

*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

Student's Name: V.B.

Date of Birth: [redacted]

ODR No. 13735-12-13-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Drew Christian, Esquire  
801 Monroe Avenue  
Scranton, PA 18510

Wayne Highlands School District  
474 Grove Street  
Honesdale, PA 18431-1099

Rebecca A. Young, Esquire  
King, Spry, Herman, Freund & Faul, LLC  
One West Broad Street, Suite 700  
Bethlehem, PA 18018

Dates of Hearing:

August 12, 2013; October 3, 2013

Record Closed:

November 8, 2013

Date of Decision:

November 15, 2013

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) was an eligible resident of the school district named in the title page of this decision (District) during the period of time relevant to this decision.<sup>1</sup> (NT 7.) Student attended a District high school during the relevant period, and graduated in June 2013. (S 17.) Student is identified with Specific Learning Disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 6.)

The Student's Parents<sup>2</sup>, identified in the title page of this decision, requested due process under the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), alleging that the District failed to provide a free appropriate public education (FAPE) and requesting compensatory education. The District asserts that it has provided appropriate services.

The hearing was completed in two sessions, and the record closed upon receipt of written summations. I conclude that the District failed to offer and provide a FAPE to Student and that there is a basis for awarding compensatory education.

## ISSUES

1. Did the District fail to offer and provide Student with a FAPE from April 10, 2011 to the date of Student's graduation, June 15, 2013?
2. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from April 10, 2011 to June 15, 2013?

---

<sup>1</sup> The parties agreed that the hearing officer would be requested to decide the appropriateness of District actions and inactions only within the period beginning on the first day permitted by the IDEA's two year statutory limitation period, which is two years prior to the filing of the complaint in this matter (April 10, 2011), and ending with Student's graduation on June 15, 2013. (NT 12, 23-26.) I refer to this as the relevant period.

<sup>2</sup> Although both Parents requested due process, Student's Mother testified. For convenience, I will refer to her as Parent - in the singular - in this decision.

3. Should the hearing officer order the District to provide post-secondary technical or other educational services, either directly or through payment of tuition or fees to a third party?
4. Should the hearing officer order the District to fund an independent educational evaluation, including a psychoeducational evaluation and an evaluation of post-secondary transition needs?

### FINDINGS OF FACT

1. Student attended the District's schools for kindergarten and first grade. Student attended a private school for a repeated first grade and second through fourth grades. Parents placed Student in a virtual charter school for two years, and then home schooled Student for seventh through ninth grades. Student re-enrolled in the District for tenth through twelfth grades. (NT 220-224; P 2.)
2. In home schooling, Student was instructed in functional mathematics skills such as grocery shopping, checkbook balance and check writing, measurement, finance word problems and nutritional labels. (P 2.)
3. Student experienced academic difficulties as early in life as first grade. Student was evaluated when in third grade, and was found to have average intellectual capacity; below average verbal skills and mental processing speed; and a severe discrepancy between intellectual capacity and mathematics achievement. (NT 219; P 1.)
4. Upon entry into the District's high school for tenth grade, Student was enrolled in a regular education class for mathematics, but struggled immediately. (NT 324-325.)
5. The District provided an evaluation report in September 2010, when Student was in tenth grade in its school. The report classified Student with Specific Learning Disability under the IDEA, in the areas of reading fluency, reading comprehension, mathematics calculation and mathematics problem solving. It also noted weaknesses in written expression, although it did not conclude that Student had a disability in writing, based upon a discrepancy analysis. (P 2, S 2.)
6. In September 2010, the District's cognitive testing yielded an intelligence quotient of 62, in the extremely low range; an adaptive behavior assessment indicated average functioning globally, and average conceptual and practical functioning (including school life and self-care skills), with below average social functioning. In light of these scores and other data, classification of cognitive impairment was not appropriate at that time. Subsequent experience with Student at school did not suggest to the contrary. (NT 377-378; P 2.)
7. In September 2010, the District's achievement testing yielded scores in the extremely low range for mathematics problem solving and fluency in addition and multiplication. Student's achievement was in the borderline range for reading comprehension, sentence

composition, word reading, numerical operations, oral reading fluency and mathematics fluency in subtraction. (NT 103; P 2.)

8. The District's September 2010 evaluation showed clinically significant difficulties in executive functions, including behavioral regulation and metacognition. (P 2.)
9. The District's September 2010 evaluation recommended consideration of the following specially designed instruction and modifications (SDI): remedial instructional programming; slowed rate of presentation of material; rehearsal; mnemonic devices; practice for new skills; explicit rules and expectations, reviewed frequently; chunking of tasks; pre-teaching; small group activities; and guided observation of peer interactions. (P 2.)
10. In October 2010, the Student's Individualized Education Program (IEP) team provided an IEP for Student's special education in tenth grade. The IEP and the District's subsequent Notice of Recommended Educational Placement (NOREP) placed Student in itinerant learning support for mathematics. The IEP found Student not eligible for Extended School Year services (ESY). (P 3, S 2.)
11. The October 2010 IEP and NOREP provided for Student's inclusion in general education for English and other subjects. The District advised Parents that learning support for these subjects was not appropriate because Student would be able to make progress in some areas of the curriculum with supports in general education. The IEP provided one supplementary aid or service, which was the provision of a study guide. (S 2.)
12. The October 2010 IEP present levels of academic and functional performance reported grades in various classes for September and part of October of 2010. The section did not reflect most of the September 2010 evaluation report, including Student's scores on standardized intelligence and achievement testing and behavior inventory scores for executive functions; the section did not reference the evaluation report. The section contained the statement that Student needed specially designed instruction in mathematics, and could make adequate progress in the general education curriculum for social studies, English and science with some specially designed instruction. Student's achievement levels and difficulties in reading fluency and comprehension were not reflected in the present levels section of the IEP. (P 3.)
13. In October 2010, Student was [of transition age]. The October 2010 IEP did not provide any present levels for transition services. The IEP provided two goals for transition, one for each semester of tenth grade. The first was completion of a future planning inventory, relating careers to personal interest, abilities and aptitudes. The second goal was to explain the importance of essential workplace skills and knowledge; the latter was to be measured by having the Student read the SDI section of the IEP and explain Student's needs to a teacher. Neither of these goals aimed at Student's development of skills needed after graduation for post-secondary training or employment, and neither was directed at providing a goal directed, individualized post-secondary plan and skill acquisition process. The District did not offer Parents the option of vocational training. (NT 137-147, 230; P 3.)

14. It was and is the custom and practice of the District's guidance counselor assigned to Student to counsel students to select courses with attention to their career preferences. Students are encouraged to use the Career Cruising website in junior year, and the counselor speaks with students about vocational schools and job application planning in senior year. (NT 259-261.)
15. The October 2010 IEP provided a mathematics goal for improving pre-test/post-test scores for a chapter of a pre-algebra or algebra curriculum, to be measured through tests, quizzes, class assignments, class participation, and teacher observations. (P 3.)
16. The October 2010 IEP did not provide goals or specially designed instruction for mathematics problem solving, operations or fluency, or functional mathematics, despite the fact that Student had educational needs in these areas. (NT 117-119, 137; P 2, 3.)
17. The October 2010 IEP did not provide goals for reading, although this was an educational need for Student. (P 3.)
18. The October 2010 IEP did not provide goals for written expression; the District did not consider this to be an educational need for Student. (NT 135-136; P 3.)
19. The October 2010 IEP provided SDI for mathematics, consisting of utilizing games, graph paper, flash cards, calculator and visually uncluttered teacher-made materials. It also provided for testing accommodations including review sheet directed to the tests, extra time, reading questions, word bank and limiting choices for matching and multiple choice questions. It required all teachers to provide study guides. It did not provide SDI directly addressing practical mathematics, reading fluency or reading comprehension. It did not require general or special education teachers to provide remedial instruction; slowed rate of presentation of material; rehearsal; mnemonic devices; practice for new skills; explicit rules and expectations, reviewed frequently; chunking of tasks; pre-teaching; small group activities (except for mathematics); or guided observation of peer interactions, all of which had been recommended in the ER. (P 3.)
20. In October 2011, the IEP team provided an IEP for Student's special education in eleventh grade and the beginning of twelfth grade. The IEP and the District's subsequent NOREP placed Student in itinerant learning support to allow Student to take tests in the learning support room. It assigned Student to general education classes for all subjects. The IEP found Student not eligible for Extended School Year services (ESY). (S 4.)
21. The IEP team decided to place Student in a general education class because Student had been performing at a higher level than peers in the special education mathematics class in which Student had been enrolled in the latter part of tenth grade. Another special education class was available, the pre-algebra class, which accessed the general education curriculum, but Student was not placed in this class to begin eleventh grade. (NT 325-326.)
22. The October 2011 IEP and NOREP provided for Student's inclusion in general education for all subjects. The District advised Parents that learning support for these subjects was

not appropriate because Student would be able to make progress in some areas of the curriculum with supports in general education. (S 2.)

23. In the October 2011 IEP, the present levels section noted Student's classification of specific learning disability in reading comprehension and fluency; and mathematics calculation and problem solving. The section included a diagnostic mathematics assessment placing Student's achievement at the first percentile rank, with a grade equivalent of 3.5. The present levels section indicated that a diagnostic reading battery in September 2011 had yielded scores at the 13<sup>th</sup> percentile in word identification; the 18<sup>th</sup> percentile in passage comprehension; and the 16<sup>th</sup> percentile in basic reading skills. Student performed at the 63<sup>d</sup> percentile in oral comprehension; the 60<sup>th</sup> percentile in spelling of sounds; and the 27<sup>th</sup> percentile in word attack. The section noted that Student works best in small groups and one on one instruction. (S 4.)
24. The October 2011 IEP provided transition activities for eleventh grade, including (for post-secondary education and training, as to which Student was undecided) SAT and ASVAB accommodations and opportunities to attend a college fair; (for Student's goal of competitive, unsupported employment) repeated completion of future planning inventory and opportunities to attend college fair; and (for Student's independent living goal) updating future planning inventory and participating in Career Cruising website. (S 4.)
25. The October 2011 IEP provided two annual goals for transition. The first was essentially a repetition of the previous year's goal of analyzing career options based on personal interest, abilities, aptitudes, achievements and goals; this was to be measured by documenting the updating of the future planning inventory. The second was to meet with the guidance counselor to decide about accommodations for taking the SAT or ASVAB tests for college admissions. These goals were completed during the school year. Neither of these goals aimed at Student's development of skills needed after graduation for post-secondary training or employment, and neither was directed at providing a goal directed, individualized post-secondary plan and skill acquisition process. (NT 137-147; S 4, 6.)
26. Student attended and completed courses on food preparation and culinary arts that addressed post-secondary considerations. (NT 263-264; S 18.)
27. It is the custom and practice of the District to provide referrals to eleventh grade students for the Office of Vocational Rehabilitation (OVR) so that they can receive OVR services if needed in twelfth grade. OVR services could have addressed some of Student's transition needs in twelfth grade. Neither Student nor Parents submitted an application to OVR through the District. (NT 339-340, 371-372.)
28. The October 2011 IEP provided one goal for mathematics, which called for the Student to develop a plan to analyze a problem in a mathematics class and solve the problem "in grade appropriate contexts". This was to be measured by general education chapter tests with an average of 75% achievement. The goal did not make clear what grade level instruction would be provided through specially designed instruction, or what

mathematics calculation skills would be attained in order to achieve this goal. (NT 355; S 4.)

