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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING

Name of Child: ER
ODR #9519/08-09 KE

Date of Birth: XX/XX/XX

Dates of Hearing:
January 29, 2009
February 10, 2009
March 10, 2009

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Ridley School District
1001 Morton Avenue
Folsom, Pennsylvania 19003

Last Transcript Received:

Record Closed

Date of Decision:

Hearing Officer:

Representative:
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March 17, 2009

April 6, 2009

April 21, 2009

Deborah G. DeLauro, M.Ed, J.D.

Background

Student is primary school aged student who resides in the Ridley School District (hereinafter "District"). Student has numerous health related disabilities, including severe allergies. [N.T. 40-41,83,576,578,598; D-5] An EpiPen (epinephrine) must be available at all times due to the risk of anaphylactic shock from allergies. [N.T. 40] [N.T. 41-42; SD-1; P-2]

Student entered the District as a kindergartener. Student attended [redacted] Elementary School (hereinafter "Elementary") for kindergarten (2006-2007) and first grade (2007-2008). Prior to the beginning of the 2008-2009 school year, Student's parents, Mr. and Mrs. (hereinafter "Parents") unilaterally enrolled Student in the [redacted] School (hereinafter "Private School"), a private school specializing in educating students with learning disabilities.

The Parents requested this hearing seeking compensatory education for alleged violations of the IDEIA and §504 of the Rehabilitation Act, and tuition reimbursement, including transportation, for Student's 2008-2009 school year enrollment in the Private School. Parents assert Child Find violations starting in February 2007 for failure to identify Student as a child with special needs until the Spring 2008 when Student was found eligible for specially designed instruction in the areas of reading, math and writing. Parents next assert that the Individual Education Plan (hereinafter "IEP") was inappropriate and its implementation was untimely resulting in the denial of a Free Appropriate Education (hereinafter "FAPE") from March 28, 2008. Finally, Parents assert that the District violated Student's rights under §504 by excluding Student from participation in, denying Student the benefits of, and subjecting Student to discrimination at school.

Issues

1. Is the Ridley School District required to provide compensatory education services to Student for school years 2006-2007 and 2007-2008 for failing to provide FAPE and for alleged violations of §504 of the Rehabilitation Act?
2. Is the Ridley School District required to reimburse Mr. and Mrs. for tuition, including transportation, at the Private School in which they unilaterally placed Student for the 2008-2009 school year, based on their assertion that the District failed to provide Student with FAPE for the 2008-2009 school year?

Findings of Fact

1. Student is a primary grades aged student who resides in the Ridley School District (hereinafter "District"). [SD-3]
2. Student attended kindergarten (2006-2007) and first grade (2007-2008) in the District. [SD-3]
3. Prior to the beginning of the 2008-2009 school year, Parents enrolled Student in Private School, a private school specializing in educating students with learning disabilities. [N.T. 218-225; P-109]
4. Student has numerous health related disabilities, including severe allergies. [N.T. 40-41,83,576,578,598; D-5] An EpiPen (epinephrine) must be available at all times due to the risk of anaphylactic shock from allergies. [N.T. 40] [N.T. 41-42; SD-1; P-2]
5. The District prepared an Allergy Treatment Plan on June 29, 2006 in order to address Student's extensive allergies. [SD-4;SD-5]
6. Student's mother has undergraduate degrees in psychology, elementary and early childhood education. She has a master's degree in special education and is currently participating in a supervisory certification program in special education. Mrs. (hereinafter "Parent") works for [redacted public education entity] (hereinafter "mother's place of employment") as a [position redacted]. [N.T. 38-39]
7. Prior to starting Kindergarten, Parents were concerned that Student had difficulties grasping pre-academic skills (e.g. letters and numbers). [N.T. 45; P-1]
8. Parents had Student evaluated at the Chester County Intermediate Unit (hereinafter "CCIU"). Although Student demonstrated inconsistent skills in letters and numbers, Student did not qualify as a child with special needs. [N.T. 46; P-1]
9. Prior to the beginning of kindergarten, Parent met with the principal of Elementary School, the kindergarten teacher and a school nurse. The purpose of this meeting was to review Student's health issues. [N.T. 48-49]
10. In September 2006 Student was identified as needing extra academic support and was placed in the extended day kindergarten (hereinafter "EDK"). [N.T. 51] Parent was advised that Student was being placed in EDK for math, specifically, and reinforcement of kindergarten academic skills. [N.T. 52-53]

11. In November, 2006 Parents requested an educational evaluation because of Student's problems with math, language arts, and attention. [N.T. 52-53]
12. Parent requested that the school psychologist use the Key Math assessment. However, at the time, [the school psychologist] told her that the District did not have the instrument. [N.T. 57-59, 444]
13. The initial Evaluation Report (hereinafter "ER") was completed on January 31, 2007. Although it indicated that math was more difficult for Student, Student did not qualify for special education services as Student's cognitive ability and Student's achievement levels were in the average range. [N.T. 233-244, 402-406; P-3]
14. The school psychologist did not administer an IQ test, but instead relied upon the results of an IQ test¹ administered in January 2006 by the CCIU. [N.T. 433; P-3] However, the test was incomplete due to the fact that Student was only 4 years old at the time Student was given the test, and several subtests² were not administered. [P-3; P-1]
15. Using the KTEA -II³ the school psychologist found the following academic levels:

Subtest	Standard Score	Percentile	Grade Equiv	Age Equiv
Phonological Awareness	98	45	<1.0	6.3
Associational Fluency	106	66	K .9	6.6
Naming Facility	79	8	<K.0	<4.6
Letter/Word Recognition	105	63	K .6	5.10
Math Concepts/Application	88	21	<K .0	4.8
Math Computation	90	25	K.1	5.0
Written Expression	105	63	K .4	5.10
Listening Comprehension	95	37	<K.0	5.2

[P-3]

16. The District also conducted an occupational therapy evaluation (hereinafter "OT") which was completed on January 24, 2007 and identified the following areas of concern: below grade level in math; lack of concentration; still inconsistent with remembering numbers 1 to 10; peer interaction; problem solving; poor desk posture; and difficulty keeping place when reading - not uncommon in kindergarten. [N.T. 240, 241, 245, 67-68; P-3; P-4] The OT findings were based in large part on teacher input. [N.T. 437]

¹ Wechsler Preschool and Primary Scale of Intelligence-3rd edition.

² Picture Concepts, Processing Speed and Coding subtests were not administered because of Student's age.

³ Kaufmann Test of Educational Achievement, 2nd Edition.

17. On February 7, 2007 an IEP team meeting was convened to review the ER. Parent disagreed with the determination that Student was not a child with a disability and requested a pre-hearing conference. The District agreed to conduct additional testing. [N.T. 409; P-3; J-65; J-66]
18. On February 22, 2007, Parent signed another Permission to Evaluate and requested the following tests: The Children's Memory Scale, the Test of Auditory Processing Skills, the Behavior Rating Inventory of Executive Functioning and a Physical Therapy Evaluation. [SD-15; N.T. 410-414]
19. On February 7, 2007 a §504 Service Agreement was issued to provide OT services for Student. [SD-14] On February 9, 2007, an Addendum to the §504 Service Agreement was developed to include the Health Action Plans and address Student's severe allergies. [SD-16] Parent signed in agreement on March 8, 2007.
20. An Addendum to the ER dated April 18, 2007 concluded that Student's memory auditory processing and executive functioning were all within the average range although Student did demonstrate a relative weakness on tasks requiring Student to retain and manipulate number series or simple sequences of auditory information and word lists. The school psychologist concluded that if given meaningful materials, Student had average ability to retain and process the information. She further suggested that Student might benefit from having a longer "think" time to respond to questions and that Student may also benefit from simple behavior modification to increase behaviors of "taking initiative" using positive enforcement. [SD-19; P-5; N.T. 413-414]
21. A Physical Therapy Evaluation was conducted the results of which are documented in a Physical Therapy Evaluation Report dated April 12, 2007 wherein Student was found not to warrant physical therapy as Student had age appropriate gross motor skills, good functional mobility, motor planning, balance and coordination. [SD-17; N.T. 418-419]
22. Another meeting was convened on June 5, 2007 to review Student's Service Plan with regard to food preparations necessary because of Student's severe allergies and Student's achievement. [SD-20] Based on Parent's request for a re-evaluation of academic skills at the end of Kindergarten, a Second Addendum to the ER was prepared. [SD-21; N.T. 420-423; 448-451]
23. The Second Addendum concluded that Student's average cognitive functioning (WPPSI-III: VIQ: 104, and PIQ: 93) predicted academic skills to also be within average ranges, (SS of 95 to 99). In fact, Student's performance on the WIAT-II did indicate average skills across all academic areas. The school psychologist concluded that the lack of a statistically significant discrepancy between Student's cognitive functioning and Student's standardized achievement test indicated an absence of the specific learning disability. In addition, she noted, that classroom-

