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Pennsylvania

## Special Education Hearing Officer

### DECISION

Student's Name: A.E.

Date of Birth: [redacted]

ODR No. 15052-13-14-AS

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Jana R. Barnett, Esquire  
Law Offices of Jana R. Barnett  
1238 Cleveland Avenue  
Wyomissing, PA 19610-2102

Hamburg Area School District  
701 Windsor Street  
Hamburg, PA 19526

Mark W. Cherie Walz, Esquire  
Sweet, Stevens, Katz & Williams, LLP  
331 East Butler Avenue  
New Britain, PA 18901

Dates of Hearing:

October 24, 2014; December 8, 2014;  
December 9, 2014

Record Closed:

January 5, 2015

Date of Decision:

January 20, 2015

Hearing Officer:

William F. Culleton, Jr., Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is an eligible child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and an individual with a disability protected by the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). (NT 10-11.) Student attends a District elementary school and lives within the respondent District. (NT 10-11, 15.) Student is identified under the IDEA as a child with a disability of Other Health Impairment. (NT 10.)

Parents assert that the District denied Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) from the first day of school in 2013 to December 9, 2014. Parents claim that the District provided an inappropriate placement, failed to provide appropriate Individual Education Programs and related services to Student that addressed all of Student's educational needs, and failed to provide Parents with an opportunity to participate in the IEP process. The District denies these allegations and asserts that it provided an appropriately least restrictive placement with appropriate special education and related services.

The hearing was completed in three sessions. I conclude that the District's placement, IEP, and services were appropriate under the law and I deny the request for relief.

## **ISSUES**

1. Did the District provide Student with an appropriate and least restrictive placement for the 2013/2014 school year and the 2014/2015 school year until December 9, 2014<sup>2</sup>?

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<sup>1</sup> Student, Parents and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. Because the Student's mother engaged in many transactions with the School, she is referred to below as "Parent" in the singular.

<sup>2</sup> In the hearing, this hearing officer stated the denial of FAPE and LRE issues (including claims regarding placement, LRE and IEPs) as applying to the 2013/2014 school year only, (NT 22); however, in the same formulation of issues, I stated that the compensatory education claim extended into the 2014/2015 school year until December 9, 2014, the last day of hearings. (NT 22-23.) This may have created some ambiguity in the record, since the compensatory education request would be viable only if the FAPE claims extended until December 9, 2014; however, I find that the parties were not disadvantaged by this ambiguity in the formulation of the issues. They both fully litigated the denial of FAPE and LRE claims, as well as the parental participation claims, for the period ending

2. Did the District provide Student with appropriate Individualized Education Programs (IEPs) during the 2013/2014 school year and the 2014/2015 school year until December 9, 2014?
3. Did the District provide Parents with appropriate opportunities to participate in the creation of the IEPs for Student during the 2013/2014 school year and the 2014/2015 school year until December 9, 2014?
4. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the 2013/2014 and 2014/2015 school years until December 9, 2014?
5. Should the hearing officer order the District to provide any evaluations, IEP revisions or other educational services to Student prospectively, or order the District to train any of its personnel regarding the requirements of the IDEA?

### **FINDINGS OF FACT**

1. Student received Early Intervention services, including placement in preschool, speech and language consultation, and occupational therapy consultation. Prior to kindergarten age, Student exhibited a 25% delay in speech and language, including articulation, expressive language and receptive language. Teachers reported that Student exhibited difficulties with speech and communication, social skills, distractibility, impulsivity, pre-academic learning and behavior. (S 1, 3, 5.)
2. Upon Student's transition to kindergarten in the District, at age 5 years eight months, the District provided an evaluation report dated August 12, 2008. Student scored in the low average range of cognitive functioning; Student's achievement was not discrepant with Student's measured ability. A standardized behavior rating scale indicated that Student was a child with Attention Deficit Hyperactivity Disorder (ADHD), with a high degree of probability; however, at that point Student's teachers recommended that Student would be able to access the kindergarten curriculum with appropriate supports and related services in the form of speech and language therapy. The District classified Student with a primary disability category of Speech or Language Impairment. (S 1.)
3. In November 2008, Student was referred for an Occupational Therapy evaluation and was found to be successfully accessing the kindergarten curriculum without any evidence of sensory, gross motor or fine motor skills deficits that interfered with Student's learning. (S 2.)

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December 9, 2014, and neither party argued in written summations that the period to be determined in this matter should not include that period. Therefore, I have proceeded to adjudicate the FAPE, LRE and parental participation claims for the period ending December 9, 2014.