29. The October 2011 IEP did not provide goals or specially designed instruction for mathematics operations or fluency, or functional mathematics, despite the fact that Student had educational needs in these areas. (NT 117-119, 137, 355; P 2, 3.)
30. The October 2011 IEP did not provide goals for reading fluency or word reading, despite the fact that Student had educational needs in these areas. (NT 355-357; P 2, 5.)
31. The October 2011 IEP provided a goal for reading comprehension, calling for Student to demonstrate grade level text comprehension of literary works, by attaining 75% scores on tests in general education English class. No metric was designated to determine mastery. Student was not able to read at grade level for comprehension, but was able to read at a sixth grade level sufficient to access the curriculum in the District's practical English class, which uses a simplified curriculum. (NT 109-110, 159-161, 355-357; S 4.)
32. The October 2011 IEP did not provide goals for written expression; the District did not consider this to be an educational need for Student. (NT 135-136; P 5.)
33. Progress monitoring on the reading comprehension goal consisted of grades (derived from supported assessments) of 72% in the second quarter; 68% in the third quarter and 80% in the fourth quarter, all from a baseline stated in the progress report of 55%, presumably in the first quarter. (S 6.)
34. The October 2011 IEP provided SDI for transition, including completion of the future planning inventory; putting in motion a career plan, including researching jobs and schools, as well as admissions testing; driver education and voter registration. The District did not provide progress monitoring for these services. (S 4, 6.)
35. It also provided the following SDI: repeated practice opportunities; rephrase/simplify; direct instruction; modifications to curriculum; study guide. There were no additional supplementary aids and services. SDI were also provided for testing, repeating those provided in October 2010, with some revisions. (S 4.)
36. The October 2011 IEP did not provide SDI directly addressing practical mathematics, reading fluency or reading comprehension. It did not require general or special education teachers to provide remedial instruction; slowed rate of presentation of material; rehearsal; mnemonic devices; explicit rules and expectations, reviewed frequently; chunking of tasks; pre-teaching; small group activities; or guided observation of peer interactions, all of which had been recommended in the ER. (S 4.)
37. By December 2011, Student was receiving a "D+" grade in class, and was moved to a functional mathematics class called "Bridges". No progress monitoring was provided other than the class score. The Bridges class was inappropriate for Student, because Student did not have the mathematics skills needed for success in that class. (NT 61-71; S 6.)

38. On January 25, 2012, the IEP team revised the Student's IEP. The present levels section was revised to reflect the reasons for Student's transfer from the general education mathematics class called Bridges to a special education pre-algebra class. The section reflected that Student had struggled in the general education mathematics class and received a grade of "F"; therefore, Student was transferred to a pre-algebra class, scoring 75% in multiplying decimals by powers of ten, and 64 in another assessment at a grade three curricular level for baseline purposes. The pre-algebra class is substantially less difficult than the general education mathematics class. (NT 57-58, 120, 283-284; P 5.)
39. The pre-algebra class did not utilize a research based curriculum. (NT 302, 368.)
40. The January 2012 IEP revision reinstated the mathematics goal from the October 2010 IEP that called for improving by 30 % from pre-test to post-test scores in chapter tests for pre-algebra curriculum, at an unspecified grade level of curriculum. Measurement was to include both the actual tests, class participation and teacher observations. Thus, subjective factors were permitted to determine whether Student reached this goal. (NT 296-301; P 5.)
41. The District provided progress reports showing that Student had received grades in mathematics of "A", "B+" and "B+" during the second half of the year in the new class, without specifying whether or not Student had improved by 30% over chapter pre-tests, as called for in the goal. (NT 285-286; S 6.)
42. In September 2012, the District invited Parents several times to an IEP team meeting to formulate an IEP for Student's twelfth grade year. Parents did not respond or come to the scheduled meeting, nor did Student respond or attend. The District prepared the IEP without them. (NT 331; S 8, 9, 10.)
43. On October 9, 2012, the District provided an IEP for Student's special education in twelfth grade. The IEP and the District's subsequent NOREP placed Student in itinerant learning support for mathematics only. The IEP did not find Student eligible for ESY services. (NT 57-60; P 6.)
44. Student was enrolled in a functional mathematics class at the beginning of twelfth grade, at Parents' request, because Student was demonstrating poor practical mathematics skills. This class was substantially easier than the pre-algebra class that Student had been in during the second half of eleventh grade. Student's mathematics achievement was such that the Student was a good fit in functional mathematics class. The previous IEP did not have a goal for functional mathematics. (NT 57-61, 234, 326-327.)
45. The October 9, 2012 IEP and NOREP provided for Student's inclusion in general education for English and all other subjects except mathematics. The District notified Parents that learning support for these subjects was not appropriate because Student would be able to make progress in some areas of the curriculum with supports in general education. (S 11.)
46. The October 9, 2012 IEP section on present levels reported Student's grade of 65.75% in practical English; 91.43% in functional mathematics; and 77.67% in money management.



Student received grades of 92.73% in career preparation, and 100% in culinary essentials. All of these scores were based upon modified assessments. (P 5, 6.)

47. The October 9, 2012 IEP section on present levels reported comparative scores from the Woodcock Johnson Diagnostic Reading Battery in September 2011 and September 2012. Student's percentile rank improved slightly in letter-word identification and basic reading skills. It declined slightly in word attack and by a substantial margin in spelling of sounds. It also declined by four points in oral comprehension, though this continued to be Student's strength. In passage comprehension, Student's percentile rank and grade equivalent classification remained the same. The present levels section indicated that Student continued demonstrate limited basic reading skills; limited skills in word identification, passage comprehension, pronouncing non-words, and brief reading; and limited to average skills in spelling letter combinations. Oral passage comprehension was average. (P 6.)
48. The October 9, 2012 present levels section did not show comparative scores in the diagnostic mathematics assessment; only the 2011 scores were reported, and no new scores were obtained. The section did not indicate whether or not Student's grade equivalent in mathematics had changed from the 3.5 level reported in 2011. The section did not provide information on Student's level of achievement in functional mathematics for Student's functional mathematics teacher. (NT 63; P 6.)
49. The October 9, 2012 present levels section of the IEP indicated that Student had been enrolled in a functional mathematics curriculum. It provided baseline information on Student's functional mathematics skills of telling time, counting money, measuring and writing checks and checkbooks. (P 6.)
50. The October 9, 2012 present levels section reported on transitional assessments, for the first time indicating that Student desired to work with animals as a career goal, and desired to receive on-the-job training. The section indicated that Student was counseled four times per year with regard to resume, job application and interview skills. The section also indicated that questionnaires had been sent to Parents with regard to transition and community agency involvement (Parents indicated that there was none). (P 6.)
51. The October 9, 2012 IEP section on transition indicated that Student would be enrolled in a career preparation class, daily for one semester, and in a career exploration meeting with the school counselor. It provided no services with regard to independent living. (P 6.)
52. The career preparation class was a general education class that focused upon job search skills such as resume writing and interviewing, and a senior project involving research about careers and writing documents needed for job applications, shadowing and interviewing persons in selected careers. Student was supported in the class by an educational aide. (NT 191-194, 201-206, 263, 290.)

