

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

Pennsylvania  
Special Education Hearing Officer

DECISION

Child's Name: J.N.

Date of Birth: [redacted]

Dates of Hearing:

September 23, 2013

December 3, 2013

December 4, 2013

December 11, 2013

January 17, 2014

**CLOSED HEARING**

ODR Case # 14117-1314KE

Parties to the Hearing:

Representative:

Parent[s]

Mark Voigt, Esquire  
Plymouth Meeting Executive Campus  
600 West Germantown Pike  
Suite 400  
Plymouth Meeting, PA 19462

South Western School District  
225 Bowman Road  
Hanover, PA 17331

Brooke Say, Esquire  
Leigh Dalton, Esquire  
Susquehanna Commerce Center East  
Suite E600  
221 West Philadelphia Street  
York, PA 17401

Date Record Closed:

February 24, 2014

Date of Decision:

March 13, 2014

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION**

Student an early teen-aged student residing in the South Western School District (“District”). The parties do not dispute whether the student qualifies as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)<sup>1</sup>. Parents claim that the District owes the parents tuition reimbursement for a unilateral private placement undertaken for the 2013-2014 school year because the District’s proposed program and placement was not designed to provide a free appropriate public education (“FAPE”) to the student. The deepest level of disagreement between the parties are the student’s needs, and consequent programming, in reading.

Additionally, the parents claim that compensatory education is owed for extended school year (“ESY”) services for the summer of 2013. Finally, parents also assert that the District has not met its obligations to the student under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”)<sup>2</sup>, and that, in addition to findings in that regard, parents should be reimbursed for certain expenses related to the services of an independent evaluator.

---

<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162 wherein Pennsylvania education regulations explicitly adopt most provisions of 34 C.F.R. §§300.1-300.818.

<sup>2</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61.

The District counters that its 2013-2014 program and placement are reasonably calculated to provide FAPE to the student and, as such, parents are not entitled to tuition reimbursement or compensatory education for alleged violations of IDEA. The District also asserts that it has entirely met its Section 504 obligations to the student.

For the reasons set forth below, I find in favor of the District.

### **ISSUES**

Are the parents entitled to tuition reimbursement for the unilateral private placement undertaken for the 2013-2014 school year?

Are parents entitled to compensatory education for ESY programming in the summer of 2013?

Has the District met its obligations to the student under Section 504, and, if not, are parents entitled to remedy?

### **FINDINGS OF FACT**

#### **Prior to 2012-2013 School Year**

1. When the student was three years old, the student received early intervention speech and language services from the local intermediate unit. (Parents Exhibit ["P"]-34).
2. In the 2006-2007 school year, the student would have been in the kindergarten year. The student was homeschooled at that time and in subsequent school years. (P-34; School District Exhibit ["S"]-5).

3. Homeschooling continued until the 2011-2012 school year, the student's 5<sup>th</sup> grade year. (P-34).
4. Through 2012, the student received numerous evaluations by medical professionals and service providers. These evaluations, including diagnostic information from throughout the student's life, yielded a complex mosaic of diagnoses:
  - Neurofibromatosis
  - Attention-deficit hyperactivity disorder/inattentive type ("ADHD")
  - Dysgraphia
  - Specific learning disabilities (reading, mathematics, written expression)
  - Speech & language needs (dysarthria, immediate memory deficit, and vocabulary deficit, receptive and expressive language)
  - Occupational therapy needs
  - Physical therapy needs (balance, endurance, foot placement, postural awareness, and reaction time)(P-1, P-2, P-3, P-4, P-6; S-3).
5. One of these assessments, and the assessment which explicitly identified specific learning disabilities, included cognitive and academic achievement testing in February 2011. (P-1; S-3).

6. In July 2012, the family obtained a comprehensive independent educational evaluation (“IEE”). (P-7; S-4).
7. The July 2012 IEE included cognitive and academic achievement testing. (P-7; S-4).
8. The independent evaluator found that the student should be identified in multiple areas of need: health impairments (neurofibromatosis and ADHD), specific learning disabilities (reading, mathematics, and written expression), speech & language impairment, hearing impairment, orthopedic impairment, and visual impairment. (P-7 at pages 26-27; S-4).
9. The July 2012 IEE recommended use of the Wilson Reading Program to address the student’s needs in basic reading and reading fluency. (P-7 at pages 28-30).

#### 2012-2013 School Year

10. The student enrolled in the District for 6<sup>th</sup> grade, the 2012-2013 school year.
11. In August 2012, the District issued an evaluation report (“ER”). (S-5; P-10).
12. The student’s cognitive ability was gauged by the District evaluator with a general intellectual ability score of 85. This was markedly higher than the February 2011 cognitive assessment

(full-scale IQ 73) and the July 2013 IEE (full-scale IQ 71). (P-1, P-7; S-3, S-5).

13. The District evaluator found that the student “was able to read words at approximately 3.5 grade level” but experienced difficulty in reading fluently. Reading comprehension skills were gauged at a 3<sup>rd</sup> grade level. The District’s primary reading assessment, Fountas & Pinnell, however, gauged the student’s reading at the spring of 2<sup>nd</sup> grade level—level L within the F&P framework. (S-5 at page 5-7; P-10).
14. The August 2012 ER, the student’s results on assessments in reading, mathematics, and written expression exhibit the need for specially designed instruction in those areas. (S-5; P-10).
15. The August 2012 ER found that the student qualified for special education with a health impairment but, based on the student’s achievement testing in light of the student’s intellectual ability score of 85 and “no documentation of repeated assessments of achievement at reasonable intervals”, should not be identified as a student with learning disabilities. (S-5 at page 10; P-10).
16. In August 2012, the student’s individualized education plan (“IEP”) team designed an IEP based on the August 2012 ER. (P-11; S-12).
17. Among other needs, the August 2012 IEP identified academic needs in reading fluency, reading comprehension, basic reading,

- written expression, spelling, math problem-solving, and math calculation. (S-12 at page 19; P-11).
18. The August 2012 IEP contained three reading goals: reading fluency, reading comprehension, and decoding. (S-12 at pages 26-28; P-11).<sup>3</sup>
  19. In September 2012, the parents filed a special education due process complaint based on issues related to the District's handling of its obligations during the student's homeschooling years. (P-20).
  20. Over September and October 2012, the student's IEP was revised as more assessment data, in areas such as speech and language, occupational therapy, physical therapy, vision therapy, and hearing, became available to the IEP team. (P-17, P-21; S-13, S-14).
  21. In October 2012, part of the revisions were based on a re-evaluation report ("RR") issued by the District to update data from these outside assessments and the weeks of instruction/achievement that the District had engaged in. (S-6).
  22. The October 2012 RR revised the student's identification status, finding that the student's primary disability category was

---

<sup>3</sup> The parties' dispute hinges on their differing views on the student's reading instruction. The student has significant academic support needs in mathematics and written expression. The record as a whole, though, including dozens of exhibits and 1,600+ pages of transcript, clearly reveals that the parties' disparate views on the student's reading program is the foundation of the dispute. Therefore, from this point in the decision, the findings of fact and ultimate conclusions will center on consideration of the issue of reading.

specific learning disabilities, with additional disability categories noted as hearing impaired and speech and language impairment. (S-6 at page 6).

23. The October 2012 IEP was also revised in light of the student's achievement in reading at that point. The student's reading comprehension goal was based on materials at the 2.5 grade level; the student had mastered the goal by October 2012, so the goal was revised to reflect reading comprehension based on materials at 3.0 grade level. The student's reading fluency goal was based on 80% accuracy at 94 words correct per minute at the 2.5 grade level; the student had mastered the 80% accuracy rate by October 2012, so the goal was revised to reflect 95% accuracy at 94 words correct per minute at the 2.5 grade level. (S-14 at pages 7-8, 30-31, 37-38; P-21).
24. In October 2012, the student also underwent an assistive technology evaluation process. (S-7; P-56).
25. The October 2012 IEP listed System 44 as the reading program being utilized for the student's reading instruction. (S-14 at pages 10-11).
26. In November 2012, the parties entered into a settlement agreement on a special education due process complaint the parents had filed in September. In exchange for considerations provided by the District, the settlement terms included an



agreement, on the parents' part, that the District was released from any claims related to the then-unfolding 2012-2013 school year. The agreement also included, as a consideration by the District, a payment for the July 2012 IEE. (P-20).

27. In January 2013, the student's reading comprehension goal was revised. The student's reading comprehension goal was based on materials at the 3.0 grade level; the student had mastered the goal by December 2012, so the goal was revised to reflect reading comprehension based on materials at 4.0 grade level. (S-15 at page 8-11).
28. In February 2013, the student's IEP team met to determine the student's eligibility for ESY programming for the summer of 2013. The student was found to be eligible for ESY services. (S-16 at pages 47-48, S-22; P-22).
29. At the February 2013 IEP meeting, the student's progress at that point in the school year was also discussed. The student was making progress on the reading fluency and reading comprehension goals. (S-22 at pages 5-6).
30. At the February 2013 IEP meeting, the student's decoding goal was discontinued. The student's decoding goal called for 80% accuracy in decoding on three consecutive trials. By February 2013, the student had met this level of accuracy on every probe since September 2011. (S-17 at page 3-4; S-22 at page 6).

31. In April 2013, the student's reading fluency goal was revised. The student's reading fluency goal was based on 95% accuracy at 94 words correct per minute on three consecutive trials at the 2.5 grade level; the student had mastered the goal by April 2013, so the goal was revised to reflect 95% accuracy at 110 words correct per minute at the 3.0 grade level. (S-17 at pages 14-16, 18).
32. In April 2013, the student's reading comprehension goal was revised. The student's reading comprehension goal was based on 80% comprehension on three consecutive trials at the 4.0 grade level; the student had mastered the goal by April 2013, so the goal was revised to reflect materials at the 5.0 grade level. (S-17 at pages 21-23, 25-26).
33. In May 2013, the independent evaluator who conducted the independent evaluation and issued the July 2012 IEE issued an update to the report. (P-27; S-8).
34. The May 2013 IEE update indicates that the student's achievement levels in reading were all commensurate with the same achievement levels in 2012. The sub-tests (reading comprehension, word reading, pseudoword decoding, and oral reading fluency), as well as basic reading and reading comprehension/fluency composites, were all commensurate with the achievement levels in the prior administration. (P-27 at page 14; S-8 at page 14).

35. The May 2013 IEE included progress monitoring data and IEP goal updates over the 2012-2013 school year to that point. (P-27; S-8).
36. The May 2013 IEE concluded that the System 44 reading program being utilized by the District was not appropriate, and the evaluator reiterated that the Wilson Reading System was a more appropriate program for the student. (P-27; S-8).
37. In May 2013, the student's IEP team met to design the student's IEP for the 2013-2014 school year. (S-19; P-24).
38. The May 2013 IEP, in the present levels of academic performance, the reading comprehension level indicates that the student is working at the 5<sup>th</sup> grade level. The reading fluency/accuracy indicates that the student is working at the 3<sup>rd</sup> grade level. (S-19).
39. In the May 2013 IEP, the student's reading fluency/accuracy goal is written at 98 words correct per minute, in three out of four trials, at the 3<sup>rd</sup> grade level. Unlike goals in the 2012-2013 IEPs, the trial will be timed. (S-19 at page 21).
40. In the May 2013 IEP, the student's reading comprehension goal is written at 15 correct responses, in three out of four trials, at the 4<sup>th</sup> grade level. Unlike goals in the 2012-2013 IEPs, the trial will be timed. (S-19 at page 21).

41. The District was recommending that the student's reading program shift from System 44, which has a heavy phonics/decoding emphasis, to Read 180, a broad-based reading program where phonics/decoding is balanced against comprehension and broader reading skills. (Notes of Testimony ["NT"] at 711, 722-766, 783-812, 831-832).
42. In June 2013, the independent evaluator that had been working with the family engaged in a conference call with certain members of the District regarding the student's reading program. Participants advocated vigorously for their views of what reading program/emphasis was more appropriate for the student. The District felt that moving to Read 180 was appropriate for the student; the independent evaluator felt that the Wilson Reading System, which was heavily grounded in and focused on phonics/decoding, was appropriate. (NT at 213-222, 581-596, 812-826, 1537).
43. In June and July 2013, the student attended the ESY program. (S-23; P-60).
44. On July 8, 2013, the District offered an IEP with certain revisions. (S-20; P-32, P-33).
45. In the July 8<sup>th</sup> IEP, on the Scholastic Phonics Inventory, the student scored 8 (beginning decoder) in September 2012 and 17 (developing decoder) in May 2013. On the Scholastic Reading

- Inventory, the student's lexile in September 2012 was 426; the lexile in May 2013 was 516. (S-20 at page 9; P-32, P-33).
46. In the July 8<sup>th</sup> IEP, on the Fountas & Pinnell assessment, the student had progressed from instructional level K (December-February of 2<sup>nd</sup> grade) to instructional level O (February-March of 3<sup>rd</sup> grade). (S-20 at page 9; P-32).
47. The reading goals in the July 8<sup>th</sup> IEP remained the same from the May 2013 IEP. (S-19, S-20; P-24, P-32).
48. In addition to the two reading goals, the July 8<sup>th</sup> IEP contained goals in the following areas: written expression, career exploration, math computation, math concepts and applications, spelling, speech & language, use of assistive technology, and occupational therapy. (S-20 at pages 25-28; P-32).
49. In the July 8<sup>th</sup> IEP, the specially designed instruction for reading would be delivered through Read 180. (S-20 at page 30; P-32).
50. The parents rejected the July 8<sup>th</sup> IEP on the notice of recommended educational placement issued with the IEP. (P-33).
51. On July 15<sup>th</sup>, the parents filed the complaint which led to these proceedings. (P-34).
52. On July 18<sup>th</sup>, the District proposed an IEP that included components of the Wilson Reading System. (S-21; P-35).

53. Thereafter, for the current 2013-2014 school year, the parents unilaterally enrolled the student in a private school serving students with learning difficulties. (P-47; P-53).

#### Reading Programs

54. System 44 was the basis of the student's reading instruction at the District in the 2012-2013 school year. System 44 focuses on phonics/decoding, beginning with letter-sound correspondence through fluent word recognition, as well as syllable strategies/word analysis and sight word recognition. (S-27 at page 2, S-34).

55. Read 180 is the proposed reading program for the student's instruction at the District for the 2013-2014 school year. Read 180 focuses on a broad-based, global approach to reading, including phonetic awareness, phonics, fluency, reading comprehension, vocabulary, spelling, and writing. (S-27 at page 1, S-34; P-64).

56. The Wilson Reading System focuses on decoding/encoding word structure, using controlled texts, speech sounds/segmenting/blending, and syllable focus. (P-7 at pages 28-29; S-4).

#### Witness Credibility

57. All witnesses testified credibly. (NT at pages 47-259, 269-605, 616-927, 939-1352, 1362-1610).

58. The testimony of the District's supervisor of reading/language arts was especially persuasive and was accorded more weight than other witnesses in terms of the student's needs in reading and how different reading programs would address those needs. (NT at 697-927).

### **DISCUSSION AND CONCLUSIONS OF LAW**

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for "significant learning" (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

#### Tuition Reimbursement

Long-standing case law and the IDEA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also*, 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive

examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

In the three-step analysis, the first step is an examination of the school district's proposed program and whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C. v. Central Regional School District). In this case, the District's July 8, 2013 IEP is reasonably calculated to yield meaningful education benefit to the student.<sup>4</sup>

Neither party disputes that the student has significant learning disabilities and requires intensive instruction in reading, instruction that addresses decoding, fluency, accuracy, and comprehension. The District's July 8<sup>th</sup> IEP identifies these needs and addresses the needs in appropriate ways.

The student's reading goals in the July 8<sup>th</sup> IEP are explicit and measurable, and are in line with where the student was surfacing in May 2013 when the District generated the assessments of the student's reading at that time. And this followed on the progress the student had made in all reading goals over the course of the 2012-2013 school year. And while the other goals in the July 8<sup>th</sup> IEP were not the focus of the

---

<sup>4</sup> The July 18<sup>th</sup> IEP was revised and offered after the parents had filed their special education due process complaint on July 15<sup>th</sup>. Therefore, the July 8<sup>th</sup> IEP is the last-offered IEP. The contents of the July 18<sup>th</sup> IEP, and events that arose between the parties after parents filed their complaint, have no bearing on the legal analysis—what program was last offered, and is that program reasonably calculated to yield meaningful education benefit? (See S-20, S-21, P-32, P-34, P-35).



hearing (indeed, while the student exhibits needs in mathematics, written expression, speech and language, reading goals/instruction/programming predominated), all goals in the July 8<sup>th</sup> IEP are reasonably grounded in data and assessment of the student, and are explicit and measurable

The specially designed instruction in the July 8<sup>th</sup> IEP creates appropriate vehicles for the delivery of instruction to help the student make progress on those goals. Read 180, the reading program which would address the student's need for specially designed instruction in reading, would meet those needs. Here, the testimony of the District's reading supervisor was very persuasive. Her testimony, in light of the record on the student's 2012-2013 school year, was highly persuasive that a broad-based reading program is appropriate for the student, as opposed to programs that are centered on phonics/decoding (such as System 44 or the Wilson Reading System). In sum, then, the District's program, from needs-identification to goals to instruction to placement, is reasonably calculated to yield meaningful education benefit.

When the school district's program and placement are found to be appropriate, as here, examinations at the second step (whether the private program and placement are appropriate) and the third step (a weighing of the equities between the parties) of the Burlington-Carter analysis are unnecessary. Therefore, the Burlington-Carter analysis ends at this point.

The District's proposed program and placement for the 2013-2014 school year, as outlined in the July 8<sup>th</sup> IEP, are appropriate. Accordingly, the parents are not entitled to tuition reimbursement.

#### Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEA, compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEA. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." (M.C. at 397).

Parents have asserted a claim for compensatory education related to ESY programming in the summer of 2013. Where a student with a disability exhibits difficulty with recoupment and/or regression given an break in educational programming, such as summertime when school is

not in session, the student may require ESY programming. (34 C.F.R. §300.106; 22 PA Code §14.132).

Here, the record is much less fulsome in terms of evidence regarding the ESY programming for summer of 2013. What evidence there is, however, supports a finding that, by a preponderance of the evidence, the District met its obligations to provide FAPE through the ESY programming.<sup>5</sup>

Accordingly, there will be no award of compensatory education.

#### Section 504

*Denial of FAPE.* Section 504 requires that children with disabilities be provided with a FAPE. (34 C.F.R. §104.33; *see also* 22 PA Code §15.1). While the provisions of IDEA, and subsequent case law, regarding the provision of FAPE are more voluminous than those for Section 504, the standards are broadly analogous and may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)).

Accordingly, the fact-finding and legal analysis outlined above in the *Tuition Reimbursement* and *Compensatory Education* subsections are adopted here in support of the conclusion that the District met its obligations to provide the student with a FAPE under Section 504. As a

---

<sup>5</sup> P-22, P-60; S-16, S-22, S-23.

consequence of this finding, the parents do not prevail on their claim for reimbursement of the services of an independent evaluator.

Therefore, the order will not include reimbursement for the services of the independent evaluator.

### **CONCLUSION**

The program and placement proposed by the District for the 2013-2014 school year, as outlined in the July 8<sup>th</sup> IEP, is reasonably calculated to yield meaningful education benefit. Therefore, the parents are not entitled to tuition reimbursement. Compensatory education will not be awarded for ESY programming in the summer of 2013. And parents are not entitled to reimbursement for certain services of the independent evaluator.

•

## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the July 8, 2013 IEP is reasonably calculated to yield meaningful education benefit. The student was provided with a free appropriate public education through the design and implementation of extended school year programming in the summer of 2013. And the student was not denied a free appropriate public education under the terms of Section 504.

Accordingly, there will be no remedy in the form of reimbursements to parents or compensatory education.

Any claim not addressed in this decision and order is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

March 13, 2014