

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: T.L.

ODR #15183 /13-14-AS

Date of Birth:
[redacted]

Dates of Hearing:
August 5, 2014
September 8, 2014
October 7, 2014

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Lower Merion School District
301 East Montgomery Avenue
Ardmore, PA 19003

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

David Arnold, Esquire
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October 29, 2014

November 26, 2014

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

Background

Student¹ is an elementary school age child who is eligible for special education under the classification of specific learning disability and other health impairment. Student enrolled in the District for Kindergarten and remained there until the end of second grade when the Parents withdrew Student from the District and enrolled Student in a private school for children with learning differences. The Parents requested this hearing in order to receive reimbursement of tuition and fees for their unilateral placement of Student during school years 2012-2013, 2013-2014, and 2014-2015 as well as for ESY for the summers of 2012, 2013 and 2014 and transportation to ESY for the summers of 2012 and 2013.²

Issue[s]

1. Did the District offer Student a free appropriate public education for school years 2012-2013, 2013-2014, and/or 2014-2015 as well as for ESY for the summers of 2012, 2013 and/or 2014?
2. If the District did not offer Student a free appropriate public education for any or all these periods, was the placement unilaterally selected by the Parents appropriate?
3. If the District's proposed placement was inappropriate, and the Parents' unilateral placement was appropriate, are there equitable considerations that would remove or reduce the District's obligation to reimburse the Parents for tuition and fees at the private school for school years 2012-2013, 2013-2014, and/or 2014-2015 as well as for ESY for the summers of 2012, 2013 and/or 2014 and transportation to ESY for the summers of 2012 and/or 2013?

Findings of Fact

Background:

1. At the beginning of the 2009-2010 school year Student entered Kindergarten in the District. Student experienced reading problems and was referred to a District certified reading specialist. Student received two 30-minute small group [3 to 4 children] supplemental reading sessions weekly, a regular education intervention. [NT 679]

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

² In its written closing brief the District belatedly argues the issue of statute of limitations on filing, an issue that District counsel did not raise in a prehearing motion and did not raise in opening statements. I therefore reject the District's arguments in this regard, and deem the relevant period in this matter to begin on June 27, 2012, two years prior to the filing of the Parents' due process complaint.

2. During summer 2010 the Parents provided Student with private tutoring in reading. [NT 69]
3. In 1st grade [2010-2011 school year] Student continued to demonstrate reading difficulties and began to have difficulty with writing as well. The District instituted an Action Plan to address Student's learning issues. Student received four to five 30-minute small group [3 to 4 children] supplemental reading sessions weekly with the certified reading specialist. [NT 41-42, 679-680; P-43]
4. During summer 2011 the Parents provided Student with private tutoring. [NT 70]
5. In 2nd grade [2011-2012] Student again demonstrated problems with reading and writing, and also began having problems with math. It was believed that Student's weakness in reading was affecting math performance because Student knew basic math facts, but had difficulty reading directions on math pages and reading math story problems. (NT 43; S-39, P-43)
6. At the beginning of 2nd grade the District instituted an Action Plan to address Student's learning issues in reading and in math. Up until the finding of eligibility for special education and the implementation of an IEP Student received four to five 30-minute small group [3 to 4 children] supplemental reading sessions weekly with the certified reading specialist. [P-43]
7. Modifications being offered to Student included preferential seating, pre-teaching during small group, scribing when Student became frustrated, and one-on-one instruction with teacher during independent time, particularly during language arts. [S-39]

Evaluation:

8. However, by early November of 2nd grade the District concluded that despite supplemental intervention under an Action Plan and making some progress in response to intervention Student was still struggling academically, particularly in literacy. The District team met with the Parents on November 7, 2011 and proposed moving forward with an evaluation. [NT 45; P-43]
9. At the time of referral and evaluation the Parents described Student as getting along with other children and adults, working very hard academically, loving school, having good self-esteem and having difficulty with focus at some times but not at other times. In 1st grade, according to the mother, Student was very easygoing, outgoing and friendly. [NT 35; S-41]
10. At the time of referral and evaluation Student was described as being kind, caring, always respectful, having some friends, being very organized, turning in all homework, being extremely creative, being able to follow directions when given examples, volunteering answers in class when feeling confident and when encouraged, wanting to do well and to please, having moments of insecurity when

- reading, giving up at times, and having some behaviors immature for age. [S-39, P-43]
11. At the time of referral and evaluation, during structured whole group lessons Student tried hard to stay on task, but often became distracted. When distracted, Student would make noises, get up and down out of Student's seat, talk to neighbors and turn head away from the instruction. During unstructured times Student was improving the ability to start on a task immediately, but if Student had difficulty with the task Student would give up and begin distracting behaviors. [S-39, P-43]
 12. The District prepared a Permission to Evaluate [PTE] form on [Friday] November 11, 2011; the mailing envelope was postmarked [Monday] November 28, 2011³. The Parents received the PTE on [Thursday] December 1, 2011, signed it and hand-delivered it on [Tuesday] December 6, 2011.⁴ [NT 46, 48; P-50]
 13. In the meantime, on November 14, 2011⁵ the Parents [father] had notified the District by email that they had decided to have Student evaluated independently and sought to arrange a date for the private psychologist to observe Student at school.⁶ [P-50]
 14. As part of its initial evaluation the District psychologist administered the Woodcock Johnson III Tests of Cognitive and Achievement Abilities on which Student achieved the following cognitive standard scores⁷: General Intellectual Ability 112, [High Average]; Verbal Ability 111 [High Average]; Thinking Ability 122 [Superior]; Cognitive Efficiency 91 [Average]; Phonemic Awareness 91 [Average]; Working Memory 89 [Low Average]; Delayed Recall 101 [Average]; Oral Language 111 [High Average]). [P-2]
 15. On the Woodcock Johnson III Tests of Cognitive and Achievement Abilities Student achieved the following academic achievement standard scores: Brief Achievement 92 [Average]; Brief Reading 94 [Average] Brief Math 94 [Average]; Brief Writing 89 [Low Average]; Academic Skills 92 [Average]; Academic Applications 90 [Average]; Verbal Comprehension 111 [(Average); Visual-Auditory Learning 92 [Average]; Spatial Relations 128 [Superior]; Sound Blending 102 [Average]; Concept Formation 131 [(Very Superior); Visual Matching 87 [Low Average]; Numbers Reversed 94 [(Average); Incomplete

³ I take judicial notice that Thanksgiving fell on November 24th in 2011.

⁴ On December 7, 2011 the Parents [mother] emailed the District asking that a follow-up be done with the appropriate department given the lag between the date of the PTE and the mailing date. [P-50]

⁵ The date of this email, November 14, 2011 directly contradicts the mother's testimony about why the Parents opted to have Student evaluated independently. When asked why they decided on a private evaluation the mother testified, referring to the lapse in time between the PTE's preparation [November 11, 2011] and the postmark of mailing [November 28, 2011]: "Our faith in the School District had diminished given the lapse." [NT 49; P-50 p 2]

⁶ The first evaluation session with the private evaluator is listed as occurring on November 28, 2014. [P-5]

⁷ Standard scores are based on a bell-shaped curve distribution whose mean is 100.

