

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: D.M.

Date of Birth: [redacted]

ODR No. 01201-0910 JS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Dates of Hearing:

October 26, 2010; November 1, 2010;
November 9, 2010; November 19,
2010

Record Closed:

December 8, 2010

Date of Decision:

December 23, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a [teenaged] eligible resident of the Methacton School District (District). (NT 9-3 to 10-10.) The Student is identified with Other Health Impairment under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 9-15 to 10-5.) Parent requests due process under the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), seeking compensatory education for prior years and tuition reimbursement for the current year after a unilateral placement in a private school, as well as reimbursement for tutoring services. (NT 10-14 to 25.) The District asserts that it provided appropriate services at all relevant times, and that the private placement is inappropriate.

By stipulation, the Parents amended their complaint to limit their claim for compensatory education to June 3, 2008 until the first day of school in the 2010- 2011 school year. The entire matter was heard in four sessions and the record closed on December 8, 2010, upon receipt of written summations.

ISSUES

1. Did the District fail to provide the Student with a free appropriate public education during the relevant period between June 3, 2008 and the first day of school in the 2010-2011 school year, with regard to study skills, self-organization, reading, written expression, and penmanship?
2. Should the hearing officer award compensatory education to the Student for all or any part of the relevant period?
3. Is the [Private] School an appropriate placement for the Student?
4. Should the hearing officer award tuition reimbursement to the Parents for tuition incurred for the 2010-2011 school year at [Private] School?
5. Should the hearing officer award reimbursement for private tutoring services provided by the Parent during the relevant period?

FINDINGS OF FACT DURING RELEVANT PERIOD

1. The Student has been diagnosed with auditory processing disorder since at least as early as 2004. Problems with processing instructions were noted. (P-2 p. 5, P-3, P-5.)
2. The Student is diagnosed also with Attention Deficit Hyperactivity Disorder (ADHD). (NT 690-12 to 692-24; P-4, P-5.)
3. The Student has a long history of difficulties with self organization. (NT 476-19 to 478-9, 479-1 to 480-1, 481-16 to 484-4, 499-2 to 502-18; P-4, P-5.)
4. The Student's intelligence is in the high average range and Student is a hard worker with good motivation. (NT 62-4 to 8, 185-6 to 13; S-7 p. 4.)
5. In September 2007, the District issued an initial evaluation report. It found attention difficulties and identified the Student with Other Health Impairment (OHI) due to ADHD. It recommended itinerant learning support. (P-5.)
6. Despite a diagnosis of Central Auditory Processing Disorder, the Student was able to process directions in a controlled testing environment free of distractions. (P-5.)

7. The September 2007 evaluation report found difficulty with planning and organizing materials. (P-5.)
8. The September 2007 evaluation report found below grade level decoding and reading comprehension. (P-5.)
9. The September 2007 evaluation report found difficulties with written expression including handwriting fatigue and conventions. (NT 728-18 to 729-8, 745-13 to 22; P-5.)
10. The September 2007 evaluation report found difficulties with anxiety. (P-5.)
11. The September 2007 evaluation report found that the Student's academic achievement was supported by extensive home supports that extend beyond normal expectations. (P-5.)
12. The September 2007 evaluation report recommended for organization the teaching of organizational strategies, utilizing a checklist, review of homework during eighth period, rewriting assignments in bullet or checklist form, checking for understanding of directions, chunking of long term projects and monitoring periodically for progress at various stages. (P-5.)
13. The September 2007 evaluation report recommended for reading, the provision of additional instruction. (P-5.)
14. The September 2007 evaluation report recommended for writing, an occupational therapy evaluation and use of a computer to address handwriting fatigue. (P-5.)
15. The May 28, 2008 IEP placed the Student in resource learning support with an inclusion model for all major subjects. (S-4.)
16. The September 2007 evaluation report recommended for auditory processing the opportunity to clarify questions, restating questions, preferential seating, and testing in the learning support classroom. (P-5.)
17. The September 2007 evaluation report recommended for testing the use of additional space or paper for tests, and separate testing location. (P-5.)
18. The September 2007 evaluation report recommended counseling services for anxiety. (P-5.)
19. During the relevant period, the Student's Parent and family provided substantial and unusual levels of support to the Student, including private tutoring, monitoring homework, prompting, utilizing organizational strategies with regard to homework and assignments, review and re-statement of directions. Part of this