53. The career preparation class teacher implemented all of the SDI in the Student's IEP except the study guide requirement. (NT 208-211.)
54. Annual goals repeated the 2011 goal for relating of careers to personal interests, abilities and aptitudes, and the 2010 goal for explaining the importance of workplace skills by reading and explaining the SDI section of the IEP. Neither of these goals aimed at Student's development of skills needed after graduation for post-secondary training or employment, and neither was directed at providing a goal directed, individualized post-secondary plan and skill acquisition process. The goals were completed at the end of Student's twelfth grade year. (NT 137-153, 177-179, 306-310; S 4, 6.)
55. Student attended a transition fair in twelfth grade, where students can meet representatives of colleges and the military. Student also was made aware of a community program that assists high school graduates with post- secondary transition needs. (NT 292-295.)
56. The October 9, 2012 IEP provided a functional mathematics goal only, to be measured by increasing post-test scores over pre-test scores by 10% on a designated assessment. The goal provided no metric for assessing mastery. There were no goals for moving beyond a grade three level in pre-algebra skills. (NT 61-71, 78-81; P 6.)
57. The October 9, 2012 IEP did not provide goals or specially designed instruction for mathematics problem solving, operations or fluency, despite the fact that Student had educational needs in these areas. (NT 121-124, 137, 358; P 2, 6.)
58. The October 9, 2012 IEP provided a reading comprehension goal formulated in the same way as the 2011 goal, with two exceptions: the goal designated a sixth grade level of curriculum, and stated a baseline of 56% accuracy; thus this goal was measureable. (P 6.)
59. The October 9, 2012 IEP did not provide goals or specially designed instruction for reading fluency or word reading, despite the fact that Student had educational needs in these areas. (NT 110-117, 137, 358; P 2, 6.)
60. The October 9, 2012 IEP did not provide goals for written expression; the District did not consider this to be an educational need for Student. (NT 135-136; P 6.)
61. The October 9, 2012 IEP provided SDI including most of the SDI set forth in the 2011 SDI; however, SDI for practice opportunities, direct instruction and modified curriculum were omitted. No other supplementary aids and services were provided. (P 6.)
62. The October 9, 2012 IEP did not require general or special education teachers to provide remedial instruction; slowed rate of presentation of material; rehearsal; mnemonic devices; explicit rules and expectations, reviewed frequently; chunking of tasks; pre-teaching; small group activities; or guided observation of peer interactions, all of which had been recommended in the ER. (P 6.)

63. The functional mathematics class was a small group and it was taught by an experienced and qualified special education teacher, who employed some or all of these techniques. (NT 82-83, 87-88.)
64. On October 17, 2012, the District and the Parents revised the IEP to increase some supports provided for testing. (S 12.)
65. Student did not receive remedial instruction for weaknesses in reading or written expression in twelfth grade. (NT 34-38; P 2.)
66. The Student's English teacher for the second half of twelfth grade did not modify the Student's curriculum to provide access through sixth grade level material, or monitor Student's progress toward the IEP goal. (NT 35-39.)
67. On the Spring 2012 PSSA tests, Student scored below basic in mathematics, reading and science. In mathematics, Student's strength profile was low for numbers and operations, measurement, geometry, algebraic concepts, data analysis and probability, comprehension and reading skills, and interpretation and analysis of text. (P 7.)
68. Student finished twelfth grade with final grades of B+ in functional mathematics, B in career preparation, D+ in money management, C- in Practical English, and A+ in culinary. These scores were based in part upon class participation and effort, as well as upon modified assessments. (NT 90-94; S 18.)
69. The Student was at risk of failing Practical English, even though it used a simplified curriculum and Student had supports in testing; in May 2013, the IEP added modifications to the IEP to make reading assessments easier, and Student's grades rose sufficiently to pass Practical English. One of the changes was to limit choices on assessments to two, thus permitting Student to get a correct answer fifty percent of the time by chance alone. (NT 50-55; S 18; P 8.)
70. Student's post test scores increased substantially over baseline in practical mathematics, including telling time, counting money, measurement and rounding. However, Student did not master any of these skills before graduation. (NT 67-71, 95-97; S 14.)
71. The Student attained the October 2012 IEP goal for reading comprehension at a sixth grade level. (NT 176-178, 186-189; S 16.)
72. At the time of graduation, Student still needed to begin to relate careers to personal interests, abilities and aptitudes; Student was unable independently to contact community agencies for support and job opportunities and unable to seek competitive employment independently. Student was not able to make change sufficiently to be employed as a cashier. Student had difficulty writing a check accurately, balancing a checkbook, depositing a check in a bank, adding, subtracting, reading and writing. (NT 96-97, 224-228; S 14.)
73. In May 2013, the District convened an IEP meeting with Parents to discuss Student's Summary of Student Performance for transition purposes. (S 13, 14.)

74. The District offered to provide educational services to Student for another year, but Parents opted to have Student graduate in June 2013. The District did not raise vocational training as a possibility. Student graduated at that time. (NT 133-134, 175-176, 235-236; S 15, 17.)

## 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 (which in this matter is the hearing officer).<sup>3</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>4</sup> that the other party failed to fulfill its legal obligations as alleged in the due process complaint. 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.

---

<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

<sup>4</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

In this matter, the Parents requested due process and the burden of proof is allocated to the Parents. The Parents bear the burden of persuasion that the District failed to comply with its obligations under the IDEA. If the Parents fail to produce a preponderance of evidence in support of Parents' claims, or if the evidence is in "equipoise", then the Parents cannot prevail.

#### FREE APPROPRIATE PUBLIC EDUCATION - LEGAL STANDARD

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 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 (3<sup>rd</sup> 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 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 or 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 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. 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. Rather, an IEP must provide a “basic floor of opportunity” for the child. 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).

I conclude that the District failed to provide Student with a FAPE because it failed to address Student’s disabilities appropriately. The District’s own evaluation in 2010 identified four areas of disability, but the District’s IEPs failed to address all of them as required by the IDEA, 34 C.F.R. §300.320(a)(2)(i). The IEPs failed to provide measureable goals, 34 C.F.R. §300.320(a)(2), and failed to offer many of the modifications and specially designed instruction

that had been recommended in the District's evaluation report. The scant data available on Student shows little progress in academic or functional skills. Successive IEPs failed to include updated present levels of academic functioning in all areas of need. Given Student's potential as indicated in the District's evaluation, I conclude that Student's progress was not meaningful.

