

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

Pennsylvania Special Education Hearing Officer Final Decision and Order

CLOSED HEARING

ODR File Number:

22629-19-20

Dates of Hearing:

October 11, 2019
November 21, 2019

Child's Name:

J.B.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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Hearing Officer:

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

Date of Decision:

December 26, 2019

Background

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

The Parents requested this hearing, alleging that the District failed to provide Student with a free appropriate public education (FAPE) for the 2017-2018 school year, and failed to offer FAPE for the 2018-2019 school year and the 2019-2020 school year including summer programming. They are requesting compensatory education for the 4th grade school year, reimbursement for private school tuition for 5th and 6th grades including extended school year (ESY) programming, and transportation to the ESY summer programs. The District maintains that it provided and offered Student FAPE during all relevant periods and that no relief is due.

¹ In the interest of confidentiality and privacy Student’s name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

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

Issues

1. Did the District provide Student with FAPE for the 2017-2018 school year?
2. If the District did not provide Student with FAPE, is Student entitled to compensatory education, and if so, in what form and amount?
3. Did the District offer Student an appropriate IEP for the summer of 2018 and the 2018-2019 school year?
4. If the District did not offer Student an appropriate IEP for that period, was the placement unilaterally chosen by the Parents appropriate, and if not, should the District be required to reimburse the Parents for tuition for summer 2018 Extended School Year (ESY) and the 2018-2019 school year as well as the related service of transportation to and from the summer 2018 ESY program?
5. Did the District offer Student an appropriate IEP for the summer of 2019 and the 2019-2020 school year?
6. If the District did not offer Student an appropriate IEP for that period, was the placement unilaterally chosen by the Parents appropriate, and if not, should the District be required to reimburse the Parents for tuition for summer 2019 ESY and the 2019-2020 school year as well as the related service of transportation to and from the summer 2019 ESY program?

7. If the District did not offer Student an appropriate IEP for the period of summer 2018 through the present school year, and if the Parents' unilateral placement is appropriate, are there equitable considerations that would reduce or remove the District's responsibility for tuition and transportation reimbursement?

Findings of Fact²

Kindergarten through 2nd Grade³

1. In January 2014, in the middle of kindergarten, Student was evaluated and found eligible for special education under the classification of speech/language impairment. The evaluation found that Student was meeting grade-level academic expectations. The Parents agreed with the evaluation results. [NT 34, 77; S-1]
2. In 2nd grade the Parents engaged a private Wilson reading tutor for once-weekly sessions. [NT 49-50]

Reevaluation at End of 2nd Grade: May 27, 2016

3. The District reevaluated Student at the end of 2nd grade, and issued a reevaluation report dated May 27, 2016. The Parents agreed with the reevaluation results. [NT 35, 78; S-2]

² Transcript page references to witnesses are as follows: Mother NT 31-111; District Lead Supervisor of Clinical Services NT 113-183; Private Reading Evaluator NT 184-225; Regular Education Teacher NT 226-279; Special Education Teacher NT 281-342; Private School Lower School Supervisor NT 348-389; Private Reading Tutor NT 390-402; District Learning Support Teacher NT 402-436.

³ School years in the District were as follows: Kindergarten 2013-2014; 1st grade 2014-2015; 2nd grade 2015-2016; 3rd grade 2016-2017; 4th grade 2017-2018. School years in the private school were: 5th grade 2018-2019, 6th grade 2019-2020.

4. The reevaluation included information from the Parents and Student's teacher, classroom observation, curriculum-based assessments and standardized instruments assessing cognitive functioning, academic achievement, behavior, and speech/language skills. [S-2]
5. The Parents' input included their observations that speech/language and vocabulary had improved dramatically, and that Student's skills in math and science had increased. [S-2]
6. Teacher input noted that Student responded well to small group settings, buddy work, scaffolding, prompts with clear steps, and regular teacher check-ins. [S-2]
7. On cognitive testing with the Woodcock-Johnson IV: Tests of Cognitive Abilities (WJ-IV COG) Student achieved
 - A General Intellectual Ability standard score of 99 (47th percentile),
 - A Gf-Gc Composite Score of 102,
 - A Comprehension-Knowledge Composite Score of 90 (26th percentile),
 - A Fluid Reasoning Composite Score of 112 (79th percentile),
 - A Short Term Working Memory Composite Score of 85 (16th percentile), and
 - A Cognitive Efficiency Score of 83 (16th percentile). [S-2]
8. Academic achievement in the area of reading was assessed with the Woodcock-Johnson IV: Tests of Achievement – Form B (WJ-IV ACH). Student obtained the following standard scores:
 - Reading Composite 86 (17th percentile);
 - Basic Reading Skills 88 (20th percentile);
 - Reading Fluency 83 (12th percentile);

- Letter Word Identification 83 (13th percentile);
 - Passage Comprehension 91 (26th percentile);
 - Sentence Reading Fluency 84 (14th percentile);
 - Word Attack 97 (42nd percentile);
 - Oral Reading 85 (16th percentile).⁴ [S-2]
9. Academic achievement in the area of mathematics was assessed with the WJ-IV ACH and Student obtained the following standard scores:
- Mathematics Composite 96 (39th percentile);
 - Math Calculation 89 (22nd percentile);
 - Applied Problems 102 (55th percentile);
 - Calculation 91 (27th percentile);
 - Math Facts Fluency 87 (20th percentile). [S-2]
10. Academic achievement in the area of written language was assessed with the WJ-IV ACH and Student obtained the following standard scores:
- Written Language Composite 87 (20th percentile);
 - Spelling 81 (10th percentile);

⁴ In March 2016, two months prior to the administration of the WJ-IV ACH, the private reading tutor the Parents had engaged administered the Word Identification and Spelling Test (WIST). Student reportedly scored at or below the 1st percentile on all reading and spelling subtests. Those scores are highly suspect given Student's reading standard scores and percentiles obtained through the administration of the WJ-IV ACH, a robust testing instrument, just two months later. [P-34]

- Writing Samples 96 (39th percentile);
 - Sentence Writing Fluency 83 (13th percentile). [S-2]
11. The WJ-IV ACH also registered Student's scores in the following areas:
- Academic Skills 83 (12th percentile);
 - Academic Fluency 84 (14th percentile); and
 - Academic Applications 95 (37th percentile). [S-2]
12. The reevaluation identified needs in basic reading, reading fluency and reading comprehension, in written expression, and in integration of newly mastered speech and language skills into the classroom. [S-2]
13. Student demonstrated proficiency in math calculation and math problem-solving skills [S-2]
14. The reevaluation found that Student continued to be eligible for special education under the primary classification of Speech and Language Impairment, with the added secondary classification of Specific Learning Disability in basic reading, reading fluency, reading comprehension, and written expression. [NT 35; S-2]
15. Pursuant to findings of the reevaluation, Specially Designed Instruction ("SDI") was recommended: Small group instruction in reading and written expression, frequent opportunities for repetition and practice of new literacy skills, multi-sensory teaching approach with visuals to support verbal instruction, check for comprehension of directions before starting independent tasks, use of visual graphic organizers for writing, teacher assistance in breaking larger tasks into smaller components, and teacher assistance in developing strategies for the organization of materials. [S-2]