- support was from the Student's grandmother, who is a retired teacher. (NT 492-21 to 502-18, 504-16 to 509-5; S-2 p. 5, S-5 p. 5, P-5 p. 1.)
20. The private tutor's services were helpful to the Student but not clearly necessary during the relevant period. (NT 768-17 to 769-11.)
 21. The May 28, 2008 IEP recognized needs with regard to inconsistent written expression, writing mechanics, organization, understanding oral instructions, processing information, responding to questions, spelling and penmanship. It noted a "strong need" for additional support for attention and organization. (S-2, S-2 p. 7.)
 22. The May 28, 2008 IEP did not recognize needs with regard to reading decoding and comprehension. (S-5.)
 23. The May 28, 2008 IEP offered one goal in self organization, to complete 85% of all class work. No baseline was established. Specially Designed Instruction (SDI) included checking assignment book, restating, repeating, reviewing and clarifying directions, chunking lengthy tests to reduce anxiety and unspecified strategies for organization. (S-2.)
 24. The May 28, 2008 IEP offered one more goal, to write homework assignments legibly in an assignment book. SDI included checking the assignment book and providing a set of books for home. This was only partially implemented. (NT 556-5 to 23; S-2.)
 25. Both goals were assessed subjectively by the teacher for progress monitoring purposes and reported to the Parent. (NT 84-18 to 87-8; S-4 p. 13, 14.)
 26. There was no goal expressly addressing and measuring written expression and conventions. (S-2.)
 27. In the second and third marking periods of the 2008-2009 school year, the assigned educational assistant wrote the Student's assignments for [Student] in the assignment book. (S-5.)
 28. SDI also included testing in the special education classroom and extended time for tests. (S-5.)
 29. In April 2009, the IEP was revised to add chunking of assignments, retesting if graded below 75% and small group testing to the SDI section. Placement was revised to reflect itinerant learning support. (S-4.)
 30. In May 2009, the IEP was revised. The present levels reflected recent performance in reading, organization, understanding directions, mathematics and writing. (S-5.)

31. The May 2009 IEP present levels reflected on – grade - level performance in reading, including a Proficient PSSA score. (S-5.)
32. The Student demonstrated improved organizational skills by multiple teacher observations. (NT 130-23 to 133-5, 760-23 to 769-9.)
33. The May 2009 IEP recognized continued problems with organization and resultant anxiety. (S-5, S-5 p. 24.)
34. The goal for completing class work was offered again without a performance standard, but inferentially with a base line of zero. SDI included providing a copy of teacher’s notes to the Student. (S-5.)
35. The May 2009 IEP offered a new goal in self-monitoring stress levels during the day, without specifying performance levels but with a base line of zero. A form for daily recording of stress levels was provided. (S-5)
36. The May 28, 2009 IEP offered a measurable goal in mathematics problem solving. (S-5.)
37. Although the homework assignment writing goal was eliminated from the IEP in May 2009, the SDI for checking assignment book was continued. New SDI included eighth period study hall, allowing Student to organize materials during study hall, allowing think time for questions, use of advanced organizers for all content areas, teaching problem solving strategies for mathematics, graphic organizers for writing, and study guides for tests. The SDI for chunking assignments and tests was deleted. (S-5.)
38. The Student’s homework was being checked in the 2009-2010 school year. (NT 312-22 to 313-17, 781-7 to 782-16; S-13.)
39. The May 2009 IEP did not offer goals or SDI for reading. (S-5.)
40. In September 2009, the District offered an IEP that reduced the goals to one goal for completing 90% of all class assignments; the Parent did not meaningfully participate in that decision. (NT 227-14 to 229-18, 564-10 to 565-17; P-12.)
41. The September 2009 IEP revision abandoned SDIs for restating and explaining directions and keeping an extra set of books at home. It modified the SDI for retaking tests to trigger that service only when the Student scored below 75%. It added SDIs for standardized testing. (P-12.)
42. One teacher testified to resisting a restating technique for understanding directions because it would single out the Student. (NT 847-9 to 15.)