The District's IEPs for three years failed to address all of Student's identified disabilities. The District's September 2010 evaluation report identified four areas of specific learning disability needing special education: reading fluency, reading comprehension, mathematics calculation and mathematics problem solving. However, the October 2010 IEP goal section failed to address mathematics problem solving, reading fluency and reading comprehension. The October 2011 and January 2012 revised IEP goal sections failed to address reading fluency. The October 2012 IEP goal section failed to address three of these areas of need: mathematics calculation, mathematics problem solving, and reading fluency. While the IEP goals failed to address these needs, there was no evidence that they were addressed in the limited SDI provided in these IEPs, or in the actual services offered. There was no data indicating an attempt to monitor progress in these skills.

The District's IEPs contained goals that were not measurable. One mathematics goal, provided in tenth and eleventh grades, called for a percentage increase in performance from pre-test to post-test; there was no baseline, and progress was to be measured by class performance and teacher observation, two methods plainly unrelated to the goals' metric. (As ultimately reported, progress monitoring data was in terms of marks, not percentage increases in performance.) The other mathematics goal given in eleventh grade to address problem solving, had no baseline. The sole reading goal offered in eleventh and twelfth grades was for comprehension of literature. For eleventh grade there was no baseline, but this was corrected for

twelfth grade, demonstrating that a baseline for this goal was possible, and that failure to provide one for eleventh grade was inappropriate.

The District's IEPs contained very few SDI directed to either special education or general education teachers. Yet, the District's evaluation report had recommended many SDI that were never implemented in the IEPs. There was no evidence to suggest that these recommendations were considered and rejected by the IEP team; the record preponderantly shows that they were simply ignored.

The District's progress monitoring was largely in the form of grades for courses. These did not always actually measure what the goals called for, and the record shows preponderantly that they were influenced by subjective factors. Moreover, the record shows preponderantly that the District made great efforts to ensure that Student would get good grades in all of Student's courses.

Student was placed in general education classes for English, where the grade level of reading selections was unknown, and readings were simplified overtly to permit access (without an IEP process) by students who could not perform adequately in the District's other English courses. The record showed that these classes were populated by a substantial number of students with IEPs; yet these classes were nominally general education classes, not taught by teachers certified for special education, and the teachers were not responsible for the students' special education programs.

The predominant form of SDI in Student's IEPs was modification to tests and quizzes. It was clear that the primary reason for these modifications was to allow Student to get better grades; when Student struggled in mathematics in eleventh grade, SDI were modified, not to provide a research based curriculum or other modifications to the curriculum or delivery of



curriculum – but to reduce the difficulty of tests and quizzes, and to allow Student to take these tests and quizzes in the supervision of a special education teacher, rather than the teacher assigned to the course. Student was in general education for most courses, and these testing modifications were applicable to Student’s general education core academic subjects, specials and electives.

I conclude that the District’s progress monitoring was inappropriate for Student. It was in some cases based upon goals that were not measurable. It consisted largely of grades, rather than more objective measures. The grades were supported; thus, they were not an accurate metric for monitoring Student’s progress on specific educational needs caused by Student’s disabilities.

## MATHEMATICS

The evidence is preponderant that the District’s services to address Student’s disabilities in mathematics were not appropriately based upon a careful prior evaluation of Student’s skills and deficits. As a result, the Student’s program was not systematic and sequential. Rather, Student was repeatedly enrolled in classes that were not appropriate for Student’s needs or skill levels; repeatedly, Student either failed or performed so far above Student’s peers as to illustrate the inappropriateness of the class placement. Student went from regular education to special education pre-algebra, back to regular education in a class called “Bridges to Algebra” and then back to special education pre-algebra. In twelfth grade, Student was enrolled in a practical mathematics class that revealed substantial gaps in Student’s practical mathematics knowledge and skills. There was no evidence that these moves and reiterations were based upon careful consideration of the available alternatives or Student’s mathematics skills and deficits. Clearly,

they were not sequential. Compounding the haphazard effect of these shifts, Student's IEP goals shifted also, depending on what class the Student was in at any given time.

I conclude that these services were not reasonably calculated to provide Student with meaningful educational benefit. Available data corroborate this conclusion. Student graduated with no evidence of acquisition of mathematics skills in the general curriculum. There was evidence of gains in practical mathematics, but these gains did not reach the level of mastery, and Parents' testimony showed serious deficits in Student's mathematics skills.

## READING

On this record, the District's special education services for reading were inappropriate. Student's IEPs in tenth grade did not address reading at all. In eleventh and twelfth grades, they completely ignored Student's identified need with regard to reading fluency. The IEPs for eleventh and twelfth grade repeated the same comprehension goal. That goal was predicated upon Student's participation in the simplified general education class with reduced reading and no known reading grade level. There was no research basis for the program in that class, and it was not delivered by a special education teacher. I conclude that this program failed to provide Student with a reasonable opportunity to gain meaningful educational benefit in reading.

The District argues that the Student did not need IEP goals for fluency and word reading, even though these skills were identified as needs in the September 2010 evaluation report.<sup>5</sup> I weigh the evidence that the District cites against the findings in the evaluation report, and I conclude that the preponderance of the evidence shows that Student did need special education to address word reading and fluency.

---

<sup>5</sup>The District's argument does not address whether or not the Student needed reading goals for the initial portion of the relevant period starting on April 10, 2011 until the end of tenth grade and continuing in eleventh grade until the new IEP was agreed upon on October 11, 2011.

The Student's case manager, a certified English teacher with experience and previous certification in teaching reading, administered a standardized reading test in successive years, September 2011 and September 2012. The scores indicated that Student was reading at a sixth grade level in 2011 (the tested categories were letter-word identification, passage comprehension, word attack and basic reading skills). In 2012, Student's scores indicated that Student remained at a sixth grade level in passage comprehension. However, the scores also indicated that Student had made almost one year's growth, because Student's achievement had advanced along with that of Student's same grade cohort, except in spelling of sounds. The data did not address reading fluency. The Student's case manager, based upon this data and her own observations, concluded that Student did not need goals for fluency and word reading.

The case manager also testified that, in eleventh grade, Student was in a practical English class, in which the case manager, a reading teacher, says that Student was appropriately placed<sup>6</sup>. The case manager's reasoning was that Student was able to comprehend in this highly simplified reading curriculum, and therefore did not need special education in word reading and fluency. While Student's scores permitted Student to pass, I note that this was aided by a last minute change in the assessment accommodations, one of which (limiting choices on assessments to two) allowed Student to get a correct answer to questions fifty percent of the time merely by chance.

