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AT 8495/07-08

Name

Xx/xx/xx

Date of Birth

3/25/08; 4/7/08; 4/18/08; 5/1/08

Dates of Hearing

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Type of Hearing

Parties to the Hearing:

Parents' Names

05/07/08

Date Transcript Received

Address

5/22/08

Date Record Closed

Upper Moreland

School District

6/10/08

Date of Decision

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I. BACKGROUND

Student, began receiving early intervention services at age 2 due to developmental delay, severe speech/language deficits, behavior and attention/focus issues. When Student entered the Upper Dublin School District as a kindergarten student during the 2006/2007 school year, she was placed in an inclusion class with primarily typical peers. Her early difficulties continued in the beginning of kindergarten, manifested primarily in communication issues and very problematic classroom behaviors.

During kindergarten, Student's Parents and teachers worked closely together, adjusting Student's program to provide additional or revised supports and services in order to address problems and increase her ability to benefit from instruction. With the assistance of a one to one classroom aide, her problem behaviors diminished and her ability to focus and attend in the classroom improved. With speech/language therapy, Student's communication skills advanced significantly in the regular kindergarten setting.

In late 2007, during Student's first grade year, Parents expressed dissatisfaction with Student's academic progress based upon the results of an independent educational evaluation they had obtained during the summer of 2007. Upon receiving the independent evaluator's report in November 2007, the District sought and obtained Parents' permission to conduct a reevaluation of Student and subsequently developed a revised IEP. Prior to completion of the reevaluation report and new IEP, Student's Parents enrolled her in Private School. Parents then filed a due process complaint seeking tuition reimbursement, reimbursement for the costs of the private evaluations they obtained during the spring and summer of 2007 and compensatory education for denial of FAPE during Student's kindergarten and first grade years.

II. FINDINGS OF FACT

1. Student is a xx year old child, born xx/xx/xx. She is a resident of the Upper Moreland School District and is eligible for special education services. (Stipulation, N.T. pp. 13—15).
2. Student has a current diagnosis of Other Health Impairment and Speech/Language Impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 14, 15).
3. Student was first identified as a child with delays in motor skills and language as a two year old and began receiving home-based early intervention services. (N.T. pp. 34, 35; P-2)
4. At age 3, Student was evaluated by the [redacted] Institute and found to have significant needs arising from developmental delays, language deficits, attention, focus and behavior difficulties, gross and fine motor impairments. (N.T. pp. 35, 36, 45, 46; P-3; S-10)
5. Student began attending a special needs nursery school conducted by [redacted] in [redacted], which provided all the services necessary to meet her needs. (N.T. pp. 35, 36, 46—48; P-1, P-2, P-3; S-4)
6. After some uncertainty concerning her readiness to leave the pre-school setting, Student's Parents decided that she should enter the kindergarten program in the School District in the 2006/2007 school year. Parents met with District officials in the spring of 2006 to plan for a District evaluation and transition to kindergarten, and twice during the summer to review the District's evaluation report and develop an IEP for Student. (N.T. pp. 35, 36, 40—43; S-1, S-4, S-6, S-10, S-11)
7. Student's first IEP addressed her speech/language deficits and included one behavior goal. Special education services centered on itinerant speech/language support, consisting of 1½ hours of speech therapy weekly, divided into three 30 minute sessions delivered partially in a pull-out setting (2 sessions/week) and partially in Student's kindergarten classroom (1 session/week). She also received 30 minutes of occupational therapy (OT) within the classroom. Parents approved the NOREP for Student's kindergarten IEP, which had been developed over two sessions in August 2006. (N.T. pp. 60, 524—526, 711—713 ; S-6, S-10, S-11, S-12, S-17)
8. Student was placed in the kindergarten inclusion class, which has fewer students than usually assigned to a kindergarten class. Kindergarten children eligible for IDEA services are assigned to the inclusion class, where additional support is provided by the school psychologist, speech and behavior therapists. During the 2006/2007 school year, a special education teacher consulted with the kindergarten teacher, provided social skills group instruction in the kindergarten inclusion class, and specifically worked with Student and a few other students each morning on transition activities and social skills. The daily schedule was consistent except for a special class, which varied as to type each day. The kindergarten inclusion class also provided daily opportunities for small group and one to one instruction. (N.T. pp. 147, 148, 527, 675—679, 686, 687, 737)

9. During Student's preschool years, uncontrollable, sometimes violent behaviors emerged as a significant issue. The challenging behaviors were believed to be related frustration she felt arising from her language deficits and the ADHD. These behaviors, including running out of the classroom, persisted in the early weeks of kindergarten, prompting Parents to request a one to one aide. (N.T. pp. 47, 49, 50, 60—65, 681, 682; P-1, P-2, P-3, P-11; S-10, S-14)

10. After the aide began working with Student, and a behavior plan was also developed and implemented, her behaviors improved dramatically. Since the aide had been added to Student's special education services early in October 2006 on a trial basis for a brief period, the District revised Student's IEP on October 30, 2006 to make the aide a permanent part of her program. By the end of kindergarten, both Parents and the School District considered Student's classroom behavior much improved, and no longer a major daily disruption. (N.T. pp. 66—68, 76, 77, 159, 161, 178, 689, 691, 693, 695, 711, 728, 732, 735; P-11; S-10, S-16, S-17, S-23, S-24)