16. Additional recommendations were made in the areas of phonemic awareness, articulation, auditory discrimination, auditory sequencing, and expressive language. [S-2]
17. Recommendations flowing from the reevaluation were incorporated into Student's IEP for 4th grade. The Parents approved the IEP and the accompanying Notice of Recommended Educational Placement (NOREP). [NT 78-80; S-3, S-4]

Reevaluation in Mid-4th grade: December 27, 2017

18. At an October 26, 2017 IEP meeting the team discussed whether Student's needs in the area of speech/language could be correlated with emerging⁵ needs in math "as the language of the math curriculum becomes more demanding." A speech/language reevaluation had been planned for spring 2018, but in light of the Parents' concerns the District instead chose to do a full reevaluation for which the Parents gave consent. [S-6]
19. Reevaluation methods, reported in the reevaluation report dated December 27, 2017, included parental input, input from the 4th grade teacher, curriculum based assessments, classroom observations, and formal standardized assessment in the areas of cognitive functioning, memory and learning, academic achievement, behavioral functioning and speech/language skills. [S- 8]
20. On cognitive testing with the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) Student achieved a Verbal Comprehension

⁵ Student's 3rd grade PSSA results in math, as well as concerns about math noted by the 4th grade teacher, led to the District's recommending extra support from a math specialist. As the Parents had previously seen math as a strength for Student they were concerned about the new need for math intervention. [S-5]

Index standard score of 103 (58th percentile), a Visual Spatial Index score of 102 (55th percentile), a Fluid Reasoning Index score of 88 (21st percentile), a Working Memory Index score of 85 (16th percentile), a Processing Speed Index score of 98 (45th percentile), and a Full Scale IQ of 92 (30th percentile). [S-8]

21. For purposes of the December 2017 reevaluation, the District also utilized selected subtests of a neuropsychological battery (NEPSY-2) to assess memory and learning, the Kaufman Test of Educational Achievement to assess academic achievement, and the Behavior Assessment Scale for Children – Third Edition – Parent and Teacher Forms (BASC-3) to assess behavior. [S-8]
22. Student's silent reading fluency (KTEA standard score of 96) and reading comprehension (KTEA standard score of 96) were found to be within age expectancy, but fluency in reading aloud (KTEA standard score of 73) and in writing production (KTEA standard score 77) were found to be below age expectancy, indicating a need for continued development of Student's automaticity of reading decoding and encoding skills. [S-8]
23. Testing results indicated that Student no longer met the eligibility requirements for a specific learning disability in reading comprehension, but the reevaluation identified continuing needs in basic reading, reading fluency, and written expression. [S-8]
24. The reevaluation found deficits in executive functioning in the areas of regulation of attention, planning, making decisions, monitoring, and completing work in a timely manner. The reevaluation report offered a number of recommendations to be considered by the IEP team to address inefficiencies with attention, planning and organization of tasks. [S-8]

25. The District assessed Student's speech/language functioning through oral reading and conversation samples, as well as a battery of formal standardized tests addressing speech/language and auditory processing - Goldman Fristoe Test of Articulation-2, Clinical Evaluation of Language Fundamentals -5, Peabody Picture Vocabulary Tests-4, Test of Auditory Processing-3, and Test of Narrative Language. [S-8]
26. Results of speech/language assessments indicated that Student no longer met the criteria for the classification of speech/language impairment. [S-8]
27. Pursuant to the December 2017 reevaluation, Student's primary disability was determined to be Specific Learning Disability in basic reading, reading fluency, and written expression, with the added secondary disability of Other Health Impairment (ADHD, inattentive type). [S-8]
28. The IEP team considered the findings of the evaluation and used the data and recommendations to craft the annual IEP of January 12, 2018. The IEP team found Student eligible for ESY programming for summer 2018, and the ESY programming was going to be Wilson reading instruction for three 45-minute periods a week. [NT 40, 82-83; S-9]
29. The Parent reached out to the special education director to discuss concerns, and they had a telephone call. [NT 84; S-48]
30. The Parents requested a follow-up IEP meeting and the team met and revised the January 12, 2018 IEP on February 13, 2018, in mid-4th grade. The Parents attended that meeting with their attorney. [NT 83-84; S-12]
31. At the February 2018 meeting the District offered to add three 15-minute periods of individual Wilson instruction weekly to the existing

small group Wilson instruction, but the Parents declined that offer because they “didn't see what the purpose was on top of the other services that were provided”.⁶ [NT 86-87, 106; S-12]

32. Pursuant to the February 2018 meeting the District agreed to do an examination of Student's executive functioning using the Behavior Rating Inventory of Executive Functioning (BRIEF) and added a goal to address executive functioning. [NT 86; S-12, S-14]
33. The SDIs of affording Student with books on tape and of encouraging self-advocacy skills were added to the IEP at the February meeting. [NT 87-88; S-12]
34. The District issued a revised IEP and an accompanying NOREP which the Parents signed. [NT 88-89; S-13]
35. The District also issued a NOREP for summer 2018 ESY to address decoding and encoding through individual Wilson instruction delivered at the family's convenience between 8 a.m. and 7 p.m. for six weeks. Student was offered this Wilson instruction 3 times per week for 45 minutes a session; the Parents did not sign the ESY NOREP. [NT 89; S-9; S-15]
36. The Parents obtained a private reading evaluation from a reading specialist examiner (not the reading tutor); Student was about 6

⁶ The record is not clear on whether or not the Parents had informed the District that Student had been receiving private reading tutoring at home since 2nd grade.

months into the 4th grade at this point. A report ensued on March 15, 2018.⁷ [NT 198-199, 205-207; P-35⁸]

37. On the Woodcock-Johnson III Diagnostic and Reading Inventory Student scored as follows on Grade Equivalents, Percentiles (between 25th and 75th are average on this test) and standard scores (between 90 and 109 are average on this test):

Measured Item	Grade Equivalent	Percentile	Scaled Score
Letter Word Identification	3.2	20 th	87
Passage Comprehension	3.2	28 th	91
Word Attack	2.6	28 th	91
Reading Fluency	3.6	32 nd	93
Oral Comprehension	10.0	86 th	115

⁷ The private reading examiner gives a very helpful note at the beginning of her report. She wrote that “grade equivalent scores represent the average grade level of children in the standardized sample who correctly answered the same number of items as the child taking the test. They do not indicate the grade level at which the child is functioning or even the level at which s/he should be instructed. Grade equivalents are extremely sensitive to even minor changes in test performance, and as such, provide a useful picture of progress – or lack of it – if the test is administered to the same child a number of times”. I add by way of further explanation that the items answered may not be the same items – only the number of items correct is counted - so hypothetically, for example, one child who answers 10 items correctly could have answered numbers 1 to 10 in a row, while another child may have answered numbers 1, 2, 3, 6, 7, 8, 10, 13, 14, and 17 correctly, thus succeeding at a number of more difficult items while missing easier items.

⁸ There is an error in the report on the paragraph about passage comprehension. It should read 28th percentile rather than 20th. The witness said this was a misprint. Also where the body of the report says grade level it should actually say grade equivalency as per the reading specialist’s excellent explanation in the footnote above. Finally under the GORT the fluency percentile should be 16th not 3rd. These were all corrected on the record and on the hard copy of the exhibit.

