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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

ODR File Number: 7158/06-07 KE
Student: JZ
School District: Central Bucks
Type of Hearing: Closed

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Due Process Hearing Request Date:	November 24, 2006
Hearing Dates:	February 26, 27, 28, and April 6, 2007
Date Record Closed:	April 27, 2007
Decision Date:	May 11, 2007
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a xx year old resident of the School District with dyslexia. Contending that he has been denied a free and appropriate public education since November 24, 2004, Student seeks compensatory education. Student's parents also seek reimbursement of the costs of an IEE, as well as tuition following their unilateral placement of Student into a private school. For the reasons described below, I find for Student on all issues except the IEE reimbursement.

ISSUES

Whether Student is entitled to compensatory education from November 24, 2004 until his unilateral private school enrollment in December 2006?

Whether Student's Parents are entitled to reimbursement for private school tuition? And

Whether Student's Parents are entitled to reimbursement for an independent educational evaluation?

FINDINGS OF FACT

1. Student whose date of birth is xx/xx/xx, is a resident of the Central Bucks School District (School District) Student is very social and loves being with his peers and working in a group setting. He is very physical, a hard worker, and an enthusiastic learner. (J1, p.9; N.T. 55-56, 447, 657, 684)¹

Pre-Third Grade

2. It is undisputed that Student is a child with dyslexia. (N.T. 99, 297, 730) Student attended kindergarten twice, having been identified immediately as a child who had difficulty identifying letters, reproducing letters, and writing his name. (N.T. 35-37) During the first semester of his first grade (2002-2003) school year, Student participated in the Reading Recovery program, which is a regular education, first grade reading intervention program. (N.T. 721-722) Reading Recovery is contraindicated for dyslexic Students and is not part of the School District's special education program. (N.T. 294-295, 722)
3. On February 5, 2003, during the second semester of his first grade school year, Student was evaluated by the School District. (N.T. 40, 154; J1)
 - a. The Wechsler Intelligence Scale for Children, Third Edition (WISC-III) indicated that Student was of average Intelligence with significant scatter in his test scores. He scored in the Superior range in practical social

¹ References to "J" and "HO" are to the joint and hearing officer exhibits, respectively. References to "N.T." are to the transcripts of the February 26, 27, 28 and April 6, 2007 hearing sessions.

- knowledge and his analytical skills were rated at the Above Average range. His ability to hold and manipulate rote information was below average and his visual perceptual skills were below expected levels. (J1, pp. 5-6) A significant discrepancy between verbal and performance IQ scores was not observed at that time. (N.T. 193)
- b. The Woodcock Johnson Test of Achievement, Third Edition indicated that Student's achievement, using age-based norms, was significantly below expected levels in reading, written language, math fluency, overall academic skills, academic fluency and academic applications. (J1, pp.8, 17) Using grade based norms, Student's achievement test standard scores still remained significantly below expectations in reading, written language, and academic fluency. (J1, pp.8, 17)
 - c. Student was identified as a Student with a Specific Learning Disability in reading and written language. (J1, p.9)
4. On March 7, 2003, an IEP was developed for Student that contained reading and writing goals. Student's reading goal was to progress from Stage 4 in the School District's primary developmental reading curriculum to Stage 6-7. (J3, p.4; N.T. 46) Student's writing goal was to progress from Stage 3-4 in the School District's primary developmental writing curriculum to Stage 6. (J3, p.6)
 5. The School District used the Multisensory Reading Instruction (MRI) program to teach reading to Student. (J5, p.1)
 - a. MRI is a structured, explicit, systematic approach that includes visual, auditory, kinesthetic and tactile learning strategies, and that focuses on phonemic awareness and phonological awareness. (N.T. 665, 729)
 - b. MRI has 4 schedules, with 178 lessons total. (N.T. 524) All Students in a reading group work on the same lesson each day. (N.T. 666) Each lesson contains a spelling component. (N.T. 525, 665)
 - c. The School District has developed an additional progress monitoring system for MRI that it calls "checkpoints" that are administered every few lessons. (N.T. 535, 574-576, 665)
 - d. Approximately 45 - 50 of the School District's 60 learning support teachers are trained in MRI. (N.T. 720) The School District's secondary learning support teachers are trained in the Wilson reading program. (N.T. 720)
 6. On March 4, 2004, during Student's 2nd grade school year, his IEP was revised. (J6) In one year, Student had progressed in reading from Stage 4 to Stage 5, which is considered mid first grade. (J6, p.4) The reading goal remained the same as the year before, i.e., to increase in one year to Stage 7. (J6, p.4; N.T. 57) The writing goal was revised and intended to bring Student to level of 3 on the second grade Pennsylvania Writing Assessment Domain Scoring guide. (N.T. 600)