11. Student's IEP team met again on November 15, 2006 to incorporate an updated OT report, as well as to review Student's behavior needs and progress toward her speech/language goals. Four goals were added, covering the areas of language, behavior and motor skills. A revised behavior plan was also incorporated into the IEP. (N.T. pp. 66—68, 70, 71, 158, 159, 531, 532, 535; P-11; S-16, S-17)

12. Student began making progress in speech therapy within a few weeks of beginning her program. Her language and social skills greatly improved during the kindergarten year. Student continued to make progress in those areas in first grade. Nevertheless, Student still exhibits significant language deficits. (N.T. pp. 68, 69, 506, 527—532, 538—541, 544, 545, 555, 695, 698; P-12; S-16, S-23, S-24, S-38)

13. Student's teacher saw academic growth over the course of the kindergarten year. She completed the District's standard progress reports for the regular education kindergarten curriculum based upon expectations of the skills kindergarten students should develop, noting satisfactory progress with respect to Student's math skills, but far less success in development of pre-reading skills, particularly in those areas requiring expressive language output. (N.T. pp. 109, 110, 270—274, 695, 699, 701, 707, 711, 725—728; P-12; S-23)

14. The IEP team determined that Student was eligible for ESY services during the summer of 2007. She attended a half-day summer school program in her neighborhood school for four weeks, which included an hour of speech/language therapy and a half hour of occupational therapy each week. (N.T. p. 73, 303—306, 543, 546; S-19, S-20, S-24, S-25)

15. Student's IEP team met on April 25, 2007 to develop an IEP for first grade (2007/2008 school year). The IEP provided for Student to continue receiving speech/language therapy three times weekly, as well as one thirty minute session of OT each week, and the services of a one to one aide. Although there had been a discussion of placing her in a learning support class for reading and math, no agreement was reached. The IEP provided that all academic instruction would be provided in the regular education setting. Revisions were made to speech/language goals to reflect the progress Student had made, including meeting some of the original goals. The behavior plan was also revised. Eligibility for pull out reading support was to be made at the

beginning of first grade. Parents approved the proposed IEP by signing the accompanying NOREP. (N.T. pp. 159, 160, 543—545, 701, 728; S-23, S-24, S-25, S-26)

16. During the summer of 2007, Parents obtained a neuropsychological evaluation of Student by Dr. R of the Institute. Although Dr. R did not perform the initial evaluation when Student was 3, she had previously evaluated Student in December 2005, prior to kindergarten. The independent evaluation also included an OT evaluation by the same therapist who had conducted the 2005 evaluation (N.T. pp. 444, 445; P-1, P-2, P-3; S-28)

17. The standardized tests administered by Dr. R placed Student in the below average to borderline range of intellectual capacity. Reading and math readiness skills were also measured in the low average to borderline range, with math scores lower than her reading scores. In terms of grade level, Student's skill development in these areas was at the early kindergarten level. Written expression was measured a bit higher, close to the mid-kindergarten level. Dr. R concluded that basic readiness skills for first grade were lacking and that Student would not succeed in a regular curriculum without significant supports and modified instruction. (N.T. pp. 460, 461, 470--475; P-1; S-28)

18. In her report, Dr. R made a number of educational program recommendations for Student, including a highly structured classroom, with consistency and continuity in both staff and routine; collaborative involvement of a speech/language therapist in her classroom; language-enriched classroom; small group or one to one instruction; multi-sensory learning, including use of visuals and manipulatives in skill instruction; supports to reduce avoidant behaviors; regular exposure to typical peers for practicing social, behavioral and language skills, OT/PT and a behavior plan. (N.T. pp. 486—488, 496, 500, 501; P-1)

19. Student's Mother testified that at the end of kindergarten, Parents were concerned about Student's academic progress and readiness for first grade. Neither the contemporaneous notes of the April 2007 IEP meeting nor the background section of the independent evaluator's report indicate that those concerns were expressed to the District in the course of developing Student's first grade IEP, or to Dr. R as a reason for seeking the independent evaluation. (N.T. pp. 76, 77, 85, 86; P-1; S-24)

20. At the beginning of first grade, before receiving the report of the Institute evaluation, Student's Mother had noted regression in Student's behaviors, including nightmares, a return to thumb-sucking and reluctance to attend school. Student's negative classroom behaviors, particularly aggression and avoidance behaviors, increased during the fall of 2007. (N.T. pp. 76, 77, 85—89, 94, 96, 100, 101, 105—108, 205, 206, 316, 322; P-10, P-13, P-14; S-32)

21. During the last week of October or the first week of November, Student's Mother visited Private School, which had been strongly recommended by Student's treating psychologist as a possible alternative placement for Student. (N.T. pp. 120, 121)

22. Student's IEP team met formally on November 13 and December 4, 2007 to review and revise Student's IEP in response to Parents' concerns about the escalating behavior issues and to address academic issues. The IEP team discussed the report of the most recent Institute

evaluation and received input from the psychologist treating Student. At the December meeting, the IEP team recommended several changes to Student's IEP to address academic issues, including providing academic instruction in math and reading in a learning support setting. Parents did not approve the NOREP for the December 4, 2007 revisions to Student's IEP. (N.T. pp. 103, 113, 114, 182, 324, 353, 374; P-10; S-30, S-32, S-35)

23. At the November 13, 2007 IEP meeting, the District requested permission to reevaluate Student, which Parents granted. The evaluation was conducted on January 30 and February 1, 2008 and a reevaluation report issued on February 19, 2008. (N.T. pp. 221, 234, 235; S-31, S-38)

