

*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: G.L.

Date of Birth: [redacted]

Dates of Hearing:

October 23, 2013

December 18, 2013

January 29, 2014

January 31, 2014

CLOSED HEARING

ODR File No. 14272-1314AS

Parties to the Hearing:

Parents

Parent[s]

School District

Manheim Township School District  
450A Candlewyck Road  
Lancaster, PA 17601

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney

Mark W. Voigt, Esquire  
Law Office of Mark W. Voigt  
Plymouth Meeting Executive Campus  
600 West Germantown Pike #600  
Plymouth Meeting, PA 19462

School District Attorney

Jeffrey F. Champagne, Esquire  
McNees Wallace & Nurick LLC  
100 Pine Street, P. O. Box 1166  
Harrisburg, PA 17108

March 5, 2014

March 20, 2014

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is a teen-aged student residing in the Manheim Township School District (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> as well as the federal and state regulations implementing those statutes.

Student attended school in the District during the 2012-13 school year, and did not return. For the 2013-14 school year, the Parents unilaterally placed Student in a private school.

The case proceeded to a due process hearing which convened over four sessions, at which the parties presented evidence in support of their respective positions. The evidence focused on the programming for the 2012-13 and 2013-14 school years. The Parent sought to establish that the District failed to provide Student with FAPE, seeking compensatory education for the 2012-13 school year and tuition reimbursement for Student's current private school placement for 2013-14; they also sought reimbursement for an independent evaluation. The District maintained that its special education program, as offered and implemented, was appropriate for Student.

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

### **ISSUES**

1. Whether the special education program provided to Student during the 2012-13 school year and the summer of 2013 was appropriate;
2. If the 2012-13 program including ESY services during the summer of 2013 was not appropriate, whether Student is entitled to compensatory education and, if so, to what extent;
3. Whether the special education program proposed for the 2013-14 school year was appropriate;
4. If the proposed 2013-14 program was not appropriate, whether the Parents are entitled to tuition reimbursement for Student's placement in a private school; and
5. Whether the Parents are entitled to reimbursement for an Independent Educational Evaluation (IEE)?<sup>4</sup>

---

<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>3</sup> 29 U.S.C. § 794.

<sup>4</sup> There was some disagreement over the scope of the IEE for which the Parents claimed reimbursement. (Notes of Testimony (N.T.) 41-43) However, the Parents did raise this claim in their due process complaint.

## **FINDINGS OF FACT**

### Background

1. Student is a teenaged resident of the District who is currently attending a private school outside of the District. Student is eligible for special education as a child with a disability under the IDEA. (Notes of Testimony (N.T.) 44-45; Parent Exhibit (P-) 12 pp. 18-20)
2. Student was born in an eastern European country and was adopted by the Parents at the age of six. (N.T. 47, 56; P-1 p. 2, P-12 p. 5)
3. Student attended a private school beginning in kindergarten and continuing through part of Student's second grade year; attended a different private school for the remainder of Student's second grade year and third grade; returned to the first private school for fourth grade; and repeated fourth grade at another private school during the 2010-11 school year where Student also attended fifth grade. (N.T. 48-49, 51, 56, 221-22; P-12 p. 5)
4. Student was evaluated by the local Intermediate Unit (IU) in 2011 during the repeated fourth grade year. At that time, Student's cognitive ability (Wechsler Abbreviated Scale of Intelligence, and Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV)) was assessed to be well below average; academic achievement (Wechsler Individual and Achievement Test – Third Edition (WIAT-III)) was average in reading comprehension, multiplication fluency, and written expression, below average in oral reading fluency, math problem-solving, and spelling, and well below average in addition fluency and subtraction fluency. (P-5)
5. Student struggled at the various private schools with all areas of academic work, despite outside tutoring in reading and mathematics provided by the Parents, as well as with making and maintaining friendships. Student's social skills have declined over time as Student has matured, and Student has historically demonstrated difficulty with following multi-step directions. (N.T. 47-52, 57-59, 76-77, 235-36, 238-39)
6. Student was provided language arts and math instruction (learning support) in a resource room setting during the 2010-11 and 2011-12 school year. Student also received speech/language services during that school year and made progress on all goals. (P-1 p. 5, P-8, P-12 pp. 2-3)
7. Between January and July 2012, Student saw a psychologist on several occasions due to behaviors Student was exhibiting. (N.T. 58, 249; P-9)<sup>5</sup>

---

<sup>5</sup> The records of the private psychologist from the spring of 2012 suggest varying Axis I diagnoses for Student, including Oppositional Defiant Disorder and Attention-Deficit/ Hyperactivity Disorder (ADHD) - Predominantly Inattentive Type based on the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (DSM-IV-TR). (P-9) Some form of private counseling continued until the beginning of the 2013-14 school year. (N.T. 249)