- Words 81 [Low Average]; Auditory Working Memory 86 [Low Average]; Visual-Auditory Learning Delayed 84 [Low Average]; Letter Word Identification 97 [Average]; Story Recall 105 [Average]; Understanding Directions 112 [High Average]; Calculation 93 [Average]; Spelling 88 [Low Average]; Passage Comprehension 89 [Low Average]; Applied Problems 95 [Average]; Writing Samples 92 [Average] and Story Recall-Delayed 120 [High Average]. [P-2]
16. As part of its initial evaluation the District psychologist administered the Brown Attention-Deficit Disorder Scales for Children. On this instrument, the Parents' endorsements of symptoms of attention difficulties [Activation, Attention, Effort, Emotion, Memory, Action, ADD Inattentive Total and ADD Combined Score] all fell into the average range with the exception of Memory which was "somewhat atypical", whereas the teacher's endorsements all fell into the "moderately atypical" range with the exception of Memory which fell into the average range. Scores in the "moderately atypical" range suggest a "significant problem" with attention. [P-2, S-44]
 17. As part of its initial evaluation the District's speech/language pathologist completed a Speech/Language evaluation. On the Clinical Evaluation of Language Fundamentals – 4th Edition [CELF-4] Student's standard scores were all in the Average Range [Standard Scores 85-115] as follows: Core Language Score 112; Receptive Language Index 103; Expressive Language Index 119; Language Content Index 106; Language Structure Index 117; Working Memory Index 91. Likewise, all Student's scores on the Phonological Awareness Test 2nd Edition were in the Average Range. Accordingly Student was not found to be in need of speech/language services. [P-2]
 18. As part of its initial evaluation the District's occupational therapist completed an Occupational Therapy evaluation. On the Motor-Free Perception Test – 3rd Edition, Student achieved a standard score 110. On the Beery-Buktenica Developmental Test of Visual Motor Integration - 6th Edition, Student obtained a standard score of 110. Neither score suggested problems in the visual/perceptual/motor area. [P-2]
 19. However, on another occupational therapy assessment tool, the Wold Sentence Copying Test, results indicated needs in the area of handwriting, with the occupational therapist concluding that Student required direct occupational therapy services to assist in in-hand manipulation, and writing and copying skills, and also required specially-designed instruction to support continued reinforcement of writing technique and focus during learning. [P-2]
 20. The private evaluation took place on five dates beginning on November 28, 2011 and ending on December 15, 2011. The date the Parents received the private

- evaluation report is not in the record, but the Parents provided the report to the District on February 8, 2012.⁸ [NT 49; P-5, P-50]
21. Among other measures, the private evaluator administered the Wechsler Intelligence Scale for Children – Fourth Edition [WISC-IV] to assess Student’s cognitive ability. Student achieved the following standard scores: Full Scale IQ 114; General Ability Index 126; Verbal Comprehension Index 121; Perceptual Reasoning Index 123; Working Memory Index = 91; Processing Speed Index 100. [P-5]
 22. Among other measures the private evaluator administered the reading subtests of the Wechsler Individual Achievement Tests Third Edition [WIAT III]. Student’s Pseudoword Decoding and Speed, Word Reading and Speed, and Oral Reading Fluency, Accuracy and Rate were all in the Below Average Range, with Reading Comprehension being in the Lower End of Average Range. To assess written expression the private evaluator used the WIAT III, the Woodcock Johnson Tests of Achievement Form A [WJ-III] and the Kaufman Test of Educational Achievement Second Edition, Form A [KTEA-II] All Student’s scores were in the Average Range with the exception of Spelling on the WIAT-III which was in the Below Average Range. The private evaluator administered the WIAT-III to assess math. While Numerical Operations was in the Average Range, Math Fluency for Addition and Subtraction and Math Problem Solving were all in the Below Average Range. [P-5]
 23. The private evaluator’s assessment of language and listening comprehension indicated age/grade appropriate functioning. [P-5]
 24. The District’s evaluation report was finished and dated February 2, 2012 and given to the Parents on February 3, 2012. [P-2, P-50]
 25. The District found Student eligible for special education services under the primary classification of specific learning disability and the secondary classification of other health impairment due to Attention Deficit Hyperactivity Disorder [ADHD]. [P-2]
 26. On February 10, 2012 the District and Parents met and discussed the District’s February 2, 2012 evaluation report. Both parents checked that they agreed with the evaluation. [P-2]
 27. The District’s February evaluation report recommended a “multisensory, sequential, rule based program of reading instruction as [Student] is a bright youngster and concepts support memory for Student.” [P-2]

⁸ The private evaluator provided a Summary noting that the Parents requested that she “provide a copy of the summary only to include in a [] School District Evaluation Report”. However Exhibit P-5 contains both the Summary and the Full Report. It is unclear whether the Parents provided the District with the full report or just the Summary on February 8th. [P-2]

28. “A multisensory, sequential, rule based program of reading instruction” is the way the District describes the Wilson reading program.⁹ [NT 758-760]

February 10, 2012 IEP:

29. On February 10, 2012 the team crafted an Individualized Education Plan [IEP]¹⁰. The IEP carried goals/objectives in handwriting related to copying text and to letter formation; goals/objectives in reading related to decoding [reading] and encoding [spelling] single and multisyllabic words, decoding letter sounds in nonsense words, acquiring high frequency sight words and oral reading fluency; and goals/objectives in math related to word problems dealing with computation, money or time. [P-6]
30. The February 10, 2012 IEP contained Specially Designed Instruction as follows addressing reading: multisensory, systematic, rule-based program for reading and spelling; high degree of repetition and review of previously taught decoding strategies; word ring for mastery of high frequency words; multisensory practice to review sight words; books on tape/CD to aid in vocabulary building; modified spelling list; practice with successive blending of mixed word families. [P-6]
31. The February 10, 2012 IEP contained Specially Designed Instruction as follows addressing math: provision of math tools [100 chart, number line and manipulatives]; provision of visual to aid in learning key words and having Student highlight key words in math problems; visual/verbal rehearsal “talk through” to prompt steps for math problems prior to independent practice. [P-6]
32. The February 10, 2012 IEP contained Specially Designed Instruction as follows addressing attention, hyperactivity and organization: movement opportunities; preferential seating; visual of “whole body cues” on desk and classroom wall; longer tasks divided into smaller parts; repeating directions given to whole class or have Student restate directions; provide incentives for attention and work completion with decreased prompting; chunking of lengthy and complex auditory information; provide time suggestions for tasks and check progress often in first few minutes. [P-6]
33. The February 10, 2012 IEP contained Specially Designed Instruction as follows addressing handwriting: encouragement regarding stabilizing paper when writing;

⁹ It is well established in case law that LEAs are given deference with regard to methodology unless the IEP specifically prescribes a particular methodology. It is a general practice in this geographical area for LEAs not to name specific commercial programs in their evaluations or in their IEPs. The leading case on methodology is *Lachman v. Illinois State Bd. of Educ.*, 852 F. 2d 290 (7th Cir. 1988), cert. denied 488 U.S. 925 (1998). “Once it is shown that the Act’s requirements have been met, questions of methodology are for resolution by the responsible authorities.” *Lachman* at 292.

