

*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**

**HEARING**

**ODR File Number:** 18992 16 17

**Child's Name:** C. S.

**Date of Birth:** [redacted]

**Dates of Hearing:**

6/13/2017, 8/15/2017 and 10/11/2017

**Parent:**

[redacted]

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**Hearing Officer:** William Culleton Esquire

**Date of Decision:** 11/27/2017

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is enrolled currently in a private school (School). Student lives within the District named in this matter (District), and attended District elementary schools for kindergarten through fifth grade. 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 disability of Other Health Impairment. (S 5.) Parents assert that the District failed to identify or provide a free appropriate public education (FAPE) to Student in earlier grades, thus violating its obligations under both the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504).<sup>2</sup> Parents seek tuition reimbursement from the District for the Student's attendance at the School for the 2016/2017 and subsequent school years. The District asserts that it has offered and provided a FAPE at all relevant times.

In addition to tuition reimbursement, Parents' complaint sought compensatory education for Student's second, third and fourth grade years. Pursuant to a District motion to limit these claims based upon the IDEA's statute of limitations, I limited the claims for compensatory education to those pertaining to District actions or inactions occurring within the two years prior to the filing to the complaint (part of Student's fourth grade year, and Student's fifth grade year at the District).<sup>3</sup> Thus, I will decide claims regarding the District's failure to identify Student from April 3, 2015 to the last day of school in the 2015-2016 school term.

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<sup>1</sup> Student, Parents, the School 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. References to "Parent" in the singular refer to Student's Mother, who participated in many interactions with the District on behalf of herself and Student's Father.

<sup>2</sup> There is no question that Student is otherwise qualified within the meaning of section 504 and that the District receives federal funds.

<sup>3</sup> Parents filed for due process on April 3, 2017. The IDEA's statute of limitations requires a parent to file within two years of knowledge or notice regarding the district action which forms the basis of the parent's complaint. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 620 (3d Cir. 2015)(IDEA statute of limitations bars claims for "all

The hearing was completed in three 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 complied with its “child find duty” and provided and offered a FAPE during most of the relevant period, and failed to offer and provide a FAPE to Student during part of the relevant period. I deny the request for tuition reimbursement and I order the District to provide compensatory education as discussed below.

### **ISSUES**

1. Was the section 504 service agreement offered in March 2015 appropriate?
2. Did the District fail to comply with its “child find” obligation under either the IDEA or section 504 during the relevant period of time from April 3, 2015 to the last day of school in June 2016?
3. During the relevant period of time, did the District offer and provide a FAPE to Student in compliance with the IDEA and section 504?
4. Is the School an appropriate placement for Student?
5. Considering the equities, should the hearing officer order the District to reimburse Parents for tuition at the School?
6. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant period?

### **FINDINGS OF FACT**

#### STUDENT’S DISABILITIES AND HISTORY PRIOR TO THE RELEVANT PERIOD

1. Student has a history of satisfactory achievement in the early years of grade school within the District. Student demonstrated proficient and advanced skills on grade level in most

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but the most recent two years” if complaint not timely filed). I conducted a hearing with regard to the starting date for the two year limitations period (the “knew or should have known”, or “KOSHK” date). I made particularized findings addressing both parental knowledge and parental notice of challenged District actions in a subsequent ruling granting the District’s motion on all but one of Parents’ claims regarding actions occurring more than two years prior to their filing date. The one claim on which I heard evidence was Parents’ contention that a section 504 service agreement offered in March 2015 was inappropriate.

subjects from kindergarten to third grade, and finished third grade with all A's. Student's scores on the Pennsylvania Systems of School Assessment examinations (PSSA) were proficient for reading and mathematics in third grade. (P 2; S 2, 8.)

2. Parents, concerned with Student's mathematics fluency, requested evaluation for special education when Student was in second grade, but the District did not provide an evaluation. The District placed Student in its response to intervention program and provided an intervention regarding mathematics facts. The District reported that Student had responded satisfactorily to the mathematics intervention. (P 1, 2; S 2, 11.)

#### STUDENT'S HISTORY PRIOR TO THE RELEVANT PERIOD – THIRD GRADE

3. In September 2013, when Student was in third grade, Student was diagnosed with [chronic condition]; Student received medical attention and medications from that time forward. The District was notified and produced a [redacted] action plan for Student. (P 4; S 2, 11.)
4. In September 2013, Parent became concerned with Student's ability to focus at home and brought this to the District's attention. (S 1.)
5. Student and Parents did not report any difficulties in school to Student's doctors during medical visits for treatment of [chronic condition], with regard to attention, behavior or mood. Some concern was reported regarding focus. (P 6 p. 2, P 7 p. 2.)
6. Student attained "A" and "B" level grades in third grade in all subjects, finishing the year with grades of "A" in all subjects. (S 8.)

