

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

Pennsylvania

## Special Education Hearing Officer

### FINAL DECISION AND ORDER

Student's Name: K.W.

Date of Birth: [redacted]

ODR No. 13815-1213AS

### CLOSED HEARING

Parties to the Hearing:

Parent[s]

Penn Argyl School District  
1602 Teels Road  
Pen Argyl, PA 18072

Representative:

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Dates of Hearing: 09/25/2013, 11/12/2013

Record Closed: 12/11/2013

Date of Decision: 12/27/2013

Hearing Officer: Brian Jason Ford

## Introduction and Procedural History

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. In this case, the Student has historically qualified for special education and related services under the IDEA.<sup>1</sup> In March of 2013, the District determined that the Student no longer qualified for IDEA services, but continued to qualify for services under Section 504. Subsequent to that determination, the Parent requested this due process hearing. The Parent alleges that the District denied the Student a free appropriate public education (FAPE) prior to the District's determination of ineligibility. The Parent further claims that the District's determination of ineligibility was improper, and that the Student remains IDEA-eligible. The Parent also claims that the District promised to fund an independent educational evaluation (IEE) for the Student, but has failed to do so; and that the Student is entitled to an IEE at public expense regardless of the District's promise. To remedy these violations, the Parent demands compensatory education, an IEE at public expense, and a finding that the Student is IDEA-eligible.<sup>2</sup>

This hearing was requested on April 29, 2013. A hearing was scheduled for May 30, 2013. The parties jointly sought a continuance, asking the Hearing Officer to leave the matter unscheduled, and asking to provide a status update by June 6, 2013. The Hearing Officer reported that the parties' proposed course of action would likely yield a significant delay, but the parties confirmed that this was their preference, and moved to extend the decision due date. On June 6, 2013 the parties reported that the District's board would discuss this matter on June 18, 2013, and asked to postpone a further status update to June 20, 2013. That motion was granted. On July 1, 2013, the parties reported that they were unable to resolve this matter. A number of correspondences regarding the schedule for this matter were then sent and received, yielding the schedule ultimately reflected in the cover page of this Decision.

## Issues<sup>3</sup>

1. For the period of time from April 29, 2011 through March 4, 2013, did the Student receive a FAPE?

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<sup>1</sup> Except for the cover page of this decision, information that could identify the Student has been omitted to the greatest extent possible.

<sup>2</sup> The Parent also demands attorney's fees and costs. Such demands exceed my authority, and will not be addressed.

<sup>3</sup> Different formulations of these issues appear in the Complaint, the transcript, and the District's written closing brief. Semantic differences notwithstanding, these are the issues that have been present throughout these proceedings.

2. Did the District correctly determine that the Student was no longer IDEA-eligible on March 4, 2013?
3. Is the Student entitled to an IEE at public expense?
4. For the period of time from March 4, 2013 through the present, if the Student was IDEA-eligible, did the Student receive a FAPE pursuant to the IDEA?
5. For the period of time from March 4, 2013 through the present, if the student was not IDEA-eligible, did the Student receive a FAPE pursuant to Section 504?

### **Findings of Fact**

1. On June 2, 2009, the Student received an FM System Consultation from an Educational Audiologist. (D-2).<sup>4</sup> At that time, the Student was using an FM System on a trial basis. *Id.* The report recommends continuation of the FM System.<sup>5</sup> (D-2).
2. On October 13, 2010, the District, using a standard invitation form, invited the Parent to a meeting to discuss “the results of the team evaluation of [the Student].” (D-3). The invitation indicated that an IEP “will be developed at the meeting.” *Id.*
3. The October 13, 2010 invitation scheduled the meeting for November 12, 2010. (D-3).
4. The Parent signed the October 13, 2010 invitation form indicating “I will NOT attend the meeting.” (D-3, capitalization original).
5. On November 12, 2010, the District issued a Notice of Recommended Educational Placement (NOREP). (D-4). The NOREP was issued on a standardized form. *Id.*
6. Via the November 12, 2010 NOREP, the District proposed special education services. Specifically, the Student would receive math instruction in a Learning Support classroom and all other classes in regular education classrooms. The NOREP explains that Student would receive specially designed instruction (SDI) in all classes, as the Student was “in need of [SDI] in order to be successful in both the regular education and special education classrooms.” (D-4).

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<sup>4</sup> Exhibits presented by schools at due process hearings are typically labeled as S-#, as per the Generally Applicable Pre-Hearing Directions. The District’s exhibits in this case were marked as D-#. To avoid confusion, I will continue that scheme in this decision.

<sup>5</sup> Specifically, the Student was using an Edulink FM system in the left ear on a trial basis. The consultation report recommended continued use of that system and provided recommendations for its implementation.

7. On December 4, 2010, the Parent approved the November 12, 2010 NOREP. (D-4).
8. The November 12, 2010 NOREP does not specify what the Student's qualifying disabilities were. (D-4).
9. An individualized education plan (IEP) dated November 18, 2010 was entered into evidence. (D-5)<sup>6</sup>. Although the dates do not match with precision, I find that the November 12, 2010 NOREP was sent in relation to the November 18, 2010 IEP, and that by approving the November 12, 2010 NOREP, the Parent provided consent for the District to implement the November 18, 2010 IEP.<sup>7</sup>
10. The November 18, 2010 IEP was intended to be implemented from November 19, 2010 through November 18, 2011. (D-5).
11. In the "Special Considerations" section of the November 18, 2010 IEP, the team concluded that the Student had communications needs, and needed assistive technology devices and services. (D-5).
12. In the "Present Levels" section of the November 18, 2010 IEP, the Student's Reading, English, Math and Math Remediation teachers all reported that the Student frequently exhibited off task behaviors, occasionally exhibited inappropriate behaviors, required frequent redirection, and was receiving poor marks. (D-5). In contrast, the Student's Writing teacher reported that the Student was "quiet" and performing well. *Id.* All teachers except for the Writing teacher reported that the Student's perceived motivation was a problem, and was negatively impacting upon the Student's grades.
13. The "Present Levels" section of the November 18, 2010 IEP reports the following academic scores: Writing - 81%; Reading - 76%; and Math - 65%. No numeric score was reported for English or Math Remediation.
14. The "Present Levels" section also reports that the Student was refusing to use an FM System, but had made progress in Speech/Language Support. (D-5)

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<sup>6</sup> D-5 and P-2 are both copies of the November 18, 2011 IEP. For convenience, I refer to D-5.

<sup>7</sup> Taking the dates on the documents at face value, the District sent the invitation on October 13, 2010, convened the meeting on November 12, 2010, developed the IEP at that meeting, printed the NOREP on November 12, 2010, printed the IEP on November 18, 2010, and the Parent provided consent on December 4, 2010. Although the appropriateness of the services provided through the November 2010 IEP, and the appropriateness of the IEP itself, are both in question, there is no dispute that the November 2010 IEP was approved and implemented.

15. The November 18, 2010 IEP indicates that the Student was to receive accommodations on both the PSSA and local assessments. (D-5).
16. The November 18, 2010 IEP contains several goals. As the IEP was written on a standard form, each goal is presented on a five (5) column grid. The headings for each column are as follows:

MEASURABLE ANNUAL GOAL ...	Describe HOW the student's progress towards meeting this goal will be measured	Describe WHEN periodic reports on progress will be provided to parents	Goal Value	Report of Progress
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17. The first goal, in the "GOAL" column, says "[Student] will receive at least a 80% in all subject areas." The "HOW" column indicates that the Student's progress would be monitored through report cards, and the "WHEN" column indicates that report cards would be provided quarterly. The goal value was "80." (D-5 at 11).
18. The second goal, in the "GOAL" column, says "Self-Advocacy Goal: [Student] will develop 5 strategies/techniques to explain to the teacher (for use in the classroom) when [Student] has difficulty understanding / comprehending information presented. [Student] will use these strategies in the classroom setting 95% of the time during a minimum of 3 class periods over 3 marking periods." The "HOW" column says, "data collection." The "WHEN" column says, "quarterly." The goal value is 95. (D-5 at 11).
19. The third goal, in the "GOAL" column, says "When presented with information in the presence of noise, distracting stimuli, [Student] will identify information, recall 2-3 details of information with 85% accuracy in the classroom setting." The "HOW" column says, "data collection." The "WHEN" column says, "quarterly." The goal value is 85. (D-5 at 12).
20. The November 18, 2010 IEP contains two other goals, one for Reading and one for Math. Both of these goals call for the Student to achieve 80% mastery in those classes, as measured against state standards via observations, tests, quizzes, and district and statewide assessments. (D-5 at 13-14).
21. The November 18, 2010 IEP lists modifications and SDI together, without distinguishing between the two. In total, the IEP lists 32 modifications or SDIs. (D-5 at 15-16). Nearly all of the modifications or SDIs simply gave the student additional time to respond in class, or complete work or tests. *Id.* Except as noted, the remaining modifications or SDIs called for teachers to break up or "chunk" larger

assignments, redirect the student when off task, and provide testing accommodations. *Id.*

22. Some of the modifications or SDIs in the November 18, 2010 IEP appear to address a reading disability and a math disability.<sup>8</sup> Regarding reading, modifications or SDIs include: “Clarification of words on test” - “Copy of spelling list for home” - “Support reading materials above reading level” - “Prompts to reread text” and “Tests read orally.” (D-5)
23. Regarding math, the November 18, 2010 IEP includes the following SDI or modification: “Peer tutoring in the area of Math.” (D-5)
24. The November 18, 2010 IEP also includes a modification or SDI specifically related to the Student’s receipt of Speech/Language services: “Work with the speech/language therapist in the classroom setting to improve and apply language processing strategies.” (D-5). This modification or SDI is connected to the only related service provided in the IEP: “Speech & Language” provided in the classroom “1-30 minute session per 6 day cycle.” (D-5 at 17).
25. The November 18, 2010 IEP, and the record of this matter as a whole, support a finding that the District provided Speech/Language services to address the Student’s auditory processing deficits. (See, e.g. D-5).
26. One modification or SDI in the November 18, 2010 IEP called for “Retest if below 70%.” (D-5 at 15).
27. The “Supports for School Personnel” section of the November 18, 2010 IEP called for the regular education staff to consult with the special education staff twice per marking period, and called for “Staff” (presumably all staff) to communicate with the Student’s mother twice per year at conferences.<sup>9</sup> (D-5)

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<sup>8</sup> The IEP never says that the Student has reading or math disabilities, or what type of reading or math disabilities the Student has. Rather, the IEP includes a passing reference to SLD, and then provides modifications or SDIs that appear to address reading and math.

