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

Student:	J.G.
Date of Birth:	[redacted]
Hearing Dates:	April 29, 2011; May 26, 2011; June 2, 2011;
ODR File Nos.:	1597-10-11JS – JG/WCSD

CLOSED HEARING

School District:	West Chester Area School District
Parties:	Representatives:
	Parent Attorney Dean M. Beer, Esquire McAndrews Law Offices 30 Cassett Ave. Berwyn, PA 19312
West Chester Area School District	School District Attorney: Sharon Wolff Montanye, Esquire Sweet, Stevens, Katz & Williams, LLP 331 East Butler Avenue New Britain, PA 18901

Date Record Closed:	June 7, 2011
Date Closings Submitted:	June 29, 2011
Decision Date:	July 8, 2011
Hearing Officer:	Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a Free Appropriate Public Education (hereinafter "FAPE") for Student (hereinafter referred to as "Student"), a late-teen-aged Student, who resides with Mother and Father (hereinafter referred to as the "Parent") in the West Chester Area School District (hereinafter referred to as "District") and who was identified as an eligible Student with specific learning disabilities when Student was originally enrolled within the District in Student's first grade year and continued to be identified as an eligible student pursuant to an IEP through the second grade year, however was determined ineligible upon re-enrollment in the District in sixth grade. The student was enrolled in private school in the interim third, fourth and fifth grade years.

The Parent filed a due process complaint notice on March 16, 2011 (the "Complaint") seeking compensatory education, reimbursement for tuition paid by the Parent for a unilateral placement in a private school as well as for reimbursement for an Independent Educational Evaluation (hereinafter referred to as "IEE"). The District's Motion to Limit Claims was heard on April 29, 2011.

Following oral argument and for the reasons stated on the Record, claims were limited to those arising on or after November 19, 2006.[1]

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[1] It is noted that the Notes of Testimony have requested to be corrected in that a typographical error appears on 181 indicating that claims are limited from November 19, 2008. The date should have read 2006. November 19, 2008 is the date determined that the Parents knew or should have known (KOSHK) that a claim could be made, thereby allowing claims occurring not more than two years prior to the KOSHK date. That is, the date when the filing party first had knowledge or reason to know is determined, and that party's hearing request must then be filed within two years of the date as well as contain allegations not more than two years prior thereto. It is noted that the error is of no consequence in that claims prior to 2008 have been determined as not viable. The statutory framework sets forth two IDEA-2004 provisions at issue here:

> (C) TIMELINE FOR REQUESTING HEARING.—A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.
>
> 20 USC §1415(f)(3)(C) (emphasis added) and
>
> b) TYPES OF PROCEDURES.—The procedures required by this section shall include the following:
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> …
>
> 6) An opportunity for any party to present a complaint—
>
> …
>
> (B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows….
>
> 20 U.S.C. §1415(b)(6)(B) (emphasis added). The underlined portions of the statutory provisions above make it clear that the date upon which the filing party "knew or should have known" (KOSHK) of the alleged action forming the basis of the complaint is a fact that is critical to determining both the filing limits and the content limits of Parents due process claims. It is

A Due Process hearing ensued over three (3) sessions on April 29, 2011, May 26, 2011 and June 2, 2011.

Exhibits were submitted and accepted on behalf of the Parent as follows:

P-9, P-10, P-11, P-12, P-13, P-14, P-15, P-16, P-17, P-18, P-19, P-20, P-21, P-24, P-25, p-26, P-27, P-29, P-30, P-31, P- 32, P-33, P-36, P- 37, P-38, P-39, P-40, P-41, P-42, P-43, P-44, P- 45 and P-46.

Exhibits were submitted and accepted on behalf of the District as follows:

S-1, S-2, S-3, S-4, S-5, S-6, S-7, S-8, S-9, S-10, S-11, S-12, S-13, S-14, S-15, S-16, S-17, S-18, S-20.

Exhibits were submitted and accepted on behalf of the Hearing Officer as follows:

HO-1 – Appeals Procedures

HO-2 – 2008/2009 School Calendar

The Parents contend that the District failed to properly identify the Student's disabilities and needs and asserted the right to an Independent Educational Evaluation (IEE), which was denied by the District. The parents further asserted that, since the District failed to properly identify the Student, Student was deprived of a FAPE, under both the IDEA and Section 504[2] thereby entitling Student to compensatory education. Additional violations of the provision of a FAPE were asserted for failure to provide proper supports and specially designed instruction in failing to identify the Student as an eligible student with a specific learning disability. The Parent claims the offered 504 plan was wholly inadequate to permit meaningful educational benefit. Finally, the Parent seeks reimbursement for a neuropsychological evaluation, asserting that the Evaluation report conducted by the District in December of 2008 inappropriately determined needs.

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noted that, as is more fully discussed infra that the typographical error is of no consequence as it is determined that the evidence supports compensable claims from November 19, 2008 only.

[2] Following Parent Counsel's Opening Statement wherein he requested relief under IDEA and Section 504, District Counsel lodged an objection, stating that claims under IDEA had not, heretofore, been asserted, that the District was not on notice of any such claims and would not agree to amend the scope of the complaint. A standing objection was noted, and overruled. The Complaint was included as an exhibit, accepted into evidence and determined to provide sufficient notice of the intent to pursue claims under both IDEA and Section 504 remedies. (NT 192-197; P-17)

The District denies these allegations and asserts the provision of a FAPE. Further, the District asserts that the student's progress was sufficient as illustrated through PSSA scores as well as grades noted on regular reports of progress and that Student's failure to thrive, if any, is as a result of the Student's lack of effort and/or insecurities.

The fact pattern presented by this case is straightforward and simple. The core question is basic: did the District meet its obligation to recognize, assess and respond to the gaps in this Student's performance or were the gaps ignored or ineffectively addressed by the District. The District responded inappropriately and often dismissively to the typography of this student's learning style, increasingly significant downward trend in performance and to the concerns of the Parent. Accordingly, this student has been denied a FAPE. The profile that the District failed to recognize is that the gaps in performance should have triggered assessment and specially designed instruction. Had the District been attentive to the many "red flags" which developed over the years, the specific learning disabilities and consequent need for specially designed instruction, and other supports, would have been discovered.

For the reasons that follow, Parents' claim for an Independent Educational Evaluation at Public Expense is GRANTED. Compensatory Education, in the form more specifically enumerated in the attached Order, for the period from December 17, 2008 through the Student's last day enrolled in the District, March 26, 2010 is GRANTED. The Request for reimbursement for tuition paid for the unilateral private placement is DENIED.

ISSUES

The issues presented at the hearing were as follows:

1. Did the District fail to provide Student with FAPE in the District's failure to identify the Student as an eligible child in need of specially designed instruction and in providing a Section 504 plan only?
2. If the District did not provide a FAPE to the Student what compensatory education should be awarded?

3. Is the Parent entitled to reimbursement for an Independent Educational Evaluation (an "IEE") obtained by the Parent?[1]

4. Is the Parent entitled to reimbursement for tuition paid for a unilateral placement to a private school? A decision on this issue must be framed in a three (3) part analysis:

   (a) Was the program and placement the District offered to the Student appropriate?

   (b) If the program and placement the District offered to the Student was not appropriate, was the placement unilaterally chosen by the Parents appropriate?

   (c) If the District did not offer the Student an appropriate program and placement and the placement unilaterally chosen by Parents was appropriate, are there equitable considerations that would serve to remove or reduce the District's responsibility to reimburse the Parents for the Students tuition?

FINDINGS OF FACT

1. The Student, a student identified with specific learning disabilities and determined to be ineligible for special education services was born on [redacted] and lives with Student's mother who resides within the District. (NT 26).
2. The District is a recipient of Federal Funds.
3. During the 2006/2007 school years, the Student was in 6th grade. (NT 34)
4. During the 2007/2008 school years, the Student was in the 7th grade. (NT 44)
5. During the 2008/2009 school years, the student was in 8th grade.
6. During the 2009/2010 school years, the Student was in the 9th grade.
7. The Student was withdrawn from the District on March 26, 2010 in the spring of the 9th grade year to attend the [redacted] School (hereinafter referred to as "Private School") (NT 176)
8. The Student was initially enrolled in the District in Student's first grade year and remained in the District through second grade. (NT 80-81)

[3] Although violations of Section 504 were alleged in the complaint and addressed by the Parties as an issue for determination, Section 504 violations need not be addressed since a determination of FAPE has been made. *West Chester Area Sch. Dist. v. Bruce*, 194 F. Supp. 2d 417, 422 n.5 (E.D. Pa. 2002).

9. The Student was identified as an eligible student in first and second grades and received specialized instruction through an IEP for a specific learning disability. (NT 80-81)
10. The District was aware of the Student's previous enrollment in the District and of Student's status as an identified eligible child during first and second grade years. (NT 86-102)
11. The District made no attempt to review the Student's previous special education file within the District. (NT 86-102)
12. The District did not assess any potential need to evaluate the student upon reenrollment within the District for placement or special education purposes. (NT 86-102)
13. The Parent has consistently been involved in the student's education and has regularly "checked in" with school officials as well as made specific inquiries or express concerns. (NT 39-74)
14. The Parent did not refuse an offer of "special education services" upon the Student's re-enrollment in the District, not was such an offer made. (NT 72-79)
15. Although the Parent requested special education services, the District determined the Student ineligible for special education services. (NT 39-74)
16. The District responded to Parent's concerns by offering accommodations through a Section 504 plan. (S- 8)
17. The Parent indicated agreement with the Plan and signed the Plan. (S-8)
18. Although the 504 Plan was amended several times, the plan remained substantively unchanged, the efficacies of the accommodations in the plan were not objectively measured and the student's performance continued to decline. (P-10; P-12; P-18)
19. Documentary and testamentary evidence presented by both the Parent and the District demonstrated significant gaps between ability and performance of the Student as well as demonstrable regressions throughout the 2008/2009 and 2009/2010 school years.
20. Evidence supports the provision of appropriate programming and adequate performance of the Student during the 2006/2007 and 2007/2008 school years.

21. The Independent Evaluator is qualified as independent evaluator and certified school psychologist pursuant to her CV. (P-45)
22. The School psychologist is a qualified professional to administer the instruments utilized during the District's Reevaluation. (SD-135)
23. One purpose of the reevaluation was to gain information on possible contributing factors to Student's inconsistent performance. The instruments utilized during the District's Reevaluation" to determine, the Student's social and emotional functioning was a student self report which did not include parent input. Parent input is a critical component in a comprehensive evaluation. (P-18)
24. In sixth grade, the Student received a final grade of an 84 in English, a 97 in Comp Lit, an 88 in Reading Through Time, an 83 in Science, and an 85 in Math. In PSSAs for that year, The Student scored a "Basic" in Reading and "Advanced" in Math. (N.T. 121-25; P-9, P-11).
25. In seventh grade, the Student remained in a specialized reading program, but without specialized instruction. The Student's grades for seventh grade remained consistent with those received in sixth grade. (N.T. 72, 138-39, 145, 150-51; P-12).
26. In eighth grade, the Student's grades began to plummet indicating a continued widening gap between ability and performance. Pursuant to the Parent's request for an evaluation, on October 27, 2008, the District issued Permission to Evaluate (PTE) form that the Student's mother signed and sent back on November 3, 2008. (N.T. 241, 245-48; P-15; P-16; P-19).
27. Following the Student's evaluation, the District issued an Evaluation Report (hereinafter referred to as, "ER") dated December 17, 2008.
28. The ER reflects that the Student had regressed significantly in both Math and English from the previous year.
29. The ER reflects the results of the WISC-IV intelligence test showed that the Student received lower scores than in corresponding tests on the WISC-III from first grade.
30. The ER notes that "The Student has not maintained [Student's] vocabulary level and knowledge base of information at [Student's] previous superior level".

31. The ER also notes weaknesses in Student's slower visual processing and indicates academic skills were discrepant.
32. The ER found the Student to be at risk for anxiety, depression, hyperactivity, attention problems and withdrawal. (P-18).
33. Notwithstanding the results of the ER indicating the existence of behaviors with learning positive behavior support planning was not offered. (P-18).
34. Notwithstanding the results of the ER indicating the existence of specific learning disabilities as well as significant performance regressions and discrepancies, the Student was deemed ineligible. (P-18).
35. Based on the recommendations of the School Psychologist, the Parent agreed to a 504 plan. (N.T. 73-75, 242-45, 250-51, 310, 313-16; P-17; P-18; P-20).
36. A section 504 plan, which noted that the Student had been diagnosed with ADHD and a specific learning disability, was put into place on January 27, 2009, in the middle of the eighth grade year.
37. The plan provided additional time for test-taking and written assignments; stated that the Student should be seated near the front of the room; that Student "may need" a quiet room to complete tests and quizzes; that Student be given "the opportunity to use a word processor for written assignments; and provided a consult with and OT. The 504 plan did not include any accommodations intended to address the identified academic discrepancies or learning disabilities identified in the District's own evaluation. (N.T. 252-53; P-18, P21).
38. The Student's final grades for eighth grade continued to show a downward trend. The final grade for English was a 78, for Pre-Algebra a 77, for History a 79, and for Science a 77. These were all in the C+ range. (P-19, at 1-2).
39. The 504 plan did not have a positive effect on the Student's behavior or learning and as ineffective to accommodate the Student. (P-19).
40. The Student's grades continued to plummet in the first quarter of ninth grade. The Student received a 58 in English and a 68 in Physical Science. (N.T. 260-63; P-27; P-28; P-30).

41. The Student's 504 plan was revised on October 7, 2009 and again on March 1, 2010. The plan did not significantly change and remained ineffective to accommodate the student. (N.T. 253-55; P-24; P-25; S-5; S-8; S-11)).
42. On February 27, 2010, the District again informed the Parents that the Student's performance in English, Algebra, Health and Fitness was unacceptable. However, no changes were made to the Student's accommodations. (N.T. 260-63; P-27; P-28; P-30).
43. The Student required remediation in Reading through specially designed instruction. (P-19).
44. The District relied on the observations of a student intern to assess the efficiency of the Student's 504 plan. The District did not produce the Intern's report. (N.T. 262, 381; P-29, S-10).
45. The District did not appropriately monitor the Student's progress. Assessment was made through issuance of grades reported on report cards and class test grades. (N.T. 363-65, 589, 599).
46. The District failed to conduct an OT evaluation recommended and agreed to by the team in February of 2010. (N.T. 50, S-16).
47. The District failed to pursue the recommendations of the Qualified Reading Inventory (hereinafter referred to as "QRI") dated November 23, 2009. (N.T. 260-64, 265, 303,572; P-31).
48. The District attributed the Student's decline to the Student's refusal to avail []self of the accommodations provided to Student. (N.T. 375-77, 381-91, 398-401, 524, 567, 607-608; S-10; S-16).
49. The Student's decline in performance was not due to Student's failure to utilize the 504 plan but the result of learning disabilities and Student's diagnosis of ADHD. (N.T. 363-65, 589-99; P-36, P-42-44).
50. On March 23, 2010, the Parent's wrote and hand-delivered a letter to the principal of the High School asking that the District reevaluate the Student in all areas of disability. The letter also advised that placing Student at the Private School for the remainder of the 2009/2010 school year. (N.T. 267-69; P-40; P-15).