All Student's scores were average or above. [P-35]

38. On the Standardized Reading Inventory (SRI-2) Student's Words Read in Isolation were as follows: Grade 2 100% correct, Grade 3 55% correct, Grade 4 15% correct. On Passage Comprehension Student's scores were as follows: Grade 1 100%; Grade 2 80% (Student made simple errors missing some words previously correctly read on the word list), Grade 3 50%. Student's norms on this test were as follows: Grade Equivalents, Percentiles (between 16 and 84 are average on this test), scaled scores (between 7 and 13 are average for this test):

Measured Item	Grade Equivalent	Percentile	Scaled Score
Passage Comprehension	2.5	16 th	7
Word Accuracy	2.7	16 th	7

[P-35]

39. On the Phonological Awareness Test (PAT-2) Student knew all the letter sounds but was a little less sure on the r-controlled vowels and the diphthongs. When decoding nonsense words Student decoded correctly but there was a slight lag time suggesting Student was retrieving learned rules and then applying them. The examiner concluded that Student had developed some appropriate reading skills but that they were not yet totally automatic. [P-35]
40. On the Gray Oral Reading Test – Fifth Edition (GORT-5) Student showed the best performance on accuracy and comprehension. Rate + Accuracy = Fluency. Scores for these elements expressed as Grade Equivalents, Percentiles (between 16 and 84 are average on this test), and Scaled Scores (between 7 and 13 are average on this test) are as follows:

Measured Item	Grade Equivalent	Percentile	Scaled Score
Rate	2.4	2 nd	6
Accuracy	4.0	37 th	9
Fluency	3.2	16 th	7
Comprehension	4.4	50 th	10

[P-35]

41. On the Test of Silent Word Reading Fluency (TOSWRF) Student scored at the 4.4 Grade Equivalency and the 42nd percentile. [P-35]
42. The private reading examiner concluded that Student struggled with reading for two reasons: Student had not automatized decoding and Student had not developed a true sight vocabulary. Student does not exhibit the true characteristics of a child with dyslexia; the auditory processing of sounds in words is present, but the visual processing of words is a problem. Additionally, attention may play a role in Student's performance. The private reading specialist was not surprised at the lower end scores, because Student has "a pretty severe disability" that "wasn't going to be fixed in short order". [NT 193; P-35]
43. The private reading examiner made concrete recommendations to use in school such as delivery of Wilson (she explained that Wilson is "the best out there – out of all of them it's the best") three to five times a week for 45 minutes (a small group would be appropriate); learning at least 10 words a week from a word list; pre-teaching new words that will occur in subject areas; not testing fluency with a cold read; have Student put new learned words into a sentence made up by Student; working toward automaticity and having "adjusted" 4th grade reading material at grade level; read to Student 2 years beyond Student's current reading level; and, using attention techniques such as 'Think Alouds'. [NT 200; P-35]

44. On May 17, 2018 at the end of 4th grade the IEP team met again with the Parents' attorney in attendance; the results of the BRIEF⁹ were discussed and a revised IEP was issued that included an additional goal for homework and executive functioning. At this meeting the IEP team discussed the plan for Student to receive a SETT¹⁰ evaluation at the start of 5th grade. The District also re-issued a NOREP for summer 2018 ESY and this time the Parents signed their approval. [NT 89-90, 92; S-18, S-19]
45. The parties agreed to reconvene the IEP team at the beginning of 5th grade. [S-19]
46. However, ultimately the Parents did not feel that the evaluation and the IEP addressed their concerns, specifically because "throughout (the 4th grade) year and throughout this time period Student showed no consistent improvement in reading and writing in (the mother's) observation. And moreover that [Student] was becoming, you know, very, very stressed and, you know, very disorganized in [Student's] thinking, [Student's] planning and [Student's] behavior. [NT 52]

⁹ While the BASC is considered a broadband rating scale that examines skill sets and behaviors across a wide spectrum, the BRIEF is a narrowband rating scale that looks primarily at attention and other executive functioning difficulties. [NT 143-144]

¹⁰ SETT stands for Student, Environment, Tasks, and Tools. The framework is an evaluative process in which children use assistive technology and the benefits of the technology are assessed. This prompts either ongoing implementation or adjustments. In this way, strictly speaking, the SETT framework is different than an "evaluation." An evaluation captures a child's abilities at a point in time. The SETT framework is an ongoing process.

47. The Parents discussed their concerns with one another, and after participating in the IEP meeting¹¹ to discuss summer programming and the next school year they made the decision to “pull [Student] out of the school”. [NT 53]

Review of IEPs Offered to Student for the 2017-2018 School Year: 4th grade

48. The District issued an IEP on January 12, 2017 (mid-3rd grade) expected to be in effect until January 11, 2018 (mid-4th grade). [S-3]
49. The January 2017 IEP addressed the identified needs for further development of basic reading, reading fluency, and reading comprehension skills; further development of written expression skills; the integration of newly mastered speech/language skills into academic instruction. [S-3]
50. The January 2017 IEP included a measurable annual goal addressing reading accuracy and fluency to support comprehension. The goal had a baseline, and was supported by the goal-specific SDIs of directed questioning to ensure comprehension, oral and written response to comprehension questions, systematic introduction for letter sounds and patterns, and tapping out letter sounds for decoding. [S-3]
51. The January 2017 IEP included a measurable annual goal to improve writing quality by using conventions of language and by organizing writing in a logical order. The goal had a baseline and was supported by the goal-specific SDIs of access to word walls, dictionaries and other supports; opportunities to answer questions orally and in

¹¹ Presumably the May 17, 2018 IEP (S-19) meeting, although this was not clearly stated on the record.

- writing; tasks broken down into manageable components; frequent feedback, repetition and review; praise and encouragement; tapping out letter sounds using multisensory approach; graphic organizers; option to dictate and then expand. [S-3]
52. The January 2017 IEP included a measurable annual goal to determine or clarify the meaning of unknown and multiple-meaning words and phrases based on grade level reading and content. The goal was supported by allowing Student to choose flexibly from a range of strategies and tools and referring back to the text. [S-3]
 53. The January 2017 IEP included teacher-directed speech/language Modifications and SDIs in the areas of articulation, auditory discrimination, auditory sequencing and expressive language. [S-3]
 54. When it was written in January 2017 Student was not deemed eligible for ESY services. [S-3]
 55. Student was to spend 77% of the day in the general education setting and 23% of the time in a special education setting. [S-3]
 56. On October 26, 2017 the January 2017 IEP was revised at an IEP meeting the Parents requested because of their concerns about Student's being recommended for extra support by the math specialist following results of 3rd grade PSSA scores and difficulties with the first math unit test. The IEP team discussed the possible connection between Student's speech/language needs and difficulties with word problems. [S-5]
 57. The October 26, 2017 Revision IEP provided for a weekly 15-minute session in the learning support class to address needs in math vocabulary and word problems. [S-5]
 58. On January 11, 2018 the District issued an annual IEP (mid-4th grade) expected to be in effect until January 10, 2019 (mid-5th grade). The

IEP was informed by the data from a reevaluation report issued in December 2017 and from progress monitoring data. [S-9]

