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## **Pennsylvania**

# **Special Education Hearing Officer**

### **DECISION**

Child's Name: Q.H.  
Date of Birth: [redacted]  
ODR No. 16378-14-15-AS

### **CLOSED HEARING**

Parties to the Hearing:

Representative:

Parent[s]

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Dates of Hearing:

July 28, 2015; August 19, 2015; September 18, 2015; September 21, 2018; October 5, 2015; October 7, 2015

Record Closed:

October 26, 2015

Date of Decision:

November 9, 2015

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is a resident of the District named in this matter (District), and is enrolled in a District high school. (NT 9-10.) Student's mother (Parent) filed this due process request, asking for an independent educational evaluation at public expense; a declaration regarding asserted procedural violations; compensatory education (in the form of a funded special needs trust) for an asserted failure to provide a free appropriate public education (FAPE) during the two year period preceding the filing of the complaint<sup>2</sup>; and a prospective order for placement at a private school selected and specified by Parent (School). Parent sought these orders pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504); and the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (ADA).<sup>3</sup> The District asserts that its services were appropriate during the relevant period, that Parent predetermined the private placement, and that the hearing officer lacks authority to order either the creation of a special needs trust or a specific, named private placement.

The hearing was completed in six sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District failed to provide a FAPE to Student, and I enter the appropriate equitable relief.

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<sup>1</sup> Student, Parent and the respondent School are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

<sup>2</sup> The parties in effect stipulated to the relevant period regarding which the hearing officer would be asked to determine the appropriateness of District services to Student: September 21, 2013 to the last day of hearing, October 7, 2015. (NT 73-81.)

<sup>3</sup> I exercise jurisdiction over section 504 claims pursuant to the Special Education Dispute Resolution Manual; in this case such claims are congruent with the IDEA claims. I assert jurisdiction over the ADA claims and decide them here only insofar as they are "derivative" claims that assert issues and request relief that is identical with the issues and relief requests advanced pursuant to the IDEA. 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011). Therefore, the analysis in this decision will refer only to the IDEA.

## **ISSUES**

1. During the relevant period of time<sup>4</sup>, did the District provide an appropriate evaluation to Student?
2. During the relevant period of time, did the District offer and provide an appropriate educational placement to Student?
3. During the relevant period of time, did the District offer and provide an appropriate Individualized Education Program (IEP) to Student, including appropriate goals, specially designed instruction and related services?
4. During the relevant period of time, did the District comply with the procedural requirements of the IDEA for parental participation in the educational planning process and required participants at IEP team meetings?
5. Should the hearing officer order the District to provide Student with an independent educational evaluation at public expense?
6. Should the hearing officer order the District to place Student in the private school designated by Parent at public expense, or any other placement?
7. Should the hearing officer order the District to provide Student with compensatory education for or on account of all or any part of the relevant period, and should the hearing officer order that such compensatory education be provided by the District in the form of a funded special needs trust?

## **FINDINGS OF FACT**

1. Student is diagnosed with attention deficit hyperactivity disorder (ADHD), specific learning disability with impairment in reading, written expression and mathematics (SLD), and a language disorder. (NT 93; P 44.)
2. Student's diagnosed disability substantially affects Student's reading skills in decoding phonemes, reading words accurately and fluently, and comprehending reading passages. (P 44.)
3. Student's diagnosed disability substantially affects Student's mathematics skills in calculation. (P 44.)
4. Student's diagnosed disability substantially affects Student's written expression skills in conventions, clarity, organization and handwriting. (P 44.)

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<sup>4</sup> See above, footnote 2, defining the relevant period of time.

5. Student's ADHD causes symptoms of poor attention, distractibility, impulsivity and hyperactivity in all settings. (P 44.)
6. Student has a history of significant delays in receptive and expressive language; social and emotional development; and cognitive development for which Student received early childhood services. (P 44.)
7. Student has a history in school, from kindergarten until seventh grade, which includes behavioral problems including inattentive, impulsive and aggressive behavior, as well as difficulties with social interactions. Student also has a history of significant delays in academic achievement during those years. (P 44.)
8. During the relevant period of time, the District identified Student under the IDEA with speech or language impairment and specific learning disability. (NT 9-10, 95; S 1.)
9. Student has been enrolled in the District during Student's entire academic career. (S 44.)
10. The District provided a re-evaluation report for Student in June 2011, when Student was in fourth grade. The report identified Student with specific learning disability in reading, and speech or language impairment. The re-evaluation noted behavioral needs and recommended a need for functional behavioral assessment and behavioral intervention in school. The report recommended speech and language therapy and social skills training. It did not recommend academic remediation. (S 1; P 2, 44.)
11. The re-evaluation report included cognitive testing that revealed average and low-average scores for cognitive abilities not elicited or demonstrated through language, and significantly discrepant, very low scores for abilities that require language to elicit or demonstrate. The evaluator did not report a full scale IQ because any such score would not be meaningful in view of the discrepancies in sub-test scores. (S 1; P 44.)
12. The re-evaluation report showed that Student's academic achievement was significantly below age and grade level expectations, and that Student's expressive and receptive language functioning was impaired significantly. (S 1; P 44.)
13. Testing in 2011, when Student was in fourth grade, indicated that Student's reading achievement was at either a first grade or second grade level. Student's mathematics achievement was scored at a second or third grade level. (S 3.)
14. Testing in 2013, when Student was in sixth grade, indicated that Student's reading achievement was at a second or third grade level. Student's mathematics achievement was scored at a second or third grade level. (S 3.)
15. Student's April 2013 IEP, at the end of Student's sixth grade year, reported present levels for reading and mathematics that contained contradictory reports of scores ranging from first grade to third grade levels of achievement. The IEP did not report measured present levels of achievement in written expression, except that speech and language present levels subjectively indicated improved ability to formulate sentences, both oral and written, with supports. In sixth grade, Student failed in reading and writing, and obtained a D in math. (S 3; P 44.)

16. The April 2013 IEP provided for supplemental learning support and 300 minutes of group speech and language therapy per IEP term (only a few minutes per week), as well as school-based group counseling, 30 minutes per week. Speech sessions were delivered approximately weekly, and most sessions were for thirty minutes. (S 3, 50.)
17. The April 2013 IEP provided goals for reading comprehension, participation in group discussions and presentations, organization and vocabulary in written expression, the math operations, analysis of data, and study skills. There was no goal for decoding or reading fluency. The reading, writing and data analysis goals were measurable by attaining a score of 80 on teacher made tests at least one time during the IEP year. Measurability of the discussion goal was unclear. The mathematics calculation goal was to be measured by student self-monitoring. The study skills goal was to be measured by 80% performance on classroom tasks or assignments, and refraining from hitting other students during classroom time. (S 3.)
18. In May 2013, a private speech and language evaluation reported that Student scored well below age expectations in core language, receptive language, expressive language, language memory and narrative comprehension. The report recommended 120 minutes per week of speech language therapy. Parent provided this report to the District. (NT 253-255; P 41, 44.)
19. In the summer of 2013, a private auditory processing evaluation found that Student experienced poor auditory discrimination, slow processing, very poor auditory closure and word finding deficits, all of which constituted an auditory language learning impairment, complicated by attention impairment. Student exhibited rapid auditory fatigue, requiring frequent breaks from testing. The evaluation recommended placement in a smaller, highly structured classroom setting with favorable acoustics and a teacher-student ratio permitting individualized instruction. It recommended use of earplugs to screen extraneous noise during independent work; preferential seating; a peer “study buddy” to help Student understand instructions in the classroom; specially designed lecturing techniques; use of mnemonics; multi-sensory instruction; repetition and review of instructions and curriculum; and speech and language intervention. (P 42, 44.)
20. Parent provided this evaluation to the District. (NT 333-335; P 38.)
21. Not all of the recommendations of the auditory processing evaluation were implemented during Student's seventh grade year, although some of the recommended accommodations appeared in the IEP. Noise levels and distractions in classrooms varied from quiet and controlled to apparently chaotic and uncontrolled. (P 43; S 6, 18.)
22. The IEP team produced a new IEP in November 2013. The present levels of academic performance indicated testing in October 2013, in which Student, in seventh grade at the time, scored at a second grade level for independent reading, and instructional at a third-grade level. Mathematics testing yielded mixed results; Student struggled in third grade level curriculum, but achieved curriculum-based scores at a third-grade level. In speech and language, the therapist subjectively reported improved ability to formulate sentences in conversation, and improved ability to formulate written expression sentences and

paragraphs with supports. The IEP reported present levels of functional behavior indicating distractibility and inappropriate behavior in the classroom. (S 6.)

23. Both the April and November 2013 IEPs recognized that Student was unable to maintain the pace of the general education classroom. (S 3, 6.)
24. Both the April and November 2013 IEPs provided for accommodations in local assessments, including testing in a small group, simplified directions, reading of tests, gestures and nonverbal expressions, multiple [ ] test periods, decoding of words in tests upon request, and use of a calculator. (S 3, 6.)
25. The November 2013 IEP placed Student in supplemental learning support, with 30 minutes per week of group counseling and 300 minutes per IEP term of group speech and language therapy. This amounted to a few minutes per week, and was an inadequate amount to address Student's profound speech and language therapy needs. (NT 153; S 6.)
26. The regular education teacher and speech and language therapist did not attend the IEP meeting leading to the November 2013 IEP. (NT 250-255, 1646-1647.)
27. The November 2013 IEP provided two reading comprehension goals; it did not provide a phonics or decoding goal, although Student's decoding skills were in need of remediation. The reading goals were measurable by attainment of 80% on any teacher made test during the IEP term. (NT 109-110; S 6.)
28. The November 2013 IEP provided a written expression goal emphasizing appropriate sentence structure and organization of written expression; this was measurable by attainment of 80% on any test given by the teacher during the IEP term. This goal aimed for skill development that was unrealistic and ignored Student's more basic skill deficits. (NT 110, 151-152; S 6.)
29. The November 2013 IEP provided a mathematics calculation goal that aimed at extending understanding of fractions to operations with rational numbers; this goal was measurable by student self-monitoring. The IEP also provided a goal for solving mathematics problems, including calculating using a calculator; this was measurable by attaining 80% on any teacher test during the IEP term. These goals were vague and aimed for skill development that was unrealistic and ignored Student's more basic skill deficits. (NT 110, 151-152; S 6.)
30. The November 2013 IEP provided a speech and language goal involving using grammatically correct sentences in age-appropriate conversation. (S 6.)
31. The November 2013 IEP provided two goals directed to completing classroom assignments and tasks without hitting other students, and in a timely manner, as well as maintaining organization and daily routine; these were measurable only through teacher observation. These goals were not specific in terms of social and classroom skills that Student needed to master. (NT 153; S 6.)
32. In November 2013, the District provided a report entitled "Functional Behavior Assessment" that was based upon conversations with assessment team members and two

classroom observations, as well as observation in unstructured settings. This assessment was not based upon structured data collection, and the behaviors in question were defined variously as "severe" behavior, including talking back to teachers, not following directions, leaving the classroom, running the hallways, distracting other students, and calling out in class. Frequency of the behavior was stated as "continuous". The functions of the behavior were stated to include receiving the attention of peers and teachers, escape from tasks, establishment of control over the classroom, and engaging in activity that the Student desired. The report recommended that a positive behavior support plan be developed, but did not make any specific recommendations for intervention. (S 8.)

33. In February 2014, the District reported an occupational therapy evaluation for Student. The Student obtained an age equivalent score that was almost 2 years below Student's age on a test of visual-motor integration. Student also scored at a fifth grade level on the test of writing speed. The evaluation recommended no need for occupational therapy intervention at that time. (P 44.)
34. The District did not offer to provide occupational therapy for Student's sensory needs and motor planning delays. (NT 742.)
35. Student's seventh grade IEP was not implemented continuously, because the special education teacher was assigned to eighth grade classroom duties during part of the year. (NT 264, 286, 297, 337-338, 1654.)
36. Student did not receive the full number of hours of pull-out special education services that were offered in Student's seventh grade IEPs. (NT 118-22, 311-312, 846-854; P 46.)
37. Student's seventh grade PSSA scores were below basic in both reading and mathematics. (P 44.)
38. On June 5, 2014, District offered an IEP continuing placement of Student in supplemental learning support. It offered the same level of group speech and language therapy as previously offered, and offered the same level of counseling as previously offered. Present levels, goals and modifications were identical to those offered in the November 2013 IEP, except that the present levels reflected the February 2014 occupational therapy evaluation. Present levels as stated contradicted more recent curriculum based assessments and stated inconsistent reading grade levels. (S 18; P 44.)
39. On June 16, 2014, the District provided a re-evaluation report at the request of Parent. The report again identified Student with specific learning disability, and speech or language impairment. (S 17.)
40. The June 2014 re-evaluation report relied upon cognitive and achievement testing conducted in 2011, additional details from Parent input, and mid-year academic assessments (2013-2014 school year). These indicated the Student, expected to be rising to eighth grade, was not yet reading independently at a third-grade level, and had scored below basic in reading on the latest PSAA testing. Assessments also indicated that Student was functioning in mathematics at the fifth grade level of curriculum, with a below basic score in PSSA mathematics testing. The speech and language therapy report continued to indicate "moderate" progress in sentence formulation; the speech therapy report provided