I find this testimony less convincing than the 2010 evaluation report itself, and therefore I accord the testimony less weight. I conclude therefore that the Student continued to need special education services in reading fluency and word reading, in addition to addressing Student's needs in reading comprehension. Student's sixth grade reading level was still substantially

---

<sup>6</sup>While the case manager described the practical English curriculum as simplified, there was little other evidence as to the curriculum level of reading material in that class for Student's eleventh and twelfth grades, although the record suggests that it was substantially below grade level.

below that of Student's age- and grade-level peers (eleventh and twelfth grades); the record is preponderant that Student was not able to access eleventh and twelfth grade level reading material. Thus, despite the special education coordinator's opinion that sixth grade reading comprehension is sufficient for this twelfth grade graduating high school student, I conclude that the District failed to address these needs appropriately as required by the IDEA.

This decision is dependent in part upon the hearing officer's estimation of the Student's abilities; to determine whether or not there was a denial of FAPE, the case law requires a judgment about whether or not the Student made progress that was "meaningful" in view of the Student's ability, as discussed above. I consider that Student's tested IQ in 2010 was in an extremely low range, thus suggesting extremely low overall academic ability, and therefore the inability to make substantial progress, even if appropriately taught. However, there was considerable evidence in the report itself that Student's ability, while modest, was higher than the simple IQ score suggests. Student's functional skills were in the average range, and the evaluation identified Student with specific learning disability, implying its conclusion that Student's cognitive capacity was higher than that suggested by the IQ score alone. Student's performance in subsequent years substantiated this judgment. Student did not have difficulty with participating in school, and Student was able to participate without known difficulty in general education classes. Student had no difficulties with social skills and did learn - less than satisfactorily (in the realms of reading comprehension and practical mathematics) despite the District's inappropriate special education program.

In sum, I conclude that Student's progress in reading was not meaningful in light of the evidence that Student's abilities somewhat exceeded what the 2010 IQ score suggested. I conclude that the very limited nature of Student's progress – keeping pace with Student's cohort,

but at a very low level of achievement - during the relevant period was not attributable solely to Student's modest academic ability, as the District argues. Rather, it is due to the District's inappropriate special education program, which was not reasonably calculated to provide Student with meaningful educational benefit, and consequently failed to provide Student with such benefit. Based upon a preponderance of the evidence, it is more likely than not that Student could have closed the gap with peers significantly, given an appropriate special education program for reading in tenth, eleventh and twelfth grades.

## TRANSITION

The IDEA requires that every IEP of a child of designated age must include “appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills.” 20 U.S.C. §1414(d)(1)(A)(i)(VIII)(aa). The IEP must also include “the transition services ... needed to assist the child in reaching those goals ... .” 20 U.S.C. §1414(d)(1)(A)(i)(VIII)(bb). In Pennsylvania, transition services must begin at age 14. 22 Pa. Code §14.131(a)(5). The transition plan is not required to drive the goals in the rest of the IEP,<sup>7</sup> nor must it guarantee a vocational result; rather, it is meant to provide the child with an opportunity to advance toward desired post-secondary goals. High v. Exeter Twp. Sch. Dist., 2010 WL 363832 (E.D. Pa. 2010).

Transition services must be coordinated activities designed to be within a results oriented process that is focused on improving the child's academic and functional achievement and that facilitate the child's movement from school to post-school activities. 34 C.F.R. §300.43(a)(1). The process must be based upon the child's individual needs, taking into account the child's

---

<sup>7</sup> In addition, procedurally, the IDEA specifies that the IEP team is not required to repeat in the transition section of the IEP any related information already found elsewhere in the IEP. 20 U.S.C. §1414(d)(1)(A)(ii).

strengths, preferences and interests. 34 C.F.R. §300.43(a)(2). Services must include, as appropriate, instruction, related services, community experiences, development of employment objectives or other post- school objectives, acquisition of daily living skills and functional vocational evaluation. Ibid. Related services for transition must include developmental, corrective and supportive services as needed. 34 C.F.R. §300.34(a). Related services for transition also must include needed rehabilitation counseling – services that focus on employment preparation, achieving independence, and integration in the workplace and community. 34 C.F.R. §300.34(c)(12). Vocational rehabilitation services must also be made available as needed. Ibid.

I conclude that the transition services that the District provided to Student failed to meet the standards set forth above. The services made available to Student were generic; there is no evidence that the District tailored transition services to Student’s individual needs. Neither the evaluations nor the goals set forth in the IEP reflected an individualized or results-oriented attempt to provide Student with an opportunity to advance toward desired post-secondary goals, and the Student made little if any progress toward any such goals.

The transition evaluations reflected in the transition sections of the IEPs for all years constituted a single survey that addressed the Student’s post-secondary interests, and a computer-based program for identifying careers and finding out information about them. Although the survey questions were updated in some unspecified fashion from year to year, there was no evidence that these evaluations addressed Student’s training, education, employment or independent living needs, as required by the IDEA. Although the computer-based program was listed as a service made available to Student, there is no evidence that there was any follow-up or that Student even tried to use it. None of the District’s witnesses evidenced any sense of

responsibility to oversee Student's transition activities or planning; the witness who had been assigned knew little about what Student actually did with regard to this service, and seemed to have little understanding of the formulation and utilization of goals in special education.

I conclude that the goals for transition in all of Student's IEPs were not appropriate. None of the goals required Student to learn specified information or perform reasonably significant transition-related tasks calculated to improve Student's post-secondary planning or skills meaningfully. None of them can reasonably be characterized as a "post-transition" goal as set forth in the IDEA regulations. Moreover, the goals in these IEPs that called for filling out one questionnaire or logging on to one computer web site without any response or interaction on the part of the student were not calculated to have a significant impact on the overall transitional needs of the Student. I conclude that these goals were inappropriate because they were only trivial interventions, not reasonably calculated to provide Student with meaningful educational opportunity. Regarding the goals that required one counseling session in a full year, I reach the same conclusion.

The goals did not provide any systematic or sequential framework for intervening with instructional services to improve Student's readiness for post-secondary goals. The goal for responding to the career interests questionnaire was repeated in successive IEPs and constituted the bulk of the post-secondary goal-directed activity for Student. Similarly, the IEPs contained goals that required Student to have a single conversation in an entire year, satisfaction of which constituted meeting the goals. I note that one of the goals, to explain the importance of workplace skills and knowledge, was to be accomplished by explaining the SDI in the Student's IEP; I find no relationship between this exercise and the goal itself, and there was no evidence

explaining how this exercise related to the importance of essential workplace skills and knowledge.

