

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
Final Decision and Order

CLOSED HEARING
ODR File Number: 21935-18-19

Dates of Hearing

May 14, 2019

June 18, 2019

August 20, 2019

August 29, 2019

Child's Name: A.G. **Date of Birth:** [redacted]

Parents:

[redacted]

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

Date of Decision: October 9, 2019

Background

Student¹ is an early-teen aged District resident who is currently parentally-placed in a private school. Student is identified as eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq.* (Chapter 14), as a child with a specific learning disability in the area of reading. As such, Student is also regarded as an “individual with a disability” as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and as a “protected handicapped student” under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

The Parents requested this hearing, alleging that the District denied Student a free appropriate public education (FAPE) from the time that Student left parochial school in the middle of 4th grade and began attending in the District in January 2016, up until the 2018-2019 school year when the Parents enrolled Student in a private school for children with learning differences. The Parents sought compensatory education for the entire time Student spent in the District, tuition reimbursement for the unilateral private school placement in the 2018-2019 school year, and reimbursement for a private speech/language evaluation. The District maintains that it provided Student with FAPE at all times and that no remedy is due.

The first hearing session was solely devoted to obtaining evidence about the scope of the hearing, addressing the Known or Should Have Known (KOSHK) date. At the completion of the session the hearing officer ruled that she could find no grounds upon which to base a retrospective extension of the IDEA’s two-year statute of limitations. Accordingly, the relevant period for recovery in this matter begins on March 15, 2017, two years prior to the date the Parents filed their complaint

In reaching my decision I carefully considered the witnesses’ sworn testimony, documents admitted into the record, and the parties’ written closing arguments. Below I reference the evidence that I found to be directly relevant to deciding the issues before me; hence not all testimony nor all documents comprising the record are cited. Based on the record before me I find in favor of the District.

¹ 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. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

Issues

1. Did the District provide Student with FAPE during the relevant period of time Student attended school in the District?
2. If Student was denied FAPE for any part of or all the relevant period of time Student spent in the District is compensatory education due, and in what form and amount?
3. If the District denied Student FAPE for the 2018-2019 school year, is the private placement the Parents unilaterally chose for Student appropriate?
4. If the District denied Student FAPE for the 2018-2019 school year, and the Parents' unilateral placement was appropriate, are there equitable considerations that would remove or reduce the District's obligation to provide tuition reimbursement?
5. Must the District be required to reimburse the Parents for the cost of the summer 2018 private speech/language evaluation?

Findings of Fact²

Relevant Background Facts³

1. Prior to the middle of 4th grade Student attended a local parochial school beginning in kindergarten. [NT 59; S-1]⁴
2. While Student was attending parochial school Student's reading skills were evaluated on two occasions by the local intermediate unit. [NT 116-117]
3. The parochial school guidance counselor suggested that the Parents ask the School District to conduct a full evaluation. The Parents followed through in August 2015, prior to the start of Student's 2015-2016 4th grade year. [NT 116-117; S-1]
4. The District issued a Permission to Evaluate and issued an initial Evaluation Report ("ER") on or about October 19, 2015. [P-1]
5. Student demonstrated cognitive functioning in the average range. [P-1]

² Transcript page references to witnesses are as follows: Mother – NT 56 through 165; District Special Education Teacher – NT 166 through 185; Mother – NT 205 through 295; District Learning Support Teacher – NT 287 through 368; District Reading Specialist - NT 369 through 434; Private Neuropsychologist - NT 441 through 510; Private School Head of Middle School - NT 513 through 562; District Middle School Special Education Supervisor - NT 563 through 593; District Reading Specialist– NT 598 through 701; District 8th Grade Learning Support Teacher – NT 703 through 750.

³ Although the period for any recovery begins on March 15, 2017 I will present relevant facts from before and after Student entered the District.

⁴ Several of the parties' exhibits were duplicative and each side tended to reference its own numbered copy of the exhibit. In this decision one or the other exhibit number will be referenced, but not both.

6. The District found Student to be eligible for special education under the classification of a specific learning disability in reading. [S-1]
7. As part of its comprehensive evaluation the District assessed Student's speech/language functioning and determined that Student was not in need of speech/language programming. [S-1]
8. In January 2016, in the middle of 4th grade, the Parents disenrolled Student from the parochial school and enrolled Student in the District, where Student attended through the remainder of 4th grade, as well as for 5th and 6th grades. [NT 59]
9. In mid-January 2016, shortly after beginning in the District, Student was given benchmark testing and the initial proposed IEP was revised to include the updated information. [S-8]
10. Between November 2015 and the end of the 2015-2016 school year, the IEP team met on several occasions. Shortly after the initial IEP meeting, once Student was actually attending school in the District, Student's time in special education was increased from an itinerant level to a supplemental level. [P-3, P-4, P-5]

5th Grade: 2016-2017 School Year⁵

11. At the start of 5th grade the District sought to identify the specific reading program that would address Student's needs. The District planned to use a Wilson-based⁶ program; Wilson recommends that students be assessed to determine which Wilson reading program, the "Wilson Reading System" or the "Just Words" program, is more appropriate. The Wilson Reading System instruction is much more restrictive and slower paced than Just Words. A placement in the Wilson Reading System could lead to frustration and boredom if a student does not need that particular Wilson program. [NT 325]
12. To determine the appropriate reading program, Student was assessed using the nationally standardized Word Identification and Spelling Test (WIST), one of the assessments Wilson recommends to determine programming decisions. Students who score 15% or lower are appropriate for the Wilson Reading System while students who score between 16% and 50% are appropriate for Just Words. [NT 341-343; S-21, S-25]
13. Student's scores on the Word Identification and Spelling Test were too high to qualify for the Wilson Reading System. [S-25]
14. Since assessment results verified the appropriateness of Just Words over the Wilson Reading System for Student, in 5th grade Student received instruction in basic reading skills and comprehension for 120 minutes per day, with 30 minutes of instruction in Just Words and 90 minutes of instruction in Read 180. As part of the literacy curriculum Student was

⁵ The scope of the hearing in terms of recovery begins on March 15, 2017.

⁶ "Wilson" is a reading program created by Barbara Wilson that is based upon Orton-Gillingham principles for teaching reading to struggling readers.

instructed in writing in the regular education classroom for 30 to 35 minutes daily. [NT 290-294]

15. The Just Words class held 3 to 5 students. Whole group instruction and small group instruction were provided; the size of small group instruction was 2 students. [NT 295-297]
16. In late September 2016 Student was in 5th grade and had been under District instruction for approximately 6 months. The Parents expressed concern with Student's progress in reading, writing and math and requested that the District conduct a reevaluation. The District agreed and timely produced a reevaluation report (RR) in early December 2016. [NT 310-211, 344; S-16, S-24, P-8]
17. The reevaluation resulted in the finding that Student continued to be eligible for special education services under the classification of specific learning disability in reading. Student continued to display a need for specially designed reading instruction to support fluency skills and the ability to read and comprehend higher level texts. [NT 311-312, 346; S-16, S-24]
18. In late December 2016, the IEP team convened to develop a new annual IEP. The IEP team also added additional supports for math, including pre-teaching and re-teaching in the learning support classroom. [NT 290-291, 313]
19. During the 5th grade school year Student showed progress in all areas of reading as well as an increase in self-confidence as demonstrated by taking initiative and using learned strategies independently without waiting for prompting. [NT 228, 338, 350; S-14, S-23]
20. The Parents had no concerns regarding Student's emotional status or well-being as of the end of 5th grade. [NT 206]
21. The IEP team met in mid-May and early June 2017 to review Student's IEP in preparation for transition to 6th grade. [NT 314-315, 609; S-19, S-20, S-21, P-10, P-11]
22. The Parents advocated very strongly for Student's proposed reading fluency goal to be changed to read that Student would read fluently on grade level by the end of 6th grade. Although the District did not believe the goal for reading fluency was realistic, the District acceded to the Parents' request and revised the goal in the proposed IEP. [NT 152-154, 315-317]
23. On June 9, 2017, the District issued a Notice of Recommended Educational Placement (NOREP). [P-11]

6th Grade: 2017-2018 School Year

24. Although the Parents had not shared the information with the District, Student had been administered prescription medication to treat ADHD in 5th grade and Student did not present with notable attention needs in school in 5th grade. [NT 85, 107, 342-343, 352, 646]

25. In 6th grade, Student presented with difficulties in sustaining attention and time on task compared to 5th grade. In general education classes, Student was provided prompts as needed to maintain focus and responded to this redirection. Student did well in the general education classes, actively participating in class and working well on group projects. [NT 381, 604-605, 646-649]
26. Student had a good sense of humor, got along well with peers and was well-liked. [NT 605, 648]
27. Towards the beginning of 6th grade Student shared with the Parents concerns about being in a number of support classes and feelings of being 'stupid'. The Parent may or may not have shared this information with the District. [NT 212-213, 217]
28. Student's 6th grade case manager is a certified reading specialist and a Wilson Dyslexia Practitioner. In October of 6th grade she administered the Wilson Assessment of Decoding and Encoding (WADE) to assess if Just Words continued to be the appropriate reading program for Student. The results indicated that Just Words remained the appropriate reading intervention to address Student's basic reading needs. [NT 655-656, 663]
29. Because the team was concerned about regression over the summer, the District's reading team decided to start Student on Unit 1 of Just Words as a review of learned skills. [NT 394-395]
30. At the beginning of 6th grade Student's certified reading specialist assessed Student's reading baseline and determined that the reading goal in the IEP developed at the end of 5th grade was not appropriate given Student's baseline score. She recommended that Student's IEP reading fluency goal be reduced and the team agreed to adjust the goal in line with baseline data. [NT 391-393; S-30]
31. The Parents were concerned about the need to adjust the reading fluency goal downward since they had advocated strongly for the higher target, but did not tell the 6th grade team⁷ that the higher reading fluency goal had been set at their initiative contrary to the District's recommendation. [NT 111, 153-154, 681-682]
32. Progress monitoring is part of the Just Words program, and students advance to the next unit upon reaching 80% on a task requiring reading a number of words in a specified time. The reading specialist noted that Student was using up time by being distracted by the timer, and was focusing on and showing concern about being timed. The reading specialist on occasion therefore administered the probe without timing and found that Student did not need that much more time to complete the probe. She consulted with Wilson training representatives to be sure that it would not impact the fidelity of the program if she advanced Student up a level when Student earned 80% or more on untimed probes and Wilson approved this approach since Student's reading accuracy was improving and comprehension scores were improving as well. Student earned 80% or more on all untimed

⁷ Children in the District all move to a self-contained school building for 6th grade.

assessments, and in some instances on timed assessments, specifically for Units 2, 3, 9, and 11. [NT 396-398, 431-432; S-27]

33. Student's 6th grade case manager, who also co-taught Student's English Language Arts class, provided Student with direct instruction in writing in a special education remedial class utilizing a research-based writing program, Step Up to Writing. Instruction was provided 2 times per 6-day cycle for 48 minutes. [NT 600-603, 619]
34. Step up to Writing addressed Student's identified needs in writing, specifically with organization, sentence combining, grammar, and writing mechanics. [NT 685; S-24, S-25]
35. Student received additional math instruction and support in math extensions, a remedial math course in a class containing a mix of regular and special education students. [NT 606-607]
36. Student's mother believed that with regard to reading comprehension Student appeared to have made progress from the beginning of the 6th grade year, but in her mind with regard to the other reading instruction Student didn't make any progress because Student was working towards the same goal over a year and a half period. The Parent acknowledged that with regard to the general education classes Student "was pulling straight A's and getting honors" but she was perplexed that this could be so if Student was not yet reading at grade level. [NT 233]

Student's Progress in the District

37. Fountas and Pinnell (4th grade through 5th grade): January 2016 = Level M; November 2016 = Level P; June 2017 = Level U (middle of 5th grade at the end of 5th grade). [P-11]
38. Just Words (5th grade through 6th grade): Progressed from Unit 1 though Unit 13. [S-27]
39. Read 180 Lexile⁸ (5th grade through 6th grade): Fall 2016 = 602; December 2016 = 662; June 2017 = 710; Fall 2017 = 630⁹, Mid-Year = 706, Year End 2018 = 919 (925 is proficiency for 6th grade). Student gained 289 Lexile points over 5th and 6th grades. [S-14, S-16, S-27, S-30, P-11]
40. Achieve 3000/Teen Biz Lexile (6th grade): Fall 2017 = 760; Mid-Year = 885, Year End 2018 = 955 (represents proficiency for 6th grade). Student gained 195 Lexile points in 6th grade. [S-27]
41. Word Identification and Spelling Test (WIST) (5th grade): Fall 2016 = Word Identification 30%; Spelling 32%; Foundational Literacy Ability Index 30%; Sound-Symbol Knowledge 14% (below average). Spring 2017 = Word Identification 42%; Spelling 35%;

⁸ Lexile is a measurement of a student's reading comprehension, the ability to read a passage and answer the questions based on the passage. The higher the Lexile number, the more difficult the passage. [NT 329-330]

⁹ It is common to see a drop in Lexile scores when moving from Read 180 to Achieve 3000 since the texts for Achieve 3000 are nonfiction and more challenging. As a result of Student's gains in Reading Extensions, the team recommended that Student transition to the higher level reading comprehension course. [NT 625-626; 668-672]

Foundational Literacy Ability Index 37%; Sound-Symbol Knowledge 25% (average). [S-21]

42. Group Reading Assessment and Diagnostic Evaluation (GRADE) (6th grade): Fall 2017 = Vocabulary 4.7; Comprehension 4.2; Total 4.3. Spring 2018 = Vocabulary 6.7; Comprehension 5.6; Total 6.1. [S-27]

43. Wechsler Individual Achievement Test - Third Edition (WIAT-III)¹⁰:
2015 (Prior to Entrance into the District) / 2016 (Middle of Time in District) /2018 (Prior to Exit from the District)¹¹:

Reading: Word Reading 85/85/79; Pseudo-word Decoding 74/88/79; Basic Reading 80/86/79; Oral Reading Fluency 86/84/85; Oral Reading Accuracy NA/84/82; Oral Reading Rate NA/83/87; Reading Comprehension 93/109/97; Total Reading 81/88/79.

Written Expression: Spelling 85/91/87; Sentence Composition 89/109/97; Sentence Combining NA/115/100; Word Count NA /100/108; Theme Development and Text Organization NA/111/106; Essay Composition 96/106/108; Written Expression 87/102/96.

Mathematics: Math Problem Solving 92/90/98; Numerical Operations 76/115/89; Mathematics 83/103/93; Math Fluency Addition 98/NA/91; Math Fluency Subtraction 85/NA/96; Math Fluency Multiplication 63/NA/88; Math Fluency 80/NA/91.
[S-1, S-16, S-31]

44. Student's end of year 6th grade report card showed good grades in general education classes: English/Language Arts = A; Math 6 = A; Science = B. [S-27]

Independent Educational Evaluation

45. The 6th grade IEP team reconvened for an annual revision in late November 2017. At or near the time of the IEP meeting, after obtaining legal consultation, the Parents requested an independent educational evaluation (IEE) which the District agreed to fund although it had completed its own evaluations in October 2015 and in December 2016 as well as administering reading-specific tests at the start of 5th and 6th grades. Although the IEE was completed in March and April 2018 the evaluator did not give it to the Parents or the District until June 12, 2018. [NT 220-222, 243, 566-567, 632]

¹⁰ (Note: Standard Scores staying within the same error of measurement over consecutive administrations of the norm-referenced test indicate that the test-taker has advanced year by year in step with the same-age cohort. Scores below or beyond the standard error of measurement indicate regression from same-age peer group or advancement from same-age peer group. The average range on the WIAT is 85 through 115 and the standard deviation from the mean is 15 points.)

¹¹ Some of the reported scores from the 2016 administration seem to be out-of-pattern. In the absence of the ability to review the test protocol I cannot draw any conclusions about these scores.

46. In addition to confirming that Student has a specific learning disability in the area of reading, the independent evaluator also found indications of Attention Deficit Hyperactivity Disorder, Predominately Inattentive Presentation. [P-14]
47. The independent evaluator noted some weaknesses in written expression, math calculation, executive functioning, and some indicators of anxiety. [P-14]
48. Upon receiving the IEE report at the end of 6th grade, the District's special education director contacted the independent evaluator by telephone to prepare for the scheduled IEP meeting to be sure that the District was "doing right by Student" going into 7th grade. She took notes summarizing parts of the independent evaluator's responses to her questions. [NT 567-568; S-32]
49. The director of special education asked the independent evaluator if the District's decision to place Student in Just Words for 5th and 6th grades was reasonable because Student's scores were on the cusp between the Wilson Reading System and Just Words and independent evaluator agreed that it was¹². [NT 570, 575]
50. The special education director and the independent evaluator discussed programing going forward and the independent evaluator suggested that the Wilson Reading System might move Student along faster in solidifying skills. The District agreed to offer Student daily instruction in Wilson for 7th grade. [NT 570-571]
51. Other than some concerns about self-confidence the District had not seen indications of anxiety. The independent evaluator did not diagnose Student with an anxiety disorder. However, since the IEE noted that Student may be anxious, the director of special education asked about this in terms of programming and the independent evaluator reported that the Parents intended to address this area of need. [NT 450, 469, 486-487]
52. Because of the increased demands of the curriculum going into 7th grade the independent evaluator recommended a speech/language evaluation. Rather than asking the District to conduct this specialized evaluation, or to fund an independent evaluation of Student's speech/language, the Parents asked a family friend to complete the evaluation. The Parents received the evaluation on June 21 and sent it to the District the following day. [NT 224, 489]
53. Prior to receiving the speech/language evaluation report from the family friend neither the Parents nor the District had noticed any needs in the area of speech/language. [NT 61]
54. The independent evaluator made recommendations for Student's programming going forward: implementation of an individualized, systematic, and intensive evidenced-based multi-sensory reading program with documented effectiveness for students with language-based learning disabilities (i.e., dyslexia), such as Wilson Reading System, delivered at the required levels of frequency and intensity; an educational environment

¹² When testifying the independent evaluator could not remember this, saying that the things she remembered from the conversation were "much broader brush issues than that specific one". The clear recollection of the director of special education is judged to be accurate on this point. [NT 487-488]

that is responsive to Student's educational needs and integrates literacy needs within the academic curriculum; and more intensive support for Student's needs in written expression, foundational math skills, assistive technology, anxiety, self-esteem, attention and executive functioning. [P-14]

District's Proposed Program for 7th Grade: 2018-2019 School Year

55. On August 10, 2018, prior to the IEP meeting scheduled for August 13, 2018, the Parents expressed their belief that the program for Student that was being offered for the coming year was not appropriate, and provided the District with written notice of their intent to place Student in the private school and seek tuition reimbursement in the event they could not agree on Student's IEP at the upcoming meeting. [P-24]
56. By the time of the August 13, 2018 IEP meeting, Student had been attending the private school's summer program; the Parents had not informed the District of this. [NT 240-241]
57. On August 13, 2018, the IEP team convened to review the independent evaluation and revise Student's IEP¹³ in preparation for 7th grade. [S-33]
58. In reviewing the independent evaluation the IEP team found it consistent with the District's previous findings that Student had a specific learning disability in basic reading. As a result of the independent evaluator's conversation with the special education director, the District changed Student's reading program for 7th grade from Wilson's Just Words program to the Wilson Reading System with revised goals for decoding and encoding. [NT 744-745; P-16, P-24]
59. The District's IEP offer for 7th grade included two periods of reading instruction per day per six day cycle, one class period with the Wilson Reading System and the other class period with Teen Biz Achieve 3000 for a total of 343 minutes per 7-day cycle (expressed in 7-day period for purposes of comparison with the private school below). [NT 717-718; S-33]
60. The Wilson Reading System is scheduled as a normal class period so that students receiving it are not pulled from another class causing them to stand out from peers.¹⁴ [NT 586]
61. Under the District's IEP offer for 7th grade Student was to continue to receive reading comprehension supports, math supports and writing supports through general education intervention programming. [P-24]
62. The proposed 7th grade IEP addresses Student's executive functioning needs and includes a goal related to completing homework assignments and direct instruction in organizational strategies two times per cycle. Student was to receive a check-out at the end of each school

¹³ Student's annual IEP would be due in November, so in 7th grade Student would start the year under a revised previous IEP.

¹⁴ All 7th grade students move within the building to change classes and 7th graders in a specific homeroom do not move to classes as a group.

day to review deadlines for homework and projects and to organize materials. [P-16, P-24]

63. The proposed 7th grade IEP included up to four counseling sessions with the guidance counselor. [S-33]
64. The District offered a Functional Behavior Assessment to be conducted at the beginning of the 7th grade school year and a District referral for the assistive technology assessment process. [S-33]
65. Student's proposed 7th grade IEP included measurable annual goals to address Student's needs in decoding, encoding, reading fluency, reading comprehension, written expression, and organization. The proposed 7th grade IEP included specially designed instruction addressing Student's needs. [S-33]
66. On September 26, 2018, the team reconvened to again consider the 7th grade IEP since a speech/language pathologist was not available for the August IEP meeting. [NT 707-708; S-33].
67. The 7th grade IEP was revised to include speech/language therapy sessions addressing word finding, and expressive/receptive language needs. [S-33, P-16]
68. For 7th grade Student would attend a District middle school. The middle school is set up in four "houses" and each house has an assigned hallway. Each house has four 7th grade core teachers and four 8th grade core teachers. All students are assigned to a house and students stay in the same house for 7th and 8th grades such that the incoming 7th graders have a chance to interact with their one-year-higher 8th grade peers and with the teachers who will instruct them the next year. [NT 707-708]
69. The 7th grade team teachers, including the learning support teacher, meet once per 6-day cycle to discuss student progress or concerns. [NT 709-710]
70. In her testimony the Parent summarized the District's offered program for 7th grade as follows: providing reading support in a special education classroom with the Wilson program; adding speech/language therapy and two related goals (in September IEP meeting); adding an executive functioning goal; adding "all sorts of SDIs"; and "a lot" added such as assistive technology, and counseling sessions to help with transition. "There were a myriad of changes." [NT 227]
71. The Parent acknowledged that these changes were significant. [NT 227]
72. The Parents' specific concerns about the IEP were with regard to the social and emotional effect on Student, for example that being in specific special education classrooms or having to be singled out by having frequent movement breaks or having Student ask the teacher to repeat the questions was going to single Student out more and "make self-esteem plummet". Having even more services, fewer elective class choices and not having some classes with friends was "a huge concern". [NT 228]

73. The Parents believed that it “would not have been beneficial [for Student] to go to a comprehension class and a Wilson class and a fluency class” and it particularly, would have been beneficial “to have it all integrated into one” in line with the independent evaluator’s opinion. [NT 232]
74. Following the August 2018 IEP meeting, the Parents “decided that (the District’s 7th grade) is not the right place for [Student] and that [Student] would be better served at a different school.” The Parents did not approve the District’s proposed program and placement and followed through with their unilateral placement of Student at the private school for 7th grade. [NT 9, 58, 232]

Private School 7th grade: 2018-2019 School Year

75. All students at the private school have been identified as having a disability. [NT 519]
76. Students identified as having a reading disability are placed in a reading program the private school developed based on Orton-Gillingham principles. [NT 544]
77. At the private school Student is provided reading instruction 3 days per 7 day cycle for 83 minute periods for a total of 249 minutes of reading instruction per 7 day cycle.¹⁵ [NT 561]
78. Benchmark progress data is collected by the private school twice per year in October and April. The benchmark data is not aligned with the reading instruction provided. [NT 529-530, 547]
79. Student is not provided with speech/language services at the private school. [NT 554]
80. Student is happy at the private school and the Parents believe that making the placement there was the best thing they could have done for Student. [NT 235]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260

¹⁵ In comparison, the District proposed 2 periods per day for 49 minutes per period for a total of 343 minutes per week.

(3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court “must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). All witnesses appeared to be testifying truthfully to the best of their recollections.

FAPE: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). The IDEA contemplates educational programs tailored to “how the child’s disability affects the child’s involvement and progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa). Rather than presuming grade-level advancement, the IDEA requires revisions to education programs “as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate.” *Id.* § 1414(d)(4)(A)(ii), (ii)(I).

The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student’s “intellectual potential.” *Shore Reg’l High Sch. Bd. f 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 (3d Cir. 2009) (citations omitted). In *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court considered a lower court’s application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” The Court concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”

However, a school district is not required to provide the best possible program to a student, or to maximize the student’s potential. *Andrew F.*, 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not

required to incorporate every program that parents desire for their child. *Ibid.* The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. *Andrew F.*, 137 S. Ct. above at 999. The program’s appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014). Further, the law does not demand that an LEA provide a goal for, or particularized data on, “every single recognized need of a disabled student. “FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education.” *Coleman v. Pottstown School District*, 983 F. Supp. 2d 543, 572-573 (E.D. Pa. 2013), *aff’d*, 581 Fed. App’x 141 (2014).

It is therefore well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). A school district cannot be expected to eliminate a student’s disability or to guarantee that a student would attain any particular level of proficiency in areas of weakness, including basic reading skills. *Leighty v. Laurel School District*, 457 F.Supp.2d 546, 557 (W.D. Pa. 2006). The fact that a gap may remain between a student’s abilities and those of peers in reading skills does not amount to a denial of FAPE. *Andrew F* in 2017 affirms the principle articulated in 1989: What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Methodology The IDEA requires the IEP team, which includes the parents as members, to take into account any concerns parents have “for enhancing the education of their child” when it formulates the IEP. *Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007). Full parental participation in the IEP process does not mean, however, that LEAs must defer to parents’ wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA “does not require school districts simply to accede to parents’ demands without considering any suitable alternatives”; *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) (explaining that “parents who seek public funding for their child’s special education possess no automatic veto over” an LEA’s decision).

A district has the discretion under the IDEA to make judgments as to the type of appropriate services it will deliver. *K.C. v. Nazareth Area Sch. Dist.*, 806 F. Supp. 2d 806, 813-814 (E.D. Pa. 2011). The IDEA does not deprive educators of the right to apply their professional judgment. *Leighty v. Laurel School Dist.*, 457 F.Supp.2d 546 (W.D. Pa. 2006). The IDEA does not preclude a district and its experienced educators from determining the methodology to be employed in educating a child enrolled in its schools. *T.L. v. Lower Merion Sch. Dist.*, No. 15-0885, 2016 U.S. Dist. LEXIS 80315 (E.D. Pa. June 20, 2016); *A. H. v. Colonial Sch. Dist.*, No. 18-2698, 2019 U.S. App. LEXIS 20489 (3d Cir. July 10, 2019) citing with approval *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 592 (3d Cir. 2000) (at times and in some ways local staff who are more familiar with the student and the local curriculum can be better-qualified than third parties to gauge needs, individual circumstance and progress). The IDEA only requires consideration of

privately obtained evaluations, and not adoption of any conclusions or recommendations set forth therein. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(c).

Compensatory Education: Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999).

Tuition Reimbursement: Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement, but they place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE, otherwise acted appropriately, or that the parents' selected placement is inappropriate.

In *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985) the United States Supreme Court established the right to consideration of tuition reimbursement for students placed unilaterally by their parents. *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) later outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement. This three-part test is referenced as the "Burlington-Carter" test for tuition reimbursement claims under the IDEA. The second and third tests need be applied only if the first is resolved against the school district.

Independent Educational Evaluation: Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1).

Section 504/Chapter 15 – Denial of FAPE:

Section 504 and Chapter 15 also require that children with disabilities be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1). The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial of FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis under the IDEA is adopted here for purposes of considering the claim under Section 504/Chapter 15.

Discussion

Did the District provide Student with FAPE during the relevant period of time Student attended school in the District and, if not, is compensatory education due?

The District provided Student with FAPE during all the relevant period of time Student was educated in the District and therefore no compensatory education is due. The Parents' desire to help their child achieve grade and age-level reading proficiency as well as proficiency in other subjects is completely understandable and their efforts toward their expectations are admirable. During Student's time in parochial school they obtained two reading assessments from the local intermediate unit, and before the beginning of 4th grade they sought an evaluation from the District. Pursuant to that evaluation they made what must have been a difficult decision to remove Student from parochial school mid-year and enroll Student in the District. Their initial optimism about what the District could accomplish is evident, because after Student had only been educated in the District for about six months the Parents were already concerned about the progress that had been made. Their concerns continued through the time Student remained in the District.

From the District's standpoint, it had received a student in mid-fourth grade from a parochial school that from kindergarten on either did not recognize the extent of Student's needs in reading or had been having difficulty addressing them. In either case, when Student entered the District there was a lot of catching up to be done. The District provided special education services addressing Student's defined area of need for the remainder of 4th grade. At the beginning of 5th grade the District undertook a process to discern which reading program would meet Student's needs, chose Wilson's Just Words, and throughout the remainder of Student's time in the District monitored the appropriateness of that program, and applied the program with fidelity, including consulting with the Wilson organization about part of the protocol. As additional needs in writing and math emerged, the District addressed these in its programming. The evidence demonstrates that Student made meaningful progress over time.

The Parents continued to watch over their child's progress closely and in 6th grade requested an independent educational evaluation at public expense. To its credit, even though it had evaluated Student twice in as many years, the District agreed to fund the independent evaluation. After the results were transmitted at the end of the 6th grade school year in June, the District's special education director consulted with the independent evaluator to make sure that what went into the proposed 7th grade would be appropriate. Although reassured that their choice of Just Words had been appropriate the District took the independent evaluator's suggestion to heart and planned to offer the Wilson Reading System to Student for 7th grade, as well as incorporating other aspects of the independent evaluation into Student's prospective programming.

Did the District offer Student FAPE for the 2018-2019 school year and, if not, must the Parents be reimbursed for Student's tuition at the private school?

The District's IEP offered for Student in August for 7th grade was appropriate, and therefore the Parents are not entitled to tuition reimbursement for the 2018-2019 school year. Guided by the experience District staff had of Student in 6th grade, and informed through consultation with the

independent evaluator, the District crafted an IEP for Student's 7th grade that was appropriate. The IEP addressed Student's areas of need with appropriate goals, and provided an array of specially designed instruction to meet Student's learning style and weaknesses. In September following the receipt of the speech/language evaluation the District added speech/language services and goals to the IEP. Notably, until the independent evaluator suggested a speech/language evaluation since 7th grade work would be getting more difficult, neither the District nor the Parents had previously noticed any weaknesses in this area.

The Parents acknowledged that the 7th grade IEP incorporated a "myriad" of changes in methodology, goals, and specially designed instruction. Herein the District is faced with a Catch-22 situation. Rather than disagreeing with the substance of the comprehensive IEP, the Parents' disagreement now centered on the setting for provision of services. This disagreement was seemingly based upon the independent evaluator's opinion that Student should be placed in an educational environment that "integrates literacy needs within the academic curriculum" and the Student's complaint of feeling out-of-step with friends' schedules.

Neither of the Parents' reasons for disapproving the District's offered program and placement for 7th grade meets their burden to prove that the District's offer is inappropriate. First, although school districts are required to consider an independent evaluation, and in fact the District very carefully considered the report it received, districts are not required to endorse the opinions or follow the recommendations of outside evaluators. In this case the District used the independent evaluation in conjunction with its own experiences with Student to inform its offer for Student's 7th grade. Second, because Student had expressed discomfort at home about not being in as many classes as peers, and feeling "stupid" the Parents believed that placing Student in an environment where all the children had disabilities would be beneficial. The Parents report that Student indeed is happy and thriving in the private school, and feel that they made the best choice for their child. However the IDEA does not guarantee that a child receives the best program, only that the program be appropriate. The District's offer for 7th grade is more than just appropriate – it is excellent and without doubt designed to offer Student meaningful educational benefit in light of Student's disabilities.

As the District's offer for 7th grade constituted an offer of FAPE, it is not necessary to examine whether or not the private placement the Parents unilaterally chose for Student is appropriate or whether there are equitable factors to be considered.

Must the District be required to reimburse the Parents for the private speech/language evaluation they obtained?

The District is not required to reimburse the Parents for the private speech/language evaluation they obtained from a family friend. When the independent evaluator recommended that Student receive a speech/language evaluation the Parents could have requested that the District complete this evaluation, or alternatively asked that the District fund an independent evaluation. Although the Parents' decision not to follow either route conserved the District's resources, the Parents willingly assumed the responsibility for this evaluation and therefore must bear the cost.

Order

It is hereby ordered that:

The District provided Student FAPE while Student was enrolled during the period under consideration; accordingly Student is not entitled to compensatory education.

The District offered Student FAPE for the 2018-2019 school year; therefore the Parents are not entitled to tuition reimbursement.

The District is not required to fund the independent speech/language evaluation the Parents unilaterally obtained.

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

Linda M. Valentini, Psy.D., CHO

October 9, 2019

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