

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

# Pennsylvania Special Education Hearing Officer

## DECISION

Child's Name: RR  
Date of Birth: xx/xx/xxxx

Dates of Hearing: March 3, April 29, April 30, May 1, June 4, 2009

## CLOSED HEARING

ODR No. 9611/08-09 KE

### Parties to the Hearing:

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Date Record Closed: July 4, 2009

Date of Decision: July 16, 2009

Hearing Officer: Daniel J. Myers

## INTRODUCTION AND PROCEDURAL HISTORY

Student (hereinafter “Student”)<sup>1</sup> is a resident of the Pennsbury School District (District) who is universally described as a slow processor and who qualifies for special education services under several disability categories. Student seeks compensatory education for denial of a free appropriate public education (FAPE) between January 2007 and January 2009. Student’s parents also seek reimbursement for an independent educational evaluation (IEE). For the reasons described below, I find that Student was denied FAPE, and Student’s parents are not entitled to IEE reimbursement.

## ISSUES

- Whether the District provided FAPE to Student between January 2007 and January 2009?
- Whether Student’s Parents are entitled to reimbursement for an IEE.

## FINDINGS OF FACT

1. Student, whose date of birth is believed to be within six months of xx/xx/xxxx, was adopted as an infant from a situation in which Student was malnourished and suffered from a lack of physical contact. (N.T. 211-212; SD-16, pg 4)<sup>2</sup> Over the years Student has been diagnosed with ADHD Combined Type, Severe Generalized Anxiety Disorder, Major Depressive Disorder, Social Phobia, Dysgraphia, and Specific Learning Disability in math, reading and writing (P-1, p.23; P-18; P-15; N.T. 286, 566,

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<sup>1</sup> All further references to [Student] will be impersonal and gender-neutral. This is intended not to be disrespectful, but rather to ensure Student’s privacy.

<sup>2</sup> References to “N.T.” are to the transcripts of the hearing sessions. References to “SD”, “P”, and “HO” are to the District, Parent and Hearing Officer exhibits, respectively.

609-610, 648-649) Student is universally described as a slow processor. (N.T. 68, 69, 195, 305, 317, 566) Student exhibits anxiety in testing situations. (N.T. 388, 599, 1031)

2. In May 2007, the District's special education teacher, guidance counselor and Supervisor of Special Education were all concerned about Student's lack of academic progress. (N.T. 318, 327, 882-888, 962; P-21) In response to these concerns, an IEP was approved by all parties on May 14, 2007 that provided for additional reading instruction as well as social skills programming. (N.T. 332, 990; D-3, pp. 1, 9,10) The May 2007 IEP called for 30 minutes weekly social work services but did not contain specific social work goals. (P-6; SD-3,p.10; N.T. 978, 982, 983, 986) The additional reading instruction consisted of two hours per week of Wilson Reading Program tutoring in Student's home. (P-6,p. 9; SD-3,p.9; SD-10; N.T. 332-336, 885, 962, 1019-1020, 1047, 1293, 1408)

3. Student's parents were pleased with the Wilson tutoring. (SD-9; NT 895) The Wilson tutor observed that Student's poor foundation in reading, lack of confidence and strong desire to be a successful reader led Student to employ unsuccessful reading strategies that interfered with reading comprehension, fluency and skill development. After the Wilson tutor taught more efficient strategies, Student progressed in reading. (P13, p.2; NT 1019, 1026, 1030)

4. The social worker consulted with Student's parent regarding Student's social skills needs and had social skills lessons prepared for Student, but usually strayed from those lessons. (N.T. 971, 979, 980, 983- 987; SD-12) On November 19, 2007, after consultation with Student's personal psychiatrist, Student's parents concluded that the social worker was providing counseling, not social skills programming, and requested

that the District discontinue the social work services “until further notice.” (D-13, p. 3; N.T. 352; 356-57, 455, 897)

5. Also in November 2007, in response to a request from Student’s mother for more information from Student’s teachers, the District’s guidance counselor arranged for weekly progress reports. (SD-14) On December 14, 2007, Student’s mother asked to discontinue these reports due to the stress they caused Student. (P21, p.24; N.T. 348, 349, 905-906, 937-938, 1002)

