

*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: C.H.

ODR #15189/13-14 AS

Date of Birth:  
[redacted]

Date of Hearing:  
August 1, 2014

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Governor Mifflin School District  
10 South Waverly Street  
Shillington, PA 19607

Date Record Closed :

Date of Decision:

Hearing Officer:

Representative:  
Elizabeth Kapo, Esquire  
2123 Pinehurst Road  
Bethlehem, PA 18018

Kathleen Metcalfe, Esquire  
Sweet, Stevens, Katz and Williams  
331 Butler Avenue  
New Britain, PA 18901

August 9, 2014

August 12, 2014

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

## Background

Student<sup>1</sup> is an early-teen aged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the classification of Specific Learning Disability.

The current matter concerns a due process request from the Parents who disagree with the District's proposed in-district program and placement for the 2014-2015 school year and instead request that the hearing officer order a prospective placement in a private school [hereinafter Private School] at public expense for the 2014-2015 school year and for ESY for summer 2015.<sup>2</sup> In the alternative the Parents request that the District be ordered to develop an appropriate IEP and provide compensatory education for Student until an appropriate IEP is produced.

## Issue

1. Is the program/placement the District offered to Student for the 2014-2015 school year appropriate?
2. If the District's proposed program/placement is not appropriate should the hearing officer order a prospective placement at public expense at the Private School, including transportation, for the 2014-2015 school year including a summer 2015 program?
3. If the hearing officer does not order a prospective placement at the Private School but finds the offered IEP inappropriate, is Student entitled to compensatory education until an appropriate IEP is produced?

## Findings of Fact<sup>3</sup>

1. Student received a private psychoeducational evaluation in 2009 and was found to have a specific learning disability. The evaluator concluded that Student had "double deficit dyslexia", which is characterized by severe phonological and orthographic

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

<sup>2</sup> This issue was one of two issues included in the Parents' June 12, 2014 complaint. The matter was bifurcated to accommodate the need to hold an expedited summer 2014 Extended School Year [ESY] hearing and complete a decision on ESY within 30 days of the filing of the complaint. That hearing was assigned ODR #15129/13-14 AS and a Decision was issued on July 4, 2014.

<sup>3</sup> Some of the facts directly relevant to the issue addressed in this decision were taken from the prior decision regarding ESY noted above. These facts are referenced as "HO Decision" with the relevant prior decision page number. Most references to the ESY issue have been removed as that issue has been decided.

- processing problems, as well as visual perceptual processing problems which interfere with the ability to write clear print. [NT 116-118; J-1<sup>4</sup>]
2. Student attended public school in the District until midway through 5<sup>th</sup> grade, at which time Student began attending a private school for children with learning disabilities [hereinafter Former Private School] where Student remained through 7<sup>th</sup> grade, the end of the 2013-2014 school year. [J-5; HO Decision Page 2]
  3. Two reevaluations conducted by the District in 2013 and 2014 found deficits continuing in reading, mathematics and written expression. [J-7, J-8]
  4. Student's tuition at the Former Private School was publicly funded by the District pursuant to a settlement agreement. Although the settlement agreement covered just the 5<sup>th</sup> and 6<sup>th</sup> grades, the parties mutually entered into an extension of the settlement agreement [hereinafter new settlement agreement] for another year to include 7<sup>th</sup> grade<sup>5</sup>. [Hearing Officer Decision Page 3]
  5. Clause 4 of the new settlement agreement states "Nothing in this agreement should be construed to suggest that the District will pay for costs for the Student to attend [Former Private School] beyond the conclusion of the 2013-2014 school year. Further nothing about this agreement shall be construed to mean that pendency attaches to [Former Private School] and the Parents hereby acknowledge and agree that under no circumstances does pendency attach to [Former Private School]". [J-5; Hearing Officer Decision Page 4]
  6. Clause 3 of the new settlement agreement provides "In the event that a dispute arises between the District and Parents over the appropriateness of the proposed program and/or placement for the Student, the parties agree that pendency shall be the program and placement offered by the District, unless or until a due process hearing officer renders a decision regarding an appropriate program and placement for the student." [J-5; Hearing Officer Decision Page 4]
  7. Because they were becoming dissatisfied with the services at the Former Private School the Parents began looking at other options. As early as March 2013 Student's mother and aunt had visited the Private School<sup>6</sup>. [Hearing Officer Decision Page 4]

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<sup>4</sup> Counsel are again commended for preparing Joint exhibits which contributed to the efficient use of hearing time. Note that the exhibit numbers refer to exhibits presented at the current hearing only and not those used in the previous hearing.

<sup>5</sup> In the previous hearing, and again briefly mentioned by Student's mother in testimony in this hearing [NT 317], the Parents contend that the settlement agreement was extended because the District defaulted on a reevaluation timeline which was part of the original agreement. This version of events was contradicted by the District's director of special education who testified that she and the mother had ongoing discussions about allowing Student to remain at the Former Private School for another year and that this is why Student was not reevaluated. As stated in the earlier ESY decision, I find this point to be moot. The mother's raising the point again in the context of this hearing and its inclusion in the Parents' written closing statement invites the reader of the current record to draw an adverse inference about the District which I did not draw after hearing ample testimony on this point in the previous hearing.

<sup>6</sup> In the previous decision Private School was referenced as Proposed Private School.

8. Because Student “still had a lot of gaps in [Student’s] learning” and “was still struggling quite a bit” the Parents “didn’t see how Student would fit coming back” to the District. [NT 316-317]
9. On or about February 1, 2014 the parents submitted an application to the Private School. [J-33; Hearing Officer Decision Page 4]
10. After reviewing the application, the Private School invited Student and Parents to visit for one day on or about March 25, 2014. [Hearing Officer Decision Page 4]
11. Student was accepted into the Private School on April 3, 2014. [J-34; Hearing Officer Decision Page 4]
12. However, given the fact that the new settlement agreement would terminate at the end of the 2013-2014 school year, the District was proposing to bring Student back into public school for 8<sup>th</sup> grade, the 2014-2015 school year. Although the new settlement agreement did not require a reevaluation, on April 3, 2014 the District issued a Permission to Evaluate form. The Parents signed the Permission to Evaluate form on April 4, 2014 but the form was not received in the District until April 10, 2014. The Parents consented to the evaluation as proposed and did not request any additional assessments. [NT 160; J-5; Hearing Officer Decision Page 5]
13. On April 8, 2014, after Student had been accepted into the Private School, the Parents wrote a letter to the District stating that they had explored options other than the Former Private School for Student for 8<sup>th</sup> grade. The Parents requested that the District provide public funding for Student’s 8<sup>th</sup> grade tuition at the Private School including ESY for summer 2015 as well as ESY services at the Private School for summer 2014, and transportation for the programs. The Parents submitted this letter to the District along with the approved Permission to Evaluate form. [NT 252-253; J-13; Hearing Officer Decision Pages 4-5]
14. The reevaluation was completed on April 28, 2014 and the report was provided to the Parents on April 29, 2014. The District and the Parents met to discuss the results of the evaluation on April 29, 2014. [J-8; Hearing Officer Decision Page 5]
15. For purposes of the reevaluation the District psychologist, among other procedures, conducted a record review. Cognitive testing completed in February 2008, in January 2009 and in April 2009 found Student’s cognitive functioning to be in the lower half of the average range with IQ levels of 97, 99 and 94 respectively.<sup>7</sup> The District psychologist believed that there was sufficient data regarding Student’s cognitive ability to determine continued eligibility and plan programming and therefore did not repeat cognitive testing. [NT 151; J-8; HO Decision Page 5]

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<sup>7</sup> This hearing officer, holding a Pennsylvania psychology license and Pennsylvania school certification takes notice of the fact that the Wechsler IQ scores are arranged on the “bell-shaped” curve. A score of 100 is exactly average with the average range being from 90 through 109, low average from 80 through 89, and borderline from 70 through 79.

16. For purposes of the April 2014 reevaluation, in order to assess Student's academic needs for program planning the District psychologist utilized the Woodcock-Johnson III Tests of Achievement, Form B, Normative Update. She chose this instrument so that she could compare Student's scores with those obtained on the same instrument three years previously. Standard scores were as follows: Broad Reading 83 [low average range] at the 12th percentile, Broad Math 86 [low average range] at the 17th percentile, Math Calculation 76 [borderline range ] at the 5th percentile, Broad Written Language 82 [low average range] at the 11th percentile, Written Expression 84 [low average range] at the 14th percentile, Academic Skills 79 [top of borderline range] at the 8th percentile, Academic Fluency 79 [top of borderline range] at the 8th percentile, Academic Applications 90 [bottom of average range] at the 26th percentile. [NT 151, 161; J-8; Hearing Officer Decision Page 6]
17. Comparisons of the 2009, 2013 and current 2014 WJ-III scores in reading and math are as follows: Broad Reading 92/79/83, Broad Math 99/84/86. The most recent scores indicated that Student had not "closed the gap" in the areas of weakness despite having attended a private school for students with learning disabilities for two-and-a-half years. [NT 189; J-8; Hearing Officer Decision Page 6]
18. An assistive technology evaluation was not done as part of the District's reevaluation because Student was already using assistive technology at the Former Private School.<sup>8</sup> [NT 152; Hearing Officer Decision Pages 8 and 9]
19. The District's reevaluation resulted in the conclusion that Student continued to be eligible for special education under the classification of specific learning disability. The parties are in agreement with this conclusion and are in agreement about Student's having needs in reading, math and written expression. [NT 162-163, 337-338; J-8; Hearing Officer Decision Page 6]
20. The District's special education director, the District's psychologist and the Parents<sup>9</sup> met on April 29, 2014 to discuss the evaluation results. The District's special education director, the District's psychologist and the District's assistant superintendent then met again with Student's mother and aunt on May 5, 2014 to discuss the Parents' concerns. The Parents summarized these meetings in a letter to the District dated May 19, 2014. [Hearing Officer Decision Page 6]
21. Based on the evaluation results, the District drafted an IEP and convened an IEP meeting on May 16, 2014 to discuss Student's program for the 2014-2015 school year. [J-16; Hearing Officer Decision Page 7]
22. The Draft May 16<sup>th</sup> IEP contained annual goals in the identified areas of need in reading, mathematics and written expression. [J-9]
23. Given the Parents' concern that Student "close the gap" the annual goals for the draft IEP for Student's first year back in the District were written for Student to reach, in

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<sup>8</sup> "Keyboarding" was mentioned for the first time in the current hearing. [NT 161]

<sup>9</sup> Student's aunt attended some if not all the meetings as well.

- one school year, the average range of mastery on 8<sup>th</sup> grade standards which starts at the 25<sup>th</sup> percentile on the AimsWeb progress monitoring system. [NT 58-59, 226]
24. Baselines were to be collected over the summer during the District's proposed 5-week transition program designed for Student. However, given that the Parents did not choose to have Student participate in that program, baselines are to be collected at the start of school which is the usual practice in the District to assess if there was any regression by its students over the summer. [NT 58, 60-61]
  25. In the May 19, 2014 letter the Parents rejected the May 16<sup>th</sup> draft of the IEP via the accompanying NOREP that proposed a District program for 2014-2015, and again requested that the District fund a summer program during 2014 and the upcoming year's tuition, both at Private School, including transportation. [NT 37-41; J-9; Hearing Officer Decision Page 7]
  26. The Parents' concerns raised at the May 16<sup>th</sup> IEP meeting and reiterated in their May 19<sup>th</sup> letter were Orton-Gillingham training for all Student's teachers, the amount of special education instruction Student would receive in the District given that Student would be coming from a 100% special education environment, the amount of 1:1 instruction Student would receive, Student's ability to be confident and independent in accessing assistive technology independently, self-advocacy, and increasing ability to complete homework and schoolwork independently through acquiring executive functioning skills such as organization. [J-9]
  27. In light of the Parents' concerns raised at the May 16<sup>th</sup> IEP meeting and in their May 19<sup>th</sup> letter the District's special education director met with the assigned case manager who had drafted parts of the IEP and with the middle school principal to discuss how the Parents' concerns could be addressed. [NT 66, 275]
  28. The District considered the draft May 16, 2014 IEP to be an appropriate offer of FAPE. However, based on the Parents' concerns expressed in the May 16, 2014 IEP meeting as well as in their letter of May 19, 2014 about Student transitioning from a 100% special education program/placement to a District middle school placement the District began working on a staffing plan that would provide more special education time for Student. Even before the Parents filed a due process complaint the District had begun to consider how it could add additional services to Student's program/placement. [NT 61-62, 275-276; J-9]
  29. As the case manager mapped out a revised program for Student, she realized that in order to fully implement the plan for Student, another special education teacher would have to be hired for the middle school. [NT 66]
  30. The director of special education approached the District business manager and assistant superintendent about the need for an additional special education teacher at the middle school in order to implement expanded special education instruction for Student. It was agreed that the proposal would be presented to the school board at the June meeting for approval. [NT 276]

31. The District provided a response by letter dated May 27<sup>th</sup>, declining to fund a summer 2014 program and the 2014-2015 school year at the Private School. The Parents filed for due process on June 12, 2014 raising both the prospective placement issue and the 2014 summer program issue. [J-13; Hearing Officer Decision Page 7]
32. On June 13, 2014 the District sent out an invitation to the Parents to attend a Resolution Meeting on June 17, 2014; in proposing the meeting date, as well as accommodating the Parents' schedule, the District was following the strict short timelines for expedited ESY hearing Resolution Meetings since the 2014 ESY issue was included in the Parents' due process complaint. [J-14; Hearing Officer Decision Page 7]
33. The director of special education presented her proposal for Student's program at the School Board meeting held on June 16, 2014, and the school board gave its approval to fund the additional middle school special education teacher needed for the District to implement its draft proposed program/placement for Student for the 2014-2015 school year. [NT 276-277]
34. At the June 17, 2014 Resolution Meeting the District discussed the elements of a proposed summer 2014 transition plan<sup>10</sup> as well as the added elements of the draft May 16<sup>th</sup> IEP including a draft of Student's weekly schedule for the 2014-2015 school year given that the school board had approved funding for the additional teacher position. The Parents raised additional concerns at the Resolution Meeting. [NT 287-288; J-17; Hearing Officer Decision Page 8]
35. Based on the Parents' concerns discussed at the May 16<sup>th</sup> IEP meeting, the Parents' concerns expressed in their May 19<sup>th</sup> letter, and the Parents' additional concerns raised at the June 17<sup>th</sup> Resolution Meeting, and given that on June 16<sup>th</sup> the school board had approved the expenditure for another special education teacher position at the middle school, on June 18, 2014 the District further revised the draft May 16<sup>th</sup> IEP [hereinafter Proposed IEP] and District counsel sent it to Parents' counsel with an accompanying NOREP on June 19, 2014. [NT 26-32, 37, 50-51, 289, 293; J-15, J-16<sup>11</sup>]

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<sup>10</sup> The District's proposed summer transition plan for Student, which was deemed appropriate in the previous decision, consisted of one-to-one instruction in reading, math and written expression for five weeks, three days per week, three hours per day totaling 45 hours of individual instruction. The instruction would be provided by the teachers who would be Student's middle school special education teachers should Student enter the District's middle school in August. While working with Student the teachers would be establishing baseline data for reading, writing and math to be used in monitoring Student's progress during the coming school year. In addition to the one-to-one academic instruction the District proposed to provide four hours of one-to-one executive functioning training by a certified school psychologist using a published program. Finally the District's summer transition plan included one-to-one work with Student on assistive technology. Student would be provided with a laptop and various assistive technology programs would be trialed to see which ones best met Student's needs. The Parents did not accept the District's offer, instead at their own expense sending Student to the summer program upon which the Private School had conditioned Student's acceptance for the fall. [Hearing Officer Decision, Pages 8 and 9]

<sup>11</sup> The term "final offer" was applied to this draft of the May 16<sup>th</sup> IEP by the hearing officer because at the end of the hearing day counsel were arguing over how the document should be titled in the Table of Contents in the joint exhibit book. The document is a revised draft of the May 16<sup>th</sup> IEP, and is the last draft

36. The District revised the successive drafts of the IEP discussed at the May 16<sup>th</sup> IEP meeting in accord with written and verbal input from the Parents. The District did not “revise the IEP” because the May 16<sup>th</sup> IEP was a draft only and not an approved IEP to be implemented. [NT 26-32]
37. On June 27, 2014<sup>12</sup> the Parents signed their disapproval of the NOREP indicating that the ESY decision was pending. The document was received in the District on July 7, 2014. [J-16]
38. The Proposed IEP and schedule provides four 56-minute periods of 1:1 or 1:2 Orton-Gillingham based reading instruction per 6-day cycle. <sup>13</sup> The decision about whether to use the Wilson program or another Orton-Gillingham-based methodology program will be made at the beginning of the school year when baselines are established<sup>14</sup>. Student’s case manager will be Student’s reading teacher and serve as the co-teacher in Student’s regular education classes. [NT 11-13, 20, 44-45, 47; J-16, J-40<sup>15</sup>]
39. The case manager has been a special education teacher for 21 years, has Pennsylvania certification in special education, in middle school English and middle school math, and holds a Master’s Degree in Curriculum and Instruction. [NT 10]
40. The case manager received the 30-hour comprehensive training, including techniques for use with middle school students, by the Orton-Gillingham Institute and holds her Level I certification in the Wilson program for students K through 12<sup>th</sup> grade. She is scheduled to take the advanced Orton-Gillingham 24-hour training in the fall. [NT 11, 14-15, 54; J-26]
41. On the other two days of the 6-day cycle Student is scheduled to attend physical education in the time-block occupied by reading. [NT 45; J-16, J-40]
42. The Proposed IEP and schedule provides six 56-minute special education learning support math periods, including math-fact fluency instruction. The class utilizes the Saxon Math curriculum<sup>16</sup>. The special education math teacher is scheduled to take the comprehensive Orton-Gillingham program in the fall. [NT 54; J-16, J-40]

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of the IEP offered prior to the current due process hearing. “Final offer” does not imply that the District considered the draft immutable.

<sup>12</sup> Judicial notice is taken that June 27, 2014 was a Friday. July 7, 2014 was the Monday following the Friday July 4 holiday. The record does not reference a date the Parents mailed the NOREP back. The previous decision was sent by email to counsel for the parties on July 4, 2014.

<sup>13</sup> This equates to 220 minutes per 6-day cycle. The Private School provides 197 minutes per 5-day cycle. The Private School will only provide 1:1 for an extra fee. [NT 242]

<sup>14</sup> Had Student attended the summer transition program offered by the District Student would have received 15 hours of 1:1 reading instruction using the Orton-Gillingham methodology during which the case manager/reading teacher would have established baselines. [Hearing Officer Decision Page 8]

<sup>15</sup> J-40 is the final actual schedule for Student created based upon the J-17 draft schedule after the middle school principal had a chance to go over the building schedule. [NT 47-48]

<sup>16</sup> The Private School does not use a specific math program. [NT 256]



43. The Proposed IEP and schedule provides six 56-minute special education learning support English periods per 6-day cycle. As part of the learning support English class Student will receive daily replacement writing instruction. The special education English teacher uses the Reasoning and Writing program and the Essentials for Writing programs. The special education English teacher has received the comprehensive 30-hour Orton-Gillingham training and is scheduled to take the advanced Orton-Gillingham training in the fall. [NT 19, 194, 215; J-16, J-26, J-40]
44. The Proposed IEP and schedule provides that a special education teacher will co-teach all Student's 56-minute regular education science, history and "specials" classes. Accordingly Student will have 100% instructional "face time" with a special education teacher although Student will be in the aforementioned co-taught regular education classes. [NT 20-21, 280-284; J-16, J-40]
45. The Proposed IEP and schedule provides five 46-minute special education periods for executive functioning support in organization and study skills per 6-day cycle. [J-16, J-40]
46. To assist Student with appropriate assistive technology the District has purchased SOLO Suite software on which all Student's teachers will be trained prior to the beginning of the school year.<sup>17</sup> [NT 77-78]
47. The revised draft of the May 16<sup>th</sup> IEP sent to the Parents on June 18<sup>th</sup> includes additional goals in decoding and in time management and organization. [J-16]
48. The revised draft of the May 16<sup>th</sup> IEP sent to the Parents on June 18<sup>th</sup> proposes additions to the Specially Designed Instructions [SDIs] addressing class size limits, assistive technology, testing accommodations and curriculum modifications by the co-teaching special education teacher. [J-16]
49. Given school board approval, the summer transition plan was also added to the draft May 16<sup>th</sup> IEP<sup>18</sup> but Student did not attend the transition program. Student will be able to come into the middle school the week before the children start back to school to meet the teachers, tour the building and get Student's assistive technology set up. [NT 79-80]
50. As Student is eligible for ESY services for summer 2015, goals in reading decoding / encoding, written expression, math fact fluency and math computation will be addressed in the District. [J-16]

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<sup>17</sup> Again, had Student attended the summer transition program an IU assistive technology consultant would have worked with Student on AT trials.

<sup>18</sup> Provision of the summer transition plan to Student required school board approval for summer expenditures specifically for the reading, math and written expression teachers, the psychologist, and [possibly] the IU AT consultant. The school board granted its approval for these expenditures.

## 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 (3<sup>rd</sup> 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).

The District's witnesses each provided credible detailed testimony upon which I could relay and to which I assigned considerable weight. The testimony of the witnesses for the Parents was assigned less weight. An administrator of the Private School testified on the Parents' behalf. Although he gave a general description of the Private School program, frankly I was surprised at the information gaps this witness displayed about Student and Student's proposed specific services at the Private School. [NT 243-244, 257-261, 263, 267-270]. The private psychologist who testified on the Parents' behalf has not seen Student since April 2009 when Student was in 2<sup>nd</sup> grade, and was called for purposes of litigation to review the District's reevaluation reports and comment on the offered IEP. [NT 115-116] She has not spoken to anyone in the Former Private School where Student spent the past two-and-a-half years and she has not spoken with anyone in the District about Student. Most importantly when she testified about the District's offered program/placement she was not looking at the final draft of the May 16<sup>th</sup> IEP that is now under consideration. Although in the past I have relied on this particular psychologist's expert testimony about her own evaluations and have given it considerable weight in other hearings, in this case I was not persuaded by her criticisms of the District's choice of test instruments in the reevaluations nor by her critique of the IEP based on the District's not identifying a specific reading program. Reevaluations are given for the purpose of determining whether a child remains eligible for special education and for the purposes of educational planning; the District's reevaluations accomplished these

objectives and both parties agree that Student remains eligible and requires specially designed instruction in reading, math and written expression. It is well-established that an IEP does not need to list specific commercially-published programs in order to be appropriate. Overall I found I could give very little weight to this witness's testimony in these proceedings. The Parents are invested in the completely understandable idea that the Private School will close the gap between Student and same-grade peers. However, there was nothing offered in the mother's testimony to weigh against the District's proposed program beyond vague criticisms and nebulous concerns.

Standards for Evaluations: The purpose of an initial evaluation is to determine whether the child meets any of the criteria for identification as a "child with a disability" as that term is defined in 34 C.F.R. §300.8, as well as to provide a basis for the contents of an eligible child's IEP, including a determination of the extent to which the child can make appropriate progress "in the general education curriculum." C.F.R. §§300.8, 300.304(b)(1)(i), (ii). Although the IDEA obligates a local educational agency to conduct a "full and individual initial evaluation ..." [20 U.S.C. §1414(a)(1)(A)], there is less specificity regarding reevaluation. C.F.R. §§ 300.304 – 300.305. As part of any reevaluation, the IEP team and appropriate professionals, with "input from the child's parents," must "identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ... ." 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). Evaluation procedures must be sufficient to "assist in determining ... [t]he content of the child's IEP. 34 C.F.R. §300.304(b)(1). *Brett S. v. West Chester Area School District*, No. 04-5598 (E.D. Pa., March 13, 2006). The IDEA requires utilization of assessment tools and strategies aimed at enabling the child to participate in the "general education curriculum" and "determining an appropriate educational program" for the child. 20 U.S.C. §1414(b)(3)(A)(ii). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related service needs" and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). If additional data from testing is utilized in a reevaluation, then that portion of the reevaluation must comport with the requirements set forth in 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3) [instruments must be technically sound] and 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1) [instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher].

Standards for a Free Appropriate Public Education: Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §711.1 *et seq.* and 34 C.F.R. §300.300, *et seq.* a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA). A FAPE is "an educational instruction specially designed . . . to meet the unique needs of a child with a disability, coupled with any additional 'related services' that are 'required to assist a child with a disability to benefit from [that instruction]'" *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982);

*Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (citing 20 U.S.C. § 1401(29)); see also 20 U.S.C. §§ 1401(9), (26)(A). In determining whether an LEA has offered an appropriate program, the proper standard is whether the proposed program is reasonably calculated to confer meaningful educational benefit. *Rowley*. “Meaningful benefit” means that an eligible student’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999).

However, under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, an LEA is not required to provide an eligible student with services designed to provide the best possible education to maximize educational benefits or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995). Pennsylvania’s Eastern District Court wrote that under the IDEA “schools are held to a minimum baseline standard, a standard that may fails to meet the expectations of the parents of disabled and nondisabled children alike”. *Sinan L. et al vs School District of Philadelphia*, 2007 WL 1933021 ([E.D. Pa. 2007]). 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).

#### Discussion

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.

The Parents are convinced that Private School is superior to the District’s proposed program/placement for the upcoming school year and more importantly profess to believe that the District’s proposed program/placement is inappropriate. I must disagree with the Parents, as I find the final draft of the May 16<sup>th</sup> IEP, issued on June 19<sup>th</sup>, more than appropriate. I will therefore not address the Private School in detail any further than in the few footnotes above.

The Parents believe that a year at the Private School will “close the gap” between Student’s cognitive ability and achievement in reading. Whether the Private School could make that happen or not, closing the gap is not the standard for meaningful educational progress. See, e.g. *El Paso Indep. S.D. v. Robert W.*, 898 F.Supp. 442, (W.D. Texas, 1995) (standard for meaningful educational benefit was not whether gap between student and his nondisabled peers was widening but, rather, student had to be getting meaningful educational benefit without regard to what his peers were doing; it was not reasonable to compare a student with unique problems to nondisabled students, and reasonable progress for student may have been completely unreasonable for his age peers); *Sherri High v. Exeter Township S.D.*, WL363832, (E.D. PA. 2010) (“Plaintiffs argue progress was not meaningful and the school should have done more to close the reading gap between

Stephanie and her peers. While this Court recognizes every parent wants his or her child reading on grade level, Stephanie's parents could not have reasonably expected the District to close a six-year gap in her reading ability in one year. Furthermore, the IDEA does not require such a demanding result from public schools"). Given their less than satisfactory experience with Student's last private school the Parents' optimism about Private School is a testament to their heartfelt determination to help their child succeed.

I have carefully reviewed the final draft of the May 16<sup>th</sup> IEP and listened to the testimony of the District's witnesses describing the proposed District program detailed in the Findings of Fact above. I have also listened to the District's very credible explanations about the process of revising the drafts of the May 16<sup>th</sup> IEP and find no violation in the procedure and find no lack of FAPE in the product. The efforts to which the District's director of special education went to address the Parents' multiple and ongoing concerns, even to the point of approaching the school board seeking and obtaining approval for funding for an additional special education teacher are admirable and went far beyond what any family could expect from many, many school districts. The District has gone far beyond an appropriate offer of FAPE and is offering, in the least restrictive environment, a very fine program for Student that may well prove superior to that offered by the Private School. The Parents have not met their burden of proof in this matter and therefore cannot prevail. The District has offered a comprehensive, well thought out program and placement that is responsive to all the Parents' expressed concerns, and more importantly responsive to the needs of the Student at the present time.

Although not a factor in this decision it is fortunate that the Parents neither signed an enrollment contract nor paid a deposit to the Private School. It is also fortunate that although Student has not been attending school in the District since the middle of 5<sup>th</sup> grade, Student does participate in organized school-sponsored sports with peers who do attend the public schools, and according to the Parents, has friends in the middle school.

Since Student did not attend the comprehensive summer transition program the District designed, it is important for Student to prepare for attending school in the District and be given the opportunity for a visit to the school and meet the teachers during the week before the school year begins. To this end I am issuing this decision a full two weeks before its due date. Any claims not specifically addressed by this decision and order are now denied and dismissed.

## Order

It is hereby ordered that:

1. The program/placement the District offered to Student for the 2014-2015 school year in the last draft of the May 16<sup>th</sup> IEP issued on June 19, 2014 is appropriate in its entirety.
2. The last draft of the May 16<sup>th</sup> IEP issued on June 19, 2014 is to be implemented for the 2014-2015 school year including summer 2015 ESY.
3. The Parents' request for a prospective placement at the Private School for the 2014-2015 school year and for summer 2015 is denied.
4. As the last offered draft IEP is deemed to be appropriate in its entirety there is no need to revise that draft as it represents an offer of FAPE. Therefore there will be no entitlement to compensatory education services.

August 12, 2014

Date

*Linda M. Valentini, Psy.D., CHO*

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