

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

Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: G.B.

Date of Birth: [redacted]

ODR No. 3399-12-13-AS

CLOSED HEARING

Parties to the Hearing:

Parents

Central Bucks School District
16 Welden Drive
Doylestown, PA 18901

Dates of Hearing:

Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Frederick M. Stanczak, Esquire
179 North Broad Street, 2d Floor
Doylestown, PA 18901

Scott H. Wolpert, Esquire
Timoney Knox
P.O. Box 7544
400 Maryland Drive
Fort Washington, PA 19034

September 20, 2012; September 25,
2012; November 15, 2012; November
16, 2012; December 5, 2012;
December 18, 2012

January 14, 2013

January 29, 2013

William F. Culleton, Jr., Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The Student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District). (NT 7.) Student attends a private elementary school (School), and previously attended the District's elementary school. The District has identified Student with Speech or Language Impairment. (NT 8.)

Parents unilaterally removed Student from the District and placed Student in the School after disputes arose with the District at the end of Student's third grade. Pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), Parents assert that the District failed to provide Student with an appropriate evaluation. Parents also assert that the District failed to provide a free appropriate public education (FAPE) for the 2010-2011 and 2011-2012 school years, including extended school year (ESY) services in the summers of 2010, 2011 and 2012, and that the District failed to offer a FAPE for the 2012-2013 school year. (NT 13-23.) Parents seek compensatory education for the 2010-2011 and 2011-2012 school years and tuition reimbursement for the 2012-2013 school year. In addition, Parents seek reimbursement for a private educational evaluation. The District denies the allegations.

The hearing was concluded in six sessions. The record closed upon receipt of written summations.

ISSUES

1. Are Parents entitled to an independent educational evaluation (IEE) at public expense, either because the District's evaluation was inappropriate at any time after July 23, 2010 or because the District failed to provide a timely re-evaluation when requested in April 2012?
2. Did the District fail to provide a FAPE to Student for the 2010-2011 and 2011-2012 school years, including the summers of 2010, 2011 and 2012?
3. Did the District offer to provide Student with a FAPE for the 2012-2013 school year?
4. Is the Student's current placement at the School appropriate?
5. Does equity support an order for reimbursement of private school tuition for all or any part of the 2012-2013 school years?
6. Should the hearing officer order the District to provide compensatory education to Student for all of any part of the 2010-2011 or 2011-2012 school years, and/or the summers of 2010, 2011 or 2012?
7. Should the hearing officer order the District to reimburse Parents for the cost of tuition at the School during the 2012-2013 school year?
8. Should the hearing officer order the District to reimburse Parents for the cost of a private educational evaluation conducted in the summer of 2012?

FINDINGS OF FACT

1. Before age three, Student was diagnosed with Pervasive Developmental Disorder, Not Otherwise Specified (PDD, NOS). (NT-44.)
2. After age three, Student received preschool services in an autistic support class. (NT - 44.)
3. In first grade, Student had a recorded history of diagnoses of PDD, NOS, Attention Deficit Hyperactivity Disorder, and Learning Disorder, NOS. Student qualified for in-home behavioral services. (P – 10.)
4. In November 2009, the District provided a re-evaluation report to Parents. The report noted a history of diagnoses with PDD, NOS. Student had received speech and language services, as well as occupational therapy services. In a 2007 evaluation, an autism diagnostic scale, the Asperger's Syndrome Diagnostic Scale (ASDS), had shown very unlikely probability of diagnoses for Asperger's Syndrome or high functioning autism.

Teachers also had rated Student low on the Childhood Autism Rating Scale (CARS). (S – 17.)

5. In 2007, the District had found Student eligible for special education on the basis of speech or language disorder and autism. (S-17.)
6. In 2007, Student had been diagnosed with a mild conductive hearing loss in the left ear only. Parent notified the District and requested that an FM system to be used in the classroom. (NT 56, 105-109; S-17.)
7. In 2008, the District had evaluated Student for kindergarten, finding Student eligible for speech and language support services, as well as occupational therapy services. The evaluation found that Student's hearing loss in one ear did not at that time create any educational or accommodation needs. (S-5, 17.)
8. The District was aware of Student's previous diagnosis of autism. (NT 95-96, 102; S – 17.)
9. The November 2009 re-evaluation found that student had high average non-verbal cognitive ability, average verbal cognitive ability, and average processing speed. Student's math skills were an area of relative strength. Overall intelligence was in the average range at the 47th percentile. (S-17.)
10. The November 2009 re-evaluation found that Student's broad reading achievement, reading fluency and passage comprehension were also in the average range, 48th percentile; however, Student displayed an inability to decode, especially for vowel sounds, and relied almost entirely upon sight word reading to score in the average range in reading achievement at the first grade level. (S-17.)
11. Student's achievement in writing was in the low average range; however, Student scored zero in writing fluency, and displayed significant difficulty with printing. (S-17.)
12. In spelling, Student scored in the average range, 38th percentile. However, it was apparent that Student reproduced dictated consonants and words entirely from memory, and had very little ability to make accurate sound/symbol associations to spell words, especially with regard to vowel sounds. (S-17.)
13. Student's writing of sentences was significantly below grade level on a District writing continuum. (S-17.)
14. In mathematics, Student scored in the average range overall. (S-17.)
15. The November 2009 re-evaluation identified Student with speech or language impairment. The re-evaluation noted significant academic needs with regard to language arts, including phonemic awareness, sound – symbol associations, writing conventions, and spelling. In addition, Student exhibited weaknesses in printing. (S-17.)

16. Typically, weaknesses in reading decoding become a more serious impediment to learning by third grade, when reading demands put more stress on weak decoding skills. (NT 1776.)
17. The November 2009 re-evaluation recommended specially designed instruction in the areas of written language and spelling, as well as regular education reading intervention through the Reading Recovery program, along with close monitoring. The re-evaluation also recommended speech and language therapy, and occupational therapy. (S – 17.)
18. In December 2009, the District provided an IEP placing Student in supplemental learning support. The IEP provided occupational therapy for 30 minutes once per week and speech therapy for 30 minutes twice per week. The IEP recognized educational needs with regard to spelling, writing complete sentences, writing expanded sentences, letter size and formation, fine motor skills, expressive language, pragmatic language, language processing and language comprehension. It provided goals for expressive language, social language, receptive language comprehension, vocabulary, writing conventions, decoding, written expression, fine motor skills and postural control. It provided modifications and specially designed instruction to address all educational needs, including direct instruction in social skills and written language. (S – 20.)
19. From September 2009 until February 2010, the District provided Student with 30 minutes per day of one to one reading instruction in the general education setting. (NT 371.)
20. During first grade and the beginning of second grade (the 2010-2011 school year), Student experienced difficulties with writing, anxiety and school refusal. However, this did not result in Student missing school to the extent of interfering with Student's educational progress. (NT 75-81, 288-293; S-56.)
21. The District provided a revised Individualized Education Program (IEP) on February 3 2010. While present levels noted some improvement in basic academic skills during Student's kindergarten year, and average functioning tested in the beginning of first grade in reading, the IEP team determined that Student's insufficient progress in reading, and that tested weakness in writing indicated a need for specially designed instruction in reading and writing. In addition, the IEP provided occupational therapy services related to fine motor skills and speech and language services related to language processing and comprehension, expressive language and pragmatic language. (S – 24.)
22. The February 2010 IEP provided placement in supplemental learning support for reading and written language instruction. The IEP provided related services of occupational therapy (30 minutes per week) and speech and language therapy (30 minutes twice weekly). (S-24.)
23. The February 2010 IEP revision provided goals to address expressive and social language, language comprehension, writing conventions, sound- symbol relationships, spelling, written expression, visual motor skills, fine motor skills, sensory processing, postural control, decoding, vocabulary and reading comprehension. (S-24.)

24. The February 2010 IEP revision provided specially designed instruction including sensory strategies, teacher warnings about what to listen for, sitting near teacher at school assemblies, wait time for verbally presented information, simple language, visual aids, paraphrasing, movement and short breaks, consistent routine, repeating and rephrasing, extra time for written assignments, feedback and repetition. The IEP provided direct instruction, individualized pacing and small group instruction in written language, reading and social skills. (S-24.)
25. The District provided small group reading instruction through the Guided Reading program, a structured, small group program which addresses all components of reading, including decoding, fluency and comprehension skills. (NT 720-724.)
26. The District provided reading instruction through a reading decoding and encoding program called Multisensory Reading Instruction (MRI), which is based upon Orton-Gillingham methodology and is direct, explicit, sequential and multisensory. (NT 419-460, 556-557; S-42, 44, P-16.)
27. The February 2010 IEP revision did not provide an FM System in the classroom. The IEP did provide for consultation with a specialist to address any needs student might exhibit with regard to hearing in the classroom. (NT 112-113; S – 24.)
28. The February 2010 IEP revision found Student ineligible for ESY Services, based on a lack of data indicating regression during breaks in school. Parent advocated for ESY Services based on Student's increase in emotional resistance to attending school during breaks in schooling, and the fact that Student was behind in academic achievement. (NT 113 -117.)
29. In March 2010, the District revised the IEP to add progress information indicating average or grade level performance in various skills addressed in speech language therapy, and providing new speech language goals. New speech and language goals were provided to address listening comprehension and retelling of stories, multiple meaning words, and listening comprehension regarding inference and main idea in stories. (S – 28.)
30. The March 2010 IEP revision reduced speech and language therapy services from 30 minutes twice per week to 30 minutes once per week. (NT 125; S-28.)
31. In the beginning of the 2010-2011 school year, Student was resisting homework, and Parent struggled with Student to get it completed. Student's teacher, serving as a substitute while the original teacher was on maternity leave, imposed consequences for failure to bring in homework. Parent contended that this was due to poor organizational skills, and was not volitional. The IEP team members, including teachers, met and reduced the amount of homework to be done at home. (NT 129 to 133.)
32. The District provided ninety minutes of reading intervention per day in the first two marking periods of the 2010-2011 school year, including one hour of Guided Reading and one half hour of a program called Multisensory Reading Instruction (MRI), which is

a direct, explicit, sequential and multisensory reading program based on Orton-Gillingham methodology. (NT 419-460, 724-725; S-42, 44, P-16.)

33. In December, 2010, the District began to implement a new IEP, with goals addressing phonemic awareness and decoding, encoding and spelling, sentence writing and writing conventions, word reading and reading comprehension, sight word reading, listening comprehension, expressive language, visual motor skills, fine motor skills, sensory processing, and postural control. (S-32.)
34. The December 2010 IEP provided program modifications and specially designed instruction including small group instruction and individualized pacing for reading and writing. The IEP also provided for occupational therapy 30 minutes per week and speech and language therapy 30 minutes per week. (NT 728-741; S-32.)
35. The December 2010 IEP addressed Student's hearing loss through consultation with an expert teacher of the deaf and hard of hearing. Teachers reported that student had no difficulties with hearing instruction in the classroom. (NT 742; S-32.)
36. In the period from April 2011 to June 2011, the District provided Student with MRI programming for thirty minute sessions, one to one, twice per week; this was for purposes of reviewing and repeating Student's already achieved decoding skills, in order to increase Student's reading fluency. (NT 762-764.)
37. Student made progress on IEP goals related to phonemic skills, writing conventions, writing paragraphs, printing, decoding, word reading, oral story retelling, multiple meaning words, listening comprehension of inferential and main idea about a story and reading comprehension in the first half of the 2010-2011 school year. (NT 726-728, 976-978; S-10.)
38. Student made progress on IEP goals related to phonemic skills from November 2010 to April 2011 - the first half of the November 2010 to November 2011 IEP year. However, Student made limited or no progress in these skills from April 2011 to November 2011. (NT 404, 746; S-10, S-40.)
39. Student made progress on IEP goals related to word writing in isolation during the November 2010 to November 2011 IEP year. Student's progress was limited for word writing in context of a written product. (S-10.)
40. Student made progress on IEP goals related to reading accuracy and comprehension, sight word reading, listening to and retelling a story, formulating a sentence with causal relationships, use of irregular past tense forms, and use of verb marker in the November 2010 to November 2011 IEP year. (S-10.)
41. Student made limited progress on the IEP goal related to sentence structure during the November 2010 to November 2011 IEP year. (S-10.)
42. In November 2011, the IEP team met and produced a new IEP for Student. The present levels noted progress during the IEP year to a mid-second grade reading level, in spelling,

in printing, in writing conventions, in mastery of speech and language goals, and in speech and language standard scores (keeping pace with the cohort as it moved to higher grade). Educational needs were noted in spelling accuracy during writing exercises, written expression, visual memory and discrimination, copying speed, an assembly task, oral word reversals and sentence fragments, reading decoding, fluency and comprehension, spelling, writing conventions, visual motor skills, fine motor skills, sensory processing, postural control, vocabulary, and speech comprehension. (S-36.)

43. The November 2011 IEP provided placement in supplemental learning support. Student received direct, explicit, sequential, multisensory and research based instruction in reading decoding and written expression. (S-36, 58.)
44. The November 2011 IEP provided new goals, modifications and specially designed instruction for Student addressing the above areas of need. The IEP continued speech and language therapy and occupational therapy to address the above needs. (S-36.)
45. Starting in December 2011, the District provided the MRI program through a learning support teacher who was intensively trained to deliver MRI; District training for this teacher and other District teachers included training to bolster fidelity in delivery of the program. The teacher also had several years of experience delivering the program. (NT 419-460; S-42, 44, P-16.)
46. In December 2011 the District provided the program three times per week for 30 minutes per session; in or about January 2012, this was increased to four times per week, and instruction was delivered one to one. Student was not deemed ready to progress in the MRI program; rather Student needed repetition and review of the introductory decoding levels of MRI to build automaticity and fluency. (NT 461-469, 550-556; S-36.)
47. The Student's hearing loss was addressed through teacher consultation with a hearing specialist. Student's teacher in third grade also changed Student's seating to accommodate Student's hearing loss in one ear. The Student was scheduled for a room in which another student was receiving the accommodation of an FM system; however, during third grade, the system was not utilized by the teacher for most of the year. (NT 191-195, 304-305.)
48. Student made progress between November 2011 and February 2012 in word reading fluency, accuracy and comprehension, until June 2012. (NT 404, 493-496, 502-506; S-10, S-40.)
49. Student made progress in the MRI levels by consolidating decoding skills and developing automaticity and fluency in these skills. Student advanced from day one through day 45 lessons and evidenced learning of the introductory concepts of these lessons, almost completing schedules 1 and 2 of the four schedules in the program. Student began to generalize decoding skills learned in MRI to reading in other classes. (NT 469-475, 491-493, 529-531, 551-552; S-10, S-40, S-42.)
50. Student made progress on IEP goals related to multiple meaning words, use of conjunctions (limited progress), phonemic skills, paragraph writing with writing

conventions (reliant on prompting for focus), total words written, correct writing sequences, printing and cursive handwriting between November 2011 and June 2012, during the November 2011 to November 2012 IEP year. Student's pace of progress slowed in the 2011-2012 school year. Scores regressed in spelling. (NT 522-524, 833-839, 875, 893; S-10, 36.)

51. Student made progress in writing during the 2011-2012 school year, by increasing total words written and correct word sequences. Student also made progress by becoming more independent in writing sentences and paragraphs. (NT 759-761, 893; S-40 p. 7.)
52. Student made limited progress on the IEP goal related to listening and answering inferential and fact based questions about a story between November 2011 and June 2012, during the November 2011 to November 2012 IEP year. (S-10.)
53. The occupational therapist subjectively reported that Student had made progress in printing, and participated in visual memory, visual discrimination, sensory and gross motor activities. (S-10.)
54. At a meeting in early April 2012, Parents expressed dissatisfaction with the reading programming being provided to Student, Student's writing, and problems that Student had been experiencing with mathematics, especially with word problems. (P-2.)
55. Student's regular education teacher attempted to address Student's anxiety by inviting Student to participate in a lunchtime social gathering of peers. (NT 81 – 84; S – 49.)
56. Parent requested a re-evaluation by email message on April 10, 2012. (NT 90-93; P-14 p. 1-3.)
57. The District responded on April 11, 2012, indicating that an evaluation was not necessary, and not offering to perform a re-evaluation. (NT 93-96; P – 14 p. 1.)
58. On May 9, 2012, Parent orally requested a re-evaluation in conversation with Student's learning support teacher. (P-6.)
59. On May 10, 2012 the Student's school counselor scheduled a meeting for May 23, 2012, promising to provide a Permission to Re-evaluate Form (PTRE) at that time, after a proposed discussion during the meeting with the District's school psychologist. (P-6.)
60. On May 18, 2012, Parent notified the District of an intention to withdraw Student from the District and place Student unilaterally in a private school. At about the same time, Parent cancelled the meeting previously scheduled for May 23, 2012. (P-2, P-6.)
61. On May 21, 2012, the District issued a PTRE to Parent. (P-2, 5.)
62. At no time before May 22, 2012 did Parent express disagreement with the most current re-evaluation, a 2009 re-evaluation, or request an independent educational evaluation (IEE). On May 22, 2012, Parents indicated that their request for an IEE was due to the

delay in responding to their request for a re-evaluation. (NT 90-93, 149-155, 216, 226-227; P-2.)

63. On May 22, 2012, Parent's counsel sent notice of Parents' disagreement with the 2009 re-evaluation and requested an IEE. (NT 155-156; P-6.)
64. On May 30, 2012, the District declined to provide an IEE at public expense. At about the same time, the District offered to complete a re-evaluation of Student during the summer of 2012. (NT 383-385; P-6.)
65. In May 2012, the School assessed Student's reading skills for placement purposes, utilizing three instruments: an unspecified Informal Reading Inventory; the placement test for the Wilson Reading program, another Orton-Gillingham based reading program utilized at the School; and three subtests of the Wechsler. On these assessments, Student was scored at a below basic level in reading, especially in reading decoding, and placed at the beginning of the Wilson program at the School. Within one month, a second Wilson assessment showed substantially improved scores; within two months, Student had advanced through two steps of the Wilson program, mastering many of the phonological skills that had been shown as mastered in the District's progress monitoring. Fatigue may have been a factor in Student's performance on these assessments. The assessments indicated significantly lower functioning than the private evaluator's results suggested. (NT 1054-1055, 1072-1074, 1169-1171, 1230-1245, 1256-1270; P-1, 17.)
66. On June 8, 2012, and the District offered an IEP as the result of an IEP meeting on that date. (NT 259 to 260; S – 40.)
67. Parents provided reading tutoring to Student for 1 hour per week during the Spring and summer of 2012, focusing on reading fluency and decoding. (NT 179-180, 201-202.)
68. In the summer of 2012, Student was active in two different sports activities; Student has regularly participated in sports activities, including team sports, during all times relevant to this due process matter. Student's teachers reported that Student interacted well with peers. Student's behavior in school regarding school rules was not problematic. Parent corroborated this history. (NT 265, 268-268, 277, 281, 285-287, 357-358; S-17, 28, 36, 40, P-1 10.)
69. Parents obtained a private educational evaluation dated June 2012 and received the report in or about July 2012. The private evaluator noted features of Attention Deficit Disorder, but "suspended" diagnosis because the aide noted features may have been a product of difficult academic work, rather than a true attention disorder. The evaluator also noted features of mild autism spectrum disorder, and that Student met criteria for reading disorder (dyslexia). (NT 241-242; P-1.)
70. The evaluator noted the following educational needs: reading fluency and comprehension, written expression, vocabulary, graphomotor skills, attention span, social skills and recall of read information. (P-1.)

71. The evaluator recommended 1 to 1 and small group instruction in reading and language arts, using lists of high frequency words, support for referential and inferential reading skills, assistive technology for increasing vocabulary development, additional repetition of novel material, repeating, rephrasing, and using examples. The evaluator also recommended preferential seating, using strategies to organize materials, changing the format of probes from free recall to verbal prompting with multiple choice options, continued occupational therapy and speech and language therapy, monitoring of Student's attention and focus, social skills group, and ESY programming. (P-1.)
72. The private evaluator conducted standardized achievement testing and found Student to be performing well below Student's same age peers in sentence composition, word reading, essay composition, pseudoword decoding, spelling and mathematics. (NT 1768-1781; P-1.)
73. Contrasting the achievement scores in the District's 2009 re-evaluation with those obtained in the private evaluation, Student appears to have fallen substantially behind Student's peers in reading, writing, spelling and mathematics. However, three factors make this contrast imprecise: first, the private evaluator utilized a different test battery, which measures different skills in different ways; second, the private evaluator reported age norms and the District had reported grade norms; third, the private evaluator had forgotten that Student had been retained for a year in kindergarten. (NT 1768-1781; P-1, S-17.)
74. Parents forwarded the private evaluation report two of the District through counsel on or about July 31, 2012. (NT 233-234; S – 41.)
75. Parents registered Student at the School in July 2012 and paid a deposit in August 2012. This did not bind Parents to send Student to the School. (NT 253-256.)
76. On August 27, 2012 the District offered a revised IEP. Present levels indicated that Student was reading with a 76 percent average comprehension at levels between the end of second grade and the beginning of third grade. Student demonstrated improvement in printing skills, receptive language comprehension, and expressive language. (S-58.)
77. The August 27 2012 IEP offered about fifty minutes of increased instruction in a learning support classroom by including mathematics along with reading and writing. The placement continued to be supplemental learning support. (S-58.)
78. The August 2012 IEP identified educational needs including reading decoding, fluency and comprehension; written expression; spelling; mathematics concepts, operations and problem-solving; visual motor skills, fine motor skills, sensory processing, postural control, spatial orientation of letters, letter formation; and vocabulary, syntax inferential and detail questions. (S – 58.)
79. The August 2012 IEP offered goals to address word reading, reading fluency, mathematics computation and application, written expression including conventions, spelling, reading decoding, receptive language comprehension, expressive language,

vocabulary, reading fluency, alignment, spacing and correct formation of letters, sensory processing, keyboard skills and correct spelling of high frequency words. (S – 58.)

80. The August 2012 IEP offered the following modifications and specially designed instruction: small group instruction; individualized pacing; instruction at Student's instructional level; 1 to 1 direct systematic and explicit instruction of the alphabetic code for an additional thirty minutes per day; guided repeated readings; direct instruction in reading comprehension strategies; direct, explicit, incremental instruction in mathematics; multisensory, explicit instruction in written expression; frequent feedback and repeated practice; providing verbal information in short units; repeating and rephrasing; increased wait time; comprehension checks; emphasis on correct posture; preferential seating; removal of distracting environmental conditions; short breaks and opportunity's for movement; seat cushion and tactile materials for sensory input; provision of a sound field; consistent routine; peer buddy or teacher checking homework for help with organization; desk checklist; extra set of text books at home; extra time for written assignments; allowing Student to move closer to the board when copying; reading tests out loud; a reduction of verbal recall probes and increase in multiple choice options; extended time for tests and tests taken in special education classroom; calling attention to syntax and use of pronouns; and participation in social group at lunch. (NT 202-204; S-58.)
81. The August 2012 IEP provided occupational therapy for 30 minutes twice weekly, and speech and language therapy for 30 minutes once weekly. (S-58.)
82. The August 2012 IEP found Student eligible for ESY Services based on regression, and offered goals in word reading, reading fluency, math computation and application, written expression and conventions, and reading decoding. Services were to be provided in the home on a one to one basis, addressing Student's need for more intensive reading instruction. (NT 171, 380, 515-519; S – 36, 58.)
83. Parents declined the August 2012 IEP on grounds that the District's explicit reading program with regard to decoding was not adequate to help Student generalize the skills to other reading demands in other classes; that only one new goal had been added to the IEP; and that the offered ESY Services were for an inadequate amount of time and not offered in a school location with peers. (NT 165-166, 171-172.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.¹ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence² that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipoise”, the Parents cannot prevail.

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

² A “preponderance” of evidence is a weight of evidence that is greater than the weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

FAILURE TO OFFER OR PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered 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).

PROVISION OF A FAPE TO STUDENT

Based on the record, and weighing the contradictory evidence introduced by both parties, I conclude that the District offered and provided an appropriate program and placement to Student during the 2010—2011 and 2011-2012 school years. In addition, I conclude that the District offered to Parents and Student an appropriate program and placement for the 2012-2013 school year.

When Student was in second grade, the District provided special education based upon an appropriate evaluation in 2009 that had identified all of Student’s suspected disabilities and

educational needs³. The District offered multiple IEPs during that year. Each IEP contained detailed present levels with data from which progress on goals could be measured. In the February 2010 IEP revision, as revised in March 2010, the District offered an appropriate placement, supplemental learning support, with direct instruction and individualized pacing to address Student's needs in written language, reading and social skills. It provided for related services in the form of occupational therapy and speech and language therapy. Goals and specially designed instruction addressed all of Student's known educational needs.

The District revised the Student's IEP and changed the programming it was providing and changed the programming that it was offering several times during the 2010-2011 and 2011-2012 school years, including revisions in December 2010, November 2011 and December 2012. District staff also made changes in programming to address changes in Student's needs as they perceived them, including reducing the homework load at the Parents' request. The IEP revisions updated present levels and goals, added specially designed instruction, and added to the amount of MRI time being provided to Student. I conclude that the District kept aware of Student's needs as they became apparent and adjusted services accordingly.

The District provided two programs to address Student's needs in reading: Guided reading to teach Student comprehension skills and provide practice in decoding and fluency, and Multisensory Reading Instruction (MRI) for direct, sequential and multisensory instruction in phonemic awareness and decoding. It is undisputed that both of these programs were

³ Parents argue that the 2009 re-evaluation failed to identify Student's diagnosis on the autistic spectrum, and failed to identify Student's specific learning disability in reading and writing. It is true that the re-evaluation had identified Student only with a speech or language disorder; however, at the time, there were test scores and history that contradicted identification with autism, and discrepancy analysis between cognitive and achievement scores indicated no basis for identification of a specific learning disability.

appropriate and well recommended in the field of special education to deal with reading needs such as Student's. Both also offered instruction to improve Student's spelling. The District supplemented these with direct instruction in written expression, occupational therapy to address Student's difficulties with printing and writing, and speech and language therapy to address Student's deficits in receptive and expressive language, as well as social pragmatics.

Parents argue that, by the start of the 2011-2012 school year and thereafter, it was apparent that the 2009 re-evaluation was obsolete, and that Student needed interventions for educational needs arising from an autistic spectrum disorder (either Asperger's Syndrome, Pervasive Developmental Disability Not Otherwise Specified, or Mild Autism), and a specific learning disability. This argument is plausible. These disabilities can become more prominent in the school setting as a child approaches and enters third grade, where academic demands increase. In the present matter, the Student did seem to experience more and more difficulty as Student advanced in grade. This would suggest that identification of Student with autism or specific learning disability may have been appropriate by the start of the 2010-2011 school year.

However, the argument does not undermine the appropriateness of the District's program for Student, for two reasons. First, the 2009 re-evaluation report had very notably highlighted Student's difficulties with phonemic awareness, decoding, writing, language comprehension and expression and social skills. Second, these findings as to Student's disability-related educational needs led to extensive programming in a learning support setting, in which the District addressed all of Student's educational needs.

Parents argue that the District failed to address a source of Student's limited progress in the years in question. Student had a significant hearing loss in one ear. The District's re-evaluation report in 2009 adverted to this and concluded that it did not interfere with learning;

however, it recommended monitoring of this disability, and the subsequent IEPs provided consultation with a hearing specialist to provide classroom accommodations, including preferential seating. Parents produced no evidence that Student's hearing loss interfered with learning.

Thus, I conclude that the District's services in the 2010-2011 and 2011-2012 school years met the IDEA's standard for provision of a FAPE: they were reasonably calculated to provide student with an opportunity for meaningful educational benefit. In addition, I conclude that Student made meaningful educational progress in those years, in view of Student's abilities.

This conclusion undermines the evidentiary value of the progress data, about which extensive testimony was received. The law is plain that the District's offered and provided services are to be assessed only prospectively, not in hindsight, as discussed above. Thus, only if the evidence should show that the Student was demonstrably not making progress, and that the District knew or should have known it, would the Student's ultimate progress be relevant to the question whether or not the District offered or provided a FAPE. I conclude that the Student did make meaningful progress, and that, thus, the District was not on notice that it had to do even more than it was doing to meet its IDEA requirements.

The District's goals were measurable, even though they did not all provide baselines in the text of the goals. District witnesses credibly described multiple objective measurements that were utilized to measure and report progress on Student's attainment of IEP goals. The results of these measures indicated that Student was making significant progress in a broad range of skills targeted by the IEP goals.

In particular, the progress data indicated that Student was making slow progress in the most profound area of Student's disabilities, reading decoding. In addition, multiple District

teachers testified that they observed student making progress in decoding and encoding, as well as written expression, on a day to day basis. I find that this testimony was credible and reliable because it was corroborated among teachers who testified, corroborated by the data itself, and corroborated by prior consistent statement. Thus, the preponderance of the evidence proves that Student made progress in this school year.

Parents argue that the District's progress measures were inadequate and produced a false impression of progress. They point out that the assessments used were not standardized; however, Parents provided no evidence to show that they were inappropriate. I conclude that the implication of this argument – that there can be no progress unless it is demonstrated in relation to age or grade-based national norms – is nowhere required by the IDEA. Rather, progress is required only to be “meaningful” when considered in relation to the individual student's abilities, as discussed above.

Parents also argue that the Student's reported progress was not real progress because the Student's performance on the assessments was supported by prompting and other accommodations. I reviewed the evidence on this point and conclude that it does not prove by a preponderance that all progress data was misleading on that account. Parents pointed to progress data on written expression and conventions, and it is true that Student's performance was supported when these skills were assessed. However, the progress reports noted this clearly, and there is no reason to presume that there were any progress reports that reported progress without similarly noting when it was supported or accommodated.

Parents further argue that the Student's progress was ephemeral because the Student did not generalize the targeted skills beyond the learning support setting. While the evidence is mixed on this point, I conclude that the preponderance of the evidence shows that Student was

generalizing some learned skills to some settings. Decoding skills and writing skills – including written expression, conventions and spelling – often did not generalize; however, teachers credibly testified that Student was beginning to generalize skills learned in the decoding programs. While the lack of generalization indicates that Student’s progress was slow with regard to decoding and writing, it does not negate the progress that Student made in learning support, especially where the evidence shows that Student was able to and in some instances did generalize those skills.

Parents’ above arguments imply that any progress noted or measured by teachers in learning support was not “meaningful” as required by the IDEA, discussed above. On the record as a whole, and weighing the contradictory evidence on this issue, I conclude to the contrary. In finding Student’s progress to be meaningful, I keep in mind that the District’s re-evaluation in 2009 had summarized a history of multiple diagnoses, all of which amplified Student’s difficulties in school. The re-evaluation noted, and the District’s subsequent IEPs addressed, profound difficulties in phonemic awareness and written expression, which were made even more challenging by deficits in fine motor skills, receptive and expressive language, attention and focus, and organization. In light of these needs, I conclude that Student’s slow progress in decoding and writing was meaningful.

I also note much greater progress in reading comprehension. Moreover, Student made significant gains in goals addressing speech and language needs, including a preponderance of evidence that Student made substantial improvement in social skills. On the whole, then, the record proves that Student did make meaningful progress during the years in question.

A significant part of the data showing progress was the MRI data. MRI measures progress according to internal benchmarks which must be mastered before the student can move

to higher levels of skill. Student showed substantial forward progress in both of the years in question. Toward the end of the 2011-2012 school year, the District's experienced teachers decided to add time to the program and enter into a period of intensive review and repetition, in order to assure mastery of basic skills before moving Student into the two higher levels of the program. I conclude that this was not evidence of a lack of progress, as Parents argue; rather, it was part of the methodology of MRI, and a not surprising consolidation of skill that cannot be properly considered a failure to make progress.

Parents produced evidence through an independent expert that the Student had regressed in all academic subjects including mathematics, based upon standardized achievement scores obtained in June 2012, compared with the achievement scores obtained in the 2009 re-evaluation. I give this data reduced weight for three reasons. First, the expert attempted to contrast two different achievement tests, which measure different skills with different kinds of assessments, and are based on different normative data. Thus, the expert's opinion was only loosely based upon the data, and required some rough estimating, based upon professional judgment. Second, the expert attempted to contrast the grade normed data in the 2009 re-evaluation with age normed data in the expert's 2012 testing, thus introducing a second element of guesswork into the attempted contrast. Third, the expert was unaware when selecting the achievement test to be used that the Student had been retained a full grade prior to first grade, and thus was some part of a year older than Student's same grade peers. I conclude that the expert's conclusions are thus of limited reliability and therefore of less weight than the extensive progress data introduced by the District in this matter.

ESY

Parents assert that the District's failure to provide ESY services in the summers of 2010, 2011 and 2012 constituted a denial of a FAPE. On the record as a whole, I conclude that the District was not obligated to provide ESY services to Student. ESY services are required under the IDEA only if necessary to provide a FAPE. I have concluded that the District provided a FAPE in the years in question. It follows that the decision not to provide ESY did not deny Student a FAPE. While the Pennsylvania Code posits various factors to be considered by districts in making ESY decisions, I am aware of no authority that the Pennsylvania Department of Education by its regulations intended to expand the ESY requirement of the IDEA.

Parents argue that the District should have provided ESY services in order to consolidate recently learned skills in decoding and writing, and to address Student's school refusal and anxiety, which were exacerbated by breaks in programming. While these arguments are sympathetic and make some sense, the District is not obligated to follow them, because the preponderance of the evidence shows that these considerations did not substantially interfere with learning or prevent progress.

TUITION REIMBURSEMENT

Parents seek reimbursement of tuition that they paid to the School for the 2012-2013 school year. They contend that the District failed to provide or offer a FAPE to Student for the upcoming school year when it offered an IEP in November 2011, failed to evaluate Student when requested, leading to a failure to adequately address Student's needs. I conclude that Parents are not entitled to tuition reimbursement for the 2012-2013 school year.

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

In the present matter, I do not reach the second and third steps of the Burlington Carter analysis, because I conclude the District offered Student a FAPE by offering a revised IEP in August 2012. I conclude that the November 2011 IEP, as revised later, appropriately addressed Student's educational needs for its effective period of time, November 2011 to November 2012, for reasons set forth above. I conclude that the District, though it delayed re-evaluation inappropriately for a few weeks, did not during that time fail to provide a FAPE, and that it did offer to provide an appropriate re-evaluation ultimately. Meanwhile, the Student was not deprived of a FAPE; thus there is no basis to award tuition reimbursement, because the first level of the Burlington-Carter test for tuition reimbursement is not met.

I have reviewed the June 2012 and August 2012 IEPs that the District offered after Parents gave ten day notice that they intended to remove Student and seek tuition reimbursement. I find that each of these provides no less service than provided in the November

2011 IEP, which I find to be appropriate, as discussed above. Each of these IEPs provided additional services, and the August IEP added and revised specially designed instruction based upon the recommendations of the private evaluator's report that the District received in the end of July 2012. Therefore, I find that the District offered an appropriate program and placement to Student for the 2012-2013 school year.

Parents argue that the District's offers came too late, that they had to enroll Student in the School before the school year started, and that the District's offers came only after due process was a threat. I find these arguments to be unavailing. Parents stressed that they did not make the final decision to enroll Student at the School until after they saw the August IEP offer. Moreover, the School's first day was in September, well after the Parents received the District's offer. Thus, the evidence is not preponderant that Parents' hand was forced and that the District's offer came too late. Meanwhile, as noted above, the District's November 2011 IEP was appropriate for the start of the year, so the Parents had no entitlement to tuition reimbursement on the merits.

Parents' real basis for seeking another school for Student is their contention that Student was not progressing and that this proved that the District's use of the MRI program for reading and its programming for writing was not appropriate. Thus, when offered the same programs, albeit with improvements in the specially designed instruction and other aspects of the program, Parents concluded that the IEP was inappropriate. I have disposed of that premise for their request for tuition reimbursement above. In short, Student did make progress, albeit slow progress, and given Student's abilities and the severe impact of Student's disabilities on Student's reading and writing skills, slow progress is not proof that the District's MRI program was ineffectual as Parents argue. Moreover, the District's offer must be judged based on what it

knew when it made the offer, and I conclude that it was not on notice that there was any deficiency in the reading and writing educational services as provided to Student.

REIMBURSEMENT FOR IEE

Parents seek reimbursement for the private educational evaluation that they obtained in June 2012. I conclude that they are not entitled to reimbursement because they did not disagree with an evaluation by the District, and did not request an IEE until it was too late to assist them in their decision to enroll Student in a private school. It is plain that Parents asked for a re-evaluation in April. The District did not immediately offer to do a re-evaluation; I conclude in dicta that they should have agreed immediately to do a re-evaluation under the circumstances of this matter. Nevertheless, their delay is the sole reasonable basis for Parents' request, counsel's belated effort to establish disagreement in the letter demanding an IEE for the first time in May notwithstanding. In the circumstances of this case, I do not accept counsel's argument that this letter fulfilled the law's requirement that the Parents must disagree with a prior evaluation to be entitled to an IEE. This is because the testimony established that Parents never disagreed with the 2009 re-evaluation. They felt that it was obsolete because new symptoms and difficulties had emerged in Student's presentation, but they did not actually assert that there was anything wrong with the re-evaluation or its methodology.

This disposes of Parents' alternate argument, that the District's delay forced their hand because a re-evaluation would have come two months into the new school year and they had to decide whether or not to enroll Student in the School sooner. The District was not aware at the time of Parent's request for re-evaluation that the Parents were contemplating this; their notice came later. Thus, even if there were some equitable basis on which to order reimbursement of

this evaluation, it does not apply here, because the District cannot be held responsible for delaying parental plans that are not disclosed to it.

Parents argue that the IEE results were incorporated into the IEP. However, not every private recommendation adopted by a district gives rise to an obligation to then pay for that recommendation. Districts are obligated to consider private reports, and if required to pay for them every time they used them they would be discouraged from doing so, contrary to the intent of the IDEA. Here, such an order would especially inappropriate, since the report's recommendations were largely anticipated in the November 2011 IEP, and since I have concluded that that IEP provided a FAPE.

CREDIBILITY

I found that the District witnesses were credible and reliable. I accorded less weight to the testimony of the Parent, because Parent's testimony repeatedly minimized and mischaracterized the nature of the services offered by the District, while emphasizing difficulties in Student's functioning that were based more upon behavior at home than upon behavior at school, where Student was much more amenable to direction and learning. I accord less weight to the private expert's testimony because of imprecision in methodology as discussed above, as well as the expert's demeanor under cross examination.

CONCLUSION

For the above reasons I conclude that the District offered and provided a FAPE to Student during the years in question, and that Parents are not entitled to either compensatory education for the 2010-2011 and 2011-2012 school years nor tuition reimbursement for the

2012-2013 school year. I find that the District's denial of ESY services for the summers of 2010, 2011 and 2012 did not result in a denial of a FAPE; thus, I will not order compensatory education for those summers. I further conclude that the Parents are not entitled to reimbursement for the private evaluation in 2012. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. Parents are not entitled to an independent educational evaluation (IEE) at public expense.
2. The District did not fail to provide a FAPE to Student for the 2010-2011 and 2011-2012 school years, including the summers of 2010, 2011 and 2012.
3. The District did not fail to offer to provide Student with a FAPE for the 2012-2013 school year.
4. The hearing officer does not order the District to provide compensatory education to Student for all of any part of the 2010-2011 or 2011-2012 school years, including the summers of 2010, 2011 or 2012.
5. The hearing officer does not order the District to reimburse Parents for the cost of tuition at the School during the 2012-2013 school year.
6. The hearing officer does not order the District to reimburse Parents for the cost of a private educational evaluation conducted in the summer of 2012.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ., CHO

HEARING OFFICER

January 29, 2013