<sup>9</sup> The record does not indicate that the staff would have communicated with the Student’s mother *less* without this support. Rather, the record as a whole indicates that this support simply documents the level of communication that all parents in the district receive, regardless of IEP status. As such, it is not clear why this support would be drafted into this, or any, IEP. Regardless, this idiosyncrasy is not determinative.

28. The November 18, 2010 IEP reports that the Student's IEP team concluded that the Student was not eligible for extended school year (ESY) services at that time. (D-5).
29. The level and type of support required by the November 18, 2010 IEP is consistent with the November 12, 2010 NOREP. (See D-5 at 18-20).
30. The record of this matter does not yield an exact date upon which the District began to implement the November 12, 2010 IEP. Given the lack of dispute concerning the period of time for which IEPs were implemented, I find that the November 18, 2010 IEP was implemented from December 4, 2010 (when the Parent approved the November 12, 2010 NOREP) through November 17, 2011 (when the Parent approved a subsequent NOREP - as detailed below).
31. For the 2010-11 school year, the Student's 7th grade year, the Student's year-end grades were as follows (D-34):<sup>10</sup>

- Reading - 80
- Writing - 74
- English - 80
- Mathematics - 99
- Science - 87
- Visual Arts - 74
- Health - 72
- General Music - 91
- Physical Education - 63
- Technology - 91
- Family and Consumer Science - 61

32. On the Student's 7th grade, year-end report card the Physical Education teacher noted a lack of participation and a lack of effort. Both the English and Math teachers noted that the Student received modified testing, and that the reported grades reflected modified instruction. (D-34).

33. On November 7, 2011, the District invited the Parent to an IEP team meeting, scheduled for November 17, 2010, to "Discuss your child's current IEP and revise it

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<sup>10</sup> Visual Arts, Health, and Family and Consumer Science were each one semester course. The remaining courses were year-long.

as needed.” (D-6). More specifically, the District indicated: “We are inviting you to attend this meeting to determine the need for and/or develop appropriate measurable postsecondary goals and a statement of transition services needed to assist your child in reaching these goals.” (D-6).

34. On November 10, 2011, the Parent signed the November 7, 2011 invitation, indicating that she would attend the meeting. (D-6).
35. The IEP team convened in November 17, 2011, with the Parent in attendance. (See D-7 at 1-2, D-8 at 3). An IEP dated November 18, 2011 was drafted. (D-7). The IEP was intended to be implemented from November 18, 2011 through November 16, 2012. *Id.*
36. Although the IEP meeting convened on November 17, 2011, for reference and convenience, I will refer to the IEP generated during that meeting by the date printed on that document: November 18, 2011.
37. The Special Considerations section of the November 18, 2011 IEP is identical to the same section in the November 18, 2010 IEP, indicating that the Student had communications needs and was in need of assistive technology. (D-7 at 3).
38. The Present Levels section of the November 18, 2011 IEP was updated to include narrative reports from the Student’s Speech/Language, Reading, English, Science, and Math teachers. (D-7 at 4-5).
39. The Speech/Language teacher reports that the Student was diagnosed with an “auditory processing delay” and was receiving services consistent with the November 18, 2010 IEP. Related to the Speech/Language goal in the November 18, 2010 IEP, the teacher reported that the Student “learned ways to advocate for [self]” and provided examples of methods that the Student learned. At the same time, the “[Student] is aware of ways to advocate for [self] but continues to have difficulty asking teachers for assistance...” The Speech/Language teacher also reported that the Student had declined to use FM System. (D-7 at 4)
40. The Reading teacher reported that the Student was “quiet and well mannered” and was doing well on in-class tests and quizzes. Despite this, the Student’s first quarter grade in Reading was a 62%. The Reading teacher’s input clearly indicates that the Student’s failure to complete and/or return out-of-class assignments was impacting negatively upon the Student’s grades. (D-7 at 4)



41. The English teacher<sup>11</sup> reported that the Student “is very quiet in [class] and she [the teacher] is concerned that [the Student] does not ask for help if [the Student] is unsure.” The English teacher’s comments clearly indicate that the Student was adverse to the direct assistance that the teacher was providing, and did not take advantage of services offered to all students. (D-7 at 4).
42. The Student would report that Student understood tasks, but was then unable to explain what was required. (D-7 at 4)
43. The Science teacher reported that the Student was “polite,” “respectful,” and “very quiet.” In Science, the Student “completes most of the work that is assigned... [and] takes modified tests and usually elects to have [] tests read by [a] classroom aide/co-teacher.” With these modifications, the Student earned an 82% for the first marking period, but scored a 55% on the first science benchmark test.
44. The Math teacher reported that the Student is “quiet in class. [The Student] usually does [Student’s] homework but doesn’t ask questions when [Student] doesn’t understand. [Student] works hard and is a good student. [Student] is polite and respectful. [Student’s] average is now a 78%. [Student] tries very hard and is a good student.” (D-5 at 5).
45. A sub-section concerning present levels related to postsecondary transition was added to the Present Levels section in November 18, 2011 IEP. The Parental Concerns section in the November 18, 2011 IEP also relates to postsecondary transition. (D-7 at 9). Taken together, these sub-sections indicate that the Student was interested in a two-year college or trade school to learn [redacted], and that the IEP team was considering a vocational program. *Id.* The vocational program would be implemented in the 2011-12 school year, and the IEP team was “setting up a meeting with the [vocational agency] to discuss if it is a possibility for [the Student] to attend based on excellent behavior and motivation to attend.” *Id.*
46. The November 18, 2011 IEP includes a Transition Services section. (D-7 at 6-7). This section includes a Postsecondary Education and Training Goal: “At this time, [the Student] anticipates in attending [sic] a 2-year college or trade school to study [redacted] because [Student] wants to work with [redacted].” (D-7 at 6).

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<sup>11</sup> More specifically, a special education teacher in the Student’s co-taught Reading and English class.

47. The Transition Services section of the November 18, 2011 IEP, along with the postsecondary transition sub-sections in the Present Levels, indicates that the Student would participate in the career planning activities available to all students. (D-7 at 6-7). The same section lists the following as a “Service/Activity” - “Given the regular education curriculum, [the Student] will maintain at least a 75% in all academic classes.” (D-7 at 6).
48. The section of the November 18, 2011 IEP regarding testing accommodations for the PSSA and local assessments is substantively identical to the same section in the November 18, 2010 IEP. (See D-7 at 8-9).
49. The November 18, 2011 IEP includes two goals, presented in the same columns as in the November 18, 2010 IEP. (D-7 at 10).
50. The first goal of the November 18, 2011 IEP repeats the goal listed in the Transition section: “Given the regular education curriculum, [the Student] will maintain at least a 75% in all academic classes.” The “HOW” column for that goal reads, “Progress will be monitored through report cards.” The “WHEN” column for that goal reads, “Parents will be given report cards every marking period.” (D-7 at 10).
51. The second goal of the November 18, 2011 IEP, in toto, reads as follows:  
“Speech/language support 2011-12: Self-Advocacy Goal: [Student] will use self advocacy strategies to explain to the classroom teacher when [Student] has difficulty understanding / comprehending information presented. [Student] will approach teacher in each subject area, minimum one time per marking period to discuss [Student’s] auditory processing needs. Standard 1.4.3A Language.” (D-7 at 10).
52. The “HOW” column for the self advocacy goal in the November 18, 2011 IEP reads, “data collection.” The “WHEN” column for the goal reads, “quarterly.” The goal value is “4.” (D-7 at 10).
53. The November 18, 2011 IEP lists modifications and SDI together, without distinguishing between the two. In total, the IEP lists 25 modifications or SDIs. (D-7 at 11-12). 24 of the 25 modifications or SDIs were carried over from the November 18, 2010 IEP. The following SDIs or modifications were removed: Peer tutoring in the area of math, copy of spelling list for home, retest if below 70%, check if [Student] has the correct response before calling on [Student], Chunking, limit choices, and oral testing to check mistakes. (D-5, D-7).
54. The one new SDI or modification in the November 18, 2011 IEP was an alteration of an accommodation the prior IEP. The SDI or modification in the 2010 IEP is:

“Projects and larger assignments will be broken down into smaller tasks. The teacher will check on student's progress during the assignment.” (D-5 at 16). The SDI or modification in the 2011 IEP is: “Projects and larger assignments will be broken down into smaller tasks but will complete the entire project [sic].” (D-7 at 12).