## Transition to the District

8. In the spring of 2012, the Parents asked the District to conduct a special education evaluation of Student. The Parents were concerned at that time that the then-current private school was not meeting all of Student's needs both academically and socially/emotionally. The signed Permission to Evaluate form was returned by the Parents to the District. (N.T. 52, 222-24, 228-29, 378-79; P-40 pp. 1-2; School District Exhibit (S-) 2 pp. 1-2)
9. The District's school psychologist, who has the requisite education and experience to conduct such an evaluation, obtained information from Student's then-current private school by reviewing Student's educational records and conducting classroom observations. The school psychologist also sought teacher input, parent input, and conducted individual testing of Student. (N.T. 376-77, 379-80, 383-84, 385; P-12; S-3)
10. Parent input at the time of the spring 2012 evaluation reflected Student's difficulties with comprehending and communicating information, working far below grade-level peers, and maintaining friendships. (P-2, P-12 p. 2)
11. Information from Student's then-current teachers reflected that Student's reading skills were at a third to fourth grade level, with noted difficulties with phonics rules and comprehension; in math, Student was noted to be weak in basic math facts, math computation, and math problem-solving but overall was working at a fourth grade level; and in written expression, Student was at a beginning level with focus, content, organization, and conventions with difficulties noted in writing style and organization. Student received support in reading content area materials including social studies and science. Teachers also noted difficulties with focus and attention, task completion, class participation, late assignments, and following multi-step directions. (P-12 pp. 2-3)
12. The District's school psychologist administered the Woodcock Johnson III Tests of Cognitive Abilities (WJ-III-COG).<sup>6</sup> Using grade-based norms, Student's General Intellectual Ability was in the low average range (23<sup>rd</sup> percentile) with a noted high average score on a working memory subtest. A specific weakness was noted in visual-auditory learning (1<sup>st</sup> percentile, deficient range) with variability among all subtest scores. (P-12 pp. 5-7)
13. The District's school psychologist also administered the Kaufman Test of Educational Achievement – II (KTEA-II). Student's scores were in the low average range for reading comprehension and decoding; in the low average range for math computation; and in the low average range for written expression. Student scored in the average or borderline ranges on the other subtests. In order to assess Student's reading fluency, the psychologist administered that subtest of the Woodcock-Johnson III Tests of Achievement (WJ-III-ACH) and the Gray Oral Reading Test – Fourth Edition (GORT-4).

---

<sup>6</sup> The District's school psychologist also assessed Student's Cognitive English Language Proficiency, concluding that Student would "likely find the English language demands of learning to be very difficult," (P-12 p. 6) and noting that test results must therefore be interpreted with caution. However, because Student had been instructed only in English for the past seven years, the assessments were given in English. (*Id.*)

Student's reading fluency score on the WJ-III-ACH was at the low end of the average range. On the GORT-4, Student scored in the deficient range on reading fluency (1<sup>st</sup> percentile) and reading comprehension (2<sup>nd</sup> percentile). P-12 pp. 8-9)

14. The District used the Behavior Assessment System for Children, Second Edition (BASC-2), asking two of Student's teachers to complete the teacher rating scales, and seeking the comparable rating scales from one of the Parents and Student. Both teachers noted clinically significant concerns with Learning Problems while one of them also endorsed School Problems and Withdrawal in that range; elevated scores reflected at risk concerns of one or both teachers with Depression, Attention Problems, School Problems, Atypicality, Withdrawal, Social Skills, Leadership, Study Skills, and Functional Communication. Student's mother noted clinically significant concern with Conduct Problems and Functional Communication, and at risk concerns with Hyperactivity, Aggression, Depression, Attention Problems, Atypicality, Withdrawal, Adaptability, Social Skills, Leadership, and Activities of Daily Living. Student's self ratings were clinically significant with respect to Somatization, and at risk for Depression, Sense of Inadequacy, Relationship with Parents, and Self-Reliance. (N.T. 381-82; P-12 pp. 9-12)
15. A speech/language assessment was also conducted as part of the District's evaluation by administration of the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4). Student obtained varying scores on the different subtests, demonstrating better receptive language than expressive language abilities, and overall scored below the average range reflecting a need for speech/language services. It was also noted that Student had articulation delays. (NT. 531-33; P-12 pp. 4, 13-14, 17)
16. At the time of that District evaluation, Student's Parents perceived a significant need for Student to develop social skills including the ability to make and maintain friendships. Student's then-current teachers, however, and the District's school psychologist who observed Student in that placement, did not see Student as having difficulty with peer interactions in the school environment. (N.T. 416-17, 977-79)
17. The District completed its evaluation of Student and issued an Evaluation Report (ER) dated May 31, 2012. The ER identified Student's strengths and weaknesses, concluding that Student was eligible for special education as a child with a Specific Learning Disability<sup>7</sup> in math problem solving and oral reading fluency, as well as with a Speech/Language Impairment. The ER also made a number of recommendations. A meeting convened to discuss the ER in late May 2012. (N.T. 383, 420, 975-76; P-12; S-4)
18. A meeting of Student's Individualized Education Program (IEP) team convened in June of 2012. This IEP includes input from Student's teachers and parents as well as from the ER, noting needs relating to oral reading fluency, reading comprehension, math reasoning, articulation, receptive and expressive language, organizational skills, attention to instruction, the ability to follow directions, coping skills, and written expression. (N.T. 62, 979-80; P-13)

---

<sup>7</sup> The District's eligibility determination process was made a part of the record. (N.T. 403-07; S-7)

19. Goals in the June 2012 IEP addressed speech/language needs with respect to expressive language - syntax (constructing grammatically and semantically correct sentences and questions, and formulating sentences containing conjunctions), articulation (correct sound production), expressive language - semantics (understanding synonyms/antonyms, similarities/differences, and making inferences), reading fluency and decoding, reading comprehension, math problem solving, written expression (composition), coping skills, and interacting with others. There were a number of program modifications and items of specially designed instruction including direct instruction in coping strategies; direct decoding and encoding instruction using a language-based reading program; direct instruction in reading strategies, reading fluency, writing strategies, and math; regular education support in content areas; visual and verbal directions to be repeated and clarified; assessment adaptations; instruction on self-monitoring; and weekly communication with the parents as well as information shared with them to promote generalization of skills across settings. This section of the IEP also noted the need to develop baselines for reading, writing, and math with revision to the IEP goals by August 24, 2012. (P-13)
20. At the time of the June 2012 IEP meeting, Student's Parents believed that Student required instruction delivered in a small class setting, more intensive reading instruction, a behavior plan, more intensive social skills programming, and more than sixty minutes of weekly speech therapy during the 2012-13 school year. (N.T. 60-67, 243-46; P-14)
21. The District sent a Notice of Recommended Educational Placement (NOREP) dated June 22, 2012, following the June 2012 IEP meeting, to the Parents. The Parents signed the NOREP without indicating disapproval. (N.T. 981-94; P-14)
22. Student's Parents arranged for an Independent Educational Evaluation (IEE) in July 2012. The independent evaluator, a certified school psychologist, conducted a number of assessments including the WISC-IV, WIAT-III, Wechsler Nonverbal Scale of Ability (WNV), the Comprehensive Test of Phonological Processing (CTOPP), and various measures relating to ADHD, Asperger's Syndrome, receptive and expressive vocabulary, visual-motor integration, and adaptive behavior. (N.T. 68, 128; P-15)
23. The independent evaluator determined Student's cognitive ability to be in the borderline range (3<sup>rd</sup> percentile) on the WISC-IV but in the low average range on the WNV, which is a "language-free measure" of cognitive ability (P-15 p. 10). This evaluator determined that Student's academic achievement was not commensurate with cognitive ability in the areas of oral expression; reading comprehension and fluency, and sight word identification; math reasoning, math calculation, and fluency; and spelling and written expression. This evaluator also identified needs in receptive and expressive language. It was the conclusion of this evaluator that Student was eligible for special education on the basis of a Specific Learning Disability (basic reading skills, reading comprehension,