Third Grade, 2004-2005

7. Student's learning support classroom in third grade contained between two and eight Students. (N.T. 662-663) During his MRI instruction, Student was in a group of six Students. (N.T. 664) Although Student had already completed MRI schedules 1 and 2A the previous year, he did not remember any of the concepts when he returned to school. (J8, pp.2-3) Thus, he went through MRI schedules 1 and 2A again during the first half of 2004-2005. (J7, p.2; J8, p.3; N.T. 693) Student was also provided with guided reading instruction in a group of three Students. (N.T. 666) This instruction included reading and re-reading to build Student's fluency. (N.T. 667) He also engaged in reading comprehension activities, vocabulary development and development of higher level thinking skills. (N.T. 667)
8. Altogether, Student's learning support teacher worked with Student for approximately one and a half to two hours per school day. (N.T. 640) She testified that small group instruction was crucial for Student. (N.T. 656) In November 2004, the School District reported that Student was progressing well in the MRI program. (J7, p.1) His overall reading skills were characterized as beginning of first grade. (J7, p.1) His writing was assessed as 3 of 4 (basic) in content, and 2 of 4 in focus, organization and style (poor), and 1 of 4 in conventions (lowest) (J7, p.4)
9. On March 22, 2005, Student's IEP was revised. (J8; N.T. 70, 600) He was described as slowly progressing in the MRI program. (J8, p.2) He was still at Stage 5 in decoding and sight words, but he had progressed to Stage 7 in reading comprehension. His reading goal was revised to indicate that, in a year, he would read text at the Developmental Reading Assessment (DRA) Level 20, which is the benchmark test for mid second grade. (J8, p.8) His writing goal remained the same, i.e., to bring Student to level of 3 on the second grade Pennsylvania Writing Assessment Domain Scoring guide. (J8, p.9)
10. In both April and June 2005, progress monitoring reported that Student continued to struggle in the MRI program. (J10, p.2) Student's teacher reported that Student seemed to rely more upon his memory of practiced words rather than his decoding skills. (J10,p.2)
11. Student was reevaluated in June 2005 ER. (J13; N.T. 85, 154)
 - a. His WISC-IV Verbal IQ standard score of 91 (lower end of Average range, 27%ile) and Performance IQ standard score of 121 (Superior range, 94%ile) indicated a significant discrepancy that occurs in only 2% of the population and strongly indicates a language-based learning disability. (N.T. 192, 195-196)

- b. His Wechsler Individual Achievement Test, 2nd Edition (WIAT-II) scores were compared to grade-based norms (not age-based norms) and indicated the following (J13, p.7):

Subtest	Standard Score	%ile	Grade Equivalent
Pseudoword Reading	75	3	1.6
Word Reading	76	5	1.9
Reading Comprehension	82	12	1.8
Numerical Operations	115	84	>4.0
Math Reasoning	100	50	3.9

- c. The reevaluation indicated that Student's impairment goes beyond general learning disability and that Student is a truly dyslexic Student. (N.T. 224) The reevaluation also recommended a speech and language evaluation. (N.T. 253)
- d. The evaluator specifically used grade-based norms rather than age-based norms because Student had repeated kindergarten twice. She believed it would be invalid to use age-based norms because it would compare Student's achievement to his age-peers who would be expected to have an extra grade of curriculum under their belts. (N.T. 268) The evaluator is not certain whether the WIAT II test manuals recommend such analysis. (N.T. 284-285) This ER does not explicitly state that grade-based norms, rather than age-based norms were used. (N.T. 292)
- e. At the due process hearing, the evaluator ER testified that standardized achievement test results in Student's 2003 and 2005 ERs cannot validly be compared because those tests expect much less of a 1st grader (which is what Student was in 2003) than of a 3rd grader (2005) (N.T. 218-221)
- f. The June 2005 ER notes in its present educational levels of performance that, while Student's reading comprehension skills are getting stronger, he applies so much effort to decoding that he often loses the meaning of text. (J13, p.2) Despite diligent effort, Student's progress in decoding was reported as very inconsistent. (J13, p.3; N.T. 532) Nevertheless, the School District decided to continue using the same teaching strategies, with some non-specific "tweaking." (N.T. 228)

Fourth Grade, 2005-2006

12. Student's 4th grade learning support teacher saw Student approximately four hours daily during a reading-writing block of 1½ hours, a one hour writing period, and in the regular education classroom during content area subjects. (N.T. 520-521) She observed that Student was learning the coding, but needed extra practice in fluency and automaticity. (N.T. 526) She believed that the numerous steps contained in MRI were very important to meet Student's need for repetition and clarification. (N.T. 552-53, 560-566) She is trained and familiar only with MRI, and she would not recommend trying a different reading program for a child

except where the child had already fully mastered MRI. (N.T. 617-618) She had an excellent relationship with both Student and his Parents. (N.T. 518-519, 550)

13. In October 2005, Student's IEP was revised to add speech and language therapy. (J9; J14; J15; N.T. 253, 256)
14. On February 28, 2006, Student's IEP was revised. (J17) The reading goal indicates a DRA baseline of Level 18 (beginning 2nd grade) and expects Student to progress to DRA Level 30 – beginning 3rd grade – in one year. (J17, p. 6) The writing goal proposed to bring Student to a level 1-2 on the PA Holistic Writing Rubric for 4th grade expectations. (J17, p.7; N.T. 610) Specially designed instruction in the IEP was not changed from the previous year, but descriptions were consolidated, or chunked, so as to be more understandable. (N.T. 554; J17, p.11) Some SDI from the previous year was eliminated simply because Student's 4th grade learning support teacher considered some things to be good teaching practices and not SDI. (J17; N.T. 555)

Fifth Grade, 2006-2007

15. This year, in addition to his usual learning support class, Student also was provided one-to-one reading instruction with a student support teacher for 30 minutes per day, 5 days per week. (N.T. 96, 430-433, 473, 731, 735-736) This is much more one-to-one instruction than any other children in the School District typically receive. (N.T. 494-495) This teacher used a diagnostic, prescriptive approach to hone in on Student's reading needs. (N.T. 474, 494, 500, 734) She spent at least 15 minutes on decoding in isolation, and then on decoding and fluency through reading in context. (N.T. 437, 444) She ordered high-interest books with Student to encourage his participation. (N.T. 440-441) She later recommended increasing the one-to-one instruction to 45 minutes per day because the sessions were very beneficial, and Student was responding very well. (N.T. 432-433) In addition, the School District decided to utilize the Soudy System, the Read Naturally system, and to purchase Earobics, which is a computer-based reading program. (N.T. 445-446, 496, 736-737)
16. On October 16, 2006, Student's IEP was updated with present education levels in reading and speech/language. The goals remained the same. SDI was updated to reflect the additional services provided by the student support teacher – except that the one-to-one instruction was not explicitly listed but rather was considered to be included in the general description of “small group instruction.” (J24; N.T. 450, 502)
17. By this time, however, Student's parents were interested in a publicly-funded private school placement. On November 8, 2006 the School District issued a Notice of Recommended Educational Placement (NOREP) offering the October 16, 2006 IEP and rejecting a private school placement. (J27; N.T. 102)

18. On November 14, 2006, Student's Parents approved the NOREP, but indicated that they intended to obtain an independent neuropsychological evaluation. (N.T. 102; J27, p.3)
19. On November 24, 2006, Student's counsel requested a due process hearing, seeking compensatory education for 3 hours per day for the previous two school years, as well as reimbursement of anticipated private school tuition. (J30; N.T. 122)
20. Student's last day at the School District was Friday, December 8, 2006. On December 11, 2006, he started attending the 5th/6th grade class at Private School. (N.T. 108, 113, 119,133, 160)
21. Private School is a private school of 70 Students in [town redacted] Montgomery County. (N.T. 108, 113, 133, 370-371)
 - a. Private School's teacher-Student ratio is 4:1. Each child is assigned to a homeroom of eight to nine Students, with smaller classes in language arts, reading and math. (N.T. 308)
 - b. All Private School Students have language-based disabilities. (N.T. 161, 306-307, 381-382) Private School uses the Wilson Reading program, the Saxon math program and Project Read's Framing Your Thoughts writing program. (N.T. 321, 333, 335-336, 339, 410) Student attends a 50-55 minute Wilson reading class daily. (N.T. 388) All Private School teachers are certified in the Wilson reading program. (N.T. 318-320, 385) None of Student's teachers are certified by the Commonwealth of Pennsylvania as special education teachers. (N.T. 387-88)
 - c. Private School has two physical campuses, with a school van that transports Student between the campuses each day. (N.T. 308,388-389) When traveling to his Wilson class, Student may miss instructional time. (N.T. 390-91; 762-764) Private School also offers "green days" on which Students participate in non-instructional special events, such as ice skating, and during which the children's usual morning instructional time is missed. (N.T. 396-97)
 - d. Private School tuition is \$25,000 per year, which Student's Parents pay in \$1,600 monthly installments. (N.T. 113-114)
22. On December 6, 2006, Student's Parents privately secured an educational evaluation from Dr. K. (N.T. 119) (J 47; N.T. 114) It is Dr. K's opinion that Student needs a more intensive program of remediation than the School District has provided. (N.T. 905)
 - a. Dr. K never spoke to School District staff members during the evaluation process. (N.T. 872-873)
 - b. Multiple sections of Dr. K's report contain large amounts of boiler-plate language that Dr. K has used in reports for other Students. (N.T. 887-894)

- c. Dr. K used age-based norms when calculating achievement test standard scores. (N.T. 748) When Student's age-based WIAT II reading comprehension standard score of 76 is calculated with grade-based norms, it becomes a standard score of 81. (N.T. 265-266) This is similar to the WIAT II reading comprehension standard score of 82 reported by the School District in its June 2005 ER. (N.T. 265-266; J13, p.7)
- d. Neither Dr. K nor Student's Parents provided a copy of Dr. K's evaluation report to the School District, until it was provided by Student's counsel as part of this litigation. (N.T. 118, 120, 871-872)
23. The School District defines meaningful educational progress as a rate of progress that is steady and is measured in terms of a Student's disability. (N.T. 739-40) The School District alleges that severe dyslexia results in phonological and phonemic awareness that is slow to develop, specifically in terms of decoding and applying the phonological process with automaticity. (N.T. 621, 741) The record does not contain research-based evidence supporting this theory.
24. The School District further contends that, with his severe dyslexia, Student cannot achieve at any rate faster than he has demonstrated while at the School District. (N.T. 553, 742, 751) The School District, however, has never charted Student's actual rate of skill acquisition. (N.T. 621)
25. Student's Parents acknowledge that the School District was cooperative in attempting to address Student's educational needs. (N.T. 124)
26. A resolution meeting was conducted on December 12, 2006. (J31; N.T. 177) Hearing sessions were conducted on February 26, 27, 28 and April 6, 2007. Joint Exhibits J1-J31 and J33-J50 were admitted into the record. Exhibit J32 was intentionally left blank and is not considered part of the record. (N.T. 18, 946)
27. The School District's data regarding Student's reading performance over the years includes the following:
- a. The Developmental Reading Assessment (DRA) explicitly measures reading fluency and comprehension, not decoding. To the extent that decoding performance is assessed in the DRA, it is inferred from Student's fluency and comprehension scores. (N.T. 579, 660) After April 4, 2006 progress monitoring reports do not contain a DRA because the DRA only assesses skills up to the beginning of 2nd grade (N.T. 496-497) DRA Level 16 is considered "end of 1st / beginning of 2nd grade." (J10, p.2) DRA Level 20 is considered mid second grade. (J8, p.8)

Date	DRA Level	Accuracy	Rate	Comprehension	Exhibit
09/ 2003	4				J5, p.1
11/ 2003	6	97%			J5, p.1
02/ 2004	10	91%	19wpm	Adequate	J5, p.2

Date	DRA Level	Accuracy	Rate	Comprehension	Exhibit
04/ 2004	12	94%	15 wpm	Inadequate	J5, p.5
06/ 2004	12	96%	22 wpm	Adequate	J5, p.6
11/ 2004	6	91%	31 wpm	Adequate	J7, p.1; J36, p.2
01/ 2005	10	86%	22 wpm	100%	J7, p.2; J8, p.3; J36, p.2
04/ 2005	14	94%	29 wpm	Proficient	J10, p.2
06/ 2005	16	94%	46 wpm	Proficient/Advanced	J10, p.2
09/ 2005	14	94%	40 wpm	Adequate	J24, p.3; J36, p.2
11/ 2005	16	92%	50 wpm		J15, p.1; J24, p.3
12/ 2005	18	95%	37 wpm		J24, p.3
01/ 2006	18	98%	49 wpm		J15, p.1; J24, p.3
Spr 2006	18	95%	37 wpm	Adequate	J36, p.2
09/ 2006	16/18	98%	50 wpm	10 (some)/ Basic	J24, p.4; J28, p.2; J36, p.2

- b. The School District's primary developmental reading curriculum is categorized in "Stages." Stage 5 is the equivalent of mid first grade. (J6, p.4; J8, p.4; N.T. 579) Stage 7 is the equivalent of mid second grade. (J8, p.4; N.T. 579)

Date	Overall	Sight Word	Decoding	Comprehension	Exhibit
03/ 2003	Stage 4				J3, p.4; N.T. 46
03/ 2004	Stage 5				J6, p.4
03/ 2005		Stage 5	Stage 5	Stage 7	J8, p.4; N.T. 579

- c. The School District reported another type of (apparently) curriculum-based assessment:

Date	Rate	Accuracy	Comprehension	Exhibit
04/ 2006	55 wpm	97%	85%	J19, p.1; J28, p.3
06/ 2006	50 wpm	98%	87%	J19, p.1; J28, p.3
11/ 2006	32 wpm	96%	85%	J28, p.2

- d. The Fry Instant Word List:

Date	Words	Exhibit
09/ 2003	43/100	J5, p.6
11/ 2003	50/100	J5, p.2
02/ 2004	62/100	J5, p.2; J36
06/ 2004	73/100	J7, p.1
11/ 2004	62	J7, p.1
01/ 2005	85	J7, p.2
04/ 2005	85	J36, p.1
04/ 2005	109	J10, p.2
06/ 2005	153/200	J10, p.2; J36
09/ 2005	144	J20, p.1; J36

Date	Words	Exhibit
2 nd Qtr 05/06	176	J20, p.1; J36
11/ 2005	182/250	J15, p.1
3 rd Qtr 05/06	225	J20, p.1; J36
01/ 2006	255/300	J15, p.1
04/ 2006	307/400	J19, p.1; J28, p.3
4 th Qtr 05/06	322	J20, p.1; J36
06/ 2006	380/500	J19, p.1; J28, p.3
09/ 2006	312/400	J24, p.4
11/ 2006	435/500	J28, p.2; J36

e. The Great Leaps Reading Fluency Assessment:

Date	Rate	Accuracy	Comprehension	Exhibit
11/ 2004	51 wpm	84%		J7, p.1
01/ 2005	38 wpm	92%		J7, p.2
04/ 2005	46 wpm	92%		J10, p.2
06/ 2005	52 wpm	94%		JJ10, p.2
11/ 2005	56 wpm	97%	90%	J15, p.1
01/ 2006	58 wpm	95%	100	J15, p.1
04/ 2006	78 wpm	99%	90	J19, p.1; J28, p.3
06/ 2006	96 wpm	99%	100%	J28, p.3
11/ 2006	88 wpm	95%		J28, p.2

f. The Woodcock Diagnostic Reading Battery/Reading Mastery:

Date	Word Identification			Word Attack			Exhibit
	SS	%ile	GE	SS	%ile	GE	
Jan 2003	91	27		89	23		J13, p.3
Fall 2004	73	4	1.4	82	11	1.5	J11, p.1
Feb 2005	77	7	1.7	85	16	1.8	J8, p.3
Spring 2005	76	5	1.8	88	21	2.3	J11, p.1

g. The Phonological Awareness Test - Standard Scores

Subtest	09/ 2003	06/ 2004	06/ 2005	Exhibit
Decoding	66	68	79	J11, p.1; J36, p.1
Graphemes	72	69	92	J11, p.1; J36, p.1
Rhyming	97	91	107	J11, p.1; J36, p.1
Deletion	82	93	103	J11, p.1; J36, p.1
Substitution	86	94	83	J11, p.1; J36, p.1
Blending	87	103	99	J11, p.1; J36, p.1
Isolation	94	106	106	J11, p.1; J36, p.1
Segmentation	91	120	120	J11, p.1; J36, p.1

h. The Phonological Awareness Test – Percentiles

Subtest	09/ 2003	06/ 2004	05/ 2005	Exhibit
Decoding	5	4	12	J11, p.1; J36, p.1
Graphemes	5	5	24	J11, p.1; J36, p.1
Rhyming	25	16	68	J11, p.1; J36, p.1
Deletion	13	24	47	J11, p.1; J36, p.1
Substitution	18	27	13	J11, p.1; J36, p.1
Blending	14	43	37	J11, p.1; J36, p.1
Isolation	24	57	51	J11, p.1; J36, p.1
Segmentation	33	91	88	J11, p.1; J36, p.1

DISCUSSION

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all Students who qualify for special education services. 20 U.S.C. § 1412 There are three prongs to the decision to award reimbursement for a unilateral placement of a student at a private school. First, the School District must not have offered Student a FAPE. Second, if the School District has not offered FAPE, Student’s parents must establish that the private school is appropriate for Student. Third, if FAPE has not been offered and if the private school is appropriate, I must weigh the equities in the case. Florence County School District 4 v. Shannon Carter, 510 U.S. 7, 126 L.Ed.2d 284, 114 S. Ct. 361 (1993); School Committee of the Town of Burlington, Mass. v. Dept. of Education of Mass., 471 U.S. 359, 105 S. Ct. 1996 (1985)

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

To satisfy the first prong of the tuition reimbursement test, Student must establish that the School District did not offer FAPE. The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998) The cornerstone of FAPE analysis is an IEP that need not provide the maximum possible benefit, but must be reasonably

calculated to enable the child to achieve meaningful educational benefit. Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 107 S.Ct. 3034 (1983); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999) Whether an IEP is reasonably calculated to afford a child meaningful educational benefit 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 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002) It is rare, if ever, that an IEP document can be deemed perfect. In Re R.B. and the Eastern Lancaster County School District, Special Education Opinion No. 1802 (2007)

Student has been denied FAPE since November 2004

As described in greater detail below, I conclude that the School District has not offered Student FAPE through its proposed October 2006 IEP. I further conclude that the School District has not provided FAPE to Student during the time period at issue in this case, i.e., since November 2004. The remedies for these FAPE denials are tuition reimbursement for the failure to offer FAPE prospectively, and compensatory education for the past denial of FAPE.

Student argues that the School District has, at all times, failed to address his significant decoding deficit, which presented a significant obstacle to his reading fluency and comprehension. Student contends that his teachers never included any explicit decoding instruction nor did they specifically measure his decoding ability, simply assuming that Student's fluency and comprehension scores were evidence that he was decoding the passages that he read. Student argues that, by the time his second IEP was developed in March 2004, the School District should have known that its MRI program was not appropriate to meet Student's needs.

The School District contends that Student has made meaningful educational progress at all times relevant, especially during fifth grade, because his reading fluency and accuracy increased, albeit slowly. It notes that Student was appropriately moving into third grade text by the middle of his fifth grade school year. (N.T. 461-471) The School District further contends that this constitutes meaningful educational progress when one considers the severity of Student's dyslexia and his disability-related slow rate of acquisition. (N.T. 467)

I agree with Student and I reject the School District's arguments. I do not believe the School District appropriately programmed for Student since November 2004. Further, although the School District did start individualizing Student's program in 5th grade and was poised to see more positive results, it nevertheless offered an October 2006 IEP that did not explicitly require the intensive one-to-one diagnostic prescriptive reading instruction that was being provided. These are FAPE denials that qualify for compensatory education for the time period between November 24, 2004 and December 8, 2006, and that also satisfy the first prong of the tuition reimbursement analysis for the time period after December 8, 2006.

The whole process of evaluation, IEP development, and progress monitoring is designed to assist the IEP team in establishing baseline data, track the effectiveness of particular teaching strategies, and then communicate the rate and growth of the Student's progress to Parents and professionals. It allows other teachers, Parents, and hearing officers to look at the documents, perceive the Student's needs, see the teaching strategies used to address the Student's needs, and observe how the instruction was adjusted in response to the progress monitoring feedback. Meaningful curriculum based assessment requires a definitive statement of comparison of the Student's performance with the requisite level of performance for success. Qualitative statements (such as "moderate progress") are insufficient. The hallmark of curriculum-based assessment is quantitative data. In Re K.N. and the Bethlehem Area School District, Special Education Opinion No. 1225 (2002)

I agree with Student that School District professionals understood, as early as first grade, that Student had difficulty with reading and writing. By the second semester of his first grade, he had an IEP with reading and writing goals. That 1st grade IEP anticipated that, in a year, he would progress from Stage 4 in the School District's primary developmental reading curriculum to Stages 6 or 7. (J3, p.4; N.T. 46)

A year later, Student's March 2004 2nd grade IEP acknowledged that he had not reached his reading goal. (J6, p.4) Yet, the IEP did not revise the goal, but rather kept the same goal, i.e., expecting that Student would reach Stage 7, i.e., mid second grade, within the following year. (J6, p.4; N.T. 57) Eight months later, in November 2004, the School District surprisingly reported that Student was progressing well in the MRI program. (J7, p.1) Incredibly, however, this was at the same time that Student needed to repeat MRI Schedules 1 and 2A because he did not remember any of the concepts that he had learned from those schedules the year before. (J8, pp.2-3)

Both April and June 2005 progress monitoring reported that Student continued to struggle with progress in the MRI program. (J10, p.2) In June 2005 Student's teacher reported that Student seemed to rely more upon his memory of practiced words rather than his decoding skills. (J10, p.2) The June 2005 ER noted that, while Student's reading comprehension skills were getting stronger, he applied so much effort to decoding that he often lost the meaning of text. (J13, p.2) Inexplicably, the School District did not try something different to see if greater academic progress could be achieved. (N.T. 228) Instead, the School District steadfastly stuck to its same old, ineffective programming.

I reject School District suggestions that severe dyslexia results in slowly developing phonological and phonemic awareness (N.T. 621, 741) and that Student in particular, with his severe dyslexia, cannot achieve at a rate faster than he has demonstrated while at the School District. (N.T. 553, 742, 751) While these may be accurate hypotheses, they are nothing more than speculation in this particular case because they lack support in the record. This record contains no evidence of any research concerning the expected acquisition rates of dyslexic children. In addition, the School District did not chart Student's skill acquisition rates, and there is no systematic evidence of Student's responses to different teaching strategies. (N.T. 621) In fact, this Student,

who is universally described as a diligent and enthusiastic learner, would have been an excellent candidate for data-based assessments of the effectiveness of various reading instruction techniques. (N.T. 432, 532) The charts in this decision's findings of fact section illustrate that the School District is skilled at assessing and tracking Student's performance. What is missing is any follow-up analysis and strategic decision-making based upon the data.

The School District's arguments regarding the progress of dyslexics in general and of Student in particular might be more persuasive if there was evidence that the School District had been attempting different strategies at reasonable intervals and tracking Student's responses to the different instructional strategies. Instead, the School District tracked Student's consistently depressing achievement, while sticking to its same old instructional strategies. The only apparent School District changes that I observe in the record, at least through his 4th grade school year, were in lowered expectations of what Student might achieve.

Interestingly, once the School District did make real changes in instructional strategy in 5th grade, it saw some encouraging improvement in Student's achievement. For some reason, however, the School District chose not to list explicitly in its proposed October 2006 IEP the strategic change that appeared to have the most potential – the intensive one-to-one diagnostic prescriptive reading instruction that had begun in September and was being increased from 30 minutes to 45 minutes daily. (J24, N.T. 450, 502)

Thus, for purposes of this decision, it is not even relevant whether the Fall 2006 intensive one-to-one reading instruction was finally beginning to meet Student's needs. The fact that the School District did not include such one-to-one instruction in the specially designed instruction portion of Student's IEP constitutes a denial of FAPE. It is a denial of FAPE to fail to include in an IEP the specially designed instruction that a Student needs – particular SDI that is so critical to Student's needs.

Student also notes in his post-hearing brief that the Appeals Panel has twice held that the use of rubrics to assess writing progress is not measurable and is, therefore, inappropriate. See, In re M.B. and the Coatesville Area School District, Special Education Opinion No. 1603 (2005); In re R.U. and the Pennridge School District, Special Education Opinion No. 1492 (2004) Thus, the lack of objective measurement of Student's writing skills is another IEP failure constituting FAPE denial. (N.T. 209, 212-213, 600-603; J19, p.2; J24, p.3)

Accordingly, I conclude that the School District has not provided FAPE to Student since November 24, 2004.

Student is entitled to compensatory education

There are two separate remedies at issue in this case: compensatory education for the time that the Student was attending School District classes from November 24, 2004 to December 8, 2006; and tuition reimbursement for the time after Student's unilateral enrollment in Private School on December 11, 2006.

For the compensatory education time period between November 24, 2004 and December 8, 2006, I will award three hours per day of compensatory education. This is based upon a rough estimate that Student received two hours of learning support services per day in 3rd grade (N.T. 640, 656), four hours daily in 4th grade (N.T. 520-521), and an additional 30 minutes per day one-to-one instruction on top of all other learning support services in 5th grade. (N.T. 96, 430-433, 473, 731, 735-736) Student argues that the usual reduction for a reasonable rectification period is not required in a case such as this where the School District knew or should have known that its programming was inappropriate since the 2nd grade year. In re LC. and the Philadelphia School District, Special Education Opinion No. 1809 (2007) I will, however, allow a reasonable rectification reduction in this case. I conclude that, by the time of Student's March 22, 2005 IEP, the School District had enjoyed a reasonable time within which to rectify its FAPE denial. (J8) Accordingly, I will award 3 hours of compensatory education for every day that Student attended school between March 22, 2005 and December 8, 2006.

Student's parents are entitled to tuition reimbursement

Regarding the tuition reimbursement remedy, I indicated earlier in this decision that a three-prong analysis must be applied before Student's parents can be reimbursed for the tuition of a unilateral private placement. The first prong of the analysis is a determination that the School District did not offer FAPE to Student. For the reasons described above, I have found that the School District's proposed October 2006 IEP does not offer FAPE to Student. For some reason, the School District's proposed October 2006 IEP did not explicitly require the instructional changes that appeared to be most promising, i.e., the intensive one-to-one reading instruction. (J24, N.T. 450, 502) This constitutes a denial of FAPE. Accordingly, Student has met his burden of proof regarding the first prong of the tuition reimbursement analysis.

The second prong of the tuition reimbursement analysis requires that the unilateral private placement be appropriate to Student's needs. The School District argues that the Private School is neither an appropriate program for Student nor the least restrictive environment in which he should be educated. Student argues that Private School meets his special education needs by providing direct and explicit instruction on all of his areas of academic deficit. (N.T. 852-853) Student also notes that Private School has been found to be appropriate in similar past cases. In re N.B. and the Upper Moreland School District, Special Education Opinion No. 1685 (2005); In re K.G. and the Upper Dublin School District, Special Education Opinion No. 1450 (2003)

I agree with Student. Student needs structured, explicit, systematic, small group reading instruction in decoding skills. (N.T. 432-433, 656) Private School provides Wilson Reading instruction by certified Wilson teachers in very small classes of 8 or fewer children. (N.T. 308, 318-321, 333-339, 388, 410) In addition, the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. Ridgewood, supra ; In Re A.Z. and the Warwick School District, Special Education Opinion No. 1783 (2006) Thus, I conclude that Private School is an appropriate program and placement for Student. Accordingly, Student has met his burden of proof regarding the second prong of the tuition reimbursement analysis.

The final prong of the tuition reimbursement analysis is a weighing of the equities. In this case, all parties have been appropriately professional and cooperative with each other. There is no equitable reason to preclude Student's parents from tuition reimbursement if Student has not been offered FAPE and the unilateral placement is appropriate. Accordingly, Student has met his burden of proof regarding the third prong of the tuition reimbursement analysis.

Thus, I will order the School District to reimburse Student's parents for their private school tuition costs.

Student's parents are not entitled to IEE reimbursement

34 CFR §300.502(b) provides that Parents have a right to an IEE at public expense if they disagree with an evaluation obtained by a public agency and the agency fails to show that its evaluation is appropriate. In Re LMB and the East Penn School District, Special Education Opinion No. 1795 (2007)

In this case, the School District's June 2005 evaluation report was appropriate. A variety of assessment tools and strategies was used to gather relevant functional and developmental information about Student, including information provided by the Parents, and information related to enabling the child to be involved in and progress in the general curriculum. No single procedure was used as the sole criterion for determining an appropriate educational program for the child. Student was assessed in all areas related to the suspected disability, including social and emotional status, general intelligence, and academic performance. The assessment tools used by the School District were technically sound instruments that provided relevant information in determining Student's educational needs. Further, the School District argues that the IEE provides no new information to the District which was needed to provide an appropriate program to Student. I agree.

The School District's flaw in this case was not its evaluation of Student's disability. Rather, the problem has been the School District's inappropriate response to the information that it consistently received regarding Student's disability. Both the June 2005 School District ER, and the December 2006 IEE, identify Student's severe reading and writing disability, and both identify a potential need for speech and language therapy. (J13; J47) It is not the School District's June 2005 ER, but rather the subsequent IEPs,

that are responsible for the School District's persistent decisions to stick to the same old, ineffective teaching strategies. While the IEE probably gave Student's parents the comfort that they felt they needed to take the "Burlington gamble" and unilaterally enroll Student into an expensive private school, the substance of the IEE simply reinforces information already known (but not given sufficient significance) by the School District.

Thus, I find that the School District's ER was sufficiently comprehensive, conducted by applicable procedure, and identified Student's needs. I further find that the IEE did not provide new information that was not otherwise known to the School District. Accordingly, because the School District's ER was appropriate and because the IEE did not provide additional, new information, there is no basis for ordering the School District to reimburse Student's Parents for the costs of IEE.

CONCLUSION

Student is a xx year old resident of the School District with dyslexia. Contending that he has been denied a free and appropriate public education since November 24, 2004, Student seeks compensatory education. Student's parents also seek reimbursement of the costs of an IEE, as well as tuition reimbursement following their unilateral placement of Student into a private school. For the reasons described above, I find for Student on all issues except the IEE reimbursement.

ORDER

- ❑ The School District shall provide to Student 3 hours of compensatory education for every day that Student attended school between March 22, 2005 and December 8, 2006;
- ❑ The School District shall reimburse Student's parents for their Private School tuition costs;
- ❑ Student's parents are not entitled to reimbursement of Dr. K's December 2006 evaluation.

Daniel J. Myers

Hearing Officer
May 11, 2007

Re:	Due Process Hearing
File Number:	7158/06-07 KE
Student:	Student
School District:	Central Bucks