55. The Related Services and Supports for School Personnel sections of the 2010 and 2011 IEPs are identical. (D-5 at 17, D-7 at 12-13).
56. The November 18, 2011 IEP indicates that the Student did not qualify for ESY. (D-7 at 13).
57. As with the 2010 IEP, the 2011 IEP calls for an itinerant level of learning support. (D-7 at 14-16)
58. On November 17, 2011, the District issued a NOREP for the Parent to approve or disapprove the IEP of the same date. (D-8). As with the accompanying IEP, the date printed on the NOREP is November 18, 2011.
59. The Parent approved the NOREP dated November 18, 2011 on November 17, 2011, thereby providing consent for the District to implement the IEP, starting on November 18, 2011. (D-8 at 3).
60. On January 24, 2012, the District invited the Parent to a meeting to discuss CIT. CIT was the vocational institution referenced in the November 18, 2011 IEP. The Parent signed the invitation on February 1, 2012, indicating that she would attend. (D-9).
61. For the 2011-12 school year, the Student's 8th grade year, the Student's year-end grades were as follows (D-35):<sup>12</sup>
  - Reading - 71 (prior year was 80)
  - Writing - 70 (prior year was 74)
  - English - 57 (prior year was 80)
  - Mathematics - 74 (prior year was 99)
  - Science - 77 (prior year was 87)
  - Social Studies - 76
  - Visual Arts - 75 (prior year was 74)
  - General Music - 93 (prior year was 91)

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<sup>12</sup> Visual Arts, Health, and Family and Consumer Science were each one semester course. The remaining courses were year-long.

- Physical Education - 72 (prior year was 63)
- Health - 81 (prior year was 72)
- Technology - 50 (prior year was 91)
- Family and Consumer Science - 78 (prior year was 61)

62. On the Student's 7th grade, year-end report card the Physical Education teacher noted a lack of effort and disruptive behavior. The Math teacher noted a lack of effort. The Reading, Social Studies and Technology teachers noted that the Student received modified testing, and that the reported grades reflected modified instruction. (D-35).
63. On August 2, 2012, the District invited the Parent to an IEP team meeting to review the Student's IEP and revise it as needed. This invitation indicates that a representative from CIT would attend the meeting. (D-10). The Parent signed this invitation on August 14, 2012, indicating that she would attend. The meeting was scheduled for August 14, 2012, indicating that the Parent signed the invitation during the meeting.
64. Pursuant to conversations at the August 14, 2012 meeting, the District issued a NOREP the same day proposing to change the Student's placement to CIT and the District's high school. The Parent approved the NOREP the same day. (D-11).
65. By approving the August 14, 2012 NOREP, the Parent also approved revisions to the Student's IEP that were discussed during the meeting of the same day. (See D-11, D-12). The IEP itself indicates that the Transition Services section was revised. (See D-12 at 5).
66. More specifically, the August 14, 2012 IEP revisions added daily participation in the CIT [redacted] as a Service/Activity in the Transition Services section of the IEP. (D-12 at 11).
67. In addition to the changes indicated in the "Revisions" section of the IEP, other hand-written changes were made to the document. First, under Modifications and SDI, "Modified Tests," "Small group testing," and "Modified Instruction" were stricken from the IEP. (D-12 at 16). Second, a hand written note in the "Educational Placement" section of the IEP says, "[Student to] participate in all regular classes." (D-12 at 19).
68. The hand written revision indicating that the Student would receive all instruction in regular education classes notwithstanding, neither the type of support (learning support), nor the amount of support (itinerant), nor the PENNDATA information in

the IEP were revised. (D-12). Similarly, the NOREP of August 14, 2012 continued to recommend itinerant learning support as the Student's placement. (D-12).

69. On September 12, 2012, the District sought the Parent's consent to conduct a three year re-evaluation, as required by statute, by issuing a Permission to Reevaluate - Consent Form (PTRE). (D-13). The Parent signed the PTRE on September 13, 2012, granting consent. *Id.* The District received the signed PTRE on October 5, 2012. *Id.*
70. On October 2, 2012, the District issued student progress reports for the Student. Although these reports were for the Student, they were generic in the sense that they are the same progress reports that the District issues for all students. (P-11 at 1-8).
71. Reports using the same format were issued throughout the 2012-13 school year. In addition to October 2, 2012, reports were issued on October 24, 2012; January 3, 2013; January 16, 2013; January 16, 2013; January 31, 2013; February 22, 2013; March 11, 2013; March 21, 2013; and April 18, 2013. (P-11).
72. All of the reports include a marking period average. Nearly all of these averages show that the Student was failing each class during the period measured. Nearly all of the reports indicate that the Student was failing because of incomplete assignments or assignments that were not turned in. Nearly all of these reports indicate that the Student's poor attention and participation in class were adversely impacting upon [Student's] grades. (P-11).
73. By January 16, 2013 - if not before then - the Student Progress Report for English indicated that the Student would fail the class for the year, and that it was not possible for the Student to pass the class, regardless of what transpired between that date and the end of the year. (See, P-11 at 11).<sup>13</sup>
74. After receiving consent, the District reevaluated the Student and drafted a Reevaluation Report (RR) dated October 16, 2012. The October 16, 2012 RR was provided to the Parent on October 22, 2012. (D-14 at 1).
75. On the face of the October 16, 2012 RR, the District reviewed existing evaluation data the same day that the report was drafted. (D-14 at 1).
76. The October 16, 2012 RR includes a narrative summary of information that the team reviewed. This section summarizes the special education services that the Student

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<sup>13</sup> Some testimony was elicited regarding the impact of that knowledge upon the Student's subsequent performance during the 2012-13 school year. The record, as a whole, does not support a finding that the Student actually knew that there was no way to pass English roughly half way through the school year.

had received to date, noting historical diagnoses of SLD in both reading and math, and a “central auditory processing problem that contributed to [the Student’s] learning problems in school.” (D-14 at 1-2).

77. The summary of information reviewed in the October 16, 2012 RR concludes as follows: “This reevaluation is necessary in order to determine whether [the Student] continues to be in need [of] specially designed instruction.” (D-14 at 2).
78. The 2012 RR indicates that the Parent provided written input, and purports to summarize that input in the section titled “Evaluations and information provided by the parent.” (D-14 at 2). The Parent reported that the Student lacks the skills to start and complete a task on Student’s own, sometimes needs directions to be reworded, requires both verbal and physical redirection, and sometimes appears Dyslexic with right and left direction. (D-14 at 2). At the same time, the Parent also reported that the Student enjoys completing projects, and is able to do so when Student understands the directions. Finally, the Parent reported that the Student is quiet and emotional, particularly as both Student’s grandmother and pets were experiencing medical issues. *Id.*
79. A section of the 2012 RR summarizes prior and new tests. (D-14 at 3-7). This section includes a report from Speech/Language Support. This S/L report summarizes the Student’s services to date, and provides a narrative progress summary. According to that summary, the Student “achieved all [] language goals in a small group setting and was working to carryover skills to the classroom.” However, the same report indicates that the Student made “limited progress” towards the Self Advocacy goal and refused to use the FM System. (D-14 at 3).
80. In addition to the summary of existing supports and progress, *parts of* the Test of Auditory Processing Skills, Third Edition (TAPS-3) were administered on October 15, 2012.<sup>14</sup> This partial test was administered to determine the need for ongoing Speech/Language Support. (D-14 at 3). This testing is summarized in the 2012 RR as follows:

On the test of Auditory Comprehension [a sub-part of the TAPS-3], [the Student] achieved a scaled score of 11, falling in the below average range. However, when test items were re-read, [the Student’s] score rose to 21, indicating average ability. These

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<sup>14</sup> On its face, the day *before* the Parent provided consent to evaluate.

findings substantiate the need for repetition and re-phrasing of auditory information. When [the Student] is given opportunity to hear the message more than one time, Student's language/listening skills improved to the average range. When auditory information is presented in the classroom, information should be paired with a visual prompt to increase comprehension. On the Auditory Reasoning portion of the TAPS-3, [the Student] achieved a scaled score of 18, falling in the average range.

81. Immediately after the forgoing, the 2012 RR says as follows:

Based on the results of the [partial TAPS-3] testing, [the Student] no longer requires direct services in the speech/language program. [The Student] continues to exhibit auditory processing deficits as per [an] audiological exam but has incorporated strategies for use in the classroom setting, i.e. repetition, re-phrasing, visual prompts. [The Student] should continue to self advocate for [Student's] listening needs however, [Student] no longer requires speech/language support services to achieve this goal.

82. The 2012 RR summarizes the prior audiological evaluation that proposed the use of an FM System. (D-14 at 3-4).

83. The 2012 RR summarized the results of a prior Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) that was conducted on January 27, 2006.<sup>15</sup> The 2006 WISC-IV testing revealed that the Student had a Full Scale IQ score of 98, which falls in the average range. Composite scores were as follows:

Composite	Score	Percentile Rank	Range
Verbal Comprehension	93	32%	Average
Perceptual Reasoning	115	84%	High Average
Working Memory	97	42%	Average
Processing Speed	98	45%	Low Average

84. The 2012 RR includes a narrative interpretation of these results, highlighting the discrepancy between the Student's processing speed and the other composite

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<sup>15</sup> As written in the 2012 RR, the date of the WISC-IV is confusing. The 2012 RR summarizes a 2009 RR. The 2009 RR summarizes the WISC-IV, which was conducted in 2006. As such, the 2012 RR re-reports information from a 2009 RR, which reported testing that was competed in 2006.

scores, and hypothesizing that the Student's comparative deficit in this domain may be a cause of academic difficulties. (D-14 at 4-5).

85. In addition to the 2006 WISC-IV, the 2012 RR reports the results of a Phonological Awareness Test and a Test of Word Reading Efficiency (TOWRE). No dates are reported for this testing. (D-14 at 5-7).
86. The Phonological Awareness Test, generally, that the Student had above average phonics skills and could sound out words, but took longer than average to respond to questions. (D-14 at 5-6).
87. The TOWRE also confirmed that the Student's ability to sound out words was a relative strength, although the Student's "Total Word Reading Efficiency" was measured with a standard score of 87, in the 19th percentile and "slightly below average compared to same age peers." (D-14 at 6). At the same time, subtests of the TOWRE placed the Student in the 21st to 25th percentile against same age peers, resulting in a grade equivalent of 1.8. (D-14 at 6-7)
88. The 2012 RR included information supplied by the Student's teachers for Science (Earth and Space Science), History (US II History), and Math (Algebra A). All of these teachers recommended, *inter alia*, "continue current program." (D-14 at 7-8).
89. In the 2012 RR, the Science teacher reported that the Student worked well in groups when Student could choose who Student worked with, but that the Student's independent work habits were not as good. The Science teacher also reported that the Student generally did well on test and quizzes, but did not take notes. In addition to "continue current program," the Science teacher recommended reconsideration of the preferential seating accommodation, as the Student performed best when seated away from the teacher. (D-14 at 7).
90. In the 2012 RR, the History teacher reported that the Student was doing poorly on tests and quizzes, despite appearing to grasp the material. To this teacher, the Student appeared "focused and motivated," but feared that the Student "may not spend time studying outside of class." The History teacher recommended both "repetition and drill" and "continue current program." (D-14 at 7).
91. In the 2012 RR, the Math teacher reported that the Student, "struggles with basic operations and formal assessments. [The Student] has a 57 average right now. [The Student] does not complete homework regularly, needs prompts often for class work, and does not show steps for problems. [The Student] appears lethargic during



most of class.” The same teacher reported that the Student “is very quiet during class” as a strength. The Math teacher recommended as follows: “Continue on current program, get agenda book signed for homework each night, resource period with a teacher would be beneficial.” (D-14 at 7)

92. In addition to the foregoing, the 2012 RR included a very brief comment from the Student’s teacher at CIT. This teacher reported that the Student was getting used to the CIT program and, although work was not getting turned in on time at first, the last assignment was completed on time. (D-14 at 7).
93. The 2012 RR reported a complete listing of all 8th grade PSSA scores and 7th grade 4Sight scores. (D-14 at 8-9). Although not stated in the 2012 RR, I find that these tests were administered with the accommodations indicated in the Student’s IEPs.
94. The 8th grade PSSA scores reported in the 2012 RR indicate that the Student scored in the Below Basic range in Math, although some sub-tests were in the Basic or Proficient range. (D-14 at 8). These scores were obtained with accommodations.
95. The 8th grade PSSA scores reported in the 2012 RR indicate that the Student scored in the Below Basic range in Reading, although some sub-tests were in the Basic range. (D-14 at 8). These scores were obtained with accommodations.
96. The 8th grade PSSA scores reported in the 2012 RR indicate that the Student scored in the Basic range in Writing, although some sub-tests were in the Below Basic range. (D-14 at 8). These scores were obtained with accommodations.
97. The 7th grade 4Sight scores reported in the 2014 RR indicate that the Student scored in the Basic range for Math, with subtests in the Proficient, Basic, and Below Basic ranges. (D-14 at 8).
98. The 7th grade 4Sight scores reported in the 2014 RR indicate that the Student scored in the Proficient range for Reading, with subtests in the Proficient, Basic, and Below Basic ranges. (D-14 at 8-9).
99. The 2012 RR included a narrative report of a 25 minute in-class observation conducted by the District’s School Psychologist. (D-14 at 9-10). The observation took place during the Student’s English class. The Student was called on several times during the class, and was able to respond appropriately, despite the fact that the Student arrived late to the class, and required prompting to keep Student’s voice up when responding to questions. *Id.*
100. The 2012 RR also reports the results of a Wechsler Individual Achievement Test, 3rd Edition (WIAT-III) that was administered in October of 2012. (D-14 at 10-11; NT

at 153).<sup>16</sup> As with the 2006 WISC-IV, only “select portions” of the WIAT-III were used for the reevaluation. (D-14 at 10).

101. WIAT-III sub-test scores were reported on the 2012 RR as follows:

Subtest	Standard Score	Percentile Rank	Descriptive Classification
Reading Comprehension	89	77	Average
Math Problem Solving	100	92	Average
Word Reading	104	99	Average
Essay Composition	91	80	Average
Numerical Operations	96	89	Average

102. The WIAT-III can be used to assess Reading Fluency, Writing Fluency and Math Fluency, but those portions of the test were not administered. (NT at 154-155).

103. Immediately after the WIAT-III scores are reported, a box is checked on the 2012 RR stating: “The student does not have a disability and no longer is eligible for special education. (The parent may request an assessment to determine whether the Student continues to be a student with a disability.)” (D-14 at 13).

104. The Parent and Student signed the 2012 RR indicating that they disagreed with it. District-employed members of the team signed the 2012 RR indicating that they agreed with it.<sup>17</sup> (D-14 at 17).

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<sup>16</sup> The format of the WIAT-III reported in the 2012 RR is exceedingly confusing. The 2012 RR does not report the date of the WAIT-III testing. I relied upon the testimony of a witness with less than perfect recollection to derive an approximate date. More importantly, all of this new data was reported in a section of the RR in which the team determined that additional data was *not* needed. As such, this important information is not highlighted as new, and could be overlooked.

<sup>17</sup> Strangely, the District’s solicitor, who did not represent the District in these proceedings, signed the 2012 RR indicating that he was a member of the Evaluation Team and that he agreed with the 2012 RR. (D-14 at 14). The Parent and/or Student may have also been represented by an attorney at this time, but not by the attorney who represented them in these proceedings. The Parent’s former attorney attended some meetings, but she did not sign the 2012 RR and her name does not appear on it. The first document indicating that the Parent was represented is D-15, which is dated November 14, 2012, nearly a month after the 2012 RR was drafted. That document indicates that the Parent’s former attorney did not attend the meeting in which the 2012 RR was presented. In this Hearing Officer’s experience, it is somewhat common - and occasionally helpful - for attorneys to attend meetings like this one. There is, however, an

105. Despite the conclusion of the 2012 RR, the District continued to implement the November 18, 2011 IEP. (See, NT; D-16).
106. On November 16, 2012 - one month after the 2012 RR was drafted - the District invited the Parent to an IEP team meeting. The meeting was to convene on November 27, 2012. The purpose of the meeting was to “Discuss [the Student’s] current IEP to review and revise it as necessary.” The Parent signed the invitation on November 19, 2012 indicating that she would attend. (D-16). Both the Parent and the District were represented at this time. (D-15, D-16).
107. The IEP team convened on November 27, 2012 as scheduled. During that meeting, an IEP was circulated. (D-17)<sup>18</sup>.
108. All of the Special Considerations in the November 27, 2012 IEP, including “communications needs” and “assistive technology” are checked indicating “No.” (D-17 at 3).
109. The “Present Levels” section of the November 27, 2012 IEP is copied from the teacher input sections of the 2012 RR. (D-17 at 5).
110. Under a sub-section of the November 27, 2012 IEP, titled “How the student’s disability affects involvement and progress in the general education curriculum” the following is written: “Due to [Student’s] specific learning disability, [the Student] will need specially-designed instruction and modifications that are described in this IEP. It is imperative that [the Student’s] progress is carefully monitored and that support is given.” (D-17 at 6).
111. The Transition Services section in the November 27, 2012 IEP is substantively similar to the same section in the November 18, 2011 IEP, with some modification to indicate the Student’s attendance at CIT. (D-17 at 7-8).
112. The November 27, 2012 IEP indicates that the Student will take the PSSAs and local assessments with accommodations, but this section was edited to reflect that

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important difference between an attorney indicating attendance at a meeting, and an attorney indicating that he or she actively engaged in educational decision-making. It is almost always inappropriate for a school’s solicitor to attend meetings with unrepresented parents if litigation has not been threatened or engaged. The Parent does not claim the District’s attorney’s attendance at this meeting is the basis of any violation, and I will not raise the issue *sua sponte*.<sup>18</sup> D-17 and P-5 both include copies of the November 27, 2012 IEP. For convenience, I refer to D-17.

the Student would take various Keystone assessments with “modifications allows” or “modifications to be determined.” (D-17 at 9).