no data. The only teacher report indicated continued recommendation for support with reading and mathematics, and a positive behavior support plan. (S 17.)

41. The District did not provide a behavior support plan until April 2015; this was not implemented with fidelity. (NT 204, 215-216, 317, 1535-1536, 1540-1543; S 37.)
42. The teacher reports provided to District personnel for purposes of the re-evaluation report had indicated that Student made academic gains only with one-to-one support. (S 16.)
43. The June 2014 re-evaluation report contained some recommendations with regard to remediating Student's below-grade comprehension skills. It contained numerous recommendations for behavioral interventions, and contained some recommendations for teaching social skills. It indicated a conclusion that additional data were not needed. (S 17.)
44. On June 16, 2014, the District provided a report entitled "Functional Behavior Assessment". This assessment was almost identical to the November 2013 behavioral assessment previously provided. There were some minor changes from the previous behavior assessment, including descriptions of two observations of Student's classroom behavior, seemingly indicating some improvement in Student's behavior. Two other observation reports were taken verbatim from the previous behavior assessment. The June 2014 behavior assessment's recommendations were identical to those composed in the November 2013 assessment. The June 2014 behavior assessment was not based upon systematic data-collection. (S 20.)
45. The June 2014 behavior assessment did not comport with appropriate applied behavior analysis standards and practices. (NT 1525-1535.)
46. On June 16, 2014, the District made revisions to the IEP that had been offered on June 5, 2014. The two IEPs were virtually identical, except that certain modifications were added, including allowing Student to read aloud in a quiet voice, paraphrasing key points when reading, pre-teaching and reinforcing main ideas, using new vocabulary in reading passages, highlighting parts of reading passages and using Post-it notes for organization. (S 21.)
47. In seventh grade, Student was able to read at no higher than a third grade level. Despite accommodations and supports in local testing, Student failed reading and writing. Student received grades of "D" in mathematics and "C" in science and social studies. Student received "C" grades in writing and English Language Enrichment. Student failed Mathematics Enrichment. (S 22, 52; P 19.)
48. In seventh grade, Student's behavior continued to be problematic. Student received a significant number of disciplinary actions for violation of the code of student conduct. (P 21, 44.)
49. At the insistence of Parent, the District, instead of placing Student in a private school as requested by Parent, transferred Student to a different school, a District elementary school. (P 9.)
50. Student's IEP was not implemented at the beginning of eighth grade. (NT 115-116; P 44.)



51. On September 22, 2014, the District made revisions to the IEP that had been offered on June 16, 2014. Present levels included results of speech and language testing in September 2014, indicating that Student was exhibiting language skills in the average to slightly below average range and had passed a screening test; nevertheless, the present levels indicated a continued need for language support. Present levels also included results of placement tests in a research-based reading and mathematics correction program. Student's reading continued to be at a third-grade level, with deficits in sight word reading and comprehension; Student's mathematics ability required remediation [ ] in subtraction, but was otherwise measured at a fifth grade level. Writing present levels were not updated. (S 24.)
52. The September 22, 2014 IEP revision amended goals to make them measurable. The revision added goals for research-based reading and mathematics corrective programs, addressing decoding; understanding of new words from context; and computation. (S 24.)
53. The September 22, 2014 IEP revision offered to provide new modifications and accommodations, including sequencing and repetition of key points; identifying main ideas; previewing units and chapters; using visual imagery; use of a research-based intervention program for reading in small group setting for 45 minutes per day; use of a research-based intervention program for mathematics in small group setting for 45 minutes per day; use of mnemonics; frequent opportunities to practice; and positive reinforcement for correct responses. (S 24.)
54. Based upon testing, Student was placed in the second of four levels of the research-based reading decoding program, which is for children whose decoding performance is not extremely deficient but is inconsistent. (P 28.)
55. The September 22, 2014 IEP revision continued to offer supplemental learning support and the same levels of speech and language therapy and counseling, both in a group modality. (S 24.)
56. The regular education teacher did not attend the September 2014 IEP team meeting; the teacher did not provide written input and Parent did not waive the teacher's appearance. The school psychologist and speech and language therapist did not attend the meeting, nor did an administrator with authority to agree to provide services. The case manager and special education teacher deliberately obtained signatures of the people who did not attend on an attendance sheet for the September meeting, thus falsifying the IEP documentation. (NT 802-825; S 23, 24.)
57. Parent's requests for further revisions in the IEP were rejected, and Parent was told that Student would be returned to the previous school setting if she persisted in requesting changes. (NT 349-351, 1652-1653.)
58. Parent obtained and provided to the District a private psychoeducational evaluation of Student, based upon testing in September and October 2014. The evaluation concluded that Student was in need of speech and language therapy due to scores below age expectations on all assessments of receptive language understanding and expressive language. The evaluation also found significant deficits in social language understanding, including great