reading fluency, written expression, math reasoning, math calculation, oral expression, and listening comprehension)<sup>8</sup> and a Speech/Language Impairment. (P-15)

24. The independent evaluator made a number of recommendations for Student's educational programming, including several specific educational programs to address: word retrieval, pragmatic and social language skills, receptive and expressive language, reading fluency, reading comprehension, spelling and written expression, math reasoning and calculation, and social skills. This evaluator did not speak with any of Student's teachers at the time the IEE. (N.T. 125, 163-64; P-15)
25. The independent evaluator recommended that Student be provided with a full day program with language therapy infused throughout the day. This evaluator also suggested that consideration be given to "a small private school for children with severely multi-handicapping disabilities." (P-15 p. 33)

### 2012-13 School Year

26. The District arranged for a literacy evaluation of Student by the local IU prior to the start of the 2012-13 school year to provide baselines. Student demonstrated overall functioning in reading skills near the fourth grade instructional level for decoding and fluency, and at the fourth grade level for vocabulary and comprehension. In writing, Student exhibited weaknesses in content, organization, style, and conventions. The results of and recommendations in that assessment were used in developing Student's August 2012 and August 2013 IEPs. (N.T. 894-98, 906-07, 918-23, 929, 933; P-18)
27. Student's IEP team met to revise Student's IEP in August 2012 to incorporate information from the IU Literacy Assessment earlier that month and the IEE, as well as to plan a Functional Behavior Assessment (FBA) based on parental concerns over Student's behaviors. As part of the transition goals, Student's time in the learning support classroom during the Remediation, Enrichment, Makeup (REM) period was increased from two days per week to five. Additional program modifications and items of specially designed instruction were added, including step-by-step guidance with new tasks, direct instruction in expressive and receptive language with strategies for providing those, instruction of articulation skills, adaptations of larger assignments, direct instruction in problem-solving, a modified science and social studies curriculum to limit concepts to the main ideas, and teaching and reinforcement of language skills. (N.T. 69-70, 844, 984-86, 989-91; P-19)
28. At the August 2012 IEP meeting, Student's Parents first broached the topic of a private school placement, but there was little discussion of that possibility at the time. At some point prior to the 2012-13 school year, Student toured the District school that Student would be attending that fall. (N.T. 71-72, 232-33, 994-95, 1065-66)

---

<sup>8</sup> The eight categories of Specific Learning Disability in the federal regulations are oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving. 34 C.F.R. § 300.309(a)(1). The Pennsylvania regulations incorporate this federal regulation. 22 Pa. Code § 14.102(a)(2)(xxv); *see also* 22 Pa. Code § 14.125(1).

29. Student's Parents signed the August 2012 NOREP approving the District's program for the 2012-13 school year, but noted their belief that the program as proposed would not be adequate to meet Student's needs. (N.T. 72,992-93; P-20 pp. 3, 5)
30. Student's IEP was again revised in October 2012 after a meeting to review the behavioral information obtained at the start of the school year. Because Student had not demonstrated behavioral difficulties at school, including focus and attention, the goal relating to those areas was removed. The District's NOREP to the Parents following this meeting was not returned. (N.T. 1014-16; P-25; S-6)

### Program Implementation 2012-13

31. Student's learning support language arts (reading and writing) class during the 2012-13 school year included approximately ten students, one teacher, and a classroom paraprofessional. The class was a ninety-minute block. Student received direct instruction in vocabulary from the regular education reading curriculum (sixth grade level), reading fluency (including the Read Naturally program), reading decoding (including Megawords), and reading comprehension (including Lindamood Bell Visualizing and Verbalizing), as well as in written expression (using the Strategic Instruction Model curriculum). (N.T. 607-12, 632, 667)
32. Student's learning support mathematics class during the 2012-13 school year included approximately eight students. The class was an eighty-minute block. The classwork was based on the regular education curriculum with supplemental materials, and allowed for frequent repetition and review. (N.T. 614-16, 667)
33. Student's learning support teacher supported Student as well as other special education students in Student's regular education science and social studies classes. Sometimes a paraprofessional was in these classrooms to provide that support. The special education teacher also worked with the regular education teachers to adapt materials and modify tests. These changes were to the format of the materials and assessments, such as reading the test aloud to Student, not to the content. When necessary, Student and a few other students read content materials with the learning support teacher. (N.T. 627-30, 688-91, 709-10, 782-83, 784-89, 801-02, 810-11, 816-18, 821-23, 828-32, 838-39)
34. Student, like all students, participated in a What I Need (WIN) period each day. Student generally went to a small group session (approximately twelve students) focusing on reading fluency, which was an identified need for Student. This group included two teachers and one paraprofessional. (N.T. 612)
35. Student, like all students, participated in an REM period that is similar to a study hall. Student went to the learning support classroom for REM period at least twice each week, focusing on study skills, organizational skills, and work completion as well as re-teaching and review. (N.T. 1010-11, 1068; P-19 p. 25)
36. During the 2012-13 school year, Student received two sessions totaling sixty minutes per week of speech/language services, one that was individual and one that was small group (three students). The speech/language therapist recommended this amount of services



after considering that Student would also be working on language skills in the learning support classroom. (N.T. 540-42)