¹⁰ Members of the Multidisciplinary Evaluation Team included both Parents, the District’s Psychologist, Speech/Language Therapist, Occupational Therapist, a Regular Education Teacher, the Reading Specialist, and the building Principal. [P-2]

allowing dictation of written work when needed; graphic organizers for writing assignments; extended time to complete assignments in writing. [P-6]

34. The February 10, 2012 IEP provided for Occupational Therapy for one 30-minute [individual] session weekly. [P-6]
35. The February 10, 2012 IEP provided for weekly consultation between the special education teacher and the regular education teacher. [P-6]
36. The Notice of Recommended Educational Placement [NOREP] dated February 10, 2012 recommended, "Itinerant Learning Support for Language Arts for 1 hour daily and Occupational Therapy 30 minutes weekly, direct." [P-14]
37. The IEP and NOREP with Procedural Safeguards were issued to Parents on February 10, 2012 on which date the Parents signed the NOREP approving the IEP. [NT 53-54; P-14]
38. Nevertheless, Student visited the private school on February 29, 2012 and on the same date the Parents requested that the District send Student's educational records to the private school. [NT 130; S-25]
39. On March 28, 2012 during the spring parent conference the Parents and District spoke about ESY eligibility, and accordingly on March 30, 2012 the IEP was amended to include Extended School Year [ESY] services. [P-7]
40. The summer 2012 ESY was designed to address decoding and spelling single and multisyllabic words containing word patterns or families. [P-7]
41. In the Notification of ESY Eligibility dated April 13, 2012, Student was determined to be eligible for ESY in Reading-Decoding Foundations¹¹. It was reported that Student's IEP progress report indicated progress made on current goals and objectives, the reports of the therapists indicated the student made progress, the student's grades and report card indicated progress, and results of tests indicated progress. [S-56]
42. Parents approved this revised IEP through a NOREP dated March 30, 2012. The recommended ESY program included services for the summer of 2012, specifically: "Reading tutor for 45 minutes, 3x a week for 6 weeks; Hours between 8:00am to 3:30pm Monday through Friday; Location: to be determined mutually by the Parents and the tutor." [P-7, P-15]

June 12, 2012 IEP:

43. The District convened an IEP Meeting on June 12, 2012 with the Student's mother, the principal, the school counselor, the regular education teacher and the special education teacher participating. [P-8]

¹¹ A Wilson reading program for younger students.

44. The June 2012 proposed IEP added two annual goals with corresponding objectives in math and an annual goal with corresponding objectives in written expression. [P-8]
45. The June 2012 proposed revised IEP added two specially designed instructions to address math: providing a visual strategy [touchpoints on numbers] to aid in math computation and providing graph paper to aid in solving multi-digit math computation problems. [P-8]
46. The District's June 2012 proposed revised IEP included updated present levels of educational functioning, and revised goals/objectives, specially designed instruction and educational placement [time spent outside the regular education setting]. [P-8]
47. The June 2012 revised IEP proposed that Student receive special education instruction in the learning support classroom 1 hour daily for Language Arts and 1 hour daily for Math, and three 30-minute sessions of supplemental reading instruction for decoding and encoding weekly, as well as receiving one 30-minute occupational therapy session per week. [P-8]

Progress During First Four Months of IEP Implementation:

48. The June IEP revision provided progress monitoring information for four instructional months, from the beginning of special education programming in February 2012 up to the end of the school year in June 2012. [P-8]
49. As of June 2012, with one-year targets in the area of handwriting, moderate progress was noted after 4 instructional months in the areas of attention to details, independently spacing between words and orienting letters to the line. Student could form 26 out of 26 letters, had improved c, d, o, p and d, but still needed repetition on g and a. [P-8]
50. As of June 2012, with one-year targets set at 80% accuracy for decoding and encoding, after 4 instructional months Student read and spelled CVC words with 100% accuracy, read CVCE words with 90% accuracy and spelled CVCE words with 80% accuracy, read CVVC words with 70% accuracy and spelled CVVC words with 40% accuracy, read CCVVC words with 50% accuracy and spelled CCVVC words with 30% accuracy, and read multisyllabic words with 40% accuracy. Although syllabic rules had not yet been introduced Student demonstrated ability to read compound words on word lists. When decoding letter sounds on nonsense words, Student was not as successful as on reading real words, but when given prompts to tap¹² sounds, Student was more successful. [P-8]

¹² Tapping sounds is a Wilson reading program technique.

51. As of June 2012, with one-year targets set at 80%-100% accuracy for sight words, after 4 instructional months Student progressed as follows: Primer list from baseline of 81% in February to 94% accuracy in June; First grade list from baseline of 85% in February to 98% accuracy in June; Second grade list from baseline of 70% in February to 87% accuracy in June; Third grade list from baseline of 68% in February to 85% accuracy in June. [P-8]
52. As of June 2012, with one-year targets set to increase oral fluency rate from 42 wpm to 90 wpm, although having made some progress after 4 instructional months Student was inconsistent: on the last 8 probes of the year Student scored 46, 46, 49, 64, 65, 52, 67, and 57 wpm. [P-8]
53. As of June 2012, with one-year math targets set at 80% [4 out of 5 problems] correctly solved, after 4 instructional months Student maintained 90% on problems involving time or money, 100% on story problems requiring addition or subtraction and involving single digit computation. However, on the last three trials of the year Student scored 53% on addition/subtraction story problems and on the last assessment involving four story problems with 2-digit numbers Student did not solve any correctly. Student chose the correct operation and wrote a correct number sentence for all four problems but made errors in computation. [P-8]
54. Student's teacher provided supports and interventions as per the IEP for the 4 month period the IEP was in effect. [NT 591, 596, 601]
55. Student's behavioral issues were being successfully managed within the regular education classroom. The teacher, who was a long-term substitute when Student was in 1st grade observed an improved temperament in 2nd grade as compared to 1st grade. [NT 589, 591, 609]
56. Student's 2nd grade report card (2011-2012) indicates that Social Skills [works cooperatively with others, participates appropriately, shows self-confidence, displays a positive attitude, respects the rights of others, accepts rules and limits, practices verbal self-control, practices physical self-control] ratings improved overall from 1st grade, and were all rated as either "Consistently" or "Most of the time". Work habits also were rated as "Consistently" to "Most of the time", with the exception of "listens attentively" which was rated as "Sometimes". Student was rated as "Capable" the whole year in Science, Social Studies, Art, Music, and PE. [P-46]

Unilateral Placement in Private School:

57. At the June 2012 IEP meeting the mother shared that Student was frustrated during homework and the District explained its homework policy, specifically that Student could stop homework if it took over 30 minutes to complete and that the Parents should contact the teacher when that happens so that modifications could be made. [P-8]

58. At the June 2012 IEP meeting the Parent expressed the opinion that science and social studies were not geared towards learning disabled students; the Principal disagreed and explained differentiated instruction. [P-8]
59. At the June 2012 IEP meeting the mother asked why supplemental reading [additional reading three times a week] that was being offered in the June 2012 IEP was not offered in the February 2012 IEP and the District explained that an IEP begins with the least restrictive environment, but that although Student was making progress under the February IEP Student was at a critical stage for acquiring decoding skills and therefore additional reading was being proposed for 3rd grade. [P-8]
60. At the June 2012 IEP meeting in order to provide additional pull-out special education services the District proposed keeping Student in the regular education setting for subjects related to language arts and math, and having Student miss social studies and science on a rotating basis. The mother rejected this, and when the District then suggested missing [a foreign language] the mother also rejected that option. [P-8]
61. The Parents rejected the June 12, 2012 revised IEP, told the District that they were going to place Student at the private school, and advised the District that they would be seeking reimbursement for all educational expenses associated with this placement. [P-52]
62. In contrast to the progress monitoring data showing that Student demonstrated progress in handwriting, decoding, encoding, sight word recognition, reading fluency, math and behavior the Parents did not acknowledge any positive changes in Student once the IEP was in place. Rather, the mother in testimony stated Student was more frustrated and noted that Student's anxiety about writing increased dramatically ["went through the roof"]. [NT 55-63]
63. In their June 12, 2012 letter the Parents stated, "The IEP is not achieving the appropriate educational goals. [Student] is becoming increasingly frustrated as a result of [Student's] learning disability and creating a reduced interest in learning and a slowing of progress." [NT 63, 830-831; P-52]
64. The Parents also rejected the offered ESY program, according to the mother, because of the difficulty transporting Student to and from the tutoring sessions at the times of day proposed.¹³ [NT 72]