51. The District did not seek to evaluate the Student prior to Student's leaving the District. (N.T. 267-69; P-40; P-15).
52. The Parent's request for a reevaluation was refused by the District. (N.T. 50; S-16).
53. The Parent's request for a reevaluation was refused based on the District's position that the December 2008 ER had been performed only 18 months earlier. (N.T. 363-65, 589-99). However, the only data collected in that interim to assess whether there was a positive response to the new interventions was academic grades and anecdotal information from the Student's teachers.
54. The Private School, a private independent college preparatory school for grades four through twelve, with 33 students in the school and 14 members on staff.
55. Ms. K, M.A., NCSP, ABSNP, a stipulated expert in school psychology and, by virture of her training and experience, an expert in neuropsychology, performed an independent neuropsychological evaluation and issued a report dated October 25, 2010. (P-45; N.T. 413-414; P-36; P-42-44).
56. The IEE concluded that the Student suffers from a specific learning disability in Reading, particularly in the area of fluency, that resembles a processing speed subtype, as well as an extreme Attention Deficit Disorder (ADD).
57. Recommendations for specially designed instruction in the area of academic fluency as well as accommodations for processing speed deficits and attention deficits were made.
58. Specific goals and objectives that are measureable and quantifiable, and progress monitoring data using research-based programs to develop academic fluency in the areas of reading, mathematics and writing are required to appropriately meet this students needs. (N.T. 186-87, 407-25, 429, 445-73; P-21;, P-31; P;-36; P-42; P-43; P-44).
59. The Student is an eligible student under IDEA as a student with a specific learning disability, as well as under the category Other Health Impaired (OHI) due to Student's diagnosis of ADHD. (N.T. 186-87, 407-25, 429, 445-73; P-21;, P-31; P;-36; P-42; P-43; P-44).
60. The Student's 504 Service Agreements were not appropriate. (N.T. 186-87, 407-25, 429, 445-73; P-21;, P-31; P;-36; P-42; P-43; P-44).

61. The program provided by the Private School has not met any of the core requirements necessary to meet this student's needs. (N.T. 186-87, 407-25, 429, 445-73; P-21;, P-31; P;-36; P-42; P-43; P-44).
62. The Private School does not provide research based reading instruction and does not provide any direct instruction in reading fluency. (N.T. 222).
63. The Parent's expert identified fluency based direct instruction critical to this student's successful remediation. (N.T. 429-430).
64. None of the teachers at the Private School have highly qualified teaching status.
65. The Private School does not develop individualized goals and have only classroom based curriculum goals which are not individualized or individually monitored. Id. (N.T. 228-230).

DISCUSSION AND CONCLUSION OF LAW

The Right to a Free and Appropriate Public Education and Burden of Proof

Under both Section 504 and the Individuals with Disabilities (hereinafter referred to as "IDEA"), the School District is required to fully evaluate any child in "all areas related to the suspected disability". 34 CFR §300.532. Thus, the seminole first issue to resolve is whether the District erred in its eligibility determination. The record is replete with documentary and testamentary evidence that the District failed to classify this student as eligible under IDEA.

The Individuals with Disabilities Education Act ("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). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of a FAPE to its local school districts.

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school district for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. *Carlisle Area Sch. v. Scott P.,* 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the Student bears the burden of proof in this proceeding. The

United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of a FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. *Schaffer v.Weast U.S, 126 S. Ct.528, 163L. Ed.2d 387 (2005). In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006)*. Because the Student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The United States Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., Student's parents) must lose because the party seeking relief bears the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005); *L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006).* Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

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). In assessing whether an individualized program of instruction is "reasonably calculated" to enable the the Student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis. Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (182); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999).*

The Parents specific denials of a FAPE in the lack of appropriate of eligibility and designation of specific learning disabilities, recognition of designation of specific learning disabilities and the lack of response by the District to support the Student in providing appropriate specially designed instruction, assistive technology, or utilization of specific methodologies is wholly supported by the evidence. In fact, the evidence is replete with examples of the District continually failing to respond to regression and ignoring its own recommendations found in the results of the testing performed by the District as well as in the comments of its child safety team.

Is the Parent Entitled to an IEE at District Expense

As previously noted, under both Section 504 and IDEA, the School District is required to fully evaluate any child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." where the child is suspected to be in need of special education 34 CFR § 300.532 . Should the Parent's disagree with an evaluation, they have the right to request an independent educational evaluation at public expense. 34 C.F.R. § 300.503. The District is obligated to grant that request or, in refusing must file its own due process request. Id. IDEA and its regulations require that the people who review the assessment information and complete the report must be qualified professionals who, with the parent, determine the educational needs of the child. 34 C.F.R. § 300.306. The Independent Evaluator was accepted as an expert and presented a thorough assessment of the Student's strengths and weaknesses and outlined specific interventions necessary to address her findings. Although the District's professional who conducted its evaluation was likewise qualified to perform the testing, the evaluation's findings in its test results, conclusions and the realities of the Student's school performance, were patently incongruent with the determination of ineligibility for specially designed instruction. It is troublesome to this Hearing Officer that the District, in its presentation of its evidence as well as in its closing statements, relies heavily on the "vast" resources available in this District , however, in reality, offered no substantive support to this student and sent an intern to do the work required by a specialist.

The District asserts that *"The applicable IDEA regulations state: "A parent has the right to an independent education evaluation at public expense* ***if the parent disagrees*** *with the evaluation obtained by the public agency…." 34 C.F.R. § 300.502(b) (emphasis added). Here, the District conducted an evaluation to which the parent expressly agreed, thus they are not entitled to reimbursement".* The fact that the Parents checked the box "agreeing" to the District's ER is not a per se bar to reimbursement.

While it is true that pursuant to 34 CFR §300.502(b)(i), a parent is entitled to reimbursement of an IEE at public expense if they disagree with the District evaluation report and the District evaluation report is in some way inappropriate. *Holmes v. Millcreek*

Tp. School Dist., 205 F.3d 583 (3rd Circ. 2000). There are also decisions supporting the reimbursement of an IEE on equitable grounds even if there was not a previous District evaluation conducted with which the parent disagreed. The regulation is broadly applied to permit reimbursement not only when the parents expressly disagree with the evaluation but also when "the parents fail to express disagreement with the District's evaluations prior to obtaining their own" evaluation because unless the regulation is so applied "the regulation [would be] pointless because the object of parents' obtaining their own evaluation is to determine whether grounds exist to challenge the District's. *Warren G. ex rel. Tom G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999). Consequently, reimbursement may be warranted where a parent does not take an express position with respect to the district's evaluation or otherwise "fails to express disagreement." *Lauren W v. Radnor School District* 480 F.3d 259 (3rd Cir 2007), PA Spec. Educ. Op. No. 899 (1999); PA Spec. Educ. Op. No. 1111 (2001); PA Spec. Educ. Op. No. 1140(2001); PA Spec. Educ. Op. No. 1573 (2005); PA Spec. Educ. Op. No. 1733 (2006). Additionally, there was a request for a re-evaluation made on March 23, 2010 for which the District refused to perform. (N.T. 73-75, 244; P-18, P-35).[3]

Of the utmost importance and particularly critical under the fact of this case is that the starting point for the determination of the appropriateness of an offer of a FAPE *is* the evaluations from which the needs of a Student are identified. In order for an evaluation to be determined to be appropriate, it must meet the requirements of 34 CFR § 300.532. More specifically, the Evaluation Report (ER) should: 1) utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the Student, including information provided by the parents; 2) assess the Student in all areas related to the suspected disability; 3) be sufficiently comprehensive to identify all of the Student's special education and related services needs; and 4) utilize technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors. *See In Re the Educational Assignment of L.-M. B., Special Educ. Op. No. 1795 (2007)*. The Districts evaluation fails the third requirement in the lack of its

[3] Although not raised by the parties, the "timing" of the re-evaluation made request i.e. just prior to removing the student from the District is inconsequential as, had the district performed the evaluation and proposed an appropriate program the student may not have been removed. The District does assert a "timing" issue with respect to the Parent request for a reevaluation in asserting that the request was simply a veiled attempt to have the costs of an evaluation covered which was necessary for the SAT boards rather than to determine the cause of the student's continued decline. I am not impressed by this assertion.