37. Student began the 2012-13 school year (sixth grade) riding the District school bus, but after the Parents learned that Student was involved in possible bullying (both as the victim and as one engaging in bullying behavior), they made alternative arrangements for transportation. (N.T. 73-75, 231-32, 602, 670, 846-47; S-5)
38. A District school psychologist other than the one who conducted the spring 2012 evaluation observed Student in various school settings, both structured and unstructured, in September 2012. This psychologist did not observe any concerns about Student's attention/on-task behavior or social interactions. (N.T. 485-93, 510-11, 518-20, 991-93; P-22)
39. Student's learning support teacher during the 2012-13 school year observed, and collected data on, how Student was interacting with peers throughout the school day. Although there were a few instances when Student reported difficulty with peers, the teacher did not view these events as atypical of a sixth grade student. This teacher observed Student to have appropriate peer interactions. This teacher also checked in with Student at the beginning and end of each day and assisted Student with organization. (N.T. 614-22, 634, 658-61, 682)
40. Student's teachers viewed Student's interactions with peers in science and social studies as appropriate. (N.T. 795-96, 821)
41. Student typically participated better and more frequently in the smaller group, learning support classes than in the larger, regular education classes. However, over the course of the 2012-13 school year, Student's participation improved in science and social studies classes. (N.T. 614, 630, 795, 820-21)
42. Student continued to experience difficulties with social skills, including friendships, during the 2012-13 school year. Parental concerns about Student's involvement with bullying (as a victim) were addressed after the Parents let District staff know, because Student did not bring bullying issues to the attention of the District. (N.T. 78-79, 753-54, 848-51, 855, 857-60)
43. When Student would report an incident relating to peers or family to the learning support teacher, she would let the social skills teacher know so that she could also address the concern with Student. Those incidents did not happen frequently during the 2012-13 school year, and the social skills teacher observed Student interacting appropriately with peers. (N.T. 732-33, 737, 745-46)
44. Student had difficulties with a particular peer at times during the 2012-13 school year. Student believed that this peer [redacted], was a friend. Toward the end of the 2012-13 school year, the Parents and District representatives worked to ensure that Student and this peer were separated to the extent possible until the school year ended. (N.T. 238-43, 622-26, 739-41, 851-52, 855-56)

45. Student frequently came home from school upset and uncooperative throughout the 2012-13 school year. (N.T. 77)
46. Following a few incidents with peers in the spring of 2013, which were of concern to the Parents, several District staff conducted observations of Student and Student's peers over the lunch recess. Those observations did not reveal such concerns. (N.T. 661-62; P-40 pp. 7-17; S-18)
47. Student's IEP team met again in April 2013. The Parents expressed concerns with Student's social skills, the lack of social clubs and a behavior plan, as well as Student's grades and test scores. The team also addressed Student's transition to the District's middle school. (N.T. 77-87, 1017-18, 1064-65)
48. A new IEP was developed at the time of the April 2013 meeting. This IEP included updated educational level information, including informal assessments for transition planning, as well as parental concerns and academic needs. Specific needs identified were oral reading fluency, reading comprehension, math reasoning, math computation, written expression, articulation, receptive and expressive language, coping skills, and interactions with others. Student would be in a regular education science class. This IEP would continue into the 2013-14 school year, when Student would be attending a different school building, the middle school. (NT. 548-50, 1018-19; P-27, P-29)
49. As in the prior IEP, goals addressed speech/language needs with respect to expressive language - syntax (formulating grammatically and semantically correct sentences and questions, and formulating sentences containing conjunctions), articulation (correct sound production), expressive language - semantics (providing synonyms/antonyms, similarities/differences, and making inferences), pragmatic language, reading fluency and decoding, reading comprehension, math problem solving, math computation, written expression (composition), coping skills, and interacting with others. A few of the goals, such as those in expressive language and written expression, were similar in content area to the previous IEP, but the expectations were greater due to Student's then-current present levels. There were a number of program modifications and items of specially designed instruction including direct instruction in coping strategies and social skills; direct decoding and encoding instruction using a language-based reading program; direct instruction in reading strategies, reading fluency, writing strategies, and math; regular education support in content areas including pre-teaching of vocabulary; visual and verbal directions to be repeated and clarified; assessment adaptations; instruction on problem-solving; and weekly communication with the parents as well as information shared with them to promote generalization of skills across settings. (P-29)
50. The goal for pragmatic language was a new goal in the April 2013 IEP, and was addressed both through speech/language therapy and Student's social skills sessions. Student's speech/language services also increased from twice per week to every day, with four individual sessions and one small group session each week. (N.T. 549, 552-55, 1020-23; P-29 pp. 15-16, 36-37)