113. The November 27, 2012 IEP includes two goals. The first goal is identical to the goal in the November 18, 2011 IEP that called for the Student to earn a 75% in academic classes. (D-17 at 10).
114. The second goal in the November 27, 2012 IEP calls for the Student to “complete all homework assignments with 75% accuracy.” The “HOW” column reads “Teacher monthly progress reports” and the “WHEN” column reads “Monthly.” (D-17 at 10).
115. The November 27, 2012 IEP includes 17 modifications or SDIs, all but one of which were carried over from the November 18, 2012 IEP. (D-17 at 11). A substantial majority of these modifications and SDIs all concern giving the Student additional time, and prompting the Student to check work and remain on task. *Id.*
116. Modifications and SDIs related to Speech/Language support were removed, and Speech/Language support was removed as a related service. (D-17 at 11-12). The Related Services section of the November 27, 2012 IEP says “None.” (D-17 at 12).
117. The new modification or SDI added to the November 27, 2012 IEP is for a “signed agenda book (by parents and teachers).” (D-17 at 11).
118. For a portion of the 2012-13 school year, the District provided an agenda book, and the Student’s teacher signed that agenda book indicating that the book accurately reflected the homework that was assigned. The Parent did not sign the agenda book.<sup>19</sup>
119. The Supports for School Personnel section of the November 27, 2012 IEP is identical to the same section in the November 18, 2011 IEP. (D-17 at 12). The ESY section of the Draft 2012 IEP also concludes that the Student does not qualify for ESY. *Id.*
120. The November 27, 2012 IEP continues to call for an itinerant level of support. (D-17 at 14-16).

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<sup>19</sup> The record does not reveal the exact dates during which the teachers signed the agenda book. Copies of part of an agenda book, starting on May 13 and ending on December 12 was entered as exhibit D-38. The book was always signed by a teacher, and never by the Parent during this period of time. Some testimony indicates that the District started using the agenda book in October of 2012 after the meeting during which the 2012 RR was discussed. NT at 99-103.

121. During the November 27, 2012 IEP team meeting, the Parent disputed the 2012 RR and requested an IEE. The request for an IEE was based, in part, on the Parent's belief that the Student's attention and behaviors were impacting upon Student's academic performance. The Parent, via former counsel, memorialized that request in writing on November 27, 2012. (D-18).
122. On December 4, 2012, the District sent a letter enclosing a NOREP for the Parent to approve or reject the November 27, 2012 IEP. (D-19, D-22). The Parent approved the NOREP on December 6, 2012, and the District received the signed NOREP on December 7, 2012. (D-22).
123. The District's letter of December 4, 2012 also responded to the Parent's request for an IEE. Regarding the IEE request, the letter states that the District had already determined that "a learning disability is not the cause of [the Student's] needs and academic difficulties," and that the IEE request was the first time that attentional deficits and behavioral difficulties were an issue. Consequently, the District proposed to conduct an educational evaluation consisting of a "Woodcock Johnson Reading, Key Math, Behavior rating scales and a Functional Behavioral Assessment."
124. The District considered the evaluation it proposed in lieu of an IEE to be an initial evaluation (not a reevaluation), because the District had not previously evaluated the Student's attentional or behavioral needs. (D-19).
125. A Permission to Evaluate (PTE) - Consent Form was enclosed with the December 4, 2012 letter, proposing the evaluations referenced in that letter. (D-20). The Parent signed the PTE, providing consent, on December 6, 2012 and the District received the signed PTE on December 7, 2012. (D-20).
126. In addition to the PTE, the District also sent a second NOREP with the December 4, 2012 letter. This NOREP is in response to the IEE request, indicates the evaluations that the District was proposing, and rejects the Parent's request for an IEE at public expense. The Parent approved this NOREP on December 6, 2012 and the District received the signed NOREP on December 7, 2012. (D-21<sup>20</sup>).
127. Per the PTE, the District completed an Evaluation Report (ER) on February 5, 2013 (the 2013 ER). (D-23)<sup>21</sup>.

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<sup>20</sup> D-21 and P-6 are duplicative. For convenience I refer to D-21.

<sup>21</sup> D-23 and P-8 are duplicative. For convenience, I refer to D-23.

128. The 2013 ER repeats the parental input that appears in the 2012 RR. (D-23 at 1-2).
129. The 2013 ER reported the Student's then-current grades from classes taken at the District as follows: Science 56%, English 35%, Algebra 55%, History C-. (D-23 at 2).
130. The 2013 ER reported the Student's then-current grades from classes taken at CIT as follows: Physical Education - 100 for the first marking period and 67 for the second marking period; Health - 84 for the first marking period and 81 for the second marking period; [redacted] - 77 for the first marking period and 72 for the second marking period. (D-23 at 2).
131. The 2013 ER includes new, narrative information from the Student's teachers. The Student's English teacher reported that the Student "just sits in class and dazes off. [Student] barely ever completes any work. ... [the Student] does not want to do anything. [Student] is apathetic and sits there in class, barely making an attempt to write something down." At the same time, the English teacher reported that the Student was able to read and write appropriately and at grade-level when prompted. (D-23 at 2-3).
132. The English teacher reported that she signed the Student's assignment book daily, although the Student was resistant to this. The Student also received extra time for English assignments and tests, and could elect to have tests read out loud. The English teacher, at that time, was of the opinion that the District was "doing all [it] can for [Student]..." (D-23 at 2, 3).
133. The Student's Science and History teachers also provided updated remarks that were generally consistent with their prior comments in the 2012 RR. (D-23 at 3-4).
134. As part of the 2013 ER, the Student was observed by one of the District's School Psychologists, but not the same Psychologist that observed the Student for the 2012 RR. (D-23 at 4). Part of the observation took place in the Student's math class. During that class, the Student was extremely lethargic and non-responsive, and the teacher reported that the Student's behavior was atypical - that the Student was "typically passive, but has never been that unresponsive." (D-23 at 4).
135. Another part of the observation took place in the Student's English class. In that class, the Student did not come to class with the required materials. The Student

demonstrated passive but compliant behavior while completing some of the assigned work and twisted a paperclip. (D-23 at 4).

136. Another part of the observation took place in the Student's Science class. The Student's behavior in the Science class was generally consistent with behavior in the English class. The Science class, however, required group work and the groups were assigned by the teacher. The Student chose to work alone during this time, but eventually worked with a group of other students when invited by that group. (D-23 at 4-5).
137. The Student was observed again by the same Psychologist the following day in the Student's History class. In this class, the Student followed the teacher passively, and took some notes. (D-23 at 5).
138. While conducting the observations noted above in Math, English and Science, the Psychologist also used the Behavioral Observation of Students in Schools (BOSS) system to track the Student's on-task and off-task behaviors relative to peers. According to this system, the Student exhibited behaviors indicating active engagement at about the same level as peers, but "across all three classes observed, [the Student] engaged in higher levels of off-task passive behavior when compared to [Student's] peers. [Student] was often observed staring into space and did not appear to be paying attention to instruction or class discussion." (D-23 at 6).
139. Recommendations from teachers in the 2013 ER were consistent with the 2012 RR: the Student should "continue [Student's] current educational program... [have] [Student's] agenda book signed [by the Parent] each night... [and] a resource period with a teacher would be beneficial." (D-23 at 6).
140. The 2013 ER includes a comprehensive summation of prior testing and services that the Student received as of the date of the document. (D-23 at 6-11).
141. As part of the 2013 ER, selected sub-tests of the Woodcock Johnson Test of Achievement, 3rd Edition (WJ-III) were administered. Composite scores were as follows:

Composite	Standard Score	Percentile Rank	Range
Broad Reading - Reading fluency scores are part of this composite score.	85	15	Low Average
Brief Reading	88	22	Low Average

Basic Reading Skills	93	31	Average
Reading Comprehension	87	19	Low Average
Broad Math - Math fluency scores are part of this composite score.	89	24	Low Average
Brief Math	92	30	Average
Math Calculation Skills	85	15	Low Average
Math Reasoning	94	34	Average

142. The evaluator noted that, on the WJ-III, the Student's lowest scores were in Reading Fluency and Math Fluency. The evaluator opined in the 2013 ER that the Student's "lower rates of fluency across reading and math could likely be related to [Student's] relative weakness in processing speed" as measured by prior evaluations. (D-23 at 13).

143. A Key Math 3 Diagnostic Assessment (Key Math) was also administered as part of the 2013 ER. On the Key Math, some sub-tests were in the Below Average range, but all composite scores were in the Average range and the "Total Test" standard score was an 87, yielding a percentile rank of 19 in the Average range. (D-23 at 13).

144. The Achenbach System of Empirically Based Assessment (ASEBA), which is a behavior rating scale, was administered as part of the 2013 ER. The ASEBA includes rating scales for parents, teachers and the Student. The ASEBA yields a very large quantity of normative data for each of the rating scales. All of that data is reported in the 2013 ER, and a summary is also provided. (D-23 at 13-17). Scales were completed by the Student, the Parent, the Student's grandmother, the Student's Science teacher and the Student's Co-Teacher from the Student's English class. *Id.* As measured by the ASEBA, the Student, the grandmother and both teachers rated the Student's problem behaviors to be in the typical range compared to same-aged peers. Scales completed by the Parent indicate significant problems in multiple domains. The Student's self ratings also indicated "clinical or significant levels of concern in the areas of Activities and Total Competence." (D-23 at 17).

145. A functional behavioral assessment (FBA) was not completed as part of the 2013 ER because of "scheduling conflicts between [the Student's] mother and attorney." A FBA meeting was scheduled before the 2013 ER was issued. (D-23 at 18).