59. The January 11, 2018 IEP identifies the continued need for further development of basic reading and reading fluency skills; further development of written expression skills; further development of strategies for regulation of attention, planning, making decisions, and monitoring and completing work in a timely manner. [S-9]
60. The January 11, 2018 IEP carries the measurable annual goal of decoding and spelling real and nonsense monosyllabic and multisyllabic words with specific baselines for various types of words. [S-9]
61. The January 11, 2018 IEP carries the measurable annual goal of demonstrating accuracy and automaticity in oral reading of a 4th grade passage progressing from a specific baseline. [S-9]
62. The January 11, 2018 IEP carries the measurable annual goal in the area of writing, addressing logical order, incorporation of relevant details, and using conventions according to the PA Writing Rubric progressing from specific baselines. [S-9]
63. The January 11, 2018 IEP carries five SDIs to address inefficiencies with attention, work planning and organization of tasks; three SDIs to address reading needs in decoding and encoding, fluency, and monitoring of comprehension; three SDIs to address writing; and one SDI to address math fluency. [S-9]
64. Student was to spend 77% of the day in the general education setting and 23% of the time in a special education setting. [S-9]
65. The January 11, 2018 IEP team found Student eligible for ESY services to address reading and writing through the Wilson program. [S-9]

66. On February 13, 2018 the January 2018 IEP was revised at an IEP meeting requested by the Parents to continue the team's discussion of Student's progress and the December 2017 reevaluation and to consider possible changes to the January 2018 IEP. [S-12]
67. The February 13, 2018 Revision IEP cites the following IEP team recommendations: Conduct further assessments to include behavioral observations of inattention across settings; collect BRIEF ratings from parents and teachers; adding a goal to address executive functioning needs to increase ability to independently plan/answer math word problems; add SDI for the content areas; add SDI for self-advocacy. [S-12]
68. The District members of the IEP team offered to add 15 minutes of individual Wilson instruction 3 times a week with the learning support teacher to reinforce multisensory decoding/encoding. The Parents declined this offer, preferring that Student remain with the current schedule. [S-12]
69. The February 13, 2018 Revision IEP carries the following added goal: After independently reading multi-step math word problems related to concepts taught in the content area math class, Student will use a self-checklist to develop a plan to analyze each problem (what is being asked), identify the operation needed (i.e. computation), highlight important information, and check work for accuracy/completion before handing it in on 4 out of 5 probes given each trimester. Baseline at the time was that Student did not use a checklist. [S-12]
70. The February 13, 2018 Revision IEP carries a Content Areas revision: access to books on tape if available, modification of reading materials and/or teacher reads to Student, modifications of worksheets/assignments/projects/tests as necessary, provision of

word banks, extended time to complete assignments/projects/tests.
[S-12]

71. The February 13, 2018 Revision IEP carries a Self-Advocacy revision: teach and encourage use of self-advocacy skills (asking for extra help, extra time, for a different place to work, use of technology). [S-12]
72. On May 17, 2018 the February 13, 2018 Revision IEP was revised to include results and descriptions of reports of time-on-task assessment (conducted by a Board Certified Behavior Analyst (BCBA)) and executive functioning assessment (conducted by a District psychologist), to consider SETT notes, and to review and consider recommendations from a March 15, 2018 private reading evaluation.
[S-19]
73. The May 17, 2018 Revision IEP carries the following added measurable annual goal: Without teacher prompting, Student will independently initiate homework routines (write assignments in assignment book, place the assignment book in book bag and hand in homework the next morning) in 3 out of 4 school days each week for 10 consecutive weeks. Baseline was 1 out of 5 school days. The goal was supported by the goal-specific SDI of double checking to make sure Student knows what to do; guide Student through the steps if needed; initially provide prompting as needed; provide praise for task initiation. [S-19]
74. Based on the assessments and the SETT framework, six very detailed SDIs were added to the May 17, 2018 Revision IEP. The IEP team also planned to meet to review the SETT process. [S-19 pp. 17, 39-40]

Review of Student's Progress in the District

75. By the middle of 4th grade, Student's speech/language deficits first identified in Kindergarten had been addressed and mitigated to the

- point where Student was no longer eligible for the classification of speech/language impairment. [S-8]
76. By the middle of 4th grade, Student no longer met the eligibility requirements for a student with a specific learning disability in reading comprehension. [S-8]
77. F & P Reading 2nd Grade - At the beginning of 2nd grade Student was reading at a Fountas and Pinnell Level E and at the end of the year had progressed to a Level I at which level Student read text with 97% accuracy with 80% comprehension. [(S-2)]
78. F & P Reading 3rd Grade - Student progressed from a Fountas and Pinnell Level I to a Level M (standard for end of 2nd grade) with satisfactory comprehension by January 12, 2017. In another two months, in spring of 3rd grade, Student was up to Level N (beginning of 3rd grade) with 96% accuracy and 90% comprehension as demonstrated by re-telling and sequencing skills. [S-3, S-5, S-9]
79. F & P Reading 4th Grade – Student progressed from a Fountas and Pinnell Level N at the beginning of 4th grade, to a December bordering on Level O, and an end of 4th grade Level O, (middle of 3rd grade) with 93% accuracy and 80% comprehension. [NT 296-299; S-9]
80. Journeys Reading Curriculum 4th Grade - In the fall of 4th grade, Student was reading 54 correct words per minute, in January of 4th grade Student was reading 74 correct words per minute, and in May of 4th grade Student was reading 84 correct words per minute at the 4th grade level. [NT 300-301, 311, 313; S-9, S-21; P-15, P-17, P-19]
81. Journeys Benchmark Reading Assessment 4th Grade - At the end of October of 4th grade Student's Journeys Benchmark Assessment was 21/32, at the Basic level. In early December, Student scored at the

Proficient level with a 32/40. At the end of the year Student continued to score at the Proficient level. [S-9, S-21; P-15, P-17, P-19]

82. Wilson Reading Program 4th Grade – At the beginning of 4th grade Student was at Step 3.1 in the Wilson Reading Program; at the end of the school term Student was tested at Step 4.4. Step 3 goes from 3.1 to 3.5, and Step 4 goes from 4.1 to 4.4.¹² [NT 305-307, 334-337; S-21; P-15, P-17, P-19]
83. At the end of 4th grade Student was assessed on Step 4 of Wilson and was able to read 14/15 real words, 15/15 nonsense words (decoding), and was able to spell words (encoding) at this level with 95% accuracy. The Step 4 post-test includes assessment of one-syllable v-e words; and multi-syllable words combining closed and v-e syllables, including words with digraphs, blends, welded sounds, and suffixes “s.” [S-21]
84. Student received math support during the second and third Trimesters of 4th grade. Testing was done on November 21, 2017 and May 9, 2018. Results from the two testing dates are as follows:

Measured Item	2 nd Trimester	3 rd Trimester
Overall Math Performance	Approaching Level 4	At Level 4
Number and Operations	Approaching Level 4	At Level 4
Algebra and Algebraic Thinking	At Level 4	At Level 4
Measurement and Data	Approaching Level 4	Approaching Level 4
Geometry	Approaching Level 4	At Level 4

[P-20]

¹² Wilson Steps are not grade equivalents or grade levels. They are steps in the Wilson program itself.

