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Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: G.W.

Date of Birth: [redacted]

ODR No. 14072-1213KE

CLOSED HEARING

Parties to the Hearing:

Parents

Methacton School District
1001 Kriebel Mill Road
Norristown, PA 19403

Representative:

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Dates of Hearing: 08/26/2013, 09/27/2013, 10/02/2013

Record Closed: 10/25/2013

Date of Decision: 11/08/2013

Hearing Officer: Brian Jason Ford

Introduction

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. Except for the cover page of this decision, information that identifies the Student and Parents has been omitted to the greatest extent possible.

The Parents requested this hearing and allege that the District violated the IDEA and Section 504 by failing to provide the Student a free appropriate public education (FAPE). The Parents demand compensatory education to remedy this violation. The Parents have also enrolled the Student in a private school. From the Student's private school enrollment onward, the Parents demand tuition reimbursement.

There is no dispute that the Student is IDEA-eligible, and was IDEA-eligible at all times pertinent to this decision. Currently, the Student is a middle-school-aged 8th grader.

Issues

1. Was the Student denied a FAPE during the 2011-12 and 2013-13 school years and, if so, is the Student entitled to compensatory education to remedy that denial?
2. Was the Student denied a FAPE in the summer of 2012 or the summer of 2013 and, if so, is the Student entitled to compensatory education to remedy that denial?
3. Are the Parents entitled to tuition reimbursement during the 2013-14 school year?
4. Are the Parents entitled to reimbursement for the cost of an independent educational evaluation (IEE)?
5. Are the Parents entitled to reimbursement for the cost of expert testimony?

Scope of Compensatory Education Demand

The Parents requested this due process hearing on June 25, 2013. There is no dispute that the Student was enrolled and began attending a private school at the start of the 2013-14 school year. Consequently, the question of whether the Student is entitled to compensatory education for a denial of FAPE concerns the time period beginning on June 25, 2011 and ending with the Student's private school enrollment. For that period of time, the Parents demand hours of compensatory education, ranging from 1,980 to 1,080 hours. Those demands represent 5.5 hours per day or 3 hours per day over two, 180 day school years.

In their Complaint, the Parents demanded 180 hours of compensatory education for a denial of FAPE in the summers of 2011 and 2012, and reimbursement for a private summer program in the summer of 2013. In their closing brief, the Parents only demand

180 days of compensatory education to remedy a denial of FAPE in the summers of 2012 and 2013. The latter is consistent with remarks defining the issues at the outset of the hearing (NT at 14-15), and so the only summer claim that I will consider is the one listed in the “Issues” section above.

Findings of Fact

2011-12 School Year – 6th Grade

1. The Student started the 2011-12 school year under an IEP that was drafted at the end of the prior school year in April of 2011. (S-1)
2. The April 2011 IEP notes the Student’s academic progress and progress towards goals in a prior IEP in oral reading fluency and spelling. The IEP also describes the Student as anxious. (S-1)
3. The April 2011 IEP notes that the Parents inquired about the Wilson Reading Program (Wilson). Wilson was offered in the District at that time and still is. The Parents wanted to know if Wilson would help the Student, and if the Student qualified. (S-1 at 11).
4. The April 2011 IEP indicates that the Student requires specially designed instruction (SDI) in Reading and English, but lists reading comprehension as a strength. (S-1 at 12). Oral reading, sight vocabulary, self confidence, impulsivity and distractibility are all listed as weaknesses. *Id.*
5. The April 2011 IEP links the Student’s oral reading difficulties to the Student’s perceived lack of self confidence, and includes comments suggesting that the Student’s oral reading was expected to improve as the Student’s self confidence improves. (S-1).
6. The April 2011 IEP indicates that the Student will receive “allowable accommodations” in the reading and math PSSA, but does not specify what accommodations the Student would receive. (S-1 at 16)
7. The April 2011 IEP includes a measurable, objective, baselined goal for reading fluency. (S-1 at 19). This goal calls for the Student to read 150 WCPM with 90% accuracy. The Student’s baseline was 89 WCPM when the goal was drafted. *Id.*
8. The April 2011 IEP includes a writing goal that calls for the Student to earn a proficient score on the PSSA writing rubric in the area of conventions. This goal is objective and measurable, but it is not related to any need identified in the IEP.

9. The April 2011 IEP includes SDIs and modifications in the same section, and does not distinguish between the two. The list of modifications and SDIs provided in the April 2011 IEP includes:
 - a. Additional time for tests.
 - b. Preferential seating.
 - c. Additional time to answer questions in class.
 - d. Prompts to “check for understanding and on task behavior.”
 - e. Reminders “to raise hand and wait until called upon before speaking out.”
 - f. Encouragement when anxiety is expressed.
 - g. No penalties for misspellings (unless the assignment relates to spelling).
 - h. Reading tests and quizzes aloud (the Student was given this accommodation as an “option” which, if taken, would have the Student take the tests or quizzes during the “flex period” at the end of the day).
 - i. Encouragement to proof read.
 - j. “Visual and/or verbal prompts.”
 - k. “Allow for repetition or breaking down of directions.”
 - l. Task modeling.
 - m. “Audible resources for textbooks not available on line [sic] with voice.”
10. An entry in the SDIs and Modifications section calls for the Student to highlight important information in notes and study guides. This is neither a modification nor an SDI.
11. The April 2011 IEP called for the Student to receive Reading and English instruction in a learning support classroom, and all other instruction in regular education. (S-1)
12. Both the April 2011 IEP and its accompanying Notice of Recommended Educational Placement (NOREP) indicate that the Student is IDEA-eligible and struggles with reading and anxiety. Neither document specifies the Student’s disability category (or whatever disabilities the Student was regarded as having at that time). Neither document references or incorporates prior documents that may contain that information.
13. A document was entered into evidence that purports to be a revision of the April 2011 IEP. (S-2) The document indicates that the IEP was revised in December of 2012 to adjust the Student’s present levels of academic achievement and PENN Data. (S-2). The present levels and PENN Data sections of the April 2011 IEP and the revised IEP are the same. However, reports of progress were added for both goals in the revised IEP for all four quarters of the 2011-12 school year.
14. Regarding the reading fluency goal, the progress monitoring shows improvement when the first probe (9/14/11 - 69 WCPM) is compared to the last probe (5/21/12 -

