a standard to extend the two year limitations period under either IDEA or §504. Moreover, Parent has provided no rationale for the contention that a "knew or should have known" standard different from IDEA standards relating to denial of FAPE claims applies to extend the IDEA limitations period with respect to claims Parent asserts in her own right.

The IDEA statute and the federal regulations provide that a proper due process complaint "must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint." 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. §300.507(a)(2). The regulations further provide that "A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 34 C.F.R. §300.511(e), based upon 20 U.S.C. § 1415(f)(3)(c). The "alleged action which forms the basis of the complaint" does not refer to whether Parent was aware of her own or Student's IDEA or other disability-

based rights, but to what the District allegedly did that constituted an IDEA violation, and does not require that Parent was aware that the action was a violation at the time it occurred. *See, e.g., J.P. and R.P. v. Enid Public Schools*, 2009 WL 3104014 (W.D.Okla. 2009 at *5, 6):

The IDEA's two-year limitation on claims...is triggered when the parent “knew or should have known about the alleged *action* that forms the basis of the complaint” and not when the parent becomes aware that the school district's actions are actionable. 20 U.S.C. § 1415(f)(3)(C) (emphasis added); *see Bell v. Bd. of Educ., No. CIV 06-1137, 2008 WL 4104070 at * 17 (D.N.M. Mar. 26, 2008)* (noting that the “IDEA's plain language states that the limitations period is two years from the date that the parents knew of the complained-of action, not two years from the date that the parents knew the action taken was wrong”)

Moreover, there is no basis for determining when the limitations period began to run on Parent’s claims based upon an assessment of when the District knew or should have known that it committed a violation. The IDEA statute and regulations provide that both “A parent or a public agency may file a due process complaint...” *See* 34 C.F.R. §300.507(a)(1). Clearly, the limitations period applies to whichever party files the complaint, and does not provide a basis for making the timeliness of a parent-initiated claim dependent upon a school district’s knowledge of any of its actions or omissions.

Although Parent does not argue that there is any basis for extending the two year limitations period on the claims relating to the District’s alleged denial of FAPE to Student, Parent appears to seek a pre-hearing ruling that any remedy that may be provided to Student will not be limited to compensatory education on an hour for hour basis for two years only. It is, however, impossible to make any preliminary ruling with respect to the scope of any remedy that may be provided to Student if Parent proves a denial of FAPE, or of services or equipment, such as speech/language therapy or assistive technology, necessary to support the provision of FAPE to Student. Remedies, no less than substantive IDEA/§504 violations, are based on evidence, and no evidence has yet been produced in this case. It is impossible to determine at this point

what an appropriate remedy might be, in terms of either amount or type of services, including whether an hour for hour remedy might be appropriate for one or more aspects of any claim that Parent might prove. The parties should be aware, however, that my general starting point for the exercise of equitable power with respect to fashioning a remedy is determining what would most closely place the student in the position he or she would have been in if the violation requiring a remedy had not occurred. As stated, however, there must be a sufficient evidentiary basis for any remedy awarded.

Dated: August 6, 2013

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER