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

Student's Name: Z.GR.

Date of Birth: [redacted]

ODR No. 1590-10-11-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Amelia Carolla, Esquire Reisman Carolla Gran, LLP 19 Chestnut Street Haddonfield, New Jersey 08033-1810
School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130	Heather L. Durrant Matejik, Esquire Office of General Counsel School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130
Dates of Hearing:	May 5, 2011, June 14, 2011, June 17, 2011
Record Closed:	July 13, 2011
Date of Decision:	July 28, 2011
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible resident of the School District of Philadelphia (District), and attends a private elementary school (School). (NT 11 to 12.) Student is identified with Specific Learning Disability, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 13.) Parents requested due process seeking reimbursement of tuition and other costs incurred for Student's education during the 2010-2011 school year, as well as payment for a summer program at the School in the summer of 2011. The District asserts that the Parent is not entitled to either reimbursement or summer tuition.

The hearing was conducted in three sessions and the record closed upon receipt of written summations.[1] I conclude that the District offered a FAPE and I decline to order any reimbursement. .

ISSUES

1. Did the District offer to provide a free appropriate public education (FAPE) to Student for all or any part of the 2010-2011 school year, including permitting Parents to participate in the IEP process?

2. Did the District fail or refuse to offer Extended School Year services to Student inappropriately?

3. Did Parents provide to the District notice of their intention to enroll Student in a private school for all or any part of the 2010-2011 school year, as required by law?

4. Was the School an appropriate placement for Student?

5. Should the hearing officer order that the District reimburse Parents for tuition incurred by placing Student at the School for all or any part of the 2010-2011 school year?

[1] Pursuant to my instructions, (NT 785), Parents submitted a ten page summation, double spaced. The District submitted fifteen pages simultaneously. In exercise of my discretion to conduct these proceedings, I disregard the last five pages of the District's summation.

6. Should the hearing officer order the District to provide extended school year services to Student for the summer of 2011, by paying tuition for summer programming at the School?

7. Should the hearing officer order the District to reimburse Parents for supplemental tutoring provided by Parents in the 2010-2011 school year, regarding reading and speech and language services.?

FINDINGS OF FACT

1. Student exhibits difficulties with literacy skills despite superior cognitive ability. Student presently has a mild specific learning disability in reading and writing, medically diagnosed as dyslexia. (NT 758, 770; P-5, 8.)

2. Student attended private schools for kindergarten and first grade, receiving speech therapy twice per week and reading tutoring with a reading specialist twice per week. Progress was slow and word finding problems were reported, despite explicit teaching directed to phonemic awareness. (P-5, 8.)

3. Student received a speech and language evaluation in February 2009 and was found ineligible for services. (P-5.)

4. In the summer of 2010, Parents enrolled Student in a summer reading program at a new private school (the School), due to Student's continuing difficulties with reading and writing at the previous private school during first grade. (P-8.)

5. In June 2010, Parent[2] contacted the District to request an evaluation in preparation for possible transfer of Student to the neighborhood elementary school. (P-6 to 8.)

6. Parent was advised that Pennsylvania law allows the District sixty days for completion of evaluation and that the report would not be completed until October 2010. (NT 570.)

7. The District began the evaluation process in June 2010; Parent signed the Permission to Evaluate on June 11, 2010, which called for a psycho-educational evaluation, academic evaluation, record review, and a behavioral or emotional evaluation if needed. In the reason for referral or "concerns" part of the form was listed "Speech and Language evaluation." (P-6 to 7.)

8. In June 2010, Parent filled out parent input forms and obtained a teacher input form from the private school of the previous school year. The District evaluator was aware that Student had received speech and language therapy and that speech and language were concerns of Parent. (NT 279-281; P-6 to 7.)

[2] Although both Parents are parties, Student's Mother took the lead in seeking services from the District. In this decision, she is referred to as "Parent" in the singular.

9. Parents signed a contract on or about August 5, 2010 to enroll Student in the private School for the 2010-2011 school year. Parents did not disclose this to the District. (NT 581-582; P-5, P-18 p. 21.)

10. The Parent obtained a full private psychoeducational evaluation of Student, with standardized testing done on August 11, 2010 and August 25, 2010. (P-5.)

11. The private evaluator found no clear evidence of discrepancy in standardized test scores, but did conclude that the Student suffers from dyslexia based upon a pattern analysis, due to weaknesses in phonemic awareness and word retrieval, as evidenced by below average decoding, reading rate, fluency, spelling and comprehension. (P-5.)

12. The private evaluator noted possible weakness in executive functioning, and a below average test score in design copying. However, the report does not explicitly recommend specially designed instruction in executive functioning or fine motor skills, except for keyboarding. (P-5.)

13. The private evaluator recommended a program like the School for Student, including intensive, daily tutoring using a multisensory, phonics based program like the Wilson program. The evaluator concluded that speech language services to improve word finding skills would be useful to Student, as would highly structured classrooms and intensive adult support. Assessment accommodations and teaching keyboarding were recommended also. (P-5.)

14. Parent did not disclose this evaluation to the District until after the District's school psychologist completed testing. (NT 584-587; P-5.)

15. The District's school psychologist examined Student in October 2010. No speech and language evaluation was performed. (P-8.)

16. The evaluation report was provided on November 16, 2010. This was more than sixty days after receipt of the permission to evaluate, even with the exception of the summer when the District was not in session. (P-8, P-10, P-17 p. 5, 8 to 10.)

17. The ER found Student to be eligible for special education services as a child with the disability of Specific Learning Disability. It recommended specially designed instruction with regard to reading comprehension, word reading and writing; screening for speech and language services; and screening for graphomotor problems. (P-8.)

18. At a meeting on November 30, Parent disclosed for the first time that the Student had been evaluated privately in August 2010, utilizing standardized cognitive and achievement tests. (NT 271-272.)

19. Parent observed a classroom likely to be the location of any District placement on December 13, 2010. (NT 591-593.)

20. At and before an IEP meeting on December 17, 2010, the District offered an Individualized Education Program (IEP) that would place Student in supplemental

learning support, with literacy goals addressing phonemic awareness, word reading and reading comprehension. The goals presupposed explicit, systematic and sequential phonics instruction, but the IEP did not promise a particular program for that purpose. Specially designed instruction also included testing accommodations and reading of science and mathematics questions. (NT 462-491, 502-516, 674-685, P-11.)

21. At the December 17, 2010 meeting, District personnel stated that the Student's program would include 45 minutes per day of individual or small group training in reading skills, provided in the learning support classroom, with a research-based, systematic program addressing phonemic awareness and reading comprehension. This would be delivered by a certified special education teacher, not a reading specialist. Special education in writing would be included. (NT 467-479, 509-515, 590.)

22. The details of Student's program were not specified in the IEP, in part because the special education teacher had not yet met Student and needed to assess Student's needs in more detail prior to allocating the amount of time in learning support and specifying the degree of intensity of programming needed in reading. Similarly, exact supports for inclusion were not specified for the same reason. (NT 509-517.)

23. The school principal advised Parents at the December 17, 2010 meeting that Wilson trained teachers would be available to implement Wilson training if appropriate. (NT 467-479, 509-515, 590.)

24. The District determined that Student would not be eligible for ESY services; however, this determination was not based upon any data from Student's current teachers or Parent. (NT 517.)

25. Parent did not raise all of her concerns at the IEP meeting. (NT 594.)

26. The District personnel contemplated the basic outline of a program as reflected in the offered IEP but were willing to work with Parent and Student to alter that plan as they received more information. (NT 468 to 517.)

27. On December 17, 2010, Parent declined to sign the Notice of Recommended Educational Placement (NOREP) on grounds that it failed to provide a FAPE. (P-12.)

28. Parent requested to have a private consultant visit the neighborhood school and observe the Student's proposed class and teacher. District personnel declined to allow this on grounds that it would be inappropriate to allow a private consultant to evaluate a teacher. (NT 99, 110-111, 590-599; P-17 p. 14.)

29. On February 7, 2011, Parent signed a Permission to Reevaluate for the purpose of reviewing the private evaluation and conducting a speech and language evaluation. (P-13, 14.)

30. On February 16, 2010, Parents notified the District that they would seek tuition reimbursement for the 2010-2011 school year at the School. (P-17 p. 38.)

31. On March 24, 2011, the District issued a re-evaluation report. Personnel reviewed the private evaluation report, observed Student in the classroom at the School and conducted a battery of speech and language testing. The re-evaluation confirmed the District's identification of the Student with SLD and found a secondary Speech or Language Impairment. The latter classification was based solely upon a speech impairment in articulation of the letter /r/. The report included additional recommendations, including that special education services be multi-sensory. (P-15.)

32. In January 2011, Parent requested and the District refused to allow a private consultant to observe the District's offered program at the neighborhood school. (P-17 p. 14.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[3] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[4] that the other party failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier

[3] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[4] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA.

LEGAL STANDARD FOR TUITION REIMBURSEMENT

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

The IDEA provides that a hearing officer can order tuition reimbursement when a parent places a child in a private facility, only if the local education agency failed to offer a FAPE in a timely manner prior to enrollment. 20 U.S.C. §1412(a)(10)(C); 34 C.F.R. §300.148(c). The hearing officer must find also that the parental placement is appropriate. Ibid. Tuition may be

denied if a parent's actions are adjudged to have been unreasonable, or if the parent fails to disclose the intention to place the child privately - either by concealing that intention at the time of the last IEP meeting before placement, by failing to give ten days' notice of that intention, or by refusing a proposed evaluation. 34 C.F.R. §300.148(d).

In Forest Grove School District v. T.A., __ U.S. __, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009), the Supreme Court held that this relief can be awarded to a parent whose child has never attended a public school. The Court interpreted the IDEA as prohibiting an order of tuition reimbursement "only when a school district makes a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child's needs." Forest Grove, 129 S.Ct. above at 2493, 174 L.Ed.2d 168. The Court also reaffirmed the discretionary nature of the tuition reimbursement remedy. See, id. at 2493-94 n. 8-11, 2496.

FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is 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 benefits" in light of the student's "intellectual potential." 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 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).[5]

"Meaningful 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). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program 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 (3rd Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court's interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily 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" – it is not required to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

[5]. The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.)

APPROPRIATENESS OF THE PROGRAM OFFERED BY THE DISTRICT

I find that this is a close and difficult case, requiring me to weigh the evidence and apply the law carefully. I conclude that the District did address Student's most important need and did offer a program and placement that meets the minimal legal standard discussed above: reasonably calculated to provide meaningful educational benefit. I find that Parent's participation in the process had the effect of depriving District personnel of essential information, creating needless delays, and making it nearly impossible for District personnel to satisfy both their legal obligation to collaborate with Parent and Parent's high standard with regard to the assurances Parent needed as to the details of Student's proposed program. However, the process employed by the District to provide an educational evaluation and propose an IEP was riddled with violations of the law, with failures to obtain and utilize important information, and with failures to facilitate Parents' participation in the process as contemplated by the IDEA.

Weighing the record as a whole, I conclude that the District provided an appropriate IEP for the Student's uncontested primary disability in reading. In reaching this conclusion, I rely heavily upon the credibility and reliability of the Parents' school psychologist, who evaluated Student as a private consultant unbeknownst to the District school psychologist. Despite the Parent's decision not to provide full disclosure of the private evaluation before the District psychologist performed testing – and the consequent cloud this created over the psychometric validity of the District's cognitive and achievement scores – both psychologists came to the same conclusion: both identified Student with a specific learning disability in reading. (FF 11-17.) Both were able to specify that the source of the disability lies in Student's phonemic awareness

and phonetics skills. Both recommended research based educational programming to address this. (FF 13, 17.)

I placed weight upon the credible and reliable testimony of Parents' expert, which confirmed the appropriateness of the District's main conclusions for this Student. The expert insisted that the Student's disability is in the "mild" range; I infer that this is not a severe disability that would be expected to require the most restrictive and aggressive programming available for reading disabilities. In this context, the expert endorsed the placement in learning support with reading training for 45 minutes per day, assuming the right program were used. Although the expert recommends an Orton-Gillingham type of program, the expert declined to criticize the selection of another program, such as the Reading Mastery program utilized at the Student's neighborhood school, as long as such a program provides instruction in phonetics that is structured, direct, sequential and multisensory. The expert properly and therefore credibly declined to provide an opinion because the expert is not familiar with the programs available at the neighborhood school.

The record shows preponderantly that the school provides (as appropriate to the individual student) Reading Mastery and other research based programs, including Wilson, which is in the Orton Gillingham family and was being provided to Student at the private school. (FF21-23.) These are structured, research based, direct, sequential phonics programs. They also address reading comprehension and writing. There was no evidence that any of these programs is inappropriate for Student. I must afford some deference to the expertise of the District's personnel in choosing the programming to be provided – especially here, where there is no evidence that the District recommendations have been tried and failed. I conclude that the

District offered a program that was reasonably calculated to provide meaningful educational benefit to Student in reading.

The Parents argue that FAPE was denied because the District did not provide the initial evaluation report within sixty calendar days of the Parents' signing of the Permission to Evaluate, minus the all days of the summer recess, (FF 5-9, 15, 16), as required by Pennsylvania regulation. 22 Pa.Code §14.123(b). Nevertheless, the report was only days late, and while this could have caused a deprivation of FAPE or parental participation, 34 C.F.R. §300.513(a)(2), I find by a preponderance of the evidence that it caused no such harm.

Parents argue that the District violated the IDEA by failing to provide an IEP to Student by the beginning of the 2010-2011 school year, citing 34 C.F.R. §300.320(a). The IDEA does require an IEP to be in place by that time for all children with disabilities. Ibid. However, Student was not a child with a disability as defined by the IDEA at the beginning of the school year. The regulations define child with a disability as one who has been evaluated as having one of the disabilities listed in the IDEA. 34 C.F.R. §300.8(a)(1). At the start of the 2010-2011 school year, Student had not yet been evaluated and was not identified as a child with a disability pursuant to the IDEA. Consequently, the District was under no obligation to provide an IEP for Student at the beginning of the school year and this was not a denial of a FAPE.

Parents argue that the delay in providing the initial IEP, and the delay in re-evaluating Student, was a denial of a FAPE. The initial ER was about two weeks late. (FF 16.) The District would not let Parents waive the ten day waiting period from receipt of the initial ER to the first IEP meeting. (FF 18, 21.) Then it insisted upon a re-evaluation in light of the private evaluation report, even though its re-evaluation did not change and its report did not adopt many

of the private evaluator's recommendations. (FF 31.) Parents assert that all this adds up to a denial of a FAPE for the period of the delay.

I do not accept this argument. When the initial ER was late, the Student was enrolled in a private school; thus, the delay could not have denied Student a FAPE, except that it delayed the offer of public payment for Student's education. I find the latter effect of the delay – as well as the asserted delay due to assertion of the 10 day waiting period by the District in spite of parental desire to waive - to be de minimis. These delays cannot be viewed in a vacuum; they are in a context of District educational planning and scheduling, and a child who might or might not transition back to the District from private school – upon an unknown schedule. Under these circumstances, the record does not show preponderantly that these delays caused Parents to spend private money that would have been public responsibility. The re-evaluation did not delay the offer of FAPE in this matter: the offer of appropriate special education for the reading disability. It delayed at most the provision of speech and language services to deal with an articulation deficiency in the expression of one letter. Again, this does not rise to the level of a FAPE.

Parent argues that the offered program is inappropriate because the IEP did not specify any details of the programming to be provided. (FF 22.) It does not specify the amount of time spent in special education programming (supplemental learning support can be provided for as little as 20% of the day and as much as 80%); the name of the program to be used; that programming would be multisensory; the amount of time allotted to one-to–one instruction, or whether a reading specialist would be provided for such one-to-one instruction. It contains none of the recommendations set forth in the private consultant's report. It does not specify the

supports and services to be provided in the regular education classroom. Parent urges me to conclude that, taken together, these omissions render the IEP inappropriate.

I decline this invitation. I note that the IDEA does not expressly require any particular level of detail in an IEP. 22 U.S.C. §1414(d)(1)(A)(i)(IV); 34 C.F.R. §300.320(a)(1). Indeed, the state regulations only require the IEP to list the "types of support" to be provided, suggesting that a lack of detail is contemplated. 22 Pa. Code §14.131(a)(1). I conclude from this only that the level of detail needs to be appropriate in the circumstances of the matter at hand.

Here, the placement is correct and it addresses the primary disability. District witnesses testified that further program detail could not be provided in the circumstances because Student was in a private school and that their process is to do more specific evaluations of functioning while the Student is in attendance, in order to establish the exact programming required. There was no evidence challenging these assertions. Moreover, the District did furnish greater detail on programming at the IEP meeting and by encouraging Parent to visit and observe the neighborhood school and its learning support classroom and teacher.

The circumstances of this matter made it extraordinarily difficult for District personnel to offer more detail in writing in the initial IEP. The Parent was insisting upon receiving an IEP as soon as possible while withholding crucial information from the private evaluation. (FF 14.) Moreover, Parent testified that she deliberately refrained from providing objections or voicing concerns about any deficiencies in the draft IEP during the IEP meeting. This is the very point at which the IDEA provides for collaboration with Parents and amendment of the draft to address deficiencies that parents point out. By deliberately refraining from voicing disagreements and disappointments with the IEP at the meeting the IDEA provides for that very purpose, Parent waived any future claim that the IEP was not sufficiently specific.

Parents argue that the effect on Parent of the lack of specificity in the IEP was exacerbated by the District's decision to refuse access to Parent's consultant for purposes of observing the program being offered. (FF 28.) I do not find that the reasons offered for this decision comport with the record and I find them implausible. Thus I find little justification in the record for the discretionary[6] exclusion of this consultant. I find that this District decision did make it more difficult for Parents to assess whether or not the offered program was appropriate for the Student, thus reducing the extent to which Parents were able to participate in the Student's IEP process, contrary to the spirit of the IDEA, which encourages broad disclosure and collaboration among the parties.

Nevertheless, the evidence is preponderant that a FAPE was indeed offered, despite this and many other procedural irregularities. The District had the consultant's report and was preparing a re-evaluation in light of it by the time of its decision to exclude the consultant. Thus I do not find any evidence that this exclusion – alone or in combination with other procedural deficiencies and the lack of specificity in the IEP - denied a FAPE to the Student. I conclude that Parents have failed to prove by a preponderance of the evidence that the lack of detail in the IEP and the exclusion of the expert rendered the District's offer of special education inappropriate in the circumstances.

There were several very serious additional procedural failures in the process of evaluating and offering special education services to this Student. I find that these failures do not convert an otherwise appropriate IEP into an inappropriate one in the circumstances of this matter.

Although the District was clearly within its rights to plan to deliver an evaluation report at the end of October in the 2010-2011 school year, it missed even that lenient deadline and

[6] Witnesses testified that there is no District or even school-wide policy on this, giving criteria for decisions to exclude private consultants.

provided the initial ER several days late, in violation of Pennsylvania regulations and the IDEA. (FF 16.) Even this late production occurred only after persistent prodding by the Parent. The record clearly suggests that this evaluation was not begun early enough and was rushed at the last minute when Parent reminded District personnel of the legal deadline.[7] As a result, several ancillary screenings or evaluations were not completed for related services needs, and so an IEP was presented in draft to Parent while the underlying ER was incomplete. This clearly violates the IDEA.

As a result of this procedural failure, the original IEP offered by the District did not address whether or not the Student needed speech and language services, even though the District was well aware that Student had been receiving such services in the recent past and the Permission to Evaluate had referenced speech and language as an issue. (FF 17.) It also did not address any need for occupational therapy. I must ask the question whether this failure renders the IEP inappropriate in the circumstances of this matter.

The legal standard is whether or not the offered IEP is "reasonably calculated to provide meaningful educational benefit." Here, although there was history of speech and language services, this must be taken in context of a relatively young child when services were initiated, a previous finding of non-eligibility for speech and language services, and a lack of any clinical observation during evaluation that the Student was exhibiting any difficulties with receptive or expressive oral language processing – whether in articulation or cognitive processing or social pragmatic use of speech. Thus, the District undeniably failed to address a specific suspected disability, but there was a mixed record at best as to need, and this suspected disability was clearly ancillary to the prominent suspected disability, the specific learning disorder in reading.

[7] The appropriateness of the evaluation was not expressly an issue to be decided in this matter, (NT 49-77), and I do not reach a conclusion on appropriateness of the evaluation.

Having found that the IEP was reasonably calculated to provide meaningful educational benefit to Student in the area of reading – Student's primary and predominant disability – I cannot conclude that the failure to address a relatively minor delay in articulation could negate the anticipated meaningful benefit in reading. Therefore, I conclude that this failure to deal with the speech and language concern did not deny Student a FAPE.

Parents correctly point out that the IEP also failed to address fine motor issues. However, they point to virtually no evidence in the record available to the District at the time of its evaluation and drafting of an initial IEP that the Student was exhibiting a disability in fine motor functioning. Again, the District's evaluator did not detect needs in those areas sufficient to make any educational classification or recommendation. Thus, again these were ancillary concerns.[8] I conclude that the failure to address them did not deny a FAPE. Indeed, the screening later performed for the re-evaluation confirmed that there was no need in this area.

The IEP did not address writing, which was a concern reflected in the history. However, District personnel testified without contradiction that the neighborhood school's special education program did address writing in a systematic way. There is no evidence that Student was harmed due to the omission of writing from the IEP. Therefore, there was no denial of a FAPE.

The District's regional director eventually saw the failure to evaluate in these areas and immediately directed District personnel to re-evaluate Student to address the above deficiencies. Meanwhile, a program had been offered to Parents. By the end of March, the District conveyed

[8] In reaching this conclusion I rely upon the fact that the Parent deliberately concealed the existence of a private evaluation report from the District until after the ER was produced. By doing so, the Parent misdirected District evaluative staff away from these issues, and left them with the impression that these issues were not the primary classification or educational issue. Moreover, Parent by depriving the District of previous evaluations until after the report was received, deprived the District evaluators of the most crucial data available on these suspected disabilities or needs.

a re-evaluation report that screened for speech and language weaknesses and fine motor weaknesses. (FF 31.) The result was that there was need for classification and therapy for an articulation error with the letter /r/; there were no fine motor issues. Thus, the re-evaluation confirmed that the suspected disabilities were ancillary at best to the primary need for special education in reading.

Parents argue that Student was struggling in the private school even with greater interventions than provided by the IEP, and that I should conclude that this is evidence that the District offer was inadequate. I decline to do so. The law does not require the District to match the intensity, the nature or the success level of private interventions. The goal under the IDEA is much more limited than any parent's goal for his or her child: IDEA only requires "meaningful" educational benefit to be reasonably predictable from the offer of services. The private services cannot be the measure of compliance. Moreover, the record did not preponderantly demonstrate that the District's offer would have been less successful than that offered by the private providers. Public school presents a different setting with different programming. It is impossible to tell whether or not the private school of Student's previous struggle had provided any of its interventions with fidelity, and there is no basis to infer that the public school would have failed to provide quality programming if given the chance.

Finally, Parents cite me to cases in which placements were "predetermined." This was raised for the first time in summations and there is not a preponderance of evidence in support of a "predetermination." Therefore I decline to conclude that there was "predetermination" in this matter.

ESY

Parents point out that the IEP denied ESY services to Student. (FF 24.) The District official who drafted the IEP confessed that there was no factual basis for this conclusion. There was no data on regression and recoupment from the private schools. There was no parental input. This decision clearly falls below the standard set by the Pennsylvania regulations. 22 Pa. Code §14.132. However, this decision came in December and there was nothing in the record to indicate that Student would need ESY services. If Parent had chosen to work with the District, it would have revisited the ESY issue on the basis of data in February, as is required under Pennsylvania's regulations. Ibid. This was a mildly impaired child who scored in the average or above average range with excellent memory skills. There is no evidence that the inappropriately considered denial of ESY constituted a denial of a FAPE.

CONCLUSION

I conclude that the District offered Student a FAPE; therefore, its offer was appropriate, despite numerous procedural and legal deficiencies. Thus, the evidence does not meet the first test of the Burlington-Carter analysis for tuition reimbursement, and such relief is denied. I decline to reach the remainder of the Burlington - Carter tests; this is unnecessary in light of my conclusion on the first test. As the offer was appropriate, the District is not responsible for any additional tutoring provided at the Parents' expense, and relief for those costs is denied. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District offered to provide a free appropriate public education (FAPE) to Student for the 2010-2011 school year.

2. The District did not fail or refuse to offer Extended School Year services to Student inappropriately.

3. The hearing officer will not order that the District reimburse Parents for tuition incurred by placing Student at the School for all or any part of the 2010-2011 school year.

4. The hearing officer will not order the District to provide extended school year services to Student for the summer of 2011, by paying tuition for summer programming at the School.

5. The hearing officer will not order the District to reimburse Parents for supplemental tutoring provided by Parents in the 2010-2011 school year, regarding reading and speech and language services.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

July 28, 2011