

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

DP 7349/06-07

Name

Xx/xx/xx

Date of Birth

4/16/07; 4/23/07; 5/07/07

Dates of Hearing

Open

Type of Hearing

Parties to the Hearing:

Mr. & Mrs.

Parents' Names

05/15/07

Date Transcript Received

Address

06/02/07

Date of Decision

Downingtown Area

School District

Anne L. Carroll, Esq.

Hearing Officer Name

126 Wallace Avenue

Downingtown, PA 19335

School District Address

Dr. Levi Wingard

School District Superintendent

Andrew E. Faust, Esq.

Sweet, Stevens, Katz & Williams

331 Butler Avenue P.O.Box 5069

New Britain, PA 18901

School District Counsel & Address

Signature of Hearing Officer

Frederick Stanczak, Esq.

179 North Broad Street

Doylestown, PA 18901

Parent Advocate & Address

**I.  
BACKGROUND**

Student is a xx year old third grade student, currently enrolled in the private [redacted] School at his Parents' expense, after attending [redacted] Elementary in the District from kindergarten through the early part of this school year.

Student began receiving help for verbal learning difficulties during kindergarten and was first evaluated for IDEA eligibility in December, 2004 as a first grader. Although the discrepancy between Student's cognitive ability and achievement scores in verbal skills resulted in a finding of specific learning disability, the District also concluded that Student's needs could be accommodated via the small group reading assistance he was receiving within the regular education classroom, along with the tutoring his Parents were providing. The District determined, therefore, that Student was not eligible for special education. Despite the District's consistent reports of his steady progress, however, by the beginning of third grade Student's academic achievement had fallen significantly behind his peers in math, written expression and reading, as disclosed by the results of an IEE and a second School District evaluation, both completed in September 2006.

After the second evaluation, the School District concluded that Student was IDEA eligible and prepared a proposed IEP and NOREP for resource room learning support in both language arts and math. Due to Student's anxiety and reluctance to attend school, as well as incidents of crying during the school day, his Parents withdrew Student from the School District and enrolled him at [Private School] prior to a first IEP meeting.

When the District refused tuition reimbursement, the Parents requested a due process

hearing to seek payment by the District as well as compensatory education for the District's decision not to provide special education to Student after his first evaluation. The School District contends that its initial ineligibility decision was correct, that it was prepared to provide Student with an appropriate IEP at the time he left the School District, and that, in any event, his Parents' tuition reimbursement claim must be denied due to their failure to provide the District with written notice of their intention to seek an alternative placement within the time provided in the IDEA statute.

## **II. FINDINGS OF FACT**

1. Student is a xx year old child, born xx/xx/xx. He is a resident of the Downingtown Area School District and is eligible for special education services. (Stipulation, N.T. p. 13).
2. Student has a current diagnosis of specific learning disabilities in language and math in accordance with Federal and State Standards. 20 U.S.C. §1401(30)(A); 34 C.F.R. §300.7(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p.13; S-1, S-4, S-5).
3. Student enrolled in the School District as a kindergarten student at the beginning of the 2003/2004 school year and almost immediately was identified as a student in need of additional academic support, particularly in language. (N.T. pp. 41, 272, 306– 308; S-1, S-5)
4. The academic supports provided to Student through the regular education program included an extended kindergarten program of an extra half-hour four days each week to work specifically on listening and following directions. In first grade, he was placed in an instructional support group four days each week to receive extra help in reading. (N.T. pp.152– 154 , 202- 205, 315; S-1)
5. Early in his first grade year, Student was diagnosed with ADD, for which he began taking medication in October 2004. Student's Parents also requested a multi-disciplinary evaluation, which was completed and an evaluation report issued on December 20, 2004. (N.T. pp. 310, 313; S-1)

6. Based upon the results of the WISC IV cognitive assessment and the Wechsler Individual Achievement Test -Second Edition, the evaluator concluded that there was a severe discrepancy between Student's cognitive ability and his reading comprehension, resulting in the conclusion that he had a learning disability in reading. (N.T. pp. 253, 314; S-1, S-8)
7. Despite Student's below average progress in reading, the evaluation team further concluded that Student was not eligible for special education services because his needs were adequately met via the IST program in the regular classroom and via the private tutoring provided by his Parents. (N.T. pp. 253, 254, 314, 315, 317, 319, 323, 332– 334, 354– 358; S-1, S-8)
8. The 2004 evaluation report also noted that Student's academic progress should be closely and carefully monitored and further evaluation considered if his needs could not be met in the regular education setting. (N.T. p. 253; S-1)
9. During the remainder of first grade and through second grade, Student remained in the regular education classroom with continued IST support in reading. During the second half of first grade, he was also invited to join "Reading Rockets," an additional intervention workshop provided by the first grade teachers to practice reading skills. In the second half of second grade, he also began receiving twenty minutes of additional math instruction per day. Student's IST teacher reported good progress as measured by periodic DIBELS (Dynamic Indicators of Basic Early Literacy Skills) assessments, the assessments designed for the Harcourt reading series and his report cards. (N.T. pp. 152– 154, 157– 192, 207, 279., 378; S-1; S-8, S-10, S-11)
10. Student's Parents and IST teacher also noted, however, that he was increasingly frustrated and anxious about school. His IST teacher observed that by the third trimester of second grade, Student was struggling daily with the increased curriculum demands and was particularly overwhelmed in large group instructional settings. Student's increasing academic struggles were not well reflected in his second grade end of the year report card, although a comparison of Student's first and second grade report cards shows fewer skill areas in which he was judged proficient. (N.T. pp. 225, 226, 277, 284, 324– 326, 329– 331; S-5, S-11)
11. As the beginning of his third grade year approached, Student's anxiety about school increased. He reported a dream about asking to be killed which disturbed his Mother and he had bouts of crying in school which resulted in a referral to the guidance counselor. In addition, due to earlier adverse reactions to Concerta and to another medication to treat his ADD, he was just beginning a trial with a third medication. (N.T. pp. 279, 310– 312, 334– 340, 350, 401, 448, 452, 453; S-5, S-8)

12. In September 2006, at the beginning of third grade, Student's Parents sought an independent educational evaluation. A second School District evaluation, which they had requested in the spring of 2006, was conducted within a few days of the IEE. The September 2006 assessments of Student's cognitive functioning were consistent with each other and with the December 2004 evaluation, but measures of academic achievement revealed a far greater disparity between Student's average cognitive ability and his significantly delayed acquisition of skills in the areas of reading, math and written expression. (N.T. pp. 259, 285, 341– 346, 405– 408, 411, 412; S-4, S-5, P-1)
13. As a result of its second evaluation, the School District concluded that Student is IDEA eligible as a student with specific learning disabilities who needs specially designed instruction in the areas of basic reading skills (decoding, sight words, reading fluency), reading comprehension, written expression, including spelling, and basic math concepts. In addition, based upon Student's ADD/ADHD diagnosis, the Evaluation Report identified Other Health Impairment as a second disability category and identified a need for improvement in Student's ability to sustain attention and effort over time. (N.T. pp. 115, 254, 255, 259, 264, 270; S-5)
14. Student's IEP team met on October 25, 2006 to review the School District's proposed IEP and NOREP, which provided for 2.25 hours of daily resource room learning support in language arts (decoding, fluency, reading comprehension, written expression) and 1 hour daily of resource room instruction in math. Under the School District's proposed IEP, therefore, Student would have spent 51% of each day receiving basic skills instruction in the resource room and the remainder of the day, including content instruction, lunch and specials in the regular classroom. (N.T. pp. 73– 75, 86–89; S-7)
15. The proposed IEP includes three reading goals directed toward developing Student's ability to read words in isolation at both the second and third grade levels, as well as his ability to answer both direct and inferential comprehension questions after reading a passage. No grade or reading series level is specified for the reading comprehension goal. (S-7)
16. The specially designed instruction included in the IEP describes the type of reading instruction Student would receive as "direct, explicit, systematic phonemic-phonetic word analytic approach to decoding, fluency and spelling instruction using controlled readers and expanding to non-controlled texts and passages...." The [District] Principal stated that the reading instructional materials used in the resource room are the Harcourt reading curriculum used throughout the District, as well as Project Read materials. (N.T. pp. 84, 125– 130, 134, 142, 143; S-7)