difficulty interpreting nonliteral language and facial expressions as part of nonverbal social communication. (NT 882-883; P 44.)

59. The October 2014 private evaluation found that Student exhibited significant impairments in phonological processing, including phonological memory, that are directly related to Student's slow progress in learning to read and weak auditory processing and language delays. (P 44.)
60. The October 2014 private evaluation found that Student's decoding and fluency were well below grade and age expectations, with test results indicating frustration level at grade 3 passages, and instructional level at grade 2 passages. Student's recognition of sight words in isolation was at the beginning second grade level. (P 44.)
61. The October 2014 private evaluation found the Student's reading comprehension was so poor that Student was unable to achieve an independent level comprehension score in curriculum-based assessments at the preprimer level. (P 44.)
62. The October 2014 private evaluation found that Student's written expression was well below grade and age expectations, including immature handwriting, interchanged capital and lowercase letters throughout sentences, multiple word boundary errors, and very poor syntax and conventions, including deficits in spelling. (P 44.)
63. The October 2014 private evaluation found the Student was functioning at a higher level with regard to mathematics. Student was able to solve problems involving single digit addition, subtraction and multiplication, double-digit addition, and division with a single digit divisor. Student remained unable to perform subtraction problems requiring borrowing and an addition problem with fractions. The evaluator found that Student was struggling with mathematics calculation and was functioning at least four years behind grade level in calculation skills, meeting the criteria for identification with a specific learning disorder in mathematics. (P 44.)
64. The October 2014 private evaluation found that Student exhibited age-appropriate or almost age-appropriate self-care, safety, health, leisure and functional communication skills. Nevertheless, with a history of oppositional and defiant behavior at school, the evaluator found that Student struggles with attention and inhibitory control. The evaluator also concluded that Student's problematic behavioral history was most likely a function of Student's problematic social communication skills. (P 44.)
65. The October 2014 private evaluation found that Student exhibits clinically significant problems with attention and inhibitory control, justifying a diagnosis of attention deficit hyperactivity disorder (ADHD). (P 44.)
66. The October 2014 private evaluation recommended that Student be placed in full time learning support in a small highly structured classroom with opportunities for individualized instruction and minimal acoustic distraction. The evaluator recommended direct, multisensory, individualized instruction in reading, writing, spelling and mathematics. The evaluator also recommended an additional hour each day in the regular education classroom for other subjects. Due to Student's minimal progress in the public school setting, the evaluator recommended that Student be placed in a specialized school

for students with learning differences. The evaluator also recommended 60 minutes of speech and language intervention, twice weekly. (P 44.)