106 WCPM). That improvement is less striking when the final probe is compared to the baseline when the goal was drafted (89 WCPM). Further, the individual probes show significant fluctuations, with the Student's fluency dropping below the initial probe on three occasions and below the baseline on 11 occasions. As such, the Student was below baseline 52% of the school year. (S-2)

15. Regarding the writing conventions goal, the Student was assessed at the basic (#2) level on two undated probes during the first marking period of 6th grade. The Student remained at the basic level on probes in November 2011 and January 2012. The Student improved to the proficient (#3) level on a second probe in January 2012 but was assessed as basic again in February of 2012. The Student improved to proficient again in March of 2012 and stayed at that level into early April. The Student fell to basic again as assessed by a second probe in April 2012, but returned to proficient over two probes in May of 2012. (S-2)
16. The Student's triennial evaluation came due in the middle of the 2011-12 school year. The District sought the Parents' consent to evaluate in January of 2012. (S-3). The District received consent to evaluate in February of 2012. *Id.*
17. As part of the reevaluation, the Parents completed a Parent Information Form. On that form, the Parents indicated that they were concerned about the Student's reading ability, shyness related to the Student's tics¹, that the Student was upset that other students were discussing the Student's tics, and that the Student could be unresponsive.
18. The District issued a reevaluation report (RR) on April 16, 2012. The RR references a WISC-IV, a WIAT-II, and a BASC-2 that were all administered in 2006. The only specific score reported from any of those assessments is a FSIQ of 108 as determined by the WISC-IV. The 2012 RR reports, however, that the Student expressed deficits in reading and written expression as measured by the 2006 WIAT-II, and clinically significant scores for Atypicality, Anxiety and Functional Communication as measured by the 2006 BASC-2.
19. The 2012 RR lists the Student's scores on local and state assessments. These include reading scores from the 2010 and 2011 PSSA. In 2010, the Student scored Basic in reading. In 2011, the Student scored Below Basic. At the same time, 4Sight reading assessments indicate that the Student improved from Below Basic in 2010 to Basic in 2011 at the 5th grade level. On STAR reading assessments, the Student declined from Proficient in 2010 to Below Basic in 2011. On "Storytown"

¹ Some testimony indicates that the Student's tics were caused by medication. Other testimony, and some documents indicate that the Student suffers from Tourette syndrome.

assessments, the Student also declined from Advanced to Proficient from 2010 to 2011. (S-3).

20. Two of the Student's teachers also provided information for the 2012 RR. Both teachers rated the Student "Below Average" in terms of the Student's rate of acquiring new information and retention and application of new information. Both teachers note attention problems, social problems and organizational problems. (S-3).
21. Based on a review of existing data, the IEP team determined that there was a need for additional data, and so new testing was completed as part of the 2012 RR. Specifically, "selected subsets" of the WIAT-III were administered. The subsets were selected to target reading, oral expression and written expression. In regard to Reading, the Student scored in the average range for Word Reading, Reading Comprehension, Pseudoword Decoding, and Oral Reading Accuracy. The Student was below average in both Oral Reading Fluency and Oral Reading Rate. In regard to Written Expression, the Student was assessed as average in Sentence Composition and Essay Composition.
22. A number of behavioral assessments were completed as part of the 2012 RR. These included an ASEBA, which revealed problems with anxiety, depression, attention and problems in social relationships. Although the doctoral-level school psychologist who completed the 2012 RR was very careful to not make a medical diagnosis, the psychologist was able to determine that the Student satisfied criteria for attention deficit hyperactivity disorder (ADHD) and anxiety. (See S-3 at 25). The 2012 RR notes that the Student has been diagnosed with ADHD and was medicated.
23. The 2012 RR concludes that the Student was IDEA-eligible with a primary disability category of Specific Learning Disability (SLD) with no secondary disability category – although ADHD, anxiety, depression and organizational problems were all clearly noted.
24. Following the issuance of the 2012 RR, the Student's IEP team convened in April of 2012. The resulting IEP, dated April 23, 2012, includes updated present educational levels that are consistent with the 2012 RR. Regarding PSSA accommodations, the April 2012 IEP is similar to the April 2011 IEP in that both indicate the Student will receive accommodations without specifying what accommodations the Student will receive. (S-4).
25. The April 2012 IEP includes a reading fluency goal that is substantively identical to the reading fluency goal in the April 2011 IEP. The differences are that 1) in April of 2011, the Student's baseline was 89 WCPM and in April of 2012, the Student's

baseline was 88 WCPM; and 2) in April of 2011, the goal was for 150 WCPM and in April of 2012 the goal was 120 WCPM.