146. Comparing the results of the WIAT-III from the 2012 RR, the WJ-III from the 2013 ER and the Key Math from the 2013 ER, the evaluator concluded that the Student did not meet criteria for SLD and did not require SDI. (D-23 at 20).
147. The 2013 ER recommends that the Student should be dismissed from speech/language support for the same reasons explained in the 2012 RR, despite the fact that such services had been discontinued previously. (D-23 at 20).
148. The 2013 ER recommends that the IEP team “consider conducting another auditory processing evaluation or consultation with an audiologist to determine the most appropriate accommodations necessary to support [the Student].” (D-23 at 20-21).
149. The 2013 ER concludes that the Student does not have a disability and is not eligible for special education. (D-23 at 20).
150. As with the 2012 RR, the 2013 ER includes check boxes for members of the team to agree or disagree with the evaluation. The Parent’s name is printed in this section, and a computer-generated, pre-printed checkmark appears in the “Agree” column. The Parent did not sign next to her name. District members of the team did sign next to their names. (D-21 at 21).
151. On February 6, 2013, the day after the 2013 ER was presented, the District issued another PTE-Consent Form. This form indicates that the Student’s academic struggles were a concern. Through the form, the District sought consent to conduct a central auditory processing evaluation and a psychiatric evaluation. (D-24). The Parent provided consent and the District received the signed PTE on February 7, 2013.
152. On February 14, 2013, the District issued a meeting invitation form. The purpose of the meeting was: “Psychiatric evaluation. [The Parent] was contacted via telephone and declined the invitation.” The meeting was scheduled for February 17, 2013. (D-25).
153. On February 22, 2013, the District issued a letter that gives context to the February 14, 2013 invitation form.<sup>22</sup> The February 6, 2013 PTE was for both a central auditory processing evaluation and a psychiatric evaluation. The Parent had intended to provide consent for the central auditory processing evaluation but not the psychiatric evaluation. Instead, the Parent intended to obtain a psychiatric

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<sup>22</sup> Without the subsequent letter, the invitation form would have been nonsensical. In context, it appears that the District - confusingly - used an invitation form to memorialize that the Parent had declined the District’s psychiatric evaluation.

evaluation privately. The Parent explained this misunderstanding to the District via telephone, prompting both the February 14, 2013 invitation and the February 22, 2013 letter. (D-26)<sup>23</sup>.

154. With the February 22, 2013 letter, the District issued two PTE-Consent forms, one for a central auditory processing (CAP) evaluation (D-27), and the other for a psychiatric evaluation (D-28). The Parent provided consent for the CAP evaluation, and denied consent for the psychiatric evaluation. (D-27, D-28).
155. When denying consent for the psychiatric, the Parent explained that she would obtain a psychiatric evaluation sometime in May of 2013 at her own expense, and was not seeking reimbursement. (D-28).
156. On March 4, 2013, the District sent a letter to the Parent stating that the District was proposing to exit the Student from special education. This letter reiterates the District's position that the Student did not have a SLD in reading or math, and states that the lack of an SLD is the basis for the proposed exit. (D-29)<sup>24</sup>. In the same letter, the District acknowledged that the Student continued to have a Central Auditory Processing Disorder (CAPD), required modifications and accommodations in regular education, and that a Section 504 plan was necessary. *Id.* At the Parent's request, the District enclosed a draft Section 504 plan with the letter. (D-29).
157. Enclosed with the March 4, 2013 letter, in addition to the draft Section 504 plan, the District enclosed a NOREP proposing to exit the Student from special education and an invitation form inviting the parent to a meeting to discuss the Section 504 plan. (D-29, D-31, D-33; P-9 at 2-5).
158. The record does not support a finding that Parent ever approved a NOREP to exit the Student from special education.<sup>25</sup> Even so, there is no dispute that the Student was removed from special education on or around March 4, 2013 and began to receive services under a Section 504 plan around the same time.
159. As indicated in the letter, the District prepared a draft Section 504 plan, titled "STUDENT ACCOMMODATION PLAN - DRAFT" on March 4, 2013. The draft Section 504 plan notes that the Student was diagnosed with CAPD based on an Audiological Evaluation from October 23, 1997. The draft Section 504 plan notes that the Student "demonstrates difficulty in processing information given verbally.

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<sup>23</sup> D-26 and P-7 are duplicative. For convenience, I refer to D-26.

<sup>24</sup> D-29 and P-9 are duplicative. For convenience, I refer to D-29.

<sup>25</sup> The only copy of the exiting NOREP that was entered into the record of these proceedings is P-9 at 2-5. This copy of the NOREP is not signed, and the Parent did not indicate approval or rejection.

[Student] has difficulty understanding verbal distractions or information with extraneous noise distractions.” (D-33)<sup>26</sup>.

160. The draft Section 504 plan included the following accommodations: “extended time, review of concepts, separate testing location, study guides, preferential seating away from extraneous noise, graphic organizers, printed notes, teacher needs to face [the Student] and establish eye contact, check for understanding of directions, assignment book signed, check for progress during assignments, FM system is available.” (D-33).
161. The Parent signed the draft Section 504 plan on April 16, 2013. This signature indicates that the parent participated in a meeting during which the plan was discussed, and that the Parent participated in that discussion. The signature does not indicate that the Parent agreed with or consented to the plan. (D-33 at 2).
162. After receiving the Parent’s consent for a CAP evaluation, the District contracted with its local Intermediate Unit (IU) and an evaluation was conducted. The evaluation resulted in the issuance of an Auditory Processing Consultation report, dated March 27, 2013 - after the District prepared the draft Section 504 plan. (D-32).
163. The Auditory Processing Consultation report includes a summary of prior testing and new audiological testing. These assessments confirmed that the Student “fits the profiles of a listener with an auditory decoding defect and an auditory integration deficit.” As such, the evaluator concluded that the Student would likely “take longer to attach meaning to auditory input and generally have greater difficulty fusing information heard between the ears.” (D-32).
164. The auditory deficits found by the evaluator, in combination with the Student’s short term memory weakness, put the Student at risk of losing auditory information while that information was being processed. The evaluator opined that this would, *inter alia*, make it difficult for the Student to listen and take notes at the same time, make it take longer for the Student to complete written work, make it take longer for the Student to respond to verbal requests, make the Student appear more distracted than peers, make it difficult for the Student to understand multi-step directions, and cause auditory fatigue. (D-32).
165. The Auditory Processing Consultation report includes suggestions for the Student’s team to consider. These included, *inter alia*, preferential seating (meaning seating away from distractions, regardless of proximity to the teacher), use of an FM System, extended time to comply with auditory requests, segmenting longer

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<sup>26</sup> D-33 and P-10 are duplicative. For convenience, I refer to D-33.

assignments, testing accommodations, note-taking accommodations (either “closed-set notes” or copies of lecture materials so that the Student would not have to listen and write at the same time) and development of self advocacy skills. (D-32).

166. On April 29, 2013, the Parent filed a Complaint with the Office for Dispute Resolution initiating these matters. (*Complaint*, D-1).

167. For the 2012-13 school year, the Student’s 9th grade year, the Student’s year-end grades were as follows (D-36):

- English - 45 (prior year was 57)
- Physical Education - 86 (prior year was 72)
- Health - 83 (prior year was 81)
- History - 72
- Math - 54 (prior year was 74)
- Science - 79 (prior year was 77)
- [redacted] - 76

168. All classes taken during the 2012-13 school year were year-long. [Redacted], Health and Physical Education were taken at CIT, other classes were taken in the District’s high school. On the 2012-13 report card, the English teacher noted that the grade reflects the Student’s marks in an adapted class with modified instruction. The History teacher also noted that the course was adapted for the student, but that the Student shows improvement. The Math teacher noted that assignments were late or incomplete, and that the Student showed a lack of effort. The Science teacher noted that the Student showed improvement and showed effort. (D-36).

169. The Student failed English during 9th grade, but participated in the Keystone Credit Recovery program and earned an 84% in “English 9.” This course was completed between July 22, 2013 and September 6, 2013.

170. The Parent obtained a private evaluation report from a medical doctor. (P-12). The report is dated September 27, 2013. (P-12). The Parent testified that she received the report on November 1, 2013. (NT at 348). The District received the report on November 1 or 2, 2013. (NT at 347-348). The report concludes that the student has a number of significant medical psychiatric diagnoses, and learning disabilities. (P-12). The report is based on a one and one half hour meeting with the doctor during which the Parent and Student were both present throughout. (NT at 382-385). The report does not indicate the sources of information that the doctor considered, although the Parent testified that copies of the Student’s report cards

and progress reports were provided. *Id.* The doctor conducted no new testing. (NT at 386-387).

171. The private evaluation report of September 27, 2013 is conclusory. The doctor determined, based on very little contact with the Student, no new evaluations, limited records, and no input from the District, that the Student should be diagnosed with a large number of very significant diagnoses. I find the report to be unsupported and unpersuasive. I afford it no weight.

## **Discussion**

### **I. Applicable Laws and Jurisprudence**

#### ***The Burden of Proof***

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

#### ***IDEA Eligibility***

The IDEA and its implementing regulations establish a two-part test to determine whether a student is entitled to the substantive rights and procedural protections of the IDEA (that is, if a student is IDEA-eligible). First, the student must be “evaluated ... as having” any of the disabilities that fall into the categories of disabilities recognized by the IDEA. 20 USC § 1401(3)(A)(1). Second, “by reason thereof,” the Student must require special education and related services. 20 USC § 1401(3)(A)(2).

The term “special education” means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including ... instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and ... instruction in physical education. 20 USC § 1401(29)(a)-(b).

