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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

5657/05-06 KE

File Number

KG

Child's Name

Xx/xx/xx

Date of Birth

9/09/09, 9/30/05, 10/19/05

Dates of Hearing/Deposition

Closed

Type of Hearing

For the Student:

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Date of Last Hearing/Deposition:	October 19, 2005
Receipt of Last Transcript:	October 24, 2005
Date Record was Closed:	October 24, 2005
Date of Decision:	November 8, 2005
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a xx year old resident of the North Penn School District (School District) attending the Private School for the current school year. Arguing that the School District has denied Student a free and appropriate public education (FAPE) for the last three years in public school, Students seeks an award of compensatory education services, and her parents seek reimbursement for this year's private school tuition as well as for two privately secured evaluation reports. For the reasons described below, I award tuition reimbursement and 444 hours of compensatory education, and I deny reimbursement of the evaluation reports.

ISSUES¹

- Whether or not the School District's proposed IEP for 2005-2006 is appropriate?
- Whether or not Student's parents are entitled to tuition reimbursement?
- Whether or not Student's parents are entitled to reimbursement for two independent evaluations? and
- Whether or not Student is entitled to compensatory education for the 2003-2004 and 2004-2005 school years, assuming that mitigating circumstances warrant extending the Montour date beyond May 19, 2004?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a xx year old resident of the School District who has been diagnosed with a neurological impairment affecting attention, deficits in sensory processing, motor processing, and visual processing, as well as an anxiety disorder, attention deficit hyperactivity disorder – inattentive type (ADHD), and learning disabilities in reading, math, and written expression. (SD 1)

Pre-Second Grade, 1999-2003

2. In April 1999, when Student was three years old, she received early intervention services from the local intermediate unit after a comprehensive evaluation found her fine motor

¹ Either Student's issues regarding the evaluation report reimbursement has shifted during this case, or my perception of them has. My prehearing correspondence indicated that Student was seeking reimbursement for two of Dr. R's three evaluation reports, while Student's posthearing argument indicates that her parents seek [reimbursement] for one evaluation report by Dr. R and one by the [redacted] Vision Center. In any case, reimbursement is denied. (HO 2; N.T. 14) References to "P," "SD," and "HO" are to the Parent, School District, and Hearing Officer exhibits, respectively. References to "N.T." are to the transcript of the September 9, 30, and October 19, 2005 hearing sessions/deposition.

skills to be delayed by 16 months and her speech development delayed by 4 – 15 months. At that time, no cognitive deficits were noted. (SD 2)

3. In May 2001, the School District issued a comprehensive evaluation report to determine an appropriate placement for Student upon entering the public school district's kindergarten. (SD 18) The School District's recommendation was a regular education placement.
 - a. A Wechsler Preschool and Primary Scale of Intelligence – Revised (WPPSI-R) IQ test indicated standard scores of 66 Full Scale, 73 Verbal, and 66 Performance. A Stanford Binet composite standard score IQ was 83.
 - b. Student could count to 14, and identify numbers 1-10, but she could not write numbers, or say the ABCs. She could write her name and recognize it in print. She could identify basic colors and shapes.
 - c. The comprehensive evaluation report, which included a review of an April 2003 occupational therapy (OT) evaluation, concluded that Student was in need of OT services, but not special education.
 - d. Academically, the report noted that Student needed repetition and rehearsal of information, and improved ability to maintain attention, but the report concluded that these needs could be addressed in the regular education classroom. (SD 18; SD 1)

4. In September 2001, Student began attending a regular education, half-day kindergarten class in the public school. Her Kindergarten teacher reported that Student performed below grade level expectation in math, word recognition, literal comprehension, inferential comprehension and decoding skills. Student also was not attentive to instruction or to independent work. She received speech and language support that addressed language, articulation, fluency and voice. She also received tutoring for reading, small group instruction, and modified time limits. (SD 1; P1)