17. The IEP also includes two written expression goals: 1) writing 27 words after being presented with a story starter, one minute to plan and three minutes to write and 2) writing a mechanically proper second grade level sentence after a writing prompt, including correct spelling, punctuation and grammar. (S-7)
18. There are two math goals in the School District's proposed IEP: solving 22 basic addition and 22 basic subtraction problems with 100% accuracy on three consecutive administrations. The IEP does not specify whether the problems are expected to include one or two digit problems, or a combination, and specifies no grade level(s) for the problems. In the Modifications and SDI section of the IEP, direct, explicit and systematic techniques are specified for math instruction, along with the use of concrete manipulatives, charts and a number line, fading to elimination. The Principal testified that Touch Math is used in the resource room at [redacted] Elementary. (N.T. pp. 78, 144; S-7)
19. According to the chart of Modifications and SDI, several strategies were expected to be implemented in the regular education classroom for Student, specifically, word banks, modification of assignments, oral directions paired with visual cues, frequent checks for understanding following oral directions, periodic prompts, reminders and redirection to remain on task. (S-7)
20. Early in October 2006, after the School District evaluation was completed but before the IEP team met, Student and his Mother visited Private School for a day. Student's Mother observed an immediate lessening of his school-related anxiety and decided to withdraw Student from Elementary School and enroll him at Private School immediately. Student's last day at Elementary was October 13. (N.T. pp. 82, 348, 349)
21. In the months since Student has been attending Private School, his school-related anxiety has substantially diminished but has not been entirely eliminated. (N.T. pp. 375– 377)
22. Although Student's Parents verbally notified the principal of their decision to dis-enroll Student and have him attend Private School, they did not provide formal written notice of their request that the School District pay Student's private school tuition based upon their position that the School District's proposed special education program was inadequate to meet Student's needs until December 10, 2006. (N.T. pp. 351, 352, 367; S-8)

### **III. ISSUES**

1. Did the Downingtown Area School District appropriately conclude that Student was not eligible for special education services after conducting an initial educational evaluation in December, 2004?

2. Is Student entitled to an award of compensatory education for any period between December 2004 and October 2006, when his Parents enrolled him at Private School, and if so, for what period, how much and in what form?
3. Are Student's Parents entitled to reimbursement from the Downingtown Area School District for Student's tuition at Private School?

#### **IV. DISCUSSION AND CONCLUSIONS OF LAW**

##### **A. Child Find/ Timely and Appropriate Eligibility Determination**

The record leaves no doubt that the School District identified Student's language-based learning disability at the time he was first evaluated in December 2004, during his first grade year. (S-1, p. 8) The School District concluded at that time that Student was nevertheless not eligible for special education services under IDEA because it believed that his acquisition of learning skills was commensurate with that of his peers and that he was responding well to small group instruction within the classroom, where he had a peer group at the same reading level. (S-1). Consequently, the School District's characterization of the appropriateness of its initial eligibility determination as a "Child Find" issue under 34 C.F.R. §300.125 is inaccurate. The Parents are not contending that the School District failed to consider whether Student was a child with a disability and/or failed to evaluate him to determine the existence and nature of his disability. The School District clearly recognized Student's early learning difficulties and appropriately responded, first, with the additional services offered to every student with early difficulties in acquiring basic academic skills. In addition, the District responded to the Parents' concerns about Student's academic problems with psycho-educational testing which accurately identified Student as a child with a learning disability. The true issue, therefore, is whether the

District appropriately concluded from its initial evaluation that Student was not IDEA eligible despite his identified learning disability.

Under the IDEA statute, the determination that a student is a “child with a disability” is a two-pronged inquiry: 1) Does the child have a condition listed in the statute? 2) Does the child, by reason of that condition, need special education and related services? 20 U.S.C. §1401(3)(A)(i), (ii); 34 C.F.R. §300.7(a)(1).