The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse

services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. 20 USC § 1401(26)(A).

SLD is one of the categories of disabilities recognized by the IDEA. SLD refers to a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. SLD includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. SLD does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 20 USC § 1401(30).

Other Health Impairment (OHI) is another category of disability recognized by the IDEA. OHI means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems (examples range from asthma to ADHD) and that adversely affects a child's educational performance. 34 CFR § 300.8(c)(9)(i)-(ii).

### ***Free Appropriate Public Education (FAPE)***

IDEA-eligible students are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably

calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

### ***Compensatory Education***

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

### ***IEE at Public Expense***

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense." 34 C.F.R. § 300.502(b)(2)(i)-(ii).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

## **II. Compensatory Education - April 29, 2011 through March 4, 2013**

The November 18, 2010 IEP was operative at the start of the time period under consideration in this matter - April 29, 2011. With the exception of the self advocacy and information recall goals, all of the goals in the November 18, 2010 IEP simply set an expectation that the Student would earn an 80% or higher in all classes. This expectation is established in the IEP's first academic goal. The remaining academic goals are duplicative of the first academic goal in the IEP, assuming that the District's regular education reading and math classes are aligned to state standards.

The self advocacy goal in the November 18, 2013 IEP is not measurable because, on its face, it is not possible to discern what criteria constitute mastery. The goal for the Student to recall information is not measurable for the same reason.

The November 18, 2010 IEP lists a large number of SDIs and modifications, but many of those are substantively similar. Nearly all are connected to the overarching goal of the IEP: the Student's grades should be 80% or better. Nearly all of the modifications and SDIs provide academic accommodations, be it for testing, assignments or class work. In addition, if, despite significant accommodations, the Student scored below a 70%, the Student was to be re-tested.

These goals, SDIs and modifications were all put into place based on a determination that the Student had an SLD in both reading and math, as well as an auditory processing disorder. As discussed above, SLD is recognized by the IDEA. Auditory processing disorder is not mentioned explicitly in the IDEA. Nevertheless, the District clearly recognized that the Student's auditory processing deficits was having a detrimental impact upon Student's education, and chose to address those problems through Speech/Language support. The Speech/Language services were not related to the Student's SLD, but rather were provided to enable the Student to learn strategies to compensate for Student's auditory processing deficits and then advocate for use of those strategies in the classroom.

The District never found that the Student is IDEA-eligible on the basis of OHI, and the Parent does not argue in favor of such a classification. All of the Student's audiological evaluations, however, indicate that the Student's audiological processing deficits resulted in heightened alertness to environmental stimuli resulting in limited alertness with respect to the educational environment. The same reports suggest that there is some biological basis for the Student's deficits, and that those deficits clearly adversely affect the Student's educational performance. Whether or not the Student was ever labeled as having OHI, it was clearly appropriate for the District to recognize the



Student's auditory processing deficits as a basis for IDEA-eligibility in addition to SLD, and provide programming to address those deficits.<sup>27</sup>

The record indicates that the accommodations provided through the November 18, 2010 IEP enabled the Student to receive passing marks during the 2010-11 school year. The record does not indicate, however, that the November 18, 2010 IEP did anything other than *accommodate* the Student's disabilities. I do not find that setting a desired grade as a student's overarching IEP goal is inappropriate *per se*. Rather, nothing on the record indicates how this goal was in any way responsive to the Student's individual needs. For example, when a student has an SLD in reading, the IDEA obligates the LEA to target the student's reading deficits. An improvement in the student's grades would be a byproduct of such services. The 2010 IEP provides no information as to *how* the Student's SLD in reading or math impacts upon the Student's reading and math abilities - only that those abilities are impacted upon. Similarly, the 2010 IEP includes no information regarding how the Student's SLD in reading or math is to be remediated.

The accommodations provided in the 2010 IEP were necessary but insufficient. By modifying tests and assignments, and retesting when grades were low, the Student was able to achieve year-end scores that were close to the goal set by the IEP (higher in some classes and lower in others). Neither the IEP itself, nor the record of this case, reveal what - if anything - the District did to address the underlying SLDs. The Student was denied a FAPE while the 2010 IEP was in place on this basis. Pertinent to this matter, that time period ranges from April 29, 2011 through the end of the 2010-11 school year, and then from the start of the 2011-12 school year through November 18, 2011.

The result is the same, but for different reasons, in regard to the Student's auditory processing deficits while the 2010 IEP was in place. Though the provision of Speech/Language Support, the District endeavored to do more than simply accommodate the Student's disability. The record shows that the District was providing SDIs with the intention of addressing the deficit itself, not simply its symptoms.

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<sup>27</sup> I do not conclude that the Student is currently IDEA-eligible as a student with OHI, or that the Student should have received that label. Rather, the District concluded that the Student's auditory processing deficits required remediation via S/L support. However, to the extent that the Student's auditory processing deficits constitute a qualifying disability by themselves, that disability likely falls under the OHI label, as opposed to a Speech or Language Impairment (S/L I). The former is described in this decision. The latter is described at 34 C.F.R. § 300.8(c)(11). It is noteworthy that S/L services are provided to address a wide range of disabilities, from S/L I, to Autism, to CAPD.

Unfortunately, the 2010 IEP included no measurable, objective goals by which the Student's progress in this domain could be tracked. The progress monitoring does not reveal that objective data was systematically collected. Moreover, subjective statements concerning the Student's progress in this domain do not indicate that the Speech/Language services that the District provided were effective. The Student was denied a FAPE while the 2010 IEP was in place on this basis as well from April 29, 2011 through the end of the 2010-11 school year, and then from the start of the 2011-12 school year through November 18, 2011.

The November 18, 2010 IEP expired on November 18, 2011. A new IEP was drafted on November 18, 2011 and put into place with an approved NOREP the same day. The 2011 IEP is, in substance, nearly identical to the 2010 IEP. The two key differences between the 2010 IEP and the 2011 IEP are the addition of a Transition section in 2011, and a reduction of the grade level goal from 80% to 75%. The record, as a whole, indicates that the services and accommodations that the Student actually received from November 18, 2011 through the end of the 2011-12 school year did not change in any substantive way as compared to the services and accommodations that the Student received pursuant to the 2010 IEP.

I find that the 2011 IEP, as implemented between November 18, 2011 and the end of the 2011-12 school year, was inappropriate for the same reasons as the 2010 IEP was inappropriate. Academically, the IEP sets a goal and provides accommodations that target the symptoms of the Student's SLDs without addressing their cause. The IEP also addresses the Student's auditory processing deficits without establishing a measurable goal, and (measurable or not) the record indicates that the Student did not make meaningful progress in this domain. In addition, and *unlike* the 2010 IEP, the 2011 IEP ultimately proved ineffective in accommodating the Student's disabilities. Even with the accommodations provided through this IEP, the Student was not able to reach the 75% grade-level goal in the majority of classes. The Student was denied a FAPE on these bases while the November 18, 2011 IEP was implemented: November 18, 2011 through the end of the 2011-12 school year.

The 2011 IEP was revised in August of 2012. The resulting revised 2012 IEP was implemented from the start of the 2012-13 school year through November 27, 2012. The revisions removed some of the modifications that the Student had been receiving, and noted that the Student would attend CIT. As with the 2010 and 2011 IEPs, the revised 2012 IEP does nothing to address the Student's underlying SLD. It must be noted that, for the period of time in question, the District was in agreement that the Student had SLDs. The District's ultimate determination that the Student does not have an SLD does not mitigate against a denial of FAPE for periods when the Student's disability status was not in dispute.

Next, the November 27, 2012 IEP removed Speech/Language services despite the fact that the Student had not made progress towards the self-advocacy goal (which was targeted through S/L support), and despite the fact that no information suggested that the Student's auditory processing deficits had abated in any way.<sup>28</sup> Simultaneously, to the extent that report cards were used as progress monitoring, the report cards indicated that the level of accommodation provided by the 2011 IEP was no longer sufficient for the Student to meet the grade-level goal. Despite this, accommodations were removed in November 27, 2012 IEP. With the underlying disabilities (both SLD and auditory processing deficits) not addressed, and with a reduction of already insufficient accommodations, the Student's remarkably poor grades throughout the 2012-13 school year should come as no surprise. On these bases, the Student was denied a FAPE while the revised 2012 IEP was in place: the start of the 2012-13 school year through November 27, 2012, and again under the November 27, 2012 IEP through May 4, 2013.

The Parent argues that compensatory education is an appropriate remedy for the denial of FAPE discussed above. I agree that the legal basis for an award of compensatory education, set forth above, has been satisfied. Unfortunately, neither party proposes an amount of compensatory education that should be awarded, nor suggests which method of calculating compensatory education should be used in this matter.<sup>29</sup> The record, however, does not reveal a basis for using the *Penn Manor* standard, and so I will use an hour-for-hour method. Even so, the hour-for-hour method is hard to apply in this case. As the Student received nothing to address Student's underlying SLD, there is no amount of inappropriate service to use as the basis for the calculation. Consequently, with no better evidence, I find that the Student is owed compensatory education for a denial of FAPE across three domains: SLD in reading, SLD in math, and auditory processing deficits to be addressed via S/L services. I will award one hour of compensatory education for the denial in each of those domains - three hours total - for each day that school was in session between April 22, 2011 and March 4, 2013.<sup>30</sup>

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<sup>28</sup> At all times, the District has agreed that the Student's auditory processing deficits are real, and require accommodation. At the time of the hearing, the District's position was that those deficits could be accommodated through a Section 504 plan.