51. The District proposed a limited purpose evaluation in the spring of 2013 to determine if Student was exhibiting problematic behaviors interfering with Student's learning, but the Parents did not consent to that assessment. The District did, nonetheless, have several professionals conduct informal observations of Student at that time in various settings. No social or behavioral concerns were noted by those who conducted these informal observations. (N.T. 495-502, 513-16, 1033; S-17, S-18)
52. Student's IEP team determined at that April 2013 meeting that Student did not meet the criteria for extended school year (ESY) services for the summer. However, the District did offer to provide weekly thirty-minute sessions of home-based services, for a six-week period, working on an expressive language goal, but the Parents declined. (N.T. 100-01, 563-64, 566, 1024, 1030-32, 1067; P-29 p. 39)
53. The District's NOREP dated April 22, 2013 was not returned by the Parents. (N.T. 1037-38; P-30)
54. The District has a policy of allowing students who perform poorly on tests to retake that assessment after the material on the test is retaught to the student by a teacher and the student has an opportunity to prepare for a re-test. The re-testing opportunity is at the request of either a student or the teacher and, after re-testing, the grade on the second testing is substituted for the initial poor grade. Student was afforded this opportunity throughout the 2012-13 school year as needed. (N.T. 630-31, 647-48, 789-94, 802-03, 824-25, 860-61)
55. While Student was in the District, Student's Parents hired a tutor to work with Student after school to help with homework, and the Parents also read with Student in the evenings. (N.T. 80-82)
56. Student's Parents believed that Student would have an opportunity to participate in social clubs during the school year. However, social clubs were not offered to any student at Student's school during the 2012-13 school year because all students participated in the WIN period. (N.T. 65-66, 72-73, 80, 233-34, 665, 706, 764, 766, 869-71, 1062-63)
57. Student's Parents also believed that Student would benefit from an art class, particularly in the area of social skills, but there was no art class provided during the 2012-13 school year. The District believed that having sufficient time to address Student's other significant needs outweighed any need for an art class. (N.T. 251-53, 1013)
58. Student made progress on Student's reading, math, and written expression goals over the course of the 2012-13 school year, although math performance was at times inconsistent. (N.T. 617, 635-37, 653-58, 696; P-26 pp. 7-11; P-28 pp. 5-7; S-9, S-16, S-19)
59. During the 2012-13 school year, Student performed well in science class, and the science teacher did not believe that Student's curriculum for that class needed to be modified since there were generally only three or four big ideas in each unit. (N.T. 782-84)
60. During the 2012-13 school year, Student performed well in social studies class. The social studies teacher was able to identify the main principles in each unit and focus on

those with Student including the content of Student's tests. All students in that class worked in small groups, reading content materials together and completing study guides as a group. The small groups were mostly self-chosen by the students but their compositions changed over the course of the school year. (N.T. 821-23, 828-31, 834-36; P-24)

61. Student made steady progress toward all but one of Student's speech/language goals during the 2012-13 school year, with the exception being combining sentences into compound or complex sentences. (N.T. 543-48; P-26 pp. 1-6, P-28 pp. 1-6; S-9, S-16, S-19)
62. Student participated in a small group social skills session every day for thirty minutes during the 2012-13 school year. The four children in the group were all in sixth grade. The special education teacher who led the group utilized the Social Skills Improvement System program which provides units of age-appropriate activities to address a variety of social skills. The group also worked on initiation and maintenance of friendships. Student made progress in these areas. (N.T. 724-25, 738-39; S-9, S-14, S-16, S-19)
63. Student was introduced to and used an "emotion meter" during the 2012-13 school year, whereby Student would assess how Student was feeling emotionally throughout the school day. This tool provided Student with opportunities to expand Student's vocabulary as well as to express emotion and have any concerns be addressed. However, the District professionals working with Student did not see Student expressing anger at school. (N.T. 618, 733-36, 743-45; S-12)
64. Student made progress on organizational skills, coping skills, and interactions during the 2012-13 school year. The District took data on Student's peer interactions in various settings during the school day and, while there were a few occasions where Student did not interact in a particular class (e.g., S-11 pp. 3-4), overall Student made improvement in this area, and District staff did not see Student display anger or other problematic behavior. (N.T. 733-35, 745-49, 751-52; P-26 pp. 12-15; P-28 pp. 11-12; S-9, S-11, S-22)
65. Student achieved passing grades in all courses during the 2012-13 school year, but scored Below Basic on the Mathematics and Reading portions of the Pennsylvania System of School Assessment (PSSA). (P-45, P-57)

#### 2013-14 School Year

66. The Parents arranged for a second IEE of Student in July 2013 by the same private evaluator as in the previous summer. The independent evaluator conducted a number of assessments including the WNV, subtests of the Normative Updates to the WJ-III-COG and WJ-III-ACH, the WIAT-III, the CTOPP, and measures of Student's visual-motor integration and executive functioning. (N.T. 101-02, 140; P-31)
67. The results of the assessments reported in the July 2013 IEE were essentially consistent with those obtained in July 2012, except that Student was no longer demonstrating to the independent evaluator a Specific Learning Disability in reading comprehension, math

reasoning, and math calculation. The independent evaluator also compared the results of the WIAT-III from each year and found several areas of decline as well as a number of areas of improvement. (P-31)

68. As in the prior year, the independent evaluator did not speak with any of Student's teachers at the District at the time she conducted the 2013 IEE. The recommendations in the 2013 IEE were not much different from those in June 2012. The District was provided a copy of the July 2013 IEE. (N.T. 141, 164-65, 1038; P-31)
69. The parties met for another IEP meeting in August 2013 after a request by the Parents. Due to various scheduling difficulties among the parties and their respective counsel, the meeting was not held until August 30, 2013. (N.T. 102-03, 107, 1039-41, 1070-71; P-40 pp. 18-22)
70. The August 2013 IEP incorporated updated information on Student's educational levels and recent progress monitoring, and the team discussed the July 2013 IEE at the meeting. The IEP team concluded that additional needs from the IEE to improve listening comprehension and decoding skills should be addressed. (N.T. 1045-46, 1048-50; P-37)
71. Student's speech/language goals were revised in August 2013, adding a word retrieval goal, because Student had mastered two of the goals in the previous IEP. The level of service increased to 200 minutes (five days) per week. Other new goals addressed listening comprehension and decoding and a goal to improve decision-making/safety skills, and additional transition programming including addition of an art class was incorporated. The modified science and social studies content was removed from the program modifications and specially designed instruction, and new items in this section addressed listening comprehension, organization, additional math supports, and the provision of extra supplies and textbooks at home. (N.T. 555-58, 560, 578-79, 1047-50; P-37)
72. At the August 30, 2013 IEP meeting, the team discussed the Parents' concerns with the proposed program for the 2013-14 school year. The Parents also requested that the District fund a private placement for Student for the 2013-14 school year. (N.T. 107-09, 112)
73. The District sought permission in September 2013 to re-evaluate Student in light of the IEP team meeting discussions as well as some of the findings in the IEE. The Parents did not return the Permission to Re-Evaluate form. (N.T. 1053; S-21)
74. The Parents elected to place Student in an approved private school (APS) for the 2013-14 school year, notifying the District of Student's withdrawal on August 27, 2013. The Parents had visited the APS twice before deciding on Student's enrollment, and the APS had accepted Student. (N.T. 104-07, 156, 198, 246-48, 254, 293-94, 296-97, 995-96, 1041, 1060; P-36, P-40 pp. 24-25, 29)