In 2004, the District concluded that Student had a specific learning disability but did not, by reason thereof, need special education and related services. (F.F. 6, 7) The evaluation report produced by the District in 2004, however, also noted that his academic progress should be closely monitored to assure that his learning needs could continue to be met by the interventions provided in the regular education classroom through the instructional support process. (F.F. 4, 8)

The District witnesses testified exhaustively that Student made reasonable progress during the remainder of first grade and throughout second grade as a result of the instructional support services he was receiving. There is, however, a plethora of evidence in the record which contradicts the District’s somewhat disingenuous position that Student was progressing well until the beginning of third grade, when, with remarkable and unpredictable suddenness, he presented with a worsening of the originally identified learning disability, along with learning disabilities in math and written expression, which led the District to acknowledge that Student now requires special education. (F.F. 9, 12, 13).

First, the District was well aware at the time of its initial evaluation of Student that his Parents were supplementing the District’s IST interventions in the regular classroom with outside tutoring provided at their own expense, and the District relied upon those Parent-



provided services as a factor in its determination that Student did not need special education. (F.F. 7; *See, especially*, S-1 at p. 5: “Given Student’s low average verbal comprehension ability found on the WISC-IV, in combination with the interventions he is receiving in school and privately, his performance makes sense.”) Since the School District knew that Student needed assistance in addition to what it was providing through the IST process, it should have recognized that he needed a higher level of intervention than the IST supports it was providing in his first grade classroom.

As every School District and Parent knows, the goal of the IDEA is to assure that every child with a disability is provided with FAPE—a **free**, appropriate, **public** education. *Brett S. v. W. Chester Area Sch. Dist.*, 2006 U.S. Dist. LEXIS 10249 (E.D. Pa Mar. 15, 2006). Here, although the School District properly conducted an initial evaluation and concluded that Student had a learning disability, the School District failed to provide Student with an education through which he was likely to make reasonable progress, at no cost to the Parents, and entirely in the context of public education, as required by IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). Instead, in determining that Student could progress academically without special education and related services, and, therefore, was not IDEA eligible, the District relied upon the Parents to supplement Student’s free public education with private instruction at their own expense. This is not to suggest that a school district would be liable for failing to provide a student with FAPE any and every time parents provide a tutor for a child with academic difficulties. Here, however, there is no question that Student met the first criterion for eligibility—he had a learning disability identified by the School District through its own evaluation. Prior to the District’s 2006 evaluation, which was consistent with its initial

evaluation, the question of eligibility centered entirely on whether Student needed specially designed instruction. The District erred in concluding that Student was not eligible for special education services based, in part, upon the private, Parent-funded educational services supplementing the IST interventions he received in the regular education classroom. The District should have realized that Student's need for significant services in addition to the regular education classroom supports it was providing indicated his need for special education services even if he was making appropriate progress with the combined efforts of the IST process and the tutoring. In light of his identified learning disability, the District was obligated to provide Student sufficient services to permit him to make reasonable progress at no cost to the Parents.

Moreover, the District's partial reliance upon tutoring procured by the Parents as a basis for its initial determination of non-eligibility is not the only basis for concluding that the District should have found that Student was IDEA eligible long before the 2006 reevaluation. For example, although Student's K-2 IST teacher testified to his steady progress in reading, she also noted that an additional reading intervention was implemented for Student in the second half of first grade and that additional help in math was required in the second half of second grade. (F.F. 9). In addition, when assessing Student's functioning and progress in school for the 2006 reevaluation, the same witness noted Student's increasing difficulties during second grade. (F.F. 10, S-5) Despite increasing classroom supports and observed distress, and despite the caution in the first ER that Student should be closely monitored to determine whether a need for special education emerged, the District continued to rely on limited assessment measures, DIBELS and progress monitoring tools associated with the Harcourt reading series, to conclude that Student was making good academic progress without special education. (F.F. 8, 9) There was a striking

disconnect between the evidence of Student's increasing struggles to keep up academically, manifested by increasing frustration and anxiety observed by teachers, the principal and his Mother, and Student's purportedly good academic progress.

The true picture of Student's increasing deficits, however, emerges most clearly from the second School District evaluation, completed less than two years after the District determined that he was not a child with a disability. (S-5) Far from confirming the positive progress reports the District produced through Student's second grade year, the 2006 reevaluation documented worsening and broadening learning disabilities. (S-5) Since nothing in the record suggests that some major and unforeseen event in Student's life suddenly accelerated his learning disabilities and propelled him into a need for special education services, the conclusion is inescapable that the District simply closed its eyes to Student's need for special education services during the second half of his first grade year and throughout second grade.

