

*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**  
**Final Decision and Order**

**CLOSED HEARING**  
**ODR File Number: 18769 16 17**

**Child's Name:** G. B.                      **Date of Birth:** [redacted]

**Dates of Hearing:**  
5/17/2017, 8/14/2017, 8/16/2017 and 10/4/2017

**Parent:**  
[redacted]

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**Hearing Officer:** William Culleton Esquire  
Certified Hearing Officer

**Date of Decision:** 11/13/2017

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is enrolled currently in a middle school within the District named in this matter (District). The District has classified Student under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et. seq. (IDEA) as a child with the disabilities of Autism, Specific Learning Disability, Other Health Impairment and Speech or Language Impairment. (NT 44.)

Parent<sup>2</sup> asserts that the District failed to offer Student a free appropriate public education (FAPE) during a relevant period from February 14, 2015 to May 17, 2017. (NT 27, 42.) Parent asserts Student's right to a FAPE pursuant to the IDEA, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>3</sup>, and the respective implementing regulations. Parent requests an order that the District provide Student with full days of compensatory education for the relevant period, and an order that the District provide Student with appropriate educational services going forward. The District asserts that it has offered and provided a FAPE at all relevant times.

The hearing was completed in four sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District failed to offer and provide a FAPE to Student during the relevant period.

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<sup>1</sup> Student, Parent and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

<sup>2</sup> Parent's counsel represents both Parent (Student's Mother) and Student's Father, who lives at a separate, undisclosed address. Thus, I acknowledge that Student's Father joins in the Parent's claims in this matter and, as his claims do not differ, will be bound by this decision equally with Parent. Nevertheless, as the entire matter was prosecuted by Parent in Parent's name, with no appearance or prosecution by Father. All of the transactions at issue herein were between District representatives and Parent. Therefore, this decision is framed in terms of Parent alone, and Parent's proffer of proof is the sole measure of the preponderance of the evidence.

<sup>3</sup> There is no question that Student is otherwise qualified within the meaning of section 504 and that the District receives federal funds.

## **ISSUES**

1. During the relevant period of time from February 14, 2015 to May 17, 2017, did the District offer and provide a FAPE to Student in compliance with the IDEA and section 504?
2. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant period?
3. Should the hearing officer order the District to provide Student with educational services for the remainder of Student's current school year?

## **FINDINGS OF FACT**

### STUDENT'S DISABILITIES AND HISTORY

1. Since the age of 2 years, Student has exhibited speech and language difficulties and has received speech and language services. (S 3.)
2. Student has a history of diagnoses of developmental delay, pervasive developmental disorder, autism, attention-deficit hyperactivity disorder, phonological disorder and oppositional-defiant disorder. (S 5.)
3. Student's overall cognitive ability is in the low average range; however, when measured with non-verbal measures, Student's cognitive ability is at the middle of the average range. (S 5.)
4. Student has a history of difficult behaviors, including atypical behaviors, tic-like movements, vocal stimming, biting, hitting, meltdowns, and invading the personal space of others. (S 5.)
5. Student continued to receive speech services through early intervention in preschool, where Student was classified as a child with developmental delay. (S 5.)
6. In June 2010, Student was evaluated for transition to kindergarten and classified with Autism and Speech or Language Impairment. (S 5.)
7. Student received itinerant learning support and speech/language services in the District's kindergarten program. (S 5.)
8. In a District first grade classroom, Student received itinerant learning support for much of the school term; this was increased to a supplemental level in March 2012. Student continued to receive speech/language services and also received occupational therapy in first grade. (S 5.)
9. In first grade on March 27, 2012, Student began receiving behavioral health services in the home and community, as well as after-school programming focused on speech and

language and social skills, and summer programming. These programs identified educational needs including attention and compliance skills; social and play skills; and communication and coping skills. (S 3, 5.)

10. Student attended a cyber charter school in second grade and the first half of third grade. The charter school classified Student with Autism, Speech or Language Impairment and Specific Learning Disability in reading. (S 5.)

### THIRD GRADE IN A DISTRICT SCHOOL

11. Student re-enrolled in the District for the second half of third grade, receiving itinerant learning support and speech/language services. Student was reported to exhibit a moderate to severe pragmatic language disorder and a moderate receptive and expressive language disorder. Speech services were recommended at a frequency of once per week individual and once per week group. (S 5.)
12. By March 2014, in the Spring of Student's third grade year, Student's academic achievement was below average in early reading skills, word reading, oral reading fluency and basic reading. Student's reading comprehension ability was low, as was Student's total reading ability. Student was average in mathematics computation, but Student's mathematics problem solving and overall mathematics ability were below average. Student's alphabet writing, sentence composition, spelling, essay composition and total written expression were all below average. (S 5.)
13. Student's achievement was significantly below the expected performance of a child with Student's cognitive ability. (S 5.)
14. Student's benchmark test scores were below basic when administered in 2014. (S 6.)
15. In March 2014, on a broad, standardized inventory of behavioral symptoms, Student's teachers provided responses that indicated clinically significant problems in behavior, atypical behavior (including picking at and babbling to self) and withdrawal (indicating significant social isolation). Concerns were also reported with externalizing problems, school problems, hyperactivity, depression, attention, and learning problems. (S 5.)
16. In March 2014, Student's adaptive behavior was reported at a clinically significant level of deficit for study skills and functional communication. Teachers also reported concerns with Student's adaptability and working or playing well with others. (S 5.)
17. In March 2014, Student exhibited severe symptoms of autism. (S 5.)
18. In March 2014, Parent reported that Student exhibited severe problems with over-sensitivity to sounds, smells, and textures, both seeking and avoiding sensory input. (S 5.)
19. In March 2014, Parent reported as mild to moderate problems: made-up words, repeating words or phrases, unusual sounding speech, conversation, eye-contact, social interactions, perspective-taking, anxiety, impatience, obsessive worrying, and adapting to unexpected changes in routine or schedule. Student's teachers endorsed these concerns but reported all

of them as severe. Teachers also reported severe difficulties with following another person's eye gaze, unusual body movements, possibly self-injurious behavior, and playing with the same thing over and over. (S 5.)

20. In March 2014, Student was rated low for adaptive functioning in communication, daily living skills and socialization. (S 5.)
21. The March 2014 re-evaluation reported a speech and language evaluation that reported Student's functioning below normal limits for making inferences, negotiating, multiple interpretation words, and supporting peers. Student's core language was below the norm, including concepts, directions, word structure, recalling sentences, formulating sentences, and categorizing. Nevertheless, Student's ability to process sounds was normal. (S 5.)
22. In March 2014, teachers noted educational needs including reading fluency and comprehension, mathematics problem solving, written expression, focus and social skills. (S 5.)
23. The March 2014 re-evaluation report recommended that Student receive learning support for academics, speech/language services, individualized instruction, instruction in small groups, increased one-on-one support, testing modifications and multiple modifications in the classroom. (S 5.)
24. From the third quarter of third grade to the first quarter of fourth grade, Student demonstrated progress on IEP goals regarding reading fluency and reading comprehension at a second grade level; reading comprehension probes were supported by Student's paraprofessional, who provided assistance, modeling and guidance. (S 10.)
25. From the third quarter of third grade to the first quarter of fourth grade, Student demonstrated progress on the IEP goals regarding mathematics problem solving; answering "wh" questions; and articulation. (S 10.)
26. From the third quarter of third grade to the first quarter of fourth grade, Student demonstrated slight progress on the IEP goal regarding identifying the problem in a story; written expression, as measured by a rubric; social conversation; and following multi-step directions. (S 10.)
27. From the third quarter of third grade to the first quarter of fourth grade, Student demonstrated progress to mastery in use of the verb "to be". (S 10.)
28. From the third quarter of third grade to the first quarter of fourth grade, Student demonstrated little or no progress on the IEP goals regarding cooperative social behaviors. (S 10.)
29. Student's first PSSA scores were below basic. (S 10.)

#### FOURTH GRADE (INCLUDING THIRD/FOURTH GRADE IEP)

30. The District convened an IEP team meeting on March 13, 2014, in the Spring of Student's third grade year, which produced an IEP scheduled to last until March 12, 2015. Student was placed in itinerant learning support in Student's neighborhood school. The IEP provided for one thirty-minute reading intervention and one thirty-minute mathematics intervention per day in the learning support environment, and two thirty-minute speech and language sessions per week. In addition, Student's day was compacted, ending at 2:00 P.M. (S 6.)
31. The March 2014 IEP recognized Student's needs to include reading comprehension, reading fluency, mathematics problem solving, written expression, social skills, reduced picking behavior, improved speech articulation, ability to introduce a topic to a listener, correct sentence structure, answering "wh" questions, and following multi-step directions. (S 6.)
32. The March 2014 IEP provided for a paraprofessional to attend Student while in school. (S 6.)
33. The March 2014 IEP provided for twelve measurable goals that addressed reading fluency, reading comprehension, mathematics problem solving, written expression, picking behavior, cooperative social behaviors, conversation, oral comprehension, multistep directions, speech articulation, speaking and listening skills, and answering "wh" questions. (S 6.)
34. The March 2014 IEP provided modifications addressing Student's needs regarding supervision and attention, including a one-to-one paraprofessional; multisensory teaching; need for movement breaks; positive behavior modification; advance notice of structured schedule; difficulty in adjusting to changes in schedule; handwriting fluency; reading comprehension; multi-step instructions; sensory seeking; emotional and behavior self-regulation; testing accommodations; social skills; speech articulation; grammatical speech; social pragmatic speech; and performing unwanted tasks. (S 6.)
35. The March 2014 IEP provided for extended school year (ESY) services for Student. (S 6.)
36. IEP revisions in April 2014 added modifications addressing Student's needs with regard to homework reduction. (S 7.)
37. In November 2014, the District provided a Functional Behavioral Assessment and behavior intervention plan addressing failure to comply with directions without needing directions repeated. (S 8.)
38. In December 2014, the District provided an occupational therapy evaluation that recommended against eligibility for occupational therapy services, but recommended modifications to address Student's social participation skills. (S 9.)
39. As of February 2015, Student's disabilities affected Student's progress in all areas of the curriculum. (S 10.)