24. The District incorporated the results of the R evaluation, conducted classroom observations, obtained parental input and assessments from Student's speech/language and occupational therapists and her Title I reading specialist. The District also performed additional testing, including the Comprehensive Test of Non-Verbal Intelligence (C-TONI), Wechsler Individual Achievement Test, Second Edition (WIAT II), Behavior Assessment Scale for Children-Second Edition (BASC-2) and the Connors Rating Scales-Revised (CTRS-R:L). (N.T. pp. 225, 229, 553, 554; S-38)

25. The results of the C-TONI placed Student's intellectual capacity in the average range. Student's scores on standardized achievement tests covering word reading, reading comprehension and listening comprehension were in the low average range. In listening comprehension, Student was more successful in receptive language tasks than in those requiring expressive skills. Pseudo-word reading could not be measured because Student refused to attempt that task. Spelling, math reasoning and numerical operations were measured as borderline. (N.T. pp. 233, 235, 236; S-38)

26. Except for anxiety, which was rated within the average range, the BASC-2 ratings completed by Student's teachers indicated that all behaviors rated fell in the "at risk" (10 behaviors) or "clinically significant" (9 behaviors) range. Results of Connors Rating scale showed 12 of 13 behaviors rated "atypical, with 9 rated "markedly" to "moderately" atypical. (N.T. pp. 246—249, 327, 328; S-38)

27. The District reevaluation report recommended continuation of IDEA eligibility based on the Speech/language and OHI categories. In addition to continuing services already in place, the District's school psychologist made additional program recommendations including adding learning support services, providing small group and one to one instruction in core academic areas, a highly structured classroom environment, multi-sensory teaching strategies, increased speech/language therapy, behavior support with clear contingencies for reinforcement, close monitoring of behaviors and tangible, concrete reinforcers, breaking assignments into smaller parts, use of consistent language throughout the school day. (N.T. pp. 250—256, 279—281; S-38, S-40)

28. By letter dated January 22, 2008, Student's Parents informed the District that they were withdrawing Student from public school to enroll her in private school. Student began attending Private School on February 4, 2008. (N.T. pp. 126, 613, 614; S-37)

29. Private School serves students with language-based learning disabilities, in particular, students with expressive language difficulties. The reading program used in Student's first grade class, where she is one of five students, is Foundations, part of the Wilson reading program, which is designed for children with language challenges. The Foundations program is supplemented by a Lindamood-Bell program. (N.T. pp. 608, 614, 623, 630, 631, 645, 647)
30. The Private School addresses behaviors that interfere with learning as a secondary focus, believing that such issues are most often related to frustrations arising from language deficits. (N.T. p. 645)
31. General, classroom-based behavior management systems are used with all students, consisting of behavior charts and the opportunity to earn age and grade appropriate rewards, such as visiting the reading corner for younger children. (N.T. pp. 661, 662)
32. Student's first two and a half months at the Private School did not go well. After approximately the first week, Student began exhibiting escalating negative behaviors which the witness from the Private School attributed to her inability to tolerate the language-processing demands in her first grade class. As the weeks passed, uncontrollable behaviors escalated despite various strategies, none of which succeeded for very long. By the end of March, Student was running out of the classroom or "eloping" several times each day, and had to be physically restrained at times. She could not participate in the social skills component of the school day, which included greeting and engaging in conversation with classmates. (N.T. pp. 615, 616, 622, 648—650, 659)
33. During the first two weeks of April 2008, the private school required Student to remain at home due to her uncontrollable behaviors until a one to one aide was hired and a behavior plan developed for her by her treating psychologist. According to Private School witness, Student did not adapt to Private School as other children do. (N.T. pp. 643, 644, 648)
34. For the two and a half week period between Student's return to school on April 14, 2008, and the last due process hearing session, a few days of behavior charts were produced, indicating that Student's uncontrollable behaviors had diminished with the addition of the one to one aide and the behavior plan. Student's elopement behavior, however, had not been entirely eliminated. The strategies implemented to address Student's behavior issues in April also included reducing academic demands. (N.T. pp. 636, 652—654, 658, 665, 668; P-16)
35. During Student's first grade year in the District, her behavior fluctuated, with good and bad days reported. Despite many instances of acting out, District staff reported that she was generally able to maintain or return to appropriate behavior in her first grade inclusion classroom. With the behavior plan interventions, Student's behaviors could generally be brought under control for at least part of the day, enabling her to benefit from her special education services, including her weekly push-in speech therapy session. (N.T. pp. 253, 254, 322, 344, 346, 355, 356, 364—366, 378, 548, 549, 766; P-13, P-14; S-38, S-40)

36. Although Student's language deficits still adversely affected her ability to interact socially with her classmates and follow directions in the classroom, she continued to make progress in speech and language. By the time of the District reevaluation in late January, she was able to initiate peer conversations and sustain conversational volleys of two exchanges independently and three exchanges with prompts. (N.T. pp. 254, 550, 553; S-38, S-40)

37. As part of her first grade reading instruction in the District, Student received Title I reading services from the District reading specialist. In early October, she was evaluated for and began participating in the Wilson Reading Foundations program, receiving 30 minutes of additional reading instruction in that program each day. She also received small group instruction daily in the first grade classroom. At the end of the second marking period, Student had not acquired any of the skills listed under "Reading" on the first grade progress report form. Her teacher reported that she was significantly behind her first grade peers in reading, but had begun to make progress in consistently identifying consonant sounds. (N.T. pp. 319, 328—338, 342, 369, 370; P-12S-38, S-40)