The record amply supports the conclusion that Student needed special education services at the time he was initially evaluated, and, therefore, should have been identified as a child with a disability as a result of the December 2004 evaluation. Consequently, Student should have been provided with special education services early in 2005, after the holiday break, and will be awarded compensatory education from January, 2005 until his last day in the District, October 13, 2006. (FF 20)

Based upon the due process hearing record, which clearly establishes Student's need for specially designed instruction in reading at the time the District's initial evaluation was completed, and the IEP eventually proposed by the District, (S-7), which provides for 2.25 hours of resource room language arts instruction each day, Student will be awarded 2.25 hours of

compensatory education for language arts for every school day from the first day school was in session in January 2005 through October 13, 2006.

In addition, since math supports were instituted through the IST process during the latter part of second grade, Student will be awarded 1 hour of compensatory education for math for every school day from the date in the spring of 2006 when he began receiving IST support in math through October 13, 2006.

The cost of the compensatory education shall be measured by the compensation, including salary and fringe benefits, paid by the District to the special education teacher who would have taught Student in the resource room to which he would have been assigned during the periods specified above. Student's Parents may use the fund created by the compensatory education award to provide Student with additional instruction in math and language arts, and/or as reimbursement for the tutoring services they provided to Student during the time he should have been receiving special education services, and/or to fund additional services related to needs identified in the District's 2006 evaluation or the IEE completed by Ms. M.

## B. Tuition Reimbursement

### 1. Legal Standards

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and

only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *In Re: The Educational Assignment of C. D.*, Special Education Appeals Panel Decision No. 994 (June 27, 2001) A decision against the parents at any step of the analysis results in a denial of reimbursement. *Id.*

2. Appropriateness of the October 25, 2006 Proposed IEP and NOREP

An IDEA eligible student is entitled to receive a free appropriate public education (FAPE) from his school district of residence in accordance with an IEP that meets procedural and substantive regulatory requirements. *In re: The Educational Assignment of S. A.*, Special Education Appeals Panel Opinion No. 1036 (July 17, 2000). To be substantively appropriate, an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *In Re: The Educational Assignment of M. L.*, Special Education Opinion No.1498 (July 1, 2004). “Meaningful benefit” means that an eligible student’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.* Consequently, in order to properly provide FAPE, the student’s IEP must specify educational instruction designed to meet the unique needs of the child and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988). In

addition, an IEP must be responsive to the student's needs as identified in an appropriate educational evaluation. *In Re: The Educational Assignment of N.E.*, Special Education Opinion No. 1661 (Oct. 21, 2005).

The District contends that the IEP it proposed on October 25, 2006 meets the foregoing standards, requiring, therefore, that the Parents' claim for tuition reimbursement be denied without further consideration of the appropriateness of the private school they selected for Student or equitable factors. Review of the proposed IEP in light of the most recent School District ER, however, does not support that position.

The fundamental problem with the proposed IEP is that it is a generic resource-room program rather than a plan specifically designed to meet Student's unique needs as described in the School District's September 2006 ER. Although the annual goals are measurable in terms of quantifying the levels of the reading, math and written expression skills Student is supposed to develop, the IEP as a whole provides no assurance that the goals are designed to remediate Students' identified deficits in reading, math and written expression and systematically move him toward grade level in those basic skill areas.

In reading, *e.g.*, both the September 2006 ER and the "Present Level of Academic Achievement and Functional Performance" section of the proposed IEP noted that Student's sight vocabulary is quite limited relative to his age level peers, and that his decoding skills are inconsistent, leading to difficulties with both reading fluency and comprehension. (S-5, p. 7; S-7, p.7). The ER provides numerous suggestions for specially designed instruction to address those needs, including a multi-sensory, structured approach to reading instruction. (S-5, p. 12) The proposed IEP includes two generalized fluency goals providing, rather inconsistently, for

reading words at both the second and third grade levels, with more words read correctly at the third grade level than at the second grade level. (F.F. 15; S-7 pp. 15, 16) The reading comprehension goal does not specify the grade level of the passages of which Student is expected to demonstrate direct and inferential understanding. (S-7, p. 16) The IEP contains no description of the “decoding and word analysis strategies” he is expected use to reach his reading goals, or how he will be taught those strategies and how to use them. In addition, the proposed IEP makes no provision for multi-sensory reading instruction. (S-7 pp. 22, 23). Although the school principal testified that Project Read materials are available to the special education teacher, (F.F. 16), the IEP itself does not explicitly provide that such materials would be used for Student’s reading instruction, much less how or to what extent. Consequently, no one reading Student’s IEP would get a sense of how to instruct him in reading in a manner that addresses his unique needs. Certainly, if Student’s family were to move to a different school district which was then expected to implement his program, this IEP would provide no guidance for continuing his program because it does not provide an individualized plan for Student’s reading instruction that any special education teacher could follow.

The math goals in the proposed IEP are even more vague and less connected to Student’s needs as identified in the School District’s evaluation and repeated in the “Academic Achievement” section of the proposed IEP. (S-5, pp. 7, 8; S-7, p. 8). The proposed IEP provides two math goals, addressing only computation. (F.F. 18; S-7 pp. 20, 21). There are no goals for addressing Student’s deficits in math reasoning and in several problem-solving skills, or for improving his ability to tell time. ( S-5, p. 8; S-7, pp.8, 20, 21 ) Moreover, there is nothing in the ER, the proposed IEP or elsewhere in the record which discloses the level at which he is

expected to complete 22 basic addition and subtraction problems with 100% accuracy, whether the problems will be limited to one digit or will include 2 digit problems, or for that matter, the basis for setting 22 problems as the measure for determining that each goal was met.<sup>1</sup> More important, without a specified level for the basic addition or subtraction problems, there is no way to determine whether or how achieving the goals would constitute a “meaningful benefit” for Student or reasonable progress toward meeting his identified needs. In other words, even if Student met the math goals in the IEP, that would provide no assurance that his deficits described in the ER were appropriately addressed.

The goals for writing are likewise sparse and vague. One goal provides that Student will write 27 words in response to a story starter. (F.F. 17, S-7 p. 18) Such goal provides no guidance as to the expected relatedness of the words to the story starter or the expected complexity of the stories he produces. Moreover, nothing in the ER suggests that Student could not write any particular number of words in response to a story starter or otherwise. Rather, the ER notes that he had a tendency to over-simplify the content of his stories to avoid difficulties with spelling and the mechanics of writing. (S-5, p. 7; S-7, p. 8) Although the second writing goal in the proposed IEP addresses writing mechanics and spelling in terms of stating that he will write sentences with correct spelling, punctuation and grammar at a second grade level, there is no hint

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<sup>1</sup> Five of the seven Measurable Annual Goals found in the IEP proposed for Student are followed by reference to a “Standard” identified by a letter and numbers, which apparently relate to the skills identified on the District report cards and are derived from Pennsylvania educational standards. (See, S-7, pp. 15–21, S-11; N.T pp. 61, 62) There is nothing in the ER, the IEP or elsewhere in the record, however, explaining how Student’s goals are connected to the referenced “Standard,” suggesting that the goals identified for Student in the proposed IEP were primarily designed to improve Student’s ability to meet the District’s objectives rather than as a means to address his own unique educational needs, thereby providing further support for the



as to how that will be accomplished, and no specific spelling goals. Most disturbing, however, in terms of assuring that the IEP follows from the ER, is the fact that the WIAT-II grade equivalents for spelling and written expression reported in the ER are already at the second grade level. Comparing the proposed IEP goals to the ER, therefore, leads to the conclusion that little or no progress is expected. (S-5, p. 14) According to the writing goals in the proposed IEP, the District has no expectation of moving Student to grade level in 30–50 minutes per day of specially designed instruction in writing and spelling, although the WIAT-II results suggest that Student is not as far behind his peers in that area as, *e.g.*, in numerical operations and reading comprehension, and despite the testimony of the elementary school principal that Student’s learning needs are not “intense” and that his progress was not significantly different from other students. (*See*, S-7, p. 14; N.T. pp. 85, 86)

Finally, the IEP does not address at all Student’s identified need to improve his ability to sustain attention and effort over time, (S-5, p. 12), and as the Parents pointed out, does not appropriately address his needs with respect to emotional functioning, specifically, school-related anxiety. (S-7, p. 12; S-8) Although the District contended that addressing Student’s academic needs would improve the anxiety and emotional distress he demonstrated in both second grade and the beginning of third grade, and that monitoring his emotional state would assure that interventions could promptly be implemented if such issues did not improve, (N.T. pp.87, 88, 118–120), such responses are clearly inadequate. In the first instance, it is highly unlikely that Student’s clear and increasing distress at being unable to keep up with his classmates academically would be instantly alleviated by assigning him to the resource room for

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conclusion that the proposed IEP is insufficiently individualized for Student.

approximately half of each school day. Even with the best possible specially designed instruction and supportive interventions in the regular classroom, it would take some time for Student's reading, writing and spelling skills to improve significantly. Consequently, he would continue to be confronted on a daily basis with his inability to keep up with his classmates in the content areas for which he would have returned to the regular classroom. According to the observations of Student's third grade regular education teacher reported in the ER, he was exhibiting "clinically significant levels of anxiety" and was "at risk" for, *inter alia.*, depression. (S-5, p. 10). These observations alone demonstrated a clear need for intervention to help Student come to terms with emotional and anxiety issues while his skills were improving, if that occurred, rather than hoping such issues would not worsen before his academic performance improved. Second, and significantly, the first ER produced by the District in December 2004 provided that Student's academic progress should be closely monitored in order to determine if, and when, specially designed instruction would be needed. The District, however, continued to insist that Student was making good progress, and maintained that position at the due process hearing, even in the face of its own second evaluation that showed greater academic deficits less than two years after the first evaluation. Consequently, the Parents cannot be faulted for taking the position that the proposed IEP was inadequate because it provided for similar "monitoring" rather immediate intervention to address Student's school-related anxiety. The Parents' fears that Student's emotional state would worsen without the District offering services to improve his emotional state are amply justified by the record.

The process of developing an IEP is supposed to result in an individualized plan which provides a picture of the child's current functioning, strengths and needs and serves as a "road

map” for meeting the identified needs by describing in detail an appropriate program of instruction and how it should be implemented. *In Re: The Educational Assignment of K.B* , Special Education Appeals Panel Decision No. 1470 (April 2004). In addition, the IDEA contemplates that an IEP will be developed as the result of a collaborative process by a team which includes the parents, teachers and other support personnel familiar with the eligible child’s strengths, weaknesses and needs. Although a true team approach to the development of an IEP appears to be rare, and may even be unrealistic, in this case the deviation from the concept resulted in a sparse and essentially meaningless document which inspires no confidence that it is likely to confer meaningful educational benefit and reasonable academic progress. Although there is no reason to doubt the testimony of the elementary school principal that the special education teacher who produced the proposed IEP has many years of experience and is recognized as an outstanding special education teacher, (N.T. p. 85), she nevertheless produced a boilerplate document that does not address each of Student’s needs as identified in the School District evaluation. The District followed the letter of the law in putting together an evaluation team of qualified professionals to determine Student’s IDEA eligibility as a child with a specific learning disability in need of special education services, and included the Parents’ input. 20 U.S.C. §1414(b)(4), (6), 34 C.F.R. §§300.534, 540. Similarly, the District met the requirements for a procedurally proper IEP team and included all sections required by the IDEA statute and regulations. 20 U.S.C. §1414(d)(1)(A), (B); 34 C.F.R. §300.344, 346, 347. Following the “letter of the law” procedural requirements, however, did not produce a substantively appropriate IEP in this case. Consequently, the first factor for considering tuition reimbursement is resolved in favor of the Parents and against the School District.

### 3. Appropriateness of Private School

The District stipulated that the Private School selected by Student's Parents is a proper placement under IDEA. (N.T. pp. 13, 14, 293– 300). That issue, therefore, is likewise resolved in favor of the Parents.

### 4. Equitable Considerations

The School District contends that tuition reimbursement must be denied due to the Parents' admitted failure to provide the District with 10 days prior written notice of their concerns about the program offered by the District, their intention to reject the program and placement proposed by the District, and their intention to enroll Student in the private school. 20 U.S.C. §1412(a)(10)C), 34 C.F.R. §300.403(d)(1). The Parents argue that their actions fall under the exception to the notice requirement found at §1412(a)(10)C)(iv)(II)(bb) and 34 C.F.R. §300.403(e)(2), which applies where immediate action is necessary to avoid severe emotional harm to the child. The record is replete with credible evidence that at the time Student left the District, he was suffering from worsening anxiety related to his school attendance, notwithstanding the Districts' attempt to minimize the seriousness of Student's primary behavioral symptom at school, frequent crying. (F.F. 10, 11; S-5, S-7) The Parents, therefore, are entitled to the benefit of the emotional harm exception to the written notice requirement. In addition, denial of tuition reimbursement for failure to comply with the written notice requirement is discretionary, not mandatory. *In Re: The Educational Assignment of C. H.*, Special Education Opinion No.1179 (Sept. 24, 2001). As in *C. H.*, Student's Parents provided immediate verbal notice to the District upon withdrawing Student from the District and enrolling him at Private School. (F.F. 22) Finally, the District was well aware that Student's Parents

were considering private school when it received a written request from Private School for Student's educational records at the end of September. ( N.T.79, 80; S-6) Consequently, the District had ample time to consider whether an IEP team meeting should be convened to develop a special education program for Student prior to his withdrawal from the District.<sup>2</sup>

Since the notice issue is resolved in favor of the Parents, and the District raised no other equitable issue as a reason to deny tuition reimbursement, the Parents will be awarded the entire cost of Student's tuition at the Private School for the 2006/2007 school year.

## V. SUMMARY

Student is a resident of the Downingtown Area School District whose learning disability was first identified by a District evaluation in December 2004 when he was in first grade. At that time, however, the District erroneously concluded that he did not need special education as a result of his learning disability, further concluding that his needs could be met through regular education services available to all students in the District who experience difficulties in learning to read, along with tutoring provided at his Parents' expense. In addition, the District failed to recognize Student's growing need for special education as the supportive services provided to him in the regular classroom were increased through first and second grades, while his educational progress decreased in math and written expression as well as in reading. After the District conducted a second evaluation in September 2006 in which standardized achievement

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<sup>2</sup> Although the second comprehensive evaluation may not have been entirely complete, Student's learning disability had been identified in the 2004 evaluation, which provided that Student's potential need for special education should be closely monitored.. Consequently, the District could have undertaken a more limited review of records re-evaluation immediately and offered him specially designed instruction based upon the results of the first ER prior to completion of the second comprehensive evaluation and ER. 20 U.S.C. §1414(c)

tests confirmed Student's learning disabilities, lack of reasonable educational progress and increased deficits in reading, writing and math, the District developed an IEP for Student, but its proposed program failed to appropriately address all of his identified needs.

As a result of the School District's failure to provide Student with an appropriate program of special education from the time of the first evaluation, he will be awarded compensatory education from January of his first grade year through the date in his third grade year when he withdrew from the District and enrolled in a private school. In addition, due to the District's failure to propose an appropriate IEP for the remainder of his third grade year, Student's Parents will be awarded reimbursement for his private school tuition paid during the 2006/2007 school year.

## **VI. ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Downingtown Area School District is directed to take the following actions:

1. Provide Student with compensatory education as follows:
  - a. 2.25 hours for every school day from the first day school was in session in January 2005 through October 13, 2006.
  - b. An additional 1 hour (3.25 total hours/day) for every school day from the date in the spring of 2006 when Student began receiving IST support in math through October 13, 2006.
  - c. The cost of the compensatory education shall be measured by the compensation, including salary and fringe benefits, paid by the District to the special education teacher(s) who would have taught Student in the resource room to which he should have been assigned during the periods specified above.

- d. Student's Parents may use the fund created by this award of compensatory education to provide Student with additional instruction in math and language arts, and/or as reimbursement for the tutoring services they provided to Student during the time he should have been receiving special education services, and/or to fund additional services related to the needs identified in the District evaluation or the IEE completed by Ms. M.
2. Reimburse Student's Parents for their entire tuition costs for Student at the Private School from the time en enrolled there through the end of the current school year.

DATED:

ANNE L. CARROLL, ESQ., HEARING OFFICER