- based assessments indicated consistent and significant progress in all areas. In support of her findings, the school psychologist noted that Student's overall performance on the Kindergarten Skill Summary indicated that Student was performing above the benchmark. Finally, Student's performance on the Brigance K& 1 screen was near-perfect with a score of 109/113 possible. Accordingly, Student was again found to be non-exceptional. [SD-21; SD-24; P-7; P-8]
24. Nonetheless, Student's kindergarten teacher recommended that Student attend the Summer Steps program,⁴ where it was noted that Student needed improvement in several academic areas. [N.T. 77-78, 79-82, 226, 228, 381-382]
 25. The Summer Steps teacher found that although Student made some progress, Student still did not recognize all of the numerals from 0-20, Student could not form all of the numbers, and Student could not count backwards from 20. [P-9; P-110; N.T. 225-229]
 26. In August 2007, Parent met with the principal, the school nurse and the first grade teacher, to discuss Student's allergies and other allergy-related matters, OT and the Service Plan. [N.T. 83-85] Parent requested that Student be included in activities as much as possible and offered to do anything to help out. [N.T. 82-83]
 27. Parent testified that the first grade teacher consistently refused to implement Student's Service Plan. She testified to a number of incidents when she believed Student was excluded and discriminated against because of Student's allergies.⁵
 28. Parent testified that she had to remind the first grade teacher of the Service Agreement which indicated that Parent was to be contacted before activities involving shared food, so that she could provide appropriate alternatives. [N.T. 96-97; P-15]
 29. On April 30, 2008, Parent testified that the first grade teacher made the comment that she did not understand why [all the] other students should have to accommodate one child when the Parent could bring separate food.⁶ [N.T. 111, 291; J-309]
 30. Parent also testified that on two occasions, the first grade teacher pointed out in front of the class [a way in which Student's allergies were being accommodated which resulted in non-compliance with a certain school rule] which resulted in Student feeling humiliated.⁷

⁴ Summer Steps is a program to reinforce skills. Students may attend by teacher recommendation only.

⁵ Parent complained that the first grade teacher failed to contact her before the food was purchased for the "[redacted]" activity. The teacher had purchased [snacks] which Student could not have, so Student would have to have one of Student's "[special snacks]" out of the nurse's freezer instead. [N.T. 95-96; P-14]

⁶ Parent testified that the first grade teacher cancelled a food activity rather than tailor a celebratory project to accommodate Student's disability. [N.T. 289-290, 544-545]

⁷ [Description of incident redacted] [N.T. 41-42, 116]. [N.T. 116-119]

31. Finally, Parent testified that Student was being marked down on tests (e.g. penmanship) for deficits identified in the Service Plan. According to Parent, the first grade teacher simply responded that Student didn't have an IEP. [N.T. 85-90, 531-532.; P-10; P-11, P-12, J-288]
32. The first six weeks of first grade the class reviewed kindergarten skills. Student's first marking period grades included seven Fs, a D-, two C-s, four C+s and an A+. Parent testified that her child was "drowning academically." [J-306; N.T. 477-497, 497-500, 506]
33. In late September, Parent wrote to Student's first grade teacher and requested a conference to discuss Student's poor grades, but the teacher wrote back that it was still very early in the year and she wanted to give Student more time to work on skills suggesting that the Parent should reinforce them at home. [N.T. 91-94; P-13]
34. In mid-October, Student was placed on a "watch list" and was recommended for extra help in reading. [N.T.133-134, 137] At home, Student was having difficulty doing the homework, and was crying because "[Student] was getting bad grades" [N.T. 137-138; P-24]
35. On November 1, 2007, a meeting was held at Parent's request. It was at that meeting that Parent learned that the kindergarten teacher, who had insisted that Student was reading fine at the end of kindergarten, had placed Student on a watch list for reading support. [N.T. 505-506] As a result, Student was placed in a reading support group with the reading specialist, but had difficulty catching up with the rest of the reading group since they had started two months earlier. [N.T. 130-134; J-258; P-25]
36. On November 16, 2007, Parent requested another comprehensive psycho-educational evaluation, and a speech and language assessment; the District issued a Permission to Evaluate on November 27, 2007. [N.T. 134; J-4; J-42]
37. On November 29, 2007 the first grade teacher indicated in her grade book that Student was a "below level reader" since Student was receiving support from the reading specialist. [J-306; N.T. 522]
38. Student was still having difficulty in math, so the reading aide started providing math support, and the District offered to work with Student on a computer based math program called "SuccessMaker." [N.T. 485-486, 516-517]
39. The District⁸ completed the Re-Evaluation Report (hereinafter "RR") on February 26, 2008 [P-26] and an Evaluation meeting was scheduled for February 28, 2008. [J-89]

⁸ School psychologist conducted the evaluation

40. The RR found Student in need of specially designed instruction as a child with a specific learning disability in the areas of reading decoding and comprehension, math computation and reasoning skills, and written language. In addition, Student was found to have fine motor delays and a language disability.[P-26]
41. The school psychologist made the following recommendations for consideration by the Individual Education Planning (hereinafter “IEP”) team. Regarding special education and related services needed to enable Student to be involved in progress in the general education curriculum:
1. It is recommended that Student began to receive resource room level of learning support services at Elementary School for reading decoding and comprehension, math computation and reasoning skills, and written language disabilities.
 2. Language therapy is recommended.
 3. Continuation with OT services is recommended.
 4. Student's 504 Service plan for food allergies will now become part of the IEP as an Individual Health Plan (hereinafter “IHP”).
 5. Student responds well to clear and concise directions and instructions as well as chunking of information.
 6. Rephrase or restate information as needed.
 7. Present materials in a concrete and meaningful format so as to help insure Student's understanding of new information.
 8. Provide visuals for Student when presenting auditory information
 9. Preferential seating would be beneficial for Student as well as positive reinforcement.

Parent signed the RR in agreement. [P-26]

42. Based on the RR recommendations, the District offered two possible placements: the learning support room at Elementary School, or the self-contained classroom at another elementary school. Parents went to observe both programs but found neither program appropriate for Student. [N.T. 154-157]
43. An IEP team meeting was convened on March 28, 2008⁹ in order to review a draft IEP to address Student’s educational needs. [N.T. 702; SD-39] The team agreed to certain revisions of the specially designed instruction (hereinafter “SDI”), some of the goals and the IHP. [N.T. 158-160, 260, 263-264]
44. The director of special education, suggested *Project Read*¹⁰ as a reading program appropriate for Student. The director of special education agreed to do some

⁹ The IEP meeting was delayed so that the Parents could visit the two proposed programs and to accommodate Spring Break.

¹⁰ *Project Read* is a comprehensive language arts program designed to provide explicit instruction in a structured reading curriculum. The goal of the program is to help all students become thoughtful,

- research on the program and get back to the Parents and the IEP team in a few days. [N.T. 309, 159-160, 202-203, 712-713}
45. A Notice of Recommended Educational Placement (hereinafter “NOREP”) was issued on April 2, 2008 but Parents refused to sign it until all of the agreed-upon revisions were made. [N.T. 167, 168, 284, 701; SD-40]
 46. The April 2, 2008 NOREP also included the District’s ESY placement offer at a Literacy Camp for six weeks, three hours a day. [N.T. 285-286; P-100] Parent did not sign the NOREP because it turned out that the Literacy Camp was not for students Student’s age.
 47. On May 2, 2008, the District issued a new NOREP agreeing to fund Student’s ESY at Private School Summer Camp in addition to tutoring in math three times a week for 1 hour for 5 weeks.[J-22; J-21]
 48. Another IEP team meeting was convened on April 30, 2008 to address Parents’ continuing concerns regarding the details of the IHP, and details in the implementation of Student’s math and reading goals. [N.T. 295-297]
 49. After the IEP was revised, Parents remained concerned about the District’s reading program and requested that the District hire someone from the Intermediate Unit (hereinafter “IU”) to provide instruction using the Wilson Reading Program¹¹ between April 30th and the end of the school year. [N.T. 297, 707-708]
 50. On May 9, 2008, the corrected NOREP was issued and Parent signed it in agreement on May 12, 2008. [N.T. 172; P-30/SD-41]
 51. On May 13, 2008 Student started going to the resource room for one hour of reading in the morning and one hour of math in the afternoon.[N.T. 254, 614, 676] Student received Resource Room assistance for a total of 18 days. [N.T. 32, 259]