6. On December 3, 2007, the District issued a reevaluation report concluding that Student continued to demonstrate learning disabilities in the areas of reading, writing and mathematics. (SD-16) Although the evaluator recognized Student’s anxiety, he did not recommend programming for anxiety because he did not believe it was appropriate to provide such programming in an educational setting. (N.T. 1118-1121) In fact, the District had a policy prohibiting its school psychologists from diagnosing OHI or emotional disability, regardless of evidence of ADHD or anxiety, and requiring parents to provide medical diagnoses for these disorders at their own expense. (N.T. 1167-1168)

7. As part of the District’s reevaluation process, Student’s parents were requested, but declined, to fill out a Behavior Assessment System for Children (BASC) rating form. (D-15; N.T. 411)

8. In May 2008, the District prepared a proposed IEP for the upcoming school year. A May 28, 2008 reading evaluation indicated that Student’s decoding skills had decreased from a 6th-7th grade level in November 2007 to a 5th-6th grade level in May 2008. (SD-6) The evaluator, however, believed this was a result of test anxiety and

concluded that Student's instructional reading level was at 6th grade. (SD-6,p.5; N.T. 759-760) The evaluator concluded that Student's reading comprehension had actually improved by two grade levels. (N.T. 763) Although it would have been useful, the District's reading specialist did not review any Wilson progress monitoring. (N.T. 808, 810) In fact, no School District professionals conferred with the Wilson tutor, who was a contractor. (N.T. 808, 1046-1047, 1305, 1310, 1408, 1409; SD-10; P-13)

9. Although the District's proposed IEP's present levels of functional performance indicated that Student had shown improvement in reading and continued to work with the Wilson tutor, the proposed IEP removed Wilson tutoring from specially designed instruction and program modifications. (SD-17,pp.4, 8; SD-19,p.11) Instead, the District proposed a regular education remedial reading program called Read 180 to which all high school students are assigned if they score below basic on their Pennsylvania System of School Achievement (PSSA) tests. (P-14; P-21; N.T. 382, 505) Read 180 is a computer based reading program with immediate corrective feedback. (N.T. 595) No one at the due process hearing explained why the Wilson tutoring was stopped. (NT 1053)

10. On May 19, 2008, Student's Parents disapproved the District's proposed IEP. (S-20; N.T. 386) In August 2008, Student's parents paid \$4,000 for an educational evaluation from Dr. G, a certified school neuropsychologist who has worked as a director of special education and as a school psychologist in the public school system. (N.T. 244) Dr. G found that Student continued to significantly underachieve in reading, spelling, and math, and showed math regression. (N.T. 80-83) Dr. G also reviewed the District's proposed IEP and was concerned that it did not provide for reading programming, and

did not address Student's ADHD-related needs, behavior, anxiety, social skills, writing, slow processing reading and writing speed. (N.T. 80-83, 385; P-1) Dr. G noted that Student's standard score of 87 in phonics (pseudo word decoding) did not vary significantly from the 86 noted in the District's 2007 evaluation report. (P-1; P2, p.12) Dr. G recommended both an occupational therapy (OT) and an assistive technology (AT) evaluation. (P-1) The District has requested permission to conduct an OT evaluation, but Student's Parents have withheld such permission. (SD-38; N.T. 438-439, 500) Dr. G also recommended two private schools as appropriate placements for Student, but no evidence was presented at the due process hearing regarding either private school. (P-1; N.T. 89) Dr. G acknowledges, however, that Student's needs can be met in public school. (N.T. 240)

11. During the portion of the 2008-2009 school year relevant to this case (i.e., until January 14, 2009), Student received Read 180 instruction in a classroom with 15 other students for 90 minutes per day, 5 days per week. (N.T. 1211, 1351-1352) This included direct one-on-one Read 180 instruction from a teacher 20 minutes of each 90 minute session. (N.T. 1281) The District also provided English instruction in a learning support class of eleven students with grade level material adapted to Student's reading level. (N.T. 1352-1354) Student also received one-on-one tutoring twice weekly from a reading specialist and special education teacher. (SD-46; N.T. 1187 – 1188) This twice-weekly tutoring consisted of academic work as well as assistance with organization and time management skills. (SD-46; N.T. 1198– 1199, 1201, 1203, 1205) Student's special education teacher for the 2008-2009 school year testified that no remediation or solution for test anxiety was provided to Student. (N.T. 136)

12. Parents continued to reject the District's proposed IEP at an October 2008 IEP meeting, requesting that the District speak with Student's private psychiatrist, Dr. S. Dr. S is a highly experienced adolescent and child psychiatrist, who has diagnosed Student with ADHD as well as clinical anxiety and depression attributable to difficulties in school. (N.T. 604) Parents allege that they immediately scheduled an appointment for a discussion between Dr. S and District officials, but that the District did not make its psychologist available on the date scheduled by Parents. (N.T. 608, 698; SD-21; SD-22; SD-28, p.8) The District complains that Dr. S's Health Insurance Portability and Accountability Act (HIPAA) compliance demands created delays in communication. (N.T. 514, 607)

13. In January 2009, Student's reading level was variously reported as at the fourth grade independent reading level in Read 180 (SD-42; N.T. 1300-1301), decoding on the high school level, and comprehending on the Upper Middle School level. (D-39; (N.T. 1238-1243) Student's Read 180 reading material lexile 731 equates to fourth grade level readability. (SD-42) School District reading evaluations indicate the following Qualitative Reading Inventory (QRI) data:

	MAY 2007	NOV 2007	MAY 2008	JAN 2009
Reading Decoding	25% accurate on 4 <sup>th</sup> grade level	90% accurate between 6 <sup>th</sup> and 7 <sup>th</sup> grade level	90% accurate between 4 <sup>th</sup> and 6 <sup>th</sup> grade level	High School level
Comprehension	3 <sup>rd</sup> grade level	75% accurate on 5 <sup>th</sup> grade level	75% accurate Between 5 <sup>th</sup> and 6 <sup>th</sup> grade level	Upper Middle School level
Instructional Level	Not calculated	5 <sup>th</sup> grade	6 <sup>th</sup> grade	Not calculated

14. On January 14, 2009 Parents requested a due process hearing, claiming FAPE denial since January 14, 2007. (P-26) Hearing sessions were conducted on March 3, April 29, April 30, May 1, and June 4, 2009. The record was closed on July 4, 2009 when parties submitted written closing arguments. The following exhibits were admitted into the record. (N.T. 1428-1431)

Exhibits	Admitted with no objection	Admitted over objection	Not admitted	Withdrawn
HO1-HO2	X			
P1-P2	X			
P3				X
P4			X	
P5-P7	X			
P8			X	
P9-P21	X			
P22			X	
P23	X			
P24				X
P25		X		
P26-P28	X			
SD1-SD26	X			
SD27			X	
SD28		X		
SD29-SD30	X			
SD31-SD38			X	
SD39		X		
SD40				X
SD41-SD46	X			
SD47				X

15. Dr. S testified that Student's anxiety is such that Student obsessively worries about learning difficulties and lack of achievement, which cyclically builds on itself, incapacitating Student and triggering major depressive disorder. (N.T. 574) Dr. S does not believe Student should remain in public school. (P-18) Dr. S, however, has



never observed Student in school, never spoken to Student's teachers, and is unable to recommend specific educational programming for Student. (N.T. 639-645, 661)

16. Dr. G testified that Student's cognitive defects are directly related to malnourishment during the first year of life (N.T. 212-213), and the cause of Student's slowness in speech, reading and writing is a frontal lobe dysfunction. (N.T. 228) Dr. G does not believe that the District's IEPs were appropriate for Student. (N.T. 150, 155, 165) Dr. G believes that a package of services that would remediate the District's FAPE denials would involve: 100 weekly one-hour counseling for emotional problems; 100 twice-weekly one hour Wilson Reading tutorial sessions; 200 weekly one hour written language tutorial sessions; 50 weekly one-hour math reasoning tutorial sessions; and 50 weekly half-hour occupational therapy sessions for ideational apraxia. (P28; N.T. 170-176) Although Wilson Reading is not the only appropriate reading program, Dr. G recommends Wilson because Student has already responded so well to it. (N.T. 197)

## DISCUSSION AND CONCLUSIONS OF LAW

### **Burden of Proof**

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case the party with the more persuasive evidence wins. In this case,

Student bears the burden of persuasion because Student alleges that the School District denied FAPE from January 11, 2007 through January 11, 2009 and Student's parents seek reimbursement for an IEE.

### **FAPE**

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. Part 300; 22 Pa. Code Chapter 14 A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP. FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533-534 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996); Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982)

The IEP must be judged as to its appropriateness at the time that it is written, and not in hindsight with respect to subsequently obtained information about the student. The concepts that 1) "an IEP is a snapshot, not a retrospective," and that 2) the IEP must take into account what was objectively reasonable at the time that the IEP was drafted are the standards in the Third Circuit. 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), cert. denied, 488 U.S. 1030 (1989); 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) Additionally, the placement of a student with a disability must be in the least restrictive environment appropriate. 34 C.F.R.

§300.114(a)(2); 22 Pa. Code §14.145(1); Oberti v. Board of Education, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993); L.E. v. Ramsey Board of Education, 435 F.3d. (3<sup>rd</sup> Cir. 2006)

**Student has been denied FAPE since January 11, 2007**

There is no dispute that the District was not providing FAPE during the second semester of 2006-2007. In May 2007, the District's special education teacher, guidance counselor and Supervisor of Special Education were all concerned about Student's lack of academic progress. (N.T. 318, 327, 882-888, 962; P-21) In response to these concerns, an IEP was approved by all parties on May 14, 2007 that provided for additional reading instruction as well as social skills programming. (N.T. 332, 990; SD-3, pp. 1,9,10)

Student complains that the May 2007 IEP was inappropriate because: 1) it lacked social skills goals and social skills programming based upon peer reviewed research; 2) no least restrictive environment (LRE) analysis was undertaken; 3) other goals were designed for minimal progress; 4) it lacked behavioral programming; 5) it did not address Student's organizational difficulties, ADHD, writing needs, anxiety, or slow processing; and 6) it did not address the interplay between Student's behavioral, anxiety, and organizational needs and Student's learning differences.

In fact, however, the May 2007 IEP was reasonably calculated at the time it was written to provide meaningful educational benefit. It addressed Student's most prominent needs, calling for 30 minutes weekly social work services (P-6; SD-3,p.10; N.T. 978, 982, 983, 986) and providing two hours per week of Wilson Reading Program tutoring in Student's home. (P-6,p. 9; SD-3,p.9; SD-10; N.T. 332-336, 885, 962, 1019-1020, 1047, 1293, 1408) It also included math computation and reasoning goals, and reading fluency and comprehension goals. (P6,p.8; SD3, p.8) Indeed, all parties approved the May 2007

IEP, Student's parents were pleased with the Wilson tutoring (SD-9; NT 895), and after the Wilson tutor taught more efficient strategies, Student progressed in reading. (P13, p.2; NT 1019, 1026, 1030)

Although the May 2007 IEP was appropriate, the District's actions in subsequently disregarding the Wilson tutoring, refusing to follow through in addressing Student's anxiety needs, unilaterally eliminating the Wilson programming, unilaterally implementing a new reading program, and ignoring the pending May 2007 IEP while a subsequently proposed IEP was disputed, constitute a denial of FAPE.

The District simply ignored Student's Wilson tutoring and no School District professionals conferred with the Wilson tutor, apparently because she was a contractor. (N.T. 808, 1046-1047, 1305, 1310, 1408, 1409; SD-10; P-13) While this deliberate disregard, by itself, is not a FAPE denial, it ultimately resulted in uncoordinated reading evaluations for the 2007-2008 school year that lack credibility due to incompleteness. (SD-6,p.5; N.T. 759-760, 763) In addition, the District's reevaluation report of December 3, 2007, recognized Student's anxiety but failed to consider any related programming because District policy prohibited its school psychologists from diagnosing OHI or emotional disability, regardless of evidence of ADHD or anxiety, and required parents to provide medical diagnoses for these disorders at their own expense. (N.T. 1118-1121, 1167-1168) Further, although the District's May 2008 proposed IEP acknowledged that Student had shown improvement in reading with the Wilson tutor over the previous year, the District inexplicably ceased the Wilson tutoring. (SD-17,pp.4, 8; SD-19,p.11) No one at the due process hearing explained why the Wilson tutoring was stopped. (N.T. 1053) Although the District correctly notes that the May 2007 never

specified either a particular reading methodology or specific afterschool tutoring, the fact is that this was a system that produced results and the District inexplicably decided to remove it. (P-14; P-21; N.T. 382, 505, 595)

Finally, Parents disapproved the District's proposed IEP in May 2008 and continued to reject it at an October 2008 IEP team meeting. (SD-20; N.T. 244, 386) The District, however, neither requested due process nor continued to implement the pendent May 2007. Instead, the District proceeded to implement its own non-approved plan, eliminating Wilson tutoring, and instituting Read 180 along with English instruction in a learning support class (N.T. 1352-1354) and one-on-one tutoring twice weekly from a reading specialist and special education teacher. (SD-46; N.T. 1187 – 1188) Student's acknowledged test anxiety was not addressed. (N.T. 136) In January 2009, Student's reading level was reported to be at various levels, such that it is impossible to determine Student actual reading progress since May 2008. (SD-39; SD-42; N.T. 1238-1243, 1300-1301)

The District rightly argues that Parents should not be permitted to order cessation of social work services and home-school communications, and then complain that FAPE was denied. (SD-13, p. 3; P-21,p.24; N.T. 348, 352, 356-57, 455, 897, 905-906, 937-938, 1002) Student's parents also were requested to fill out a BASC rating form as part of the District's reevaluation process, but declined to do so. (D-15; N.T. 411) These parental behaviors do not negate the District's denial of FAPE, however. They may be taken into account when the equitable remedy of compensatory education is assessed.

The District argues that any procedural violations concerning the May 2008 proposed IEP do not equate to FAPE denial. L.R. v. Manheim Twp School District, 540

F. Supp 2d 603 (E.D.Pa. 2008) The District notes that Student's expert, Dr. G, recommended small classes and learning support services in reading, English and math, and regular education for social studies and science (N.T. 88), modified texts, a multisensory reading program five days a week (P-1), and availability of a social worker or school psychologist (Exhibit P-1). The District argues that, at all times relevant, it provided a 15:2 student:teacher ratio in reading class, 11:2 ratio in English, learning support for English and math, reading and science in co-taught regular education classes, modified texts when needed (N.T. 1353-1354), social worker services until they were discontinued by the parents on November 17, 2007, open access to guidance counselors, teachers and a case manager, and twice weekly tutoring. The District further argues that it provided essentially the same specially designed instruction recommended by Dr. G.

In this case, however, Student's evidence of adverse educational impact establishes that the District's procedural violations did deny FAPE. Student continued to significantly underachieve in reading, spelling, and math, and showed math regression. (N.T. 80-83) The District's proposed IEP did not provide appropriate reading programming (P-1; P2, p.12), nor did it address Student's ADHD-related needs, behavior, anxiety, social skills, writing, slow processing reading and writing speed. (N.T. 80-83, 385; P-1)

The District also argues that Student's inability to make academic progress is limited by infancy malnourishment as well as a frontal lobe dysfunction. While there is evidence that such circumstances can affect academic progress (N.T. 212, 228), the record does not establish a causal connection between Student's lack of academic progress and either infancy malnourishment or a frontal lobe dysfunction.

Accordingly, the District denied FAPE to Student between January 2007 and January 2009.

### **Compensatory Education**

Compensatory education may be awarded when a school district deprives an eligible student of FAPE. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999) Compensatory education awards may be qualitative, designed to place the student in the same position she would have occupied but for the school district's denial of FAPE. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005) Compensatory education awards may be quantitative, based upon the period of time that a school district denies FAPE, with an offset for the time reasonably needed to discover and remedy FAPE deficiencies. M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)

The record contains evidence that a package of services that would remediate the District's FAPE denials would involve: 100 weekly one-hour counseling sessions for emotional problems; 100 twice-weekly one hour Wilson Reading tutorial sessions; 200 weekly one hour written language tutorial sessions; 50 weekly one-hour math reasoning tutorial sessions; and 50 weekly half-hour occupational therapy sessions for ideational apraxia. (P28; N.T. 170-176) Although Wilson Reading is not the only appropriate reading program, Dr. G recommends Wilson because Student has already responded so well to it. (N.T. 197) Based upon Dr. G's recommendations, Student shall be awarded 100 twice-weekly one hour Wilson Reading tutorial sessions; 200 weekly one hour written language tutorial sessions; and 50 weekly one-hour math reasoning tutorial sessions. (P28; N.T. 170-176)

An award of compensatory education is an equitable remedy under IDEA-2004. *Ferren v. School District of Philadelphia*, 2009 WL 222376 (E.D. Pa. 2009) Parents should not be permitted to order cessation of social work services and home-school communications, and then complain that FAPE was denied. (SD-13, p. 3; P-21,p.24; N.T. 348, 352, 356-57, 455, 897, 905-906, 937-938, 1002) Student's parents also were requested to fill out a BASC rating form as part of the District's reevaluation process, but declined to do so. (D-15; N.T. 411) The District has requested permission to conduct an OT evaluation, but Student's Parents have withheld such permission. (SD-38; N.T. 438-439, 500) While these parental behaviors do not excuse the District's failure to address Student's anxiety and OT-related needs (the District could have requested due process to enforce its FAPE responsibilities), they did affect the District's ability to address those needs, and they shall be taken into account in the equitable remedy of compensatory education. Thus, the compensatory education award will not include Dr. G's recommendations for 100 weekly one-hour counseling sessions and 50 weekly half-hour occupational therapy sessions for ideational apraxia.

### **IEE**

Parents argue that both the law and the equities demand reimbursement for Dr. G's IEE. They contend that the District's ongoing refusal, as a matter of policy and otherwise, to recognize Student's glaring need areas in ADHD, anxiety, behavioral difficulties, dysgraphia, learning disabilities, social skills deficits, and processing speed required the Parents to obtain their own IEE at private expense.

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 C.F.R. §300.502(b)(1) If



a parent requests an, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. 34 C.F.R. §300.502(b)(2) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(3)

Parents are required to disagree with the District's evaluation and to request an independent educational evaluation at public expense before obtaining reimbursement for their own IEE. 34 C.F.R. §300.502(b)(1) The District's re-evaluation was concluded December 3, 2007. (SD-16) No evidence was presented showing that the parents disagreed with District's evaluation and requested an IEE at public expense. Accordingly, Student's parents are not entitled to reimbursement of Dr. G's evaluation.

#### **Section 504**

To the extent that the FAPE requirement under Section 504 differs from that under IDEIA, the difference appears to be a difference between merely failing to meet statutory and regulatory requirements (IDEIA) and either intentionally or deliberately indifferently failing to provide FAPE (Section 504). Mark H. v Department of Education, 513 F.3d 922 (9th Cir. 2008); K.R. v. School District of Philadelphia, 50 IDELR 190 (E.D. Pa. 2008); L.T. v. Mansfield Township School District, 48 IDELR 156 (D.N.J. 2007) The record in this case does not contain specific evidence that the District's FAPE denials occurred either with intention or with deliberate indifference. Accordingly, the District did not violate Student's Section 504 rights during the relevant time period.

CONCLUSION

Although the May 2007 IEP was appropriate, the District's actions in subsequently disregarding the Wilson tutoring, refusing to follow through in addressing Student's anxiety needs, unilaterally eliminating the Wilson programming, unilaterally implementing a new reading program, and ignoring the pendent May 2007 IEP while a subsequently proposed IEP was disputed, constitute a denial of FAPE. Accordingly, Student is entitled to compensatory education for FAPE denial between January 2007 and January 2009.

ORDER

The School District shall provide to Student the following:

- 100 twice-weekly one hour Wilson Reading tutorial sessions;
- 200 weekly one hour written language tutorial sessions; and
- 50 weekly one-hour math reasoning tutorial sessions.

*Daniel J. Myers*

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HEARING OFFICER

July 16, 2009