38. Student's first grade teacher reported progress in acquiring first grade math skills as presented to her, with modifications and accommodations. The progress reports indicate that Student reached proficiency in some of the math skills by the end of the second marking period, although she still did not know basic addition and subtraction facts. (N.T. pp. 338—341, 370—372; P-12; S-38, S-40)

39. Student was instructed in the standard first grade handwriting curriculum, as well as receiving OT to develop her ability to print, and was demonstrating progress in printing the letters of the alphabet. (N.T. pp. 311—313; P-12; S-30, S-38, S-40)

40. On March 11, 2008, Student's IEP team, including her Father, participating by telephone, met and issued a proposed IEP based upon the results of the reevaluation. The proposed IEP includes goals in reading, English/language arts, math, behavior, speech/language and OT/PT. Specially designed instruction/modifications to the curriculum include multi-sensory instructional strategies throughout the school day, small group instruction for math and language arts, strategies for improving social skills, on-task behaviors and effective communication, speech/language and behavior goals to be addressed throughout the curriculum. Related services of transportation and a behavior program were also provided, along with a continuation of a one to one aide, greater frequency of speech/language and occupational therapies, and ESY services. The IEP also recommends a change in placement such that Student would receive instruction in reading, language arts and math outside of the regular classroom, as well as pull outs for her speech/language and occupational therapies, and social skills program. The NOREP issued on March 14, 2008 reflects the more intensive services proposed by the District to meet Student's increasing academic needs and proposed efforts to increase her academic progress in reading, written expression and math. The specially designed instruction in the proposed IEP included multi-sensory teaching strategies, small group instruction, behavior support strategies, language support throughout the curriculum. (N.T. pp. 257, 260, 390, 393—405, 411—418, 420—425, 549—559, 747—756, 769, 775; S-40, S-41, S-42)

III. ISSUES

1. Are Student's Parents entitled to reimbursement for the tuition they paid to Private School along with transportation costs and/or reimbursement of transportation costs?
2. Are Student's Parents entitled to reimbursement for the costs of private evaluations they obtained?
3. Is Student entitled to compensatory education, and if so, for what period and in what form and amount?

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Introduction

Parents, through Student's Mother's testimony, expressed two concerns with the District's programming for Student from kindergarten (2006/2007 school year) through the first half of first grade (2007/2008) before they removed her from the District and enrolled her in Private School in February 2008. 1) That Student's achievement in basic reading and math skills places her well below her peers at both the same age and grade level, having made no discernible academic progress in kindergarten; 2) that Student was so far behind academically when she began first grade, she could not keep pace with her typical peers in the regular education inclusion class to which she was assigned, resulting in escalating displays of aggressive and avoidant behaviors in school and regressive behaviors at home through the fall of 2007. *See*, P-10 and S-37, letters from Parents to District Special Education Supervisor dated 11/18/07 and 1/22/08. Parents, therefore, came to believe that Student needed a different type of placement, outside of the District, to eliminate the stress she was experiencing in the regular classroom and to allow her to make better educational progress. *Id.*

The objective evidence, however, does not support the Parents' position concerning a lack of reasonable progress in kindergarten. In addition, although there is evidence that Student needed a more intensive, small group placement in first grade, the record discloses that the District offered learning support for reading and math, a change in Student's program which could have been implemented as early as the beginning of the current school year, had Parents wanted to consider it, or in December 2007, when the District formally made the recommendation to change Student's placement from itinerant language support to part time learning support, or in March 2008, when the District proposed comprehensive revisions to Student's IEP. *See* F.F. 15, 22, 40. Parents, however, rejected the District's proposals, for reasons that are still not entirely clear, given the initial cooperation between the parties and the absence of any reasonable basis for the Parents' conclusion that the District had completely failed to provide Student with FAPE. *See, e.g.*, N.T. pp. 165--192

B. Tuition Reimbursement

IDEA regulations provide that a public agency is not required to reimburse parents for the costs of a private school placement if it offered FAPE to the student and further provide that disputes concerning that issue are to be resolved through the IDEA due process procedures. 34 C.F.R §300.148(a),(b). Under the applicable statutory/regulatory standards, a hearing officer may order tuition reimbursement for a child who received special education services from a school district and, without district consent, was removed from the public school program and enrolled in private school by the parents only if the school district failed to provide FAPE to the child and the private school placement is determined to be appropriate for the child. 34 C.F.R §300.148(c).

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court first established the principle that parents do not forfeit an eligible student's right to FAPE, to due process protections, or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly 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 parent selected placement is inappropriate.

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.*, whether 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 that process results in a denial of reimbursement. *Id. See also, In Re: The Educational Assignment of N.B.*, Special Education Appeals Panel Decision No. 1685 (January 2005).

1. Appropriateness of the Alternative Placement

Under the *Burlington* analysis, a determination that a school district was providing or offering an appropriate program at the time a student is unilaterally enrolled in a private school is

sufficient to deny tuition reimbursement. For the reasons explained below in the discussion of the Parents' compensatory education claim, the tuition reimbursement issue in this case could be decided on that basis alone, since the District has provided Student with an appropriate program since she enrolled in kindergarten in the 2006/2007 school year. Moreover, to the extent that Student's special education needs could no longer be appropriately addressed in a regular education inclusion class in first grade, the District timely offered an appropriate program to address the concerns raised by the Parents. Since the District did not deny Student FAPE, Parents have no legally cognizable basis for obtaining reimbursement from the District for the tuition and transportation costs they have incurred due to their unilateral choice of a private school placement.