4. Student was evaluated privately in May and July 2010, prior to Student's second grade year. Testing revealed cognitive functioning in the low average range, with variation in subtest scores, including high average perceptual reasoning and borderline processing speed. Testing revealed weaknesses in language formulation, language expression and visual-motor sequencing abilities. Academic achievement in reading, mathematics and listening comprehension was average or slightly below average; written expression skills were significantly below expectations. Student scored in the average range in spelling, but significantly low in written expression. Student's social communication, social interaction and play behaviors indicated no support for diagnosis of autism spectrum disorder. (S 3.)
5. The private evaluation in 2010 endorsed qualification for speech and language services for needs in receptive and expressive language. The evaluator recommended classification with Specific Learning Disability in writing, and noted support for a diagnosis of ADHD. Behavioral difficulties included over-activity, impulsivity, distractibility and oppositional behavior. (S 3.)
6. In third grade in the District, Student worked on grade level in a regular education classroom with an IEP for speech and language therapy. However, Student exhibited gaps in third grade knowledge and skills by the end of the third grade academic year. (NT 32-36, 70-73,129-131; P 1, 5; S 4, 9.)
7. In March 2012, Parents and the District entered into an agreement as a result of which Parents placed Student in a private school for the last few weeks of third grade and all of fourth grade. (NT 30, 121; S 4.)
8. Student performed poorly at the private school in fourth grade, earning failures in reading, mathematics and social studies; and grades of "C" in spelling, social studies and science. Student's behavior in the private school was poor. Student exhibited a lack of self-control; disruptive talking during class; failure to adhere to behavioral guidelines; and poor academic performance not consistent with Student's ability, including poor reading comprehension and deficits in fourth grade mathematics skills. (NT 32-51; P 2; S 5.)
9. Student was evaluated by the local intermediate unit in May 2013. Standardized testing revealed cognitive ability in the low average range. Student demonstrated achievement in reading within the average range. In mathematics, Student performed well below average. Student performed in the average range in written expression, with spelling an area of weakness. Student's expressive vocabulary and sentence repetition were below average. Student had below average test scores in motor coordination. Behavior inventories revealed elevated scores for emotional distress, academic difficulties, language, mathematics, hyperactivity and compulsive tendencies. Overall, the evaluation revealed weaknesses in mathematics reasoning, numerical operations and spelling. Student also exhibited difficulty with activities that rely heavily on fine motor skills. Behavior was seen as an impediment to learning. (S 5.)
10. Student's sensory seeking behavior in the private school did not interfere with Student's education or that of others. (NT 42, 45.)

11. Due to Student's difficulties in fourth grade at the private school, the School decided that Student could not remain there without a one-to-one educational assistant full time. The School determined that its regular-education interventions were not sufficient to support Student's success in their school. (NT 63-67, 107-108, 120-123.)
12. Parents asked the District to provide a one-to-one aide at the private school, and the District declined to do so. (NT 107-110.)
13. Parents and the school administrator had an impression that Student could be placed in either autistic support or emotional support, if deemed appropriate based upon an evaluation; however, the District did not promise or pre-determine that Student would be placed in such levels of support. (NT 67, 69, 110-111.)
14. Pursuant to the recommendations of the private school and the District's Director of Special Education, Parents removed Student from that school and enrolled Student in the District, retaining Student in fourth grade. (NT 107-108, 120-123, 133; S 5, 9.)
15. The District implemented the previous District IEP, which provided Student with itinerant speech and language therapy on a pull-out basis. The IEP provided for an extra desk for student; verbal reminders to stay on task; an agenda; a communication journal between home and school; and visual charts for monitoring appropriate pragmatic speech. In addition, teachers were expected to provide appropriate educational interventions to support Student's needs, pending completion of a re-evaluation. (S 9; NT 129-131, 143.)
16. The District presented a Permission to Re-evaluate form to Parents during a meeting on October 4, 2013; the District made multiple attempts to obtain a signature and re-issued the form on November 25, 2013. Parent signed and returned the form during an IEP meeting on November 25, 2013. (S 7, 8, 9.)
17. District evaluators provided a parental-input questionnaire and behavior rating scales to Parents on October 4, 2013. Parents returned the questionnaire and rating scales to the evaluator on January 23, 2014, the 60th day of the reevaluation report timeline. District personnel considered this parental input subsequently. (NT 146-147, 577-580; S 11.)
18. Also on November 25, 2013, the District provided an IEP and Notice of Recommended Educational Placement (NOREP), recognizing Student's IDEA classification with Speech or Language Impairment, providing placement in Student's neighborhood school with inclusion for all subjects in regular education classrooms, and Itinerant Speech and Language Support. Speech and language therapy was to be provided on a pull-out basis for 30 minutes per month. The IEP provided one goal addressing pragmatic language. Specially designed instruction and accommodations were provided to address attention and hyperactivity issues, self-organization issues and pragmatic language skills. GIEP also proposed an occupational therapy screening. (S 9.)
19. During the first and second marking periods of Student's fourth-grade year in the District's elementary school, Student made educational progress. Working at a fourth grade reading level, Student demonstrated average reading fluency and comprehension. Student demonstrated average mathematics facts and fluency, and obtained satisfactory or good scores on mathematics written assessments. Student's written expression

performance was variable, with appropriate spelling, word choice and vocabulary, but demonstrating problems in grammar, sentence structure, sequence and organization, capitalization and punctuation. (S 11, 12.)

20. In a regular education social skills group during fourth grade in the District, Student demonstrated improved social skills in the areas of not interrupting others and respecting personal space. Student continued to need practice in the social area of being aware of the needs and feelings of others. In the area of social speech, Student was able to maintain a conversational topic for three turns with 84% accuracy, and stated an emotion being portrayed on a picture card with 85% accuracy. In classroom observations, Student was able to maintain attention to task and regulate problematic behaviors in 98% of sampled time intervals. (NT 474-475; S 11.)
21. Student's teacher imposed consequences on Student's inappropriate behavior, which included disruptive speech and initiating and engaging in physical and verbal altercations. Consequences included requiring Student to write repetitive sentences or prose paragraphs about correct behavior; requiring Student to write apology letters; and retaining Student from all or part of recess periods. (P 14.)
22. On January 22, 2014, the District provided an occupational therapy evaluation report. The evaluation found that Student seeks sensory input, including auditory input, movement and proprioceptive and deep pressure input. Student exhibited average visual motor skills, low-average visual spatial skills and above average fine motor skills. Student was able to produce adequate word, letter and number legibility, and produce written work at a speed within the expected range for fourth and fifth grade. Legibility was somewhat less for assignments requiring writing longer passages. Student exhibited needs in the area of balance and motion, as well as in social participation, visual processing, auditory processing and body awareness. The evaluation concluded that Student's sensory differences appeared to be affecting Student's social participation, including handling conflict and frustration, entering play situations and maintaining personal space with others. The report recommended trials of resistive materials on Student's chair and occupational therapy consultation at least quarterly. (S 10.)
23. On January 23, 2014, the District provided a Re-evaluation report to Parents. The report classified Student as a child with the disability of Other Health Impairment. The report addressed Student's cognitive, academic, developmental, social, emotional and behavioral functioning in the school setting. The report incorporated the results of the occupational therapy assessment report dated January 22, 2014. (S 11.)
24. The January 23, 2014 Re-evaluation Report inquired into Student's speech and language needs, including the areas of listening comprehension, receptive and expressive vocabulary, articulation, fluency and social language skills. It found that Student's speech and language functioning is within normal limits compared to peers of the same age range, and it recommended no need for speech and language services. (S 11.)
25. January 23, 2014 Re-evaluation Report inquired into Student's academic achievement in relation to Student's cognitive ability. A standardized achievement test indicated that Student's academic achievement was in the average range in all academic areas. The

report found no discrepancy between Student's ability and achievement, and therefore found no specific learning disability. (S 11.)

26. The January 23, 2014 Re-evaluation Report identified needs in the areas of distractibility; impulsivity; memory; organization and responsibility; following school rules, routines, and instructions; hyperactivity; over-responsiveness to auditory stimuli and sensory seeking; some fine motor skills; emotional and behavioral self-regulation; and impulsive social behavior. (S11.)
27. The January 23, 2014 Re-evaluation Report provided recommendations to the IEP team for placement, specially designed instruction, related services and accommodations. (S 11.)
28. The January 23, 2014 Re-evaluation Report recommended placement in regular education with supplementary aids and services. It recommended occupational therapy consultation on a quarterly basis to address sensory strategies. It recommended extended time in local and state assessments and alternate locations for testing, to accommodate Student's distractibility. It also recommended continued participation in the regular education social skills group. (S 11.)
29. The January 23, 2014 Re-evaluation Report recommended accommodations and specially designed instruction, including modeling organizational and behavioral skills; preferential seating; prompts and cues for attention to task; modified instructions and explanations; chunking of assignments; previewing and outlining for writing assignments; access to school counselor for social issues; leadership opportunities; and future assessments as needed, including a functional behavioral assessment (FBA). (S 11.)
30. On February 17, 2014, the District offered an IEP to provide special education and related services to Student. The IEP placed student in regular education with itinerant learning support for all classes and activities, with the exception of the availability of assistance in a resource room as needed for help with written assignments, or as needed to accommodate Student's attention and sensory regulation needs during state and local assessments. (S 12.)
31. The February 17, 2014 IEP provided goals for maintaining an agenda and legible copying of assignments; behavioral self-control by maintaining appropriate personal space and voice level; organization of school work sheets; and following directions in regular education classes independently. (S 12.)
32. The February 17, 2014 IEP provided specially designed instruction and accommodations addressing Student's needs with regard to attention and impulsivity. These included preferential seating; verbal and nonverbal prompts and choose; specially designed explanations and instructions; chunking of long-term assignments and multi-step tasks; use of special paper with wider lining and highlighting to assist in legibility; prompts to slow down and self-correct classroom writing assignments; help in the resource room for long-term assignments; highlighting of key words in directions; outlines and graphic organizers; direct assistance with elaborating more in Student's writing; peer buddy

assignment in less structured environments; behavioral self-monitoring checklist trial; frequent checks for understanding; and oral/motor pencil topper. (S 12.)

33. The February 17, 2014 IEP provided specially designed instruction and accommodations addressing Student's needs in the area of organizational skills, in addition to those listed above for attention and impulsivity. These included providing subject folders and a system for explicit teaching in their use; teacher and parental checking of Student's agenda and folders, with sign off; and use of an incentive chart and rewards for organizational success. (S 12.)
34. The February 17, 2014 IEP provided specially designed instruction and accommodations addressing Student's needs with regard to sensory regulation, both distractibility from and avoidance of loud noises, and sensory seeking. These included provision of alternative seating or special materials on Student's seat; standing at Student's desk to work; movement breaks; and trial of Velcro, Theraband and fidgets during instruction. (S 12.)
35. The February 17, 2014 IEP provided accommodations for testing, including extended time; testing in the resource room; study guides; structured format for lengthy written responses; small-group testing; word bank; test modification as needed; highlighting of key words or directions; one retest as needed; and reminder to check test before handing it in. (S 12.)
36. The February 17, 2014 IEP provided specially designed instruction to ensure parental participation in decisions involving discipline or other school responses to inappropriate behavior. The IEP provided for daily use of a communication book between home and school to inform Parents of discipline problems or concerns. (S 12.)
37. The February 17, 2014 IEP did not provide for related services, except for transportation. However, the IEP provided support for regular education teachers through consultation with occupational therapy personnel, once per marking period, to address sensory strategies. (S 12.)
38. The District invited Parents to an IEP meeting scheduled for February 21, 2014. Parents were unable to attend and the meeting was rescheduled for March 6, 2014. (S 19.)
39. The District presented a NOREP to Parents dated February 24, 2014. The NOREP proposed placement in itinerant learning support. It explained why more restrictive placement was not considered appropriate for Student. Placement in full time or supplemental learning support was rejected because Student was deemed able to meet grade level expectations in all academic classes, and supports could be provided through itinerant learning support services. (S 13.)
40. Shortly before the scheduled March 6, 2014 IEP meeting, the Parents advised the District that their attorney would attend the meeting. The District cancelled the meeting in order to permit its attorney to attend. On March 11, 2014, the District invited Parents to an IEP meeting to discuss the February 2014 IEP; the meeting was scheduled for March 26, 2014. (S 14.)



