

*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: M.D.  
ODR #1530/10-11-AS

Date of Birth:  
[redacted]

Dates of Hearing:  
May 9, 2011  
May 16, 2011  
June 24, 2011

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Downingtown Area School District  
540 Trestle Place  
Downingtown, PA 19335

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:  
Donald Litman, Esquire  
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July 9, 2011

July 27, 2011

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

## Background

Student<sup>1</sup> is an elementary-school-aged learning disabled eligible student enrolled in the Downingtown Area School District (District). Student's Parents (Parents) requested this hearing, alleging that the District failed to offer Student a free appropriate public education (FAPE) and seeking compensatory education as well as reimbursement for privately obtained evaluations. The District asserts that it has in all respects provided FAPE to Student and that neither compensatory education nor reimbursement is due. For the reasons presented below I find for the parents on several but not all issues.

## Issues

1. Did the District deny Student FAPE during the 2009-2010 school year by virtue of:
  - a. Failing to identify all areas of educational need and strengths; and/or<sup>2</sup>
  - b. Failing to address all areas of need through research-based intervention; and/or
  - c. Failing to deliver intervention in the intensity required; and/or
  - d. Failing to deliver interventions with fidelity?

Did Student fail to make meaningful educational progress due to the alleged denial of FAPE? If so, is Student entitled to compensatory education? If so, in what kind and in what amount?

2. Did the district deny Student FAPE during the 2010 2011 school year by virtue of:
  - a. Failing to provide sufficient speech language, occupational therapy, sensory integration<sup>3</sup>, and behavioral support services; and/or
  - b. Failing to obtain baselines, fashion concrete measurable goals and provide appropriate SDI in the areas of reading, OT/SI<sup>4</sup> and behavior; and/or
  - c. Failing to implement the IEP; and/or
  - d. Failing to consider the Student's educational needs and recommendations for addressing these needs in the ER and in the IEP as put forth in the independent evaluation of April 23, 2010?

Did Student fail to make meaningful educational progress due to alleged denial of FAPE? If so, is Student entitled to compensatory education? If so, in what kind and in what amount?

3. Did the District deny the Parents meaningful participation in Student's educational programming in 2009/2010 and in 2010/2011 by virtue of:

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<sup>1</sup> The decision is written without further reference to the Student's name or gender to provide privacy.

<sup>2</sup> The Parents did not present evidence addressing this sub-issue during the hearing and therefore I decline to reach this sub-issue.

<sup>3</sup> For the reason cited above I decline to reach the foregoing parts of this sub- issue.

<sup>4</sup> For the reason cited above I decline to reach this part of this sub-issue.

- a. Failing to provide verifiable data; and/or
  - b. Failing to allow the Parents to conduct progress monitoring;<sup>5</sup> and/or
  - c. Misleading the Parents and/or otherwise providing false data; and/or
  - d. Predetermining Student's educational programming in preparing/issuing the 2011 IEP and NOREP outside the IEP process?
4. Should the District be required to reimburse the Parents for various<sup>6</sup> independent evaluations privately obtained in 2010?

### Findings of Fact

1. Student is an elementary-school-age eligible student enrolled in the Downingtown Area School District. From the beginning of 2<sup>nd</sup> Grade Student began receiving special education services. [S-2]
2. Student has been classified with a specific learning disability in reading which an independent evaluator characterized as "developmental dyslexia". Student also has deficits in written language. [NT 589]
3. Student's Full Scale IQ/General Intellectual Ability has remained stable at standard score 101 as assessed by both the Wechsler Intelligence Scale for Children - Fourth Edition [WISC-IV] reported in evaluation reports dated August 2008 and June 2010, and the Woodcock-Johnson III Tests of Cognitive Ability [W-J-III] reported in an evaluation report dated April 2010. [S-1, S-6]

### Third Grade:

4. Student's 3rd Grade learning support teacher holds special education certification from the Commonwealth of Pennsylvania, and also holds a Masters degree in elementary education from West Chester University. She has been certified as a special education teacher for about eight years. [NT 223-224]
5. Prior to commencing work as Student's 3rd Grade learning support teacher this individual was contacted by the family and asked if she would tutor student for the summer. [NT 225]
6. The tutoring that the 3rd Grade learning support teacher provided to Student was done at Student's home. The teacher worked with Student on oral reading, fluency, and comprehension during the summer. The tutoring also involved math and some writing but there was not a large focus on writing. [NT 227, 279, 282]

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<sup>5</sup> For the reason cited above I decline to reach this sub-issue.

<sup>6</sup> This decision addresses only the April 2010 private evaluation. Evidence was not presented on any other evaluation within the time period addressed during this hearing.

7. During the summer Student was a pleasure to work with. Student would be focused and work really hard. [NT 287]
8. The 3rd Grade learning support teacher continued to provide tutoring to Student during the 3rd Grade school year. This tutoring involved mostly doing Student's homework or working on any type of project or studying for upcoming tests. [NT 291]<sup>7</sup>
9. When the teacher/tutor worked with Student at home she saw about the same types of cooperative behavior as she saw in school. [NT 331]
10. In 3rd Grade Student was instructed with Project Read, a phonics-based program. [NT 227- 228]
11. For reading Student also used the Harcourt Trophies program which is the regular education program, although the special education teacher used it at Level 2 for Student when Student was in 3rd Grade. [NT 228]
12. The independent evaluator testified that the Harcourt trophies program is not researched based but rather it is a generic program. [NT 601]
13. Supplemental instruction was provided through the Success Maker Enterprise, a new program, and the Readers Workshop program. [NT 230]
14. The learning support teacher also used a non-researched-based program called Prime Time that involves strategies of repeated, formal, modeled reading which in themselves are research-based strategies. [NT 232]

For a time the learning support teacher also used Plays for 2, a strategy which she sent home. [NT 233]

15. Student was eventually instructed in Read Naturally. Student started the Read Naturally program in March because fluency was an issue and the teacher was not seeing the progress that she wanted to see. The teacher testified that progress in fluency was very limited. [NT 229, 233]
16. In the Read Naturally program Student first does a "cold read" during which Student records the time, then the program takes Student through the passage, introduces the vocabulary, allows Student to do repeated reading, and asks a few comprehension questions and asks the reader to make predictions. Student listens to the tape a few times. Student reads with the tape. At the end Student does a

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<sup>7</sup> Tutoring stopped around March of 3rd Grade because of the schedule of the 3rd Grade learning support teacher who was acting as the tutor and the family. The parent e-mailed the teacher/tutor asking if they could just "put things on hold". [NT 325]

- “hot read” which is again timed, allowing Student to see the progress made after repeated reading and learning vocabulary. [NT45, 306-307]
17. Read Naturally is mostly done independently but during hot reads the teacher liked to sit with pupils to see that they were doing the program correctly. [NT 308]
  18. Student’s father notes that when he reads to Student, Student has an uncanny ability to learn from something verbal, which he identifies as a great strength. [NT 446-447]
  19. Although Student’s father understands the thinking behind Read Naturally, he is concerned that when Student has listened to stories several times Student is memorizing the story as opposed to being able to read it, so he's not certain that the hot reads produce valid data. Student has told father that sometimes after a cold read Student listens to the story four or five times before doing the hot read. [NT 447-448, 474- 475]
  20. The independent evaluator was formerly a teacher of children with learning disabilities in reading and occasionally still works with reluctant readers. [NT 637]
  21. The independent evaluator noted that Read Naturally is not backed by the What Works Clearinghouse which found that the program produces “no discernable effect”. However, the independent evaluator opined that while Read Naturally is “helpful”, unless it is implemented with fidelity, with feedback with the teacher sitting next to the pupil making sure it's titrated at the right levels it, can or can not be helpful. The independent evaluator said that she used to recommend that program but “since it started to be computer-based there are a lot of variables and there are other programming options that we would use to substitute instead of Read Naturally”. [NT 592, 602-603]
  22. The independent evaluator on cross-examination admitted that she cannot answer whether the Read Naturally program was implemented with fidelity since she did not observe the program being administered in the school setting. [NT 610]
  23. The independent evaluator also acknowledged because she did not observe the Student being instructed she cannot say whether the teacher interacted with student during Read Naturally even though the program is computer-based. [NT 611]
  24. The independent evaluator did not find out how the Reading Naturally program was delivered because although she and the teacher are leaving phone messages back and forth they never actually connected to have a conversation. [NT 691]

25. The independent evaluator acknowledged that she herself has never actually implemented the Read Naturally program. [NT 680]
26. The 3<sup>rd</sup> Grade learning support teacher testified that she “picked and chose” the areas of programs that most fit Student’s needs. [NT 228-229]
27. The 3<sup>rd</sup> Grade learning support teacher noted that Student’s need drove the instruction and the teacher would modify things as they went along. [NT 232]
28. In her testimony the 3<sup>rd</sup> Grade learning support teacher used the phrase “we were just hanging out in this area [fluency]” and this testimony in context suggested that there was little to no progress in reading fluency during the periods of “hanging out” [NT 233- 234]
29. In February 2010 the 3<sup>rd</sup> Grade learning support teacher noted in an email to another District staff person that Student was making very little progress on one of Student’s goals [fluency]. [P-68]
30. The 3<sup>rd</sup> Grade learning support teacher testified that she was “consistently and constantly” trying something new, allowing an intervention to be implemented long enough to see if it was going to work and show the progress wanted. She testified that “toward the end of the year” “We had some good things in place. The Read Naturally was in place. Was it huge gains? No, but after we got the interventions into place and programs, yes I felt there was gains in [Student’s] fluency”. [NT 334]
31. The learning support teacher noted that Student’s comprehension is definitely a stronger skill set than fluency. Student can read something and even though struggling with fluency is able to come away with the main idea of what was read. [NT 235]
32. The learning support teacher noticed that Student had difficulty with mechanics of writing as well as with spelling. Student was instructed with the spelling program Step-Phon. [NT 228]
33. Even though Student was in the regular education 3<sup>rd</sup> Grade math class the learning support teacher monitored math progress. The parents were concerned with math fluency facts but almost immediately Student met an assigned goal. [NT 237- 238]
34. The learning support teacher testified that she hadn't observed anxiety in Student any more than in Student’s typical peers, [NT 239, 351]
35. The learning support teacher believes that the rapport created with Student over the summer tutoring prior to the start of the school year was in some part responsible for having the Student feel safe in the classroom. [NT 239- 240]

36. Because the 3rd Grade learning support teacher was also tutoring Student at home on a weekly basis she and the mother would discuss any concerns the parents had. [NT 248]
37. Because the parents expressed concerns that homework was giving Student anxiety at home the learning support teacher modified the homework and put time limits on the amount of minutes Student would spend on homework. [NT 248-249]
38. At the June 2010 MDT meeting both the independent evaluator and the school district examiner were present, along with the Parents' neurodevelopmental disability case manager, the Parents and District staff. The meeting was lengthy but cordial. [NT 346-348, 498, 706, 714-715, 724]
39. At the MDT meeting in June 2010 the independent evaluator gained the impression that she and the school district psychologist broadly agreed with one another. There were no significant differences between their testing results. [NT 599]
40. At the MDT meeting in June 2010 the team considered both the independent evaluation that had been done in April 2010 and the District's evaluation that had been done in June 2010. The independent evaluator made over thirty recommendations. The 3rd Grade learning support teacher noted that some of the recommendations were very natural "teacher things" to do but that the main recommendations from the independent evaluator were put into the SDI in the IEP. [NT 256]
41. The learning support teacher provided the summer ESY teacher with Read Naturally materials because Student had been showing progress with that program and Student seemed to enjoy the program. [NT 262]

Fourth Grade:

42. Student's 4<sup>th</sup> Grade learning support teacher holds a Masters degree in reading from West Chester University and has Reading Specialist certification from the Commonwealth of Pennsylvania. She has twenty-two years of experience as a learning support teacher. [NT 30-31, 99]
43. During 4<sup>th</sup> Grade Student spent 50 to 60 minutes in the learning support classroom in the morning and another 30 minutes in the afternoon. Student was receiving one-on-one instruction for 30 minutes each day in the morning and 25 to 30 minutes each day direct one-on-one instruction in the afternoon. When Student was not in direct instruction Student could be in a small group of up to seven pupils for about 20 minutes in the morning. Student was also receiving two-to-one instruction for about 10 minutes twice a week. [NT 86, 88-89]

44. Student was instructed using Megawords, a scientifically-based, systematic, multisensory, explicit program of reading instruction. Megawords teaches the six syllabication types and the five syllabication rules. Megawords requires a great deal of practice and repetition. [NT 36-38]
45. Student has a great ability to memorize rules. Student knows phonemes but needs to gain automaticity necessary for fluency. [NT 37]
46. The independent evaluator characterized Megawords as a “good program to help kids learn how to structure English language for reading and spelling”. She opined that Megawords seemed to have contributed to Student’s improvement, noting also that there was “a relatively nice improvement in spelling.” [NT 600-602]
47. However, because the Parents liked the Read Naturally program and were quite concerned that it be implemented, the teacher also used that program with Student as an independent program and as time went on the teacher used Read Naturally more than Megawords. [NT 37, 43]
48. The teacher felt that Student was better served by using Megawords than by using Read Naturally. [NT 37-38]
49. Although the teacher gathered that the parents wanted “all the emphasis to be on reading fluency” for 4th Grade the learning support teacher was also concerned that comprehension needed to be addressed. [NT 107]
50. Because progress monitoring indicated that Student's comprehension was dropping, the teacher began using another program called Reading Milestones. [NT 38-39]
51. Reading Milestones is a research-based program and is highly controlled. It was originally targeted for hearing disabled students and then it was found that learning-disabled children highly benefited from the approach. [NT 39]
52. Reading Milestones involves the process of taking a cold time read, working with the story, and then taking a hot time read. Student is highly motivated and is aware of Student’s goals and progress. [NT 40-41]
53. Reading Milestones in the opinion of the learning support teacher is “a very well-rounded program” and it also has a writing component which is the reason that the learning support teacher chose it to instruct Student. [NT 109]
54. The independent evaluator opined that Reading Milestones is not a program to use for anyone with a reading based learning disability. She characterized it as “almost the opposite of what you should be using in terms of the whole word approach to reading”. She noted that Reading Milestones has no research base for



- a learning disabled population although it does have a research base with deaf students. [NT 601-602]
55. In addition to the scientifically-based programs provided to Student, the teacher also pulled from other research-based materials to promote Student's independence with comprehension, fluency, and grammar. The teacher used SRA and materials from Steck-Vaughn. [NT 41]
  56. Although the 4<sup>th</sup> Grade learning support teacher is trained in the Wilson reading program she did not use that program with Student [NT 95]
  57. Student has a specific learning disability in written language. Student has difficulty in written expression in the area of spelling. [NT34- 35]
  58. Intervention regarding writing was geared toward problems Student had that emerged from AIMSWeb progress monitoring. [NT 42]
  59. The teacher gave mini lessons in writing that included such topics as punctuation. [NT 42]
  60. Student was taught to answer open-ended questions using the RACE model: Restate, Answer, and Cite Examples and Evidence. [NT 51, 201-203]
  61. Student's teacher has worked on memory activities with Student and Student has done quite well. These activities were used to work on auditory memory and visual memory. [NT 83-84]
  62. Although the independent evaluator noted that student was "highly distractible" during testing, the learning support teacher noted that Student does not exhibit issues regarding attention in the day-to-day school setting. The learning support teacher did daily monitoring of work completion that included rewards. Student has received every class wide reward in contrast to some of the other pupils. Student is described as a thorough Student who was very responsible for everything that Student is asked to complete. [NT 161-162, 655]
  63. It is not appropriate for Student to have a behavior management plan because there are no behaviors that Student exhibits in school that would warrant an intensive behavior program. NT 163
  64. Student has not exhibited behaviors that would suggest anxiety in the 4th Grade learning support program. [NT 164-165, 185-186, 196]
  65. Student is motivated and works very hard. Student takes ownership of school work and has a high level of motivation in school. [NT 85-87]

Standardized Testing:

Comparison of WIAT Standardized Individual Achievement Testing<sup>8</sup>

66. WIAT August 2008: Following first grade, Student's academic achievement relative to same-aged peers, as assessed by the Wechsler Individual Achievement Test – Second Edition [WIAT-II] and reported in the District's evaluation report dated August 2008 was as follows:
- Reading Standard Score 92, 30<sup>th</sup> percentile;
  - Mathematics Standard Score 84, 14<sup>th</sup> percentile;
  - Writing Standard Score 84, 14<sup>th</sup> percentile. [S-2]
67. WIAT June 2010: Following 3rd Grade Student's academic achievement relative to same-aged peers, as assessed by the Wechsler Individual Achievement Test<sup>9</sup> and reported in the District's evaluation report dated June 2010 was as follows:
- Reading Standard Score 82 at the 12<sup>th</sup> percentile;
  - Mathematics Standard Score 103 at the 58<sup>th</sup> percentile;
  - Writing Standard Score 80 at the 23<sup>rd</sup> percentile. [S-7]

Comparison of Woodcock-Johnson III Standardized Individual Achievement Testing<sup>10</sup>

68. Woodcock April 2010: Near the end of 3rd Grade, as assessed through the Woodcock-Johnson III Tests of Achievement and reported in an independent evaluation report dated April 2010, relative to same-aged peers Student's Broad Reading standard score was 87 at the 19<sup>th</sup> percentile, Basic Math was 103 at the 57<sup>th</sup> percentile, and Broad Written Language was 85 at the 16<sup>th</sup> percentile. [S-6]
69. In April 2010 on the Woodcock-Johnson III Tests of Achievement, Student's Letter-Word Identification relative to same-aged peers was a standard score of 88 at the 22<sup>nd</sup> percentile, Reading Fluency was 87 at the 18<sup>th</sup> percentile, Passage Comprehension was 92 at the 29<sup>th</sup> percentile, and Word Attack was 89 at the 23<sup>rd</sup> percentile. [S-6]
70. In April 2010 on the independent evaluation as assessed on the Woodcock-Johnson III Tests of Cognitive Ability relative to same-aged peers Student's standard score on Phonemic Awareness was 125 at the 95<sup>th</sup> percentile and Sound Blending was 129 at the 98<sup>th</sup> percentile. [S-6]

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<sup>8</sup> The reader should note that when a pupil receives the same or a similar Standard Score from one year to the next on a particular portion of a test, the pupil has retained his/her position with respect to peers by making yearly progress in improving and acquiring new skills to maintain his/her ranking, keeping in mind that pupils to which he/she is being compared within the standardized testing population also continued to increase their skills. The average student is expected to make about a year's progress in a year; progress of a learning disabled child may be variable.

<sup>9</sup> One section of the report references the WIAT-II [published in 2001] and another section of the report references the WIAT-III [published in 2009]. This inconsistency is not trivial, since if the WIAT II was administered there can be a direct comparison of scores between the 2008 and the 2010 evaluations, whereas if the WIAT III was used the test and the norms would be different, thus not making a direct comparison possible, although an approximate comparison can be made. [S-7]

<sup>10</sup> Student was evaluated twice by a psychologist who was qualified for this hearing as an expert in neuropsychology and school psychology. [NT 580; P-40]

71. In April 2010 on the Woodcock-Johnson III Tests of Achievement Student's standard score for Math Fluency was 107 at the 68<sup>th</sup> percentile and Math Calculation was 111 at the 77<sup>th</sup> percentile. [S-6]
72. In April 2010 on the Woodcock-Johnson III Tests of Achievement Student's standard score for Spelling was 76 at the 6<sup>th</sup> percentile, while Spelling of Sounds was 98 at the 46<sup>th</sup> percentile. Writing Fluency was 100 at the 49<sup>th</sup> percentile and Writing Samples was 95 at the 28<sup>th</sup> percentile. [S-6]
73. Woodcock May 2011: Near the end of 4th Grade as assessed through the Woodcock-Johnson III Tests of Achievement and reported in an independent evaluation report dated May 2011, relative to same-aged peers Student's standard score in Broad Reading was 86 at the 18<sup>th</sup> percentile and Broad Math was 102 at the 55<sup>th</sup> percentile. A Writing score was not reported. [P-65]
74. In May 2011 on the Woodcock-Johnson III Tests of Achievement, Student's Letter-Word Identification relative to same-aged peers was a standard score of 94 at the 33<sup>rd</sup> percentile, Reading Fluency was 81 at the 10<sup>th</sup> percentile, Passage Comprehension was 90 at the 26<sup>th</sup> percentile, and Word Attack was 92 at the 30<sup>th</sup> percentile. [P-65]
75. In May 2011 on the Woodcock-Johnson III Tests of Achievement Student's standard score for Math Fluency was 109 at the 72<sup>nd</sup> percentile and Math Calculation was 104 at the 60<sup>th</sup> percentile. [P-65]
76. In May 2011 on the Woodcock-Johnson III Tests of Achievement Student's standard score for Spelling was 84 at the 15<sup>th</sup> percentile, and Writing Fluency was 106 at the 66<sup>th</sup> percentile. [P-65]

Other Standardized Testing Instruments:

77. In May 2011 another measure of written language, the Test of Written Language – Fourth Edition was administered. Student demonstrated average performance [standard score 9<sup>11</sup> at the 37<sup>th</sup> percentile] on Contextual Conventions [punctuation, spelling, capitalization] and in the above-average range for Story Composition [SS 14 at the 91<sup>st</sup> percentile]. These results supported findings from the Woodcock and were better than results of the WIAT administered a year previously. [P-65]
78. In May 2011 the Gray Oral Reading Test was administered with results that contrasted with the Woodcock-Johnson III results. On the GORT Student demonstrated more difficulty with fluency, rate and accuracy but demonstrated significant strengths in comprehension. The contrast in Student's decoding and fluency and Student's comprehension of what Student reads was marked. [P-65]

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<sup>11</sup> This instrument's Standard Scores are reported differently than the method used on the WISC, the WIAT, or the Woodcock. Average on this instrument is a Standard Score of 10 rather than 100.