In this case, however, the evidence so unequivocally establishes that the Private School was not appropriate for Student at the time she entered the school on February 4, 2008, that this issue should be laid to rest at the outset. Moreover, there is insufficient evidence to support a conclusion that Private School overcame its initial inability to meet Student's educational needs, or will ever be able to do so.

The Head of Private School was the only witness called to testify at the due process hearing who was competent to testify to whether the school provides an educational program in which Student is likely to make reasonable educational progress. Her testimony, however, and all reasonable inferences that can be drawn from it establishes that the Private School placement did not successfully and appropriately meet the concerns Parents raised with respect to the District's past and future programs and placements for Student. To the contrary, the evidence adduced during the due process hearing supports only a conclusion that the private school selected by the Parents does not meet Student's significant educational needs. *See* F.F. 32, 33.

The evidence establishes that Private School was unprepared to deal effectively with Student's known behavior issues—one of the reasons Parents decided to enroll Student in private school. *See* P-10, S-37. There was no evidence that Private School is meeting Student's specific and individualized language needs and no evidence that it can otherwise meet her academic and motor needs.

Student's well-documented speech/language needs are complicated by equally well-documented ADHD and behaviors that impede Student's ability to learn. *See, e.g.*, F.F. 4, 6, 9, 10, 11, 20, 22, 27. The intensity of Student's behaviors at the Private School during February and March and the inability of the School to effectively control those behaviors literally obliterated any chance for educational progress in her first grade class at Private School. The Head of the Private School testified very frankly that Student had come to the point of "eloping" from her classroom several times each day, that no behavior or medical strategies employed by the staff reduced the avoidant/aggressive behaviors, leaving Student so uncontrollable that she had to be physically restrained at times. F.F. 32. Student's behavior ultimately became so disruptive and intractable that the school requested that she be kept at home while a behavior plan was developed and a one to one aide hired, which took two weeks. F.F. 33.

The foregoing facts alone would be sufficient to conclude that the Private School is not an appropriate placement for Student. As noted by Parents' expert evaluator when questioning the effectiveness of the District program: "[W]hen there's this much manifestation of behavior issues, you have to wonder how much learning is going on. ...how much is she participating actively in learning if there's so much behavior and reactivity going on in the classroom." N.T. p. 479, l. 7—10, 17—21. In the case of the Private School, the answer must be that no learning occurred during the period Student was kept out of school by reason of her behaviors, or during

the time that she was uncontrollable on a daily basis, since there was no evidence that Student was provided any instruction during those periods

More important than the behavior issues which the school could not handle effectively is the underlying reason for the behaviors offered by the Private School Head: “[Student] would just not be able to tolerate sitting still, not be able to tolerate the language processing demands in the first grade. It was just very very hard for her to comply with classroom expectations.” N.T. p. 615, l 19—24. The witness further testified that Student’s behavior greatly improved once the behavior plan was implemented (F.F. 34). She also testified, albeit without any discernible factual basis, that a reduction of academic demands which had been implemented to lessen Student’s avoidant and aggressive behaviors arising from stress, “is not current as of now,” (N.T. p. 665, l.10). There was, however, no explanation how a plan to reduce negative behaviors would have the effect of diminishing the language processing demands of Student’s classroom, or why her frustrations will not build again and erupt in more uncontrollable behaviors if the language demands of the classroom remain too difficult for Student.

In light of the weeks of uncontrollable behavior and the underlying reason attributed to the behaviors, the testimony of Private School witness inspires no confidence that Student’s still significant speech/language deficits can be appropriately addressed in that setting. Student receives less direct speech/language therapy at Private School than provided by the District. *See* F.F. 7, 15; N.T. pp. 615, 641. In addition, although private schools are not required to develop IEPs for their students, it is disturbing in this case that there is no systematic plan to address Student’s language deficits, despite attributing her uncontrollable behaviors in February and March to being overwhelmed by her language-based classroom. Since Student’s primary eligibility category is speech/language impairment, the lack of evidence concerning how

Student's specific language needs will be met in the private school setting provides an even more important reason for finding that Private School is not appropriate for Student..

Neither the opinion of the Head of Private School nor the opinion of the Parents is entitled to any weight concerning the appropriateness of Private School for Student. Both testified to characteristics of the school that should make it a place where Student can make appropriate progress. *See* N.T. pp. 121—126; 621—637. Notably absent, however, was any testimony showing how Student's specific special education needs are being met on a daily basis, other than testimony that over a period of approximately two weeks, the behavior plan was successful, based upon a sample of behavior charts from that period. F.F. 34.

In light of the testimony concerning the resurgence of Student's problem behaviors when she entered the private school, which were only successfully controlled, at most, for a relatively few days before the due process hearing ended, along with the lack of evidence that Private School can effectively meet Student's needs for speech/language services, Parents failed to meet their burden of proving that the private school they selected is an appropriate alternative placement. Consequently, even if the District's program were found to be inappropriate for Student in any respect, tuition reimbursement could not be awarded for Private School.

C. Compensatory Education

1. Legal Standards

Under IDEA, an 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.*, 172 F.3d 238 (3RD Cir. 1999). 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 (3rd 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 (3rd Cir. 1988).

An eligible student who has not received more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known.

In determining whether an award of compensatory education is warranted, the first step in the analysis is to assess the appropriateness of the program offered by the School District at the time it was offered or provided. *In re: The Educational Assignment of K. S.*, Special Education Appeals Panel Opinion No. 1124 (June 4, 2001). An award of compensatory education for lack of an appropriate program may be based upon implementation as well as the contents of the IEP.

Ridgewood; In re: The Educational Assignment of Z. S., Special Education Appeals Panel
Opinion No.1000 (February 28, 2000).

2. 2006/2007 School Year (Kindergarten)

Student's Mother testified that by the end of kindergarten, Parents were greatly concerned that Student's academic progress was far below her same-age and same grade peers. *See, e.g.*, N.T. at 76. She further testified that Parents were dismayed by the results of the private neuropsychological evaluation they obtained after Student's kindergarten year, which showed that on standardized achievement tests, she was far below her same age peers. F.F. 20. It is difficult to understand, however, how the Parents could have expected Student to be at or close, to age level in academic skills after kindergarten. At the beginning of kindergarten, Student was significantly behind her typical peers in language development, and had been diagnosed in the preschool years with ADHD and general developmental delay, as well as significant speech/ language deficits. F.F. 3, 4. Student's intractably impulsive and uncontrollable behaviors had been noted as a major problem in every preschool evaluation report. F.F. 9. Student's Parents were so concerned about Student's obvious delays and differences from typical children, particularly with respect to her language deficit, troublesome behaviors and need for one to one assistance, that they seriously considered delaying her transition to kindergarten, hoping another year in pre-school would permit her to gain additional ground. F.F. 6; N.T. pp. 38—42. It was only when the preschool staff pointed out that Student would be much bigger than the other children, with possible negative effects for her, that Parents decided to enroll Student in kindergarten in 2006. N.T. pp. 42, 43

After conducting an evaluation, (S-4), the District determined that Speech/language was Student's primary disability category and developed IEP goals to address her language deficits. F.F. 7. It was not unreasonable for the District to take this course, particularly at the beginning of the year. Student had very serious deficits in language, which is essential for learning to read and for other academic skills, as well as functioning successfully in the classroom in terms of understanding and following directions. Student's teacher testified that the early kindergarten curriculum for all children is focused on acclimating the students to the classroom routines, which are often very different from preschool, rather than on academic skills. N.T. pp. 713, 714. Student's language deficits were also complicated by her ADHD and the behavioral issues arising from both of her identified disabilities. F.F. 9. Responding to those needs successfully was paramount in the kindergarten year. The evidence establishes that Student's many needs were addressed not only by the special education and related services she received, but by the supports added to her kindergarten inclusion classroom. *See*, F.F. 7, 8; S-10 (Kindergarten IEP) Moreover, the District moved quickly to add the additional support of a one to one aide and a behavior plan once it became obvious that Student could not make meaningful progress in kindergarten with less intensive behavior management techniques. F.F. 8, 10, 11.

Parents were initially very pleased with Student's progress in kindergarten. Her Mother noted that the behavioral issues were no longer a major problem, that "she really had been very well behaved." N.T. p. 76, l. 21. Student's Mother also testified that her self esteem had increased and she no longer described herself as a "sad girl" who didn't want to go to school. *Id.* at l. 24, 25. Parents' claim that the District failed to provide a an appropriate education for Student during kindergarten was made well after the kindergarten year ended, after learning that her academic skills, as measured by standardized achievement tests, were well below other

children of her age. F.F. 17, 19. That information, however, does not negate the conclusion that Student was provided with FAPE during the 2006/2007 school year.

Given the extent of Student's language and behavior issues when she entered kindergarten, there is no doubt that Student made more than reasonable progress toward her IEP goals during her first year in the District, even if Parents are correct that her academic progress did not keep pace with the progress she made in language and behavior. IDEA does not require a school district to fully remediate an eligible student's every deficit in every area in a single school year. The District's obligation is to provide a program that enables an eligible student to make "reasonable" progress toward IEP goals designed to address identified needs, and that certainly occurred here. Parents' expectations of greater academic progress based upon standardized test scores comparing Student to a general population of kindergarten age students is unrealistic, and, therefore, unreasonable. Most children learn language as they learn other physical skills, as a matter of expected maturation, without specific instruction or assistance. Student, however, continues to need speech therapy and a language enriched classroom environment to teach her to understand language and communicate effectively because her verbal skills are well below the level of her typical peers. *See*, P-4, Independent Speech/Language Evaluation. It is a matter of common sense to infer from the evidence that Student's continuing difficulties with language will delay and otherwise adversely affect her development of academic skills, even with an optimal program. Student must not only learn the basic math and reading skills that all children need to master in the primary grades, but must also continue to be taught underlying language concepts and communication skills that other children acquire naturally. *See, Id.* at pp. 2, 3, noting that with respect to language, Student needs "direct teaching of specific concepts" (in front of, behind, around, center, below between, second, third).

She would also “benefit from direct teaching of pragmatic language functions, such as asking for directions, requesting information and making a compliment.” *Id.*

In addition, the District’s school psychologist provided a cogent explanation for the difference between Student’s academic skill development reflected on the District’s kindergarten progress reports (P-12, pp. 4—8) and the standardized test results. In her District classes, Student is provided with various modifications, supports and strategies that she can use to learn academic skills and demonstrate her understanding. She is accompanied by an aide to help her maintain focus and provide additional instruction to overcome her language deficits. Standardized achievement tests, however, must be administered in accordance with strict protocols and are language-based. *See N.T.* pp. 270—274. In short, Student’s disabilities interfere with her performance on standardized tests, while the supports and services she was provided to assist her in accessing the regular kindergarten curriculum were successful. Although Student did not reach the academic skill development level of her typical peers with respect to the kindergarten curriculum, she certainly made reasonable progress commensurate with her abilities, as affected by her language deficits, in developing reading and math skills. F.F. 12, 13

Since Student made reasonable progress during the 2006/2007 school year, Parents’ claim for compensatory education for that year will be denied.

3. 2007/2008 School Year (First Grade)

Parents’ claim with respect to the current school year is based upon the deterioration in Student’s behaviors through fall of 2007, which they contend was due to her inappropriate placement in a first grade regular education inclusion class, where she could not keep up with her peers academically. At the IEP meeting on April 25, 2007 to develop an IEP for first grade, the possibility was raised that a regular first grade classroom, even an inclusion class, might not fully

meet Student's academic needs. The contemporaneous notes of that meeting reference a discussion of Student's possible need for a learning support class for reading and math. F.F. 15. *See*, in particular, S-24 at p. 5. The record provides no reason to believe that the District would not have placed Student in a learning support class from the beginning of first grade, had Parents either requested or agreed to it. On the other hand, Student had been quite successful in the kindergarten inclusion class, so there was no reason to assume that a similar class would not permit her to continue making meaningful progress in first grade. Student did continue making very good progress toward her speech/language goals, as well as progress in the general curriculum, albeit much more limited. F.F. 12, 36, 38, 39.

Student's behavioral issues re-surfaced as an area of concern during the fall of 2007. F.F. 20. The daily communication log and behavior charts, however, reflect a child whose behaviors were a problem at times, not a child completely out of control for the majority of every school day. *See* P-13, P-14. The communication book also indicates that the strategies in the behavior plan included in Student's IEP (S-23, p. 17) were used and were generally successful in returning Student to appropriate behaviors after an outburst. P-13; F.F. 35.

In response to the difficulties which arose in first grade, Student's IEP team met in November 2007 to review her IEP and consider revisions in light of the behavior issues, as well as to address academic issues. F.F. 22. The IEP meeting notes disclose that the District was open to changing the approach to Student's learning needs and to consider the Institute evaluation report, along with its own reevaluation results. *See* S-32 at pp. 4, 5. In addition, the District proposed placing Student in learning support for reading and math immediately. F.F. 22, S-35.

Parents, however, rejected the District's proposal for learning support, expressing the opinion at the IEP meeting and in their November 2007 letter, sent after the meeting, that Student needed "a different program, different school." S-32, p. 3; P-10. The record, however, provides no reasonable basis for the Parents' precipitous loss of confidence in the District's ability to provide an appropriate program for Student. The District's kindergarten program for her was very successful. F. F. 12, 13. In first grade, the District was willing to adjust her program to assure that she continued to make progress in overcoming her language deficits, and to focus more closely on academic issues. S-30, S-32.

The District's actions in this case can in no way be termed non-responsive to Student's needs or to Parents' concerns. The record reveals that Student's IEP team met six times between August 2006, prior to her entry into the District's kindergarten, and the date she was withdrawn from the public school approximately 1½ years later. *See* S-6, S-11, S-16, S-18, S-24, S-32. Student's IEP team then met one more time, after she left the District, for the purpose of developing another revised IEP based upon the results of the latest reevaluations of Student. F.F. 40

It is not surprising Student's needs evolved in first grade as the demands of the academic curriculum changed and increased, and that her IEP, therefore, needed to be revised. The fact that Student made uneven progress, advancing in some areas more than others, and the fact that additional areas of need emerged, does not render the District's programs either ineffective or inappropriate. The District has an obligation to react promptly and effectively to address special education needs as they arise. The record amply supports the conclusion that the District did just that in this case. In December 2007, just after receiving the Institute report, the District proposed adding multi-sensory learning strategies to Student's IEP, as well as assigning her to learning

support. S-30, p. 18. Student also received Title I reading services and began to receive instruction in the Wilson Reading Fundamentals program early in her first grade year. F.F. 37. The District's proposed program for Student encompassed by the March 2008 proposed IEP included almost all of the elements recommended in the Institute evaluation report for a program that will address Student's continuing language and academic skill deficits. *See* P-1, F.F. 40.

In light of the District's efforts to meet Student's needs as they arose, the Parents' abrupt withdrawal of their cooperation is puzzling. Had the Parents continued to work with the District in making adjustments to Student's IEP when necessary, it is likely that academic and renewed behavioral concerns could have been successfully addressed to improve Student's progress in those areas well before she was withdrawn from the District at the end of January.

The only explanation for the Parents' refusal to continue working collaboratively and cooperatively with the District beginning in November 2007 is that they had already decided that a private school would be better for Student after visiting the Private School prior to the November 13 IEP meeting. F.F. 21. After that time, the District could do nothing right in Parents' eyes. The utter lack of objective reasonableness in their view of the District's proposals beginning in November 2007 is best illustrated by the Mother's testimony regarding Foundations, the reading program used in Student's first grade class at Private School. F.F. 29; N.T. p. 623. When asked whether Parents were aware that the District was using the Foundations program for Student, [Mother] denied that it was the same multi-sensory program used at Private School. N.T. p. 190, l. 3—16. When asked further whether she was told that Foundations would be appropriate for Student, she stated, "That's what they proposed. But as for them proposing it, and it actually being appropriate for her, we disagree." N.T. 192, l. 3—8. To the Parents, the

same type of instruction in the same reading program was the very thing Student needed if provided by Private School but inappropriate for her if provided by the District.

Whatever the reasons underlying the Parents' decision to remove Student from public school, it is not justified by any failure of the District to provide Student with FAPE. There is likewise no basis for an award of compensatory education for the current school year. The 2007/2008 IEP was appropriate at the time it was offered and implemented. As problems emerged in the fall of 2007 suggesting that Student needed reading and math instruction in a different setting, the District proposed a change to Student's IEP to place her in learning support, which would have provided a much smaller instructional group. The only reason the change to learning support was not made before Student left the District was Parents' refusal to approve the NOREP. S-35. The District also reevaluated Student, and based upon that reevaluation and the information in the Institute evaluation report, proposed additional changes to Student's IEP to meet her current needs, including incorporating the program recommendations made by the private evaluator. F.F. 40, P-1.

C. Reimbursement for Private Evaluations

The IDEA regulations are quite clear with respect to reimbursement for independent evaluations, providing that parents have the right to a private evaluation at public expense only when the parent disagrees with the school district's evaluation. 34 C.F.R. §300.502(b)(1). Here, the Parents obtained the private educational evaluation for which they request reimbursement without requesting a District evaluation. There is no provision in the regulations for retroactive payment for private evaluations obtained without discussing the need for an evaluation with the District. IDEA provides that a parent may file a due process complaint to obtain an evaluation if a district denies a parental request for an evaluation. Parents had an obligation to follow such

procedures and first seek an evaluation from the District if they wanted an evaluation at public expense, with the further right to seek an IEE if they were dissatisfied with the results of the District evaluation.

Here, although the Parents did express dissatisfaction with the comprehensiveness of the first District evaluation in 2006, as Student was entering the District kindergarten, (P-8), there is no evidence that the Parents requested an IEE at that time. Parents requested neither a District reevaluation nor an IEE before obtaining the private evaluation by Dr. R in July 2007, nearly a year after the evaluation with which they disagreed. Nothing in the record suggests that the District would not have reevaluated Student had Parents requested it before seeking an independent evaluation.

After learning of the independent evaluation by Dr. R, the District immediately requested permission to conduct its own evaluation, and in compiling its subsequent ER, considered the results of all the private evaluations obtained by the Parents, as required by the regulations. F.F. 23, 24; S-31; 34 C.F.R. §300.502(c). The results of the District evaluation were substantially the same as the private evaluation. *Compare* P-1, S-38. Consequently, there is no basis for disagreement with the most recent District evaluation, even retroactively.

Parents also request reimbursement for the pediatric optometric evaluation they obtained in April 2007. S-38, p. 2. The evaluation revealed that Student is farsighted and needs glasses. It also revealed efficiency and perceptual issues. *Id.* As part of its reevaluation, the District referred Student to the Intermediate Unit for a functional vision assessment to determine how her vision issues may be impacting her educational progress. N.T. 281, 282; S-34. The assessment did not occur because Student left the District. *Id.*

Parents provided no legal basis for obtaining reimbursement for this examination. Although it was suggested at an IEP meeting in November 2006 that Student should be examined for vision problems, Parents never requested an evaluation from the District before obtaining their own optometric evaluation. S-16. Leaving aside the question whether an evaluation for near or far sightedness is initially a special education issue, the same legal standards apply to obtaining reimbursement for this type of evaluation as for a psycho-educational evaluation. Parents should have first requested a vision evaluation from the District if they believe that they are entitled to an optometric examination at public expense. If it had been refused, Parents could have obtained the evaluation and then requested reimbursement. Their failure to take the first step required by the regulations for obtaining reimbursement for a private evaluation eliminates further consideration of that claim.

Since Parents do not meet the regulatory standards for obtaining reimbursement for either of the private evaluations they obtained, those claims will be denied.

V. SUMMARY

The record in this case establishes that Student is a student with significant educational needs, which were particularly evident in the areas of speech/language, attention/focus, and behavior when she enrolled in the District kindergarten program in the 2006/2007 school year. Student made significant progress toward goals designed to remediate her language disability during that school year, and in controlling problem behaviors. Academic skill development emerged as an area of need early in first grade. Student was provided with Title I reading instruction as a regular education support, and her IEP team met to adjust Student's program to better meet her needs. Nevertheless, by November 2007, Parents became dissatisfied with the District's program and did not approve a proposal to revise Student's IEP to provide learning support pending a reevaluation by the District and further IEP review. Student continued to

make good progress toward her speech/language goals in first grade, and slow progress in basic math and reading skills. Negative behaviors increased but could generally be addressed with the strategies in her behavior plan.

Student's Parents withdrew her from the District and enrolled her in Private School which she began attending on February 4, 2008. Student did not adjust well to the School, evidenced by an eruption of intense negative behaviors that the School was so unsuccessful in controlling that Student had to be removed for two weeks. In addition to the behavior issues which so obviously interfered with Student's education for nearly the entire time she attended Private School, there was insufficient evidence that the Private School could meet her language and academic needs with its standard program.

Parents sought tuition reimbursement, compensatory education and reimbursement for privately obtained evaluations, but failed to meet the legal standards for relief in any of those areas.

VI. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Upper Dublin School District need take no action concerning Student with respect to the due process complaint submitted by the Parents in this matter.

Parents' claim for tuition reimbursement for the Private School is **DENIED**.

Parents' claims for reimbursement for privately obtained evaluations are **DENIED**

Student is not entitled to an award of compensatory education for the 2006/2007 school year or for the 2007/2008 school year.

Dated: June 10, 2008

Anne L. Carroll
Anne L. Carroll, Esq., Hearing Officer