¹³ Mother testified that "The hours given I believe were between 8 o'clock and 3 or 4 o'clock in the afternoon. It was impossible to get a child out of their daytime day care to a location, back from the location. It required essentially almost three – at least two hours out of my day or a parent's day to get [Student] away for 45 minutes and then get [Student] back." [NT 72]

65. The Parents did not raise concerns with the District at the IEP meeting about the timing of the proposed services or the concerns regarding transportation to and from the location where ESY services would be rendered. Had Parents brought to the District's attention that Student required transportation services, such services would have been arranged. [NT 766-767]
66. Notably, during most of the 4-month initial IEP implementation, Student was receiving trials of medications to address symptoms of ADHD, the trials first starting "right after" the initial IEP in February of 2012. In February-March Student went through Adderall and, according to the Parents [father], "the collection of stimulants", but none of the stimulants worked for Student so they were discontinued. [NT 261]
67. However, the Student's prescribing physician indicated on April 3, 2012 that Student was "less emotional" in school, but "no difference" was evidenced at home and referenced possible home stressors. He also noted that in [the special education teacher's] class Student was "less distracting" and "kind of better."¹⁴ [S-86]
68. Further significantly affecting Student during the latter half of the 4-month initial IEP implementation period was the unfortunate event that during the final trimester of 2nd grade Student suffered a [fractured limb] and was absent from school from April 16 to April 24 while the injury was healing and then had other absences related to medical follow-up. [NT 130-131, 640-641]
69. In letters dated April 25, 2012 and May 1, 2012 Student's physician [documented the limb fracture]. As a result, Student had physical restrictions [redacted]. [S-57, S-59]
70. When Student returned to school, Student [had physical limitations] which impacted Student's academics in the classroom. Student's injury and [physical limitations] were a source of both distraction and emotional concern to Student. [NT 641]
71. As of June 12, 2012 Student was still in a short cast and was not able to participate in [physical activities]. [S-61]
72. Student attended programming at the private school in summer 2012 and began 3rd grade there in the 2012-2013 school year. [NT 31]

¹⁴ After Student left the District and entered the private school Student was on Zoloft for "a good chunk of the [3rd grade] year" according to father. Just before and through the 4th grade year Student had trials of nonstimulants which "finally" did have some effect in controlling symptoms of ADHD. Medications were being changed between the dates of March 13, 2012 and November 28, 2012 and on the prescribing physician noted that Wellbutrin was "helpful now... [Student] does homework easily this year...attention not an issue with learning". [[NT 262-263;S-86]

May 14, 2013 IEP:

73. On or about March 21, 2013 the Parents through counsel contacted the District to determine what ESY services were available for Student in Summer 2013, as well as what type of school placement was available for Student during the 2013-2014 school year. [S-76]
74. On April 8, 2013 the District issued a NOREP offering Summer 2013 ESY programming. On April 16, 2013 the Parents neither approved nor rejected the NOREP but requested an IEP Meeting. [S-90]
75. On May 14, 2013 the District convened the requested IEP meeting attended by the Parents, the principal, the director of special education, the speech/language pathologist, the occupational therapist, a special education teacher, a regular education teacher, and attorneys for both the District and the Parents. [P-9]
76. As per discussion at the May 14, 2013 IEP meeting, a re-evaluation for speech/language eligibility and a functional behavior assessment, both to be completed before the start of the 2013-2014 school year, were agreed upon. [P-9]
77. The District issued a draft proposed IEP that contained the results of its February 2012 evaluation and the results of the November/December 2011 private evaluation, present levels of education performance provided by the private school, and results of an occupational therapy evaluation completed in August 2012 at the private school. [P-9]
78. At the time of the May 14, 2013 IEP meeting Student had been attending the private school for nearly one year, from the summer of 2012 onwards. The Parents expressed concerns about Student as follows: anxiety when completing homework assignments, anxiety around writing assignments, needs in executive functioning skills, the need for psychological counseling to address anxieties surrounding school, their belief that Student's anxiety affects ability to access the educational curriculum without 1 to 1 teaching and a small group environment, ADHD affects ability to access the curriculum, the need for Student to continue with the Wilson reading program, their desire that Student's teachers are trained in language deficits to address literacy needs. [P-8]
79. On May 21, 2013 the Parents emailed the District reiterating concerns about anxiety, homework, executive functioning, small setting, and language enriched program. They added concerns about concentration and attention deficits requiring prompting during testing and other work, frustration related to performing academic tasks, "need to provide an educational setting in a regular classroom that will not cause [Student] to be socially persecuted and/or singled out as different" and "the need to provide integrated art-based learning to provide a true multi-sensory educational environment", and need to address "encoding and spelling" skills. [P-9]

80. The May 14, 2013 IEP carried goals/objectives in reading related to decoding [reading] and encoding [spelling] single and multisyllabic words containing word patterns in families in isolation or in context, to reading comprehension by identifying evidence in an instructional reading level text to draw inferences, to reading fluency on a third grade level passage; goals/objectives in written expression related to developing strategies to organize thoughts and combine with background knowledge and opinions to write an essay, to score a three on the Pennsylvania writing rubric assessing focus, content, organization, style and conventions; and goals/objectives in math related to accurate problem-solving; and goals/objectives related to using self-regulation strategies to participate in school tasks independently for 15-20 minutes. [P-9]
81. The May 14, 2013 IEP contained Specially Designed Instruction from the previous IEPs as follows addressing attention, hyperactivity and organization: movement opportunities; preferential seating; visual of “whole body listening cues” on desk and classroom wall; longer tasks divided into smaller parts; repeating directions given to whole class or have Student restate directions; provide incentives for attention and work completion with decreased prompting; chunking of lengthy and complex auditory information; provide time suggestions for tasks and check progress often in first few minutes. The May 14, 2013 IEP added the following to address attention, hyperactivity and organization: modifying tests, chunking questions, and providing word banks; providing redirection and frequent authentic positive reinforcement to increase attention for listening activities; reduce environmental distractions including closing windows and doors when noises interfere with listening. [P-9]
82. The May 14, 2013 IEP contained Specially Designed Instruction from the previous IEPs as follows addressing reading: multisensory, systematic, rule-based program for reading and spelling; high degree of repetition and review of previously taught decoding strategies; word ring for mastery of high frequency words; multisensory practice to review sight words; books on tape/CD to aid in vocabulary building; modified spelling list; practice with successive blending of mixed word families. The May 14, 2013 IEP added the following to address reading: introducing new curricular vocabulary words individually prior to presenting them in class. [P-9]
83. The May 14, 2013 IEP contained Specially Designed Instruction from the previous IEPs as follows addressing math: provision of visual to aid in learning key words and having Student highlight key words in math problems; visual/verbal rehearsal “talk through” to prompt steps for math problems prior to independent practice; providing a visual strategy [touchpoints on numbers] to aid in math computation and providing graph paper to aid in solving multi-digit math computation problems. [P-9]

84. The May 14, 2013 IEP contained Specially Designed Instruction from the previous IEPs as follows addressing handwriting: encouragement regarding stabilizing paper when writing; allowing dictation of written work when needed; extended time to complete assignments in writing. The May 14, 2013 IEP added the following to address handwriting: encourage use of a pencil grip to decrease pressure and fatigue. [P-9]
85. The May 14, 2013 IEP contained Specially Designed Instruction to address written expression as follows: graphic organizers for writing assignments. [P-9]
86. The May 14, 2013 IEP contained Specially Designed Instruction to address anxiety as follows: provision of alternate ways to showcase knowledge; additional adult support. [P-9]
87. The May 14, 2013 IEP provided for Occupational Therapy for one 30-minute [individual] pull out session weekly for the first trimester and then push-in support in the classroom for 30 minutes per week. [P-9]
88. The May 14, 2013 IEP provided for consultation across the school day between the special education teacher and the regular education teacher, and review of SDI by the occupational therapist followed by consultation with teachers to assist with supports and implementation. [P-9]
89. Under the proposed May 14, 2013 IEP Student would receive special education services in Math in the resource room for 1 hour per day, five days per week; Language Arts in the learning support room for 1 hour and 40 minutes per day, five days per week; Supplemental Reading in the learning support room for 45 minutes per day, 5 days per week. [P-9]
90. Under the proposed May 14, 2013 IEP Student would be with Student's nondisabled peers to receive Science/Social Studies in the regular education room with adult support for 45 minutes per day, five days per week; Special Areas [Music 2 times a cycle for 30 minutes, Art 1 time a cycle for 60 minutes, Library 1 time a cycle for 30 minutes, Physical Education 2 times a cycle for 30 minutes]; Lunch for 30 minutes daily; Recess for 20 minutes daily. [P-9]
91. The May 14, 2013 IEP proposed an ESY program consisting of [individual] tutoring in reading four times a week for 45-minutes each session for eight weeks, [individual] writing tutoring three times a week for 30-minutes each session for eight weeks. The IEP also provided for ESY instruction in reading, writing, and mathematics in the learning support classroom environment three days per week, 4 hours per day from June 25, 2013 through August 1, 2013. [P-9]
92. The May 14, 2013 IEP proposed transportation to and from the designated elementary school building for ESY programming in the learning support classroom. [P-9]

93. The ESY program proposed for summer 2013 in the May 14, 2013 IEP references back to the goals put forth for the 2012-2013 school year. [P-9]
94. The Parents rejected the May 14, 2013 IEP including the offered ESY program and set forth their reasons in their response to the District's NOREP.¹⁵ [P-17]
95. Student attended the private school's programming in summer 2013. [NT 31]

August 23, 2013 Reevaluation Report:

96. Shortly after the May 14, 2013 IEP meeting the District requested, and the Parents provided, permission to re-evaluate Student, and the District conducted a re-evaluation in late spring and early summer 2013. [S-101]
97. The District issued its re-evaluation report on August 23, 2013, fourteen months after Student started at the private school. [P-3]
98. Testing results from the August 23, 2013 reevaluation indicated that Student was below grade level expectations on writing, reading and some aspects of math. [P-3]
99. The August 23, 2013 reevaluation report noted that Student was having difficulty regulating emotions throughout each school day, difficulty with math tests and new concepts, and that paragraph writing tasks triggering whimpering, crying, and noises. The report also noted that Student used calming strategies inconsistently and sometimes during the school day it was difficult to determine the cause of Student's demonstration of anxiety. [P-3]
100. The August 2013 reevaluation also noted that Student giggled to self often and made noises such as "memememe" or yelled "oucthhhh" frequently. Student did not socialize with many students at private school, however did like to be physically close to certain students hugging or poking them at times. [P-3]
101. Two private school teachers completed the Behavior Assessment Scales for Children second Edition [BASC-2]. Both raters' endorsements resulted in Clinically Significant concerns on the School Problems, Internalizing Problems, Adaptive Skills, and Behavior Symptom Index scales. [P-3]
102. An FBA was completed on August 13, 2013 and included in the August 23, 2013 reevaluation and in the September 3, 2013 IEP. [P-3, P-10]

¹⁵ However, beginning in mid-April 2013 through May 2, 2013 the District completed a reevaluation conducted at the private school on three separate days. On one of the three testing dates a private school teacher told the District evaluator that she knew Student was coming to the private school for ESY because the Parents had already signed Student up for the private school summer program. [NT 424-425]

103. The private school teacher's input into the FBA indicated that Student's classwork completion percentage is approximately 20% while classwork accuracy is 90%. This concern is related to withdrawing, shutting down, inattention and impulsivity predominantly during writing, math and Wilson reading. [P-3, P-10]
104. The FBA noted that Student's noncompliance/withdrawal was difficult to manage and very disruptive to the classroom, that these behaviors are displayed approximately 10-12 times each class period and that they have been present the entire school year. [P-3, P-10]
105. The FBA noted that Student's inattentive/off-task behaviors were somewhat manageable but somewhat disruptive to the classroom, occurred 10-12 times per each class period and were present the entire year. [P-3, P-10]
106. The FBA noted that Student's hyperactivity was difficult to manage and very disruptive to the classroom environment, displayed 7-9 times per class period and were present the entire school year. [P-3, P-10]
107. As part of the August 23, 2013 reevaluation, the Parents described Student as follows: enjoys school most of the time but gets frustrated by writing and timed tests; displays anxiety at home and this affects homework completion; displays anxiety when a social situation is coming up; shuts down and has a panic attack when anxious; anxiety triggered by routine changes, disruption of preferred activity and new environments. [P-3]
108. A Speech/Language Evaluation was completed in May 2013 and was included in the August 23, 2013 reevaluation report and in the draft IEP brought to the September 3, 2013 IEP meeting. On the Clinical Evaluation of Language Fundamentals -4 (CELF-4) Student achieved a Core Language Index standard score of 100; a Receptive Language Index standard score of 99; an Expressive Language Index standard score of 101; a Language Memory Index standard score of 110; a Language Memory Index standard score of 103; and a Working Memory Index standard score of 88. The evaluator concluded that Student continued to present with all language skills within the average range, and that any academic difficulties Student may be experiencing were not due to difficulty with language skills. Student was not eligible for speech and language services. [P-10]
109. The August 23, 2013 reevaluation presents the following as Student's needs: basic reading, reading fluency and reading comprehension; math calculation and math problem solving; written expression; time on task; task completion; affect regulation; written productivity; in pencil pressure and control; and use of learned self-regulation strategies in classroom. [P-3]
110. The District and Parents met informally in August 2013 to discuss programming for Student, but following the meeting the Parents again, by letter dated August 23, 2013, put the District on notice that they were unilaterally

placing Student back at the private school for 4th grade [2013-2014] and would be seeking reimbursement for their expenses. [P-53]

111. In a letter to the Parents dated September 17, 2013 the District acknowledged receiving their August 23, 2013 letter, noted that multiple meetings had been convened, indicated that the District would continue to work to establish a mutually agreeable program for Student moving forward, that it remained willing to reconvene an IEP team at any time to review the most recently offered program, consider any new information, and make any changes to the IEP. The letter also provided notice that the District was denying the Parents' request for tuition reimbursement, fully respected their right to educate their child outside of the District at their own expense and was willing to program for Student at any time they would choose for Student to return. Procedural safeguards outlining parent rights were included. [S-117]

September 3, 2013 IEP:

112. An IEP Meeting was convened on September 3, 2013 to discuss the August 2013 re-evaluation and potential programming and to revise the May 14, 2013 IEP in terms of the present education levels, goals and specially designed instruction. [S-113, P-10¹⁶]
113. The meeting attendees listed were the Parents, case manager, director of special education, principal, school psychologist, speech/language pathologist, occupational therapist, and regular education teacher. [S-113, P-10¹⁷]
114. The September 3, 2013 IEP carried all the goals/objectives in reading decoding, reading encoding, reading comprehension, reading fluency, written expression and mathematics that were presented in the May 14, 2013 IEP. Two new goals/objectives were added: for math, a related to regrouping for addition and subtraction; for anxiety, utilizing a calming strategy such as deep breathing, visualizing, and requesting a break; for task completion, beginning a task within one minute and remaining of task for 10 minutes [modified the related SDI from May 14, 2013 IEP]. [P-9, P-10]
115. The September 3, 2013 IEP contained Specially Designed Instruction as follows addressing attention, hyperactivity and organization: allowing breaks and opportunities to be active in the classroom, preferential seating; visual of "whole body listening cues" on desk and classroom wall; chunking of lengthy and complex auditory information; longer tasks divided into smaller parts that can be

¹⁶ Counsel for each party provided an IEP dated September 3, 2013. One difference between the Parents' version at P-10 and the District's version at S-113 is the Cover Sheet, the first page of both documents. The Parents' version lists Primary Exceptionality as "Under Review" with no Secondary Exceptionality, while the District's version lists Primary Exceptionality as Specific Learning Disability and Secondary Exceptionality as Other Health Impairment. The District's version of the IEP is the finalized IEP created on September 14, 2013 following receipt of fifteen pages of additional information from the private school on September 11, 2013 and the creation of a Positive Behavior Support Plan.

¹⁷ Neither exhibit contained a signed attendance sheet.

- completed at different times; repeating directions given to whole class or have Student restate directions; provide incentives for attention and work completion with decreased prompting; chunking of lengthy and complex auditory information; provide time suggestions for tasks and check progress often in first few minutes; teacher check-in regularly to ensure Student is on task; modifying tests, chunking questions, and providing word banks; providing redirection and frequent authentic positive reinforcement to increase attention for listening activities; reduce environmental distractions including closing windows and doors when noises interfere with listening. [P-10]
116. The September 3, 2013 IEP contained Specially Designed Instruction addressing reading: multisensory, systematic, rule-based program for reading and spelling; high degree of repetition and review of previously taught decoding strategies; word ring for mastery of high frequency words; multisensory practice to review sight words; books on tape/CD to aid in vocabulary building; modified spelling list; practice with successive blending of mixed word families; introducing new curricular vocabulary words individually prior to presenting them in class. [P-10]
117. The September 3, 2013 IEP contained Specially Designed Instruction as follows addressing math: provision of visual to aid in learning key words and having Student highlight key words in math problems; visual/verbal rehearsal “talk through” to prompt steps for math problems prior to independent practice; providing a visual strategy [touchpoints on numbers] to aid in math computation and providing graph paper to aid in solving multi-digit math computation problems; scripts written and rehearsed to remember procedures; provide place value lines, color-coding paper, tri-line paper [the latter to also support attention and handwriting. [P-10]
118. The September 3, 2013 IEP contained Specially Designed Instruction as follows addressing handwriting: encouragement regarding stabilizing paper when writing; allowing dictation of written work when frustrated; extended time to complete assignments in writing; encourage use of a pencil grip to decrease pressure and fatigue; continue with occupational therapy through push-in support to encourage generalization of strategies to increase written production and self-regulation. [P-10]
119. The September 3, 2013 IEP contained Specially Designed Instruction to address written expression as follows: graphic organizers for writing assignments. [P-10]
120. The September 3, 2013 IEP contained Specially Designed Instruction to address anxiety as follows: provision of alternate ways to showcase knowledge; additional adult support; encourage relaxation and self-regulation strategies in the classroom; inform of any schedule/routine changes in advance and role-play appropriate responses to the change; encourage to actively seek help/support

- when needed; provision of alternate assignments if Student seems anxious or overwhelmed by an assignment; homework adapted to avoid overwhelming Student; prepping with a practice test or quiz the day before actual test/quiz; provision of visual aids, manipulatives and support with mnemonics. [P-10]
121. The September 3, 2013 IEP contained Specially Designed Instruction to address behavior and social/emotional difficulties as follows: social scripts, visual card to remind of expected behavior; access to school counselor to address social/emotional difficulties; use preferred activities such as art and music as motivators; receive immediate feedback for appropriate behavior. [P-10]
122. The September 3, 2013 IEP contained Specially Designed Instruction to address organization and time management as follows: help in maintaining a daily homework assignment book; help in establishing a before-class routine; chunking tasks and avoid providing large multi-step verbal directions. [P-10]
123. The September 3, 2013 IEP provided for Occupational Therapy for one 30-minute [individual] direct pull out session weekly for the first trimester and then push-in support in the classroom for 30 minutes per week to assist in skill generalization. [P-10]
124. The September 3, 2013 IEP provided for the case manager to support the regular education teacher and special areas teachers with resource materials across the school day, and supply these teachers with copies of the SDI and assist in implementation and monitoring of SDI. [P-10]
125. The September 3, 2013 IEP provided for review of SDI and IEP by the occupational therapist with staff to assist with supports and implementation. [P-10]
126. Under the proposed September 3, 2013 IEP Student would receive special education services in Math in the resource room for 1 hour per day, five days per week; Language Arts in the learning support room for 1 hour and 40 minutes per day, five days per week; Supplemental Reading for 45 minutes per day, 5 days per week. [P-10]
127. Under the proposed September 3, 2013 IEP Student would be with Student's nondisabled peers to receive Science/Social Studies in the regular education room with adult support for 45 minutes per day, five days per week; Special Areas [Music 2 times a cycle for 30 minutes, Art 1 time a cycle for 60 minutes, Library 1 time a cycle for 30 minutes, Physical Education 2 times a cycle for 30 minutes]; Lunch for 30 minutes daily; Recess for 20 minutes daily. [P-10]

128. The September 3, 2013 IEP did not propose an updated ESY program for summer 2014 as the dates reflected 2013 programming.¹⁸ [P-10]
129. An additional fifteen pages of additional information was provided by the private school on September 11, 2013 and the District crafted a PBSP before sending the final September 3, 2013 IEP to the family. [S-113]
130. The PBSP of September 11, 2013 outlined appropriate goals, antecedent strategies, replacement behaviors, and consequences. Program modifications and SDI were also to be implemented, as provided in the IEP. [P-12]
131. On September 10, 2013 the District requested that the Parents permit an additional re-evaluation to determine whether Student's learning issues could be based in autism.
132. The District's school psychologist explained the District's request to the Parents, noting that during the IEP team meeting on September 4, 2013, the father shared additional information with the IEP team regarding Student having more outward breakdowns to the point that the Parents felt it necessary for Student to have some direct consultation with a psychologist, along with the prescribing psychiatrist. The psychologist noted that based on her assessment during the FBA, coupled with this new information, there was a possibility that Student may be on the Autism Spectrum. She also noted that the Parents' attorney had questioned whether Student may have an emotional disturbance. [S-114, S-115]
133. The Parents agreed to the re-evaluation, and it was conducted with a report being issued on November 14, 2013 and presented to the Parents the next day. [P-4]
134. The November 14, 2013 reevaluation included the Autism Spectrum Rating Scales [ASRS] completed by the parents and three private school teachers. The following results were presented relative to the three teachers' endorsements on a scale of average/slightly elevated/elevated/very elevated: On the Total Scale, one teacher's endorsements resulted in a very elevated score, another teacher's endorsements resulted in a slightly elevated score and the third teacher's ratings did not yield a score on this dimension. Social/Communication – 2 very elevated and 1 elevated; Unusual Behaviors, 1 very elevated and 1 elevated with the third teacher's responses not yielding a score; Self-Regulation- one slightly elevated and average; DSM-IV TR¹⁹ – 2 very elevated and 1 elevated; Peer Socialization – 2 very elevated and 1 elevated; Adult Socialization – 1 very elevated and 2 slightly elevated; Social/Emotional Reciprocity – 2 very elevated and 1 elevated; Atypical Language – 1 very elevated, 1 elevated and 1 slightly elevated;

¹⁸ This is not atypical or a flaw as official determination of eligibility for ESY must be made by February 28th of each school year.

¹⁹ Diagnostic and Statistical Manual Fourth Edition Text Revision of the American Psychiatric Association.

Stereotypy- 3 slightly elevated; Behavioral Rigidity – 3 very elevated; Sensory Sensitivity- 2 elevated and 1 slightly elevated; Attention – 3 average. [P-4]

135. The Parents' ratings on every category were average. [P-4]
136. The November 14, 2013 reevaluation included input from Student's therapist who noted that she does not believe that Student presents with an Autism Spectrum Disorder [ASD] diagnosis. Rather she posited that anxiety and ADHD continue to interfere with learning and socialization. [P-4]
137. Information was requested via three voicemail messages from Student's prescribing psychiatrist; on the day of the completion of the November 14, 2013 reevaluation he responded that he needed to gain the Parents' permission before releasing information. [P-4]
138. The conclusion of the November 14, 2013 evaluation was that "while teacher input indicated concerns with social functioning and unusual behaviors, parent input noted that Student displays age appropriate social and behavior functioning. As a result, at this time Student does not present as a child with an Autism Spectrum Disorder. Since Student is only reported to display social and behavioral difficulties in the school setting, it appears that difficulties with learning, attention regulation and anxiety are the primary factors impacting social and behavioral functioning. [P-4]

December 4, 2013 IEP:

139. An IEP Meeting was held on December 4, 2013, where the November 14, 2013 re-evaluation was discussed, and the District presented the Parents with another IEP. [P-11]
140. The meeting attendees listed²⁰ were the Parents, director of special education, speech/language pathologist, occupational therapist, special education teacher and regular education teacher. [P-11]
141. The December 4, 2013 IEP included input from Student's therapist who reported that Student presented with significant struggles with frustration tolerance and anxiety surrounding academic and social situations. Uncertainty and potential embarrassment are triggers for outbursts across settings. Student has weaknesses in expressing himself appropriately when upset as well as remaining calm and focused in the classroom setting." [P-11]
142. The December 4, 2013 IEP included input from Student's 4th grade teacher in the private school. The teacher reported that Student reads independently "on a 3rd grade level, and requires multiple prompts to stay on topic during reading, but when supported and provided with reminders [Student] performs well." In math Student requires frequent prompts to stay on task. [P-11]

²⁰ There was no sign-in sheet with signatures.

143. The December 4, 2013 IEP carried all the goals/objectives related to reading decoding, reading encoding, reading comprehension, reading fluency, written expression, mathematics and anxiety that were presented in the September 3, 2013 IEP. [P-10, P-11]
144. The December 4, 2013 IEP carried all the SDIs contained in the September 4, 2013 IEP related to the areas of reading/spelling, written expression, math, handwriting, attention, anxiety, behavior/social/emotional and organization. [P-10, P-11]
145. The December 4, 2013 IEP proposed additional SDIs as follows: Direct counseling to target social skills, affect regulation, flexibility and anxiety [30 minutes per day]; use of nonverbal gestures rather than frequent verbal prompts to prevent reliance on these cues and avoid embarrassment; provide frequent ‘check ins’ by an adult and provide the “just right” amount of input to keep Student’s attention without overloading; adjust task demands through gradual complexity and/or mix preferred with nonpreferred tasks based on Student’s self-perception of ability level. [P-11]
146. The December 4, 2013 IEP proposed one 30-minute OT session provided as a push-in into the classroom. [P-11]
147. The December 4, 2013 IEP proposed that the case manager and the occupational therapist support the teachers and staff as outlined in the September 3, 2013 IEP. [P-10, P-11]
148. The December 4, 2013 IEP outlined the following program Supplemental Learning Support program in the neighborhood school: Learning Support Room [Math instruction, 1 hour a day, 5 days a week; Language Arts, 1 hour and 40 minutes a day, 5 days a week; Writing, 30 minutes a day, 5 days a week; Supplemental Reading, 45 minutes a day, 5 days a week. [P-11]
149. Student’s reading instruction is to be provided through the Wilson Reading Program, referenced in each proposed IEP as a “multisensory, sequential, rule based program of reading instruction”. The Wilson program will be provided by Wilson-qualified instructors. The District employs an In-District Trainer who is in good standing at Wilson Language Training. [NT 758-760, 788-797; S-135, S-136]
150. The summer reading tutoring for ESY would be provided by a Wilson certified teacher as well. [NT 778-779]
151. There is a contract between Wilson Language Training Corporation (WLTC) and the District and its In-District Trainer that indicates that the District is an affiliate of WLTC. The District’s contract with Wilson Language Training

- Corporation (WLTC) is renewed in May of 2013 and then again in June of 2014 [S-139, S-140, S-141, S-142, S-143]
152. The District has a list of personnel qualified to deliver Wilson programming. The teacher who would provide Student's reading instruction is on that list. [S-137]
153. For subjects Student would have in the regular education setting a variety of supports would be in place, including scaffolding to break down information, pacing of instruction, differentiated instruction, and previewing and pre-teaching material. [NT 754-755]
154. Student would be educated in the Regular Education Classroom in the neighborhood school with nondisabled peers with adult support for Science and Social Studies, 45 minutes a day, 5 days a week and in Special Area Instruction with adult support as follows: Music 2 days; Art 1 day; Library 1 day; Physical Education 2 days. [P-11]
155. The December 4, 2013 IEP provided ESY plans for summer 2014 in the form of tutoring in reading and writing as well as classroom instruction in reading, writing, and mathematics. [P-11]
156. Specifically the December 4, 2013 IEP proposed an ESY program consisting of [individual] tutoring in reading four times a week for 45-minutes each session for eight weeks, [individual] writing tutoring three times a week for 30-minutes each session for eight weeks. The times of delivery of this ESY component were to be worked out between the family and the tutor[s]. The IEP also provided for ESY instruction in reading, writing, and mathematics in the learning support classroom environment three days per week, 4 hours per day from June 25, 2014 through August 1, 2014. Transportation was to be provided for this component of the ESY program for summer 2014. [P-11]
157. The ESY goals referenced back to the goals/objectives addressed during the 2013-2014 school year. [P-11]
158. The Parents rejected the December 2013 IEP, setting forth their reasons in their response to the accompanying December 12, 2013 NOREP. [P-18]
159. Student received private tutoring in the Wilson reading program during the summer of 2014. [NT 31]
160. Student has shown concerning behavioral issues at the private school such as work refusal, pushing back against teacher support, covering ears with hands, multiple reminders to stay on task, refusal to work with speech therapist, ignoring teacher, lack of accountability, not being cooperative in class, not participating and having difficulty controlling [Student's] impolite comments, and responded to

an adult with “I don’t care.” refusing to pick up pencil and begin a task, when frustrated with writing refused to use Wilson spelling and sight word strategies and writing consisted of strings consonants rather than words. [NT 136-152, 553; P-24]

161. Student currently remains at the private school in 5th grade [2014-2015 school year]. [NT 31]
162. On June 27, 2014, the Parents filed their Due Process Complaint, asking for reimbursement for Student’s private school tuition and fees from the 2012-2013 school year to the end of the current 2014-2015 school year including tuition/fees or tutoring for ESY during the summers of 2012, 2013 and 2014, and all transportation costs associated with Student’s transportation to the private school for summers 2012 and 2013. [P-1, P-56, P-57]

Legal Basis

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

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). All witnesses seemed to be testifying honestly to the best of their abilities and recollections and each contributed a portion of valuable information. I did have difficulty with some of the mother’s testimony and refer the reader to the Discussion section below as well as to Footnote #5 in the Findings of Fact above.

Tuition Reimbursement: Although parents have an absolute right to decide upon the

program and placement that they believe will best meet their student's needs, public funding for that choice is available only under limited circumstances. The IDEA does not require that a school district "pay for the cost of education including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. §1412 (a)(10)(C)(i); 34 C.F.R §300.148.

The United States Supreme Court established a three part test to determine whether or not a school district is obligated to fund a private placement. *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. *See also, Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

School districts and other LEAs provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" at the time it was created to enable the student to receive "meaningful educational benefit", a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011) *aff'd*, 2013 U.S. App. LEXIS 11091 (3d Cir. 2013).

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the student only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*. The Third Circuit explains that while an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia*; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), *cert. den.* 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District noted, [LEAs] "need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA

represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008).). The U.S. District Court for the Middle District of Pennsylvania has noted, ‘the standard is virtually minimal, indeed, “modest.”’ *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 1:11-CV-574, 2012 WL 2979038 at 27 (M.D. Pa. July 20, 2012). The law requires only that the plan was reasonably calculated to provide meaningful benefit at the time it was created.

The IEP for each student with a disability must include a statement of the student’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the student’s needs that result from the student’s disability to enable the student to be involved in and progress in the general curriculum and meeting the student’s other educational needs that result from the student’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the student...and a statement of the program modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other students with disabilities and nondisabled students; an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class... 34 CFR §300.347(a)(1) through (4)

While the IDEA also requires that disabled students be placed in the least restrictive environment [LRE] that will provide meaningful educational benefit, and Congress has expressed a clear intent and preference that disabled children be placed in regular education classes, and that removal of a student from regular education classrooms is permissible “only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (20 U.S.C.A. § 1412(a)(5)(A); 34 CFR §300.550), the issue of LRE only becomes determinative when the choice is between two appropriate placements. Should the District’s original placement, or subsequent proposed placements be deemed inappropriate, then the Parent’s unilaterally chosen placement of their child in a school for disabled children cannot be found inappropriate on LRE grounds alone. See *S.H. v. State-Operated School District of the City of Newark*, 336 F3d 260, 272 (3d Cir. 2003); *Florence County School District Four v. Carter*, 510 U.S. 7, 13 (1992); *Kruelle v. New Castle City School District*, 642 F.2d 687, 695 (3d Cir. 1981).

Discussion

The Parents are entitled to tuition and transportation reimbursement only if the District failed to provide Student with an appropriate program and placement, and if not, only if the private school is an appropriate placement, and if so, only if the equities weigh in favor of granting the relief the Parents request.

Given the chronology of events starting with the timing of the private evaluation, Student’s visit to the private school, Parents’ request for the District to provide the

private school with records and the removal of Student from the school after only four months of IEP implementation, the evidence unequivocally supports the finding that the Parents placed Student in the private school not because they disagreed with the special education program the District offered, but because they were convinced that the private school would offer Student a better program. The District discussed having Student evaluated with the Parents on November 7, 2011. One week later, by November 14, 2011, the Parents had already selected a private evaluator, notified the District of such, and sought to set up an observation appointment at a specific private school. The mother's testimony that the Parents' decision to have a private evaluation was based on their having lost faith in the District because of the District's time lapse between writing the PTE form on November 11th and mailing it on November 28th cannot be credited, given that as of November 14, 2011 the Parents had already selected a private evaluator and identified a particular private school. Similarly, although following the evaluation an IEP was proposed and accepted on February 10, 2012, by February 29, 2012 the Parents were having Student visit the private school and asking the District to forward educational records. Further, although the mother stated that the Parents saw no progress once the IEP was implemented, progress monitoring as presented in the June 2012 IEP showed considerable progress especially as the District was only able to implement the IEP for approximately four months during which time Student was not only undergoing trials of medications but had also broken a [limb] and was out of school for a considerable amount of time, movement-impaired and likely in discomfort once returned to school. Again I cannot credit the mother's testimony with much weight as it relates to reasons for removing Student from the District.

After minimal opportunity to settle in and work within the structure of the IEP, Student was withdrawn from the District and placed privately. The standard for tuition reimbursement is not whether the District's program was better than that of the private school but whether the District's program was appropriate. In this case each of the District's IEPs was appropriate. Having very carefully reviewed each successive IEP as put forth in the Findings of Fact above, I am compelled to conclude that from its very first IEP in February 2012 through and including the May 2013 IEP, the September 2013 IEP, and the December 4, 2013 IEP, the District offered Student a free appropriate public education [FAPE] representing considerably more than the basic floor of opportunity the law affords, both for the academic years as well as for Extended School Year. Moreover, the IEPs permit Student to be educated in the least restrictive environment appropriate to Student's needs. Despite only a brief 4-month implementation period, Student made educational progress under the initial IEP. Again, this is remarkable since during the same period Student was undergoing trials of psychotropic medications and suffered a badly fractured [limb] which led to pain, discomfort, decreased mobility, school absence and diminished focus on learning.

Having found that the District provided and offered Student FAPE, it is not necessary to reach the question of the appropriateness of the private school or to examine the equities.

Conclusion

The testimony of every witness, and the content of each exhibit, was considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties' written closings were also carefully considered. In light of all the testimonial and documentary evidence before me I conclude that the District offered a free appropriate public education to Student and therefore the Parents' claims must fail. As the District has offered Student an appropriate program and placement in the least restrictive environment it is not necessary to address the appropriateness of the Parents' unilateral placement or the equities in the matter.

Order

It is hereby ordered that:

1. The School District offered Student a free appropriate public education for school years 2012-2013, 2013-2014, and 2014-2015 as well as for ESY for the summers of 2012, 2013 and 2014.
2. As the District offered Student a free appropriate public education the District is not required to reimburse the Parents for tuition, fees or transportation costs for any of the time period at issue.

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

November 26, 2014

Date

Linda M. Valentini, Psy.D., CHO

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