#### STUDENT'S HISTORY PRIOR TO THE RELEVANT PERIOD – FOURTH GRADE TO APRIL 2015

5. On November 5, 2014, when Student was in fourth grade, Parent requested an evaluation for IDEA eligibility, because Student had been struggling with mathematics for some time, and with science more recently. Parent expressed these concerns in a letter to the District's counselor and Director of special education, noting specific concerns. Parent's request was also based upon the request of Student's physician, who had indicated a need to rule out educational disability as a cause of Student's difficulties. Parent made sure that the District received the letter, by re-faxing it when told that they had not received it. (NT 37-38; P 8, 10.)
6. Parent signed a request to evaluate giving consent to an evaluation on November 6, 2014. (P 9.)
7. In January 2015, the District's reading specialist tested Student and Student scored proficient in all areas of reading, including comprehension. Student read independently at grade level and was at the instructional level on fifth grade material. Student's teacher,

however, noted that reading and writing were “somewhat” problematic for Student. (S 2; P 11.)

8. By the second marking period of fourth grade, Student was attaining “B” and “C” level grades in all subjects; Student’s local assessments were supported only by permitting test taking in a separate room. (S 2, 8.)
9. Student was progressing through the curriculum in alignment with peers. Teachers were aware that Student experienced some stress in taking tests, and could benefit from instruction for test taking strategies. (S 8; P 11.)
6. The District conducted an evaluation and provided an initial evaluation report dated February 27, 2015, finding Student ineligible for special education services under the IDEA. The evaluation found that Student experienced moderately limited alertness in the classroom, meeting the IDEA definition of Other Health Impairment, but concluded that Student was not a child with a disability as defined in the IDEA because Student did not need specially designed instruction, in view of Student’s grade-level progress and achievement in the curriculum. (S 2.)
7. The February 2015 evaluation report recommended a section 504 service agreement to assure that Student would be accommodated for the effects of [chronic condition] upon Student’s ability to access and succeed in the curriculum, including the possible effects on Student’s attention, stamina and ability to follow complex directions. (S 2.)
8. The evaluation report conveyed cognitive testing, including cognitive tests batteries from two publishers, as well as an additional five ancillary and three complementary subtests made available by one of the publishers. In addition, the school psychologist administered an instrument to test Student’s learning and memory ability. Student scored in the average range in the great majority of subtests and index scores. Testing indicated no cognitive deficits. Student scored in the average range for quantitative (including mathematical) reasoning. (S 2.)
9. Student scored in the low-average range for free recall of long term memory, understanding directions, incomplete words and decision speed. On the learning and memory instrument, Student scored generally within the average range, with low average subtest scores in verbal learning and verbal learning recall. (S 2.)
10. On a test of phonological processing, Student scored in the average range on all subtests. (S 2.)
11. The school psychologist administered achievement tests from two different publishers. Student scored in the average range or higher on all subtests except mathematics fluency and understanding directions in one publisher’s subtests, in which Student scored “low average”. (S 2.)
12. Student’s performance on a variety of achievement subtests addressing reading ability, including comprehension, Student scored in the average range. (S 2.)

13. Student's performance on a variety of achievement subtests addressing mathematics skills, Student scored in the average range except in fluency, where Student scored in the upper level of the low average range. (S 2.)
14. On achievement subtests addressing writing, Student scored in the average range. (S 2.)
15. On subtests addressing receptive and expressive language, Student scored within the average range, while showing some weakness in following complex directions, possibly due to fatigue. (S 2.)
16. Student's overall academic achievement was in the expected ranges given Student's cognitive functioning in third grade and the first half of fourth grade. (S 2.)
17. Student exhibited some difficulty remembering and performing complex or multiple-step directions without repetition. (S 2.)
18. A behavior inventory administered to a teacher and both Parents revealed no clinically significant areas of concern regarding Student's emotional and behavioral health. Responses did indicate "at risk" concerns in the areas of depression (Father and teacher); attention (all respondents); anxiety (Father and Mother); internalizing (Father and Mother); and adaptability (Father and Mother). (S 2.)
8. In fourth grade, Student performed better in a small group or one-to-one setting within the regular classroom. Student's teacher recommended "direct instruction" for some purposes, small group instruction, breaks, chunking, organizers for writing and testing accommodation by providing a separate testing location. The report recommended a Service agreement pursuant to section 504 to provide scaffolding of directions, preferential seating, modified work load, counseling, and social skills interventions. (S 2.)
9. When Student was in fourth grade, Student's educators did not see Student displaying any emotional issues at school. (NT 42.)
10. Student's educators reported to Parent that Student was beginning at that time to isolate from peers, and they agreed to place Student in a social lunchtime group as an intervention. (NT 42-43.)
11. In the first half of fourth grade, Student made progress that was appropriate to Student's cognitive ability, despite experiencing difficulties due to [chronic condition]. (S 2.)
12. The evaluation report recommended a number of modifications to address Student's memory, including memory for mathematics facts; attention in the classroom; fatigue (including reduced work load and extra time); testing anxiety, including alternate testing sites; frustration and risk for depression; and need for recognition of skills to build self-esteem. It also recommended occupational therapy to address Student's handwriting. (S 2.)

13. On March 10, 2015, the District conveyed to Parents a NOREP refusing to identify Student as a child with a disability under the IDEA. The NOREP stated that Student did not need special education to make meaningful progress at that time. The NOREP indicated that Student would receive a section 504 service plan with accommodations. (NT 44; P 12; S 3.)
14. At the District's invitation, on March 11, 2015, Parent participated in the development of the recommended section 504 service agreement, which included 23 accommodations, including a number of those recommended in the February 2015 evaluation report. Accommodations addressed [redaction] response; mathematics (through use of math tools on assessments); testing accommodation (separate site and use of math tools); attention; complex directions (various modifications to the giving of directions); fatigue in the classroom (but not including reduced work load); the need for counseling for maintenance of self-esteem and avoidance of depression; and social skills. The accommodations also included provision of small group instruction at teacher discretion and supports for organization. The accommodations did not include occupational therapy for handwriting. (NT 45-46, 61-62; P 12; S 3.)

#### RELEVANT PERIOD - THE END OF FOURTH GRADE

15. Student finished fourth grade with marks at the level of "B" and "C". (S 8.)
16. Student's PSSA score for mathematics in spring 2015 was below basic; Student scored basic for English language arts and proficient for science. (S 5, 8.)
17. By August 2014, Student's [redacted] were reduced substantially due to treatment with medication. (P 7.)

#### RELEVANT PERIOD - FIFTH GRADE

18. Student transitioned to a new elementary school for fifth grade due to re-alignment of schools within the District. The new school was designed to be physically more open than the typical school building and consequently presented significant distractions to students. (NT 224-229; S 4, 5 p. 13.)
19. Student's [redacted] in school were reduced in fifth grade to two known occurrences. (NT 232-233; S 8 p. 24.)
20. In benchmark testing at the beginning of the year, Student scored below basic in reading, but was at the top of that range. Student scored below basic in writing. Student's teachers

were concerned about Student's attention and focus, organization and ability to complete assignments independently. (NT 201-207, 211, 248-251; P 13; S 5.)

21. In benchmark testing at the beginning of the school year, Student scored within acceptable levels in mathematics, mathematics fact fluency and spelling. (NT 201-207, 210; P 13; S 5.)
22. In fifth grade, Student was given goals and followed through data collected as part of the District's RTII program. Student received small group instruction in mathematics twice per week, 30 minutes per session. Student received small group Title I reading support four times per week, 30 minutes per session. Student failed to meet RTII goals in mathematics, reading and following directions by October 2015. (S 5.)
23. In the beginning of fifth grade, Student experienced difficulties with recalling information, understanding concepts in science, social interactions and self-esteem. The Student's new counselor intervened and tried to help with these concerns after Parent notified the counselor of them. (S 4; P 13.)
24. By October 7, 2015, Student's grades were substantially below the level expected based upon Student's cognitive ability scores and Student's past performance. Student's grades were at levels of either "C" or below. (NT 230-231; S 5.)
25. By October 7, 2015, Student's teacher and Parent referred Student for an evaluation for special education. The teacher reported that Student was falling behind peers at grade level; struggled with memory, attention, work completion and following directions; and needed special education. (S 5.)
26. By October 30, 2015, Student was performing below grade level in reading fluency and comprehension. Student's benchmark scores were below basic in reading and mathematics. Student was not performing satisfactorily in written expression or writing mechanics. (S 5.)
27. The District approved the referral on November 6, 2015. Parent received and returned a signed permission form by November 18, 2015. (S 5.)
28. The District provided an evaluation report dated November 30, 2015. The report identified Student as a child with the disability of Other Health Impairment pursuant to the IDEA. The evaluation report did not indicate that the District had evaluated Student for Specific Learning Disability. (S 5.)
29. The evaluation report incorporated the recommendations for modifications that had been provided in the February 2015 evaluation report. It added some modifications not mentioned there, to address including direct instruction for mathematics fact fluency; applying concepts; and spelling and mechanics. It added testing accommodations including reading questions aloud and extended time; greater use of visuals and modeling; and word bank for spelling. (S 2, 5.)
30. On December 22, 2015, the District convened an IEP team meeting, and the team produced an individualized education program (IEP) that placed Student in supplemental learning

support. In mathematics, the IEP offered direct, explicit instruction in mathematical computation, including pre-teaching, re-teaching, facilitation of application of mathematics skills, and practice in a special education classroom. The IEP offered reading and writing support in the regular education setting, through Title I reading support four days per week. The IEP did not offer occupational therapy for handwriting. (NT 246, 252-254; S 6, 7.)

31. The IEP offered a goal to address mathematics problem solving and a goal to address reading fluency. (S 6.)
32. The IEP offered modifications to address fatigue; anxiety; self-esteem; organization; following multi-step directions; and written expression and conventions. Modifications also included monthly counseling; testing accommodations including alternative setting, alternative format and word banks; and the accommodation of Student's slow reading fluency through provision of audio books. (S 6.)
33. The December IEP addressed most of Student's educational needs as identified in the February 2015 evaluation report, as well as benchmark scores and teacher concerns in the beginning of fifth grade, by providing goals or modifications in the IEP. It did not provide added specially designed instruction or goals to address reading comprehension or Student's reported shyness regarding socializing with peers. The IEP provided a goal for reading fluency and an accommodation for Student's slow reading fluency in classes other than reading classes. No goal was provided in written expression, but the IEP provided specially designed instruction for written expression through the use of graphic organizers and support for editing. (S 6.)
34. Parent signed the Notice of Recommended Educational Placement (NOREP) on January 1, 2016, and the District received it on January 8, 2016. (S 6.)
35. By the end of March 2016, Student continued to struggle to meet grade level classroom expectations in reading and writing. Student was unable to complete some assignments independently. Student's second benchmark testing was at the level of basic. Student continued to struggle with written expression and conventions. (S 7.)
36. On March 31, 2016, the District convened an IEP team meeting, which revised Student's IEP. The revision continued Student in supplemental learning support, but added goals and modifications to address reading comprehension and written expression. Measurable goals were added to address written expression and reading fluency. Modifications were added to address these areas, including direct, explicit and systematic instruction in a learning support classroom for vocabulary, reading comprehension and written expression, for about thirty to forty-five minutes per day. In addition, Student continued to receive thirty minutes per day of Title I reading support four days per week to address reading comprehension. (NT 217-218, 255-257; S 7.)
37. By April 2016, Student had made some progress on goals for mathematics, but insignificant progress in reading fluency. (S 7.)
38. Parent signed the NOREP, approving the March 31, 2016 revisions on April 6, 2016. (S 7.)

39. Student's IEP team met on May 4, 2016 to plan Student's transition to middle school for the following year; it revised the IEP to offer services for sixth grade, including direct, explicit and systematic or sequential instruction in a learning support classroom for mathematics, vocabulary, reading comprehension, and written expression, for about one period per day. The IEP revision also provided for learning support for study skills and organization. (NT 220-221, 261-264; S 7.)
40. The District offered services to help students transition to middle school, including a summer program. (NT 269-270; S 7.)
41. The District sent a NOREP reflecting these revisions on May 13, 2016, but Parents did not return the NOREP. (S 7.)
42. Student finished fifth grade with marks at the level of "B" and "C". Student made progress in addressing previous gaps in mathematics facts and operations, but continued to exhibit difficulty with mathematics application. Student made some progress in reading comprehension. (NT 230-231, 239-244, 248-249, 257; S 8.)
43. Student's PSSA scores were basic in both mathematics and English language arts. (P 18.)

#### PARENTS' PLACEMENT OF STUDENT IN THE SCHOOL

44. On June 8, 2016, Student's fifth grade teacher filled out a questionnaire as part of an application process for the School. (S 11.)
45. On August 18, 2016, Parents sent a letter to the principal of the middle school in which Student was to be placed for sixth grade. The letter gave notice of Parents' intent to place Student unilaterally in the School for the following school year, and asked the District to provide financial support and transportation for this placement. On August 22, 2016, the District refused Parents' request for tuition and transportation and offered to convene an IEP team meeting to consider any revisions to placement or IEP that Parents should suggest. (S 9.)