26. The April 2012 IEP includes a writing conventions goal that is substantively identical to the writing conventions goal in the April 2011 IEP. The only difference is that the April 2011 IEP referenced “proficient” as measured by the PSSA rubric and the April 2012 IEP referenced “3” as measured by the PSSA rubric. I take judicial notice that a “3” on the PSSA rubric is “proficient.” (S-4)
27. The April 2012 IEP adds a Math goal that calls for the Student to earn at least an 85% on three consecutive Math tests. The Student’s baseline at the time of the IEP was 71%. (S-4)
28. The Modifications and SDIs in the April 2012 IEP are the same as in the April 2011 IEP with two exceptions. The April 2012 IEP calls for study guides to be provided “when possible” and that a teacher will check the Student’s assignment book for accuracy. (S-4).
29. The Parents and District did not finalize any IEP in April of 2012. Rather, the April 2012 IEP meeting was the first in a series of meetings in April and May of 2012. During these meetings, the Parents asked the District to assess the Student for possible placement in Wilson. The District agreed to testing for Wilson, and also tested for placement in READ 180, a different reading program.
30. Regarding the Wilson testing, the District administered sub-tests of the WJ-III and the WADE (a Wilson-specific assessment). On the reading subtests of the WADE, the Student scored above mastery in Real Words, Nonsense Words, and Sight Words. In the spelling subtests of the WADE, the Student scored below mastery in Words and Sentences, but above mastery in Sight Words.
31. Based on the WJ-III and the WADE, the District determined that the Student did not qualify for Wilson.
32. Regarding READ 180, the District administered a Scholastic Reading Inventory (SRI, a test that matches READ 180 but may not be specifically “for” READ 180). The SRI yields a “lexile score” that corresponds to reading comprehension. At the end of 7th grade, students who successfully complete READ 180 are expected to have a lexile score of 850 or higher. At the time of testing (late in 6th grade), the Student received a lexile score of 797.
33. Based on the SRI, the District determined that the Student did not qualify for READ 180. (NT at 1040, 1116).

34. Around the same time as the Wilson and READ 180 testing, the District also administered a Social Language Development Test and a TOPS-2. Based on those assessments, the team determined that the Student had a number of social skills deficits, and Speech/Language therapy was recommended to address social skills. (S-5 at 7-19).
35. After the Wilson and READ 180 testing was completed, several more meetings convened until the IEP team developed an IEP on May 31, 2012. (S-5 at 7).
36. The May 2012 IEP includes the results of the Wilson and READ 180 testing in the present education levels. (S-5).
37. Regarding the PSSA, the May 2012 IEP is the same as the April 2012 IEP.
38. The Math goal in the April 2012 IEP is removed in the May 2012 IEP.
39. Two Speech and Language goals were added in the May 2012 IEP. The first calls for the Student to demonstrate appropriate social behaviors following discussion and role-playing. This goal is measurable, if not completely objective, but it is not baselined. (S-5)
40. The second Speech and Language goal in the May 2012 IEP is: "Given short stories or paragraphs of increasing difficulty, [Student] will demonstrate [] comprehension by answering literal and inferential questions in 4 out of 5 trials over 3 therapy probes." (S-5).
41. A similar new goal appears to target reading comprehension as opposed to Speech and Language: "When given fiction or non fiction passages, [Student] will respond to literal as well as inferential questions with 80% accuracy for three consecutive marking periods." The baseline for that goal is listed as 52%.
42. All of the SDIs and modifications in the April 2012 IEP were carried over into the May 2012 IEP, and more were added: use of a computer for lengthy written assignments, hard copies of notes, an extra set of books for the Student to keep at home. (S-5)
43. Related services were added in the May 2012 IEP including: one individual session of unspecified duration every other cycle (a "cycle" is six school days) with a Special Education Counselor; a "[same gender] group" with a Special Education Counselor for 25 minutes, once per cycle; and 30 minutes of Speech/Language Therapy twice per cycle (the IEP does not specify if the Speech/Language therapy would be group or individual).

44. The May 2012 IEP was issued with a NOREP. It is not clear whether the NOREP was ever approved by the Parents but, some version of the May 2012 IEP was implemented with the Parents' knowledge and consent. (S-5 at 40-43; P-21).

Summer of 2012

45. On the face of the IEP, the Student qualified for ESY based on "speech/communication/socialization services as well as reading intervention." (S-5 at 36).
46. The District provided ESY services through Teamwork Wins, a community-based social skills program. Teamwork Wins does not address reading. (S-10 at 9-10).
47. Progress reports from Teamwork Wins indicate that the Student appeared to be "in [Student's] own world" and isolated. At the same time, the Student was "cooperative." *Id.* The same document reports that the Student's "Initial Observed Social and Self Awareness Quotient" was 63% and the Student's "Final Observed Social and Self Awareness Quotient" was 66%. Nothing in the report explains what those scores mean or how they are derived. *Id.*

2012-13 School Year – 7th Grade²

48. Despite the complete lack of documentary evidence that the Parents ever approved the May 2012 IEP, it is clear that the District implemented a version of that IEP during the 2012-13 school year. (See S-10). It is equally clear that the Parents, by their actions, approved such implementation (the Parents sent the Student to the ESY program offered in the May 2012 IEP, and were in frequent communication with the District while the May 2012 IEP was implemented).
49. The District monitored the Student's progress towards the goals in the version of the May 2012 IEP that it implemented.

² The Parents introduced testimony and evidence that the Student was bullied in 7th grade. This testimony and evidence is sufficient for me to conclude that the Student was bullied on a few occasions. Evidence and testimony also reveals that the District's response to the bullying was insensitive to the *Parents*, but ultimately appropriate regarding the Student. Similarly, the District presented evidence that the Student's progress in general, and 7th grade PSSA scores in particular, were hindered by absences. This evidence and testimony was not compelling. As such, both the incidents of bullying and the Student's absence are ultimately irrelevant to my analysis below.

50. It is not clear that the version of the IEP that the District implemented during the 2012-13 school year actually contains a reading fluency goal, let alone whether that goal was measurable and objective. (See S-5). Regardless, the District did monitor the Student's reading fluency monthly throughout the 2012-13 school year. (S-10 at 15). Reports of progress indicate as follows:

- September 2012 – 83 WCPM
- October 2012 – 90 WCPM
- November 2012 – 80 WCPM
- December 2012 – Not Reported
- January 2013 – 107 WCPM
- February 2013 – Not Reported
- March 2013 – 96 WCPM
- April 2013 – 113 WCPM
- May 2013 – Not Reported
- June 2013 – 118 WCPM

51. As in the prior year, comparing the first 2012-13 probe to the last shows an increase. However, as with the prior year, that increase is diminished when it is noted that the Student finished the prior year at 106 WCPM. Using that number as a baseline, the Student regressed from the prior year on 4 of 7 probes and, overall, only improved by 6 WCPM.

52. Regarding the writing conventions goal that called for "3s," probes were taken in the first, second, and fourth quarter of the 2012-13 school year. In the first quarter, the Student earned a "2." In the second quarter, the Student earned a "3." In the third quarter, the Student earned a "2." (S-10)

53. The version of the May 2012 IEP that the District implemented included the Math goal that was in the April 2012 IEP. This goal called for the Student to score an 85% on three consecutive tests. Progress reports indicate that the Student did not meet this goal. (S-10).

54. Regarding the Speech/Language goal that called for the Student to demonstrate appropriate social behaviors, progress reports indicate that the goal was mastered in November of 2012. Progress reports thereafter are narrative and generally positive (for example, to the extent that the narrative of progress indicates that the

Student had trouble expressing self, Student was able to self-correct and call upon strategies to help self-expression). (S-10)

55. Regarding the Speech/Language goal that called for the Student to answer literal and inferential questions about a paragraph, the progress is mostly narrative and, to the extent objective data is presented, it is difficult to compare that data to the “4 out of 5 trials over 3 therapy sessions” that the goal calls for. The narrative progress monitoring, however, presents a very detailed picture of the Student’s actual performance when confronted by the task contemplated by the goal, and generally indicates that the Student was successful. (S-10)
56. Regarding the reading comprehension goal, progress monitoring indicates significant improvement to mastery almost immediately. (S-10).
57. On the 7th grade PSSAs, the Student was assessed to be “Below Basic” in both Reading and Math. (P-36).
58. The Parents obtained an independent educational evaluation (IEE) which was a neuropsychological evaluation. (P-24). The IEE indicates that testing occurred on March 14, 2013. The District did not receive the IEE until late in May of 2013. (S-8).
59. The IEE includes a classroom observation and describes some clinical observations as well. The IEE lists “test administered” – although not all of the tests listed were actually administered. (P-24).
60. The independent evaluator, a doctoral level psychologist, administered a Woodcock-Johnson Test of Cognitive Ability, Third Edition, resulting in a GAI measured at 97 (average range). The evaluator also administered a Woodcock-Johnson Test of Academic Achievement, Third Edition. On the latter, the Student scored below the average range in the Broad Reading subtest although both Letter-Word Identification and Passage Comprehension were both less than one standard deviation from the mean. Reading Fluency was significantly impaired, assessed with a standard score of 75. Word Attack was a strength (SS = 105), indicating a good ability to decode words. (P-24).
61. The Student’s strong decoding ability as measured by the Woodcock was not consistent with the Student’s scores on the Test of Word Reading Efficiency, which was also administered as part of the IEE. This assessment found that the Student’s ability to *efficiently* decode sight words and nonsense words was below average. Consistently, the Student’s Reading Rate, Reading Accuracy and Reading Fluency, as measured by the GORT-5 were significantly impaired. (P-24).

62. The IEE endorsed diagnoses of Developmental Dyslexia, ADHD (combined type), and Cognitive Disorder, NOS (reflecting organization, memory and executive functioning impairments).
63. The IEE recommended significant, explicit reading instruction. Recommendations regarding attention and emotional issues were less specific.

Summer 2013

64. The Student attended a private summer program at [a private school for students with learning differences] in the summer of 2013.
65. In the summer of 2013, the District qualified Student for ESY to address reading, math and social skills goals identified in the June 2013 IEP. (S-7 at 41). To address this, the District offered four hours of programming, three days per week, from July 8, 2012 to August 9, 2013. (S-7 at 41). The IEP specifies that the Student would receive READ 180 during this time. *Id.*
66. Upon receipt of the IEE, on May 28, 2013, the District sought consent to reevaluate the Student so that it could review the IEE and make changes to the Student's IEP. (S-8). The Parents provided consent and a new RR was drafted, dated June 3, 2013.³
67. The June 2013 RR includes a summary of the IEE and all prior testing. It also includes what must be characterized as the District's response to the IEE. In the District's view, the IEE was "generally consistent with previous data obtained through past assessments," but the District disagreed that the Student's needs were not being adequately addressed, and critiqued the report for not including teacher input.
68. Through the June 2013 RR, the District determined that the Student's primary disability category should be changed to Other Health Impairment (OHI) based on the executive functioning concerns noted in the IEE. The June 2013 RR recommended SLD and Speech/Language Impairment as secondary categories.
69. The June 2013 RR also notes that the Student's Lexile Score was assessed again at the end of 7th grade and dropped from a 797 to a 377. (S-8).

³ The document is dated August 3, 2013, but this is an error. Both parties agree that the RR and subsequent IEP were drafted, initially in June. The parties continued to meet through August, resulting in inaccurate dates on some documents.

70. The June 2013 RR recommends that the Student receive READ 180, starting in the summer of 2013 and continuing through the 2013-14 school year. (S-8).
71. After the June 2013 RR was completed, a revised IEP was drafted on June 4, 2013.⁴ The resulting June 2013 IEP includes significant revisions to the Student's present education levels, consistent with the June 2013 RR. This is also the first IEP to include a postsecondary transition goal, since the Student would turn 14 years old during the IEP's implementation. The June 2013 IEP also includes fairly specific PSSA accommodations.
72. The June 2013 IEP includes a writing goal that focuses on conventions but is not relative to the PSSA rubric. Instead, the goal calls for the Student to reach "75% accuracy over 3 consecutive quarters" as measured by curriculum based assessments. The baseline for this goal was "TBD." (S-9).
73. The June 2013 IEP includes a goal for the Student to make notecards with critical information based on study guides and other materials. The goal called for the notecards to contain 80% of the critical information on "three consecutive opportunities" with a "TBD" baseline.
74. The June 2013 IEP includes a Speech/Language goal nearly identical to the prior Speech/Language goal calling for the Student to answer literal and inferential questions. Despite the work on the prior goal, the baseline for this goal was "TBD." (S-9).
75. The June 2013 IEP includes a vocabulary goal with decoding components. There is no objective measure that would determine how or when this goal would be met, and it is not related to any need. (S-9).
76. The June 2013 IEP includes a math goal, calling for the Student to perform certain math skills with 80% accuracy in 8 out of 10 trials for 3 consecutive quarters.
77. The June 2013 IEP includes a writing goal that calls for the Student to revise written work after a teacher prompt with 75% accuracy over three consecutive quarters. The baseline is "TBD."

⁴ The record is not clear as to exactly when the June 2013 IEP was first presented to the Parents. There were many meetings between the Parents and the District between June and August of 2013. In their closing brief, the Parents refer to the District offering the June 2013 IEP in June of 2013.

78. The June 2013 IEP includes a goal for the Student to self monitor homework assignments and projects with decreasing teacher prompts and bring 100% of needed materials home with 100% accuracy on four out of five weekly observations. The baseline is “TBD.”
79. The June 2013 IEP includes a goal for the Student to finish reading assignments with an allotted time with no more than 5 non-verbal prompts to remain on task. It is not clear if this goal is directed to the Student’s reading speed, or the Student’s attention, or both. The baseline is “TBD.”
80. The Modifications and SDIs in the June 2013 IEP are essentially the same as those in the May 2012 IEP with the addition of SDIs specific to READ 180.
81. Related services in the June 2013 IEP included Speech/Language Therapy for 30 minutes, twice per cycle; individual sessions with a Special Education Counselor for 22 minutes, once per cycle; group session with a Special Education Counselor for 25 minutes, once per cycle; daily “check in” counseling services; and 30 minutes per month of consultative occupational therapy. (S-9).
82. The Parents filed their Complaint initiating this matter on June 25, 2013. The Complaint includes a demand for reimbursement for [a private school for students with learning differences] for the 2013-14 school year.
83. The District proposed the June 2013 IEP for the last time with a NOREP on August 19, 2013.⁵ The Parents rejected the NOREP the same day. (S-9).

2013-14 School Year – 8th Grade

Before the findings of fact concerning the 2013-14 school year, I must note the following: The first session of this due process hearing convened on August 26, 2013 – just seven days after the District issued the August 2013 IEP and, importantly, before the 2013-14 school year started. Evidence and testimony concerning the appropriateness of [the private school] was presented through the hearing, but both Parents testified during the first hearing session. Procedures established during the first hearing session forbid the recall of witnesses. The final hearing session convened after the school year had started. During that session, the Parents attempted to recall the Student’s mother to testify as to the Student’s progress at [the private school]. The District objected to the recall, and I sustained the objection. Consequently, there is

⁵ It is clear that the Parents did not accept the June 2013 IEP at any time, but it is not clear that the Parents rejected the June 2013 IEP until August of 2013.

virtually no record as to the Student's actual performance at [the private school] during the 2013-14 school year.

I further note that, had I permitted the recall, the Parent's testimony in the context of litigation and without supporting documentation (all of which would have violated the IDEA's disclosure rules) would have been suspect. More importantly, however, the Student's actual performance at a private school is not part of the tuition reimbursement test discussed below. To the extent that the appropriateness of the private placement is a factor, the appropriateness is judged at the time of the placement – just as IEPs are judged as of the time that they are offered. Actual performance may impact upon subsequent claims for continuing reimbursement but, as applied to this particular case, the Student's actual performance at [the private school] is irrelevant.