43. Some SDIs were removed because they were believed to be redundant to ordinary teaching practices, or were believed to be unnecessary. (NT 241- 8 to 245-17.)
44. During the relevant period, the Student maintained good grades and did not fail any courses, including English courses. (S-1, S-2 p. 5, S-5 p. 5, S-6, S-10, S-13 p. 1, S-19 p. 5, P-25 p. 13, 14.)
45. An independent neuropsychological evaluation in October 2009, funded by the District, found problems with organization and attention, and diagnosed the Student with ADHD as well as Learning Disorder Not Otherwise Specified. (S-7, P-11.)
46. The October 2009 report found reading achievement to be within the average range on a standardized test. Attention and organizational difficulties reduced reading efficiency. (S-7.)
47. The October 2009 report found graphomotor skills to be consistent with age expectations. Spelling and overall written language skills were within the average range in standardized testing. Punctuation and conventions were a weakness. Attention difficulties were found to adversely impact performance in written expression. (S-7.)
48. The Student received passing marks in a regular education English class that emphasized grammar and writing. In the 2008-2009 school year, the teacher did not note any extraordinary deficiency in writing conventions. The Student's writing was in the top quartile in the Student's literature reading strategy class. (NT 95-8 to 17, 98-21 to 105-3, 872-1 to 11, 874-9 to 880-10, 884-2 to 895-9, 899-16 to 901-24; S-13, S-18.)
49. The October 2009 report found subclinical problems with anxiety. (S-7.)
50. The October 2009 report recommended specialized instruction in study skills and organizational strategies. It also recommended checking assignment book, chunking larger tasks, teacher copies of lecture notes, teaching retrieval strategies, active learning settings, reading intervention, teaching organization for written expression, testing accommodations, and services of a guidance counselor. (S-7.)
51. In December 2009 the District issued a re-evaluation report that reflected the findings of the October 2009 neuropsychological evaluation. (S-8.)
52. In December 2009, the District offered an IEP that reflected recent grades, and changed the goals. The goal for writing homework assignments was retained and simplified to require 100% compliance. The goal for self monitoring stress levels was abandoned. The goal for mathematics problem solving was abandoned. The goal for completion of classroom assignments was reinstated. (S-10.)

53. The December 2009 IEP revision made significant reduction in the number of SDIs. It eliminated restating directions, reading directions aloud, think time, self monitoring, advanced and graphic organizers, problem solving strategies, study guides, testing modifications, and visual and verbal cues. It modified SDIs for teacher notes, retaking tests and extra time for tests. (S-10.)
54. SDIs were implemented in regular education classes, to the extent necessary to allow the Student access to the curriculum. However, the SDIs were rarely needed to that end. (NT 70-9 to 71-20, 123-18 to 133-5, 156-16 to 18, 185-5 to 187-23, 321-2 to 322-12, 795-11 to 797-9, 816-16 to 820-25, 832-13 to 16, 920-25 to 934-3.)
55. During the 2009-2010 school year, the Student participated in a homework support service, the Homework Club. (S-11.)
56. During the 2009-2010 school year, the Student had a high completion rate for homework assignments and class work assignments. (S-13 p. 2 to 46, S-15 p. 268.)
57. By letter dated August 4, 2010, the Parent gave ten days' notice of intention to unilaterally place the Student in a private school at public expense. (S-16.)
58. In August 2010, the District offered an IEP that reflected recent grades, and changed the goals. One goal with two objectives was offered, a goal for writing homework assignments. Progress monitoring was made more explicit. Checking homework was added to the goal, and the performance standard was stated. The goal for completion of classroom assignments was abandoned. (S-19.)
59. The December 2009 IEP revision made significant reduction in the number of SDIs. It eliminated copy of teacher's notes, retaking tests, all test accommodations, and chunking assignments. It modified SDIs for use of curriculum support to organize materials. It added new SDIs for reading and writing, including use of graphic organizers. It retained the extra set of books at home. (S-19.)

DISCUSSION AND CONCLUSIONS OF LAW

In this matter, the Parents assert that the District failed to provide a free appropriate public education to the Student with regard to auditory processing deficits, ADHD, reading, writing, self organization and anxiety. In the face of these assertions,

the Student's record is demonstrably positive, and the Student's marks are generally good, mostly A's and B's with an occasional C. (FF 44.) The Parent asserts that these good marks were the result of the Parent's extensive interventions at home, with the assistance of the Student's grandmother, who is an experienced and trained teacher. (FF 19.)