sufficient comprehensiveness. Notwithstanding the administration of a variety of instruments all demonstrating significant deficits, most particularly stating: "There is a severe discrepancy in [Student's] basic reading skills when age-based standard scores were used to describe [Student's] levels of achievement compared to [Student's] cognitive ability…" (P-18). Nevertheless, the ER concludes, inappropriately, that the Student is achieving at a level as same age peers in all areas of the curriculum. At the time of the ER, the Student was in eighth grade yet all the data in the ER indicate performance at a sixth grade level or below. The ER's conclusion that the Student is ineligible for special education services is irreconcilable with its own data and the continued existence of a significant gap between documented cognitive ability and performance.

For the reasons heretofore mentioned the District's Evaluation was inappropriate. Reimbursement of the IEE is appropriate and is so Ordered.

Compensatory Education as a Remedy

The facts and circumstances of this matter constitute a series of events that in the end, amount to too little too late. There is no evidence to suggest that the Student was in need of an evaluation or services upon re-entry into the District. The District's failure to review its own records of the Student's previous services within the District, or the fact that the Student some five years earlier received support would constitute a per se failure of the Districts child find obligations as suggested the Parent. In fact, the Student's sixth grade performance seemed adequate under the law. It is the evidence of decline throughout the seventh and eighth grade years that should have caused the District's to take swift action to correct the increasing deficits in skill acquisition and interfering behaviors. The District's assertions that they monitored the Student appropriately and implemented modifications as necessary are not supported by the evidence. The District's position that the Student is not entitled to compensatory education as Student is not an eligible student begs the question: "There are no bright line rules to determine when a school district has provided an appropriate education as required by § 504 and when it has not. *See* *Molly L. v. Lower Merion Public School Dist.* 194 F. Supp 2d. 422, 427 (EID. Pa 2002). *Ridgewood,* 172 F.3d at 253. Further, it was determined that relief is sought under § 504 as well as under IDEA.

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 the Student is receiving only trivial educational benefit, and the district fails to remedy the problem. The period of compensatory education granted should be equal to the period of deprivation, excluding the period of time reasonably required for the district to act accordingly. *Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Regional School District, 81 F. 3d 389 (3rd Cir. 1996).*

If personalized instruction is being provided with sufficient supportive services to permit the Student to benefit from the instruction the child is receiving a "Free Appropriate Public Education as defined by the Act." Polk, Rowley. As discussed above, the Student demonstrated a decline in skill and increase in behaviors impeding Student's ability to access education and experienced increased difficulty in maintaining gains previously achieved.

The District failed to respond to these events.

Since the District failed to provide supportive services to permit the Student to benefit from the instruction the child is receiving a "Free Appropriate Public Education as defined by the Act." (emphasis added) Id, the Student was denied a FAPE and is entitled to compensatory education.

IS THE PARENT ENTITLED TO REIMBURSEMENT OF TUITION FOR A UNILATERAL PRIVATE PLACEMENT

Tuition reimbursement claims by Parents of individuals with disabilities are subject to the well-settled test as set forth in the United States Supreme Court's decisions in *Florence County School District Four v. Carter,* 510 U.S. 10 (1993) and *School Committee of Burlington v. Department of Education,* 471 U.S. 359 (1985). In *Burlington*, the Court reimbursement for Parents' prove that (1) the District has failed to offer FAPE, and (2) the private school selected by the Parents in appropriate, and (3) relevant to equitable considerations favor reimbursement. *See Carter,* supra; *Sinan L., et al. v. School District of*

Philadelphia, 2007 WL 1933021 (E.D. Pa. 2007); *Ridgewood Bd. Of Educ. v. N.E. for M.E.,* 172 F.3d 238, 248 (3rd Cir. 1990). If it is determined that the District did in fact offer the Student an appropriate program and placement, no further inquiry is necessary and the Parents' request for tuition reimbursement must be denied. *See* 20 U.S.C. § 1412(10)(C)(ii) (LEA does not have to pay tuition reimbursement for unilateral placement chosen by Parents if LEA made an offer of FAPE in timely manner before private enrollment); *See Also Sinan L., supra* at 11 (after Court found District's proposed program and placement to be principles.)

Only if there is a finding that District failed to offer the Student an appropriate program should the aforementioned second and third prongs of the analysis then be considered. If District's IEP is deemed appropriate, then the analysis moves to second prong of test and one must decide if private placement is appropriate; if private placement is then deemed appropriate, the third prong of test considers equities.

To satisfy the first prong of the tuition reimbursement test under *Burlington-Carter,* Student must establish that the School District did not offer FAPE. This burden is met as it has already been established that, by virtue of the District's failure to appropriately identify this Student, a resultant denial of a FAPE exists and the first prong of the analysis is satisfied.

Therefore the appropriateness of the program at the Private School and whether any other circumstances exist to mitigate the obligations of the District should the program at the Private School be found appropriate, (the second and third prongs of the *Burlington* analysis) must be reviewed.

Regarding the appropriateness of the Private placement, one cannot look to the apparent , current success of the student alone. The parent points to higher grades and general positive affect in support of their position that the Private placement is an appropriate one. No other data, test results or details of existing supports or specially designed instruction were offered.

While the private school may be a good fit for this Student currently, the Parent cannot expect nor does the law support the Student's attendance there at public expense. The thorough testing of the IEE and the comprehensive testimony of the parents' expert whom is found to be highly skilled and credible, specifically enumerates particularized

specially designed instruction, highly specialized curricula and the need for data collection and analysis of individualized objective and measurable goals as critical components of the program required for this Student whom she designates as eligible under two categories of the IDEA. [4]

CREDIBITLTY OF WITNESSES

Hearing Officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing. Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).* Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a Student's special education experience. In this particular instance, the evidence, testamentary and documentary, was not as disparate as one finds in many cases in support of the position that this Student is one who should have been determined as eligible. All witnesses testified credibly.

Hearing Officers have the plenary responsibility to make "express qualitative determinations regarding the relative credibility and persuasiveness of the witness". *Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIZ 21639 at *28 (2003).* This is a particularly important function, as in many cases the Hearing Officer level is the only forum in which the witness will be appearing in person.

[4] The administrator of the private school specifically testified that the school does not offer any of the supports identified as necessary to comprise an appropriate program for this student. Consequently, the request for reimbursement of tuition is DENIED as the private school program is deemed inappropriate on analysis of the third prong under *Burlington* is not reached.

CONCLUSION

For all of the foregoing reasons, the Student has been denied a FAPE in the District's failure to properly identify the Student as one in need of special education services. Accordingly, as outlined below the Student is entitled to compensatory education sufficient to remediate the depravation of free access to a public education for the entire period applicable. Additionally, as the IEE secured by the Parent provided valuable information and insight to the Student's needs and remedied the deficiencies and inconsistencies of the District evaluation. As such, the Parent is entitled to reimbursement for the expenses incurred in securing the evaluation.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby ordered to take the following actions:

1. Issue reimbursement for the Independent Educational Evaluation secured by the Parent within 30 days of provision, by the Parent, of documentation of the Invoice evidencing payment for the evaluation.
2. Provide the Student with compensatory education for the entire period of deprivation in the form of full days for each applicable day of the school calendar from December 17, 2008 through March 26, 2010 conducted in 2008 and 2009. The value of those services shall be measured by the cost to the District in providing such services and may be utilized by the Student to acquire tutoring in any academic domains, therapy/instruction in executive function or organizational skills, college preparation or assistance/instruction regarding other vocational/technical training as well as any related services incident thereto which may be indicated by the IEE.

Dated: July 8, 2011

Gloria M. Satriale

Gloria M. Satriale, Esq.,

Special Education Hearing Officer