85. Student's 4th grade end-of-year Report Card includes academic ratings from the second and third trimesters. "2" is 'Approaching the grade level standard' and "3" is 'Consistently Meeting the grade level standard'.¹³[P-18]
86. Student remained at 3 on understanding of vocabulary; determines main idea; cites details and examples to support a response; uses details and examples to make inferences; analyses text to determine a theme; writing focus, content and organization. [P-18]
87. Student improved, moving from a 2 in the second Trimester to a 3 in the third Trimester in the following: Reading - understanding figurative language; citing details in a text to support a response; using text details to make inferences and draw conclusions; understanding of character, setting, and plot. Writing – develops habits of writing; modes of writing; writing style. [P-18]
88. Student remained at 2 on reading accuracy and fluency; using text structure and features to understand information; comparing and contrasting literary elements and points of view; using evidence from informational text to develop a well-written analysis of text, and on writing conventions and using place value to perform multi-digit multiplication and division. Student declined from a 3 to a 2 in only one area: applying place value concepts of multi-digit whole numbers to 1,000. [P-18]

¹³ Only the areas where there are both second and third semester ratings are included here. As report card ratings are somewhat teacher-subjective I include them here only for completeness, but consider them less reliable progress indicators than testing results with normed instruments.

89. Student's 4th grade end-of-year Report Card includes teacher comments about work habits and peer relationships from all three trimesters of 4th grade. In Trimester 1 Student exhibited an increased alertness for the Habits of Mind of persisting, managing impulsivity and striving for accuracy. One of Student's greatest strengths was the ability to apply self to a task and persist until the goal is accomplished. In Trimester 2 of 4th grade Student worked well with others in small and large group settings, and was often able to work cooperatively in small groups, but had some trouble working independently. Student contributed nicely to discussions during language arts class. In Trimester 3 of 4th grade it was noted that Student greatly contributed to the positive class atmosphere. On a project Student exhibited a willingness to collaborate with a partner by welcoming the partner's input and perspective and learning reciprocally. [P-18]
90. Much of the 4th grade teacher's instruction in subject areas was done in small groups, and for science and social studies there was a second teacher in the room. [NT 233-238]
91. When Student entered the private school for 5th grade the supervisor of Student's program noted that Student entered with a strength in written expression. [NT 383]

Review of Parents' Consideration of Private Placement

92. The Parents felt "it was necessary to see what other programs were out there since [they] had been working with the district since kindergarten and this past year (4th grade) [Student] seemed to have hit a proverbial wall so to speak in [Student's] performance". [NT 104-105]
93. The Parents actually became concerned about Student's progress in early October at the beginning of 4th grade. Some of the work Student was bringing home was incomplete, Student wasn't able to complete

reading assignments and writing assignments, and Student was starting to get 'a little anxious' about going to school. [NT 41]

94. The Parent noticed that Student took a long time to finish homework and the Parent spent a lot of time helping Student with homework. The Parent also noticed that Student was getting frustrated with math, a subject Student had liked and in which Student previously excelled. The Parent further noticed that it took Student 45 minutes to an hour to organize Student's thoughts, to calm down enough from the school day to start homework. [NT 41-42, 46]
95. Student eventually expressed hating to go to school, especially after long breaks. [NT 43]
96. Student complained about feeling isolated because of being pulled out of the regular 4th grade class for special education reading and math support, and said that some peers were making Student feel different, making comments that Student wasn't really part of the regular education class. [NT 43-45]
97. The 4th grade classroom teacher noted that Student went to the special education Wilson-certified reading instruction directly from lunch, not from a class, and that reading was given while the class received language arts, although occasionally Student's session would spill over into science or social studies. Two other children went to reading with Student. [NT 230-231, 283]
98. Student went to math instruction twice per letter cycle with at least two other children towards the end of the classroom math block. [NT 241-242]
99. Student felt that Student was being treated differently than in past years, with special classes being set up and with the Parent going to many meetings. [NT 46-47]

100. Starting in early October of 4th grade, the Parent requested an IEP meeting; there were several subsequent IEP meetings during 4th grade¹⁴. [NT 41, 47-48]
101. The District responded to the October 2017 parental request by moving up Student's reevaluation schedule, issuing a reevaluation in December 2017 followed by an annual IEP on January 12, 2018. The Parents requested a follow-up IEP meeting that was scheduled for February 13 2018. [NT 48; S-8, S-10]
102. On February 12, 2018, the day before the requested follow-up IEP meeting, and two months after the December 2017 reevaluation had found that Student was no longer eligible for classification as a student with a speech/language impairment or as a student with a specific learning disability in reading comprehension, the Parent emailed the 4th grade teacher, requesting that information be sent to a private school for which the Parent had already signed consents for release of information¹⁵. [NT 84-85; S-29]
103. At some point the Parents had retained special education counsel; their attorney attended the February 13, 2018 IEP meeting. [S-12]
104. Invoices and Enrollment Contracts prepared by the private school indicate that a \$3,000 deposit for attendance at the private school for the 2018-2019 school year was due on April 1, 2018, indicating that

¹⁴ Student's January 12, 2017 annual IEP that was issued in mid-3rd grade (S-3), was revised on October 26, 2017 in early 4th grade (S-5). The October 2017 IEP was replaced by the annual IEP on January 12, 2018 in mid-4th grade (S-9). The January 2018 IEP was revised on February 13, 2018 (S-12), and revised again on May 17, 2018 at the end of 4th grade, and revised again on June 21, 2018 after the Parents' 10-day letter. (S-19)

¹⁵ A different private school from the one in which the Parents decided to enroll Student.

the Parents had seriously considered the private school at least as early as February/March of 4th grade.¹⁶ [S-39; P-38]

105. Despite the Parents' previously agreeing with and signing the District's May 17, 2018 ESY NOREP, payment to the private school for summer 2018 ESY in the amount of \$3,400.00 was confirmed on May 20, 2018 and paid in full on May 24, 2018. This payment was made for "Full Day LA and Recreation" (July 2, 2018 to August 3, 2018).¹⁷ [NT 109; P-37]
106. On June 5, 2018, without having previously informed the District of their intent to enroll Student at a private school at public expense or expressing any disagreement with the IEPs offered during 4th grade, the Parents sent the District a 10-Day letter advising that they would be placing Student at the private school for ESY during the Summer of 2018, and for 5th Grade during the 2018-2019 school year. [P-10]
107. On June 18, 2018 the District received an e-mail indicating that the Parents were declining the District's 2018 ESY services. The District confirmed this information in a letter to the Parents [S-18, S-20]

¹⁶ The Parent testified that Parents had not signed a contract prior to sending their 10-day letter because they wanted to see what the District was going to offer. Nevertheless as of April 1, 2018 they had incurred some contractual expense for the 2018-2019 school year, and as of May 24, 2018 they had paid in full for summer ESY at the private school. [NT 104-105, 108-109]

¹⁷ The Parent testified that the Parents did not make a decision about ESY for summer 2018 prior to June 5, 2018. However, the Parent also testified, and the invoice/contract confirmed, that the Parents decided to send Student to ESY at the private school at least by mid-to-late May of 2018. [NT 105, 109]