5. In May 2002, Student's parents privately secured an evaluation by Dr. R of the [redacted] Institute.
 - a. In addition to objective testing, Dr. R observed Student in her kindergarten classroom on May 30, 2002 for approximately 1.5 hours.
 - b. Dr. R found significant weaknesses in virtually all aspects of Student's psychological functioning. The greatest weakness was seen in the area of attention, while the strongest area was named memory. Student scored in the Borderline range in the areas of sensory motor and visual-spatial functioning. (N.T. 390)
 - c. Dr. R recommended a learning support across all areas of academic instruction. She found that Student needed a much lower student to teacher ratio than she received in her regular education kindergarten class.
 - d. She recommended high structure, consistency, use of visual cues and routines, a multi-sensory format, ongoing OT, a comprehensive speech and language

evaluation, remedial intervention for basic reading and math, and she recommended a neurological evaluation. (P1; N.T. 391)

6. At about the same time, i.e., May 2002, when Student was 6 years, 4 months old, Dr. C of the [redacted] Physician Network addressed an undated letter to “Director of Special Education.”
- The letter diagnoses mild to moderate neurological impairments and ADD.
 - It states that Student’s greatest deficits were weak attention and executive functions, manifested by her short attention span.
 - It further stated that Student has Global Neuropsychological Impairment affecting attention, executive functions, language, visual spatial abilities and sensorimotor functions. (SD 19; P8)

7. On June 11, 2002, the School District issued an evaluation report (ER.) (SD 1)
- Student’s IQ scores were reported as follows:

WISC III	Standard Score	Range
Full Scale	76	Borderline
Verbal	76	Borderline
Performance	80	Low Average
Stanford Binet IV		
Composite	77	Borderline
Verbal Reasoning	89	Low Average
Abstract-Visual Reasoning	70	Borderline
Quantitative Reasoning	84	Low Average
Short Term Memory Scale	80	Low Average

- Student’s standardized achievement test scores were reported as follows:

WIAT II	Standard Score	Range
Overall	91	Average
Overall Written Language	81	Low Average
Spelling	88	
Written Expression	76	
Overall Math	74	Borderline
Math Calculation	79	
Math Reasoning	73	

- The ER concluded that Student qualified for special education services as Other Health Impaired and it recommended that Student receive support in reading, writing and math, that she receive a speech/language evaluation in Fall 2002, and that she continue to receive OT. (SD 1)

8. In September 2002, therefore, based upon the June ER, Student attended regular education first grade classes for science, social studies and specials, and she received pull-out learning support services for reading, language arts and math. (P1) For decoding skills, her teachers used the Recipe for Reading/Developing Independent Readers program. For reading fluency, they used the Sounds of Language Readers/Reading A to Z program. For handwriting, they used the Handwriting Without Tears program. And for math, they used the Everyday Math program. Student also received speech and language therapy, OT and PT at school. (SD 2)

9. On January 9, 2003, Student's parents privately secured an OT evaluation from Ms. L of [redacted] Occupational Therapy Services. (SD 2)
 - a. This OT evaluation identified difficulty with phonological awareness, comprehension and written expression. It also concluded that Student had a sensory modulation disorder that contributed to her attention difficulty and could very easily be mistaken for ADD.
 - b. Ms. L recommended brushing, including brushing of the hand prior to handwriting tasks, reduced visual and auditory stimuli in the classroom, an FM system in the classroom, direct OT services at a frequency of 60 minutes per week plus a sensory diet to improve her sensory motor skills. (SD 2, p. 29 – 31)

10. On April 29, 2003, near the end of Student's 1st grade school year, the School District issued an IEP recommending full time learning support services with itinerant speech and language therapy. (SD 3)
 - a. Student's language arts goal was to improve her reading readiness skills from a Kindergarten level to a beginning first grade level.
 - b. Student's math goal was to improve her math readiness skills from a Kindergarten level to a beginning first grade level.
 - c. Student's speech and language goals were to demonstrate understanding and use of selected grammatical forms, including plurals, spatial prepositions, and verb tenses. Another speech and language goal was to sequence a 3-4 step picture series and learn to use sequencing words such as first, next, etc.
 - d. Student's OT goals were to process sensory input, write and copy words and sentences in class, increase left leg and trunk strength, improve eye-hand and eye-foot coordination, and descend a flight of steps with a notebook.
 - e. Program modifications and specially designed instruction included small group/individual instruction, pacing, repetition and frequent review, a multi-modal approach, manipulatives, teacher proximity, a sensory diet, and time for processing.