41. On March 23, 2014, Parents' counsel sent to the District a 21-page letter detailing changes that Parents desired to be made to the re-evaluation report. (S 18.)
42. Parents requested extensive revision of the summary of prior evaluations and circumstances of Student's return to the District, as well as additional language reflecting Parents' concerns arising from previous evaluations. Parents requested secondary and tertiary disability categories based upon previous evaluation reports. (S 18.)
43. Parents requested recognition of previous diagnoses of Oppositional Defiant Disorder and Obsessive Compulsive Disorder, as well as diagnostic categories identified in behavior inventory scores for Manic Episode, Generalized Anxiety Disorder, Obsessive Compulsive Disorder, Autistic Disorder and Asperger's Disorder. Parents requested recognition that Student's behaviors impeded Student's learning and that of others. (S 18.)
44. Parents requested inclusion of Student's grades in fourth grade at the private school. Parents requested explanation of the import of Student's grades in the District's fourth grade, in light of the fact that Student was repeating fourth grade, and in light of the District's "second chance policy", according to which the District allows students to correct tests and quizzes for final marking. (S 18.)
45. Parents asked that the present levels explain the extent to which the District's curriculum for fourth grade, as delivered to student, was less demanding than that of the private school's fourth grade curriculum as delivered to Student. (S 18.)
46. Parents requested that present levels also reflect instances in which Student's District teacher withdrew various privileges from Student in response to Student's inappropriate classroom behavior, without referring Student for formal discipline. (S 18.)
47. Parents requested additional detail in the summary of testing performed as part of the re-evaluation. Parents criticized the classroom observations that were part of the re-evaluation. (S 18.)
48. Parents also requested that the present levels recognize additional educational needs, including defiant and aggressive behavior; emotional distress; adaptive skills needs; atypicality; externalizing problems; functional communication needs; grammar and auditory recall issues; visual perception needs; and motor coordination needs, along with the ability to write legibly. (S 18.)
49. Parents requested an FBA and additional evaluation of Student regarding fine manual control and perceptual skills, as well as more psychological and psychiatric evaluation. (S 18.)
50. Parents requested a recommendation for counseling, occupational therapy and speech and language therapy, based upon the private evaluation that they had received in 2010, with noted needs in the areas of legible writing, grammar and auditory recall. (S 18.)
51. Parents requested ESY services. (S 18.)
52. Parents requested removal of the recommendation for testing accommodations. (S 18.)

53. The District's director of special education reviewed the Parents' requests and declined to make the requested changes to the re-evaluation report. (NT 205.)
54. At the March 26, 2014 meeting, the District agreed to conduct a functional behavioral assessment (FBA) with assistance from a behavioral specialist at the local intermediate unit. (S 15, 17.)
55. Student's April 2014 PSSA scores in mathematics and reading improved from basic to proficient. Student's April 2014 PSSA score in science was advanced. (P 5, 6; S 31.)
56. The intermediate unit specialist met with the IEP team on April 22 to plan the assessment, including identifying the behaviors of concern, identifying the antecedents and consequences of the behaviors, and developing hypotheses about the functions of the behavior. (S 16.)
57. The behaviors of concern included calling out, getting out of seat, making noises, making faces, playing with objects, and pushing or bumping into someone. (S 16.)
58. District personnel collected data for the FBA on ten consecutive school days from April 24, 2014 through May 7, 2014. (S 16.)
59. On April 30, 2014, by signing and returning the NOREP form, Parents rejected the February 24, 2014 NOREP and requested due process. Parents explained why Parents rejected the NOREP and IEP. Parents asserted that the IEP had many factual errors and was based upon an inadequate re-evaluation report. Parents asserted that Student's academic success in the District was overstated; that the IEP provided unnecessary accommodations; that the IEP goals established low expectations with insufficient assessment; that Student needed emotional support and speech and language support; that support should be provided at a supplemental level; that behavioral interventions should be more closely coordinated between school and home; and that an FBA should be performed by an independent evaluator because the District had provided the local intermediate unit with a "script" for the behavioral evaluation. (S 13.)
60. Parents filed a request for due process on May 2, 2014. In an addendum to the complaint, Parents provided detailed critiques of the District's re-evaluation report and the IEPs offered to date. (S 18.)
61. The FBA report was prepared on May 6 for inclusion in the Student's IEP. (S 17.)
62. The FBA concluded that the most frequent behaviors were calling out and making noises; the duration of all behaviors was brief. The function of these behaviors was to gain attention. Getting out of the seat and playing with objects had a function of satisfying the need for sensory input or movement. (S 16.)
63. The intermediate unit specialist recommended acknowledgment of positive behaviors; explicit instruction on appropriate ways to gain attention, including modeling, guided practice and frequent feedback; frequent opportunities for movement; and enhanced positive reinforcement for appropriate behavior through use of school-wide behavior support tickets. (S 17.)

64. On May 29, 2014, the District revised the IEP to reflect the results of the FBA conducted in April and May 2014. The IEP revision reflected the fact that the FBA did not recommend creation of a positive behavioral support plan at that time. The revision also reflected the recommendations of the intermediate unit specialist regarding how to address Student's behavior in the general education setting. The May 29, 2014 IEP revision also added specially designed instruction in the form of private meetings with the school guidance counselor, once every two weeks, for instruction in social skills, resolving conflict, coping skills and handling frustration. (S 19.)
65. Student's behaviors did not impede Student's learning or that of others. (NT 478-480; S 17, 19.)
66. On June 26, 2014, Parents consented to a psychiatric evaluation as part of an educational re-evaluation. (S 22.)
67. Student finished fourth grade with average scores in reading and mathematics, and above average scores in spelling, health, science and social studies. Student's reading comprehension was graded as satisfactory; and Student's spelling in written work was rated as satisfactory. Student's written expression was rated as "improving". (S 24.)
68. Student met Student's IEP goal for maintaining a legible agenda book. (S 24.)
69. Student did not meet Student's IEP goal for maintaining appropriate personal space and appropriate voice volume. (S 24.)
70. Student did not meet Student's IEP goal for organizing Student's worksheets. (S 24.)
71. Student did not meet Student's IEP goal for following directions with no more than one prompt. (S 24.)
72. In a resolution meeting on July 28, 2014, the IEP was revised to reflect changes made in special considerations, present levels and specially designed instruction. The IEP certified that Student was experiencing behaviors impeding Student's education and that of others. Present levels were changed to recognize that Student is helpful and friendly. Specially designed instruction and accommodations were added, including preview of daily schedule twice per day, including compliance with the classroom rules; sensory toolkit; frequent small group instruction; scheduled sensory breaks; multisensory instruction; daily check-in and check-out; extra space and paper; classwork, tests and assignments sent home weekly; Student permitted to carry a water bottle; monitoring Student's workspace and removing distracting items; permission to use restroom upon request; adult supervision of peer interactions in the lunch room and at recess; and extra space at lunchroom table. A positive behavior support plan was added to the IEP. (S 25.)
73. On August 28, 2014, the District received a psychiatric evaluation, completed in July 2014, which diagnosed Student with Pervasive Developmental Disorder. The psychiatrist found multiple signs of autistic spectrum disorder, including serious social delay, echolalia, perseveration, peculiar speech patterns, rigidity and concrete thinking. The psychiatrist also noted that the Student displayed severe attentional difficulties. The psychiatrist recommended applied behavior analysis for social skill development,

wraparound services, pharmacological treatment consideration for ADHD, autistic support services, extended school year services and instruction in a smaller classroom with increased one to one support. (S 27.)

74. Prior to September 30, 2014, Parents, through counsel, conveyed to the District their requests for 67 changes in the September 30, 2014 proposed IEP, including numerous editorial changes; requests for changes in the history recounted in the IEP and in the present levels; critiques of the goals as drafted, including requests that the goals proceed from baseline data; requests for additional goals; requests for additional accommodations and specially designed instruction; changes in the special paper used to accommodate Student in writing, and in the spacing of the Student's agenda book; additional specially designed instruction for social skills; requests to remove all but one testing accommodation; changes in the District's re-testing procedures; requests to be notified whenever District educators should impose consequences on Student for inappropriate behavior or for behavior that is secondary to Student's disabilities; prohibition of specific methods of imposing consequences, such as holding Student back from recess; a request for a positive behavior support plan and for alteration of the existing positive reinforcement methodology; requests for related services including occupational therapy, speech and language therapy, counseling and social work services; requests for additional or different assessments and data gathering; more frequent counseling and other educational services; and placement in supplemental support with autistic support, learning support, speech and language support, and additional supports that may be indicated by further assessment. (P 18.)
75. The director of special education reviewed the requested changes with District personnel and decided to make some of the requested changes and not to make some of the requested changes. (NT 200.)
76. On September 30, 2014, the IEP was revised. The District members of the IEP team determined that a positive behavioral support plan was not necessary. They agreed to make certain changes in terminology in the IEP, including changes in the functional section of present levels. They added parental input that reflected Parents' disagreement with the conclusions of District educational personnel about Student's behavior and functioning in the school setting. They added Student's fourth grade PSSA scores to present levels. They reformulated the social skills group to reflect a change from a weekly cycle to a six-day cycle. They briefly discussed the psychiatric report and recommendations. (NT 162-164, 202-203; S 29, 30.)
77. The September 30, 2014 IEP revision added specially designed instruction, including use of a money system for behavior modification; morning access to the learning support teacher to work on homework issues or questions; and permission to utilize District technology notwithstanding Parents' refusal to sign the District's acceptable use policy. (S 31.)
78. On October 2, 2014 the District issued a NOREP continuing Student in an itinerant learning support placement, and explaining rejection of the alternatives of full-time autistic support or emotional support, or supplemental autistic support, as being

unnecessary academically and not in the best interest of Student with regard to development of social skills. (S 32.)

79. Student's behaviors have not changed from fourth to fifth grade. (NT 233.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).<sup>3</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>4</sup> that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

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

<sup>4</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

In this matter, the Parents requested due process and the burden of proof is allocated to the Parents. The Parents bear the burden of persuasion that the District failed to provide Student with a FAPE in the LRE, and failed to provide Parents with an appropriate opportunity to participate in the IEP process. If the Parents fail to produce a preponderance of evidence in support of their claims, or if the evidence is in “equipoise”, then the Parents cannot prevail under the IDEA.