40. Student's benchmark testing indicated either no growth or slight decline in the time before February 2015. (S 6.)
41. On February 25, 2015, the District convened an IEP team meeting, and the team produced an IEP that continued Student's placement in itinerant learning support in Student's neighborhood school. (S 10.)
42. The IEP indicated that Student's needs included skills in basic reading, reading fluency, reading comprehension, written expression, mathematics problem solving, following directions, social skills, and various speech/language skills. (S 10.)
43. The February 2015 IEP reduced Student's mathematics learning support intervention from five days per week to three. It added one thirty-minute session of explicit instruction in social skills, and it continued Student's reading intervention, five days per week, in a small group setting. The IEP continued Student's speech/language services at the same level of two thirty-minute sessions per week. (S 10, 11.)
44. The February 2015 IEP provided eleven goals, addressing reading comprehension (same goal as previous IEP, at second grade level but with higher baseline); sight word reading fluency; mathematics problem solving and mathematics operations (new goals with different monitoring); writing sentences with correct spelling and punctuation (not measuring organization of writing); decoding and recoding single syllable and multi-syllable words; reducing escape behavior by following directions without repetition; positive social behaviors (changed method of measuring progress); following oral two step directions involving concepts of space and quantity; social conversation (same goal as previous IEP, but slightly higher baseline); and answering "wh" questions (who, what & when, same goal as previous IEP but mastery level reduced from 90% to 80%, and baselines higher). (S 10.)
45. The February 2015 IEP did not contain goals addressing picking behavior, identifying the problem in a story, articulation or using the verb to be. (S 10.)
46. The February 2015 IEP provided the modifications listed in the previous IEP, and modified some to explain them in greater detail. It added new modifications, including explicit reference to a positive behavior support plan; reduction of homework assignments by 50%; a technique for asking Student to perform non-preferred tasks; adjusting the curricular level of tasks to Student's instructional level; and extra days to complete homework assignments with a Parent note. (S 10.)
47. The February 2015 IEP added three social skills and speech/language goals for ESY, for which Student was again found eligible. (S 10.)
48. By April 2015, Student had made some progress in reading fluency. Student's reading ability was in the low range, exhibiting difficulty with both word reading and comprehension, and Student was not reading at grade level. Student was working on phonics. Student's reading comprehension had regressed to the level measured in the previous school term. Overall, Student's reading was below basic. (S 11.)

49. By April 2015, Student was functioning in the Basic to proficient range in mathematics. Student displayed difficulties with understanding the meaning of numbers, addition, subtraction, fractions, converting to mixed numbers, solving word problems, mathematics vocabulary, multiplication, division, fractions, decimals and percentages, and formulas. (S 11.)
50. By April 2015, Student was able to write independently at a basic level, but still utilized a scribe. Student displayed difficulty with organizing written expression, capitalization and punctuation. (S 11.)
51. By April 2015, Student understood the concepts, “who”, “what”, “when”, “where”, and “how”. Student inconsistently demonstrated understanding of the word “why”. (S 11.)
52. By April 2015, Student continued to present concerns with personal space issues, and the need for frequent redirection. (S 11.)
53. In April, 2015, the District and Parent participated in two planning sessions, one to develop recommended assistive technology, and one to address barriers to Student’s access to regular education. (S 11, 13.)
54. In May 2015, the Student’s IEP team revised the IEP to provide specifics for ESY services for Student; social skills and speech and language services were added to Student’s ESY program. (S 12.)
55. In the third and fourth quarters of fourth grade, Student made progress in goals regarding mathematical concepts and applications; decoding and recoding single syllable words; following directions; and initiating and continuing social conversations. (S 10, 14, 15.)
56. In the third and fourth quarters of fourth grade, Student made little or no progress in IEP goals regarding basic mathematical skills; writing sentences without errors in spelling or grammar; reading comprehension; word and phrase reading; cooperative social behaviors (yet data showed reduction in negative behaviors); understanding concepts of size and quantity; and answering “wh” questions. (S 10, 14, 15.)
57. Student did not improve PSSA scores, which remained Below Basic for mathematics and science. (S 22.)

#### FIFTH GRADE (INCLUDING FIFTH/SIXTH GRADE IEP AND REVISIONS)

58. On or about September 9, 2015, Student’s lunchtime paraprofessional treated Student in an improper manner while attempting to physically prompt or cue student, who was exhibiting inappropriate behavior. Further investigation revealed allegations that the paraprofessional had acted in anger or irritation toward the Student in the past in response to Student’s inappropriate behavior that was known to be related to Student’s [medical condition]. (S 16.)
59. The paraprofessional had been assigned prior to receiving appropriate training regarding Student’s needs and difficult behaviors. (NT 231; S 16.)