(SD 3)

11. In May 2003, Dr. R again evaluated Student. (P2)
 - a. She again observed Student in her full-time learning support classroom for 1.5 hours. (P2; P 22)

- b. She noted that Student's ADHD could now be understood as secondary to a seizure disorder. She found minimal, and in some cases no, academic gains over the course of the previous year. She noted that Student had extremely weak math skills with virtually no improvement over the past year, and she observed anxiety related to low self esteem. (P2, pp. 4-5, 8; N.T. 400-404)
 - c. She recommended systematic, multi-modal instruction, with extensive drill and practice, the over-learning of skills before moving on to the next skills, and a low student-teacher ratio. She recommended continued speech and language therapy, OT, PT and sensory integration. She recommended consideration of the FastForWord program and intensive remedial intervention in both reading and math over the summer. (P2)
12. On August 27, 2003 Student's parents secured a private speech and language evaluation from Ms. C of [redacted] Associates. (N.T. 331-332)
- a. She diagnosed a moderate receptive and expressive language impairment, secondary to difficulty with auditory decoding, synthesis and recall. She recommended speech and language therapy twice per week for 60 days. She also recommended that Student be evaluated for vision therapy.
 - b. Ms. C provided speech and language therapy to Student, initially, at the rate of two times per week.
 - c. The goals for therapy included increasing the ability to phonemically synthesize three units, complete phonemic decoding tasks, provide four lexicons per topic using a webbing visual strategy, paraphrase a 3 sentence story, and increase oral vocabulary scores on the Test of Language Development (TOLD) by 25 percent. (P4, p.3)

Second Grade, 2003-2004

13. In September 2003 Student began her second-grade year in a full-time Learning Support class where she was provided with instruction in all academic areas. (N.T. 24) She also received speech and language services once per week in school, when she worked on grammatical forms, plurals, prepositions, verb tenses, following directions and sequencing. (N.T. 124) Student's full time learning support classroom had 9 students in the class, and Student was not pulled out of her regular education classes during the day in order to receive her learning support services. At that time, in September 2003 Student could count to 45, write her numbers to 19, recognize numbers to 11, and she knew colors, shapes, and days of the week, but not months and seasons. (SD 26)
14. On September 24, 2003, Student began a privately-secured program of Optometric Vision Therapy from the [redacted] Vision Center. (SD 22; P 7)
15. On November 2, 2003 the School District conducted a STAR general reading diagnostic report, resulting in a Standard Score of 76, which is equivalent to 0.9 grade equivalent,

and the 5th percentile of students nationally. The STAR report estimated that Student's independent reading level for fiction was 0.9 to 1.9. (SD 27)

16. In January 2004, Student prepared a chart of from 1 to 100. In comparison to a similar chart of numbers that Student had prepared four months earlier in September 2003, the January 2004 chart demonstrated improvement both in the accuracy and the neatness of the charts. (SD 25, pages 3 and 4)
17. In January 2004, Student began receiving an additional speech and language session per week. (SD 4; N.T. 125-126)
18. In March 2004, Student's private speech and language therapist, Ms. C, reported that Student had made significant gains over the last five months of therapy. (P 5)
19. On April 29, 2004, Student's IEP team developed another IEP. (SD 4)
 - a. Student's reading level was reported to be 1-2 in the Signature Reading series, with some difficulty with decoding. Student's reading comprehension and sight word vocabulary was reported to have improved. Student was able to answer most literal questions, but still struggled with inferences. The IEP reported that Student needed practice with sentence writing. In math, Student could write to 100, add and subtract single digits. She was reported to be working on time, money and fractions.
 - b. Student's reading goal was to increase her reading skills from 1-2 level to 1-5 first grade level.
 - c. Her math goal was to improve from middle first grade to end of first grade level.
 - d. Her speech and language goals were to work on selected word relationships, including categories similarities/differences, and listing items in categories. She would also understand and use W questions, learn grammatical structures words/phrases/sentences, and understand body language.
 - e. Her OT goals involved trunk strength, eye-hand coordination with high level ball skills, and learning to jump a self-turned jump rope.
 - f. Student had an organizational goal, i.e., to follow 3 step tasks, keep her desk organized, and to pack her book bag correctly.
 - g. Program modifications and specially designed instruction would include small group instruction, wait time, frequent review and practice, multi-modality instruction, and individualized pacing.
 - h. Student would attend the full time learning support classroom 21 hours per week.
 - i. Student would receive 30 minutes PT once every 2 weeks, 30 minutes of OT once every week, 30 minutes of pull-out speech and language therapy twice per week, and 30 minutes of push-in speech and language therapy once per week.

(SD 4)

20. On April 24, 2004, Student's parents approved the proposed IEP. (SD 4)

21. At about that same time, Student's private speech and language therapist, Ms. C, recommended that Student participate in Ms. C's PACE (Processing and Cognitive Enhancement) program over summer 2004, based upon the significant progress that Ms. C had observed in the area of receptive and expressive language, phonemic synthesis and auditory segmentation skills. (N.T. 344; P-6)
- a. The PACE program is a training program to improve a child's ability to process verbal or written information. The focus is on decoding skills and is aimed at increasing the student's fluency in reading. (N.T. 342-343)
 - b. It is an intensive program that consists of two 90 minutes sessions per week. (N.T. 343)
 - c. Progress was documented by the administration of the Gibson Cognitive Battery, which is associated with the PACE program, and the Woodcock Reading Mastery test. (N.T. 345-347, 352; P-6)
22. In June 2004, the School District reported Student's progress on her reading and math goals as "3"s. A "3" means that "progress has been made," and falls between "significant progress," which is a 2, and "no progress" which is a 4. (SD 13; SD 23)
23. Student's full time learning support teacher for second and third grades, Ms. S, noted that Student experienced significant anxiety that affected her academic performance. She would frequently cry in class, she had difficulty establishing and maintaining peer relationships, and she had difficulty expressing herself. (N.T. 32, 47, 67, 95, 115, 154-155)

Third Grade, 2004-2005

24. On October 7, 2004 a School District quantitative reading analysis indicated that Student's Instructional reading level was at Level 1. (SD 14)
25. On October 12, 2004 Ms. C issued another speech and language evaluation. She noted significant progress in a number of areas as a result of the PACE system that had been used over the summer. (SD 6; P 6)
26. On November 23, 2004, Student's IEP team added an OT session and a speech and language session to Student's program in response to Ms. C's October 2004 suggestions. (SD 6; SD 8; SD 9)
27. On November 22, 2004, the School District's STAR diagnostic report indicated the following scores, which I have placed in a table to compare the previous year's STAR report results:

	SS	%ile	GE	Independent zone
2004	187	10 th		1.9 to 2.9
2003	76	5 th	0.9	0.9 to 1.9

(SD 27; N.T. 58-59)

28. On April 28, 2005 the School District proposed another IEP. (SD 12)

- a. Present education levels were listed as follows:
- 45/48 on the Signature Reading Series Skills Assessment, missing 1 out of 4 on comprehension and well as on structural analysis.

	Primer	Level 1	Level 2	Level 3
Average Comprehension	56	75	62.5	45
Silent Reading	62.5	87.5	75	30

DRA assessment	Word Recognition	Comprehension
Level 10 (equivalent to middle first grade level)	99%	16 = adequate
Level 14 (end of first grade level)	100%	10 = some
Level 16 (end of first grade level)	99%	9 = very little
Level 18	99%	7 = very little
Level 20		Very little

- Dolch sight word vocabulary list:

Preprimer	Primer	First	Second	Third
38/39	48/49	42/42	43/46	38/41

- Signature sight word list first grade reading level :

1-1	1-2	1-3	1-4	1-5
100%	98%	94%	92%	75%

- b. Student's reading goal was to comprehend 2nd grade level literature and informational texts.
- c. Student's writing goal concerned spelling, presenting activities, and writing organization.
- d. Student's math goal was to improve her math readiness skills to the middle first grade level. (SD 4, P11; SD 12; P 10)
- e. Program modifications and specially designed instruction were to include small group in learning support for all academic subjects at Student's instructional reading level for 5 hours per day. Student would also receive speech and

language therapy for 30 minutes three times each week, as well as OT services and ESY.