108. The District responded to the Parents' June 5, 2018 letter on June 13, 2018 proposing an IEP meeting for June 21, 2018 and sent an Invitation to Participate. [NT 53-54; P-11, P-12]
109. The District and the Parents met on June 21, 2018 and the District offered a revised IEP on that date. The IEP added counseling as a related service. [NT 54-55, 93; S-21]
110. The proposed revised IEP did not change the Parents' minds about placing Student in private school. Student attended ESY in the private school during summer 2018, and attended the private school for 5th grade, the 2018-2019 school year. [NT 55, 59-60; P-37, P-38]

IEP Offered for the 2018-2019 School Year: 5th Grade

111. On June 21, 2018 after the Parents had sent their ten-day letter the IEP team met to review Student's academic progress and parental concerns. At the June 21, 2018 IEP meeting the May 17, 2018 Revision IEP was further revised. Present levels of academic functioning were updated and a new self-advocacy goal was added. Counseling services were added as a related service. [S-21]
112. The June 21, 2018 Revision IEP documents Student's progress on the goals.
 - Decoding and Encoding: Decoding real words 14/15 versus 14/15 (met goal of 14/15); decoding nonsense words 12/15 versus 15/15 (met goal of 13/15); spelling 87% accuracy versus 95% accuracy (exceeded goal of 75%).

- Reading fluency at 4th grade level: DIBELS September 54 wcpm, February 74 wcpm, May 84 wcpm (did not meet goal of 103 wcpm)¹⁸
 - Reading comprehension at 4th grade level: 28/32 - Proficient Level.
 - Writing Rubric: Organization from 2 to 3 (met expectation); Content from 2 to 3 (met expectation); Conventions stayed at 2 (did not meet expectation)¹⁹. Fall was overall score of 10 – Basic Level; Spring overall score of 14 – Proficient Level.
 - Checklist for Math Word Problems: Uses with reminders, successful at highlighting important information, can identify operation needed, and correctly determine if one or two steps are needed.
 - Homework Routines: Newly implemented.
113. The June 21, 2018 Revision IEP carries an additional goal for self-advocacy: During a 60-minute time period in class, when Student does not know what to do academically or appears confused in class Student will ask for help from the teacher at least 2 times a week over the course of 3 weeks. Baseline to be determined after 10 days of IEP implementation. [S-19]
114. The June 21, 2018 Revision IEP provides for the related service of counseling for 15 minutes weekly. [S-19]

¹⁸ It is important to remember that Student's IEP ran from January to January, so Student was only half-way through the IEP year at the end of 4th grade. [NT 309-310]

¹⁹ See previous footnote.

Private School

115. The private school accepts students who have language based disabilities and executive functioning disabilities. [NT 351]
116. The private school has small classrooms with 10 to 13 students and two teachers (ratio 5 or 6 students to one teacher) in their primary subjects of language arts and math. [NT 353, 355]
117. The private school's curriculum is not tied to objectives needed to achieve for all students such as with the Pennsylvania and Core Curriculum standards, but instead the students move ahead as they are ready, can skip areas in which they already are competent, and go over things again if needed so as to learn at their own pace and feel successful. [NT 353-354]
118. The private school is not an approved private school that is guided by the Pennsylvania Department of Education standards. [NT 380-381]
119. Students have 45 minutes of directed reading per day, 40 minutes of independent reading and 40 minutes of writing instruction as a whole class or in smaller groups with some individual work. Students have 55 minutes of math instruction per day and in math the students work toward Common Core standards. [NT 356-358]
120. The private school does not use the Wilson reading program. [NT 382]
121. The private school offers direct instruction in executive functioning. [NT 358-359]
122. Teaching and learning strategies are integrated into all subjects of the curriculum. [NT 354]
123. Some of the teachers in the private school may be certified in special education. The individual supervising Student's education does not know who is or who is not special education certified. [NT 381-382]

124. The Parents were pleased with the private school in 5th grade for three main reasons: Student was in a class of 12 to 14 students; there were two teachers in the classroom and occasionally a third teacher as well; and, the Parents were especially pleased that Student was given an executive functioning rubric and review so that Student could self-advocate, plan the day, and plan how Student was going tackle Student's own specific learning disability. All Student's peers in the classroom were all aware of their issues, so Student was comfortable with that and was able to work with peers and collaborate with the teacher. [NT 60-61]
125. The Parents noticed a difference in Student's ability to do homework mainly unattended, and that Student was happy about making friends and making contributions in the classroom. [NT 62]
126. Student's teachers at the private school told the Parents that Student was making 'very strong' progress in math and reading; reports and some testing confirmed that. [NT 61; P-29, P-30, P-31, P-33]

Parents' Selection of the Private Placement for 6th Grade

127. The Parents contacted the District through their counsel on January 28, 2019, asking what programming the District had available for Student for 6th Grade, the upcoming 2019-2020 school year. [NT 67; 2-24, P-23]
128. The parties held an IEP team meeting February 25, 2019 to discuss possible programming. The District proposed to reevaluate Student and the Parents agreed. The District produced the reevaluation report on April 30, 2019. [S-30]
129. The results of the April 2019 evaluation, compared with the December 2017 evaluation, were that Student continued to meet eligibility requirements under the category of specific learning disability in the

areas of basic reading, reading fluency and written expression, but now had additional discrepancies in math and reading comprehension. [S-30]

130. Achievement standard scores were obtained on the Kaufman Test of Educational Achievement – Third Edition (KTEA-3). On all areas other than spelling and math computation, Student’s scores decreased between 2017 and 2019.²⁰ The KTEA-3 is a valid and reliable achievement assessment instrument. The Parent was concerned about these results which, comparing age-normed standard scores and percentiles from 2017 to 2019, were as follows:

Measured Item	2017 Standard Score	2017 Percentile	2019 Standard Score	2019 Percentile
Reading Composite	91	21 st	85	16 th
Sound Symbol Composite	90	25 th	81	10 th
Phonological Processing	98	45 th	84	14 th
Nonsense Word Decoding	87	19 th	84	14 th
Decoding Composite	86	18 th	8	12 th
Letter and Word Recognition	88	21 st	84	14 th
Nonsense Word Decoding	87	19 th	84	14 th
Silent Reading Fluency	96	39 th	88	21 st
Reading Comprehension	96	39 th	88	21 st
Written Language Composite	86	18 th	80	9 th

²⁰ After the 2017 reevaluation Student spent from January to June in the District, and from summer ESY followed by September to April in the private school. Obviously it is not possible to apportion “blame” for these declines, most of which were not clinically (statistically) significant. [NT 155-162] [See 175-178 for a discussion of testing norm derivation and year to year movement of a test-taker’s normative cohort]

Measured Item	2017 Standard Score	2017 Percentile	2019 Standard Score	2019 Percentile
Written Expression	101	53 rd	80	9 th
Spelling	73	4 th	80	9 th
Math Composite	92	None Listed	88	21 st
Math Concepts and Applications	100	50 th	88	21 st
Math Computation	87	19 th	90	25 th

[NT 95-96, 154; S-30, S-32]