60. The District removed the Student from the paraprofessional's supervision during lunchtime, but did not evaluate Student or address Student for possible trauma. Parent's ability to form a trusting collaborative relationship with District personnel has been harmed due to the District's resistance to Parent's attempt to obtain information from District personnel. (NT 72, 84-92, 161-162, 221.)
61. On September 15, 2015, Student's IEP team met with Parent present. The team revised Student's IEP to eliminate Student's mathematics interventions, retain paraprofessional support in the mathematics classroom, reduce the frequency of reading interventions to three times per week, and continue Student's speech/language services and social skills instruction at the same level. (S 17.)
62. On October 20, 2015, Student's IEP team met with Parent present. The team revised Student's IEP to add information to the parent concerns section; clarify that one intervention session out of three per week, previously stated to be for reading, was devoted to writing instead; report Student's level in the reading intervention; propose a new FBA to address new behaviors; hear Parent's requests for greater communication with teaching staff, paraprofessional attendance to Student during transitions such as in hallways, and revisions to Student's behavior support plan; indicate a trial of assistive technology; hear Parent's plans for private evaluation, social skills group program and occupational therapy; and discuss planning for supplementary aids and services as well as Student's participation in extracurricular activities. In addition, Parent raised concerns about an altercation involving Student; the need to prepare Student for transitions; the need for additional reading support, social skills opportunities and occupational therapy services; the reading of homework; and training of new staff regarding supplementary aids and services. (NT 273; S 18.)
63. In December 2015, the District performed an FBA for a new behavior of grabbing other people when anxious. (S 19.)
64. In December 2015, the District revised Student's IEP to reflect new present levels information from the new FBA. The team decided not to provide a behavior support plan; rather, it added language to the modifications section of the IEP to address the new behavior of grabbing. It added role playing, scripting and peer helpers to the modifications, along with opportunities to use social stories. (S 20.)
65. In the first quarter of fifth grade, Student made progress in goals regarding fourth grade level mathematical concepts and applications; decoding and recoding single syllable; following directions; and initiating and continuing social conversations. (S 15, S 22.)
66. In the first quarter of fifth grade, Student made little or no progress in IEP goals regarding basic mathematical skills; writing sentences without errors in spelling or grammar; reading comprehension; word and phrase reading; cooperative social behaviors (yet data showed reduction in negative behaviors); understanding concepts of size and quantity; and answering "wh" questions. (S 15, 22.)
67. On January 19, 2016, the District revised the IEP to add assistive technology, word prediction software. It did not add many of the modifications listed in the planning

document for supplementary aids and services; some of the listed modifications were already in the Student's IEP. (S 11 pp. 37-39, 46-47, 54, 58; S 21.)

68. On February 18, 2016, the District convened an IEP team meeting to establish Student's annual IEP for the February 19, 2016 to February 18, 2017 year. (S 22.)
69. The IEP team placed Student in itinerant learning and speech/language support. The IEP team did not add many of the modifications listed in the planning document for supplementary aids and services; some of the listed modifications were already in the Student's IEP. (S 11 pp. 37-39, 46-47, 54, 58; S 20 p. 49.)
70. Student's benchmark scores for mathematics and English language arts remained below basic. Student improved in reading fluency by 13 words correct per minute. (S 22.)
71. In February 2016, Student's teachers reported that Student was able to read most single syllable words, and some multi-syllable words. A teacher reported that Student's writing showed good sentence structure and complete sentences. Student was fluent in multiplication facts, and was learning long division. (S 22.)
72. In February 2016, Student's teachers reported that Student's paraprofessional often took notes for Student, and helped Student to complete assignments. The paraprofessional often redirected Student to ask questions of the teacher, and frequently prompted Student to stay on task. (S 22.)
73. In February 2016, Student's teachers reported that Student did not work well in groups, but often worked alone with the paraprofessional. Student did not assist others. Student called out in class and engaged in self talk. Sometimes Student [redacted]. Student did not participate in classroom discussions. (S 22.)
74. Largely due to changes in the IEP goals over the IEP year, Student's IEPs for fourth and fifth grades reported data that were not in the same form and not easily comparable for reading fluency and comprehension, mathematics problem solving, written expression, basic reading, and following directions. (S 22.)
75. By February 2016, Student had met goal expectations (with prompting) for social conversation. (S 22.)
76. During the IEP year ending in February 2016, Student made little or no progress in answering "wh" questions. (S 22.)
77. The February 2016 IEP reduced the paraprofessional's support in small group situations. (S 22.)
78. The February 2016 IEP retained Student's goals for fourth grade level mathematical concepts and applications (baselines were adjusted); basic mathematics problem solving (goal was increased), writing error-free sentences (goal increased); reading comprehension (goal increased); reading multi-syllable words (goal for single-syllable words dropped); reading fluency (no baseline for speed); answering "wh" questions (baseline updated); and

social conversation (introducing topic goal eliminated and 2-3 conversational exchanges goal retained with baseline of zero)). (S 20, 22.)

79. The February 2016 IEP added goals addressing independent reading; grade level vocabulary; and grade level reading comprehension. (S 20, 22.)
80. The February 2016 IEP eliminated previous goals addressing decoding and re-coding; following directions without further prompting; cooperative/positive social behaviors; and understanding directions involving concepts of space and quantity. (S20, 22.)
81. The February 2016 IEP found Student ineligible for ESY. (S 22.)
82. On May 5, 2016, the District provided an occupational therapy evaluation report that indicated that Student was manifesting problems with social participation, hearing, touch, body awareness, balance and motion, and planning and ideas. Behaviors of concern included difficulties with personal space; frequent distraction by visual stimuli; frequently speaking too loud or making excessive noise during transitions; making unusual noises to self; [redacted]; frequent fidgeting and slumping at desk; occasional repetitive play in free time; and frequently poor organization of materials. (S 23.)
83. On May 25, 2016, the District convened an IEP team meeting to review the occupational therapy sensory evaluation. The IEP team revised the IEP to add opportunities for sensory self-regulation during the school day; modifications for test-taking; and use of visuals with presentation of materials. It added 30 minutes of occupational therapy consultation per quarter. (S 23.)
84. Testing modifications included reducing the length of spelling lists; maximum numbers of questions, no more than three choices for multiple choice questions; use of word banks in testing; and chunking lists of fill-in-the-blanks questions. (S 23.)
85. By fifth grade, Parent did not understand at what grade level Student was reading. (NT 133-135.)
86. In fifth grade, in regular education, Student's progress monitoring in reading was untimed so that Student could concentrate on reading accuracy rather than reading speed. Probes were given at grade level. Student's progress in reading was monitored at a lower grade level in the reading intervention program, which was a supplemental program, not a multisensory program. (NT 567-579.)
87. By the last quarter of fifth grade, Student had made progress in goals regarding fourth grade level mathematical concepts and applications; basic mathematics/problem solving skills (to mastery); untimed grade level vocabulary reading; following directions; answering "wh" questions; and maintaining social conversations. (S 15, S 22.)
88. By the last quarter of fifth grade, Student had made little or no progress in IEP goals regarding reading multi-syllable words; writing sentences without errors in spelling or grammar; answering reading comprehension questions (measured through modified and supported classroom assessments); the new untimed reading comprehension grade level probe; untimed grade level word reading; word and phrase reading; cooperative social

behaviors (yet data showed reduction in negative behaviors); understanding concepts of size and quantity. (S 15, 22.)

89. The behavior data gathering protocol that the District utilized permitted subjectivity and inaccuracy. (NT 660-663; P 6, P 7; S 47.)

90. Student made some progress in social skills in fifth grade. (NT 359-360; S 37 pp. 24-26.)

## SIXTH GRADE

91. For the start of sixth grade, the District assigned a new paraprofessional to Student for the morning hours of school. (S 28.)

92. In August, 2016, the District increased Student's social skills instruction to two times per week, increased Student's reading/writing intervention to four times per week, and added a period per day of pull-out organization and work completion support with a special education teacher, four days per week. The District also placed Student's social skills instruction in a special education classroom. Student's placement remained at the itinerant level. (S 28.)

93. In September, 2016, the IEP team increased Student's basic mathematics problem solving goal to a fifth grade level, as Student was deemed to have mastered the goal at a fourth grade level. (S 29.)

94. In September, 2016, Student continued to score Below Basic in benchmark testing for English Language Arts and mathematics. (S 36.)

95. In November 2016, the IEP team considered reports of new and increased behaviors impeding learning, including [redacted]; depending on the paraprofessional to support Student in work that Student should do independently; noises and personal space issues; provoking others; and aggressive behaviors toward peers. The team decided to perform another FBA and to utilize a new curriculum for developing self-awareness and perspective taking. (S 30.)

96. In November 2016, the IEP team further modified Student's classroom assessments by reducing content by 50%. (S 30.)

97. In December 2016, the IEP team further modified Student's assessments to reduce multiple choice assessments from three options to two options. It also provided for more frequent progress monitoring of Student's basic mathematics problem solving goal, added a goal to reduce aggressive behaviors toward peers, and added eight modifications to address Student's behaviors and frustration in class. (S 31, 32.)

98. In January 2017, Parent obtained a private speech/language evaluation that diagnosed Student with a severe receptive and expressive language impairment, including mild pragmatic language deficits. Student began private speech therapy on weekday mornings, once per week. (S 33, 35)

99. In February 2017, the IEP team and the District provided Student with an annual IEP that increased Student's placement to supplemental learning and speech/language support. Special education environment-based services continued to be four periods per week of reading/writing support; four periods per week of organizational support; and two periods per week of social skills instruction. (S 36.)
100. The February 2017 IEP did not add many of the modifications listed in the planning document for supplementary aids and services; some of the listed modifications were already in the Student's IEP. (S 11 pp. 37-39, 46-47, 54, 58; S 21.)
101. The District did not provide a research based, multisensory, explicit and sequential special education reading program to address Student's reading deficits. (NT 358, 368-371, 738-740.)
102. Teachers reported that Student exhibited behavioral problems including inattention, and that Student was excessively dependent upon Student's paraprofessionals for support in the classroom. Data indicated that Student's aggressive behaviors had declined. (S 36.)
103. Progress monitoring indicated that Student had attained Student's goals in the first quarter of sixth grade with regard to answering comprehension questions and untimed grade level reading; the goals were increased. Student had attained Student's goals regarding maintaining conversations and answering "wh" questions. (S 36.)
104. The February 2017 IEP retained goals for problem solving; writing sentences with fewer errors; answering comprehension questions, multi-syllable words and grade level words; untimed reading comprehension; mathematics concepts and applications; maintaining conversations; answering "wh" questions; and reducing aggressive behaviors. The IEP team added goals addressing yelling off-topic comments; independent completion of tasks and directives in regular education; and self-organization without the help of the paraprofessional. The Team also provided modifications including provision of a snack as needed; self-assessment tools; explicit teaching of organizational skills; and response requirements for Student's asthma. (S 36.)
105. During sixth grade, Student's benchmark scores continued to fall in the below basic ranges for English Language Arts and Mathematics. (S 37.)
106. On March 10, 2017, the District provided Student's three-year re-evaluation Report. The report classified Student as a child with Autism, Specific Learning Disability, Other Health Impairment and Speech or Language Impairment. (S 37.)
107. The re-evaluation yielded IQ scores within the low average range, with very low scores in verbal comprehension and high average scores in visual/spatial reasoning. While these scores were lower than previous scores, they reflect a greater emphasis on verbal reasoning in the test administered. (NT 265-290; S 37.)
108. The re-evaluation yielded achievement scores within the below average range, with low scores in reading comprehension and written expression. Student's reading comprehension was at the first percentile rank; sentence composition was at the second percentile. Word reading was at the third percentile. Student's achievement remained

significantly discrepant with predicted achievement based upon the Student's low-average tested cognitive ability, previously measured in the average range, in the areas of reading comprehension, word reading, oral reading fluency, basic reading, total reading, mathematics problem solving, mathematics, sentence composition, spelling, and written expression, achievement levels. The discrepancy level was extremely high at .01 for this discrepancy determination. (NT 300-305; S 37.)

109. Student's achievement scores demonstrated some growth in reading comprehension and some weakening of spelling skills. Student's composite scores increased in total reading, reading comprehension, pseudoword decoding, oral reading fluency, and essay composition. Scores declined in basic reading, written expression, mathematics, word reading, numerical operations, mathematics problem solving, spelling and sentence composition. Increased or equal scores indicated progress over three years, because Student maintained Student's relative standing among children of the same cohort. (NT 295-298; S 5, 37.)
110. In speech and language, Student's standardized scores were well below average in core language, receptive and expressive language, semantic development, and language structure. Student functioned below normal limits for pragmatic language. Student struggled with abstractions, such as idioms, metaphors and similes. Student continued to have articulation difficulties. Nevertheless, Student showed some progress in the below average range because Student's standard scores rose from 50 to 62, with the normal range being 85-115. (S 37.)
111. Student made progress in sixth grade in social skills. (NT 707-710; S 37 pp. 24-26.)
112. The re-evaluation report found that Student was too dependent on the paraprofessionals for organization; required many redirections; called out and disrupted class by making noises; instigated peers; was disrespectful to adults sometimes; exhibited strong mathematics skills; exhibited normal voice, rate and fluency of speech; initiated topics with adults; and exhibited appropriate eye contact. Student manifested needs in basic reading skills; reading fluency; reading comprehension; written expression; mathematics problem solving; independent task completion; organization; speech and language; and behavior. (S 37.)
113. By the last quarter of sixth grade, Student had made progress in goals regarding writing sentences without errors in spelling or grammar; answering reading comprehension questions (measured through modified and supported classroom assessments); untimed grade level reading; untimed grade level vocabulary reading; untimed reading comprehension; reducing aggressive behaviors; reducing the behavior of yelling out off-topic; reducing the need for prompts to complete tasks and directives; and understanding antonyms. (S 38, S 52.)
114. By the last quarter of sixth grade, Student had made little or no progress in IEP goals regarding fifth grade level mathematical concepts and applications; basic mathematical/ problem solving skills; reading multi-syllable words; proper use of the past tense; and understanding similarities and differences. (S 38, 52.)

115. At all grade levels, District measurement of Student’s ability to answer “wh” questions did not measure Student’s ability to answer “why” questions. (S 7, 12, 17, 20, 28, 29, 31, 32, 36.)

## CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>4</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>5</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance

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<sup>4</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>5</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

of the evidence in support of Parent’s claim, or if the evidence is in “equipoise”, the Parent cannot prevail under the IDEA.

#### CREDIBILITY/RELIABILITY

It is the responsibility of the hearing officer to determine the credibility and reliability of witnesses’ testimony. 22 Pa. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following determinations.

Considering the testimony in light of the documentary evidence, I find that most of the witnesses were credible. I found that the lunchtime paraprofessional’s testimony was not credible, as it is contradicted by documents in evidence and is undercut further due to the palpably defensive manner in which the witness responded to questioning.

#### FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is “special education and related services”, at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive

appropriate services in light of the child’s individual circumstances. Endrew F. v. Douglas County Sch. Dist., RE-1, \_\_\_ U.S. \_\_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Endrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

In order to provide a FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Endrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Endrew F., 137 S. Ct. above at 999; Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d

544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The program's appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District has not provided Student with an educational program that was appropriate in view of Student's circumstances during the relevant period, nor could its program have been expected to confer meaningful educational benefit upon Student, in view of Student's individual circumstances and needs.

During the relevant period, Student presented as a child with complex learning needs grounded in severe speech and language impairments. Student also was well known to have average cognitive ability if tested by instruments that were not highly dependent upon verbal ability, and low average cognitive ability if tested with instruments that relied more on verbal ability. It is clear on this record that the Student had the potential for substantial academic achievement.

Student also exhibited autism and attendant difficulties with social development and behavioral control. Student exhibited severe difficulties with maintaining attention to task and self-organization. As a consequence, Student came to the District with serious developmental and academic delays.

By the beginning of the relevant period, the District was or should have been familiar with Student's history and impairments, as well as their effect on Student's ability to learn. It knew that

Student had a history of interventions from age two, that Student had multiple medical diagnoses – autism, ADHD and severe speech and language disorder. Student also had been classified educationally with Autism, Speech or Language Impairment, and Specific Learning Disability in areas of reading, mathematics and writing. Student’s needs in the previous school year were reading comprehension, reading fluency, mathematics problem solving, written expression, social skills, reduced picking behavior, improved speech articulation, ability to introduce a topic to a listener, correct sentence structure, answering “wh” questions, and following multi-step directions. Student was functioning below grade level in all core subjects – at a second grade level in reading. Student’s benchmark and PSSA testing in all areas were Below Basic. Student could benefit from individual and small group instruction, as the March 2014 re-evaluation showed. In addition, Student was delayed in social skills and exhibited difficult behaviors in school. While Student had demonstrated some academic progress in third grade, Student’s progress was very slow with the interventions provided.

The District’s response during the relevant period was to place Student in the lowest level of special education intervention, itinerant learning and speech/language support. It did not place Student in a direct, multisensory, sequential curriculum for any of Student’s core needs. It did not provide more than one half hour of intervention for any core subject, whether reading, mathematics or writing. It provided one hour of speech and language intervention per week, divided into two sessions. It provided goals for reading comprehension and fluency that anticipated minimal progress, abandoning any effort to measure Student’s reading speed due to Student’s anxiety and behavior, without any effort to circumvent the behavioral difficulties to deliver instruction on this crucial aspect of reading. It continued this array of services through Student’s fifth grade year

(actually reducing mathematics and reading interventions for parts of fifth grade) and into Student's sixth grade year, with minimal additions.

I conclude that the District's services in Student's fourth and fifth grade years were not reasonably calculated to enable Student to receive appropriate services in light of Student's individual circumstances. Such circumstances include Student's average cognitive ability without reliance upon language, and Student's low-average ability even with the use of language. They also include the many educational strengths recounted in Student's evaluations and IEPs, including being eager to learn and to please, ability to participate well in small groups, ability to converse and make appropriate eye contact with adults and good background knowledge of facts, which is an important benefit to learning reading comprehension. Given these innate abilities, I conclude that Student was denied the opportunity to benefit from more intensive, research-based interventions inappropriately, during Student's fourth and fifth grade years.

In sixth grade, the District began to add services, returning Student's reading interventions to the level provided in March 2015, doubling social skills instruction that had been added at a lower level in previous IEPs, and adding a weekly period to support Student's organizational needs. I conclude that these added services were too little and too late. By sixth grade, Student's reading and mathematics deficits were interfering with academics across the board, though the District addressed this by increasing modifications and drastically altering classroom assessments to the point that Student's grades in other core academics and specials simply cannot be reliable indicators of achievement.

Meanwhile, Student's behavior in school deteriorated. Student began to exhibit behaviors in fourth grade, and the District attempted to address them with FBAs and intervention plans. In

fourth grade into fifth, I conclude that these interventions were reasonably calculated to address Student's behaviors.

However, in September of Student's fifth grade year, it became apparent that a lunchtime paraprofessional was treating Student inappropriately, with treatment that was likely to be traumatizing to the child. The District, on this record, changed the paraprofessional's assignment, but there is no evidence that it did anything to guard against possible trauma to the child. There was no explicit evaluation for any possible adverse effects on the child. There was no provision for counseling if needed. More likely than not as a result of the inappropriate treatment, Student began to exhibit behaviors that, when compounded by a change in paraprofessional personnel, escalated and interfered further with Student's ability to make academic progress. While the District intervened, the record shows that Student's behavioral problems continued throughout the fifth and sixth grades. Data showing progress in behavioral control is unconvincing, because it was based upon a protocol that permitted imprecise and subjective recording of incidence, without any clear definitions of the behavior to be counted.

Part of Student's behavioral difficulties was a byproduct of the way in which the District decided to address Student's multiple needs in the general education classroom. From the beginning of the relevant period, the District provided Student with a one-to-one paraprofessional in the general education classroom. Unfortunately, Student became highly dependent upon the paraprofessional that was with Student most of the time, a dependence that was exacerbated by the mistreatment incurred in September 2015. The District addressed this in sixth grade, but it was apparent much earlier, in fifth grade. Thus, the District had more than enough time to respond, and failed to do so for too long.

The District argues that Student's progress in all areas demonstrates that its minimal services during the relevant period were appropriate in the circumstances and reasonably calculated to provide Student with meaningful educational benefit. I conclude that Student's progress was much too slow to be meaningful in most areas of reading, mathematics and writing. The District argues that standardized testing in the three-year span from March 2014 to March 2017 shows progress because Student maintained comparable standard achievement scores from one testing to the other. While it is true that keeping one's place in the cohort indicates progress, it is at best an unconvincing answer to Student's consistently below basic reading, mathematics and writing. Careful perusal of the scores in question show that Student's standard scores advanced somewhat in total reading, reading comprehension, pseudoword decoding, oral reading fluency and essay writing, but fell in basic reading, written expression, mathematics, word reading, numerical operations, mathematics problem solving and spelling. Thus, these scores show some progress, but the progress is minimal at best. Moreover, all core academic skills were discrepant at an extremely stringent level, when contrasted with the progress to be predicted by Student's low average cognitive ability – the ability score that takes into account Student's severe language deficits. Thus, Student's minimal progress in the three years in question resulted in Student's demonstrated failure to achieve at a level commensurate with Student's ability.

Curriculum based measures offer another view, and while Student in over two years did manage to master some goals and show progress on some IEP goals, overall, Student's progress was slow, inconsistent and within the context of below-grade level achievement. In sum, I conclude that Student's academic history does not validate the level of service that the District provided during the relevant period.

Districts are bound to consider educating eligible children with typically developing peers. But this mandate does not justify providing inappropriately ambitious services. The least restrictive mandate does not require a district to offer services that are not multisensory, sequential and direct to address severe deficits in core academic skills. Nor does the mandate prevent consideration of higher levels of restrictiveness when needed to address severe needs. Moreover, the district is required to consider all feasible supplementary aids and services to enable a child to succeed in general education. Here, the District considered none of these things. It did not even incorporate into the IEP many of the results of the planning document intended to show ways to instruct in the least restrictive environment. I conclude that the District did not provide appropriate planning of services in view of its least restrictive environment duty.

The District argues that it provided benefit by instructing Student in social skills, for which Student showed progress. I agree that this record shows benefit in that area of education; however, the Student's slow and halting academic progress was not ameliorated by this area of personal growth, aided by the District's services.

#### SECTION 504 VIOLATION

I conclude that the District, by failing to provide a FAPE as defined in the IDEA, also failed to provide Student with appropriate services and accommodations to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1). In this case, noncompliance with the IDEA is preponderant evidence that the District also failed to comply with section 504. 34 C.F.R. §104.33(b)(2).

## COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a “make whole” approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

Here, the record does not support an order that the District attempt to make Student whole for the educational deprivations that Student experienced during the relevant period. Therefore, I am constrained to order compensatory education on an hour-for-hour basis. The record shows that the District’s interventions for Student’s academic needs were inappropriate. These include interventions for reading, mathematics and writing. The record also shows that Student received the benefit of District services for other core subjects and specials, as well as social skills instruction. I conclude that the equitable remedy is to provide Student with appropriate interventions in the above core subjects every day, one hour per day for every day on which Student’s neighborhood schools were open to students during the relevant period.

## PROSPECTIVE RELIEF

I also conclude that it is appropriate to order the District to provide appropriate services to Student going forward. Therefore, I will order the District to convene a meeting of Student’s IEP team to revise Student’s IEP to provide Student with direct, explicit, sequential, multisensory, and research-based interventions for reading, mathematics and writing.

## CONCLUSION

I conclude that the District failed to provide Student with a FAPE during the relevant period. Accordingly I order both compensatory and prospective relief.

## ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District shall provide compensatory education to Student in an amount equal to three hours per day of educational services for every day on which Student's neighborhood schools were open for students during the regular school term within the relevant period of time from February 14, 2015 to May 17, 2017.
2. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parent, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parent. Such services may be provided to Student until Student reaches twenty-one years of age.
3. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
4. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service within a radius of fifty miles from the District administration building.
5. Within fifteen days, the District shall convene a meeting of Student's IEP team. The team shall develop a program of services that shall include the provision of direct, explicit, sequential, multisensory, and research-based interventions for reading, mathematics and writing, to be delivered in an appropriate learning support classroom on a one-to-one or small group basis.

It is **FURTHER ORDERED** that the parties may alter any of the terms of this Order by agreement of the District and Parent.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are hereby denied and dismissed.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

DATED: November 13, 2017