The District emphasizes that, while the Student's difficulties are real, the Parent has exaggerated them with regard to the Student's functioning at school. In effect, the District argues that the marks speak for themselves, when corroborated by District personnel. The District defends its IEP process as having produced a reasonable opportunity for meaningful educational benefit.

The record is far greater than preponderant that the Student made meaningful educational progress in all phases of education, including the educational needs identified in the evaluations in the record, all of which are virtually undisputed. I conclude that the Student was provided with meaningful educational benefit despite any deficiencies of the District's educational planning process in this matter.

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.¹ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special

¹ 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).

education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Thus, the moving party must produce a preponderance of evidence² that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claims, or if the evidence is in “equipoise”, the Parent will not prevail.

OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a

² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810. In this decision, I refer to “preponderant” evidence, which is a quantity or weight of evidence that is at least great enough to constitute a “preponderance” of evidence.

program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “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 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide 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). An eligible student is denied FAPE if his/her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP

must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. 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.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered 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).

In the present matter, a preponderance of the evidence demonstrates that the Student received meaningful benefit with regard to all academic subjects, as well as with regard to reading, self organization and attention. I conclude that the problems associated with auditory processing deficits were not a substantial obstacle to the Student and that the Student was able to hear and understand directions sufficient to enable the Student to succeed demonstrably in all academic subjects. As to written expression, I conclude that the only area of performance in which the Student demonstrated weakness was conventions, and as to conventions, I conclude that the evidence is in “equipoise”; therefore, since the Parent has the burden of persuasion that the District failed to provide meaningful educational benefit, I find against the Parent regarding the provision of FAPE with regard to writing conventions.

AUDITORY PROCESSING DEFICIT

The record is not preponderant that the Student suffered from a cognitive deficiency in auditory processing. (FF 1, 5, 6, 16, 45.) The independent neuropsychologist's report made it clear that the Student's difficulties in understanding oral directions and assignments were due to problems with attention, not with auditory processing. (FF 6, 45 to 47.) The District appropriately accepted this assessment. (FF 51.) The Student's performance in the relevant period demonstrates preponderantly that the Student was able to hear and understand directions. (FF 20, 54.)

In reaching this conclusion, I rely upon findings as to credibility of witnesses. I did not find any witness whose testimony was not credible in terms of honesty. However, I assign varying weight to some witnesses' assertions, based upon my observations of their testimony in the context of the overall record.

Most of the evidence as to the Student's performance with understanding directions is based upon witness impressions. The Parent's impression was that the Student was having extreme difficulty with understanding directions, thus confirming early evaluation reports that diagnosed a Central Auditory Processing Disorder. On the contrary, numerous teachers reported that the Student had no such difficulties in school. One witness, a former tutor of the Student who is now an employee of the District, flatly contradicted the Parent's impression, based upon years of tutoring the student once per week. I find that, although the witness may have had a theoretical reason to shape testimony favorably to the District, the record contains not a shred of evidence of bias or dissembling. On the contrary, this witness presented under oath as relaxed and open, with a normal facial expression and straightforward demeanor. Answers were measured

and even difficult questions were handled forthrightly. (FF 20.) I find the witness credible and reliable.

The Parent was patently sincere and an admirable advocate for the Student. However, I find that Parent's perception of Student's needs was not entirely reliable. In light of the tutor's testimony, I conclude that the Parent's perception of the degree and intensity of the Student's functioning deficits was inaccurate as applied to the student's performance in school.

There is no doubt that the Student impressed the Parent at home as exhibiting serious difficulties across a wide spectrum of functioning, including ability to understand or process instructions. (FF 1, 3, 7, 10, 11, 18, 19, 32, 33.) However, the tutor's testimony was to the contrary, even though the tutor saw the Student outside of school. (FF 20.) With the tutor, there was not a hint of difficulty understanding directions or being prepared to complete homework within a reasonable time frame. (FF 20, 54, 56.) Weighing the testimony of these two credible witnesses, I find that the tutor's impressions have more weight.