131. There were no elevations on the BRIEF across parent and teacher ratings. Student was no longer eligible for the classification of Other Health Impairment. [NT 68, 151-153, 163; S-30]
132. The parties held an IEP meeting on May 16, 2019. The IEP team found that Student was eligible for ESY services during summer 2019 and the District proposed an ESY program as well as a program/placement for the 2019-2020 school year. [S-32]
133. The District's offer for summer 2019 ESY programming was based upon findings from the April 2019 reevaluation and progress reports. Instruction was to be one-to-one, delivered at the family's convenience, between 8 a.m. and 7 p.m. for six weeks. Student was offered Wilson instruction 3 times per week of 45 minutes a session, writing instruction 3 times per week for 15 minutes per session, and math instruction twice a week for 60 minutes per session. [NT 96-97; P-27]
134. The District proposed to increase Student's special education instruction to 3 hours per day during 6th grade. [NT 70]
135. The Parent felt that the District was offering the same type of programming that Student had experienced in 4th grade, where special education services were provided "in a separate room" instead of the

immersion program Student was receiving at the private school. [NT 71]

136. The Parents wanted a continuation of the programming at the private school where they believed Student was showing progress, where Student was able to develop Student's own learning plan and where Student was "much more less stressed out as a student...a happier and more productive" student. [NT 72]
137. The Parents did not accept the summer 2019 ESY offer, or the proposed IEP for 2019-2020. On May 31, 2019, the Parents sent the District a 10-Day letter saying that they would keep Student at the private school for summer 2019 ESY and for 6th Grade during the 2019-2020 school year. [NT 72-73; P-25, P-26, P-27]
138. Student attended the private school for summer 2019 ESY and for the 2019-2020 6th grade school year. [P-39, P-40]
139. Student was transported to the ESY program by Student's grandmother and the parent of another private school student. [NT 71]
140. The Parents want Student to return to the District's schools when they "feel Student is ready to be a productive student in the District with reading, writing and math and (they) feel [Student has] been fully caught up at [Student's] level. [NT 76]

IEP Offered for the 2019-2020 School Year: 6th Grade

141. On May 16, 2019 pursuant to the Parents' request that the District offer a possible program/placement for Student's 6th grade year an IEP team convened on February 25, 2019. Both parties were accompanied by counsel and a reevaluation was agreed upon. [S-32]
142. After Student had been reevaluated the District offered an IEP dated May 16, 2019. The IEP, offered for 6th grade, was written by the special

education teacher who would be responsible for Student. This teacher is Wilson-certified in addition to having special education certification. [NT 418-419]

143. The May 16, 2019 IEP reported Student's progress at the private school and the findings in a District reevaluation report dated April 30, 2019. [S-32]

144. The May 16, 2019 IEP addresses Student's needs in the areas of further development of basic reading, reading fluency and reading comprehension skills; further development of written expression skills; further development of mathematics problem solving skills. [S-32]

145. The May 16, 2019 IEP carries the measurable annual goal of decoding and spelling real and nonsense monosyllabic and multisyllabic words with specific baselines for various types of words to be determined within 10 days of IEP implementation.²¹ This goal is supported through the SDI of the Wilson reading program. Since Student did not receive Wilson at the private school the baseline was where Student had left off at the end of the 4th grade, to be recalculated after 6th grade started. [NT 426; S-32]

146. The May 16, 2019 IEP carries the measurable annual goal of demonstrating accuracy and automaticity in oral reading of a 5th grade passage progressing from baselines to be determined within 10 days of IEP implementation.²² This goal is supported by the SDI of rereading familiar texts and exposure to a variety of texts. [S-32]

²¹ This is the same goal as on Student's last annual IEP from January 2018. As it is implemented through the Wilson program the difficulty of the words/text will change.

²² Student was in 5th grade at the time the IEP was written; when Student is in 6th grade the material will change.

147. The May 16, 2019 IEP carries the measurable annual goal in the area of reading comprehension, progressing from baselines to be determined within 10 days of IEP implementation. This goal is supported by the SDI of a guided reading assessment for teacher's monitoring of comprehension. [S-32]
148. The May 16, 2019 IEP carries the measurable annual goal in the area of writing, addressing logical order, incorporation of relevant details, and using conventions according to the PA Writing Rubric, progressing from baselines to be determined within 10 days of IEP implementation. This goal is supported through the SDIs of graphic organizers, brainstorming, access to spell-checking supports, and reinforcing grammar with emphasis on past tense. [S-32]
149. The May 16, 2019 IEP carries the measurable annual goal in the area of math problem solving, progressing from baselines to be determined within 10 days of IEP implementation. This goal is supported through the SDI of having Student practice math facts. [S-32]
150. The May 16, 2019 IEP provides for modifications and SDI to address attention, planning and task organization through preferential seating, instruction and assistance in chunking large assignments into smaller pieces, monitoring work for accuracy and timely completion, teacher conferencing to monitor progress in longer assignments, additional time for task completion. [S-32]
151. The May 16, 2019 IEP provides for modifications and SDIs in Content Areas through access to books on tape if available; modification of reading materials and/or teacher reading to student; modification of worksheets, assignments, projects, tests as necessary; word banks; and, extended time to complete tasks. [S-32]

152. Parents through their counsel requested one addition to the IEP - that extended time for tests be included as a modification. [NT 430-431]
153. The May 16, 2019 IEP provides an SDI for teaching of advocacy skills. [S-32]
154. The May 16, 2019 IEP provides modifications and SDIs related to the SETT assessment that largely overlap with the SDIs for the goals for the year. [S-32]
155. The May 16, 2019 IEP provides Student access to noise-canceling headphones to address difficulties in memory and processing speed. [S-32]
156. The May 16, 2019 IEP provides that Student will meet with the guidance counselor prior to the beginning of the school year to assist with transition back to the District, and encouragement of use of the frequent check-ins with the counselor that are available to all students. The IEP also calls for Student to tour the middle school before the start of the school year. [S-32]
157. The May 16, 2019 IEP provides for more special education programming than in previous IEPs such that Student would spend 56% of the day in the regular education setting. [S-5, S-9, S-12, S-32]
158. Student was to receive literacy, math, and executive functioning instruction in special education settings. [NT 415-416]
159. The subjects Student was to have in general education classes (science or social studies and special subjects) were classes with two teachers and 20 children (ratio 1 to 10). The teachers could be, but would not necessarily be, special education teachers. [NT 408, 410]

160. The District was offering general education classes with two adults to Student to make sure that Student was attending and completing assignments. [NT 409]
161. The IEP team determined in May 2019 that Student was eligible for ESY in summer 2019 and offered goals in reading, writing and math. ESY instruction was to be delivered individually at the family's convenience of time and location as follows: Wilson reading 45 minute sessions three times a week for 6 weeks; writing 15 minute sessions three times a week for 6 weeks; math 1 hour two times a week for 6 weeks. [S-32]

Legal Basis

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion

and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); .see also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). I generally found most witnesses to be credible, testifying to the best of their recollections. There were no discrepancies in testimony of any real import between or among the witnesses. There was some discrepancy between the mother's testimony regarding the Parents' decision to send Student to the private school for 5th grade, as well as for post-4th grade ESY, and the documentary evidence [S-39, P-37, P-38]; I found the documents more persuasive as they were created contemporaneously with the events in question. I did find the private reading tutor's contribution to the hearing unhelpful; her credibility was undermined severely by her testing results at P-34 that made no sense in light of all other testing in the record. I also find that her failure, over a two calendar year period, to speak with District staff who were also presenting the Wilson instruction to Student was highly unusual and not best practice. [NT 402-403]

FAPE

Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special

Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). The IDEA contemplates educational programs tailored to “how the child’s disability affects the child’s involvement and progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa). In *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court concluded that “the IDEA demands...an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”

The *Endrew* court explained that the “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The *Endrew* court notes that the IEP must aim to enable the child to make progress as the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. A focus on the particular child is at the core of the IDEA. As this Court had previously observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”

Also critical is the recognition that, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010). Still, the IEP team is required to monitor the student’s response to the various programming provided, including progress toward IEP goals in order to make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

A school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard requires LEAs to provide more than “trivial” or “*de minimus*” benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Compensatory Education

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child’s educational

program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d. Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue.

