

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

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: J.B.

Date of Birth: [redacted]

Dates of Hearing: 4/22/2015, 5/13/2015, 5/18/2015, 6/8/2015

### CLOSED HEARING

ODR File No. 15875-14-15 AS

Parties to the Hearing:

Representative:

Parents

Parent[s]

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Date Record Closed:

June 29, 2015

Date of Decision:

July 16, 2015

Hearing Officer:

Cathy A. Skidmore, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

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

Following a ruling that limited the scope of the claims to the two year period following the applicable "knew or should have known" date(s), and concluded that the Parents had presented claims only with respect to the 2012-13, 2013-14, and 2014-15 school years, the case proceeded to a due process hearing convening over four sessions, at which the parties presented evidence in support of their respective positions.<sup>4</sup> The Parent sought to establish that the District's special education program, as offered and implemented, denied Student FAPE; and they sought compensatory education and tuition reimbursement for a private school (Private School). They also requested reimbursement for an Independent Educational Evaluation (IEE) and a District-funded speech/language evaluation. The District maintained that its program, as offered and implemented, was appropriate for Student and did not deny FAPE; and that there was no merit to the evaluation issues.

For the reasons that follow, I find in favor of the Parents on a portion of their claims.

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

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

<sup>3</sup> 29 U.S.C. § 794.

<sup>4</sup> References to the transcript will be to the Notes of Testimony (N.T.) followed by page numbers. Parent Exhibits will be referenced as "P-" followed by the number, and School District Exhibits will be referenced as "S-" followed by the number. Exhibits which are duplicative (*e.g.*, P-2 and S-1) are referenced to that of one party or the other, or occasionally both.

## **ISSUES**

1. Whether the District provided an appropriate educational program to Student for the 2012-13 and 2013-14 school years;
2. If the District did not provide an appropriate program for 2012-13 and 2013-14, whether Student is entitled to compensatory education and in what form and amount;
3. Whether the District offered an appropriate educational program to Student for the 2014-15 school year;
4. If the District did not offer an appropriate program for 2014-15, whether the Parents and Student are entitled to reimbursement for tuition to private school;
5. Whether the Parents are entitled to reimbursement for an Independent Educational Evaluation; and
6. Whether the District should provide an independent speech/language evaluation at public expense.

## **FINDINGS OF FACT**

1. Student is a late teenaged student who is a resident of the District and is eligible for special education as a child with a disability. (N.T. 36-37; S-10 p. 10)
2. Student began receiving early intervention services when Student was approximately two years of age. (N.T. 44; S-1 p. 1)
3. Student started attending school in the District in kindergarten. Student struggled with academics throughout Student's career in the District. In its initial evaluation of Student, the District identified Student as eligible for special education on the basis of a speech/language impairment, and subsequent evaluations noted a cognitive disability. (N.T. 44-47; S-1 pp. 1-3)
4. The District reevaluated Student in the fall of 2008 at the request of the Parents and issued a Reevaluation Report (RR). Student was determined to be eligible for special education on the basis of an intellectual disability<sup>5</sup> and a speech/language impairment. The RR rejected a classification of specific learning disability in reading based on a comparison of Student's cognitive ability and academic achievement. (P-2; S-1)
5. The District issued another RR in November 2010. This RR summarized Student's educational history and records and included new parent and teacher input, achievement

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<sup>5</sup> All references to mental retardation in the record will use the term intellectual disability consistent with Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010); *see* 20 U.S.C. § 1401(3)(A)(i).

testing, speech/language assessment, and then-current progress monitoring information. Assessment of adaptive behavior was also obtained. Educational needs included reading fluency, decoding, and comprehension; mathematics calculation and problem solving skills; written expression skills; functional academic skills; independent living skills; social skills; and speech intelligibility. Student remained eligible for special education on the basis of an intellectual disability and a speech/language impairment. (S-3)

6. Student understood that the content of classes was modified for Student, and Student was self-conscious about being treated differently from peers. Student had a very difficult year during the eighth grade year (2011-12) in all aspects: academically, socially, and emotionally. Student felt isolated from peers and overwhelmed academically, and was concerned about the transition to the high school for ninth grade. (N.T. 52-56, 58-60, 101)
7. An Individualized Education Program (IEP) was developed in November 2011 when Student was in eighth grade. This IEP included current information on Student's present levels of academic achievement and functional performance, and identified needs for reading fluency, decoding, and comprehension; mathematics calculation and problem solving; written expression; and speech intelligibility. Annual goals addressed reading fluency and reading comprehension, mathematics calculation and problem solving, written expression, and articulation. Program modifications and specially designed instruction included use of a computer; mathematics manipulatives; repetition and practice; research-based programming for reading, language arts, and mathematics; testing accommodations; a modified curriculum for content area classes; and speech/language therapy was a related service. Student would be provided with supplemental learning support, participating in regular education for social studies with support and receiving other instruction in the learning support classroom. (S-4)
8. Student's decoding skills were assessed in January of 2012, at which time Student was a beginning reader and a beginning decoder. By March of 2012, Student was a developing decoder. (N.T. 386-88; S-6)
9. In May 2012, Student's IEP team met to discuss Student's transition to high school, including Student's schedule. Student's IEP was revised to provide for transition planning, including Student's coursework. Student was also determined to be eligible for Extended School Year (ESY) services. The Parents approved the Notice of Recommended Educational Placement (NOREP) in June 2012. (S-7, S-8)
10. The IEP team also determined that programming for Student's speech/language needs in ninth and tenth grades would focus on speech intelligibility and articulation, with generalization through practice using in pragmatic social language skills. (N.T. 871-72)
11. Student obtained final grades ranging from A to B+ for the 2011-12 school year. (P-5; S-9)
12. Student requires that information be presented in a simplified manner, at Student's level, with repetition. At the high school level, Student requires modification to the content of

the regular education curriculum. (N.T. 118-19, 646-649-50, 692)

### 2012-13 School Year

13. The District high school had class periods (approximately 45 minutes each day) during the 2012-13 school year. (N.T. 164, 381-82)
14. By the end of the eighth grade year, the Parents had begun to explore private school placements and visited Private School. The Parents were concerned about Student's social relationships and expressed those concerns to the District. They did not decide to pursue that option, in part because the District would not support a private placement, and in part because they were not completely satisfied with Private School as an option for Student. Student toured the District high school before entering ninth grade. (N.T. 60-63, 65, 102-03, 105, 929-33, 1000; S-36 pp. 3-5)
15. The District did not observe that Student had difficulty with social skills or social relationships at school. (N.T. 234-35, 523, 542-43, 714-15, 875, 881-82, 904-07, 950-54, 1005, 1028)
16. The District suggested that Student attend a technical program for ninth grade in a service occupation program. The family agreed to this suggestion even though the options in this particular program were limited to areas in which Student did not have an interest. Student and one of the Parents toured the technical program building before ninth grade. (N.T. 63, 67-68, 70-71, 104, 935-37)
17. Student attended the technical program in the morning and high school classes for a half day in the afternoon. The District arranged for special transportation to the technical program because of concerns of the Parents and Student about peers who would be riding the bus. An aide was assigned to Student at the technical program but then discontinued because Student was not comfortable with having the aide present throughout the day. (N.T. 68-70, 107-08, 111-13, 937-38, 940-42)
18. The District evaluated Student again in October 2012 and issued a new RR. At a meeting to discuss the RR, the Parents did not express any disagreement with the document. (N.T. 789-91; S-10)
19. The 2012 RR summarized Student's educational history and records, and included an administration of the Woodcock Johnson Tests of Academic Achievement, Third Edition reflecting very low scores in broad reading, brief reading, broad mathematics, mathematics calculation, and brief mathematics. The District also assessed Student's adaptive behavior through rating scales completed by the Parents and a teacher, revealing overall average functioning with relative weaknesses in functional academics by both raters. Additional information in the 2012 RR included parent and teacher input. Needs were identified in the areas of reading comprehension, mathematics skills, speech intelligibility, and everyday living skills. (S-10)
20. The District evaluation team members did not consider a Functional Behavior

Assessment (FBA) at the time of the RR because Student was not exhibiting significant behaviors that interfered with Student's learning. (N.T. 793-94)

21. Student's IEP team met in November 2012 to develop a new IEP. This document included some information on Student's then-present levels of academic achievement and functional performance that included a summary of the most recent RR. Needs identified incorporated those in the RR with the addition of career exploration. Transition programming included the technical program classes. Annual goals addressed articulation, career exploration, functional reading and writing skills, reading comprehension, written expression (based on the District writing rubric for the first time), and mathematics problem solving. Program modifications and items of specially designed instruction were similar to the previous IEP with the addition of study guides, community based instruction, and everyday living skills instruction. Student would continue speech/language therapy weekly. The IEP proposed supplemental learning support with participation in regular education for a food preparation class, and Student was determined to be eligible for ESY. The Parents approved the NOREP. (S-11, S-12)
22. The IEP team determined that, despite Student's continued weaknesses in reading decoding and reading fluency, at Student's age the focus should be in reading comprehension. (N.T. 823-25, 852-54, 859-60)
23. Student did not care for the technical program skill area in which Student was placed, and Student transferred in the fall to a different technical program area. (N.T. 68-69, 72-75, 937; S-36 p. 16)
24. Student had a resource room mathematics class in the second half of the 2012-13 school year, but was not able to take any mathematics class for the first semester because of a conflict with a food preparation class. There were three to four students in the resource mathematics class, which focused on basic mathematics and pre-algebra skills for students who were at least two years below grade level. All students worked on the same materials, classwork, and homework, but the assignments were modified depending the individual student's needs. The class used a textbook written at a middle-elementary school grade level. Students had direct instruction as a class and worked in small groups, with individualized attention from a teacher or aide as needed. This class also had a computer-based component that identified pre-algebra skill deficits that a student had not yet mastered, and students would work on those skills. This computer program was a diagnostic tool, and was unrelated to Student's IEP goals. (N.T. 70, 77-78, 158-60, 162-71, 172-76, 221-25, 237-38, 256, 938-39, 943; S-15 p. 5)
25. Students were able to log on to the resource mathematics computer component outside of class and were encouraged to do so. Students were also able to choose from a variety of skill areas that they had not yet mastered when using the computerized component of the class. There was no homework in the computerized mathematics program. (N.T. 175-82, 217, 245)
26. Student struggled with Student's classes during ninth grade, including mathematics. (N.T. 116-17, 233-34)

27. Student grades in the resource mathematics class were based upon assignment and homework completion, class participation, assessments, and work on the computer program. Student's resource mathematics teacher believed the course was appropriate for Student and that Student's struggles were not dissimilar from those of others in the class. (N.T. 201-03, 211, 230, 233-34)
28. Student had a reading/language arts class in the 2012-13 school year. The class of seven students was based on the Read 180 program with some additional writing instruction. Student was placed into this class based on an assessment of reading ability. (N.T. 381-86, 388-89, 392-93, 394-95, 397-98, 419, 444-45)
29. Student had a food preparation class during the first half of the 2012-13 school year. Students typically worked in small groups. At the beginning of the year, Student had an aide for that class who assisted Student with note taking and provide any other assistance. The aide was removed after Student expressed a desire to eliminate that support. The special education teacher modified the curriculum and content for Student's food preparation class, and also modified and administered assessments that Student took in that class. (N.T. 511-14, 516-20, 525-32, 536-37, 552-53, 942-43, 946-49)
30. Student had a transitional living class during the 2012-13 school year where Student worked individually with the special education teacher. This class addressed functional skills including reading, mathematics, and life skills, and helped Student make the transition to high school. Student also worked on organizational skills and was provided remediation as needed in this class. (N.T. 942-44)
31. Student's speech/language therapy was provided weekly, addressing speech intelligibility, phonemic awareness, and prosody. Three sessions each month were individualized, and the fourth was with another student in order to promote generalization of intelligibility to social communications. (N.T. 872-74)
32. Student attained final grades ranging from A- to B during the 2012-13 school year. (P-7; S-14)
33. Student did not attend ESY for the summer of 2013 except for one speech/language therapy session. (N.T. 122, 883)

#### 2013-14 School Year

34. The District changed to block scheduling for the 2013-14 school year (80 minutes every other day). (N.T. 164, 381-82)
35. Student attended the District high school for tenth grade. The Parents decided to discontinue Student's attendance at the technical program that year and let Student focus more on academic subjects such as mathematics and language arts. (N.T. 80, 124, 956-58)
36. Student's IEP team met in November 2013 to develop Student's IEP. This document

provided Student's then-current present levels of academic achievement and functional performance, including an interest inventory for transition planning. This IEP identified needs in functional living skills, reading comprehension, mathematics skills, and speech intelligibility. Transition programming was included. Annual goals addressed reading comprehension, written expression, mathematics problem solving, articulation, reading fluency, and functional mathematics skills. Program modifications and specially designed instruction were similar to the prior IEP with the addition of modification to the graduation project, and speech/language therapy remained a related service. Student's program was again supplemental learning support with participation in regular education for career and technology and driver's education classes. Student was determined to be eligible for ESY services. (S-16)

37. Student believed the tenth grade classes were too difficult and moved at a fast pace. Student dropped a U.S. Cultures class in the first semester and took a study skills class instead. (N.T. 80-85)
38. The study skills class was a special education class with approximately ten students who worked on strategies for developing study habits, organization, and test taking strategies. The class was taught by a special education teacher with a classroom aide. (N.T. 80, 700, 712-13, 959)
39. Student was in the resource room mathematics class again for the 2013-14 school year with six to eight students in total and a classroom aide. (N.T. 161-62, 175, 959)
40. Student had career and technology class during the 2013-14 school year. That class was largely computer based, focusing on career exploration and technology education; it was a co-taught class with a classroom aide. Student's assignments and tests were modified for this class, and Student was provided with individual explanation of instructions by the special education teacher. Student took assessments outside of the classroom. (N.T. 558-65, 569-71, 576-78, 580-84, 587-88, 594-97, 608, 959-60, 961-62)
41. Student had a Read 180 reading class during the 2013-14 school year that included vocabulary, phonics, reading comprehension, and reading fluency. Student was one of five to eight students in the class taught by a special education teacher with the assistance of a classroom aide. Typically the teacher provided whole group instruction, then the students participated in small group and independent work that included computed-based programming. The class included a writing component. (N.T. 700-03, 755-57, 759-61, 959)
42. Student's speech/language programming in tenth grade focused on rate of speech and articulation and therapy was provided both individually and in small groups. The speech/language therapist also discussed providing supplemental therapy at home to address phonemic awareness and auditory discrimination after the Parents' requested increasing the amount of speech/language therapy, but they did not ultimately follow up on this suggestion. (N.T. 877-79, 908-12)
43. Student had a transitional living class again in tenth grade, which addressed functional



reading, functional mathematics, and also supplemented the career and technology class topics. (N.T. 945-46, 955-56, 963-64)

44. Student had a driver's education class in tenth grade that was supported by a special education teacher who worked with other students as needed. The curriculum and assessments were not modified but assessments were adapted. (N.T. 960-61, 963)
45. Student exhibited some need to develop self-advocacy skills during the 2013-14 school year. (N.T. 588, 1044-45; P-34 p. 28)
46. Student played a particular sport in high school during ninth and tenth grades. Student did not want to continue with the sport after tenth grade, however, because Student perceived that the other members of the team did not want to interact with Student. (N.T. 79, 90-91, 104)
47. Student's IEP was revised in February 2014 to reflect additions to the goals and objectives for ESY programming. (S-18)
48. The District sought permission to reevaluate Student in June 2014 as Student was due for the biannual evaluation in the fall. Assessments proposed were cognitive and academic achievement, in addition to parent and teacher input and an observation. Additional assessments were later proposed for behavioral and adaptive behavior rating scales. The Parents consented to the reevaluation in August 2014, but one was not conducted by the District because Student enrolled at Private School. (N.T. 830-32; P-15; S-25)
49. Following the end of Student's tenth grade year, the Parents again considered Private School and decided to enroll Student there after Student was accepted in August 2014. They notified the District by letter of August 15, 2014. The District advised the Parents that it would not support the private placement and requested an IEP meeting. (N.T. 87, 91-94, 130-31; P-16, P-22, P-23, P-24; S-26 pp. 1-2, S-35)
50. Student did not attend ESY for the summer of 2014 because of scheduling difficulties for the family. (N.T. 126-27, 883-841; S-19)
51. Student achieved final grades ranging from A to B for the 2013-14 school year. (P-13; S-20)
52. The District convened a meeting of the IEP team in August 2014. At the meeting, the Parents expressed concerns with Student returning to the District, noting their surprise at Student's wish to go elsewhere. They also advised that Student would be attending Private School. The District in turn was surprised by this announcement. The Parents did not approve the NOREP for a program in the District and indicated a request for a due process hearing. (N.T. 94, 967-69, 990-91, 993; P-17, P-18; S-27, S-28)
53. The District's proposed program for the 2014-15 school year provided for a co-taught regular education mathematics class in an inclusive setting for the second half of the school year. It also added counseling as a related service. No other changes were

proposed by way of an IEP at that time. (N.T. 833-34, 863-64, 985-89; S-27)

### Progress Monitoring in the District

54. In monitoring Student's progress on goals for reading comprehension at grade level, the level of the passages used were determined using various factors. The grade level for any specific progress monitoring interval could vary from the previous or subsequent report, and were not correlated to the present levels in Student's IEPs. (N.T. 723-27, 733-36; S-S-11, 13 p. 2, S-16, S-21 pp. 7-8, S-24 p. 1)
55. Progress monitoring on the IEP goals from November 2011 did not consistently report on the annual goals or objectives for reading comprehension, and the data reflected a "decline" in progress toward that goal by November 2012 (S-13 p. 1). For reading fluency, Student's progress was inconsistent and reflecting a downward trend. Student's progress toward the mathematics goal and objectives was variable depending on the operation. For speech/language therapy, Student's progress was noted anecdotally as satisfactory. Progress on the written expression goal is unclear as the goal lacked a baseline or objective measurement. (P-6; S-13)
56. Progress monitoring on the IEP goals from November 2012 indicated mastery of the transition and functional reading and writing skills goal. Anecdotally, Student's progress on the articulation goal was noted as satisfactory. Progress on the reading comprehension goal using probes revealed Student maintained accuracy on class assessments over the course of that year, but attained a much lower level of accuracy on the computer-based probes in November 2013. Reading fluency progress was also provided for January and April 2013 but Student was not assessed on decoding. Student's progress on the written expression goal, based on the District's rubric, was variable for 3-paragraph essays. Progress on the mathematics problem solving goal was also variable with some increases and some decreases reported depending on the operation. (708-10, 736, 742-43; P-8; S-21)
57. In ninth grade (2012-13 school year), the District used Aimsweb reading probes to monitor Student's reading fluency, for which Student did not have an IEP goal, and monitored the reading comprehension goal using teacher-created reading comprehension questions. Probes of Student's reading fluency varied considerably, but the reading comprehension scores remained fairly stable over the course of the school year. (N.T. 389-93, 400, 423, 451, 462-64; S-15)
58. The District also used Read 180 to measure Student's reading comprehension levels for progress monitoring, but the data was not based or on correlated to Student's IEP goal for reading comprehension. Student's reading ability level did not improve over the course of the spring of 2013; it increased slightly numerically but remained in the below basic level at the 1<sup>st</sup> percentile. (N.T. 424-28, 458-59; S-21, S-24)
59. In reporting Student's progress on written expression goals, the length of the composition on which scores was not always provided but Student's scores were based on the District writing rubric. (N.T. 394-95, 737-38; S-13 pp. 9-10, S-15 p. 2, S-21 pp. 9-10, S-24 p. 12)

60. Between February and May 2013, Student mastered 31 topics covered by the resource mathematics computer program out of 275, for a total of 48 topics. (S-15 p. 5)
61. As of January 2014, Student was making little progress on the mathematics goals in Student's IEP. No changes were made to Student's program in this area for the remainder of the school year. (N.T. 1018-20)
62. Progress monitoring on the IEP goals from November 2013 in the spring of 2014 reflected an increase in accuracy in answering reading comprehension questions, with notably better scores on class assessments compared to the computer program; the measure of Student's reading ability increased over the course of the school year. On the written expression goal, Student's scores were based on the writing rubric showing variability across categories measured over that time period. Student's progress in the mathematics course for the 2013-14 school year reflected that Student mastered 78 of the 275 topics included in the computer program. Student also demonstrated an increase in the number of problems completed on probes of multiplication, decimals, fractions, and algebra, as well as on functional mathematics skills (calculating tips, tax, and discounts). Anecdotally, Student's progress on the articulation goal was noted as satisfactory with inconsistent reference to the stated measure of accuracy. Student's reading fluency data revealed an increase in words read correct per minute at grade level with incomplete reporting of errors. (P-12; S-22, S-24)

#### Private School

63. The Parents decided to enroll Student in Private School for eleventh grade for the 2014-15 school year in August 2014. (N.T. 42, 92-94, 278-79; P-24)
64. Private School serves students who have disabilities and is staffed by teachers who are certified in and/or have degrees in special education. (N.T. 277, 280, 306, 343-44, 467-69)
65. The Private School has three schools that separate students into levels based on age. Some classes, such as language arts, are formed based on student need. At the high school, there are five to ten students in each class. (N.T. 277-79, 282-84, 295, 345, 350, 470, 478)
66. Student had an IEP at Private School. Most classes provide individualized instruction to a student based on his or her needs. (N.T. 294-96, 304, 350)
67. Student's classes at Private School were morning homeroom, language arts (writing, grammar, and note-taking and research skills), mathematics applications (functional and applied math), reading (vocabulary and comprehension), social skills, independent living skills, an instructional lunch period focused on social skills, social studies, science, physical education, electives, and an afternoon homeroom. Student at some point also was provided instruction with reading decoding. (N.T. 279-80, 285-89, 298-300, 338-39, 345-46, 469-70, 472-73, 482-85)

68. Student made progress in Student's academic classes at Private School, including language arts and mathematics. (N.T. 283-85, 289-90, 314-15, 318, 320, 352-53, 360-63)
69. Student showed growth at Private School in self-advocacy skills and social skills. (N.T. 96-97, 285-88, 324-25, 353-54)
70. Private School conducted an evaluation of Student and issued a report in January 2015. The report summarized educational and other history including the IEE from 2014, and included current information from teachers and the Parents. Following a reading assessment, the report recommended further evaluation to determine Student's need for decoding instruction. Speech/language assessment was also conducted. This report concluded that Student was eligible for special education on the basis of intellectual disability, a speech/language impairment, a specific learning disability, and other health impairment. (P-29)
71. Private School developed an IEP for Student that included transition programming; and also provided annual goals addressing mathematics problem solving and calculation, social skills, self-advocacy skills, written expression, speech/language skills, reading comprehension, and functional mathematics skills. Program modifications and specially designed instruction included use of a calculator and mathematics manipulatives, graphic organizers and guided questions for writing, social skills, role play and modeling, small class size, accommodations for assessments and assignments, repetition and reinforcement, visual prompts, an opportunity for sensory breaks, and concrete information with visual references. Speech/language therapy was a related service. (P-30 p. 38)
72. Student's grades at Private School for the first and second quarters ranged from A to C+, with all but two grades in the A to B range (B- in a foreign language and C+ in Social Studies, both in the first quarter). (P-26)
73. The Parents drove Student to Private School, which took approximately one hour each way, until Student began driving Student's self in approximately March 2015. Student has friends at Private School, and the Parents believe Private School has been beneficial for Student. (N.T. 95-97, 99, 145)

#### Independent Neuropsychological Evaluation

74. The Parents arranged for a private neuropsychological psychological evaluation of Student in the fall of 2014 in order to ascertain "the way [Student] learned" (N.T. 149). (N.T. 97, 149, 625-26; P-20; S-32)
75. The private neuropsychologist observed Student at Private School for the IEE. (N.T. 626-27; P-20 pp. 5-7; S-32 pp. 5-7)
76. The private neuropsychologist concluded that Student demonstrated deficits in reading decoding, word reading, and language comprehension skills. (N.T. 631-40, 674-75; P-20; S-32)

77. The private neuropsychologist determined that Student had significant executive functioning weakness. She also reported on emotional and behavioral concerns (anxiety, depression, withdrawal, adaptive skills) identified by the Parents or teachers or both, and social weaknesses outside the home setting. (N.T. 652-54; P-20; S-32)
78. The private neuropsychologist determined that Student has a specific learning disability in reading, mathematics, and written expression, but did not meet the criteria for a student with an intellectual disability. She suggested that Student had borderline intellectual skills (FSIQ 71) with significant academic and language needs. (N.T. 635-36, 638, 661-64, 667-68, 684-86; P-20; S-32)
79. Recommendations for educational programming in the IEE included direct instruction and support in the areas of speech/language, reading comprehension, reading fluency, mathematics computation and problem solving, written language, study and memory skills, anxiety and coping skills, and transition/vocational training; small group or individual instruction; year round programming; research based instruction (reading decoding, fluency, and comprehension; written language); an assistive technology assessment; speech/language therapy; transition planning. She also made recommendations for specially designed instruction and classroom accommodations. She recommended Private School. (P-20; S-32)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516

F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses to be generally credible, testifying to the best of their recollection, and the factual testimony as a whole was remarkably consistent among witnesses. It should also be noted that the Parents are clearly loving and devoted parents who are concerned for Student's best interests; similarly, District personnel all presented as dedicated individuals who care about Student and Student's education, despite their conflicting positions at the hearing.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision. The parties' Closing Arguments were also carefully reviewed.

### IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to a student who qualifies for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized

Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

### Section 504 Principles

The Parents assert claims under Section 504 in addition to the IDEA. Generally speaking, the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Section 504 of the Rehabilitation Act of 1973 further prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

*Ridgewood* at 253.

### Scope of the Hearing

Before turning to the substance of the issues, it is necessary to explain that this hearing officer previously ruled, on a Motion to Limit the Scope of the hearing, that the Parents had not raised any claims for the time period prior to the 2012-13 school year. Consequently, this hearing officer limited the evidence to the 2012-13 school year and beyond, and ruled that the parties should present any necessary evidence relating to when the Parents knew or should have known of the actions that formed the basis of the complaint during the course of the hearing. Based on a review of the entire record, there is nothing in the record to suggest, and there was no argument made by the Parents, that they were unaware of any of the District's actions at the time that they occurred.

At the conclusion of the hearing, the Parents argued that the "knew or should have known date" for purposes of the statute of limitations is August 2014, when they enrolled Student in Private School. (Parents' Closing Argument at 17) The record, however, does not support this assertion. The "knew or should have known" date is not the time when a parent understands that there may be a basis for filing a due process complaint against the school district; the language in the statute references "the alleged action which forms the basis of the complaint." 20 U.S.C. §1415(b)(6)(B); *see also* 34 C.F.R. § 300.507(a)(2). Nor is it the date that a parent takes an affirmative step in challenging an action by the school district with which he or she disagrees. In this case, there is no discrepancy between the dates of the various actions taken by the District during the relevant school years and the dates the Parents knew about them. Accordingly, the scope of the Parents' claims in this matter are limited to the two year period preceding the date that the due process complaint was filed, or February 9, 2013. *D.K. v. Abington School District*, 696 F.3d 233 (3d Cir. 2012).



## The Parents' Claims

The Parents' major issue is the appropriateness of the program implemented by the District during the 2012-13 and 2013-14 school years, and offered in August 2014 for the following school year. They contend that the program was deficient in many respects, which will be addressed in turn.

First, the Parents challenge programming with respect to reading. The Parents and District clearly had a difference in opinion on Student's need for continued programming to address reading decoding and fluency weaknesses. Some progress monitoring continued on reading fluency even after those goals were removed, suggesting it remained an area of concern despite the absence of a specific goal or specially designed instruction. By November 2012, the IEP team made the decision to focus on reading comprehension, and not decoding or fluency. This hearing officer cannot conclude that prioritization of such skills for Student at the high school level, particularly given other needs, was unreasonable. Nonetheless, Student continued to demonstrate weaknesses in reading comprehension skills that the District and Parents both recognized as important; yet, in evaluating the actual reading program that was implemented for Student during the spring of 2013 and over the 2013-14 school year, the reporting on Student's progress, or lack of progress, is significantly flawed. Specifically, the progress monitoring provided in reading for the relevant time period did not report on the IEP goals. The information it did convey was confusing at best, and as a whole suggested that Student was not making gains. (N.T. 720-27, 732) A major purpose of monitoring a student's progress on IEP goals is to evaluate whether the program is meeting the child's needs and to then provide an opportunity for the team to consider whether revisions to the program may be necessary. The data provided to the Parents, though, and introduced at the hearing, lacks the necessary link to

the reading comprehension goals, and does not provide a basis to evaluate whether Student was benefitting from the program, or whether the instruction addressed Student's reading comprehension needs, or whether Student was regressing in the skills areas assessed. The District was certainly aware of the progress monitoring as it was obtained and reported. In sum, the evidence supports a conclusion that the reading program did not confer meaningful educational benefit to Student, and that Student was denied FAPE on this basis.

With respect to mathematics, the District's program was also deficient in the spring of 2013 and the 2013-14 school year. There was no information about Student's present levels in mathematics in the November 2012 IEP from which appropriate goals could be derived. Despite Student's recognized weaknesses in mathematics skills that the IEP team agreed were necessary to address, the development and implementation of Student's program was not responsive to those needs. The resource room mathematics class was not individualized to Student, and Student struggled with the content. The computer-based component bore no relationship to Student's IEP goals, and Student ended 1½ years in the class having mastered relatively few of the concepts that were necessary to move on to algebra. Further, the progress monitoring that does exist does not reflect growth in Student's mathematics skills. In short, the mathematics program as implemented did not address Student's needs in that area and, therefore, was not reasonably calculated to, nor did it, provide meaningful educational benefit.

This hearing officer observes that there were many facets of Student's program that were appropriate. With respect to the other components of the program, the Parents contend the District failed to address Student's social/emotional needs and receptive and expressive language weaknesses beyond articulation; they also argue that the District should have conducted an FBA. (Parents' Closing Argument at 17-19, 23) However, the record establishes that the District did

not observe Student to exhibit difficulty with social skills, or with receptive and expressive language needs beyond speech intelligibility. While the parents perceived difficulty with social skills and friendships in the home and community, and that information was made available to the District, none of the evaluations conducted, or the IEPs developed, during the time period in question suggested a need to address social skills at school. In a related area, while Student did begin to exhibit weaknesses in self-advocacy during the 2013-14 school year, the evidence is not preponderant that Student lacked such skills to a significant degree that required special education programming. Finally, as for the argument that the District neglected to address behavioral functioning including conducting an FBA, the record is devoid of any behaviors that Student exhibited that may have suggested, much less mandated, such an assessment. For these reasons, this hearing officer cannot conclude that the District denied Student FAPE in the spring of 2013 and the 2013-14 school year beyond the reading and mathematics programs.

With respect to the program for the 2014-15 school year, it must be noted that the IEP that was developed in November 2013, with the minor revisions in August 2014, would have provided essentially the same program for the start of the 2014-15 school year, with the very same inadequacies with respect to reading and mathematics programming that was not individualized for Student. Again, there were elements of the program that were not inappropriate; but this hearing officer finds that the flaws with the reading and mathematics portion of the program were significant based on Student's needs and, thus, also amounted to a denial of FAPE for the 2014-15 school year.

With respect to the related Section 504 claim of discrimination, this hearing officer concludes that the District's denial of FAPE discussed above encompasses those claims, and that the District did not otherwise discriminate against Student on the basis of Student's disability.

There is no need to further discuss Section 504.

The final issue with respect to substantive programming is the difference in opinion between the District school psychologist and the private neuropsychologist on whether Student should be classified as intellectually disabled and/or having a specific learning disability. (N.T. 635-36, 638, 661-64, 667-68, 684-86, 788-89, 840-43) The District relied on the IDEA definitions of eligibility for intellectual disability, while the private neuropsychologist focused on the criteria in the DSM-5 for that diagnosis.<sup>6</sup> As they both agreed, however, the specific category of special education eligibility is not crucial as long as the child's individual needs are addressed. This hearing officer found the opinions of both of these professionals to be credible and helpful in understanding Student's strengths and weaknesses and overall profile, but neither was determinative on the issue of FAPE in this case.

### Remedies

The above determinations lead to the next issue, the Parents' request for compensatory education. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C, supra*. Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's

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<sup>6</sup> Diagnostic and Statistical Manual, Fifth Edition (2014).

failure to provide a FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”)). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Having concluded that that the District’s special education program was not appropriate because it failed to address Student’s individual needs in reading and mathematics, the next question is how to calculate the remedy. This hearing officer will apply the *M.C.* standard to remedy the precise loss of educational services, 45 minutes per day for both reading and mathematics instruction during the applicable time period, which is the approximate equivalent of one period per day or one block every other day. Student shall therefore be awarded 1.5 hours of compensatory education for each day school was in session for the 2012-13 and 2013-14 school years beginning with February 9, 2013.

The hours of compensatory education are subject to the following conditions and limitations. Student’s Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student’s educational and related services needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student’s IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for

Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21).

There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the average of the hourly salaries and fringe benefits that were paid to the District professionals who provided educational services to Student in reading and mathematics during the period of the denial of FAPE.

The next requested remedy is reimbursement for tuition to Private School. Parents who believe that a public school is not providing FAPE and unilaterally remove their child from that school and place him or her in a private school may seek tuition reimbursement for the cost of the alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra*; *see also. See Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice). In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive

requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

Having concluded that the program proposed by the District for the 2014-15 school year was not appropriate, the next step of the analysis is whether the parentally-selected placement was appropriate. Private School is staffed by special education teachers. Students are grouped into relatively small classes that are based on age or need. Instruction is individualized, and Student had an IEP that was based on its recent evaluation. Student received instruction in language arts, reading, mathematics, and independent living skills, and was provided speech/language therapy and transition programming, all areas of need for Student. Student made progress in the Private School classes, as well as with self-advocacy and social skills.

The District argues, among other things, that Private School did not provide appropriate reading and mathematics instruction. (District's Closing Argument at 8-10) It merits repeating that a parentally-selected private school need not satisfy the requirements of the IDEA in order to be appropriate. *Carter, supra*. Moreover, when a child makes an initial entry a private school that has not had previous experience with a child, it is to be expected that it would need time to get to know the child, then revise the program to be responsive to the child's needs as they are demonstrated in the new environment. This hearing officer recognizes that some of the testimony describing the progress monitoring in Private School for Student's reading (N.T. 481-93) may, at first blush, resemble some of the flaws in the District's reporting; nevertheless, that testimony also clarifies that there was a natural chronology or progression of reading level in the material presented and on which Student was assessed at Private School, which was not evident in the District's own progress monitoring. Furthermore, in the situation encountered by Private School professionals teaching a new child in a new school, it is both reasonable and

understandable that they would continually refine programming decisions as they grow to understand his or her needs, a factor not present in the District for the relevant time period. The record as a whole supports the conclusion that Private School was appropriate for Student under the second step of the tuition reimbursement analysis.

The final question on this issue is whether equitable considerations should operate to reduce the award of tuition reimbursement. This case presents a situation where the parties appeared to essentially be in agreement in Student's programming, with the exception of class scheduling, through the summer of 2014. It was not until sometime in mid- to late-August that the Parents determined that Student should not return to the District high school and advised its staff of their intention to enroll Student in Private School. By that point, the District had little if any opportunity to attempt to make any revisions to its program that the Parents might consider.

Although the Parents evidently were not expecting to discover that it was Student's wish late in the summer to attend a different school, the District was at least as equally surprised by that announcement as the school year was about to start. This hearing officer concludes that the equities demand a fair and reasonable adjustment to this remedy, and will allocate an equal share to the parties in the cost of the tuition. Accordingly, the District will be ordered to reimburse the Parents for one half of the tuition at Private School for the 2014-15 school year, and shall not be ordered to provide reimbursement for the transportation costs to Private School.

#### Reimbursement for IEE

The last issue is the IEE and a private speech/language evaluation. In conducting an evaluation, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained.

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—



(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

When parents disagree with a school district’s educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); 20 U.S.C. § 1415(b)(1). When a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, the Parents did not make the request of the District, but rather obtained the IEE and sought reimbursement after the fact. In this circumstance, the analysis of the appropriateness of the evaluation is the same. However, one element in considering whether a parent is entitled to an IEE at public expense is his or her disagreement with a school

evaluation, which is often not evident if the Parents do not make the initial request directly to the District and ask for an IEE at public expense.

Review of the District's 2012 RR reveals that it met the requirements in the IDEA, particularly in light of the significant information about Student that the District already had at the time of that reevaluation. Moreover, the evidence quite convincingly establishes that the Parents did not obtain the IEE because of any disagreement with an evaluation of the District, but rather to gain better understanding of Student's learning profile. (N.T. 97, 149) Parents may certainly obtain an IEE at any time, but they are not necessarily entitled to public funding of that evaluation. Here, the IEE was arranged as the Parents made the commitment to send Student to Private School. Further, the District cannot be faulted to failing to proceed with its own RR after Student left its rolls for a nonpublic placement. For all of the same reasons, there is no basis to order the District to fund a private speech/language evaluation. Under all of the circumstances presented in this case, the Parents are not entitled to relief on their evaluation claims.

### **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, the District denied FAPE to Student in some respects and shall be ordered to provide compensatory education and partial reimbursement for the tuition to Private School for the 2014-15 school year. The request for reimbursement for an IEE and for a private speech/language evaluation shall be denied.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby

**ORDERED** as follows.

1. The District denied FAPE to Student from February 9, 2013 until last day of the 2013-14 school year.
2. The District shall provide Student with 1.5 hours of compensatory education for every day that school was in session from February 9, 2013 through the end of the 2013-14 school year. The compensatory education hours are subject to the conditions and limitations set forth above.
3. The District's program as offered for the 2014-15 school year denied FAPE to Student.
4. The District shall reimburse the Parents for one half of the full tuition paid for Private School for the 2014-15 school year.
5. The Parents and Student are not entitled to reimbursement for the IEE, or to a private speech/language evaluation.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: July 16, 2015