The impressions of the tutor are consistent with those of the overwhelming majority of teachers who testified in this matter. (FF 32, 54.) Although some were more reliable than others, all agreed that the Student had little or no difficulty understanding or complying with directions. (FF 32, 54.) I conclude that auditory processing as manifested by ability to understand directions was not a significant educational need during the relevant period of time.

ATTENTION

The record is preponderant that the Student suffered from significant deficits in attention. (FF 2, 5, 45.) These impacted negatively the Student's ability to receive directions and retain them for purposes of learning. (FF 3, 6, 11, 16, 19, 21.) Attention also impacted the Student's ability to learn in all subjects and settings. (FF 5, 6, 21, 45.)

The record is preponderant that the District employed an array of regular educational accommodations and SDIs, listed in some of the IEPs, that directly supported the Student in the inclusive educational setting, and that the Student made progress, not only with overall academic grades, but also with strategies taught by District personnel to overcome attention problems. (FF 24, 28, 29, 32, 37, 38, 44, 54, 55, 56.) These included preferential seating, monitoring Student understanding of directions, provision of graphic organizers and teacher notes, repetition of directions, and use of an assignment book and checking it on a one to one basis with teachers. (FF 24, 28, 29, 32, 37, 38, 44, 54, 55, 56.)

During the relevant period, teachers – including the tutor - reported that the Student knew the instructions given, learned how to be prepared for classes and homework sessions, consistently completed class work with better than average grades, and consistently returned homework and longer term projects. (FF 32, 44, 54.) Standardized achievement testing showed grade level performance at an average level in core academic skills. (FF 45 to 47.) Teacher observations and curriculum based testing confirmed progress in all areas. (FF 44, 56.) While there were testing accommodations, the Student's marks preponderantly demonstrated substantial educational progress. (FF 44.) I conclude that the District in fact taught the Student effective skills for academic

success and accommodated all areas of attention difficulty which remained as barriers to meaningful educational progress.

ORGANIZATION

My conclusions are similar with regard to organization and planning. The same SDIs and accommodations that the District employed to address attention difficulties were also directed to organization and planning. District personnel taught the Student with graphic organizers, and taught reading comprehension strategies explicitly. (FF 54.) They assisted the Student when necessary, to break down or “chunk” assignments and test questions. (FF 54.) They monitored long term projects. (FF 54.) The Student’s good marks proved the success of these strategies, and the tutor confirmed that the Student had learned to be better organized, better prepared and more efficient in accomplishing academic tasks. (FF 20, 44.)

READING

The Student had difficulties in reading for many years, consistently scoring below grade level in reading decoding, fluency and comprehension early in life. (FF 8, 13.) However, by the time of the independent neuropsychological evaluation, the Student’s standardized achievement testing was within the average range in almost all measures of the components of reading skill, including decoding, sight word reading, fluency and comprehension. (FF 30, 46.) Weaknesses in fluency were attributed to attention difficulties and a tendency to focus on details rather than the gestalt of a word or sentence. (FF 46.) Thus, the Student had no significant deficit in reading, though the

Student's performance in school showed some weakness in terms of oral reading fluency. (FF 48.) The District provided regular education interventions to address the Student's weaknesses in reading, and the Student made significant progress both in reading and in academic subjects that require reading proficiency. (FF 37, 44, 48, 54, 55.)

WRITING

The Student demonstrated deficiencies in writing in early years, including problems with penmanship, conventions, organization and production of ideas. (FF 9, 19, 21.) By the time of the relevant period, most of these problems had been resolved, but the Student continued to have deficits in writing conventions. (FF 38, 44, 47, 48, 54, 56.) Thus, there is some evidence that these problems continued in school in the relevant period; however, there is contrary evidence that implies that the Student had made progress in conventions and was at least a proficient writer. On balance, based upon this evidence, I cannot find either that the Student failed to make progress in writing conventions or that the Student made progress in writing conventions. Thus the evidence is in equipoise, and I must conclude that the Parent has failed to meet the Parent's burden to persuade the hearing officer, as discussed above, that the District denied the Student a FAPE with regard to writing conventions.