## The Private School

75. The APS serves special education students with intellectual and developmental disabilities from kindergarten through twelfth grade and has approximately 84 students, 34 of whom attend during the day while the others are residential. All students belong to a “home” where they enjoy meals and recreation as well as work on daily living skills such as completing chores in a combined home-life experience. (N.T. 288, 296, 343, 346; P-41 p. 1)
76. The APS categorizes students into grade levels based solely on chronological age, and each grade has a separate class of approximately ten students, one teacher, and two to four assistants depending on the time of day. The basic curriculum involves academics as well as art, music, crafts, and hands-on activities. The APS offers speech therapy, occupational therapy, and physical therapy as well as music, painting, and horseback riding therapy. (N.T. 289-93; P-41)
77. In the APS, Student was placed in a group of similar-aged peers in what is considered to be ninth grade. Academic lessons such as in science and social studies are taught within specific unit themes to include language arts components, and the units last between three and five weeks. Students at Student’s grade level are also further grouped based on abilities for reading, writing, and mathematics lessons in smaller group settings three times per week; on the other two days, students participate in arts and music activities. There is a once-weekly gym class. Additionally, Student participates in prevocational work skill training four times per week for two hours at a time. (N.T. 115-16, 297, 299-301, 305-06, 309, 341-44. 348-50)
78. At the time of the due process hearing, Student was not provided occupational therapy at the APS, but was receiving individual speech therapy one time per week for thirty minutes. (N.T. 306-07)
79. The Parents did not approve the September 2013 NOREP and requested a due process hearing. (N.T. 112-13; P-38, P-39)
80. The Parents are pleased with the APS, and are satisfied that Student is making progress academically as well as socially. At the time of the second hearing session, they were considering whether to enroll Student as a residential student at the APS to provide the opportunity for Student to develop independent living skills and have more opportunities for social skills. (N.T. 114-15, 119, 309-10, 323)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v.*

*Ramsey Bd. of Educ.*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock Sch. Dist.*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County Sch. Bd.*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also generally *David G. v. Council Rock Sch. Dist.*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole on matters important to deciding the issues in this case was essentially consistent. Credibility will be discussed further as necessary for this decision.

### Relevant IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. The IDEA sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. § 1414(a)(1)(C)(i).

The IDEA further defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). “Special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a).

In conducting the evaluation, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

- (b) Conduct of evaluation. In conducting the evaluation, the public agency must—
  - (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
    - (i) Whether the child is a child with a disability under § 300.8; and
    - (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

- (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
- (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

Upon completion of all appropriate assessments, “[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]” 34 C.F.R. § 300.306(a)(1). In interpreting evaluation data and making these determinations on eligibility and educational needs, the team must:

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered.

34 CFR 300.306(c). When parents disagree with a school district’s educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); 20 U.S.C. § 1415(b)(1). When a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2).

Once a child is determined to be eligible for special education, the IDEA requires the states to provide a “free appropriate public education” (FAPE). 20 U.S.C. §1412. In *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).



Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). Most critically, the IEP must be appropriately responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Where a student’s behavior impedes his or her learning, the IEP team must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. § 300.324(a)(2)(i); *see also* 20 U.S.C. § 1414(d)(3)(B), 22 Pa. Code § 14.133.

When adjudging the appropriateness of a special education program, it has long been recognized that “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993). The IDEA further requires that eligible students be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000).

Entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives FAPE. 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
- (iii) Whether the student’s difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
- (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

Moreover, school districts are not required to provide ESY based upon "[t]he desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education." 22 Pa. Code §14.132 (c)(3).

The IDEA and case law interpreting it permit two specific remedies for a District's denial of FAPE. Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996); *see also Ferren C. v. School 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)). Further, parents who believe that a public school is not providing FAPE may unilaterally remove their child from that school and place him or her in a private school, and also seek tuition reimbursement for the cost of the alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra*; *see also. See Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice). In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

## Parents' Claims

### 2012-13 School Year

The first issue is whether Student's special education program as implemented for the 2012-13 school year was appropriate for Student.

The District's initial IEP of June 2012 was based on a recent comprehensive evaluation that assessed Student in all areas of suspected disability. (Findings of Fact (FF) 9-15, 17, 18) The June 2012 IEP identified Student's needs based on that ER and addressed each of those areas through a combination of annual goals, program modifications, and specially designed instruction. (FF 18, 19) That IEP was revised in August 2012 to add new information from the IU assessment, and to consider and incorporate the recommendations of the independent evaluator (FF 26-27); a comparison of the recommendations in the IEE with the content of this IEP reflects that virtually all of those suggestions<sup>9</sup> were incorporated into Student's program.

Further, the August 2012 IEP and its October 2012 revision were implemented appropriately to address all of Student's needs, and Student made progress on nearly all goals and areas of weakness. (FF 30-36, 39-41, 58-64) Student was provided small group instruction in language arts and mathematics, areas of significant weakness for Student. (FF 31, 32) As recommended by the Parents' expert, Student's curriculum incorporated language throughout the entire school day. (FF 31, 33, 34, 36, 61, 62, 63) Content area classes were supported by the learning support teacher or a paraprofessional. (FF 33) Student participated in a social skills group and had learning support available every day during REM and WIN periods. (FF 34, 35, 62, 64) The District responded to all concerns raised throughout the school year in a timely manner. (FF 27, 30, 37, 42, 43, 44, 46, 47) Finally, the IEP team met to develop a new IEP in April 2013 to incorporate new information and begin planning for Student's transition to the next school year. (FF 47-52)

The Parents challenge a number of aspects of Student's 2012-13 program. First, they complain that the initial IEP lacked baseline data on some of the goals. (Parents' closing at 3)<sup>10</sup> This is hardly surprising, given that Student had not been enrolled in the District prior to the 2012-13 school year; in any event, the baselines were added as soon as information on which to form those baselines was available. This hearing officer does not find the program inappropriate due to baseline data in the 2012-13 IEPs.

The Parents also contend that the program was inappropriate because the District and the IEP team never developed a behavior plan. (Parents' closing at 2) The record reflects that the IEP team considered, prior to Student's first day in a District school, that Student might demonstrate problematic behaviors, and it agreed to conduct a behavioral assessment. (FF 27, 30) The District did so; however, Student did not demonstrate behavior at school that interfered with Student's learning. (FF 16, 37, 42, 43, 45, 46, 51) While it is apparent that Student's behavior at home was markedly different than that at school, there is no reason to develop a behavior plan for a student who is not exhibiting behaviors in the educational environment. Thus, this contention does not support a claim of a denial of FAPE.

---

<sup>9</sup> Incorporation does not necessary mean that specific recommended programs were adopted by the District; however, choices of methodology are generally matters left to its discretion provided the selection is appropriate. *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir. 1988) (citing *Rowley*, *supra*, at 208); *J.E. v. Boyertown Area Sch. Dist.*, 834 F.Supp.2d 240 (E.D. Pa. 2011). It is also noteworthy that the Parents' expert opined that the August 2012 IEP was appropriate for Student at the time it was drafted. (N.T. 149, 192)

<sup>10</sup> These claims are addressed in an order that is essentially chronological, rather than the order presented in the Parents' closing.

In a similar argument, the Parents challenge the District's failure to incorporate the independent psychologist's recommendations for specific reading, writing, and mathematics programs. (Parents' closing at 3) However, the record establishes that the District was appropriately addressing Student's needs in each of these areas, and was using several research-based programs. (N.T. 925-27) A school district is required to provide an appropriate program, and whether or not other programs may have been as effective as, or better than, the chosen program is not the legal standard.

Next, the Parents contended throughout the hearing and in their closing that the District provided too many modifications to Student's program so as to, in essence, "water down" the curriculum. (N.T. 96-100; Parents' closing at 3-4) This hearing officer cannot agree. The methods which the District chose to support Student in content area classes<sup>11</sup> did not dilute the content or the curriculum; rather, the District elected to use educationally-sound modifications and accommodations to enable Student to access the grade-level curriculum consistent with least restrictive environment principles. It is undisputed that Student has significant educational needs, and it would have been inappropriate to expect Student to participate in regular education content area classes and fail to provide some program modifications, accommodations, and specially designed instruction. The fact that the District did not fail in this regard cannot, therefore, be construed as inappropriate. Moreover, this hearing officer cannot conclude based on this record that the District-wide policy on retaking tests was inappropriate for Student, or that it necessarily resulted in inflated grades or otherwise reflected a mischaracterization of the information Student was learning and skills Student was demonstrating.

The Parents also argue that Student's behavioral difficulties and inability to participate in clubs evidences a denial of FAPE. (Parents' closing at 5-6) However, the evidence is preponderant that Student was not demonstrating behaviors that interfered with Student's learning at school; that the District responded to the concerns raised about peers; and that Student was making progress with social skills and peer interaction even without the opportunity to join a club. (FF 38-40, 42, 43, 46, 51, 62, 64) This argument is therefore unavailing.

The Parents also claimed throughout the hearing and in their closing that Student's progress monitoring data demonstrate a lack of meaningful educational progress. (Parents' closing at 4-5) This hearing officer finds no merit to the contention that slight variability between two progress monitoring data points equates to a lack of meaningful educational progress.<sup>12</sup> The similar argument that Student's scores on standardized tests reflect a lack of progress (Parents' closing at 4, 6) is also unconvincing. Although the Parents' expert opined on a lack of progress shown by comparing Student's scores on the WIAT-III in July 2012 and July 2013 (N.T. 142-45, 185-87), and questions were asked of various witnesses about Student's lack of proficiency on assessments such as the PSSAs (e.g., N.T. 943-44), the record as a whole is preponderant that Student was making meaningful educational progress toward Students' IEP goals and areas of weakness. This hearing officer is not convinced that, at least in this case, Student's lack of proficiency on the PSSAs, or a decline in a score on a benchmark assessment,

---

<sup>11</sup> The special education teacher very credibly and convincingly testified that she did not provide Student with answers to test questions. (N.T. 690-91)

<sup>12</sup> It is also noteworthy that the IU consultant provided a detailed and logical explanation in response to questions about this data on cross-examination. (N.T. 951-54)

or failure to make one year's growth in one year's time on all of the WIAT-III subtests,<sup>13</sup> equates to a lack of appropriate progress in light of the record as a whole and particularly given Student's background and significant needs.

Turning to the summer of 2013, the record contains little evidence of Student's need for ESY services. The Parents apparently believed ESY would be beneficial (N.T. 101) and their expert concluded that ESY would help Student "maintain" learned skills (N.T. 151) However, no testimony suggested that any of the above-quoted eligibility factors were met, or that ESY was necessary for Student to receive FAPE. For these reasons, the Parents have failed to meet their burden with respect to ESY services.

### 2013-14 School Year

The Parents' next claim in this case is for reimbursement for tuition and related expenses for the private school placement for the 2013-14 school year.

The IEP team developed a new IEP for Student in April 2013 that was to continue into the 2013-14 school year. (FF 47) That IEP reflected updated information including Student's mastery of some goals and newly identified needs. (FF 48-50) The IEP was again revised in August 2013 to incorporate suggestions from the most recent IEE, and additional needs were identified. (FF 69-71) Review of the August 2013 IEP establishes that the program as proposed appropriately addressed each of Student's areas of need through a combination of annual goals, program modifications, and specially designed instruction.

The Parents first challenge some of the procedural aspects of the August 2013, including the failure to convene the meeting until a few days after the school year started and the team's composition. (Parents' closing at 7) The record establishes that there were valid reasons for the date the meeting convened (FF 69); and the record does not provide any basis to reach a conclusion that the meeting was otherwise procedurally deficient.

With respect to the substance of the IEP, the Parents challenge the absence of baseline data, a lack of an explanation on how the District would implement the IEP with fidelity, a lack of specificity in the programs to be implemented, and a lack of a plan to transition Student to the new building. (Parents' closing at 7-8) The IEP itself (P-37) reflects that the District had a plan in place to gather missing baseline data, which was understandable given the addition of goals and the transfer to a new school building, and there were arrangements in the previous April 2013 IEP (P-29) to prepare Student for the new school. This hearing officer is unable to conclude that the absence of specificity in programming is fatal, or that the District was required to provide assurance on how it would implement Student's IEP appropriately in order to make an offer of FAPE. As the U.S. Department of Education logically stated when the regulations implementing the 2004 reauthorization of the IDEA were promulgated, "[t]here is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies." 71 Fed. Reg. 46665 (2006). It follows that the IDEA likewise does not require that the IEP contain the type of

---

<sup>13</sup> Student's subtest scores declined by only a few points on all but two subtests; on those two, the decline was less than one standard deviation. As the Parents' expert explained, a student who scores the same on the WIAT-III one year later is demonstrating one year's growth. (N.T. 186-87)

assurances of implementation of those methodologies that the Parents suggest were necessary in this case.

For all of these reasons, this hearing officer concludes that the District's program as implemented in the 2012-13 school year, and the proposed program for the 2013-14 school year, were appropriate for Student. There is, consequently, no need to address the issues of compensatory education or to go on to the remaining prongs of the tuition reimbursement test.<sup>14</sup>

### IEE Reimbursement

The last issue is whether the Parents are entitled to reimbursement for their IEEs.<sup>15</sup>

The first step in considering whether a parent is entitled to an IEE at public expense is his or her disagreement with a school evaluation. While the District argues that the Parents fail at this threshold, this hearing officer finds that the Parents did express, at least to some extent, a disagreement that the District's evaluation had uncovered all of Student's needs (N.T. 68), and had advised the District of their concerns with its program for Student at least by August 2012.

Nevertheless, the record as a whole does not support the second step, namely a conclusion that the District's evaluation was inappropriate.<sup>16</sup> The District's evaluation was conducted by a qualified school psychologist. (FF 9) The evaluation comprehensively assessed Student in all areas of suspected disability and provided adequate information to identify Student's educational needs. (FF 8, 9, 11-15) The evaluation utilized a variety of assessment instruments in gathering information about Student's functional, developmental, and academic abilities and in making the determination of Student's eligibility for special education. (*Id.*) In short, there is little evidence in the record to contradict the appropriateness of the evaluation itself,<sup>17</sup> and I find that it was appropriate. Furthermore, although the IEEs clearly provided insight about Student's disabilities and information useful to the IEP team, the conclusions and recommendations in both the District evaluations and the IEEs were more similar than not. The standard is not whether an IEE is arguably better than a District evaluation for reimbursement purposes. Accordingly, the Parents are not entitled to reimbursement for the IEEs.

---

<sup>14</sup> It is, however, not insignificant to note that many of the flaws that Parents found in the District's program also exist at the APS. For example, the Parents did not believe that sixty minutes per week of speech/language services was sufficient, yet Student receives only thirty minutes of that service per week at the APS. (FF 78) Additionally, the Director of the APS described Student's reading and writing instruction as "eclectic," (N.T. 354, 357), and his testimony as a whole did not establish how Student's special education needs were being met; it is also unclear how, if at all, the APS is following the recommendations in the IEEs.

<sup>15</sup> The Parents also seek reimbursement for the expert's fee to testify. Such a remedy is outside of this hearing officer's authority, even if it were available under the applicable law.

<sup>16</sup> It merits mention that the Parents' closing does not set forth any argument in support of this claim, other than a footnote reference asking for reimbursement for the IEE and expert witness fees. (Parents' closing at 15 n. 1)

<sup>17</sup> There was significant testimony regarding the District's use of grade-based norms, and the independent evaluator's use of age-based norms, as well as the effect of each on their respective evaluations. To the extent that such a finding is necessary, I found the testimony of the District's school psychologist on the reasons for using grade-based norms (N.T. 384-85) to be more persuasive than the independent evaluator's testimony on the reasons for using age-based norms (N.T. 173, 182-83) in this case.

This hearing officer offers the following observations. The Parents are clearly caring and devoted parents who want what is best for Student. While the Parents' desire for Student to attend the APS where Student apparently is thriving is certainly understandable, the District cannot be required to fund that placement where, as here, it is able to meet the legal standards of an appropriate program. This hearing officer sincerely hopes that, should the Parents decide to re-enroll Student in the District, they are able to return to a mutually collaborative team approach to developing an appropriate program for Student based on Student's needs.

### **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not deny FAPE to Student for the 2012-13 or 2013-14 school years, and that its evaluation of Student was appropriate. Accordingly, there will be no remedy awarded.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's program for Student for the 2012-13 school year was appropriate.
2. The District's proposed program for Student for the 2013-14 school year was appropriate.
3. The District's 2012 ER was appropriate.
4. The District need take no further action.

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

*Cathy A. Skidmore*

---

Cathy A. Skidmore  
HEARING OFFICER

Dated: March 20, 2014