purposeful, and independent readers. *Project Read* curriculum may be implemented in a regular classroom, special education classes, and title one classes. It may also be used as an intervention reading program for 1st through 6th graders or with adolescents and adults who struggle with reading or language learning. *Project Read* was designed to be research based and the students made progress in reading but there were flaws in the research which made it impossible to attribute the reading growth the students experienced to *Project Read* alone.

¹¹ The Wilson Reading System (hereinafter “WRS”) is a research based reading and writing program. It is a complete curriculum for teaching decoding and encoding (spelling) beginning with phoneme segmentation. The WRS directly teaches the structure of words in the English language so that students master the coding system for reading and spelling. Unlike other programs that overwhelm the student with rules, the language system of English is presented in a systematic and cumulative manner so that it is manageable. It provides an organized sequential system with extensive controlled text to help teachers implement a multi-sensory structured language program. The basic purpose of the WRS is to teach students fluent decoding and encoding skills to the level of mastery.

52. The resource room reading program consisted of the following programs: *Read Naturally, Reading Workshop and Month to Month Phonics and systematic Phonics*. [N.T. 615, 619, 620]
53. The resource room had five other students but none of them were First Graders and each of them had different learning issues, yet all of them were provided with the same reading programs. [N.T. 639-640]
54. Once Student starting receiving resource room support, the reading specialist no longer worked with Student. [N.T. 712-713; J-143]
55. Prior to entering the resource room program, Student was still receiving poor grades on the one hundred word list, in word recognition and on the running benchmark tests. [188-189, 303, 334-335; J-306]
56. Student's grades in the Resource Room show significant improvement. [N.T. SD-43; P-102] Parent expressed concern that Student's improvement was based in large part on the help provided by the teachers. [N.T. 318-320, 332, 339]
57. Parent questioned Student's progress in the Resource Room because there was a significant discrepancy between Student's grades and comments from Student's Resource Room teacher and Student's first grade teachers.¹² [N.T.553-554; J-145; J-15/SD-43]
58. The IEP team reconvened on June 9, 2008 to update and revise Student's IEP and IHP as necessary. [J-6/SD-45]
59. The NOREP from the June IEP meeting recommended Student's placement in the Fall to be in the resource room learning support for math and reading in which a direct reading program will be done as well as a direct phonemic-based program to address Student's needs in decoding vocabulary, fluency and comprehension skills. Student will receive 60 minutes per day instruction for reading and at least 60 minutes per day math at Elementary School. [SD-46]
60. The June 9, 2008 NOREP also identified factors relevant to the District's proposal. Specifically, that the District would be training their learning support staff on *Project Read* during the summer. The training would be provided by the Intermediate Unit, and the program would be up and running before the end of September 2008. Additional specially designed instruction was added to Student's IEP as well as additional information regarding Student's health plan. [SD-46]

¹² For example, Student did not know addition facts for sums of 10, nor could Student identify place value for 1's and 10's as measured on the *Everyday Mathematics Secure Goals End of the year Checklist* prepared by the first grade teacher. [N.T. 553-554; J-145]

61. After conducting her own research, Parent concluded that *Project Read* was not appropriate for Student. [N.T. 213-214, 224; P-108]
62. Parent testified that Student made progress during summer school at Private School and Student had a totally different attitude about school. [N.T. 213-215; P-107]
63. Parent was convinced that Student needed an intensive multi-sensory approach to reading in order to make meaningful progress and that 60 minutes a day was not enough. [N.T. 213-214; P-108]
64. On August 14, 2008, Parent wrote a letter to the director of special education that she had decided to enroll Student in the Private School for the 2008-2009 school year. [P-108]

Stipulation

The Parties stipulated that with regard to the letter dated January 9, 2009 from Student's teachers at the Private School, that if the two signers: [redacted], the classroom supervisor, and [redacted], the support services were to testify, they would testify consistent with this letter., [N.T. 346-347; J-310]

Discussion and Conclusions of Law

Burden of Proof

The Parents requested this hearing and therefore they bear the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case.

Child Find

IDEA's so-called "Child Find" provision requires that states ensure that:

“...All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services.” 20 U.S.C. § 1412(a)(3).

A ‘child with a disability’ means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. §300.7

“Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

In this case, the District responded promptly to Student’s seeming difficulties with letters and numbers, and identified Student as needing extra academic support and placing Student in the extended day kindergarten (hereinafter “EDK”) [FF 10] The kindergarten teacher, although a little nervous, testified credibly that Student’s areas of weakness were not unusual in a Kindergartener in January. In her 22 years teaching kindergarten, her experience was that some children “get it” sooner than others. [N.T. 388-389] Children enter kindergarten with a wide difference in skills and develop their skills at different rates. [N.T. 360-361]

With regard to the comprehensiveness of the evaluation, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1414[a][1][A] provides that a local educational agency shall conduct a full and individual initial evaluation, in accordance with subsection [b] dealing with evaluation procedures, before the initial provision of special education and related services to a child with a disability. 20 U.S.C. §1414[b][2] instructs that in conducting the evaluation, the local educational agency shall use a variety of assessment tools and strategies to gather relevant information, including information provided by the parent, that may assist in determining whether the child is a child with a disability. 20 U.S.C. §1414[b][3][C] requires that the child be assessed in all areas of suspected disability.

In evaluating a child, a district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child

- Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;
- Are used for purposes for which the assessments or measures are valid and reliable;
- Are administered by trained and knowledgeable personnel; and
- Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEA 2004 provides, at Section 614(b)(4) that

Upon completion of the administration of assessments and other evaluation measures,

- The determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).

In this case, after the first parent-teacher conference in November, the District conducted extensive testing, which showed Student's cognitive ability and achievement levels to be in the average range. The school psychologist testified credibly about the testing measurements she used and explained that the standard score, not the percentile rank was the most important measure of a child's achievement. She stated further that just because

a child has an area of weakness, it doesn't necessarily mean that they have a disability. [N.T. 439-440, 451-452, 462] Additionally, the Evaluation Report included testing results for the Occupational Therapy evaluation. [FF 19]

In addition to the Key Math Test requested, Parent requested a slew of additional tests, including The Children's Memory Tes, the Test of Auditory Processing Skills, the Behavior Rating Inventory of Executive Functioning and a Physical Therapy evaluation. [FF 18, 21] And still, Student was found not to be exceptional. [FF 20]

The Parent is certainly to be commended for her dedicated and knowledgeable pursuit of the right test to garner special education eligibility for her child, but the District also appeared to be invested in addressing Student's needs and providing appropriate instruction and interventions before rushing to special education identification.

In light of the requirements above, this hearing officer finds that the evaluation produced by the District was substantively appropriate. 34 C.F.R. §300.304(c)(6).

The Parents' claim that the District violated its Child Find responsibilities to Student by not finding Student eligible for special education services in Kindergarten lacks any basis in the testimony or documents.

FAPE

A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP that need not provide the maximum possible benefit, but that must be reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit can only be determined as of the time it is offered to the student and not at some later date. 20 U.S.C. §1412; Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002)

The IDEA requires a local educational agency to address every substantial educational need of the child with a disability, including behavior and social skills. If the IEP is inadequate in any material way, it is inappropriate as a matter of law. Rose v. Chester Co. Intermed. Unit, 196 WL 238699, 24 IDELR 61, aff'd 114 F.3d 1173 (3d Cir. 1997). This is reflected in the requirements for both evaluations and individual education plans.

The local educational agency must conduct a “full and individual initial evaluation” 20 U.S.C §1414(a)(1)(A). The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulations require that the evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1)

The IEP must be specific enough to address all of the child’s needs which are identified, both academic and functional. 20 U.S.C. §1414(d)((1)(A)(i)(II), (IV); Christen G. v. Lower Merion Sch. Dist., 919 F.Supp. 793 (E.D. Pa. 1996). The child’s developmental and functional needs must be considered. 20 U.S.C. §1414(d)(3)(A)(iv). Where a child’s behavior impedes learning, the IEP team must consider strategies to address that behavior. 20 U.S.C. §1414(d)((3)(B)(i).

Here the Parents assert that the District’s failure to identify Student in the beginning of first grade resulted in a denial of FAPE. I agree. The District had provided Student with a number of interventions, programs and supports, including but not limited to the EDK, support from the Reading Specialist, and Summer Steps, and yet Student was still struggling academically. The first grade teacher was extremely nervous and uptight when she testified both on direct and cross examination. She needed to refer to written notes and frequently tried to explain her actions in a nonsensical way. For example, when asked whether she knew that Student was concerned that Student was getting a lot of F’s and poor grades in general, the first grade teacher testified that she hoped that the students wouldn’t focus on grades, but then proceeded to explain the meticulous grading system¹³ she used to capture grades in all areas. The first grade teacher also insisted that Student was making progress when it was clear that any progress made was inconsistent. The first grade teacher testified that she was not concerned in the beginning of first grade about Student’s academic difficulties and she put off meeting with Student’s mother when asked to schedule a parent/teacher conference. Although the District had a Child Support Study Team (hereinafter CSST) to monitor students’ progress given the interventions which are being implemented, it was highly reliant on input from the teacher; in this case [name redacted], who did not believe that Student’s ongoing academic difficulties warranted an evaluation for special education services. Interestingly, she then blamed the CSST for not offering an evaluation.

Therefore, I find that the District did deny Student a FAPE from the beginning of first grade to the time that the evaluation was completed, and the IEP team determined that Student qualified for specially designed instruction.

Next, the Parents assert that the IEP was delayed in its preparation and implementation. However, a review of the evidence and testimony reveals that a large part of the delay was caused by the Parent’s ongoing revisions and the need for the Parent to observe the two proffered programs. In addition, the finalization and implementation of Student’s IEP was delayed further as a result of the District’s Spring Break.

¹³ The District used a computer program called “Power School,” which among many other things allows teachers to rank order their students by their grades.

Nevertheless, in the 2004 revisions to the IDEA, Congress affirmed its position that de minimis procedural violations do not constitute a deprivation of FAPE. In Section 1415, it provides

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision making process...; or (3) caused a deprivation of educational benefits.

This hearing officer considers the District's procedural violation in failing to timely finalize and implement Student's IEP, not a substantial violation although it goes beyond *de minimus*.

In this hearing officer's opinion, the primary basis of the District's denial of FAPE is its failure to provide a scientifically research-based, peer reviewed reading program, which Student needed in order to make meaningful progress.

IEP

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit "must be gauged in relation to the child's potential."

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

Guidance for determining the factors comprising "meaningful benefit" is offered in Cypres v. Fairbanks, 118 F.3d 245, 253 (5th Cir. 1997) as follows:

1. The program must be individualized on the basis of the student's assessment and performance;
2. The program must be administered in the least restrictive environment;
3. The services must be provided in a coordinated and collaborative manner by the key "stakeholders"; and
4. Positive academic and nonacademic benefits must be demonstrated.

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

The IEP that the IEP team developed between March 18, 2008 and June 9, 2008 lacked appropriate specially designed instruction in the form of a research based, peer reviewed reading program, and therefore was insufficient and denied Student a FAPE.

Tuition Reimbursement

The 1999 implementing regulations of the IDEA, which are authoritative as regulations for the IDEA are not yet available, provide that

At the beginning of each school year, each public agency shall have an IEP in effect, for each child with a disability within its jurisdiction. Each public agency shall ensure that an IEP is in effect before special education and related services are provided to an eligible child under this part...". 34 CFR Section 300.342(a)(b)(1)(I).

Parents who believe that a district's proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly

established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

In 1997, a dozen years after Burlington the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court’s test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district’s proposed program was appropriate; 2) if not, whether the parents’ unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Case law has established that the private school placement selected by a parent, where the District’s program is inappropriate, does not need to conform to federal or state IDEA regulations. Florence County 4 School District v. Shannon Carter, 126 L.Ed.2d 284 (1993). Therefore the teachers do not have to meet state requirements and the students do not have to have IEPs generated by the school. Under the federal IDEA as interpreted by the United States Court of Appeals for the Third Circuit in Oberti v. Board of Educ. of Borough of Clementon School Dist., 995 F.2d 1204 (3d Cir. 1993). Student is presumed to be entitled to the least restrictive environment, that is, the educational setting appropriate to Student’s needs that maximizes interaction with nondisabled students.

This hearing officer has determined that the IEP produced by the District in June 2008 was inappropriate in that it lacked appropriate specially designed instruction. A review of the NOREP also makes it clear that even the training on *Project Read* which has flaws in

the research supporting it, would not be completed until after the start of the 2008-2009 school year.

It is this hearing officer's conclusion that because the District did not have FAPE "on the table" at the start of the school year, Parents are entitled to be reimbursed tuition at the Private School for the 2008-2009 school year.

§504 of the Rehabilitation Act.

The Rehabilitation Act, 29 U.S.C. §701 et seq., prohibits discrimination on the basis of disability within federally funded programs. This prohibition is specifically extended to public school systems in Section 504. See 29 U.S.C. §794(b)(2)(B). Section 504 provides that "no otherwise qualified individual with a disability ...shall solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794 (a) (2002)

In this case, I agree with the Parents that Student was excluded from participation in and denied the benefits of class activities at school because of Student's disability. It may not have been intentional but the reality of the first grade teacher's reticence and almost passive aggressive behavior in having to change the way she had planned to conduct several classroom projects in order to accommodate Student's severe allergies amounted to discrimination. Furthermore, her comments [redacted] embarrassing Student whether it was in front of the class or not, constitutes a §504 violation. The fact that the first grade teacher was unapologetic and insisted that she was just following the [redacted] policy supports this hearing officer's finding that the District denied Student a FAPE by violating §504. Compensatory education is an appropriate remedy allowing for equitable relief. Ridgewood Board of Education v. N.E., 172 F.3d 238, 253 (3rd Cir. 1997)

Compensatory Education

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 Karyn 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 Zachary S., Special Education Appeals Panel Opinion No.1000 (February 28, 2000).

Like tuition reimbursement, compensatory education is an equitable remedy, designed to assure that an eligible student receives all of the special education services to which s/he is entitled. It is not, however, appropriate to consider countervailing equities in determining whether compensatory education should be awarded, as in tuition reimbursement cases. In re: The Educational Assignment of Nicholas T., Special Education Appeals Panel Opinion No. 1166 (August 17, 2001); In re: The Educational Assignment of Laura C., Special Education Appeals Panel Opinion No. 1183 (October 19, 2001). Rather, once it is determined that a School District has failed to provide FAPE, compensatory education, measured as stated above, must be awarded. Id. Since it is the responsibility of school districts to offer FAPE to all eligible students at all times, the conduct of the parents in assuring that appropriate services are provided is irrelevant. Id.

In addition, there is a significant distinction between tuition reimbursement, which restores to the parents funds they expended to provide an educational program for their child, and compensatory education, which restores to the child time and services lost during periods when the school district failed to offer or provide FAPE. When tuition reimbursement is denied due to the parents' conduct, it is they who are denied relief, not the eligible student. In circumstances where compensatory education is due, however, it is the eligible student who has been deprived of necessary services. Although it is reasonable and appropriate to deny monetary relief to parents based their conduct, there is no justification for relieving school districts of their responsibility to provide FAPE to an eligible child based upon parents' conduct.

Here for all of the reasons delineated above, Student is entitled to compensatory education for the 2007-2008 school year in the amount of two hours for each school day for a total of three hundred and sixty hours.

Since transportation is a related service which Student requires in order to access Student's education, Parents are entitled to be reimbursed for mileage to and from Private School in the amount the District reimburses its school employees.

ORDER

It is hereby ORDERED that:

1. The Ridley School District did not fail in its Child Find obligation to Student.
2. The Ridley School District is not required to provide compensatory education services to Student for the 2006-2007 school year.
3. The Ridley School District is required to provide compensatory education services to Student for the 2007-2008 school year for violation of FAPE under IDEIA and §504 of the Rehabilitation Act in the amount of three hundred and sixty (360) hours as described above.
4. The Ridley School District failed to provide an appropriate educational program for Student for the 2008-2009 school year, and therefore is required to reimburse Mr. and Mrs. for tuition at the Private School, including transportation, for the 2008-2009 school year .

April 21, 2009
Date

Deborah G. DeLauro
Deborah G. DeLauro, Esquire
Hearing Officer