### **DISCUSSION AND 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 Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipoise”, the Parents 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

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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 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 all of the witnesses were credible. With all, I noted that their manner of responding to questions, even from the adverse party, were characterized by care as to knowledge and memory, willingness to clarify and add information, and an absence of defensiveness. I also noted that the witnesses' testimony was not contradicted in any significant way by the documents of record.

Mindful of Parent's expertise [redacted], I accord Parent's concerns about Student's functioning and needs considerable weight, because of Parent's likely ability to detect concerns and issues. I also found that Parent's testimony was credible for the reasons set forth above. Nevertheless, I must accord reduced weight to Parent's opinions as to the appropriateness of the District's evaluations, section 504 plan and IEPs, because Parent participated in the preparation of these District actions. Parent was well aware of Parent's right to contest any of these actions through further meetings, mediation or due process, yet did not challenge them at the time at which Parent received them. On the contrary, Parent indicated agreement or consent to all of them immediately upon their provision to Parent, with the exception of the May 2016 IEP revision after the middle school transition meeting in May 2016.

I also accorded less weight to the opinion testimony of the school psychologist, because of that expert's limited knowledge of Student.

#### “CHILD FIND” UNDER THE IDEA AND SECTION 504

Parents assert that the District failed to perform its “child find” obligations from April 3, 2015, when Student was in fourth grade, to at least November 2015, when the District identified

Student under the IDEA. Applying the IDEA and section 504 standards for “child find”, I conclude that the District did not violate its “child find” obligations.

Under the IDEA “child find” requirement, 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c), a local education agency has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability." Ridley Sch. Dist. v. M.R., 680 F.3d 260, 271 (3d Cir. 2012)(citing P.P. v. West Chester Area School District, 585 F.3d 727, 738 (3d Cir. 2009)); Perrin v. Warrior Run Sch. Dist., 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015).

Local educational agencies are required to fulfill their child find obligation within a reasonable time after notice of behavior that is likely to indicate a disability. Ridley Sch. Dist. v. M.R., 680 F.3d above at 271-272. The courts will assess the reasonableness of an agency's response to such information on a case-by-case basis, in light of the information and resources possessed by the agency at a given point of time. Ibid. Even if parents do not cooperate fully with district efforts to identify a student (or do not request an evaluation), it is still the responsibility of the school to identify those children who are in need of IDEA protections. Taylor v. Altoona Area Sch. Dist., 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010).

Failure to conduct a sufficiently comprehensive evaluation is a violation of the District’s “child find” obligations. D.K. v. Abington Sch. Dist., 696 F.3d above at 250 (a poorly designed and ineffective evaluation does not satisfy “child find” obligations). An evaluation must be sufficiently comprehensive to address all of the child’s suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6).

A hearing officer can remediate a district's failure to respond to such information reasonably. D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2009)(if a district should have known of

an educational deficiency through compliance with its statutory duties, student may be entitled to compensatory education) (citing W.B. v. Matula, 67 F.3d 584, 501 (3d Cir. 1995)).

Section 504 imposes a “child find” obligation on school districts analogous to that which they shoulder under the IDEA. 34 C.F.R. §104.32(a). Districts are obligated to “[u]ndertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education ... .” Ibid. This includes the obligation to evaluate children within their jurisdiction appropriately to determine whether or not they are qualified handicapped persons. 34 C.F.R. §104.35(a). The District must evaluate “any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” Ibid. I apply these standards to the relevant period, which begins on April 3, 2015, near the end of Student’s fourth grade year.

At the end of Student’s fourth grade year, Student’s grades dropped somewhat. This must be taken in context. In third grade, despite experiencing a serious disability, Student demonstrated the ability to perform in school at a high level. While Student was exhibiting some weaknesses in following complex directions; recalling mathematics facts; utilizing comprehension skills in reading; and written organization, Student was functioning on grade level in these and all areas, and Student’s grades were commensurate with Student’s previously measured cognitive ability. Student performed well in the classroom, albeit that teachers needed to push Student to participate in larger group settings. Student revealed no emotional dysfunction in school, and Student, though somewhat reticent socially, was able to function socially at grade level. Taken in context, the reduced grades at the end of Student’s fourth grade year do not constitute a “red flag” compelling educators to immediately revisit an evaluation that had been delivered less than a year before – an

evaluation that on its face appeared to be thorough, and even extraordinarily searching in its use of multiple standardized tests and strategies to evaluate Student's cognitive ability.

In the beginning of fifth grade at a different school, it was not until early October that Student's new teachers noticed that Student was struggling with many grade level academic skills. I find nothing inappropriate in this; under the circumstances, it is reasonable to accord Student's teachers some time to attentively observe Student's performance and administer some benchmark and curriculum based assessments before deciding that more robust intervention was needed.

Within four to six weeks, Student's teachers intervened appropriately, referring Student for another evaluation to determine whether or not special education was now needed in view of the new data accumulated over the first weeks of school. Within sixty days of the teachers' initial referral, the District had issued another evaluation report, reversing its previous finding against eligibility, and identifying Student with Other Health Impairment. Within thirty days of the evaluation report date, the District issued an initial IEP to address Student's needs through special education.

In sum, I conclude that the District complied with its child find duties during the relevant period. It did not ignore any red flags. It responded to accumulating evidence that its previous intervention was not appropriate, and did so within a reasonable time. Its identification of Student under the IDEA was not unreasonably delayed in the circumstances.

#### TUITION REIMBURSEMENT

Although a parent is always free to decide upon the program and placement that he or she believes will best meet a child's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to

determine whether or not a school district is obligated to fund such a private placement<sup>6</sup>. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district’s program legally adequate? Second, is the parents’ proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007). I employ this analysis to address Parents’ request for tuition reimbursement in this matter.

#### FIRST PART OF THE BURLINGTON-CARTER TEST: FAILURE TO OFFER OR PROVIDE A FAPE UNDER THE IDEA AND SECTION 504

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 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. Andrew 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

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<sup>6</sup> The weight of judicial authority in this Circuit holds that tuition reimbursement is available under section 504, and that the Burlington-Carter tests are equally applicable to section 504 claims for tuition reimbursement. See, 34 C.F.R. §103.33(c)(4); Lauren G. v. West Chester Area Sch. Dist., 906 F.Supp.2d 375, 390-391(E.D. Pa. 2012). Therefore, I so conclude.

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 Andrew 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. Andrew 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. Andrew 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).

Under section 504, federal regulations define the District's obligation to provide a FAPE differently than under the IDEA. Districts must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of [persons with disabilities] as adequately as the needs of [non-disabled] persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of section 504. 34 C.F.R. §104.33(b)(1).

Applying these standards to the above findings and the record as a whole during the relevant period, I conclude that, with the exception of a period of time described below, the District has provided Student with an educational program that was appropriate in view of Student's circumstances, and that could be expected to confer meaningful educational benefit upon Student, in view of Student's unique learning style and needs. I conclude that the District appropriately understood Student's needs during the relevant period. It intervened to address these needs appropriately, with the exception discussed below. While the record does not show dramatic progress, I conclude that the District's interventions were appropriate for the most part, based upon what the District knew at the time that the services were provided or offered.

My conclusions are based upon the principle that the District's actions must be evaluated for appropriateness based upon what it knew at the time it took those actions, as discussed above. Carlisle Area School v. Scott P., 62 F.3d above at 534. The analysis is prospective, and the success or failure of the District's actions, while it may raise relevant inferences, is not determinative. T.M

v. Quakertown Cmty. Sch. Dist., 251 F. Supp. 3d 792, 812 (E.D. Pa. 2017) The District is not a guarantor of success for any child.

As of the beginning of the relevant period in April 2015, I conclude, contrary to Parents' argument, that the District had a comprehensive knowledge of Student's needs based upon the February 2015 evaluation report. That report depicted a child whose cognitive ability was well within the average range overall, and deviated below that range only slightly in a few areas of weakness. Yet, to Student's great credit, Student was a high achiever in the early grades, earning very high marks that exceeded what might be reasonably expected for a child with average abilities.

The report also noted that Student was diagnosed with [chronic condition], and experienced multiple [redacted]. It noted that this disability would be expected to affect Student's attention, stamina and ability to follow complex or multi-step directions. Following directions was linked also to Student's weakness in recalling from long-term memory, a weakness that also affected Student's fluency in calculation using already-learned mathematics facts. I find it especially telling that, at that time, Student's history - after being diagnosed and before Student's [redacted] were brought under better but not perfect control with medications - was one of high achievement in school in third grade. Again, to Student's great credit, Student was able to compensate when necessary for the debilitating effects of the [redacted] disorder and continue above average performance in school in third grade.

In fourth grade, as the demands of the curriculum became more difficult, Student's achievement was lower, but it remained within the average range - at grade level and with marks at the level of "B" and "C" - expected for a child with average intelligence. Standardized testing indicated average achievement in reading comprehension, mathematics (except fluency) and

writing. Standard behavior inventories elicited no clinically significant emotional, behavioral or social problems, nor did teachers report observing problems in these domains, except for a certain reticence or withdrawal socially, which teachers were addressing through regular education interventions. There is preponderant evidence that Student's [redacted] were occurring less frequently as reported by Parents. The medication regime was becoming effective. Its side effects became less disruptive to Student.

Taking into account parental concerns, the report recommended a number of interventions to address Student's cognitive weaknesses with complex directions and mathematics fluency, as well as measures to help improve Student's self-esteem and reduce anxieties, especially in testing. The District issued a section 504 plan with 23 accommodations to address Student's needs. I have reviewed both the recommendations in the evaluation report and the subsequent section 504 service agreement, and I conclude that the service agreement addresses Student's educational needs appropriately and comprehensively with modifications in the regular education setting. Contrary to Parents' argument, the modifications in the service agreement do not fail in any material way to address the needs identified in the February 2015 evaluation report. Based upon what the District knew at the time of the service agreement, the District did not fail to deliver a FAPE within the meaning of section 504.

One area mentioned in the February 2015 report was handwriting; the report recommended occupational therapy to address this. The service agreement did not address this. I conclude that the record is devoid of evidence that this omission was inappropriate. A district is free to choose the interventions that it will employ as long as they deliver a FAPE; there is no evidence that Parents at any time objected to the omission of occupational therapy, and the evidence conversely

implies that Parent approved this omission, because Parent consented to the service agreement. In short, there is no evidence that this omission constituted a denial of FAPE.

Thus, during the relevant period that encompassed the end of fourth grade after April 2015, the record is preponderant that the District was providing Student with appropriate services. Although Student's grades declined somewhat at the end of the year, Student still finished the year with average grades ("B" and "C" level) for a child of average cognitive ability. Thus, during this period there was no red flag indicating that the District must reconsider its section 504 interventions, or revisit its evaluation denying the need for special education. I find no basis to conclude that the District's services were inappropriate based upon what it knew at this point in time.

At the beginning of fifth grade, teachers became concerned within four to six weeks. Benchmark testing in reading and writing showed Student at lower than expected levels of achievement, and Student was demonstrating difficulties with attention, focus and independent completion of complex directions. The District responded within a reasonable time to this information, which previously had not been available to it. By early November, Student was identified under the IDEA, and by early December, an IEP was in place to provide additional modifications and specially designed instruction to address Student's needs. Thus, the District increased its intervention in fewer than ninety days. I conclude that this was a reasonable period for detection and rectification of its interventions under the circumstances of this matter. Contrary to the Parents' argument, the District was not reasonably on notice in the latter part of Student's fourth grade term that Student would perform so far below benchmark standards at the beginning of fifth grade, given Student's past performance in fourth grade.

Parents argue that the November 2015 evaluation was deficient because it did not include any new testing. The evidence is preponderant to the contrary. The previous comprehensive evaluation had determined that Student manifested a disability. None of the prior testing was outdated less than a year later. The record discloses no reason to conduct additional testing in November 2015. As the only issue was the disability's effect on Student's education and the need for specially designed instruction. The reports of Student's fifth grade teachers and Parents, as well as the early benchmark and other assessments in fifth grade, were an appropriate basis for the District's November report identifying Student under the IDEA.

As with the section 504 service agreement in fourth grade, I have reviewed the needs outlined in the February 2015 and November 2015 evaluation reports, as well as those indicated by Parent and Student's fifth grade teachers. I conclude that the December IEP addresses all of the Student's needs, but fails to address Student's needs in the areas of reading comprehension and written expression appropriately.

The IEP addressed Student's known needs. It provided two goals addressing fluency in recalling mathematics facts and word reading. It provided direct instruction in mathematics computation and problem solving. It continued Title I intervention in reading. It provided modifications and accommodations addressing Student's attention, focus, fatigue and anxiety; difficulties with multi-step directions; recall from long term memory in reading, spelling and other subjects; testing speed and focus through separate location and extra time in testing; self-esteem; at-risk status for depression; fluency with mathematics facts; reading fluency; organization for written expression; organization of materials; and recall difficulties and reduced speed in assessments. Regarding most of these areas of need, I conclude that the December 2015 IEP was appropriate.

Nevertheless, the December 2015 IEP did not address Student's needs with regard to reading appropriately. The District was on notice by December 2015 that Student was not achieving on grade level in this area of need. Yet, the December 2015 IEP provided no goal or specially designed instruction for reading comprehension. It provided a goal for reading fluency, which might have indirectly addressed reading comprehension, but without a goal and progress monitoring pursuant to a goal, there was no precise way to monitor Student's progress closely in the area of reading comprehension. The December IEP continued the Title I reading support services, but these are not special education interventions, and Student had been receiving them for months, while declining at the beginning of fifth grade to below grade-level in reading. Thus, the District was on notice that the Title I intervention was not sufficient to address this need. I conclude on this record that Student needed close monitoring and specially designed instruction in reading comprehension by December 2015. It was not appropriate to simply continue Title I support without additional special education intervention and an IEP goal.

Similarly, the December 2015 IEP failed to provide a goal for written expression, despite the District's knowledge that Student was falling behind in written expression. Although the IEP did provide supports for organization of writing and chunking of multiple-step directions in writing, without a goal and progress monitoring there was no precise way to monitor Student's progress closely in the area of written expression. As the District was on notice that special education was needed in this area of need, I conclude on this record that modifications without a goal were inappropriate.

The IDEA requires goals in all areas of educational need. 34 C.F.R. §300.320(a)(2)(B)(goals must meet "each of the child's other educational needs"). Therefore, I find that the District failed to provide a FAPE to Student in the December 2015 IEP in the areas of reading comprehension

and written expression. This conclusion is buttressed by the fact that Student continued to struggle in these areas from December 2015 to the end of March 2016.

I do not find the December 2015 IEP inappropriate for failing to provide a goal with regard to Student's social needs of shyness or reticence in making new friends in the first half of fifth grade at a new school. These needs did not rise to the level of a deficit in social skills, as demonstrated by Student's generally appropriate social interactions in the classroom at all times, reported by Student's teachers. Teachers did take actions in the regular education context to ameliorate these concerns. Parents have not shown by a preponderance of the evidence that these efforts were insufficient or inappropriate.

The IEP was revised in March 2016 to add direct instruction in reading comprehension strategies, vocabulary and written expression. The revision also added goals for these areas of need. I conclude that the IEP as revised in March 2016 was appropriate, as it cured the deficiencies in the December 2015 IEP.

Parents argue that the District's offered program as of May 2016 (which included all of the services in the March 2016 revision, reconfigured to be applied in middle school), was inappropriate because it placed Student in supplemental learning support in the learning support classroom for reading, writing and mathematics, rather than providing for "push in" support in the regular classroom for these areas of need. The record does not support this argument by a preponderance of the evidence. Parent's opinion on this issue must be weighed against that of the District's educators as evidenced by its teachers' recommendations, evaluation reports and IEPs, and I find that the District's evidence on this point is preponderant, for all of the reasons set forth above.

Parents also complain that the middle school learning support classes would have used an alternate curriculum for Student, despite Student's ability to handle the District's regular education curriculum. Again, I must weigh the evidence, and I find no preponderant evidence that the District's placement offer was inappropriate.

#### SECTION 504 VIOLATION

I conclude that the District, by providing a FAPE as defined in the IDEA (with the exception of the period December 22, 2015 to March 31, 2016), also provided 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). On this record, compliance with the IDEA is preponderant evidence that the District also complied with section 504. 34 C.F.R. §104.33(b)(2).

Conversely, the District's failure to provide a FAPE from December 22, 2015 to March 31, 2016 is preponderant evidence that it failed to provide FAPE as defined in section 504. Therefore, I find that it violated section 504 during that period of time.

#### 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, during the period specified above, the District failed to provide appropriate services with regard to reading comprehension and written expression. The record also shows preponderantly that this deficiency was cured subsequently by the provision of direct, explicit and systematic instruction in reading comprehension and written expression for thirty to forty-five minutes per school day, with attendant IEP goals. Based upon this evidence, I conclude that an appropriate equitable order is to require the District to provide forty-five minutes of such instruction for every school day during the period of time specified above.

#### TUITION REIMBURSEMENT

I conclude that the District offered an appropriate IEP to Student as of May 2016. Therefore, Parents have failed to prove entitlement to tuition reimbursement under the IDEA, pursuant to the first level test of the Burlington-Carter analysis. Based upon this determination, it is unnecessary to reach the remaining two Burlington-Carter tests (appropriateness of the private placement and equitable considerations). Consequently, I will not order the District to provide tuition reimbursement as requested by Parents.

#### **CONCLUSION**

I conclude that the District offered and provided a FAPE to Student during the relevant period, with the exception of the period between December 2015 and March 2016 specified above. Therefore, I deny the request for tuition reimbursement, and order the District to provide compensatory education to Student for part of the relevant period as discussed above.

## 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 forty-five minutes per day of educational services for every day on which Student's neighborhood school was open for students from December 22, 2015 to March 31, 2016.
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.

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

It is **FURTHER ORDERED** that all other relief requested by Parents, including tuition reimbursement, transportation expenses and compensatory education for periods of time not specified in paragraph 1 above, is hereby **DENIED and DISMISSED**.

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 27, 2017