29. Student's parents rejected the April 2005 IEP. (SD 16)

30. In May 2005, Dr. R issued another evaluation report. (P3)

- a. Student's Parents admit that they did not provide a copy of this report to the School District. (N.T. 282)
- b. Kaufman Test of Educational Achievement 2nd edition (KTEA-III) results were:

Subtest	SS	%ile	GE	Range
Word Recognition	80	9 th	1.8	Low Average
Phonemic Skills	89	18 th	1.4	Low Average
Reading Comprehension	74	4 th	1.5	
Spelling	79	8 th	1.6	
Math Computation	67	1 st	k.10	
Math Concepts	59	0.3 rd	k.g	

- c. Dr. R concluded that it was becoming increasingly evident that Student needs systematic, sequential and repeated exposure to instruction with opportunities for intensive repetition and drill. (P3)
- d. Among her recommendations was systematic use of the Touch Math program. (P 3)
- e. Dr. R concluded that Student had achieved minimal progress in reading skills including decoding and comprehension. (N.T. 410-411)
- f. At hearing, she testified that Student's progress in math was not appropriate given that she remains at the kindergarten level. (N.T. 413, 416)
- g. Dr. R testified that the April 2005 proposed IEP is not appropriate for Student because she was not making meaningful progress over the course of the three years that Dr. R had evaluated her. (N.T. 415-416, 423-428)
- h. She stated that the goal for reading in the April 2005 IEP does not represent meaningful progress for Student. (N.T. 419)

31. On May 19, 2005 Student's parents requested a due process hearing. (SD 16; P 13)

Fourth Grade, 2005-2006

32. On June 14, 2005, Student's parents gave to the School District notice of their intent to enroll Student in Private School. (SD 17) Annual tuition is \$22,850. (N.T. 535)

- a. Dr. B. is the head of Private School. She testified that the Student to teacher ratio in Student's classes are 3.3 to 1. (N.T. 462) Only one of Student's Private School teachers is a certified special education teacher. (N.T. 510) Student's teachers are

provided with professional development to allow them to become certified in the programs that are used to instruct the children. (N.T. 478)

- b. Private School provides six 55-minute basic instructional blocks per day, with 3 of those 6 blocks dedicated to language arts, one to math, one to social studies/science, and one to specials. (N.T. 473)
 - c. The programs that Private School uses to teach reading are Orton-Gillingham based, and include such programs as Wilson, Project Read, and Foundations. These are structured, explicit, sequential, cumulative and diagnostic reading programs. (N.T. 462-463)
 - d. Private School uses Saxon Math as its math program, which is designed for students with learning disabilities. (N.T. 471)
 - e. Private School offers speech and language services through a therapist provided by the local intermediate unit. Private School does not provide either OT or PT to Student, who receives those services privately outside of the Private School. (N.T. 297-298, 515-517)
 - f. Progress is measured through objective assessments such as the KTEA and TONI. (N.T. 482)
 - g. Small classes of teacher and assistant with 8 students. (P 14)
33. I conducted a hearing on September 9 and 30, 2005. Both parties wanted to submit evidence from Dr. B., who was unavailable to attend the scheduled hearing sessions. Thus, on September 30, I held the record open until October 21, 2005 for the submission of Dr. B's deposition as well as written closing arguments from both parties. (N.T. 449) On or about October 21, 2005, I granted the parties' joint request to finish their arguments over the weekend, and I closed the record on October 24, 2005.
34. I unintentionally did not give the parties an opportunity to offer into the record for admission, and to raise any objections to, the exhibits that they used at hearing. I will, therefore, admit all School District, Parent and Hearing Officer exhibits into the record. School District Exhibits SD 1-29 are admitted into the record, Parent Exhibits P1-23 are admitted into the record, and Hearing Officer exhibits HO 1-2 are admitted into the record.
35. This decision is issued:
- a. 179 days after the due process hearing request was filed;
 - b. 116 days after my assignment as Hearing Officer to the case; and
 - c. 15 days after the record was closed.

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) and its implementing regulations require the School District to provide a free appropriate public education (FAPE) to all students

who qualify for special education services. 20 U.S.C. §1412; 34 CFR §300.304 *et seq.*; 22 Pa. Code §14.102 *et seq.* This entitlement is delivered by way of the IEP, i.e., a detailed written statement that summarizes the child's abilities, outlines goals for the child's education, and specifies the services the child will receive. In addition, children eligible for special education services are to be educated within the regular classroom "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550; 22 Pa. Code §14.102(a)(2)(xxiv) The burden is on the School District to establish that a child's educational program complies with the law. Oberti v. Board of Education, 995 F.2d 1204, 19 IDELR 908 (3rd Cir. 1993)