DEFICIENCIES IN THE EDUCATIONAL PLANNING PROCESS

I find that the District's IEPs were reasonably calculated to confer meaningful educational benefit during the relevant period, but just barely so; the Student's meaningful progress in all relevant areas of educational need demonstrates that these

plans did meet all of the Student's educational needs, despite numerous faults.³ The May 2008 IEP failed to offer measurable goals to address explicitly all of the educational needs identified in the previous Evaluation Report, and set forth in the present levels portions of the IEP. (FF 21 to 24, 26.) The goals that were offered were not clear or measurable based upon baselines and stated performance standards. (FF 23, 25, 34.) Thus progress monitoring was subjective and the goals were not data driven. (FF 25, 33 to 36.) Moreover, multiple changes were made to the goals and SDIs, and the record shows good reason for only some of them. (FF 27, 29 to 43, 52, 53, 58, 59.) IEP team meeting discussions did not always clearly convey to Parent the options and proposed changes. (FF 40.)

LEGAL STANDARD FOR TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) ("Burlington-Carter test). First, has the District offered to provide a free appropriate public education? 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,

³ The Parent does not contest the placement, which was itinerant learning support with full inclusion throughout the relevant period.

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).

In the present matter, the District has provided a program that met the Student's educational needs. Accordingly, I will not order the District to provide tuition reimbursement for the cost of the Student's private school placement. In light of this decision, I do not reach the second and third parts of the above described "Burlington-Carter" analysis for tuition reimbursement – appropriateness of the private placement and any equitable considerations.

REIMBURSEMENT FOR PRIVATE TUTOR

As noted above, the private tutor testified and the tutor's testimony carried great weight with me. The tutor was hired independently by the Parent and the Parent asserts that the tutor substituted services with regard to organization and remedial teaching that the District should have provided as part of a FAPE. (FF 19.) However, when asked whether or not the tutoring services had been necessary for the Student to keep up with school work during the 2008-2009 school year, the tutor responded that the services had benefitted the Student, but that the tutor was unable to say that they were necessary. (FF 20.) Thus, the Parent has failed to prove by a preponderance of the evidence that there is any legal or equitable basis for an order of reimbursement. I will not order reimbursement for the private tutoring services.

SECTION 504

Generally, section 504 protects students with disabilities from discrimination in access to and equal opportunity to benefit from educational services from kindergarten through twelfth grade. 29 U.S.C. §794 ; 34 C.F.R. §104.4. To establish discrimination under Section 504, a student or parent must prove that (1) he or she is disabled or has a handicap as defined by Section 504; (2) he or she is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he or she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of his or her disability. 29 U.S.C. §794; 34 C.F.R. §104.4; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

The Commonwealth of Pennsylvania protects the student’s right to be free from discrimination on the basis of handicap or disability, through Chapter 15 of the Pennsylvania Code, part of the regulations implementing the educational statutes of the Commonwealth. 22 Pa. Code Chapter 15. A “protected handicapped student” under these regulations is entitled to those related aids, services or accommodations which are needed to afford that student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student’s abilities, without cost to the student or his or her family. Chapter 15 by its terms is intended to implement students’ rights under section 504, and it does not expand or limit those rights. 22 Pa. Code §15.11(c).

In the instant case, the finding that there is no denial of a FAPE under the IDEA applies equally to the section 504 claim. My conclusion is based upon a finding that the

Student was able to receive meaningful educational benefit; thus, there is no basis in the record for a separate finding of discrimination under section 504.

CONCLUSION

For the reasons set forth above, I conclude that the District provided a FAPE to the Student. Therefore, I will not direct the District to provide compensatory education or to reimburse the Parent for private school tuition or the private tutor. Any claims not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District did not fail to provide the Student with meaningful educational benefit during the relevant period between June 3, 2008 and the first day of school in the 2010-2011 school year, with regard to study skills, self-organization, reading, written expression, and penmanship.
2. The hearing officer does not award compensatory education to the Student for all or any part of the relevant period.
3. The hearing officer does not award tuition reimbursement to the Parent for tuition incurred for the 2010-2011 school year at the Private School.
4. The hearing officer does not award reimbursement for the cost of private tutoring services provided by the Parent during the relevant period.

William F. Culleton, Jr. Esq.

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

December 23, 2010