84. [The private school], as its name implies, is a private school affiliated with [a religious group] also known as [redacted]. The record, taken as a whole, indicates that the Student receives no direct instruction in [the beliefs or practices of this religious group].
85. [The private school] specifically serves intelligent, college-bound students with language based learning disabilities, like dyslexia. (P-37). [The private school] also specifically serves students with disabilities that commonly appear in students with language-based learning disabilities, such as ADHD and executive functioning disorders. *Id.*
86. Class size at [the private school] is limited to 6 to 8 students. (NT at 225-227).
87. Orton-Gillingham methodologies are implemented across the curriculum in all subject matters. *Id.*; P-37.
88. Based on the Student's [private school] summer program, the program for the Student in the 2013-14 school year includes language arts, in which the Student studies syllable division, vocabulary development, and word construction. (N.T. 245). In math, the Student receives small group instruction and extra practice to master concepts. (N.T. 246-247). The Student also receives programming intended to remediate (as opposed to accommodate) the Student's executive functioning difficulties.
89. Based on its intake testing and experiences with the Student in the summer of 2013, [the private school] requires the Student to take additional 1:1 tutoring (at an additional expense) as a requirement for admission.

Legal Principles

The Burden of Proof

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

Free Appropriate Public Education (FAPE)

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

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

Compensatory Education

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

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education

services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this “hour for hour” approach, some courts have endorsed an approach that awards the “amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA’s] failure to provide a FAPE.” *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the school district’s violations of the IDEA.”)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

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

Tuition Reimbursement

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993).

The first step is to determine whether the program and placement offered by the District is appropriate for the child. The second step is to determine whether the placement selected by the parents is appropriate. Appropriateness in this step of the analysis is not the same as measure of appropriateness that is used to judge IEPs. Only if that issue is resolved against the District are the second and third steps considered, *i.e.*, is the program proposed by Parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. See also, *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

Independent Educational Evaluation

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its

evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

Discussion

Denial of FAPE

There is an important difference between accommodating a reading disability and teaching a student how to read. During the 2011-12 and 2012-13 school years, the District did the former, but not the latter.

At all times, all testing from all parties indicates that the Student is of average intelligence, but has both reading and emotional disabilities. Specifically regarding reading, all testing from all parties at all times indicates that the Student is an excellent decoder. The Student can sound out real words and made up “nonsense” words. In fact, decoding is a strength for the Student. But decoding is only one component of reading. All witnesses, including the District’s witnesses, agree. This concept is evident in the District’s testing, in which decoding is only one of several measured reading skills.

In contrast to decoding, all assessments from all evaluators at all times indicate that the Student has significant deficits in reading fluency. Reading fluency, which is more than the mere rate at which the Student can read words, describes the Student’s ability to actually read a text as opposed to sounding out a passage word by word, syllable by syllable. Although there are differences between the District’s testing and the Parents’, there is no question that the Student has serious deficits in reading fluency.

Given the Student’s deficits in reading fluency, it is not surprising that reading fluency was one of the two goals in the April 2011 IEP. The goal, viewed in isolation from the rest of the IEP, is laudable. In context, however, the goal only serves to illustrate the inappropriateness of the April 2011 IEP. The IEP included no modifications or SDIs that were intended to enable the Student to reach the reading fluency goal. Said simply, the April 2011 IEP clearly established where the Student was and where the IEP team wanted the Student to be – but put no services in place to enable the Student to go from point A to point B. The IEP’s failure to include reading instruction renders the IEP inappropriate.

The District’s contention that the Student’s reading fluency deficit is the result of the Student’s anxiety is unpersuasive. If it were, that argument would not render the April 2011 IEP appropriate. The IEP puts nothing in place (via SDI or otherwise) to target the Student’s anxiety. Even accepting the District’s assertion as to the root cause of the

Student's reading problem (and I do not), the April 2011 IEP would be inappropriate for the same reasons.

The Student's scores on the 6th grade PSSAs are not a persuasive defense. The April 2011 IEP indicates that the Student was to receive accommodations on that test. The IEP does not specify what accommodations the Student would receive. As a result, it is not possible to know if the PSSA is an accurate reflection of the Student's ability.⁶

Finally, the progress monitoring regarding reading fluency does not indicate meaningful progress during the 2011-12 school year. Looking at only the first and last WCPM numbers ignores the fact that no clear trend line is apparent in the probes over the course of the school year. For more than half of the school year, the Student was less fluent than the baseline from which the goal was to be measured. It is also telling that the District decreased the expected level of mastery when the goal was revised for the 2012-13 school year.

For all of these reasons, the Parents have substantiated by preponderant evidence that the Student did not make meaningful progress in reading during the 2011-12 school year.

I reach the same conclusion regarding the 2012-13 school year for the same reasons. As noted in the findings above, the record does not readily reveal what reading fluency goal the District was implementing during the 2012-13 school year. Given the Student's needs, this ambiguity could rise to a substantive denial of FAPE in and of itself. Regardless, for all of the same reasons in the prior year, the District was accommodating the Student's reading disability but not teaching the Student to read. This is evident in the progress monitoring. Looking only at the months in which progress was reported, the Student's fluency regressed as compared to the end point of the prior year during 57% of the 2012-13 school year. In absolute (but arguably less meaningful) terms, the Student improved by only 6 WCPM over the course of the entire year as compared to the year prior. The Student did not demonstrate mastery at the level required by the April 2011 or April 2012 IEPs.

Progress monitoring need not show linear growth to prove meaningful progress. Some inconsistency is to be expected. It also is important that the District placed the Student in a Learning Support class for English. The Parents did not present a meaningful or serious critique of the teachers of those classes. Rather, the Parents' valid criticism is that the District had no plan in place to systematically, directly address the problem

⁶ Further, arguably, the PSSA was designed to assess *schools* not individual students. No testimony or evidence was presented regarding the validity of the PSSA as a measure of an individual student's performance.

revealed by the District's own testing. Without such a plan in place, the Student did not make meaningful progress in reading during the 2011-12 or 2012-13 school years.

The Parents have not proven, however, that the Student derived no benefit whatsoever from the District's services during the 2011-12 or 2012-13 school years. In fact, as noted above, the modifications and SDIs in the IEPs were designed to accommodate the Student's disability, enabling learning in core academics. In essence, the District put a system in place under which the Student's reading difficulties would not yield an academic penalty. Such accommodations were necessary, but insufficient. Similarly, the Parents have not proven by preponderant evidence that the District failed to provide a FAPE in the areas of writing or math (two components that factor into the demand of 1,080 hours of compensatory education). Regarding math, no evidence suggests that the District's IEPs were inappropriate at the time they were drafted. Regarding writing, I respectfully disagree that the writing samples that were entered into evidence conclusively demonstrate a writing disability that required accommodation.

The Parents' demand for 1,080 hours of compensatory education is based on a denial of FAPE in reading, writing and math, constituting three hours per day for 180 school days per school year over two school years. I have found that the Student was denied a FAPE in reading only during the same period of time. Consequently, the Student will be awarded 360 hours of compensatory education to remedy the denials of FAPE during the 2011-12 and 2012-13 school years.

In addition to the forgoing, the Parents demand an additional 180 hours for a denial of FAPE in the summers of 2012 and 2013 (90 hours for each summer). Regarding the summer of 2012, the Parents have proven their case by preponderant evidence. The District qualified the Student for ESY based on social skills deficits and reading needs. Then, the District offered an ESY program that has no reading component. The only report of progress from the ESY program indicates (albeit through an unclear metric) that the Student finished the summer where the Student began.

In the summer of 2013, the District also qualified the Student for ESY to address reading, math and social skills goals identified in the June 2013 IEP. (S-7 at 41). To address this, the District offered four hours of programming, three days per week, from July 8, 2013 to August 9, 2013. (S-7 at 41). The IEP does not specify what services the Student would receive to address social skills goals in the summer of 2013. For reading, the Student was to receive READ 180. For math, the IEP notes that the Student was to receive direct instruction in math during ESY.

In sum, it appears that the District wished to jump-start key components of the June 2013 IEP in the summer of 2013. Regardless of the appropriateness of the June 2013 IEP, evidence indicates that the Student regressed during summer breaks (compare WCPM at the end of the 2011-12 school year and start of the 2012-13 school year after

a summer without reading interventions). Consequently, I find that the programming offered by the district in the summer of 2013 was responsive to the analysis required by 22 Pa. Code § 14.132. Whether or not the June 2013 IEP would have been appropriate for school year's worth of programming, the District's ESY offer in the summer of 2013 was reasonably calculated to prevent regression and, therefore, was appropriate at the time it was offered.

In sum, in addition to the 360 hours of compensatory education already awarded. I award an additional 90 hours of compensatory education to remedy a denial of appropriate ESY services in the summer of 2012.

Tuition Reimbursement

In the first prong of the *Burlington-Carter* analysis, I must determine if the District offered an appropriate program. On its face, there are some significant procedural flaws in the June 2013 IEP. For example, with mounting evidence of the Student's reading disability, the District changed the Student's primary disability category to OHI. In the context of tuition reimbursement, however, the focus must be on the substantive services that the Student would have received, not compliance with the IDEA's procedural minutia.

In substance, the June 2013 IEP is a significant improvement over its predecessors. For the first time, the IEP indicates that the District will provide direct reading instruction through its offer of READ 180. There was a considerable amount of testimony from the Parents' psychologist (the author of the IEE) that READ 180 is not appropriate for the Student because READ 180 does not address reading fluency. The Parents' psychologist also referenced independent studies, finding that READ 180 was not effective for Students with a severe risk of a reading dysfunction. (NT at 1071-1074). The District's personnel, including the District's psychologist, all testified that READ 180 would be appropriate, and pointed to studies establishing the efficacy of the program. Documentation from READ 180's publisher was also presented. (S-11 at 1-9). Oddly, one of the leading experts in the field of dyslexia, referenced by the Parents' psychologist for the purpose of validating the assessments used in the IEE, has endorsed READ 180. Equally oddly, none of the studies cited in the READ 180 materials concerns the efficacy of the program particular to students with reading fluency deficits.

I do not find that READ 180 is appropriate for the Student. Rather, I find that the Parents have not proven that READ 180 is inappropriate. As the Parents have the burden on this issue, I cannot find that the June 2013 IEP is inappropriate on its face. That, however, is not the end all and be all for the first prong of the *Burlington-Carter* test.

In *A.H. v. Boyertown Area School District*, ODR No. 00098-0910LS (McElligott, 2010), Hearing Officer McElligott considered similar circumstances. In that case, a student was denied a FAPE for two years. Then, Boyertown offered a facially-appropriate IEP in the summer before the parents enrolled the student in a private school. In applying the *Burlington-Carter* test, Hearing Officer McElligott concluded as follows:

“In this three-step analysis, the first step is an examination of the school district’s proposed program. Here, the District has proposed a program at the 11th hour which, on its face, would seem to be appropriate. When considered at the time it was offered, parents had come to the end of two academic years (and the intimation outside of the record in this case is that the parents’ discontent had been building over years) where they felt the educational programming for their child was inappropriate, leading to a lack of meaningful progress and a denial of FAPE. In this, they were correct. Therefore, it is the opinion of this hearing officer that, under the facts of this case and weight of this record, the District’s proposed IEP of August 2009 was too little, too late. The parents’ rejection of the August 2009 IEP is defensible.”

Id at 16. I adopt the foregoing analysis in this case. In the June 2013 RR and IEP, the District adamantly disavowed any defect in the reading programs provided through prior IEPs, disagreed with the Parent’s IEE, and changed the Student’s primary disability category to OHI. At the same time, in the specter of litigation and with attorneys attending IEP meetings, the District offered a reading program (albeit a questionable one for the Student in this case) for the first time. Testimony from District personnel, taken as a whole, suggests that this offer was simply placation. As in *A.H. v. Boyertown*, the Parents in this case were justified in rejecting an IEP that was barely facially appropriate, offered in the 11th hour and with a due process hearing building steam.

Turning to the second prong of the *Burlington-Carter* test, all of the evidence and testimony considering [the private school] indicates that [the private school] was an appropriate placement at the time it was selected. The District argues that [the private school] is more restrictive than the District’s offer. A traditional LRE analysis does not apply to in *Burlington-Carter* cases. All private programming is more restrictive than district programming. If LRE were a deciding factor, there could not be tuition reimbursement (a remedy that the IDEA clearly provides). The District also argues that [the private school’s] students do not receive IEPs and are not required to take the PSSAs. Both of these facts are supported by the record, and neither diminishes [the private school]’s appropriateness. Nothing in the record indicates how or why taking the PSSAs is necessary for the delivery of FAPE to the Student, and all evidence regarding [the private school] indicates that the Student will receive a highly individualized

program at [the private school]. The Parents have met their burden to establish that [the private school] is appropriate.

The third prong of the *Burlington-Carter* test requires a balancing of the equities. In support of their claim, the Parents point to a power point presentation from the District's administrators to the District's School Board. The presentation emphasizes the District's efforts to reduce the cost of special education by reducing out-of-district placements. I did not make any explicit findings of fact regarding this presentation because the Parents did not establish that the presentation comports with the District's actual policies or practices. Further, even if the District had a policy or practice intended to reduce out-of-district placements, the Parents did not establish that implementation of such a policy was the reason why the District refused to fund the Student's placement at [the private school]. Moreover, I see nothing sinister about a school district's desire to build its own capacity to serve students with disabilities. If reduced cost is a happy byproduct of such efforts, all the better.

While evidence of the District's motivation was not compelling in regard to the equities, evidence of the District's use of the IEE is. Offering READ 180 while opposing the only evaluation that recommends direct reading instruction evidences, at best, either acquiescence or placation in an attempt to avoid litigation. The record regarding the District's last offer, taken as a whole, compels the conclusion that the District offered READ 180 only to put itself in a better position for this due process hearing – not because the District concedes the need for direct reading instruction. This effort to weaponize the Student's IEP is a disservice to the Student, regardless of the offered program. By crafting an IEP for purposes of litigation (offering programming that the District insists is not necessary, based on an evaluation that the District disputes) places the equities with the Parents.

The Parents have satisfied all three prongs of the *Burlington-Carter* test. As such, they are entitled to tuition reimbursement at [the private school] for the 2013-14 school year. They are also entitled to reimbursement for the mandatory costs of programming beyond tuition that [the private school] requires as a condition of the Student's enrollment, and the related services that enable the Student's participation at [the private school] (specifically, tutoring and transportation).

IEE Reimbursement

The Parents point to the April 2012 RR, and argue that RR was not appropriate. The District evaluated the Student for Wilson and READ 180 eligibility after the April 2012 RR, and so it is not clear that the April 2012 RR would constitute the last evaluation

prior to the IEE. Regardless, entitlement to reimbursement for an IEE is predicated on a contemporaneous disagreement with the District's evaluation and a contemporaneous demand for an IEE at public expense. The record does not reveal that the Parents disagreed with the RR when it was issued, or demanded a IEE at public expense before the IEE was obtained. The Parents' demand for IEE reimbursement is denied on these bases.

Reimbursement for Expert Testimony

The Parents concede that they cannot obtain reimbursement for expert testimony under the IDEA, but they can under Section 504. As noted above, this matter arises under both statutes. The Parents cite to *LT vs. Mansfield Twp Sch. Dist.*, 53 IDELR 7 (D. NJ 2009) to support their contention that expert fees are reimbursable under Section 504. Be that as it may, I have no jurisdiction under the fee-shifting elements of the IDEA or Section 504. I cannot award prevailing party fees. Such demands are brought as a new matter in a court of competent jurisdiction. Expert fee shifting is completely analogous. The Parents' demand for expert fee reimbursement is denied on this basis.

ORDER

Now, November 8, 2013, it is hereby **ORDERED** as follows:

1. The Student is awarded 360 hours of compensatory education to remedy a denial of FAPE during the 2011-12 and 2012-13 school years.
2. The Student is awarded an additional 90 hours of compensatory education to remedy a denial of FAPE in the summer of 2012.
3. The Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future educational programming. If the Student returns to the District and is IDEA-eligible at that time, the compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP to assure meaningful educational progress.
4. The District is ordered to reimburse the Parents for the cost of tuition, books, transportation, and required 1:1 tutoring at [the private school] during the 2013-14 school year. Such reimbursement is limited to the actual costs that the Parents paid or debts that the Parents incurred, less any scholarship provided by [the private school].

5. All of the Parents' other claims are denied.

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

/s/ Brian Jason Ford
HEARING OFFICER