#### PROVISION OF FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley,

458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time at which it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

## STUDENT'S PLACEMENT IN REGULAR EDUCATION WITH ITINERANT SUPPORTS WAS APPROPRIATE

I conclude that the District provided Student with an appropriate placement, based upon what the District knew at the time of the placement decision. The District knew that standardized testing in at least three evaluations had placed Student in the average or below average range of cognitive ability, with evaluators predicting solid average or above average ability. The prominent disabling condition identified in all of these evaluations was Student's relatively severe attention deficit, which revealed itself in both inattentive and hyperactive behaviors. Autistic spectrum disorder had been ruled out essentially by a reputable private evaluation team. Teacher reports from both the private and public settings did not contradict the test results or the clinical impressions of the evaluators, although some autistic-like manifestations were noted.

There was no analysis in the record to suggest that the Student could be legally classified with Emotional Disturbance, 34 C.F.R. §300.8(c)(4), at the time of the placement decision. There was no indication in the record that an emotional support placement was needed, based upon Student's performance in either the District or the subsequent private school. While Parents' behavior inventories in the various evaluations depicted numerous indicators of emotional disturbance as defined clinically, teacher scales on the same instruments did not endorse either the breadth or the depth of the symptomology that Parents reported. Thus, the District cannot be charged with notice or knowledge of any behavior in school that would have justified an educational classification of Emotional Disturbance or placement in an emotional support classroom.

Student's problem in third and fourth grade was a failure to perform commensurate with Student's intellectual potential, but all signs pointed to attentional and impulsivity issues as the predominant reason for this. Student's regular education teacher from the private school testified



very credibly that Student exhibited gaps of knowledge and skill from the third grade curriculum, putting Student behind Student's peers, and that Student was unable to catch up in fourth grade at the private school. In some areas, Student had achieved commensurate with ability and on grade level, but in other areas, Student's performance indicated that Student had not learned part of the third grade curriculum.

Such performance is entirely consistent with the District's conclusion that what Student needed was not a separate classroom whose focus would be to overcome the unique deficits caused by autistic spectrum or emotional disorders, but rather specially designed instruction and accommodations aimed at removing the attentional, impulsivity and organizational deficits that kept Student from performing on grade level and up to Student's intellectual potential. On this record, therefore, the evidence is not preponderant that the placement decision was inappropriate.

Parents argue that all of the accommodations in the IEPs offered to Student for fourth and fifth grade were tried and failed in the private school. Student's teacher at the school testified credibly that the school had provided numerous accommodations to address many of Student's needs, including small class size, allowing frequent breaks, providing sensory objects for sensory seeking behaviors, providing one-to-one aides to teach Student directly, and other accommodations, many of which were continued in the IEP offered to Student by the District in February 2014.

I find this argument unconvincing. First of all, this argument is inaccurate, because the District offered and implemented numerous specially designed curricula and teaching techniques, as well as different accommodations, that were not tried in the private school. Second, I conclude that the significant differences in the private and public school environments made it reasonable for District officials to conclude that it was appropriate to rely upon even

many of the same strategies in the more structured special education environment of the public school. There are four such differences.

First, the private school is an academic school, and it does not provide special education services. Its staff assigned to Student were not trained or credentialed in special education, with the exception of one educational aide who was assigned to Student for part of the school year in fourth grade. Student's teacher had no special education credentials, although she had received some training in special education.

Second, the private school employed the Montessori approach, which emphasizes independent work, and that provides less structure than the public school provides. In the private school, Student was in a classroom spanning four grades, first through fourth, whereas the public school classroom would address students all of whom would be in the same grade. The public school would provide more structure and thus would address Student's need for accommodation of attention and impulsivity needs in a different, potentially more effective way.

Third, Student received no speech and language therapy at the private school, although Student was classified as needing such therapy because language challenges had interfered with Student's learning in the past. Without this support, for which some need was documented at the time of the placement decision, other accommodations provided at the private school might have been reduced in their effectiveness.

Last, the record does not disclose whether or not the interventions recounted by Student's private school teacher were implemented with fidelity, and the above circumstances raise some doubt that their effectiveness would be equal to that which could be attained in the specialized special-education environment of the District's elementary school.

Parents also argue that retaining Student in fourth grade in the District was inappropriate, citing the weight of scientific data supporting that view. While current research does disfavor retention as a general matter, nothing in the record suggests that educators therefore are deprived of their discretion to make judgments based on the needs of specific students to deviate from the common wisdom, in the exercise of their sound educational judgment. Nothing in the record indicates that this judgment was inappropriate in Student's case. Thus, the evidence of contrary scientific literature is not sufficient to prove preponderantly that the retention decision in this matter was inappropriate under the IDEA.

#### LEAST RESTRICTIVE ENVIRONMENT

The District's decision to place Student in regular education with itinerant supports was appropriate also because it was consistent with its obligations under the IDEA requirement for placement in the least restrictive environment. I conclude that the District correctly considered the available continuum of services and correctly determined that it could provide Student with appropriate supplementary aids and services in the regular education classroom to provide Student with a FAPE.

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, "to the maximum extent appropriate ... ." 20 U.S.C. §1412(a)(5)(A). The United States Court of Appeals for the Third Circuit has construed this language to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved "satisfactorily." Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d 1204, 1207 (3d Cir. 1993). Each public agency must assure that

a continuum of alternative placements is available, including special classes, resource rooms, supplementary services and special schools. 34 C.F.R. §300.115.<sup>5</sup>

Children with disabilities may not be removed from the regular educational environment unless “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A). In determining placement, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs ... .” 34 C.F.R. §300.116(d). Removal is not permitted if the sole reason is “needed modifications in the general education curriculum.” 34 C.F.R. §300.116(e).

In this matter, the District’s selection of regular education with numerous supports and accommodations was reasonable based upon what it knew at the time of the placement decision. As noted above, it was reasonable at that point for the District to conclude that Student needed interventions for attention, impulsivity and organization issues. These supports were not incompatible with placement in regular education, so their utilization in that setting could be achieved “satisfactorily”, 20 U.S.C. §1412(a)(5)(A). Therefore, the placement was to the least restrictive appropriate environment.

#### THE IEPs WERE APPROPRIATE

When Student entered its fourth grade classroom, the District implemented the previously agreed upon IEP, which was the third grade IEP calling only for speech and language services. It also offered interim supports to Student. It immediately sought permission to re-evaluate, in order to address any other needs. Parents delayed returning the permission to re-evaluate for

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<sup>5</sup> This continuum assumes a mandate to educate the child in “the school that he or she would attend if nondisabled.” 34 C.F.R. § 300.116(c). State regulations require school districts to ensure that “children with disabilities have access to the general curriculum ... .” 22 Pa. Code § 14.102(a)(ii).

weeks; during this delay, the District added to the IEP some interventions that the Student's new teacher was implementing.

After the delayed re-evaluation was completed in January 2014, the District offered a new IEP in February 2014 that provided extensive interventions, addressing all of Student's needs through specially designed instruction and accommodations. The offered IEP addressed Student's needs regarding attention to task, impulsivity, organization, following directions and sensory needs and it left in place a regular education intervention for explicit teaching of social skills. In subsequent iterations over the ensuing months, and in response to Parents' numerous requests for additional interventions and services, the District expanded the originally offered IEP, addressing all of the above categories of need. In so doing, the District offered to and did provide detailed reporting to Parents, and responses to parental input.

With the general education placement, itinerant support, and the numerous interventions described in the IEPs, Student made meaningful progress in fourth grade. Student's teachers noted growth in academics and social skills, and testified credibly that Student's behaviors did not preclude such progress. Standardized testing placed Student squarely within the average to above average range in all academic skills, and Student was able to access and make progress in the fourth grade curriculum, as evidenced by standardized and local curriculum-based assessments. Student's state-wide PSSA scores rose from basic and below basic to proficient. Student met fourth grade benchmarks.

It is significant that Student did not meet all of Student's IEP goals. To some degree, this may have been due to the fact that these goals did not utilize baseline data, and may have overestimated Student's ability to progress. While this is a deficiency in the IEP goals, it must be

viewed in the context of Student's meaningful academic achievement in fourth grade. Therefore, I do not find a failure to provide a FAPE because of this deficiency.

Parents argue that Student's achievement in fourth grade is not indicative of meaningful educational gain, because Student was repeating fourth grade, because District testing allowed retesting when grades fell below 75, and because Student's testing was accommodated for attention and other challenges. I find these arguments unconvincing. The record shows that gaps in learning detected in the private school were overcome, and that Student was able to excel in some subjects. This is meaningful. The record does not show that District testing was an invalid measure of growth; standardized and benchmark testing corroborated the implications of Student's good grades. Thus, on the record as a whole, the evidence is preponderant that Student made meaningful educational gains in the District's school.

Parents make much of the evaluative data that indicated Student's continuing needs regarding delayed social skills and sensory needs. There was evidence that the Student's behaviors and social needs, as well as Student's sensory issues, continued through fourth and into fifth grade. However, I conclude that these continuing issues do not prove a failure to provide a FAPE. The evidence is preponderant that the District made every effort to address these issues, and remained flexible about altering the IEP and attempting new interventions throughout the relevant period. Moreover, Student achieved in spite of Student's behavioral, social and sensory needs. The IDEA does not require a district to guarantee success in every realm of education; it requires a reasonably calculated attempt to provide opportunity for meaningful gain, and the District made that attempt, on this record.

Parents argue that the District was obligated to perform a Functional Behavioral Assessment at the beginning of fourth grade, that the FBA in the Spring of 2014 was too late, and that the FBA was not performed appropriately. None of these arguments is convincing.

The timing of the District's FBA must be viewed in light of two things: First, the District never concluded that the Student needed an FBA or a positive behavior support plan; it was intervening in a way that its educators found effective without an FBA. Second, the Parents' obfuscation was a large factor in any delay in this matter. Therefore, I conclude that the FBA was not inappropriately late.

The record does not support the argument that the FBA was inappropriate when finally provided. It was data based. It followed the state-recommended "ABC" analysis, identifying antecedent circumstances, the behaviors of concern, and the consequences thereof. It raised hypotheses about the function of the behavior. It was a group effort that included both educators and Parents, under the guidance of a behavior specialist. It resulted in recommendations that were part of the interventions provided by the District to Student. Parents may disagree with the FBA, but their disagreement does not prove that the FBA was somehow deficient, thus causing a denial of a FAPE. There simply is no evidence that this was the case.

Parents assert that the IEPs were not implemented. As evidence of this, parents cite the continuation of the regular education teacher's implementation of consequences for Student's failures to complete work. The teacher's policy was to require completion of homework at lunch, and Parents objected to the implementation of this policy with regard to Student. Parents claim that this practice was forbidden by an IEP revised in March 2014; however, even if the teacher was unaware of a single accommodation in the lengthy list of interventions in this IEP, this does

not prove a failure to implement all of the rest of those interventions. Thus, the evidence cited fails to prove a lack of IEP implementation.

#### PROSPECTIVE RELIEF

Parents request that this hearing officer order training for the District's educators with regard to the requirements of the IDEA, and make other orders for the present school year. Parents base this request upon a lengthy list of editorial and clerical errors that they have identified in the District's documentation of Student's special education services. They also accuse the District of falsifying sign-in sheets to create the appearance that Parents attended two meetings – one regarding the January 2014 re-evaluation report, and one regarding the February 17, 2014 IEP. (NT 330-333; P 11, 12.) In both instances, the record shows that Parents did not attend meetings during which District officials created these documents. Ibid.

Although it is plain on the face of the documents that someone hand-wrote dates at the tops of the sign-in sheets in question, the Parents have failed to show preponderantly that any District employee intentionally falsified the sign-in sheets by so dating the documents. The District explains that the sign-in sheets were proffered to Parents and their attorney to sign at a meeting on March 26, 2014. (NT 411-413; S 12 p. 4.) It explains that the handwritten dates on these documents were intended for clerical purposes to identify the documents to which they pertained – the January 2014 re-evaluation report and the February 2014 IEP, which was not finalized until the March 26, 2014 meeting. (NT 411-413; P 10.)

I conclude that it is reasonable to interpret the record as an effort to correct retroactively the paperwork in a special education file that was missing important documents when reviewed by clerical personnel. (P 10.) While such an interpretation is not favorable to the District's



organization of this Student's file, it does not bespeak a conscious effort to falsify the record, as Parents assert. As such an interpretation is at least as plausible as that urged by Parents, I conclude that the evidence is not preponderant that the District was hiding any failure to follow IDEA procedures based on these documents.

The more important question is whether or not the District failed to provide Parents with appropriate opportunities to participate in the evaluation and IEP processes. I conclude that the District did not exclude Parents inappropriately, as they claim. With regard to both the re-evaluation and the IEP, the District provided Parents with appropriate opportunities to participate and provide their input.

As to the re-evaluation report in January 2014, the IDEA does not require the District to meet with the Parents; it requires only that they be part of the evaluation team. 34 C.F.R. §300.305(b). The evaluation also must include parental input; in this matter, the District solicited parental input into the re-evaluation, but Parents did not respond within the 60 day evaluation time frame so as to permit consideration of their input. The District considered the Parents' input thereafter. Moreover, in March 2014, just prior to an IEP meeting scheduled to discuss the proposed IEP that was based upon the January 2014 re-evaluation report, Parents' attorney sent a written statement requesting numerous changes to the re-evaluation report; the District reviewed and considered these requested changes. I conclude that the District provided the required opportunity for parental participation in the re-evaluation.

As to the IEP process, the record shows a lengthy delay between the issuance of the re-evaluation report on January 23, 2014 and the IEP meeting on March 26, 2014, at which the IEP was finalized. The IDEA requires an IEP meeting to be held within thirty days of the evaluation or re-evaluation report finding that a child is eligible. The District did invite Parents to an IEP

meeting on February 21, within thirty days of the date of the re-evaluation report, but Parents were unable to attend. I find no documentation in this record that the District made multiple attempts to schedule IEP meetings within the thirty days required by the IDEA, nor do I find testimony providing sufficient excuse for failure to do so.

Nevertheless, I find no legal or equitable ground to order the District to train its staff or take any other action as a consequence of what I conclude to be a procedural violation at most. Unfortunately, the relationship between these parties is characterized by failures on both sides to communicate effectively for the benefit of the Student. The record is replete with examples of Parents' lack of cooperation, including the delay in returning the permission to re-evaluate, the delay in returning parental input for the re-evaluation, the belated list of criticisms sent by their attorney and Parents' unavailability for some scheduled meetings. I find that Parents are as much responsible as District personnel for the delays in providing Student with an IEP during Student's fourth grade year. As noted above, I conclude that these delays did not deprive Student of a FAPE, because Student was able to access the curriculum and make meaningful progress in spite of the delays.

Parents assert that the District's IEP must be amended due to the psychiatric evaluation that it received in August 2014, which found that Student was a child with a disability on the autism spectrum. I find no support in the record for such an assertion. The diagnosis contradicts several other evaluations, and some of the historical information upon which it is based is inaccurate; specifically, the report, based largely on Parent's history, asserts that Student did well in the private school's smaller classroom. I find that Student did not do well in the private school's smaller classroom. Therefore, the report in light of the record does not show any error

on the part of the District, and does not provide a preponderance of evidence in favor of the relief requested.

## CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I found the District and private school witnesses to be credible and for the most part reliable, but I gave less weight to Parent's testimony. Cross examination revealed a number of instances in which this witness embellished or provided inaccurate testimony. (NT 393-410, 414-418, 423-428, 431-434.) In addition, the witness' answers to questions, material consistency with other testimony and the written record, and demeanor led me to assign less weight to this witness' testimony.

## CONCLUSION

I conclude that the District did not deny Student a FAPE. It provided a placement and IEP that was reasonably calculated to provide meaningful educational gain. It provided services that in fact did permit Student to make meaningful progress. It did not exclude Parents from participation in the District's re-evaluation and IEP processes. No compensatory education is due to Student. No prospective relief is appropriate on this record.

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the Parents' requests for relief are hereby **DENIED** and **DISMISSED**. It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

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

January 20, 2015