At the end of the process, the District's own documents show that Student still was in need of further identification of career desires – the very beginning of any goal-directed transition process. There was substantial and credible evidence that Student graduated with no career direction, with none of the skills necessary to obtain and retain employment, and with no ability to obtain assistance and support from community agencies. Thus, I conclude that the District failed to provide Student with meaningful opportunity for educational benefit with regard to post-secondary transition.

The District did provide instruction in practical mathematics, but this did not occur until twelfth grade. The evidence is preponderant that this was not part of Student's transition plan; it was not related to any evaluation or goal. The Parents identified this need and requested Student's placement in the practical mathematics class. The Student's performance in that class demonstrates that Student was in great need of such education. If this need had been identified within a reasonable time after Student's enrollment in the District in tenth grade, pursuant to appropriate transition evaluations, the District could have intervened earlier and could have taught these skills to Student. Such intervention would have advanced Student toward an ability to hold down employment in jobs, such as the job of cashier, that requires basic mathematics skills.

There was evidence that the District provided classes and referrals relating to post-secondary transition, and counseling about various opportunities to find out more information. However, the IEPs fall below the IDEA standard impermissibly, and the transition plan was haphazard and not results-oriented. For example, there were no goals related to a career in food



service, although Student did attend culinary arts classes. The District's non-individualized and unplanned approach to transition failed to provide the intervention that Student needed to overcome Student's disabilities and benefit from these generic classes and referrals that the District offered to all students.

The District seeks to blame Parent for any failure to address independent living skills, pointing out documentation that Parent "agreed" that Student had such skills. Initially, I give little weight to this documentary evidence. It is general and pro forma, and does not specify what skills were discussed with Parents within the rubric of "independent living". Moreover, even if Parents had affirmed a skill level that Student did not have, the IDEA places the onus upon the District – not Parents - to evaluate Student's post-secondary skill needs and address them, as discussed above. Thus, the District's defense on this score is unavailing.

#### WRITTEN EXPRESSION

Parents argue that the District inappropriately failed to address weaknesses in written expression that Student had exhibited. I conclude that the preponderance of the evidence does not prove that the District failed to provide appropriate services with regard to written expression. Although the 2010 evaluation report mentioned this as a weakness, it also endorsed it as a relative strength; moreover, the report evidenced a conscious choice not to identify Student with a specific learning disability in written expression, because there was not a sufficient discrepancy between Student's performance and ability in this area. There was testimony indicating that the District's teachers were not seeing a weakness in this area that required intervention. There is no evidence that the District's judgments in this regard were inappropriate.

## CREDIBILITY

I found that all of the witnesses were credible and reliable. I found that the coordinator for tenth and eleventh grades was frank as to defects in the IEPs and accepted responsibility forthrightly. While I accord this witness great credit for credibility, I also give reduced weight to the witness' opinions, due to the history of the judgments that the witness made in this matter.

## COMPENSATORY EDUCATION

Parent argues that the hearing officer should order compensatory education in the form of "adult compensatory education". Parent argues that Student's graduation requires that any compensatory education order be delivered by a service provider servicing adults, and that therefore it cannot be limited to the secondary school level of educational services. Parent points to this hearing officer's decision in a previous matter, limiting compensatory education to the secondary level of curriculum, and argues that this limitation should not be imposed in the present matter. Parent argues that the previous decision is distinguishable because Student in this case, unlike the student in the previous matter, has graduated. Parent points to various judicial decisions that expressly authorized post-secondary services as part of a compensatory education award.

The District points to OSEP guidance, Letter to Frank, 52 IDELR 16 (2005), which explicitly advised that IDEA funds cannot be used for tuition for a college, stating that such funds must be limited to paying for secondary school services only. The District distinguishes and criticizes the authorities cited by Parent and argues that decisions by other hearing officers confirm that post-secondary services cannot be made a part of a compensatory education order.

Parents point out correctly that the nature of compensatory education permits it to be ordered even if the child has passed the age of 21. Ferren C. v. School Dist. of Phila., 595 F.Supp.2d 566, 575 (E.D. Pa. 2009). It follows that compensatory education is not limited to services that can be provided only by a secondary school. Ferren C. recognized the appropriateness of ordering provision of a wide range of services provided by organizations other than secondary schools, emphasizing that compensatory education is equitable in nature and is not delimited by the outlines of statutory authority. Ferren C. v. School Dist. of Phila., 595 F.Supp.2d above at 577. I conclude that the compensatory education is not limited by the nature of the service provider, especially in the present situation, where the equitable remedy seeks after graduation to return the Student to the position the Student would have been in if the District had provided the extensive academic and transition services that the IDEA mandates.

Thus, my order for compensatory education will not forbid the use of compensatory education funds for services because they are provided by “post-secondary” providers. Similarly, it will not prohibit services provided by organizations simply because the organizations provide services to adults. This too would amount to limiting services on the basis of the nature of the provider of services, and for this reason I reject the District’s argument that the order should be so limited. In addition, I conclude that such a limit would limit the Parents’ choice of providers greatly, making it unduly, unnecessarily and inequitably difficult for Parents to provide the services that Student needs in a timely fashion.

In this decision, I am guided by the OSEP Letter to Frank, discussed by both parties. The letter stated that an LEA could not expend IDEA funds for college tuition, but it pointed out that there may be circumstances in which an award of compensatory education could be used for the costs of a provider that is not a secondary school, especially for a student who has graduated.

The letter contained a proviso: services so provided must be “considered secondary education” under state law.

I accept the OSEP interpretation of the IDEA. It is clear that the IDEA requires special education only at the secondary school level. 34 C.F.R. §300.17(c); 300.36. Both sections of the regulation refer to secondary school “education”. I conclude that the regulation does not limit the source of that education; rather, it limits the nature of the education itself. This is emphasized in the definition of “secondary school”, which contains the exception: “except that it does not include any education beyond grade 12.” 34 C.F.R. §300.36. I conclude that the critical criterion for limiting the special educational services required by the IDEA is the grade level of the education being taught, not the grade level of the provider of that education. Thus, I will limit the compensatory education order to educational services recognized or authorized by the Commonwealth of Pennsylvania as grade twelve or lower services.

This is consistent with the authorities cited by the parties. As noted, this is the distinction that OSEP relied upon in Letter to Frank. It is consistent with Pennsylvania judicial authority that makes it clear (albeit in the different context of gifted education) that Pennsylvania law does not require school districts to provide college courses to secondary school students. Centennial Sch. Dist. v. Commonwealth, 517 Pa. 540, 551-553 (1988) (gifted education mandate limited to statutorily mandated high school curricular offerings).

Pennsylvania public schools, both primary and secondary, are authorized to provide a broad array of curriculum, including remedial services, 24 P.S. 15-1511.1, and vocational education, including occupational training, 22 Pa. Code §39.22. Thus, by limiting the compensatory education order to educational services recognized or authorized by the Commonwealth of Pennsylvania as grade twelve or lower services, I intend Parents to have

discretion to provide Student with any services of a nature that is authorized by Pennsylvania law to be provided by Pennsylvania public schools, including the above, as well as those services mandated by the IDEA, discussed above.

The District argues that the compensatory education order should take into account that Parents did not complain about Student’s educational program until Spring of Student’s twelfth grade year, in the context of a due process request, and that they opted to have Student graduate rather than accept an additional year of vocation-oriented services beyond twelfth grade. I agree that these assertions are basically true, and I take them into account, as an order for compensatory education is primarily an exercise of equitable authority. Nevertheless, I do not find these considerations to be so compelling that they require a reduction of the compensatory education ordered in this matter.<sup>8</sup>

Compensatory education is not a monetary sum awarded to parents<sup>9</sup>, making relevant the equitable “clean hands” principle. It is an order that a school district provide educational services to a student, to make up for its failure to provide meaningful educational benefit to the Student –either hour for hour, or to return the child to the position the child would have been in if the education agency had provided a FAPE. Judicial authority further recognizes that a child’s entitlement to compensatory education should not depend upon the parent’s vigilance in policing a local educational agency in its fulfillment of its statutory duties. Ridgewood Bd. Of Educ. v. N.E., 172 F. 3d 278, 250 (3d Cir. 1999); Brendan K. v. Easton Area Sch. Dist., 2007 U.S. Dist.

---

<sup>8</sup> While I acknowledge that Parents chose graduation and rejected an offer of services for a thirteenth school year, I conclude that this argument is beside the point. In deciding for graduation for reasons related to Student’s relatively advanced age, comfort and self-esteem, Parents did not waive compensation for services that should have been provided in the tenth through twelfth grades. Moreover, there is no evidence that the offered services were post-secondary in nature, as the District suggests.

<sup>9</sup> While the order in this matter will not prohibit the parties from converting the District’s educational obligation to a monetary value in a monetary fund for the benefit of Student, that is the option of the parties for administrative purposes, and is not the fundamental nature of compensatory education, which is educational and related services to a child.

LEXIS 27846 at 26 (E.D. Pa. 2007). Similarly, Parents' failure to apply for vocational rehabilitation services and other habilitation services for Student does not reduce the District's obligation to recompense Student for the services that it was obligated to provide but did not. Nor does the Parents' decision to allow Student to graduate reduce the District's obligation. My order does not require the District to provide service because it would have done so if Student had stayed for an extra year; it requires compensation for the services – including post-secondary transition services as defined in the IDEA and its implementing regulations – that it should have provided to Student while Student was enrolled in its high school.

### CONCLUSION

In sum, I conclude that the District failed to provide Student with a FAPE during the relevant period. Because this failure was in the areas of reading and mathematics, the record supports an inference, unrebutted by competent evidence, that the failure to provide Student with a FAPE pervaded all aspects of Student's education. Therefore I will order the District to provide Student with compensatory education for full days<sup>10</sup> of education during the entire relevant period<sup>11</sup>, to be calculated as provided in the order below.

As to the post-secondary nature of the compensatory education, I conclude that the Parent will be given discretion to choose any and all instructional, remedial or developmental services, regardless of the identity of the provider of such services, as long as the services are substantially equivalent in nature to those educational services recognized by the

---

<sup>10</sup> A full day will be 6.8 hours. (S 10.)

<sup>11</sup> I have considered the required period for identification and remediation of the deficits in the District's programming, and I conclude that it should not be applied to limit the number of days for which I order provision of special education. Student returned to the District for tenth grade, and began at the beginning of the school year. The relevant period does not begin until April of that school year. I conclude that the District thus had over seven months within which to remediate the deficiencies in its program; there is no equitable basis upon which to reduce the amount of compensatory education ordered to begin on April 10, 2011.

Commonwealth of Pennsylvania as grade twelve or lower services, or authorized by the Commonwealth to be provided by public elementary, middle or high schools. I find no evidence that would justify a separate, additional educational evaluation at public expense; therefore I will not order the District to pay for one in addition to the compensatory education to be ordered. Nevertheless, compensatory education may include evaluation services, at Parents' discretion, under the order below.<sup>12</sup>

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

---

<sup>12</sup> The parties did not brief the Parents' separate claim for services under section 504. In light of my decision, I find no need to address that claim, because the District's violation of the IDEA is also a violation of section 504, and my remedy addresses any such violation appropriately.

ORDER

1. The District failed to offer and provide Student with a FAPE from April 10, 2011 to the date of Student's graduation, June 15, 2013.
2. The hearing officer hereby orders the District to provide compensatory education to Student for the period from April 10, 2011 to June 15, 2013.
3. Compensatory education shall be provided in the form of any instructional, remedial or developmental service that addresses Student's educational needs, including but not limited to academic and vocational education and educational or vocational evaluation. Parent may select any qualified provider of such services. Such services shall be substantially equivalent in nature to those educational services recognized by the Commonwealth of Pennsylvania as appropriate to grade twelve or lower grades, or authorized by the Commonwealth of Pennsylvania to be provided by public elementary, middle or high schools. The number of hours of compensatory education shall be 6.8 hours for every day that Student was present in school from April 10, 2011 to June 15, 2013.
4. The cost of such services shall be limited to the comparable cost that the District would incur to provide such services through qualified instructors, including salary and fringe benefits, or by contract with appropriate providers. The services may be provided at any time, including after Student reaches 21 years of age.

*William F. Culleton, Jr. Esq.*

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

November 15, 2013