79. The independent evaluator testified that when students are given the Gray Oral Reading Test she often gets lower scores from the students than on the Woodcock Johnson. She also noted that if she sees “emotional arousal” over reading she will also get lower scores on the GORT than on the Woodcock Johnson.<sup>12</sup> [NT 657]

Progress Monitoring:

Tracking of Reading Decoding and Fluency Progress Monitoring in the School<sup>13</sup>  
Reading Fluency - Words Read Correctly: First - Fourth Grades<sup>14</sup>

80. Baseline: In first grade when Student was not receiving special education, as assessed on the DIBELS at three points in the year [beginning, middle, end] Student’s Phonemic Segmentation Fluency scores were 44, 48, and 50 and at the end of the year were considered Established. Student’s Nonsense Word Fluency scores were 16, 54 and 32 and at the end of the year were considered Emerging. Student’s Oral Reading Fluency scores were 12 at mid-year and 14 at the end of the year and were considered High Risk. [S-1]
81. Baseline: In first grade, as assessed on the Harcourt Oral Reading Fluency measure in January 2008 and twice in May 2008, Student’s scores were 17 wpm, 30 wpm and 22 wpm, all within the 1<sup>st</sup> Quartile. [S-1]
82. Baseline: In first grade, as assessed through the Qualitative Reading Inventory in May 2008 Student read 37 wpm at the Pre-primer level, 23 wpm at the Primer level, and 25 wpm at the 1st Grade level, the latter two scores being At Risk. [S-1]
83. Baseline: Following first grade, as assessed on the Qualitative Reading Inventory – Fourth Edition [QRI-4] in August 2008 Student’s Automatic [timed] Accuracy and Total [untimed] Accuracy scores were: Pre-primer 65% and 85%; Primer 45% and 70%; 1<sup>st</sup> Grade 20% and 70%; 2<sup>nd</sup> Grade 10% and 25%. [S-1]
84. Baseline: Following first grade, as assessed on the Qualitative Reading Inventory – Fourth Edition [QRI-4] in August 2008 Student’s Correct Words Per Minute and Untimed Comprehension were: Pre-primer 24% and 70%; Pre-primer

<sup>12</sup> In this hearing officer’s experience from other due process hearings it is not unusual for the GORT to be somewhat at odds with other standardized test instruments assessing similar functions. Results from the GORT are included for purposes of making a complete record.

<sup>13</sup> This hearing officer agrees with the independent evaluator and the neurodevelopmental disabilities specialist that the data for the Read Naturally hot reads and cold reads is difficult to understand and interpret. Therefore that particular set of data is not included in this decision; there is ample other data on which to base this hearing officer’s findings. [NT 677-687, 739-740]

<sup>14</sup> An IEP prepared in February 2011 contains progress monitoring data for the first two marking periods of 2010-2011. [S-13] This IEP was not approved by the Parents and therefore Student is still being instructed under the June 2010 IEP. [S-8] As more complete monitoring data for the year is contained in the June 2010 IEP, the monitoring data provided in the February 2011 IEP is not presented here. .

- repeated 23% and 60%; Primer 19% and 75%, 1<sup>st</sup> Grade 7% and n/a [too frustrational to be administered]. [S-1]
85. In second grade when Student was receiving special education in reading, as assessed through AIMSWeb and monitored on 1<sup>st</sup> Grade materials, Student's Words Read Correctly per timed interval went from 21 in September 2008 to 65 in June 2009, exceeding the Goal of 59. [S-2]
86. The Parents hired a reading tutor the summer between 2<sup>nd</sup> and 3<sup>rd</sup> Grades and the tutor continued working with Student throughout 3<sup>rd</sup> Grade. The tutor was the individual who was Student's learning support teacher for 3<sup>rd</sup> Grade. [S-6]
87. In 3rd Grade, as assessed through AIMSWeb, and monitored on 2<sup>nd</sup> Grade materials, Student's Words Read Correctly per timed interval went from 31 in September 2009 to 61 in March 2010, failing to achieve the Goal of 100. The data probes indicated uneven functioning, dipping as low as 23 and as high as 78. [S-3]
88. Following 3rd Grade, the June 2010 District evaluation report notes administration of the Comprehensive Test of Phonological Processing [C-TOPP]. Compared with same-aged peers, Student's standard score in Oral Reading Fluency was 73. [S-7]
89. Following 3rd Grade, the June 2010 evaluation report provides progress monitoring information for the 2009-2010 school year. On the DIBELS 3<sup>rd</sup> Grade probes Student read 40 words correctly in September, 36 words correct in Winter, and 43 words correct in Spring; all three scores indicated Student was At-Risk and required "substantial intervention".<sup>15</sup> [S-7]
90. Following the independent evaluator's April 2010 report and subsequent attendance at the IEP meeting the District followed her recommendation to assess Student at the grade level at which Student was functioning rather than at Student's chronological grade level. [NT 623-626]
91. The independent evaluator clarified that after Student was finished being probed at the second grade level and began being probed at third grade level it would be consistent that Student would drop down to a lower score because the level of difficulty in the passages has increased. [NT 633-634]
92. In 4th Grade, as assessed through AIMSWeb, and monitored on 2<sup>nd</sup> Grade materials, Student's Words Read Correctly per timed interval went from 67 in September 2010 to 94 in April 2011, demonstrating achievement of the Goal of 90 words read correctly. [S-8]

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<sup>15</sup> Expectations for an average 3<sup>rd</sup> Grader on the DIBELS are not provided in the report. [S-7]

93. In 4th Grade, the District also used AIMSWeb to monitor Student's Words Read Correctly at the 3<sup>rd</sup> Grade level from the end of February 2011 to mid-April 2011. Student increased from 67 to 89, surpassing the Goal of 83. [S-8]
94. In 4th Grade, as assessed through AIMSWeb to monitor Student's Words Read Correctly at the 4<sup>th</sup> Grade level, Student scored 46 and 63 in the first and second marking periods respectively, both scores being well below average. [S-8]

Tracking of Reading Comprehension Progress Monitoring in the School  
Reading Comprehension: Second - Fourth Grades

95. In second grade, as assessed through the Informal Reading Inventory [IRI], when given a passage at the 1<sup>st</sup> Grade level Student demonstrated understanding by correctly answering 7 out of 8 questions at 87.5% in December 2008. Given the Harcourt End-of-Selection Grade 1 Test, Student scored 100% in December 2008, scored 93% on material at the 1.5 level in March 2009, and was said to have met the goal as of the end of June 2009. [S-2]
96. In 3rd Grade, as assessed through AIMSWeb, and monitored on 3<sup>rd</sup> Grade materials, Student's MAZE Comprehension Responses Correct went from 1 in September 2009 to 9 in March 2010, failing to achieve the Goal of 16. The data probes indicated uneven functioning, going as high as 13. [S-3]
97. In 3rd Grade, as assessed through the Informal Reading Inventory [IRI] when given a passage at the 2<sup>nd</sup> grade level Student demonstrated understanding by correctly answering 9 out of 10 questions at 88% in December 2009 and at 79% in March 2010, thus not meeting her goal of 90%. [S-3]
98. In 4th Grade, as assessed through AIMSWeb to monitor Student's comprehension [MAZE] at the 4<sup>th</sup> Grade level, Student scored 10 and 18 in the first and second marking periods respectively, the first score being below average and the second score being emerging. [S-8]
99. As assessed through AIMSWeb, and monitored on 4<sup>th</sup> Grade materials, Student's MAZE Comprehension Responses Correct went from 14 in September 2010 to 15 in April 2011, failing to achieve the Goal of 20. The data probes indicated uneven functioning, going as high as 13. [S-8]

Tracking of Written Expression Progress Monitoring in the School: Second – Fourth Grades

100. In second grade, as assessed through AIMSWeb, and monitored on 1<sup>st</sup> Grade materials, Student's Correct Writing Sequence per timed interval went from 8 in September 2008 to 20 in June 2009, exceeding the Goal of 19. [S-2]
101. In 3rd Grade, as assessed through AIMSWeb, and monitored on 1<sup>st</sup> Grade materials, Student's Correct Writing Sequence per timed interval went from 12 in

September 2009 to 16 in May 2010, but was erratic and went as high as 26, not meeting the Goal of 28.<sup>16</sup> [S-3, S-8]

102. In 4th Grade, as assessed through AIMSWeb, and monitored on 1<sup>st</sup> Grade materials, Student's Correct Writing Sequence per timed interval went from 24 in September 2010 to 30 in April 2011, not meeting the Goal of 38.<sup>17</sup> [S-8]

#### Tracking of Mathematics Progress Monitoring in the School: Second - Third Grades

103. In second grade, as assessed through AIMSWeb, and monitored on Kindergarten materials, Student's Correct Digits applying addition facts went from 24 in September 2008 to 64 in June 2009, exceeding the Goal of 32. Student's Correct Digits applying subtraction facts went from 12 in September 2008 to 31 in June 2009, exceeding the Goal of 32. [S-2]

104. In April 2010 near the end of 3rd Grade, the independent evaluator acknowledged Student's mathematics skills as strong and in the expected range for grade and recommended that if there is any mathematics work in the learning support room it should be directed toward reading, for example reading math problems and reading directions in the math program. [S-6]

#### Tracking of Anxiety Reports: First - Fourth Grades

105. Following first grade, as assessed through the Behavioral Assessment System for Children [BASC], based on independent ratings reflected in the August 2008 evaluation, by the mother, the father and the teacher, Student scored in the clinically significant range for anxiety across all three raters. The Parents informed the school that they were seeking private services for Student. [S-2]
106. Based on the Parents and the teacher's ratings, the original school district evaluation at the end of 1<sup>st</sup> Grade noted that Student was showing some anxiety symptoms but not enough to meet criteria for an anxiety diagnosis. It was noted however that there is a family history of anxiety. [NT 380; P-12]
107. In second grade, per the 9-9-08 IEP as of December 2008 Student did not exhibit signs of stress in the school setting. However as of December 2008 Student self-reported that Student experiences anxiety in math class and that drawing aids relaxation. Continuing stress in math class with appropriate coping was noted in March 2009 and "anxiety in the school setting" was being addressed by Student using coping strategies as noted in June 2009. [S-2]
108. In late 3rd Grade, as assessed through the Behavioral Assessment System for Children [BASC], based on independent ratings reflected in the April 2010 evaluation report, by the father, the special education teacher [who was also the

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<sup>16</sup> The data was presented in two separate exhibits, one being the IEP for 3<sup>rd</sup> Grade [S-3] and the other being the IEP for 4<sup>th</sup> Grade [S-8]. This hearing officer spent a considerable amount of time ascertaining what data sets were being presented.

<sup>17</sup> However, see section on Data Collection and Reporting in FF 164 below.

- tutor] and the regular education teacher, Student scored in the clinically significant range for anxiety as perceived by the father, but in the typical range for anxiety and all other markers as perceived by the teachers. On the Manifest Anxiety Scale for Children Student endorsed average [non-significant] levels of anxiety except for one clinically elevated subscale in the area of separation/panic.<sup>18</sup> [S-6]
109. Following 3rd Grade, the June 2010 evaluation report notes BASC-2 scores in the typical range, including the score for anxiety, as rated by the mother, and with the same results for ratings by the teachers.<sup>19</sup> [S-7]
110. Near the end of 4th Grade the May 2011 evaluation report notes BASC-2 scores for anxiety in the clinically significant range as rated by the mother and the father, but in the non-clinical range as rated by three teachers, and in the non-clinical range per Student's BASC-2 self-report. [P-65]
111. Student's 4th Grade teacher does not see Student as exhibiting anxiety in school. [NT 54]
112. The parents were concerned that reports from the school indicated Student was not exhibiting anxiety in that setting whereas they did see anxiety in the home setting during homework time. [NT 77]
113. The 4th Grade learning support teacher noted that Student tries to get homework done in school rather than doing it at home and considered that this may have been an avoidance reaction to having to do it at home. [NT 209-210]
114. Student's father does homework with Student. He tries to make homework fun and engaging for Student. He testified that reading created a reaction from Student that has confused him because he has tried a lot of strategies with Student. He noted that when the topic of reading and language arts arises, Student becomes "very uncomfortable". He notes that Student will stumble on words and when Student stumbles Student becomes frustrated and angry with self and may start to sulk. When father offers reassurance, Student insists on continuing "because I don't want to do this all night". Sometimes Student will come home and say "I did this at school today. I really did good at it at school". Some days might be a little bit better than others but typically since the Parent started working with Student on reading it is as described. [NT 442-445, 451-452]

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<sup>18</sup> Somewhat puzzling is the independent evaluator's contradictory account in the written report at page 8: "[Student] currently manifests and endorses symptoms of anxiety and anxiety-related behaviors" and the assignment of the diagnosis Adjustment Disorder with Anxiety. [S-6]

<sup>19</sup> Although the District evaluator notes that several teachers responded to the BASC-3, only one set of scores for teacher ratings is provided. It is not known whether the teachers filled out the survey in a group or the evaluator averaged the ratings. [S-7]



115. Student's father testified that doing reading homework with Student can be emotionally difficult at times for him, so he engages in various strategies to take a break. He does not think that Student can tell that it is emotionally difficult for him. [NT 469-470]
116. Student's mother does not feel that too much reading pressure is put on student at home [NT 494-495]
117. The Parents were truthful with Student about there being a due process hearing and Student asked who knew about this, suggesting concern that the teachers knew about it. [NT 566-570]
118. The Parents have been diligent in implementing any suggestions from school regarding reading homework and they've also sought suggestions from family and friends. [NT 449]
119. The school guidance counselor offered testimony regarding the issue of anxiety. [NT 359-394]
120. Over the time period of the last three years the guidance counselor had spoken with the Parents and e-mailed the Parents many times. The guidance counselor also has been in regular communication with the teachers. [NT 391-393]
121. In September of Student's 2<sup>nd</sup> Grade year it had been brought to the attention of the guidance counselor that the Parents had some concerns that Student had anxiety symptoms. The guidance counselor consulted with the 2<sup>nd</sup> Grade learning support teacher about strategies for helping manage any stress that arose, and the counselor agreed to work with Student in a small group [Stress Busters] for stress reduction during that year. The group met for six one-hour sessions. The guidance counselor followed up with the learning support teacher regularly to be sure Student was employing the strategies. [NT 363-364]
122. Student was always the one in the group showing the least amount of worry, concern or symptoms. Student was pleasant and looked as if Student was having fun. Student once shared a concern that the Parents might be getting divorced and another time Student was worried about a sibling's health<sup>20</sup>. [NT 367, 494]
123. The group members learned techniques to reduce anxiety such as deep breathing, progressive muscle relaxation, setting aside worry time, how to talk back to worries, and how to use communication to get needs met. [NT 368]

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<sup>20</sup> The record is not clear whether Student shared these two concerns in the 2<sup>nd</sup> Grade or the 3<sup>rd</sup> Grade Stress Busters Group.

124. In the 2<sup>nd</sup> Grade year neither the special education teacher nor the regular education teacher felt they were seeing any anxiety symptoms. The guidance counselor opined that having gotten the smaller setting for learning support, especially for reading, was helping Student such that the symptoms observed the year before were not seen. [NT 366]
125. At the request of the Parents who reported that Student was expressing anxiety at home about school, in 3<sup>rd</sup> Grade Student did the Stress Busters group with the guidance counselor again. Occasionally Student would self-refer to the guidance counselor about “little things along the way” such as friendship issues. [NT 364, 367]
126. Student’s relationship with the guidance counselor continued into 4<sup>th</sup> Grade with check-ins with the teachers and Student because the Parents continued to report concerns. The regular education teacher and the learning support teacher reported they were not seeing any overt signs of anxiety. [NT 368]
127. In November 2010, 4<sup>th</sup> Grade, Student told the guidance counselor Student was having a great year, loved the teachers wasn’t as worried about school work in previous years and had lots of friends. [ NT 369]
128. In February 2011 after an IEP meeting it was shared with the guidance counselor that based on the request of the Parents Student needed individual counseling as they were still seeing a lot of anxiety at home regard to school. The Parents were concerned that Student would be embarrassed to talk about anxiety in the small group. The new IEP crafted in February 2011 therefore contained counseling as a related service. [NT 365, 370]
129. Student received 15 minute weekly sessions in which the guidance counselor monitored Student’s stress levels using a rating from 0 to 10 on a thermometer. In the 11 times the guidance counselor met with Student from February 2011 up to the date of her testimony on May 16, 2011 Student has never self-rated higher than a “2” for stress. [NT 370]
130. The guidance counselor observed Student in the learning support room doing the Read Naturally program in November 2010 and watched Student again in the learning support room at parental request in April 2011. In the November observation Student was seen doing a cold read and then a repeated hot read. Because the Parents suggested that the guidance counselor meet Student directly after a reading lesson, in April the guidance counselor did so with unremarkable results. [NT 393]
131. The guidance counselor, who has worked through the years with students with anxiety, has not seen anything that would give her the impression that during the school day Student is suffering from any anxiety. [NT 371-372]

132. The guidance counselor's private case notes were entered into evidence, as was the stress monitoring packet that Student used to gauge anxiety. These documents prepared contemporaneously in the course of the school years fully supported the guidance counselor's testimony. [NT 373-378; S-12, P-48]
133. The independent evaluator found that Student did not meet criteria for an anxiety disorder. [NT 593]

#### Evaluators' Recommendations

134. The Parents obtained an independent evaluation in April 2010 when Student was near the end of 3rd Grade. The independent evaluator described Student as a child whose neuropsychological profile is consistent with developmental dyslexia including reading and written language difficulties. The evaluator noted, "[the neurological disorganization in individuals with Student's profile] often results in less efficient responsive [sic] to reading instruction, particularly with typical regular education methodologies." [S-6]
135. The independent evaluator recommended "intensive, systematic, and direct instruction which should be specifically targeted to remediate [Student's] reading fluency level." [S-6]
136. The independent evaluator recommended that a new baseline of a 2<sup>nd</sup> Grade reading level words correct per minute [wcpm] be conducted and set forth goals for future IEPs as follows: 2<sup>nd</sup> grade 90 wcpm, 3<sup>rd</sup> Grade 100 wcpm, 4<sup>th</sup> Grade 110 wcpm and 5<sup>th</sup> Grade 120 wcpm. [S-6]
137. The independent evaluator recommended that Student's written expression goals not be set at the 3<sup>rd</sup> Grade level until Student has mastered Student's 2<sup>nd</sup> Grade reading goals. [S-6]
138. Unexplained by any other reference in the body of the independent evaluator's report is her recommendation that the Student receive a genetics evaluation at a facility such as the Children's Hospital of Philadelphia "due to primarily [Student's] physical presentation of phenotypically unique features". [S-6]
139. The District reevaluated Student and issued a re-evaluation report in June 2010 following completion of 3<sup>rd</sup> Grade. [S-7]
140. The District evaluator recommended that Student have direct instruction in sound-symbol association and instruction in irregular letter patterns. She also recommended manipulative materials such as letter tiles, repeated reading strategies, flashcards and assistance in organizing learning. [S-7]
141. The Parents obtained a second independent evaluation in May 2011 from the same evaluator who performed the April 2010 evaluation. [P-65]

142. The independent evaluator noted that Student has shown adequate improvement over time with no areas of deficit noted, but that reading skills are more variable, and while Student can read words in isolation at near grade levels reading of longer and more difficult text consistently remains in the impaired range. [P-65]
143. The independent evaluator recommended that Student's reading program should be focused "most intensely with more direct intervention to improve [Student's] reading fluency" and that instruction in "meaningful word parts should now take precedence over letter-sound correspondences with emphasis on the exploration of patterns that can be detected in the sound, structure, and meaning features of words as opposed to the single sound level". [P-65]

#### Data Collection and Reporting<sup>21</sup> and Predetermination

144. The Parents have had concerns that Student was not making meaningful educational progress. [NT 76-77, 141]
145. Student's mother and the 4th Grade learning support teacher had frequent conversations, most of them by e-mail, although some were verbal. [NT192]
146. Student's 4<sup>th</sup> Grade teacher preferred face-to-face meetings with the Parents because Student's mother contacted her at times several times a week by e-mail, e-mails were sometimes long and involved and it took considerable time for the teacher to respond giving everything the Parent had asked for, and the teacher also was concerned that at times data would be misunderstood. [NT 80-81]
147. The Parents have been concerned that the District may have been manipulating progress monitoring data. [NT 76]
148. Student's progress has consistently and primarily been monitored through AIMSWeb. AIMSWeb is not an instructional program, it is a progress monitoring program. [NT 146-147]
149. The AIMSWeb progress monitoring program has been implemented for a few years now within the District in the special education program. [NT 129]
150. The District had some difficulty with the AIMSWeb technology monitoring Student's progress. [NT 81]
151. AIMSWeb monitoring for progress is done by entering probe scores into a computerized program which then creates a graph of progress. The computerized program assigns dates for probes, and because the actual probes are not

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<sup>21</sup> It took this hearing officer a considerable amount of time to decipher the data. Only some examples are presented.

- necessarily done on those identical dates the score date versus the probe date may be different. [NT 114-121]
152. The Parents were concerned about the fact that the data entered as a probe on AIMSWeb did not always match the actual date of probe administration. [NT 131]
153. Although reading progress monitoring was done using AIMSWeb, an earlier baseline had been established as a DIBELS norm. [NT 45-46]
154. DIBELS is a regular education benchmarking program the district previously used, but it is used no longer. It has been replaced by AIMSWeb. [NT 132]
155. DIBELS was administered to all students whether they were regular education or learning support in order to establish benchmarks in the fall, in the winter, and in the spring. AIMSWeb was used to progress monitor specific Students with IEP goals. [NT 352]
156. The DIBELS testing administered to Student would have been administered at Student's actual chronological grade level, whereas the AIMSWeb was administered at the level at which the Student's goal was set. [NT 252-253]
157. The Parents wanted DIBELS scores obtained in 4th Grade for purposes of comparison with the previous baseline, so the teacher administered the DIBELS to Student even though the program was no longer used. [NT 134, 412-413]
158. DIBELS and AIMSWeb are not necessarily comparable in that they have different readability passages and different norms from one another. [NT 132-133]
159. The independent evaluator noted that one difficulty with progress monitoring is that the target words correct per minute for various grade levels varies from assessment system to assessment system. She explained that a comparison of DIBELS scores with AIMSWeb scores is difficult because of the variability between the tools. Results depend on the actual reading samples, the readability of the samples, the relative ratio of sight words to decoded words to irregular word forms, the length of the sentences the complexity of the sentences, and the vocabulary used. [NT615- 616, 618]
160. Reading progress was also monitored through Reading Milestones which is curriculum-based. [NT 66]
161. Because Student uses contextual cues Student sometimes substitutes a word because of knowing the meaning of the sentence but not being able to

- decode the word. This aids comprehension but is recorded as an error in progress monitoring. [NT 47-48]
162. The IEP of June 17, 2009 [6-17-09 IEP] prepared at the end of 2<sup>nd</sup> Grade for implementation in 3<sup>rd</sup> Grade contains Present Levels of Academic Achievement and Functional Performance data that is in some part not carried over from the progress monitoring or assessments done during the 2<sup>nd</sup> Grade school year. [S-2, S-3]
163. The 6-17-09 IEP does reflect the AIMSWeb Oral Reading Fluency data [65 wcpm with benchmark of 59 wcpm using 1<sup>st</sup> Grade material]. The Dolch word list data does reflect 100% mastery of 2<sup>nd</sup> Grade words at the end of 2<sup>nd</sup> Grade as compared with only 65% mastery of the 2<sup>nd</sup> Grade words at the end of 1<sup>st</sup> Grade. [S-2, S-3]
164. The 6-17-09 IEP reports 24 Correct Writing Sequences rather than the 20 cws noted on the AIMSWeb monitoring chart. There is no AIMSWeb math data reported in the 6-17-09 IEP. [S-2, S-2]
165. The Harcourt Trophies End-of-Selection Tests Grade is reported as being 92% at Level 2-1, however the last recorded score was 93% at Level 1-5 in March, with a notation that Student had met the goal as of June but with no numerical data. [S-2, S-3]
166. The 6-17-09 IEP lists new assessments in the Present Levels section that did not appear in the AIMSWeb progress monitoring data through 2<sup>nd</sup> Grade, nor in the evaluation data from August 2008, nor in the IEP progress monitoring during 2008-2009. This new data is: The Critical Reading Inventory Word Lists [100% mastery of 1<sup>st</sup> Grade words and 95% mastery of 2<sup>nd</sup> Grade words]<sup>22</sup>; Second Grade Narrative Oral Reading Passage [Accuracy 98%, Comprehension 70%]; Second Grade Informational Oral Reading Passage [Accuracy 99%, Comprehension 60%]; Harcourt Trophies Vocabulary 2.1 [87%]; Harcourt Trophies Spelling [87%]; Math Trimester 3 Second Grade Posttest [24/30]. [S-3]
167. As noted earlier, in 4th Grade, as assessed through AIMSWeb, and monitored on 1<sup>st</sup> Grade materials, Student's Correct Writing Sequence per timed interval went from 24 in September 2010 to 30 in April 2011, not meeting the Goal of 38. However, another data set from March 2010 to March 2011, which overlaps the first set of data, has some differing scores. For example, the March 2010 to March 2011 data set has scores for 9/01 and 9/15 not presented in the September 2010 to April 2011 set, the score for 9/29 appears on both sets but one score is 24 and the other is 22, on 10/13 one score is 17 and the other is 24, and 10/6 and 10/20 appear on one or the other data set but not both. [S-8]

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<sup>22</sup> It is unclear if this is the "word list" referenced in the previous IEP although the score of 95% would suggest that this may be the same.

168. The Parents engaged the services of a neurodevelopmental disabilities specialist in April 2010 to help them navigate through the process. This specialist works with parents and school districts and testified as a fact witness in the hearing. [NT 541, 706-708]
169. When the neurodevelopmental disabilities specialist reviewed the data the District supplied to the Parents she found many inconsistencies. Because she works with AIMSWeb data frequently with school districts she couldn't understand why she couldn't compare "apples to apples" when she went from one report to the next. She testified "things would be moving all over the place; so I didn't know what to do with it." She noted she was very willing to accept whatever answer there was but just wanted bottom line data. [NT 712-713, 737-738]
170. The neurodevelopmental disabilities specialist has actually worked with AIMSWeb and has entered data into AIMSWeb. [NT 745-747]
171. At times Student seemed to be making "leaps and bounds" of an increase in data [correct words per minute] right after information was requested by the Parents. [NT 738]
172. At the suggestion of the neurodevelopmental disabilities specialist the Parents requested raw data so that the specialist could compare raw data points with the data presented, but despite many requests this was never produced. Raw data was being requested because of the inconsistency in the data presented; neither the Parents nor the neurodevelopmental disabilities specialist understood the graphs. [NT 508-510, 542, 563, 727, 741-743]
173. The Parents had requested records from the District, and in addition to records previously received, at the end of May 2011 they received a stack of records approximately as high as a ream of copy paper. In this collection of records there were no records that went back to the 2009-2010 school year, the first year in question at this hearing. [NT 750-751, 758-759]
174. Student's mother went through the records the family has received and prepared a summary, describing questions that she had about the documents received. This summary prepared by the Parent fairly and accurately puts forth the exceptions the family takes to the production of records from the District. [NT 751-753; P 66]
175. At the February 2011 meeting the neurodevelopmental disabilities specialist noted that the relationship between the District and the Parents was less cordial than had been the case at the June 2010 IEP meeting. [NT 735]
176. At the February 2011 meeting the Parents asked for placement at a private school, for the summer and for the following school year. The District responded

that it was not placing Student at the private school, and that Student would remain in the public school, with no further discussion. [NT 736]

Independent Evaluation:

177. The Parents asked for an independent evaluation, and the District denied the request. [S-5, P-17]
178. As a compromise the District recommended commencing an evaluation of its own if Parents would withdraw their IEE request. [NT 560-561]
179. The cost of the independent evaluation that was secured in April 2010 is \$2400. [P-63]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in “equipoise,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer*. The Parents met their burden of persuasion on several issues and prevailed on those issues, given the preponderance of the evidence in their favor and the resulting lack of evenly balanced evidence between the parties. On other issues the Parents did not meet their burden as the evidence on the District’s side was preponderant.

Credibility of Witnesses

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).

All the witnesses in this matter appeared to be testifying honestly and to the best of their recollections. I found the testimony of the 4<sup>th</sup> Grade teacher regarding reading and written language interventions, and the guidance counselor regarding anxiety, particularly



compelling. With regard to the Parents' contention that data was confusing and at times contradictory I found the testimony of the neurodevelopmental disabilities specialist who had herself worked with AIMSweb particularly persuasive as it in many respects comported with my own findings regarding the data produced for this hearing. The testimony of the Parents' independent evaluator was generally credited, however her opinion regarding the manner in which the reading programs were delivered was given limited weight because she did not observe the classroom and the manner in which reading programs were provided. I found that the testimony of the 3<sup>rd</sup> Grade teacher tended in large part to support the Parents' case rather than the District's case. She did not settle on a specific effective methodology, and her testimony suggests that she did not deliver programs with the frequency, intensity and fidelity required. Given this, it is interesting that the record reflects that the Parents had many more concerns about the program delivered in 4<sup>th</sup> Grade than in 3<sup>rd</sup> Grade, although the outcome measures suggest that Student made progress in 4<sup>th</sup> Grade whereas regression in reading was seen during 3<sup>rd</sup> Grade. This discrepancy may be due to the fact that the 3<sup>rd</sup> Grade teacher also tutored student in Student's home before and during 3<sup>rd</sup> Grade, thus forming a relationship with the Parents and being readily accessible for face-to-face conversations in contrast to the availability of the 4<sup>th</sup> Grade teacher.

The Parents each testified and I found them to be concerned, devoted parents who had been doing everything they could think of to assist Student. They asked for a great deal of information and communicated very frequently with school staff, which likely caused the staff to spend considerably more time on Student than on most other pupils. While the Parents' interest is natural, the frequency of their communication and the breadth of their requests may have been responsible in part for what they perceived as a negative attitude from the District as 4<sup>th</sup> Grade went along. Having said that, however, I can certainly understand the Parents' frustration, given the confusing and at times disorganized data - data which apparently they requested on a number of occasions, had to wait for, and then could not interpret once received.

Legal Basis:

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.*

Once disabled children are identified as being eligible for special education services the IDEIA requires the State to provide them with a "free appropriate public education". 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

School districts 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” to enable the child to receive “meaningful educational benefit”, a principle established by nearly 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); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> 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)

“Meaningful educational benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk.*

Under the Supreme Court’s interpretation of the IDEA in *Rowley*, and in interpretations rendered in other relevant circuit court cases, a school district is not required to provide the best possible program to a student, or to maximize the student’s potential. Rather, 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, “Districts 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 law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit.

The Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP provides meaningful benefit necessary to satisfy the IDEA’s FAPE standard. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). One of the issues in the instant case, then, is whether or not the School District has shown that it provided a “meaningful benefit” to this Student, progress which is gauged in terms of educational improvement commensurate with academic ability.

Discussion:Progress

In order to determine whether Student demonstrated progress in the educational program and derived meaningful benefit from the IEP, after having carefully considered the volume of data presented in this hearing, this hearing officer has chosen to rely heavily upon data derived from standardized testing. This choice was made for several reasons. Standardized testing as its name implies, is administered in the same standard way with every student, is extensively researched and is widely normed over a large population. Additionally, the standardized testing in this case was administered by examiners both assigned by the District and engaged by the Parents, such that comparing data did not pose an advantage of one side over the other. Finally although classroom progress monitoring can be useful, this hearing officer has no way of knowing with certainty whether or not the probes were given exactly as directed by the publisher of the reading programs and progress monitoring programs and whether the data was accurately recorded.

The standardized testing showed that in the two-year interval between two different District psychologists' administrations of the WIAT at the end of 1<sup>st</sup> Grade and at the end of 3<sup>rd</sup> Grade, Student lost ground relative to reading, not only failing to maintain the previous reading Standard Score which would have indicated one year's progress in one year's time, but in fact dropping ten Standard Score points, a considerable decline over the interval. [FF 67, 68] This decline correlates with the findings of fact that the third-grade teacher used a variety of programs [FF 10 through 17], seemed to be searching for the right program, seemed not to give any one program a long enough, intensive enough try [FF 27, 28, 31] and seemed surprisingly nonchalant about Student's "just hanging around" in the area of fluency, not making progress at various times during the year. [FF 29, 30]

On the other hand in the same two-year interval between administrations of the WIAT Student gained a considerable amount of ground relative to mathematics, gaining 19 Standard Score points, an increase of over one standard deviation. [FF 67, 68]

In the same two-year interval between administrations of the WIAT Student remained approximately at the same Standard Score level in writing, indicating about one year's progress in one year.<sup>23</sup> [FF 67, 68]

In the one year interval between two administrations by the independent evaluator of the Woodcock-Johnson III Tests of Achievement which covered approximately the entire 4<sup>th</sup> Grade year, Student remained approximately at the same Standard Score level in both reading and math, indicating about one year's progress in that one year in both areas. In written language Student showed some modest gains beyond a year-for-year progress in spelling, and writing fluency showed a modest increase over a one-year gain as well, and was solidly in the average range, commensurate with Student's cognitive testing results. [FF 69, 74]

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<sup>23</sup> "Closing the gap" between a learning disabled child and typical peers would require the child, who struggles with learning, to make more progress per year than a typical child in regular education makes.

The independent evaluator noted that oral reading is an area that is difficult to remediate [NT 643] and that research has indicated that it takes five times as much intervention in the area of oral reading than in other areas of reading, and the older the child gets more has to be done in order to get the same output. She opined that remediation can happen given sufficient frequency, intensity, duration, fidelity of programming, and using research-based programming intended to remediate that specific skill deficit. [NT 644]

The independent evaluator acknowledged that student has made progress in the area of word reading, and remarked that student's comprehension has not been an issue. The area of significant need is oral reading, or reading fluency. [NT 638]

The independent evaluator opined that for a child as low as student was and who was making gains everywhere else the data regarding reading does not represent adequate progress in the area of reading fluency. [NT 640] Although I agree with her regarding 3<sup>rd</sup> Grade, it appeared that the independent evaluator was criticizing the District for not having Student “close the gap” between Student’s reading fluency and that of neurotypical peers. 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”).

Data:

This hearing officer found the progress monitoring data presented during the hearing to be confusing and at times it seemed to be contradictory. Furthermore, present levels cited in the IEPs did not match up at times with present levels according to progress monitoring. [FF 165 through 168] Although some of the difficulty may be that Student was assessed using various progress monitoring devices according to the reading programs delivered, even data within programs was difficult to decipher. I do not believe that the District deliberately manipulated the data, or purposely provided accurate data in a confusing way, but I do believe that the District did not prepare data for presentation to the Parents in a way that was Parent-friendly. The District suspected that data could be misinterpreted, yet the solution was to require the Parents to come to a meeting rather than provide the data in a clear format. As I noted above, I had considerable difficulty understanding the progress monitoring data, particularly the AIMSWeb, even though my profession is clinical and school psychology. More telling was the fact that the neurodevelopmental disabilities specialist, who had used AIMSWeb herself, also had

difficulty. [FF 170]

Not having clear, understandable data prevented the Parents in this case from being able to gauge whether their child was making educational progress in reading. It makes perfect sense that they would seek an independent evaluation in order to obtain more information. Given that the April 2010 evaluation, done near the end of 3<sup>rd</sup> Grade, was sought to obtain a clearer picture of Student's status, a picture that was not provided through progress monitoring, the equitable remedy that I am ordering is reimbursement for that particular evaluation.

With regard to predetermination, at an IEP meeting the District did quickly orally deny Parent's oral request for a private school placement. [FF 177] However, I do not find that this was predetermination. The District and the Parents had a cordial and productive MDT meeting at the end of 3<sup>rd</sup> Grade, and had negotiated a comprehensive IEP for 4<sup>th</sup> Grade. There is no evidence that the District predetermined its refusal to discuss placements; the District was appropriately planning for Student's remaining in the District programs.

#### Compensatory Education

The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy when a school district has failed to provide a student with FAPE. *Lester H. v. Gilhool*, 916 F.2d 865, 871-73 (3d Cir. 1990) The purpose of compensatory education is to replace those educational services lost because of the school district's failure. [*Id.*] Student is entitled to compensatory education for the 2009-2010 school year, as Student was denied a free appropriate public education that year in the area of reading. Given the severity of Student's reading disability and not only the lack of progress but also the actual regression during 3<sup>rd</sup> Grade, I find that an appropriate remedy is 1.5 hours per day of compensatory education services for each scheduled school day Student was in present in school during the 2009-2010 school year.

The Parents may select the form of the compensatory education so long as it provides any appropriate developmental, remedial, or therapeutic service that addresses the needs identified in the District's ER and in the independent educational evaluation. There are financial limits on the Parents' discretion in selecting the appropriate developmental, remedial, or therapeutic services. The costs to the District of providing the awarded hours of compensatory education may not exceed the full cost of the services that were denied. Full costs are the case-load proportional<sup>24</sup> salary and fringe benefits that would have been paid to the actual professional [Certified Reading Specialist] who should have provided the District services. This principle sets the maximum cost of all of the hours of the compensatory education awarded. The Parents may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The Parents also may use fewer hours of expensive services so long as the maximum dollar amount of the award is not exceeded. Finally, the Parents must not be

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<sup>24</sup> For example, if the Reading Specialist in the elementary school was responsible for 10 students the proportion would be one-tenth of the cost of the salary and benefits.

required to make co-payments or use personal insurance to pay for any part of these services.

Student may use the compensatory education award through the summer following 7<sup>th</sup> Grade as remediation needs to be intensive and three years is a reasonable period over which to apply the hours.

### Order

It is hereby ordered that:

1. The District denied Student FAPE during the 2009-2010 school year by failing to deliver appropriate interventions, in the intensity required and failing to deliver interventions with fidelity.
2. As Student failed to make meaningful educational progress in reading due to the denial of FAPE during the 2009-2010 school year, Student is entitled to compensatory education. Compensatory education is awarded in the amount of 1.5 hours per day for every day school was in session and Student was present during the 2009-2010 school year, according to the parameters put forth above.
3. The District did not deny Student FAPE during the 2010 2011 school year and therefore Student is not entitled to compensatory education for that year.
4. The District denied the Parents meaningful participation in Student's educational programming in 2009/2010 and in 2010/2011 by virtue of failing to provide verifiable data and thereby limiting the Parents' ability to monitor Student's progress.
5. As the Parents were not provided with progress monitoring that a reasonable and attentive parent could understand, as an equitable remedy the District shall be required to reimburse the Parents for the independent evaluation they privately obtained in April 2010 which they sought to assist them to discern whether or not Student was making progress.

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

July 27, 2011  
Date

*Linda M. Valentini, Psy.D., CHO*  
Linda M. Valentini, Psy.D., CHO  
PA Special Education Hearing Officer