<sup>29</sup> I certainly would not expect the District to admit that the Student is entitled to compensatory education. Nothing prohibits the District, however, from raising an alternative argument that, in the event of a determination that FAPE was denied, either no compensatory education should be awarded, or a particular amount of compensatory education is sufficient.

<sup>30</sup> In light of the totality of the District's failures, the fact that the Parent did not sign the Student's agenda book is not a mitigating factor. Had the District endeavored to address the cause of the Student's poor grades, not just the grades themselves, and had concluded that the assignment book was an important part of that effort, the Parent's apparent lack of cooperation in this regard would have much greater significance. Going forward, should the Student's team determine that an agenda book must be signed by both teachers and the Parent, and puts a plan in place to

## II. Current Eligibility

The 2012 RR and 2013 ER form the basis of the District's determination that the Student is no longer IDEA-eligible. I find that the District's eligibility determination is erroneous, and agree with the Parent that the Student should not have been exited from special education.

Ignoring that the 2012 RR included only portions of the TAPS-3, it is obvious that the District ignored its own speech/language evaluation and reached conclusions that directly contradict its own findings. Within the same page of the 2012 RR, the document notes that the Student was only starting to generalize S/L skills from the small group to the classroom. The TAPS-3 indicated that the Student required repetition and re-phrasing of auditory information, as well as visual prompts. The unmastered self advocacy goal in the IEP that was in place at the time called for the Student to approach teachers to obtain these services, but the 2012 RR reports only "limited progress" towards that goal. In sum, testing revealed that 1) the Student was suffering from auditory processing difficulties, 2) those difficulties were having an adverse impact upon the Student's learning, 3) the Student had not demonstrated the ability to generalize the S/L skills provided to address the auditory processing difficulties and 4) the Student had not made progress towards a self advocacy goal that called for the Student to demand necessary auditory accommodations. Despite this information, the District concluded that the Student was no longer in need of direct Speech/Language support.

The District's conclusions within the 2012 RR, and its actions subsequent to it, defy logic even if the Student's S/L needs are ignored. Within the 2012 RR, the District compared a partially-completed aptitude test from 2006 to a new, partially-completed achievement test to conclude that the Student did not have any SLD. The District reached this conclusion despite the recommendations from all of the Student's teachers to continue the current plan, and despite the Student's poor academic performance at the time of testing. Next, after concluding that the Student had no SLD, the District drafted an IEP stating that the Student required SDIs *as a result of an SLD*. Next, in the same letter proposing the IEP with a NOREP, the District reiterated its conclusion that the Student does not have an SLD. So, in November and December of 2012, the District was simultaneously insisting that the Student had no SLD while recommending an IEP to address the Student's SLD.

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make sure that the book actually gets from home to school and back, the Parent's active participation in the process will be key.

The 2013 ER was conducted in response to the Parent's demand for an IEE at public expense. The propriety of rejecting the Parent's demand is discussed below. Regarding the substance of the 2013 ER, the District viewed the evaluation as an initial evaluation because concerns about the Student's behavior and attention had not previously been raised by the Parent. The Student's progress reports, however, indicate that behavior (including distractibility, inattention, and off-task behavior) were of significant and long standing concern to the Student's teachers. In addition, even if concerns about attention and behavior were truly novel, the proposed evaluation included reading and math assessments in addition to behavior scales and an FBA. The 2013 ER was an initial evaluation in name only.

The 2013 ER concludes that that the Student does not have any SLD. The basis of this conclusion is a comparison between aptitude testing in 2006 and new achievement testing that was part of the 2013 ER. In challenging this determination, the Parent makes compelling arguments that challenge both the District's statistical discrepancy analysis between the Student's ability (measured in 2006) and achievement (measured in 2013), and the metrics used for that analysis (FSIQ versus GAI). These arguments are compelling on their own. Regardless, the District committed far more basic and fundamental errors when removing the Student from special education.

The IDEA requires an evaluation consistent with 20 USC § 1414 before determining that the child is no longer a child with a disability. See 20 USC § 1414(c)(5). As such, the District was required to assess "all areas of suspected disability." 20 USC § 1414(b)(3)(B). At the time of the 2012 RR, the Student had at least two suspected areas of disability: SLD and auditory processing. The 2012 RR does not address auditory processing at all, in violation of § 1414(b)(3)(B). At the time of the 2013 ER, the Student had at least four suspected areas of disability: SLD, auditory processing, additional issues and behavioral issues. Again, auditory processing was not assessed in the 2013 ER, in violation of § 1414(b)(3)(B).

In addition, neither the 2012 RR nor the 2013 ER appropriately addresses the Student's suspected SLD, but not because of a flaw in the District's statistical analysis or choice of metrics. The District permissibly elected to use a discrepancy model, under which the Student's achievement was measured against abilities. The metric indicating ability - correctly calculated or not - was six years old by 2012. The IDEA requires an up-to-date assessment before a student can be exited. Both the 2012 RR and the 2013 ER fail in this regard.

In sum, I find that the District did not comply with 20 USC § 1414(b)(3)(B) when exiting the Student from special education. The District's ineligibility determination is reversed on that basis.

### **III. Compensatory Education - March 4, 2013 Through the Present**

This Hearing Officer has very serious reservations about the way in which the Student was exited from special education, the appropriateness of the 2012 RR and the 2013 ER notwithstanding. The record does not include a signed exiting NOREP, and the Parent's signature on the subsequent Section 504 plan indicates neither an agreement to exit the Student from special education, nor parental approval of the Section 504 agreement. Despite these reservations, there is no dispute that the Student was exited from special education and did not have an IEP from March 4, 2013 onward.

Having established that the District violated the IDEA when determining to exit the Student from special education, it is clear that the Student was not provided a FAPE from March 4, 2013 through the present, on an ongoing basis. The Student has no IEP at all and is receiving no special education or specially designed instruction. This lack of service is inappropriate *per se*.

Further, to the extent that the Section 504 plan was implemented, it was not appropriate even if the District were permitted to provide only a 504 plan to an IDEA-eligible student. The Section 504 plan continued some of the accommodations that were provided through the prior IEPs. As discussed above, those services were insufficient at the time that the IEP was withdrawn, and the Section 504 plan constitutes a further reduction. The result of reducing the Student's accommodations while not addressing the underlying disabilities are evident in Student's grades. Again, it is important to note that the Student's grades are a symptom of a problem, not the problem itself.

On the forgoing basis, I find that the Student was denied a FAPE from March 4, 2013 through the present, ongoing, and that compensatory education is an appropriate remedy. Using the same method as above, I find that the Student is owed three hours of compensatory education for each day that school was in session from March 4, 2013 through the date of this decision. I will not order an indefinite accrual of compensatory education, as the remainder of this decision will compel the District to fund an evaluation of the Student, and use that evaluation to provide appropriate programming.

### **IV. IEE at Public Expense**

The District's reaction to the Parent's request for an IEE at public expense is confounding. As discussed above, by operation of law, when an LEA receives a request for an IEE at public expense, the LEA has only two choices: fund the IEE or request a hearing. In this case, the District did neither. I find that the District's letter of December

4, 2012 constitutes the District's denial of the Parent's request for an IEE at the District's expense. The accompanying NOREP was an additional, more explicit rejection. After refusing to fund the IEE, the District did not request a hearing. Rather, the District proposed what it considered to be an initial evaluation of the Student.

In other cases, I have found that schools are justified in denying IEE requests when they have yet to evaluate a student, or when there was no clear parental disagreement with the District's own evaluation. In this case, as discussed above, the 2013 ER was not an initial evaluation, and the Parent voiced a clear, contemporaneous disagreement with the 2012 RR. More importantly, even if the District had a legal basis for rejecting the IEE request, it was still obligated to request a hearing.

Further, as discussed above, the IDEA permits LEAs to inquire as to why a parent requests an IEE, but does not require the parent to justify the request. The fact that the Parent in this case went beyond what the IDEA requires does not mitigate the District's obligation to request a hearing when it denied the Parent's request for an IEE at public expense. The fact that the Parent approved a NOREP explaining that the District was rejecting the IEE request also does not mitigate. This document merely evidences that the District told the Parent that it was rejecting the request, and the Parent acknowledged the rejection. The District's failure to request a hearing to defend the disputed RR, in and of itself, warrants an award of an IEE at public expense, and I order that relief.

Finally, even though the District's failure to request a hearing is the basis of the IEE award, for reasons discussed above, the Parent has substantiated that the 2012 RR and 2013 ER were inappropriate for their failure to assess all areas of suspected disability. This, in and of itself, would also justify the award.

### **ORDER**

Now, December 27, 2013, it is hereby **ORDERED** as follows:

1. For the period from April 29, 2011 through December 27, 2013, the Student is awarded three (3) hours of compensatory education for each day that school was in session.
2. The Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP to assure meaningful educational progress.

3. The District is ordered to fund an Independent Educational Evaluation of the Student. The Parent has sole discretion in selecting an evaluator, provided that the evaluator is “qualified” as defined in 20 U.S.C. § 1414; and that the evaluation will assess all areas of suspected disability.
4. The District’s ineligibility determination is hereby reversed. The Student is, currently, considered to be IDEA-eligible.
5. Issues concerning the appropriateness of the Section 504 plan, to be considered in the event that the District’s eligibility determination was proper, are dismissed as moot.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER