

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: 19819 1718

Child's Name: W. M. **Date of Birth:** [redacted]

Dates of Hearing:

12/8/2017, 2/9/2018, 2/13/2018, 2/16/2018, 2/22/2018, 4/25/2018 and 5/21/18

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[redacted]

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Hearing Officer: William Culleton Esq.

Date of Decision: 5/28/2018

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is enrolled currently in a private school (School). Student lives within the District named in this matter (District), and attended District elementary schools from kindergarten through disenrollment during ninth 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 disabilities of Specific Learning Disability and Other Health Impairment.

Parents placed Student in the private School for the greater part of ninth grade and all of tenth grade. Parents continued Student in the School unilaterally for eleventh grade, the current school year. Parents seek tuition reimbursement for eleventh grade, and reimbursement for the cost of a private evaluation that they obtained. They assert that the District failed to offer Student a free appropriate public education (FAPE) for eleventh grade under the IDEA, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504),² and the Americans With Disabilities Act, 42 U.S.C. §12101 et seq. (ADA). In the alternative, Parents seek compensatory education for Student's eleventh grade year.

The District asserts that it has offered a FAPE for Student's eleventh grade year; that the School is an inappropriate placement; and that an order for tuition reimbursement or compensatory education would be inequitable. It also argues that there is no basis to order reimbursement of the Parents' private evaluation.

¹ 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.

² The parties stipulate that Student is a handicapped person and otherwise qualified within the meaning of section 504, and that the District receives federal funds. (NT 60.)

The hearing was completed in seven sessions, including two short sessions by video conference. 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 a FAPE for Student's eleventh grade year, and I order reimbursement of tuition and fees. I dismiss Parents' remaining claims.

ISSUES

1. Did the District offer a FAPE to Student for eleventh grade (2017-2018 school year) in compliance with the IDEA, section 504 and the ADA³?
2. Is the School an appropriate placement for Student?
3. Considering the equities, should the hearing officer order the District to reimburse Parents for tuition and fees incurred for Student's eleventh grade year at the School?
4. In the alternative, should the hearing officer order the District to provide Student with compensatory education on account of any services not provided in Student's eleventh grade year?
5. Should the hearing officer order the District to reimburse Parents for the cost of a private evaluation obtained by Parents and dated September 2017?

FINDINGS OF FACT

STUDENT'S HISTORY DISABILITIES AND EDUCATIONAL NEEDS KNOWN TO THE DISTRICT AT THE START OF THE RELEVANT PERIOD

1. Student was enrolled in the District from kindergarten through eighth grade. (P 2.)
2. By history and by recent assessment, Student has average to above average cognitive ability, high motivation and good social skills. (P 7.)

³ I assert jurisdiction over the ADA claims and decide them here only insofar as they are "derivative" claims that assert issues and requests for relief that are identical with the issues and relief requests advanced pursuant to the IDEA. 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011). To the extent that Parents assert claims based upon the ADA that exceed the "derivative" scope of jurisdiction described above, their claims are expressly denied and dismissed hereby for lack of jurisdiction. I exercise jurisdiction over section 504 claims pursuant to the Special Education Dispute Resolution Manual and Chapter 15 of the Pennsylvania Code, 22 Pa. Code §15.2 et seq. Therefore, the analysis in this decision will refer only to the IDEA and section 504.

3. Student has a history of medical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) when in second grade, and additional diagnoses of Tourette's syndrome, Vocal Tic Disorder, Generalized Anxiety Disorder and Central Auditory Processing Disorder. Student's history also includes some visual deficits. (P 2, 7.)
4. Student has a history of exhibiting distracting behavior in the classroom such as talking to peers and leaving Student's seat. (P 2.)
5. When Student was in fifth grade, Student was determined to be a child with a disability and was given a section 504 service agreement. (P 2.)
6. When Student was in seventh grade, Parents provided to the District a private vision evaluation that found significant visual deficits that could affect Student's ability to read with accuracy, fluency and comprehension; recognize identical words in text; sustain visual attention at near point as required in reading and writing; take notes from a board; spell consistently; discriminate depth at near point; shift rapidly from far to near points of focus as required in a classroom; and discriminate the proper orientation of letters, such as "b" and "d". (P 7.)
7. The vision evaluation report recommended a course of vision therapy and recommended classroom accommodations to support Student's vision. (P 7.)
8. When Student was in seventh grade, the local Intermediate Unit provided a Functional Vision Evaluation that found visual problems but recommended against vision support services and in favor of classroom accommodations to include accommodated lighting and preferential seating. (P 7 p. 5.)
9. When Student was in seventh grade, Parents provided to the District a private central auditory processing evaluation that found deficits in auditory integration that could affect Student's sound-symbol identification; sight word reading; word attack skills; reading fluency; spelling; writing; and processing or screening out sounds coming from different directions. It also disclosed a deficit in auditory organization that can affect attention, organization, planning sequences, recalling words in writing, and responding to instructions given orally. (P 7, 16.)
10. The evaluator recommended classroom accommodations including preferential seating, an FM system to block out environmental noises, pre-teaching of vocabulary and supplemental information to accompany verbal input. The evaluator noted that Student's attention and organization difficulties can impact the ability to process auditory information, requiring modifications or accommodations for attention difficulties in the classroom. (P 7.)
11. When Student was in seventh grade the District conducted an assessment for assistive technology and trialed a number of high-tech assistive technology devices. (P 7.)
12. In March of Student's seventh grade year, the District provided Parents with a re-evaluation report which identified Student under the IDEA as a child with a disability in need of special education, with a classification of Other Health Impairment due to ADHD. (P 7.)

13. In April of Student's seventh grade year, the District provided Student with an Individualized Education Program (IEP) that placed Student in itinerant learning support, with one period per day in a learning support environment for assistance with organization and academics. The IEP provided goals addressing mathematics concepts and application, organization, returning to task after movement breaks, and comprehending/using teacher-made class notes. The IEP provided for testing accommodations; mathematics remediation; monthly conferencing with learning support teacher; assistive technology; and modifications addressing attention, organization, sensory needs and understanding directions in class. (P 19.)
14. In September of Student's eighth grade year, the District revised Student's IEP by revising the mathematics goal. (P 20.)
15. When Student was in eighth grade, Parents obtained a private psychoeducational evaluation, with testing in May and June. Parents provided the evaluation report to the District at some time after they received it. (P 5, 7.)
16. The private report recommended classification with Other Health Impairment; Specific Learning Disability in reading fluency, written expression, mathematics calculation and oral discourse comprehension; and Visual Impairment. The report noted Student's problems with visual tracking and forming sound-symbol relationships. It found academic deficits in oral discourse comprehension, phonetic decoding of unknown words, reading fluency, mathematics calculation, mathematics fact recall fluency, sentence composition and writing conventions, including spelling and punctuation. (P 5.)
17. The report found that, on age-based standardized testing, Student scored within the average to above average ranges in cognitive ability and academic achievement, with the exception of mathematics fluency, addition fluency, and subtraction fluency. (P 5.)
18. The report concluded that Student's performance in the classroom was significantly below what would be expected based upon Student's cognitive potential, and it also was significantly below what would be expected with Student's skills as measured by Student's average range standardized achievement scores. (P 5.)
19. The private evaluator assessed reading fluency through a more particular testing instrument than the standardized age-based test. The report noted that Student struggled with the physical mechanics of reading, leading to slow and fatiguing reading for schoolwork, which could result in eye strain, physical discomfort and loss of attention. It also noted deficits in the perception of symbol directionality, decoding, and reading fluency. (P 5 pp. 10 n.4, 12-14, 16-17.)
20. The report indicated significant underachievement in oral discourse comprehension, sentence composition, writing conventions, spelling speed and visual-motor integration (the process of integrating visual perceptions and fine motor functions). It reported that Student was displaying increasing difficulty in writing with both speed and accuracy. (P 5 pp. 18-22.)
21. The report found that Student was displaying increasing anxiety and fatigue with regard to schoolwork. (P 5)

22. The report found that Student displayed severe deficits in mathematics concepts and applications, mathematics calculation and fluency. (P 5 p. 21-22.)
23. The report recommended placement in small, structured classes; direct, structured, sequential instruction in mathematics; and learning support, specially designed instruction and accommodations for courses demanding difficult reading and writing skills. It also recommended use of assistive technology. It recommended modification of curriculum, methods of presenting material and methods of delivering instruction including repetition, redundancy and chunking of longer assignments. (P 5, P 5 pp. 30-35.)
24. Student's PSSA scores in eighth grade were Basic in English Language Arts and Below Basic in mathematics and science. (P 7.)
25. Parents withdrew Student from the District on October 30, 2015 and placed Student at the School for the remainder of ninth grade and for tenth grade.⁴ (NT 59; P 2.)

TENTH GRADE RE-EVALUATION

26. In March 2017, when Student was in tenth grade at the School, the District's school psychologist delivered a re-evaluation to Parents. (P 7.)
27. The 2017 re-evaluation included a 37 minute observation of Student in one class at the School; this was performed by the school psychologist. (P 7.)
28. The March 2017 re-evaluation report found that standardized test scores for overall reading, mathematics, writing conventions and written expression indicated that Student's academic performance was in the average range, and that Student should not be classified with Specific Learning Disability. (P 7.)
29. The March 2017 re-evaluation report found that Student's performance on certain cognitive sub-tests indicated weaknesses with regard to numerical operations, and mathematics fluency. (P 7.)
30. The March 2017 re-evaluation report found that Student's score in a test of reading fluency and accuracy was in the low average range, and Student's score in oral reading fluency was discrepant by one standard deviation from Student's cognitive scores. (NT 604-605; P 7.)
31. The March 2017 re-evaluation report classified Student with Other Health Impairment due to significant difficulties with attention and organization. It recommended accommodations and modifications to address attention and organization, including modifying assessments by highlighting important areas in order to encourage checking and completing work; encouraging use of a ruler in reading to support reading fluency; use of a computer for writing to encourage keyboard skills and use of spell-check; two minute

⁴ The parties introduced evidence of a settlement agreement pertaining to these two years at the School. I decline to interpret this agreement or draw any inferences with regard to it. See J.K. v. Council Rock Sch. Dist., 833 F. Supp. 2d 436 (E.D. Pa. 2011).

warnings when classes are ending to support Student's "shift" weakness; remedial instruction in mathematics; and withdrawal of some support for organization in classes to encourage greater independence. (P 7.)

32. The March 2017 re-evaluation report summarized the reports of four of Student's teachers at the School. (P 7.)
33. All teachers indicated that Student needed special education services to address deficits in writing, note taking, study skills, attention, organization and self-monitoring. That Student needed special education services to address reading comprehension and vocabulary, and understanding oral communications or directions, was indicated by three of the four teachers. That Student needed special education services to address writing conventions, mathematics, understanding language, and self-control was also mentioned by one or more teachers. (P 7.)
34. The March 2017 re-evaluation report indicated that Student's four teachers at the School unanimously recommended that Student needed small class size, supports for note-taking, assistive technology and modified assessments. Teachers also indicated needs regarding prompting, prompt dependence, chunking of longer assignments and multisensory instruction and directions. (P 7 pp. 16-19.)
35. The March 2017 re-evaluation report section on recommendations referenced the accommodations provided at the School generally, but did not indicate explicitly a need for special education to address writing, note taking, reading comprehension, vocabulary, understanding oral instruction and directions, or learning writing conventions. (P 7.)
36. The March 2017 re-evaluation report did not indicate explicitly a need for small class sizes, except for remedial mathematics support; specially designed instruction methods to address Student's unique needs for prompting and cues due to attention issues; chunking of longer assignments; and multisensory delivery of oral instruction or directions. (P 7.)
37. The March 2017 re-evaluation report did not assess Student's post-secondary transitional preferences or needs, except for academic, behavioral and social functioning in general. The evaluator did interview Student about Student's post-secondary goals, but the District performs formal assessments through either the teacher or the counseling department. (NT 636-637; P 7.)
38. It is reasonable to anticipate that Student would have worries if returned to the District's high school. (NT 699-700.)
39. For eleventh grade, Student needed special education to address Student's reading deficits, including deficits in reading fluency and its possible negative effects upon comprehension. Student needed modified and accommodated classroom instruction delivery to contextualize and chunk reading assignments. In addition the Student needed a goal and specially designed instruction to improve Student's reading fluency. (NT 856-872; P 2 pp. 2-3, P 4 p. 12, P 5, P 7, P 8 pp. 7-8, P 16.)

40. For eleventh grade, Student needed special education to address Student's deficits in written expression, including deficits in fluency and organization of long written assignments. Student needed measureable goals and modified delivery of instruction to support grade-level writing assignments. (NT 872-889; P 2 pp. 4-5, P 4 p. 14, P 5, P 7, P 8 pp. 7-8, 16, P 59.)
41. For eleventh grade, Student needed special education to address Student's deficits in mathematics, including goals, placement in a small special education classroom setting with a single curriculum for all mathematics instruction, and direct, structured, multisensory instruction. (NT 889-901, 1024-1026, 1078-1079; P 2 pp. 5-7 and 10, P 4, P 5, P 7, P 8 pp. 7-8, P 16, P 59.)
42. For eleventh grade, Student needed special education and accommodations to address Student's attention deficit disorder and deficits in executive functions. (P 5, P 7, P 8 pp. 7-8, P 16.)
43. For eleventh grade, Student needed special education and accommodations to address Student's deficits in visual tracking, including explicit instruction and accommodations for note-taking. (P 5, P 7, P 8 pp. 7-8, P 16.)
44. The District did not convene a multidisciplinary team meeting with Parent to discuss the results of the re-evaluation. The school psychologist offered to discuss the re-evaluation report with Parent by telephone, but the offered discussion did not occur. (NT 375-385, 583-586; P 7.)

ELEVENTH GRADE OFFER OF FAPE – INITIAL APRIL 2017 DRAFT IEP

45. The District scheduled an IEP team meeting for April 28, 2017 and provided a draft IEP to Parents at the meeting. (P 8.)
46. The District's school psychologist did not attend the April 28, 2017 IEP team meeting due to a death in the family; the psychologist offered to discuss the re-evaluation with Parent by telephone. No other school psychologist attended the meeting. Because of this, the District's re-evaluation report was not discussed at the IEP team meeting. Other than the school psychologist, no other members of the IEP team had observed Student at the School. (NT 139-141; 585, 638-639, 695; P 7.)
47. There was no regular education teacher at the April 2017 IEP team meeting, and no regular education teacher provided Parent with written input. (NT 375-381; P 8, 33; S 6.)
48. The April 2017 draft IEP offered services based entirely upon the 2017 re-evaluation and its standardized testing scores. The present levels of academic functioning made no reference to curriculum-based measures. It did contain detailed reports from Student's teachers at the School, and a summary of the Student's grades, which were passing. (P 8)
49. The April 2017 draft IEP did not identify educational needs in reading decoding or fluency, reading comprehension, vocabulary, writing fluency, writing conventions, sentence

composition, ability to visually discriminate reversed symbols, or spelling because the District's standardized age-normed tests elicited average range scores in reading and written expression. (P 8.) .)

50. The April 2017 draft IEP identified Student's educational needs as improvement in organizational and study skills; work completion and focus; mathematics; and self-monitoring skills. It identified both mathematics fluency and mathematics facts as needs. (P 8.)
51. The April 28, 2017 draft IEP offered to place Student in itinerant learning support in Student's neighborhood high school. (P 8.)
52. The April 2017 draft IEP offered to place Student in general education classes for core academic subjects and specials, except for mathematics, for which Student would receive remedial mathematics instruction in a special education classroom during three class periods per cycle, to strengthen skills in fluency and computation. Student would be placed in general education classes for mathematics for three class periods per cycle. (P 8.)
53. The April 2017 draft IEP offered a separate academic support class in the special education classroom three times per cycle to improve organizational and self-monitoring skills, including explicit teaching of organizational techniques. (P 8.)
54. The April 2017 draft IEP provided weekly check-ins with an academic support teacher in a "home access center". The purpose of the check-ins was to monitor grades and completion of assignments. (P 8.)
55. The April 2017 draft IEP offered two goals. One was for mathematics computation in the eighth grade curriculum; the goal had no baseline but stated a numerical target with intent to provide a baseline upon Student's entry into the District. The second goal was measurable with a baseline of zero and addressed self-organization, self-monitoring and assignment completion. The second goal addressed the need to fade prompting to a reasonably effective level. (P 8.)
56. The April 2017 draft IEP offered no goals for writing. (P 8.)
57. The April 2017 draft IEP offered no modifications or accommodations for note-taking. (P 8.)
58. The April 2017 draft IEP offered modifications to address Student's ability to shift focus during the school day by providing a two minute warning before the end of class and visual warnings for changes of daily schedule; to address attention and focus through preferential seating, cues and prompts; to follow directions and process oral input by checking for understanding; to address attention and focus during assessments by providing testing accommodations including the highlighting of critical parts of assessments; to address attention and focus while reading by providing Student with a ruler to isolate reading material line by line; to address completion of assignments through weekly check-ins; and to address writing fluency by providing graphic organizers and a computer for writing. (P 8.)

59. The April 2017 draft IEP did not offer accommodations or modifications to address reading, writing or note-taking. (P 8.)
60. The April 2017 draft IEP offered post-secondary transition services based upon a survey completed by Parent in April 2017 and the March 2017 re-evaluation report. It noted that Student had already identified goals including attending a four-year college; obtaining full-time employment in the music industry; and living independently. It noted that Student had researched colleges that might fit Student's goals, and lined up interviews with individuals who work in the music industry. (P 8.)
61. The April 2017 draft IEP identified vocational needs that are identical to the academic needs listed for Student's special education program: supports addressing attention, focus, organization, self-monitoring, study skills, mathematics and testing accommodations. (P 8.)
62. The April 2017 draft IEP offered post-secondary transition goals in the form of opportunities in the District's general education programs for Student to explore preferences and post-secondary options, as well as to prepare for college testing. Other than the mathematics calculation and self-organization/self-monitoring goals offered in the IEP, the post-secondary transition goals did not offer to measure Student's progress toward any of the skills that would be needed in order to meet Student's post-secondary goals. (P 8.)
63. The District does not offer a course on campus to teach students explicitly how to apply for colleges. There is an option to take such a course at a local community college but this is not offered in Student's IEP. (NT 702.)
64. The April 2017 draft IEP did not offer a goal for independence or reduction of prompt-dependence except that the mathematics and writing goals called for minimal effective prompting in administering those goals. (NT 707-708; P 8.)

ELEVENTH GRADE OFFER OF FAPE – REVISED PROPOSED IEP

65. On May 15, 2017 and May 17, 2017, Parents notified the District's supervisor of special education that they intended to re-enroll Student in the School for eleventh grade, unilaterally and at District expense. (P 9.)
66. On May 18, 2017, the District sent Parents a revised proposed IEP by email without convening an additional IEP team meeting. (NT 139-141, 266-271; P 10.)
67. The May 2017 revised proposed IEP did not identify educational needs in reading fluency, reading comprehension, written expression, anxiety, note taking or ability to visually discriminate reversed symbols, because the District's standardized tests elicited average range scores in reading overall, written expression, spelling and conventions. (P 10.)
68. The May 2017 revised proposed IEP offered to place Student in itinerant learning support in Student's neighborhood high school. (P 10.)

69. The May 2017 revised proposed IEP continued to offer mathematics remediation services in a special education classroom, three class periods per cycle, to strengthen skills in fluency and computation. (P 10.)
70. The May 2017 revised proposed IEP continued to offer explicit teaching of organization and self-monitoring skills in an academic support classroom, three times per cycle. (P 10.)
71. The May 2017 revised proposed IEP increased the Student's scheduled check-ins with teachers from weekly to daily, to monitor grades and work completion. (P 8, 10.)
72. The May 2017 revised IEP proposed to deliver all "direct instruction" for organizational skills, remedial instruction for mathematics and other special education services in the "mainstream support" classroom during one period daily. (NT 755-756.)
73. The May 2017 revised proposed IEP added a goal to address anxiety in Student by measuring Student's ability to self-monitor anxiety. The goal was added in response to Parent's input during the April 2017 IEP meeting. The goal was not measurable because there was no baseline and because measurement depended unreliably upon staff being able to assess Student's internal state of anxiety. (NT 795; P 10.)
74. The May 2017 revised proposed IEP added a goal to address Student's written expression and writing conventions. The goal would be measurable once a baseline should be supplied, but there was no baseline because the District had not administered curriculum-based assessments to Student. The goal called for composition of a number of paragraphs and sentences that was below the grade level curriculum and was close to Student's current ability. (NT 680-683, 774-777, 882-884; P 10.)
75. The May 2017 revised proposed IEP added modifications including opportunity to meet guidance counselor; chunking larger or multistep tasks; prior tour and meetings to assist in transitioning from the School to the District's high school; IEP team meeting within one month to monitor Student's transition to the District; team analysis process to identify possible assistive technology for Student; modifications to method of delivering both instruction and directions to address auditory processing deficits and attention deficits, including chunking of directions and use of visual models; wait time and repetition of directions; direct instruction in study skills in special education setting; encouraging self-advocacy; audio books, FM system in large groups and use of a computer for writing; additional assessment modifications including study guides; and additional support for writing assignments, including chunking, deadlines, and check-ins. (P 10.)
76. The May 2017 revised proposed IEP added collaboration among special education and regular education teachers as a support for school personnel. (P 10.)
77. The May 2017 revised proposed IEP addressed additional educational needs through modifications and accommodations: potential anxiety due to transition to the District; Student's need for substantial support in the classroom through prompting; the need for multisensory instruction; and the need for assistive technology. (P 10.)
78. The May 2017 revised proposed IEP did not offer individualized counseling services. (NT 774; P 10.)

79. The May 2017 revised proposed IEP did not offer to address Student's needs by providing instruction in small classes, except for mathematics remediation classes in three of six days per cycle and support for organization in a special education classroom, one period per day. It did not offer push-in support through an assigned paraprofessional. (P 10.)
80. The May 2017 revised proposed IEP did not offer to address Student's needs with regard to reading fluency through small classes, direct instruction, goals or modifications; its only support for reading was to provide a ruler and encourage its use while reading. (P 10.)
81. The District did not offer to address Student's needs regarding mathematics through a modified sequential curriculum. (P 10.)
82. The April 2017 draft IEP offered no goal for mathematics fluency or mathematics fact recall fluency. (P 8.)
83. The May 2017 revised proposed IEP did not list pre-teaching and re-teaching as a modification. (NT 757-758; P 10.)
84. The May 2017 revised proposed IEP did not offer instruction, accommodations or modifications to address note taking. (P 8.)
85. The May 2017 revised proposed IEP did not offer any new goals or services for post-secondary transition. (P 10.)

APPROPRIATENESS OF THE PRIVATE SCHOOL

86. The School is a small private school that provides individualized elementary and secondary level education to children with learning differences, including those differences with which Student has been diagnosed and identified. The School is accredited by the Pennsylvania Association of Independent Schools, which is a member of the National Association of Independent Schools. (NT 286-289, 309; P 35.)
87. The School employs teachers who are certified special education teachers. (NT 298-299, 329.)
88. The School provides small classes and individualized instruction. (NT 288-289, 309; P 35.)
89. The School utilizes a self-created curriculum that is developed in consideration of Pennsylvania curricular standards and is explicit, multisensory and sequential. (NT 291, 840-842; P 59; S 4.)
90. The School provides an environment which presents reduced distractions for Student. (NT 939; P 35, P 59 p. 4.)
91. The School offers the services of a learning specialist to whom Student is assigned, to support Student with attention and organizational needs. (NT 289-290, 300-301, 330-331, 339.)

92. The School offers explicit and extensive instruction and support for college applications. (NT 319-324.)

EQUITABLE CONSIDERATIONS - PARENTS' PLACEMENT OF STUDENT IN THE PRIVATE SCHOOL

93. On May 8, 2017, Parent sent an email message to the District's supervisor of special education, reflecting what Parent understood to be the services offered in the April 2017 draft IEP discussed at the meeting on April 28, 2017. (P 9.)
94. On May 15 and 17, 2017, Parent notified the District that she and her husband believed that the April 2017 draft IEP did not offer Student a FAPE, and that she intended to re-enroll Student in the School and seek reimbursement of tuition and costs from the District. (P 9.)
95. After a considerable amount of time discussing the draft IEP on April 28, 2017, the invited general education teacher had not arrived. Parent left the April 28 IEP team meeting before the other participants were ready to end the meeting. As a result, the District's special education teacher, who drafted the draft IEP, was not able to fully discuss Parent's concerns about the omission of special education services regarding written expression, and Parent's concerns that returning to the District high school could trigger a recurrence of anxiety in Student. (NT 375-380, 397-381, 464, 788, 791, 793, 795, 799, 802-803, 809; S 6; P 8, 33.)
96. Although the District's school psychologist reached out by email message to Parent, offering to discuss the results of the evaluation report, Parent did not contact the school psychologist to do so. After the April IEP meeting, Parent requested additional standardized testing scores that had not been sent by the District in connection with the re-evaluation report. In a series of email messages, Parent requested and received the scores that had been omitted. (NT 646-650; P 7 pp. 1, 41, 45-46.)
97. Parents signed an irrevocable enrollment contract for Student to attend the School on or about June 8, 2017. (NT 256-260; P 48.)

CREDIBILITY

98. Parents' expert witness is qualified to offer opinions in developmental psychology and psychometrics; the expert is a doctoral level consultant with teaching and administrative experience in special education, and consulting experience with the administration of curriculum based assessments, IEP goal writing and post-secondary transition planning. The expert has consulted with the Department of Education in the area of special education procedural compliance. (NT 829-832; P 3, 63.)
99. Parent's expert witness is not certified to teach at the secondary level, nor does she have any education, training or experience in teaching at that level. (NT 832-833.)

100. Parent's expert witness misunderstood the number of counselors available to students at the District's high school. The expert was not aware that Student would receive a computer along with all students. (NT 1054-1055, 1061-1062.)
101. Parent's expert witness misinterpreted many of the observations that the expert made in the District's mathematics and Spanish classes. (NT 441-442, 1248-1293; P 63.)
102. The School's head of school has experience in public education. (NT 284-285; P 49.)
103. The District's school psychologist miscalculated Student's subtest scores for written expression. (NT 626-628.)
104. The District's school psychologist omitted to perform curriculum based testing and speech/language related testing because she does not typically perform such tests; she did not ask a teacher, reading specialist or speech pathologist to perform such testing as part of the District's 2017 re-evaluation of Student. (NT 680-683; P 7.)
105. The District's school psychologist discounted Student's lower standardized test scores in mathematics partially based upon the belief that many students in eleventh grade cannot calculate a percentage or perform long division. (NT 693, 706.)
106. The District's supervisor of special education testified incorrectly that the District's school psychologist discussed the re-evaluation report with Parent. The supervisor also testified incorrectly about the source of a note that purported to corroborate Parent's early exit from the April 2017 IEP team meeting. (NT 375-381, 583, 645-646; P 7 p. 90; S 6 p. 4.)

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.⁵ 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

⁵ 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).

in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁶ 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 or Section 504.⁷

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.

⁶A “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.

⁷ I apply the same evidentiary analysis to IDEA and section 504 claims.

Considering the testimony in light of the documentary evidence, I find that most of the witnesses, including Parent, were credible and reliable witnesses. In most cases, the witnesses' testimony was consistent with the documentary evidence and other testimony. Witnesses exhibited demeanor consistent with truthful intent. Their memories of events were sufficient to be given weight, and where memories failed, they were open and honest about it for the most part.

I gave weight to the testimony of the School's head of school. I found him to be well qualified to render opinions on the appropriateness of the School's services to Student. I note that he has some, albeit remote in time, experience with public education. Moreover, his testimony was knowledgeable and forthcoming, bespeaking both expertise and candor.

I carefully weighed the opinion evidence given by Parents' expert witness, the developmental psychology and psychometrics expert. I conclude that the expert is well qualified to offer opinions as to Student's academic functioning at the time of the expert's evaluation and testing. She is qualified to utilize the QRI test to evaluate reading fluency, and administered it in accordance with the test manual. She is qualified to offer opinions concerning the appropriateness of the District's IEP as written in final form. As to her opinions within these realms, I gave her testimony full weight.

In contrast, I accorded no weight to her interpretations of her observations of the District's mathematics and Spanish classes. District witnesses credibly rebutted these inferences. The mathematics teacher testified at length to the circumstances in which the observed session was held, showing that what the expert observed was not inconsistent with instructional techniques that the Student would have needed, contrary to the expert's conclusions. The District supervisor of special education indicated that the expert did not witness the entire Spanish class; rather, the witness saw only an initial warmup stage in which instructional control was not intended to be as

strict as the expert expected. In short, the expert's interpretations of what she saw in these classes was unreliable and entitled to no weight.

Notwithstanding the above, I accord weight to the expert's conclusions as to the likely operation and educational opportunities available to Student in the "mainstream support" classroom. In doing so, I take into consideration that the expert is not a secondary school educator by profession, and that she could not observe how the District would organize that classroom to deliver the services that it had promised to Student – since Student obviously was not in that classroom at the time of the observation. Nevertheless, the expert's inferences went largely unrebutted by District witnesses, except that they all testified broadly to the conclusion that the IEP could be delivered using that classroom for many of the promised special education services. On balance, I find the expert's reasoning to be preponderant on this issue.

I considered whether or not the expert's errors with regard to the implications of her observations in the mathematics and Spanish classes undermined her credibility, in conjunction with her obvious retention for purposes of litigation. I rejected such a broad inference. Rather, I concluded that these errors more likely were a result of the witness' unfamiliarity with the District's classes, and the adversarial nature of her visits, with the likely limitation of her ability to verify impressions at the time of the observations. Moreover, I found that her observations of the "mainstream support classroom" went unrebutted for the most part. Thus I find her to be a credible witness, whose conclusions were entitled to weight, except for her observations in February 2018 with regard to the mathematics and Spanish classes.

I also found flaws in the conclusions of the District's school psychologist with regard to Student's needs. In addition, I considered the witness's demeanor of defensiveness and antagonism during her testimony. Thus, I give her evaluation reduced weight as to Student's needs.

My primary concern with the reliability of her testimony and assessment of need was the failure to delve further into the Student's needs in reading. There was ample history (including evidence of concerning physical and language-based deficits), and substantial teacher report, that was inconsistent with Student's scores on national-sample standardized achievement testing (it was unclear whether the scores were grade-based or age-based). The school psychologist did not administer or seek administration of any additional testing, such as curriculum-based measures or language assessments. Such additional testing could have elucidated the reasons for such inconsistencies. It could have helped to more accurately determine whether or not it was appropriate to rely exclusively upon the standardized scores to rule out educational need in reading. Yet, the school psychologist's only explanation for this omission was that she does not do such testing personally; she did not explain why she did not ask to have it done by someone familiar with other forms of testing. In addition to this omission, the school psychologist miscalculated sub-test scores regarding written expression; there was no evidence whether or not the miscalculation might have affected scoring of the standardized scores. In view of the flaws in the school psychologist's evaluation strategies, and the adversarial nature of her testimony, I accord reduced weight to her opinions as to Student's needs.

I gave reduced weight to the testimony of the District's supervisor of special education, because other District witnesses contradicted her testimony in two material respects. First, the supervisor asserted that the school psychologist had spoken with Parent about the results of the 2017 re-evaluation, but the psychologist denied that any conversation had taken place. Second, the supervisor identified the handwriting on a note about Parent leaving the April 2017 IEP meeting early; yet the person who asserted wrote it denied writing it. I do not find reason to doubt the supervisor's candor regarding these incorrect assertions, but I consider that her lack of information

in these respects suggests a weakness in the basis for her more global assertions about the District's ability to program for Student with the level of special education services it has offered.

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 placement⁸. 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 (3rd 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

⁸ 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.

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 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 weigh the evidence in this matter to determine whether or not Parents have proven by a preponderance of the evidence that the services offered by the District were not “reasonably calculated”, Andrew F., 137 S. Ct. above at 999, to provide Student with appropriate or meaningful progress. I must assess the reasonableness of the District’s “calculation” that the services that it offered were appropriate to Student – that is, addressed Student’s unique constellation of educational and service needs in order to provide reasonable opportunity as the law defines it. For

this purpose only, I consider what the District knew or should have known about Student's medical and educational history, District and private evaluations, and Student's scores on relevant tests prior to eleventh grade

I make no judgment regarding the appropriateness of the services offered for school years prior to Student's eleventh grade, but I do consider what went before to assess the extent to which District educators were aware or on notice of Student's needs going forward into eleventh grade. Thus, to the extent that District educators were aware of or should have been aware of prior evidence concerning Student's disabilities, how those disabilities impacted Student's ability to make educational progress, or the kinds of services needed, these facts bear upon the extent to which the District's offer of services was "reasonably calculated." In this matter, it is clear that the District had many details of Student's history before it when determining what services to offer, because the District's 2017 re-evaluation report contains a thorough summary of that history.

Based upon this analysis of the record before me, and based upon the preponderance of the evidence, I conclude that the District's offer of services in its final revised IEP dated May 2017 was not "reasonably calculated" to provide Student with appropriate progress. The IEP did not take into account Student's then-current circumstances reasonably. It failed to acknowledge and address all of Student's educational needs with regard to reading and writing. It failed to offer a reasonable level of supports for Student's needs regarding mathematics. It did not provide measurable goals to the extent feasible regarding reading, writing or mathematics. It offered pro forma post-secondary transition goals that did not focus on or offer to measure Student's development of skills necessary to reach the goals that Student had articulated. Therefore I conclude that the District's offered IEP for eleventh grade was not an offer of a FAPE.

CONSIDERATION OF STUDENT'S CIRCUMSTANCES – APRIL DRAFT IEP

In the planning for Student's proposed return to the District for eleventh grade, the predominant circumstance was that Student had been receiving highly individualized and extraordinarily supported instruction in the small environment of the School. The testimony, corroborated by documents in this record, convinces me that that the School was providing a very high level of supports to Student by way of small classes; a highly structured, distraction-reduced environment; a specific staff person assigned to Student to support Student's significant attention and organization deficits; sequential and explicit instruction in a step-by-step approach for mathematics and written expression; a high level of assistive technology that provided both support and multisensory instruction; and a post-secondary transition plan that offered explicit instruction and multiple points of intervention to guide Student step-by-step through the process of applying for college admissions. Student made some progress in that environment, and the evidence shows that any such progress was attributable in large part to the high level of supports that the School provided to Student for two school years. This placement was one of the most supportive settings on the continuum of placements.

The District offered to return Student to an itinerant level of support, one of the least supportive settings on the continuum, and this to be located in a large high school environment. I conclude that the District did not take into account reasonably that it was proposing to return Student to a significantly less supported environment. The District's re-evaluation report did not advert to any need to address the magnitude of the proposed change for Student. The District's initial draft offering did not even consider providing supports to address the possibility that a change of such magnitude would be difficult for Student.

To accomplish this possibly fraught change for Student, the District employed a process that was not reasonably likely to elicit or seriously consider sufficient information on Student's needs. The evidence is preponderant that the District's school psychologist never talked to Parent to explain her findings, even though the report disagreed with the Parent's private reports regarding the proper IDEA classification for her child⁹. At the subsequent IEP team meeting in April 2017, the District omitted to have a psychologist present to explain the educational implications of the re-evaluation report¹⁰. It also omitted to have a regular education teacher present, thus precluding meaningful discussion of how Student could be supported in the regular education classroom while accessing the grade-level curriculum¹¹. While the District introduced evidence of parental unresponsiveness and blocking to explain these omissions, I conclude that the result was the same no matter who is to blame¹²: the District's re-evaluation and its IEP team procedures did not provide for reasonable consideration of the need to support Student during any transition from a highly supported special education placement to a much lower level of support in the District's high school.

⁹ Although the District's supervisor testified that the school psychologist talked to Parent prior to the scheduled IEP team meeting, the weight of the evidence contradicts this assertion. Both the school psychologist and the Parent denied that any conversation had taken place either in person or by telephone. The psychologist was absent from the subsequent IEP team meeting due to a death in the family, and reached out to speak with Parent by telephone. However, the conversation never took place. The District did not provide a substitute psychologist for the IEP team meeting. See 22 Pa. Code §14.123(a)(multidisciplinary team to discuss evaluation must include school psychologist for classifications including Other Health Impairment and Specific Learning Disability).

¹⁰ This was arguably inconsistent with the procedural requirements of the IDEA. 34 C.F.R. §300.321(a)(5)(requiring team to include a professional able to interpret the educational implications of evaluation results); the record is unclear as to whether or not the supervisor of special education, counselor or special education teacher at the meeting would have been able to do this; thus, there is not preponderant proof of a procedural violation.

¹¹ This was in violation of the IDEA's procedural requirements. 34 C.F.R. §300.321(a)(2)(requiring team to include a regular education teacher). There was no written input from the teacher and there was no written waiver, as required by the IDEA to excuse participation of the regular education teacher. 34 C.F.R. §300.321(e)(2).

¹² Similarly, I find no preponderant evidence that one party was more "predetermined" than the other; thus, I conclude that neither party has proved that the other party violated the IDEA by "predetermination" of Student's eleventh grade placement.

CONSIDERATION OF STUDENT'S CIRCUMSTANCES – APRIL FINAL REVISED IEP

After receiving Parent's ten day notice rejecting the draft IEP and stating an intent to enroll Student in the School for eleventh grade at District expense, District leaders revised the draft IEP immediately, adding a number of services without a team meeting, and sent the revised version to Parent on the following day. This revised draft became the District's final offer of services.

In this final version of the IEP, the District's administrators added a group of supports to address Student's transition from the School to the District high school. I conclude that these supports were not reasonably calculated to address the difficulty that Student was likely to experience due to the precipitous drop in supports that the District was proposing.

The revised IEP, without citing anxiety as an educational need, added a goal for Student to self-monitor anxiety. As written, this goal was ill-conceived, because it called for Student to match a teacher's perception of Student's anxiety. Thus, it was not designed to be measurable, because any data points depended upon a teacher's unreliable perception of Student's internal emotional state. I conclude that this goal was not reasonably designed to address Student's anticipated anxiety that might arise from the proposed reduction in supports. Thus, it was not reasonably calculated to address the proposed severe reduction of supports.¹³

Similarly, the revised IEP proposed a transition plan in which Student, prior to the start of school, would be given a tour of the high school building and access to a guidance counselor to discuss schedules. While these services might be helpful to reduce anxiety, they did not in any way address the fact that Student would be receiving a lower level of supports in the proposed District

¹³ I also conclude that the modification calling for an IEP team meeting after a month of the school year had passed is no substitute for a proactive plan to transition Student from the high support setting to the significantly lower support setting.

classroom and other settings. Thus, I conclude that these services were not reasonably calculated to address the proposed reduction of supports.

I considered two other revisions in the final offer IEP, and conclude that they do not appropriately address the proposed reduction of supports. First, the revised IEP explicitly offered “direct instruction” in study skills and organization in a special education classroom, three times per week, but it did not specify whether or not such instruction would be in an individual or group setting; how many students would be in any group; or how much time would be devoted to such instruction per week. Second, it offered daily check-ins with an academic support teacher, but did not specify whether or not Student would work with one specified teacher or a group of teachers rotating into the setting for this purpose.

It was unclear as to whether or not the added offer of “direct instruction” and daily check-ins constituted specially designed interventions individually designed to meet Student’s unique needs for support during the transition, or mere assignment to a regular education setting with others to receive the kind of assistance that is typically provided in a high school “study hall” type of setting. The IEP’s terse references to the “home access center” with the daily check-ins and “academic support class” for addressing organization suggested the latter on the face of this IEP. Therefore, I admitted retrospective testimony in this matter in the hopes of clarifying what those terse references meant.

Although I determined to admit the retrospective testimony about the meaning of terms and references in the IEP, I adhere to the principle that I should give reduced weight to such testimony when it strays so far from what was offered explicitly in the document that it amounts to a retrospective re-writing of the document. Tuition reimbursement should be based upon the appropriateness of the IEP as offered at the time when the parents decided to unilaterally place the

child. See generally, Jalen Z. v. Sch. Dist. of Phila., 104 F. Supp. 3d 660, 675-678 (E.D. Pa. 2015); M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131 (2d Cir. 2013); R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012).

In this case, Parents offered retrospective testimony based upon an observation by their retained expert developmental psychologist and behavior analyst. The District countered with testimony challenging the expert's observations and explaining the meaning of the IEP terms "direct instruction", "academic support class" and "HAC".

District witnesses explained that Student would have received "direct instruction" in what the District called its "mainstream support" class. It emerged that "academic support class" in the IEP meant "mainstream support class", (NT 755-testimony of learning support teacher). "Home Access Center" was not a different classroom, but a computer program allowing access to a student's grades. (NT 755-756.)

The term "mainstream support" did not appear in the IEP, and the scheduling of this "mainstream support" was unclear even during the due process hearing. (NT 449-552, 752-753, 797, 804; S 8.). The IEP stated that Student would have mathematics remediation three times per week in a special education classroom, and daily "check-in" support with organization, in addition to three periods per week of direct instruction for organization. This implied on the face of the IEP that Student would receive instruction in a small group special education setting for more than six periods per six day cycle. Yet at the hearing, the District learning support teacher indicated that the mathematics support and the "direct instruction" in organization would both be provided during the six daily periods per cycle in the "mainstream support" classroom. (NT 752-753, 761, 796-797.) The guidance counselor and special education teacher also asserted that other services set forth in the IEP would be provided during this single period per day. Student's goal for self-

monitoring of anxiety would be progress monitored in the “mainstream support” classroom. Note-taking needs would be addressed there also. (NT 525, 774-775.) Thus, from retrospective testimony, it appeared that all “direct instruction” for organizational skills, remedial instruction for mathematics and other special education services were to take place in the “mainstream support” period each day.

Parents’ expert observed this “mainstream support” class on February 1, 2018 and concluded that it was not organized as a small special education classroom for delivery of direct instruction in organizational skills or mathematics; rather it was a kind of study hall in which teachers helped a variety of students to complete homework tasks and participate in the process of applying to colleges. (NT 937-939; P 2.) It was designed to deal with multiple students with differing needs, rather than to provide a structured individual or small group “direct instruction” service for more than a few minutes per day. The District’s witnesses did not explain how “direct instruction” would be provided in such a setting.

The supervisor of special education added that Student’s teachers would have received a “point of contact” person from that classroom, but did not elaborate on the meaning of this term. (NT 435-436.) The IEP had not specified the offer of this service. In passing, the school counselor seemed to say that a specific person would be assigned to provide Student with guidance in organization of materials and assignments. (NT 501, 525, 572-573, 799-800.) However, later credible testimony made it clear that multiple teachers are assigned to the mainstream support classroom, so it remained unclear whether or not Student would have one assigned teacher to provide support with organization. (NT 1279.) As this testimony adds to the services offered in the final offered IEP, I give it no weight.

This retrospective testimony, taken altogether, adds little weight to the explicit provisions of the IEP itself. Consequently, I conclude that the evidence is preponderant that the final offered IEP of May 2017 was not appropriate to address the Student's need for supports in transitioning to a lower level of special education intervention as proposed.

READING

The District took the position that Student did not need any supports for deficits in reading. I conclude that the record is preponderant to the contrary. In preparation for its offer for eleventh grade, the District was on notice of a concerning history with regard to Student's skills in reading when Student was in the seventh and eighth grades in the District. Student was diagnosed with a visual deficit that could affect reading. Student was diagnosed with a central auditory processing deficit that could affect reading. A private educational evaluation recommended classification with Specific Learning Disability due to detected weaknesses in reading fluency, visual tracking, detection of symbol directionality and decoding, all of which the evaluator found to be significantly discrepant with Student's above average cognitive ability. Student's seventh grade score on the PSSA test was Basic and Student's ELA score in eighth grade was Basic.

In addition, evaluations just prior to the District's offer detected ongoing weaknesses in basic reading skills. The District's re-evaluation of Student in tenth grade detected weaknesses in reading fluency and accuracy, and for fluency found a discrepancy of over one standard deviation from Student's cognitive ability. Three of four of Student's tenth grade teachers at the School noted weaknesses in reading comprehension and vocabulary and indicated the need for supports for reading. The School provided accommodations for reading.

While noting these indications of educational need, the District's evaluation concluded that Student had no educational need in basic reading skill, and that no supports were needed. It based this determination upon Student's scores on age or grade-related standardized achievement tests. These tests showed Student performing in the average range compared to a national sample of equal age or grade. The District's re-evaluation did not include any other tests to delve further into why Student's national-sample scores for overall reading and reading comprehension were average but Student's national-sample scores in fluency were low average. The re-evaluation did not seek investigate further to determine whether or not Student's physical deficiency in eye movement or central auditory processing deficit continued to affect Student's reading. It did not attempt multiple kinds of testing in light of Student's teachers' repeated mention of reading deficits.

I conclude that the District's March 2017 re-evaluation report did not provide the Student's April 2017 IEP team with information that was sufficiently comprehensive to identify all of Student's educational needs, 34 C.F.R. 300.304(c)(6), with regard to basic reading. The District's report gave overriding weight to the national-sample standardized scores in reading, which fell for Student in the average range. In choosing to ignore the historical data, private evaluation findings and teacher input that contradicted the standardized scores, the District's school psychologist utilized single measure or assessment as the sole criterion for her recommended educational services, contrary to the IDEA, 34 C.F.R. 300.304(b)(2).

When an additional test was utilized, it revealed that Student's deficit in reading fluency, detected in the District's standardized testing and mentioned by Student's tenth grade teachers, was a substantial educational need. Parents' retained expert in developmental psychology administered a curriculum-based assessment of Student's basic reading skills, and credibly revealed that Student was still exhibiting deficits in basic reading ability. This evidence suggests

that a more thorough testing of Student's basic reading skills would have corroborated a need for special education support. It would have provided information in addition to the information relied upon in the re-evaluation, which was limited to the standardized national-sample achievement scores. I conclude that the District's failure to detect and address this need was inappropriate.

WRITING

As with reading, the District was on notice of a concerning history with regard to Student's skills in written expression during Student's tenure with the District in the seventh and eighth grades. When in seventh grade, Student was diagnosed with a visual deficit that could affect Student's ability to sustain attention to the close work of writing, and could affect Student's spelling and ability to take notes from a classroom board. Student was diagnosed with a central auditory processing deficit that could affect spelling, recalling vocabulary, responding to directions for written assignments, and planning sequences in written assignments. When in eighth grade, a private educational evaluation recommended classification with Specific Learning Disability due to detected weaknesses in spelling, punctuation, sentence completion and writing fluency. Student's seventh grade score on the PSSA test was Basic in English Language Arts.

In addition, Student's tenth grade teachers at the School unanimously reported that Student exhibited weaknesses in written expression, two of whom specified weaknesses in conventions. The School, which the District's evaluator visited, provided extensive supports to Student for writing assignments.

While noting these indications of educational need, the District's evaluation concluded that Student had no educational need in written expression, and that no supports were needed.¹⁴ It based

¹⁴ The report recommended that Student learn to use a computer for writing, but at most this recommendation can be interpreted as an effort to accommodate Student's weaknesses in spelling and conventions.

this determination upon Student's scores on standardized achievement tests, which showed Student performing in the average range compared to a national sample. The District's re-evaluation did not include any other tests to delve further into why Student's national-sample scores for written expression-related skills were average but Student's tenth grade teachers unanimously advised that Student needed extraordinary supports for written expression, which they all found to be a weakness. The re-evaluation did not investigate further to determine whether or not Student's physical deficiency in eye movement or central auditory processing deficit continued to affect Student's ability to perform the many writing tasks that eleventh grade education demands.

The re-evaluation report explains the discrepancy between Student's average performance on standardized tests and Student's needs for extraordinary support in tenth grade writing assignments by attributing it to Student's attention-deficit disorder. It recommends providing supports to shore up Student's exceptional organizational difficulties. While I find no basis in the record to fault this approach regarding written expression, I note that the re-evaluation report fails to specify the high level of supports that Student would need for lengthy written assignments that are to be expected in the upper-grade high school curriculum. Therefore, I conclude that the District's March 2017 re-evaluation report did not provide the Student's April 2017 IEP team with information that was sufficiently comprehensive to identify all of Student's educational needs, 34 C.F.R. 300. 304(c)(6), with regard to written expression.

Apparently as a result, the District offered a draft IEP that failed to provide for even partial replacement of the extensive supports that were enabling Student to succeed in written projects at the School. However, at the April 2017 IEP team meeting, Parent raised her concern about this omission, and the District's administrators added a goal and a number of modifications to the

revised final IEP delivered in May 2017, although they did not revise the IEP's list of educational needs to reflect any new finding that Student had needs for supports with regard to written expression. I conclude that these additional services fell short of providing Student with an appropriate program for written expression for three reasons.

First, the writing goal had no baseline, and the evidence is preponderant that the writers of this goal had no idea whether or not it was appropriately ambitious. The District's special education teacher admitted that she did not make any effort to establish what Student was able to do before establishing the upper limit of this goal. The evidence is preponderant that the goal as written aimed at below-grade-level writing and was close to what Student was capable of achieving at the start of the proposed IEP year. Without a baseline, it was not possible to know whether or not the goal was appropriately calibrated to Student's present level of academic performance in writing. Thus, the goal was inappropriate.

Second, the additional support offered for writing assignments, including chunking, deadlines, and check-ins, was to be provided in the same single period per day that would also address all other organizational needs and all mathematics needs. The evidence is preponderant that the amount of support that could be provided in this schedule was not likely to be enough to provide Student with sufficient support to successfully participate in eleventh grade writing assignments.

Third, the IEP did not address Student's note-taking at all. For a student in eleventh grade with aspirations to attend a four year college, note-taking is a necessary skill. The evidence shows that it requires the ability to scan visually and shift from far to near fields of vision. It also requires the ability to integrate the skills of writing and reading. The evidence is preponderant that Student has a history of deficits in these areas. There also was evidence that the School was accommodating

these deficits for Student. The District's failure to acknowledge and duplicate these accommodations was inappropriate.

MATHEMATICS

The District's re-evaluation revealed significant deficits in mathematics. Its national-sample standardized scores showed low performance in fluency for addition, subtraction and multiplication. These scores were significantly lower than what would be expected based upon Student's cognitive ability and Student's performance in all other areas of academic functioning. Similarly, Student had a history of private evaluations finding such large discrepancies as to indicate a Specific Learning Disability in mathematics.¹⁵ Student had scored Below Basic in eighth grade mathematics.

Although it attributed Student's deficiencies to ADHD, and rejected the classification of SLD, the District deemed the information before it sufficient to identify an educational need for special education services with regard to mathematics. It offered a goal to address this need, as well as specially designed instruction in a special education setting to provide remedial instruction in mathematics calculation facts and operations. I conclude that these offered interventions were inappropriate to address Student's needs in mathematics.

The offered services were remedial in nature; they did not purport to instruct Student sequentially. Indeed, remedial services in the special education classroom were to be provided three times per week, in the same "mainstream support" classroom that is discussed above and that was to provide all specially designed instruction and progress monitoring for organization, and written expression. The evidence is preponderant that this level of service is insufficient to meet

¹⁵ There was no tenth grade teacher input regarding mathematics, as Student's tenth grade mathematics teacher did not respond to the District school psychologist's requests for input.

Student's significant deficits in basic mathematics skills; Student needed more systematic, structured and integrated intervention to address Student's unique constellation of needs for mathematics. I conclude that the services to be provided in the "mainstream support" classroom for mathematics are inappropriate.

The District's final offer reiterated its goal as written in the April draft IEP. The goal had no baseline and so its end-point of achievement was not based upon any data about Student's then-current performance. The evidence shows that the District's school psychologist had visited the School yet made no effort to establish a present level of academic achievement or baseline in mathematics for Student. Moreover, the goal was not timed, so it did not address Student's fluency with basic mathematics operations, which was the specific need in which Student had shown low standardized scores. I conclude that the offered goal for mathematics was inappropriate.

The District offered no accommodations or modifications to either the eleventh grade curriculum or instructional methodology in the general education classroom to address Student's needs in mathematics. The "modifications" section of the IEP did not specify that Student would be provided with pre-teaching and re-teaching of concepts in conjunction with Student's assigned regular education, although witnesses asserted retrospectively that these techniques would have been provided.¹⁶

The District justifies its limited remedial services based upon the school psychologist's clinical judgment that Student's under-achievement in mathematics, both historically and in tenth grade, as well as upon its standardized achievement sub-tests, was due entirely to ADHD. The evaluator pointed out that Student's low standardized scores and decreased achievement in mathematics in the seventh and eighth grades coincided with the ending of medication previously

¹⁶ As discussed above, I accord little weight to these assertions as they would add services not mentioned in the final revised version of the IEP.

prescribed for ADHD. The evaluator noted that Student's attentional deficits may have impacted negatively Student's vision and central auditory processing evaluations. The evaluator discounted Student's low scores for mathematics calculation fluency by pointing out that some of Student's errors in that assessment could have been due to inattention or organizational difficulties.

While this hearing officer need not enter into the thicket of differential diagnosis between ADHD and SLD, I find unconvincing the evaluator's minimization of Student's needs in mathematics. The evaluator, while attributing severe underachievement in seventh and eighth grades to withdrawal of medication, evidenced no attempt to ascertain if Student had restarted any medication regime more recently. Moreover, the evidence was preponderant that, even if Student's history were influenced by a lack of medication, and even if some of Student's errors in standardized tests were careless or attention-based, this does not negate the validity of the scores themselves.

As with reading, the evaluator did not delve further in the face of conflicting information. When Student's expert later administered tests that might elucidate the nature of Student's mathematics deficits, she was able to show that the Student's deficits were fundamental and involved Student's imperfect understanding of the basic concepts that underlie mathematics operations at the eleventh grade curricular level and even at an elementary school level. The evidence is preponderant that regardless of the cause, Student's achievement was significantly lower and required more intensive intervention than the District offered.

TRANSITION

The IDEA requires the IEP to contain "[a]ppropriate, measurable postsecondary goals based upon age appropriate transition assessments" 34 C.F.R. 300.320(b)(1). While the goals

are characterized as “postsecondary”, it makes little sense to interpret this phrase as permitting school districts to list the child’s postsecondary aspirations as the goals themselves. Interpreted this way, the goals could not be measurable within an IEP year, except possibly for admission to a college, and that would be measureable only in the twelfth grade for some children with IEPs. Moreover, if aspirations were goals, there would be no need to require assessments; the aspirations would speak for themselves. Rather, I interpret this language as requiring districts to identify skills that the student would need in order to attain his or her aspirations, and then program to teach those skills to the student, and measure the student’s progress toward attaining such skills. Based upon this interpretation of its obligations, the District failed to offer an appropriate postsecondary transition plan to Student.

The regulation also defines the services that are to be provided pursuant to a postsecondary transition plan. They include services that are “focused on improving the academic and functional achievement of the child ... to facilitate the child’s movement from school to post-school activities” 34 C.F.R. §300.43. As with the definition of the mandated goals, this language requires attention to the development of the student’s skills while in school, not just to facilitating the student’s own efforts to reach the student’s ultimate aspirations. By this definition, the District’s transition plan falls short again, because the services that it offered were not focused on improving the skills needed to move from school to post-school activities.

Rather, Parents were able to show by a preponderance of the evidence that the District’s offer of transitional services was a pro forma depiction of their regular education services available to all students in eleventh grade. There was nothing about it that was individualized. The offer was not based upon assessments or evaluations of Student’s skills related to Student’s personal post-secondary aspirations, as required at 34 C.F.R. §300.320(b)(1), although the plan provided for

Student's self-assessment utilizing a computer software program at an unspecified time during the IEP year. The goals did not identify specific skills that Student would need in order to reach Student's aspirations; rather, they merely restated those aspirations – to attend college, to be employed in the music industry, and to live independently.

There was nothing to measure pursuant to these goals as stated, contrary to 34 C.F.R. §300.320(b)(1); indeed, as these goals were written, Student would have needed to actually attend college, obtain a job in the music industry, and move out of Student's Parent's home within the IEP year in order to attain the offered transition "goals". The IEP did not offer specially designed instruction or any modifications in the curriculum or in the method of delivering curriculum to address specific skills that Student would need in order to attain Student's aspirations.

In short, the transition plan was not a plan reasonably calculated to help Student advance toward Student's aspirations by overcoming any barriers posed by Student's disabilities. It was simply an invitation to utilize the services available to all Students of the District for whatever purpose Student should desire. That this invitation was generous and possibly helpful does not diminish my conclusion that it was not an individualized offer of specially designed instruction as required by the IDEA.

The District, in addition to describing its transition services available to all, also argued that the academic and functional goals in the IEP were part of the transition plan, especially since Student aspired to matriculate at a four year college. While this argument carries some persuasive weight, the deficiencies of these goals militate against the District's argument. Moreover, these goals were not based upon "transition assessments" as required, 34 C.F.R. §300.320(b)(1). Therefore, weighing the evidence regarding the post-secondary transition plan in view of the applicable legal standards, I conclude that the plan was inappropriate.

SECTION 504 VIOLATION

I conclude that the District, by failing to offer a FAPE as defined in the IDEA for Student's eleventh grade, the District also failed to offer a FAPE as defined by section 504, which requires a district to provide 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, noncompliance with the IDEA is preponderant evidence that the District also failed to comply with section 504. Cf. 34 C.F.R. §104.33(b)(2).

APPROPRIATENESS OF THE PRIVATE SCHOOL

It is well established that a parent does not have to show that a unilateral private placement is as good as or superior to the district's offered placement. Lauren W. v. DeFlaminis, 480 F.3d 259 (3d Cir. 2007). Rather, the parent must prove that the private placement is appropriate, ibid. Parents have done so here by showing that the services provided by the School addressed Student's needs appropriately.

I conclude that Parents have proven by a preponderance of the evidence that the School was an appropriate placement. The School is well known and accredited. It employs state certified special education teachers. It provides structured, sequential, multisensory instruction in a small group setting and explicit instruction in the college application process. The evidence is preponderant that the School's services addressed Student's educational needs appropriately.

EQUITY

I conclude that there is no statutory basis to reduce tuition reimbursement. 34 C.F.R. §300.148(d)(1)(ii). In May 2017, Parents provided proper and timely notice of their intent to place Student unilaterally. Parents did not sign a contract to enroll Student at the School for eleventh grade until June 2017; thus their notice was over ten days before disenrollment.

The District has not shown equitable grounds for reduction of tuition reimbursement. Parent's demeanor at the April 2017 IEP team meeting, as reported by District staff, does not prove predetermination. Nor does Parent's leaving of that IEP team meeting before the other participants considered the meeting over provide an equitable basis for reduction of reimbursement, because there were extenuating circumstances that could have explained Parent's actions, including that there was no psychologist present and that an invited general education teacher was either late or absent, without written input or parental waiver. Moreover, there was not preponderant evidence that the Parent knew that the meeting was not over. Similarly, I do not consider the Parent's omission to reach out to the school psychologist for further explanation of the re-evaluation report to be inequitable behavior. Parent had her own advisors and actively pursued the scores relied upon in the report. There is no evidence that Parent needed to discuss the re-evaluation further.

The District made much of its perception that Parent was difficult to work with, and it argued that its twenty-four-hour IEP revision was due to Parental predetermination that Student would be returning to the School for seventh grade. It supported this defense with the testimony of two witnesses and a handwritten note on a document in Student's file that asserted that Parent left the IEP meeting before it was over. Parent denied leaving early intentionally.

I reject this defense for three reasons. First, perceptions of a difficult parent are irrelevant to the District's obligation to offer a FAPE; Districts must follow the law and part of that is to be

professionally open to every parent's meaningful participation in the educational planning process, regardless of difficulty. Second, the evidence was not preponderant that Parent knowingly left the meeting early, or that leaving early had any substantive effect on what the District was able to offer; although Parent's action precluded discussion of written expression needs, the District knew that Student had them, and its failure to offer FAPE on this score was due to its own inappropriate crafting of the goal and supports, not any omission of Parent. Third, on this record, there was no reasonable basis for the procedural violations evidenced here. Thus, the District cannot be heard to blame Parent for its omissions, as it comes to any administrative equity with unclean hands.

COMPENSATORY EDUCATION

As I will order tuition reimbursement, there is no basis to order compensatory education.

REIMBURSEMENT OF EXPERT FEES

I see no basis to order reimbursement of expert fees for the September 2017 evaluation report. The record is preponderant that Parents obtained multiple expert reports in anticipation of litigation, including the one in question, and that they did not request an Independent Educational Evaluation before retaining the experts who provided these reports. 34 C.F.R. §300.502(b).

Moreover I see no other legal or equitable basis for such an order.

CONCLUSION

I conclude that the District failed to offer Student a FAPE for eleventh grade, that the School is an appropriate placement, and that there is no legal or equitable basis to reduce the amount of tuition reimbursement to be ordered. Therefore, I will order the District to reimburse

Parents for all tuition and fees paid to the School for Student's education during the 2017-2018 school year.

I find no basis to order reimbursement of the costs of any private neuropsychological evaluation that Parents obtained.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the District shall reimburse Parents for the tuition and fees that they have expended for instruction provided by the School in Student's eleventh grade year, the 2017-2018 school year.

It is **FURTHER ORDERED** that all other relief requested by Parents 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.

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

DATED: May 28, 2018