Tuition Reimbursement

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

In *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985) the United States Supreme Court established the right to consideration of tuition reimbursement for students placed unilaterally by their parents. *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) later outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are:

- 1) Whether the district's proposed program was appropriate;
- 2) If not, whether the parents' unilateral placement was appropriate, and;
- 3) If so, whether the equities reduce or remove the requested reimbursement.

This three-part test is referenced as the "Burlington-Carter" test for tuition reimbursement claims under the IDEA. The second and third tests need be applied only if the first is resolved against the school district.

Section 504/Chapter 15 – Denial of FAPE

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

Discussion

Does this case beg the question, “What is a parent supposed to do?” or does it beg the question, “What is a school district supposed to do?” In their opening statement, the Parents through their counsel asked the first question; in considering the record in this case, I consider the second.

From the viewpoint of the Parents, Student was finding schoolwork harder in 4th grade than in previous years, and while making progress Student was still in need of special education, but was becoming conscious of being different from classmates and of classmates’ noticing Student’s absences from the general education classroom. In this case the Parents chose to remove Student from public school in favor of a placement in a school where every student has special needs and where special education is integrated into the curriculum, and in doing so avoiding many of Student’s emerging negative feelings about school. For the Parents, their choice was to allow Student to be somewhat different within a heterogeneous group of peers of varying abilities or to remove Student to a homogeneous environment where everyone is disabled. They chose the latter.

From the viewpoint of the District, Student was making steady progress in areas of need, had eliminated one eligibility classification and part of another classification, and its efforts to keep up with Student's evolving needs had included several reevaluations and multiple IEP revisions in response to data and to the Parents' concerns. In this case the District had tried to provide the pull-out remedial services Student needs, while striving to maintain the least restrictive environment appropriate for Student. For the District, this is a matter of a rock and a hard place, or actually more aptly, damned if you do and damned if you don't. Student requires special education, and in a public school environment this often means some specialized classes apart from general education peers.²³

Parallel to their concerns about Student's unhappiness about receiving some special services outside the general education classroom, the Parents were also not satisfied by Student's progress. All Student's disability-related needs did not emerge all at one time; however the District repeatedly was willing to gather new data by reevaluating Student as new needs seemed to arise, and to change its programming to address Student's needs and the Parents' concerns. No more can reasonably be asked of a public school district. Educational interventions must be provided over some period of

²³ One District whose program I recently evaluated ameliorated this problem significantly by arranging the 6th grade program in such a way that all students moved to and from various rostered classes throughout the day, such that one whole cohort (homeroom) of students was rarely all together at any given time, and eligible students moved to special education classes at the same time their peers moved to their classes, whether special subjects or academic classes. I hypothesize however that this works better for 6th graders than for 4th graders, just out of the primary grades. Interestingly, even with that setup, the student in that other case also complained about feeling different because of not being able to be with friends in certain classes. Notably in the instant matter Student moved to reading after lunch, with a few other peers, and also went to math with other classmates.

time in order to determine whether they are working or not working for a particular child. While one might hope, and Parents would understandably expect, that Student will be able to “close the gap” the law does not demand that of school districts; rather, special education programming must aim to permit meaningful progress in light of the child’s unique strengths and weaknesses. An ideal or optimal program is not the standard. See *Andrew supra* and, e.g., *Dunn v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

Through the lens of virtually every piece of testing or progress monitoring data presented in the record, Student made progress during Student’s time attending school in the District. I found the private reading evaluator’s contribution to the data set particularly helpful, given that she had no prior knowledge of the Student’s District-provided reading program, and had not reviewed progress reports or IEPs. Her March evaluation when Student was in the sixth month of 4th grade was comprehensive and thorough, and demonstrated that Student was within the broad average range (although generally at the lower end of that range) on most of the varied skills tested. In contrast to the private school supervisor’s and the private reading tutor’s opinions, I also noted her strong endorsement of the Wilson program which the District had delivered just as she testified should be done.

The record before me clearly illustrates that when Student began to encounter difficulties in 4th grade in early October, after having enjoyed a successful path from Kindergarten through 3rd grade, the Parents, albeit while working cooperatively with the District on evaluations and IEPs, also very quickly turned to the solution of private school; by mid-February of 4th grade they had arranged for records to go to one private school and had engaged a special education attorney. By March of 4th grade, at the latest,

they had gone so far as to incur the expense of an enrollment deposit due to the private school by April 1st of 4th grade.

These are certainly loving Parents who have been consistently proactive participants in their child's educational programs and who have been cooperative with the District. Given Student's average cognitive ability, and in light of the progress documented in the record before me, I do not doubt that over the course of Student's education Student will acquire the reading, math, writing and organizational skills necessary for success as an adult, and perhaps even "close the gap". It is also possible, but certainly not desirable, that Student will experience some difficulties and need to employ learned strategies throughout the school years and beyond. I recognize that the Parents have chosen to make a considerable investment of resources in procuring the private school education that they believe is necessary for Student, but if the parties had the opportunity to continue working together I do not agree that Student would currently be unable to be successful in public school. I find that the District was appropriately responsive to Student's needs as they arose, through conducting reevaluations to acquire current data and through creating and revising IEPs as the school and the Parents deemed necessary. The District provided Student FAPE during enrollment in 4th grade, and offered to provide Student FAPE during the time the Parents placed Student in private school. Accordingly the Parents cannot prevail, having failed to produce evidence that the District did not provide, or could not have provided, Student with FAPE in the 4th, 5th and 6th grades under consideration herein.

As the District offered Student appropriate IEPs for the period of time Student has been in the private school, an examination of the appropriateness of the private school and an examination of the equities are not necessary.

Order

It is hereby ordered that:

1. The District provided Student with FAPE for the 2017-2018 school year, and Student is not entitled to compensatory education.
2. The District offered Student an appropriate ESY program for the summer of 2018 and the 2018-2019 school year, and therefore it is not required to reimburse the Parents for tuition for summer 2018 ESY or the 2018-2019 school year as well as the related service of transportation to and from the summer 2018 ESY program.
3. The District offered Student an appropriate ESY program for the summer of 2019 and the 2019-2020 school year, and therefore it is not required to reimburse the Parents for tuition for summer 2019 ESY or the 2019-2020 school year as well as the related service of transportation to and from the summer 2019 ESY program.

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

December 26, 2019

Linda M. Valentini, Psy.D., CHO

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