In creating a legally appropriate IEP, a School District is not required to provide an optimal program, nor is it required to "close the gap" between the child's performance and that of non-disabled peers. In Re the Educational Assignment of A.L., Spec. Ed. Op. No. 1451 (2004) ; See In Re the Educational Assignment of J.B., Spec. Ed. Op. No. 1281 (2002) A School District is simply required to provide a program that confers more than trivial, or minimal benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986) Whether an IEP is appropriate must be judged based upon information known at the time it is drafted. Fuhrman v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993)

It is axiomatic that a student who has been denied FAPE is owed compensatory education by her School District. Ridgewood Board of Education v. N.E. for N.E., 172 F.3d 238 (3d Cir. 1999); M.C. v. Regional Central School District, 81 F.3d 389 (3d Cir. 1996) Furthermore, tuition reimbursement is an available remedy for parents to receive the costs associated with their unilateral placement of their child in a private school where certain criteria are met. The three-step tuition reimbursement analysis provides that Student's parents shall be reimbursed for their unilateral placement of Student at Private School if (1) the School District has failed to offer an appropriate program; (2) the unilateral placement is appropriate; and, (3) the balance of the equities favors the unilateral parents' placement. Florence County School District v. Carter, 510 U.S. 10 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); In Re the Educational Assignment of K.G., Spec. Ed. Op. No. 1450 (2003)

Consistent with Montour School District v. S.T., 805 A.2d 29 (Pa. Cmwlth. 2002), Student and her parent had one year from their approval of any IEP within which to request due process with regard to a denial of FAPE. Her parents have been very involved with her education and have had many opportunities to request a due process hearing after each IEP approval. The last IEP approved by Student's parents was the April 2004 IEP. The first disapproved IEP was the May 2005 proposed IEP, with a due process hearing requested on May 19, 2005. There are no mitigating circumstances that warrant extending the filing period beyond one year, i.e., May 19, 2004. Thus, although the record in this case covers Student's entire public school career, primarily for the purpose of establishing context, the only relevant period of time for purposes of any relief is from May 19, 2004 forward.

Both compensatory education and tuition reimbursement analyses require an initial Hearing Officer conclusion regarding the School District's provision of FAPE to the child. In this case, I find that the School District has not provided FAPE since at least May 19, 2004, nor did it offer FAPE in its April 2005 proposed IEP.

The April 2004 IEP describes Student's present education levels in decoding as "with some difficulty," reading comprehension and sight word vocabulary are described as "improved," Student is described as "struggling" with inferences, she "needed practice" with sentence writing, and she was "working on" time, money and fractions. (SD 4) These are not meaningful, objective descriptions of Student's present educational levels. Apparently, the reader is expected to deduce from the IEP's reading goal (to increase Student's reading skills from a 1-2 level to a 1-5 first grade level) that the phrases "with some difficulty," "struggling," "improved" and "needing practice" are equivalent to the 1-2 level within this School District's language arts curriculum. Similarly, the reader is apparently expected to presume from the IEP's math goal that Students who are "working on" time, money and fractions are at the middle first grade level in the math curriculum. (SD 4)

The April 2004 IEP reading goal itself also seems halfhearted. In a full-time learning support classroom with only 9 other children, the IEP proposes that Student will, over an entire year, only increase her reading skills from a 1-2 to a 1-5 first grade level. It expects, after a full year, that she will be able to listen to, respond and retell stories only 75% of the time, and that she will recognize and use vowel sounds only 75% of the time. (SD 4) This School District evaluated Student even before she entered kindergarten and believed her capable, at that time, of learning in the regular education environment without special education services. In first grade, it still believed her capable of learning appropriately in a part-time learning support environment. Other than in their development of IEP goals, I did not see in the record any opinion of School District officials suggesting that they believe Student's capabilities are such that she can only make the equivalent of three months progress in reading over an entire year. Student's expert, Dr. R, on the other hand, testified that Student was capable of making more academic progress than she had already, and that three months progress in one year is much to low an expectation. (N.T. 411-414, 419)

The April 2005 IEP provides a more objective description of Student's present educational levels in reading, referring to specific scores on the Signature Reading Series Skills and DRA Assessments, as well as on Dolch and Signature word lists at various grade levels. (SD 12) At least these 2005 IEP present education levels provide baseline information upon which goals can be formulated and against which subsequent progress can be measured. If Student had continued to attend public schools, I would expect to see subsequent Signature, DRA and Dolch assessments to compare Student's performance over time.

It does not appear, however, that the more objectively described present educational levels in reading were used to develop Student's reading and speech and language goals. The 2005 IEP does not explicitly translate the objective present educational levels into grade level

equivalents, even though the goals are written in terms of grade levels. Thus, although Student will be expected to decode 2nd grade literature and informational texts 80% of the time within one year, increasing her sight vocabulary with 70% accuracy, the reader cannot determine from these goals, what Student's objective scores can reasonably be expected at the end of the year on Signature Reading Series or DRA Assessments or Dolch word lists that presumably served as the baselines for these goals.

In math, the present educational levels are as imprecise as they were in the April 2004 IEP. Student is described as "improved" in counting by 2s and 5s, addition, time, writing numbers to 20, place values and math fact families. Student's money skills are at "50%," and while Student "can be taught math procedures, she does not understand math concepts." Again, the reader should apparently assume, from the 2005 IEP's math goal, that these present educational levels in math are the equivalent of a grade level somewhere below the mid-first grade level. (SD 12) In addition, the 2005 IEP's math goal anticipates that Student will reach the mid-first grade level within one year, which is where the 2004 IEP's math goal started! (The 2004 IEP expected Student to progress from middle first grade to end of first grade level.) Apparently, then, Student not only made no progress between the 2004 and 2005 IEPs, but the goal of the 2005 IEP is to get Student back to the mid-first grade level where the 2004 IEP had started. (SD 4; SD 12)

Finally, despite testimony from Student's learning support teacher that significant anxiety affected Student's academic performance, neither the 2004 IEP nor the 2005 IEP addressed Student's anxiety-related needs. (N.T. 32, 47, 67, 95, 115, 154-155; SD 4; SD 12)

It is not unreasonable for the School District to argue that Student made academic progress while in public schools. Second grade appeared to be relatively successful. Between September 2003 and January 2004, Student appeared to make easily apparent progress in accuracy and neatness on her 1-100 number chart. (SD 25, pages 3 and 4) In March 2004 and in October 2004, Student's private speech and language therapist reported significant gains. (P 5; P 6; SD 6) In addition, the School District's STAR diagnostic reports for 2003 and 2004 indicated an improvement in reading during second grade from the 5th percentile to the 10th percentile and from an independent reading zone of 0.9-1.9 to 1.9-2.9. (SD 27; N.T. 58-59)

What is at issue for purposes of relief, however, is the period of time from May 19, 2004 forward. I conclude that Student did not make meaningful academic progress during that period of time. As I described above in reviewing the present educational levels and in comparing reading and math goals between the 2004 and 2005 IEPs, the IEPs themselves do not suggest that Student made any meaningful academic progress. Dr. R's testimony and reports support my conclusion that Student should have been expected to make greater academic progress than she did. (N.T. 411-419)

For an award of tuition reimbursement, I must also review the appropriateness of the unilateral placement, as well as weigh the equities. In this case, while the evidence is not

overwhelmingly in favor of Student in either area, it weighs more heavily in Student's favor in both areas.

Private School does not develop IEPs in the manner required of school districts, and only one of Student's three teachers is state certified in special education. (N.T. 479, 510) Private School class sizes are small, at 3.3 students to 1 teacher. (N.T. 462) This permits specific, structured, explicit, sequential, cumulative and diagnostic programs that are delivered at the school. The programs that are utilized for teaching reading are Orton-Gillingham based, include such programs as Wilson Reading, its predecessor "Foundations," and Project Read. (N.T. 462-463, 507) Saxon Math is utilized to teach math students and is specifically designed for instruction of students with learning disabilities. (N.T. 471) The teachers are provided with professional development to allow them to become certified in the programs that are used to instruct the children. (N.T. 478) Progress is measured through objective means such as the KTEA and TONI. (N.T. 482) I conclude that the small group instruction in Wilson Reading and Saxon Math programs with objective progress monitoring, as well as the related services provided at Private School, sufficiently addresses Student's needs so as to render Private School an appropriate unilateral placement for Student for purposes of tuition reimbursement.

With respect to weighing of the equities, much was made at hearing and in concluding arguments regarding whether or not Student's parents shared Dr. R's 2002 and 2003 evaluation reports. The School District contended that it never received those reports while Student's parents testified that they did share those reports. It is certainly arguable that the School District should have known, or at least inquired, about any written reports from Dr. R, considering both the fact that her opinions had been referenced in several of the other private evaluations reviewed by the School District, and the fact that Dr. R personally observed Student at the school several times. It does not appear that any of the School District evaluations and IEPs refer to any of the numerous outside evaluation reports secured by the School District. (SD 1; SD 3; SD 4; SD 10; SD 11; SD 12) On the other hand, Student's parents admit that they did not share Dr. R's 2005 evaluation report with the School District. (N.T. 282) Frankly, both scenarios seems just as likely: 1) that the School District received Dr. R's reports and now denies it; and 2) that Student's parents withheld from the School District Dr. R's previous reports and now deny it. I believe, however, that where the choice could go either way, I must find against the accusing party, in this case Student's parents, and conclude that they have not provided sufficient information to convince me that they did, in fact, give Dr. R's reports to the School District and that it is now denying such receipt. Accordingly, I conclude that Student's parents withheld Dr. R's reports from the School District.

Regardless of the fact that I decide this particular "he said/she said" dispute by finding that Student's parents withheld Dr. R's evaluation reports from the School District, I do not believe that the equities, when weighed as a whole, fall in the School District's favor. Student's parents attended and cooperated fully in all of the School District evaluations and IEP meetings from kindergarten through 4th grade. There was plenty of evidence in the School District's own records, even without the parents' outside evaluation reports, upon which the School District

should have based more objective descriptions of Student's present educational levels and could have developed more meaningful IEP goals. Student's parents did not prevent the School District from performing its duties. Overall, the equities weigh in favor of Student's parents for tuition reimbursement purposes. Accordingly, I conclude that Student's parents are entitled to reimbursement for Private School tuition.

I further find that Student is entitled to compensatory education for the one year period between May 19, 2004 and the end of the 2004-2005 school year. During the Private School school year, Student receives four 55-minute blocks of language arts and math instruction per day. (N.T. 473) Using this as my guide for calculating compensatory education, I calculate that Student was denied one year of FAPE, or 222 minutes x 180 days, which equals 666 hours of compensatory education. Of course, compensatory education awards must also include a grace period, or a reasonable time after a School District knew or should have known that FAPE had been denied. In this case, the IEP team, including Student's parents, moved Student from the part-time to the full-time learning support program just before her 2nd grade, 2003-2004 school year, and the School District should have known when it developed Student's April 2004 IEP at the end of that 2nd grade year that its present educational levels and IEP goals were not sufficiently objective and appropriate to provide FAPE. Allowing three months, or 60 school days for the School District to correct its defective April 2004 IEP would reduce a 666 hour compensatory education award by 222 hours (222 minutes x 60 days), for a total of 444 hours. Thus, I will award Student 444 hours of compensatory education.

Student's parents also seek reimbursement of Dr. R's 2002 evaluation report and the [redacted] Vision Center's 2003 evaluation report, arguing that both evaluations provided the District with valuable information that was not available to it prior to receipt of those reports. As I discussed earlier with respect to the weighing of the equities, I find that the School District did not have Dr. R's report. I further find no basis in the record, or in the concluding arguments of Student's parents, regarding the relevance of the [redacted] Vision Center evaluation report to Student's program and placement. Accordingly, reimbursement for these reports is denied.

CONCLUSION

Student's request for relief is limited to the time period of May 19, 2004 forward. During that time, the School District produced IEPs in April 2004 and April 2005 that lack appropriate present educational levels and goals. In addition, for tuition reimbursement purposes, Student's unilateral placement at Private School is appropriate, and the equities weigh in Student's favor. Thus, I will award tuition reimbursement. For the 2004-2005 school year during which Student attended public schools, I award one year of compensatory education, reduced by a reasonable grace period, resulting in a total award of 444 hours of compensatory education. Reimbursement of Student's parents for two evaluation reports is denied.

ORDER

For the reasons described above, I ORDER that:

- Student's request for relief is limited to the time period of May 19, 2004 forward.
- Student's parents are entitled to reimbursement of tuition at the Private School
- Student is entitled to 444 hours of compensatory education.
- Student's parents are not entitled to reimbursement for any evaluation reports.

Daniel J. Myers

Hearing Officer

November 8, 2005

Re: Due Process Hearing
File Number 5657/05-06 KE
, Student

North Penn School District