67. The evaluator recommended that reading intervention include a highly structured, sequential, multisensory, phonics-based reading program delivered by a certified teacher, and that it include the building of sight word vocabulary. The evaluator also recommended assessment for the utilization of assistive technology, including recorded readings, teaching of word-processing skills and use of the word processor, writing support software, computer games, flashcards, cards and dice games and board games, use of graph paper and graphic organizers. (P 44.)
68. The evaluator also recommended intervention to support Student with regard to attention to task, rushing through assignments, organization, and the need for frequent breaks from seatwork, and that these needs be addressed through a positive behavior support plan. (P 44.)
69. The evaluator also recommended weekly small group remediation of Student's social skills and pragmatic language, as well as extended school year services in a remedial academic program. (P 44.)
70. In March 2015, Parent attended an IEP team meeting. Neither the regular education teacher nor authorized public agency representative attended that meeting. (NT 352-354, 925-932; S 35.)
71. On April 30, 2015, the District provided updated present levels and a new behavior goal. New present levels indicated some academic progress in school district benchmark testing. Student was at mastery level in the initial level of the research-based correction program into which Student had been placed. Student was able to write 2 to 3 sentences independently. Reportedly, Student had mastered subtraction. (S 35.)
72. With one exception all of the goals in the April 30, 2015 IEP, were identical to the previous goals, and posited performance at the same level of curriculum. (S 24, 35.)
73. The reading comprehension, written expression and mathematics goals in the IEP were unreasonably advanced in view of Student's present levels of academic functioning. (NT 155-158.)
74. The April 30, 2015 IEP added a goal for social skills, providing for positive interactions with peers as measured by teacher observation. This goal contained specially designed instruction in the form of a small group setting, defined as 2 to 12 students. (S 35.)
75. The April 30, 2015 IEP terminated group counseling as a related service but continued speech and language therapy at the same level. The IEP placed Student in supplemental learning support, as previously offered. (S 35.)
76. On April 30, 2015, the District provided a document entitled "Functional Behavior Assessment", which described the behavior of concern as "verbal aggression". The behavior assessment indicated that Student's behavior had been good at Student's new school. It also reported the Student's social relationships were good. (S 36.)

77. On May 21, 2015, Student was suspended for violation of the student code of conduct by possession of a weapon and attempting to assault another student. (S 42.)
78. In the spring of eighth-grade, Student was tested for word reading fluency, utilizing a curriculum-based measurement, as reported through AIMSweb. Student's scores indicated progress between two administrations of curriculum-based measurements, at a rate that was higher than 55% of students in a national sample who started at a similar level of reading deficit. (P 24.)
79. In May 2015, the private evaluator who had provided the October 2014 private evaluation report tested Student to determine whether or not Student had made educational progress. The evaluator found small improvements in certain skills over the six-month period, but some regression in other skills. Student appeared to have benefited behaviorally from the better-controlled environment in the new school. Overall, testing revealed that Student's progress, if any, was minimal. (P 45.)
80. Also in May 2015, the private evaluator observed Student in three classes. The evaluator found that, of 45 minutes allocated for learning support in the research-based reading program, only 19 minutes appeared to be spent delivering that curriculum. 25 minutes were allocated to a research paper that all eighth grade students were required to complete for graduation. This special education class was small, with only two students on the day of observation. Student appeared to be effectively supported in the smaller environment, and was able to attend to task and perform with access to the curriculum. (P 46.)
81. The private evaluator's observation of regular education classrooms indicated a greater level of disruption, and Student appeared to experience frequent episodes of distraction, and continuous struggling to understand directions and organize the work. A co-taught regular education mathematics class was not co-taught on the day in question, because the special education teacher was in a meeting. (P 46.)
82. In May 2015, Student was charged with violation of the student code of conduct by possessing a weapon – a pair of scissors - and attempting to assault a classmate with the scissors. (S 42.)
83. Parent filed for due process on or about June 1, 2015. (S 56.)
84. On June 2, 2015, the District presented a re-evaluation report to Parent. Much of the report consists of summaries a previous evaluation data, with whole sections of previous evaluations being cut and pasted into the report. Nevertheless, the District did updated speech and language assessment and cognitive and achievement testing. The re-evaluation report recommended continued special education for reading and speech and language difficulties. (P 17.)
85. District speech and language professionals reported that Student was within the average range for both expressive and receptive language; Student continued to exhibit difficulty with semantic absurdities, figurative language, pragmatic judgment and proper grammar in sentence structures. However, test scores in the re-evaluation report in areas affecting expressive language were one and two standard deviations below the mean. There was no updated testing of Student's language processing. (NT 626-627; P 17.)

86. The June 2, 2015 re-evaluation report's cognitive test scores were consistent with previous cognitive test scores. (P 17.)
87. The June 2, 2015 re-evaluation report did not contain updated achievement testing; the report recommended that there were discrepancies between ability and achievement in several academic areas, including basic reading, reading comprehension, oral reading fluency, math calculation, and written expression. (P 17.)
88. The re-evaluation report incorporated results of the 2014 occupational therapy evaluation, which did not assess Student's sensory or motor planning needs. (NT 711-715, 730-737; S 13; P 62.)
89. The re-evaluation report did not include a classroom observation. (P 17.)
90. On June 2, 2015, the District offered an updated IEP. The update added speech and language therapy observations of Student's progress, and one modification for speech and language sessions. Neither the placement nor the goals nor the related services were changed. (S 41.)
91. Progress monitoring for Student's eighth grade school year was not based upon data measuring the skill posited in the goal, with regard to the goal relating to reduction of negative social exchanges and increasing positive interactions with peers; this was measured by completion of independent assignments. Student did not reach Student's goals in decoding, reading comprehension, social communication or writing. Student met goals in subtraction. (S 46.)
92. In eighth grade, Student made minimal gains in reading and Student's grades ranged from failing or "D" grades to "C" grades in social studies, English, Writing, Science and Mathematics. Student failed in writing, and finished with accommodated grades of "C" in reading, "C" in mathematics, and "D" in science and social studies. (S 52, 54.)
93. Student made some progress within the research-based reading decoding program, but did not progress beyond the second of four levels of that program. Students are expected to progress to and complete the second and third levels within one school year. (P 28.)
94. On July 21, 2015, Parent notified the District of her intent to place Student in a private school and seek tuition reimbursement from the District. (P 38.)
95. On July 9, 2015, Parent obtained a private speech and language evaluation. The evaluator found significant receptive and expressive language challenges to degree that impacts educational performance and academic success. Student's disorder affects Student's fundamental language processing, including phonological awareness, auditory discrimination, segmentation, and phonological blending. It also affects Student's ability to retain auditory information, produce expressively complex sentence structures and understand the meaning of words. It also affects social communication and makes social interaction at times overwhelming. The evaluator recommended two 45-minute speech and language sessions per week. The evaluator also recommended educating Student in a small classroom with preferential seating, gestural cues, an FM system, and a peer study buddy. (P 47.)

96. District evaluations and assessments as reported in IEP present levels, for both seventh and eighth grade, were reported in unclear and contradictory fashion, and failed to provide usable baselines for IEP goals. (P 48.)
97. District evaluations and assessments as reported in IEP present levels, for both seventh and eighth grade, incorrectly implied that the reported scores were an indication of an increasing grade level of academic achievement or significant academic progress within grade level. On the contrary, Student has not made substantial academic progress beyond a third grade level of academic achievement since third grade. Many of Student's current academic skills are expected to be attained in first or second grade. Student's academic learning during seventh and eighth grades was minimal. By the end of eighth grade, Student's reading, mathematics and written expression achievement was at no greater than a third grade level. (NT 110, 157-158, 1349-1358, 1503-1514, 1515-1516, 1553-1558; P 44, 48.)
98. District progress monitoring reports were inaccurate and incorrectly implied implausible levels of progress. (NT 1349-1358, 1503-1516, 1544-1546, 1553-1558; S 46.)
99. On September 24, 2015, the District offered a new IEP to Parent. Placement was not changed from supplemental learning support, and the related services remained at 300 minutes per IEP term of speech and language therapy. (S 62.)
100. The new IEP updated present levels of academic achievement. In reading, Student was measured at a 4.0 level in the below basic range. Student's reading fluency fell below the 10th percentile. In writing, Student was able to write a total of 15 words in three minutes, and eight correct writing segments. Student made significant capitalization, punctuation and spelling errors, and Student was unable to answer high school level questions with regard to English literature. In mathematics, Student was measured at the 4.4 level, in the below basic range. Student was able to solve subtraction problems, but not those that required borrowing. Student was unable to complete multiplication or division problems. Student was unable to solve basic algebra problems. (S 62.)
101. The September 24, 2015 IEP provided new goals, including goals for reading fluency, reading comprehension, writing correct sequences, solving algebraic equations, and mathematics computation. The new IEP also included previous goals for social conversation, positive peer relations, and postsecondary transition. (S 62.)
102. Student continues to present behavior problems in school that disrupt Student's learning and that of others. (S 42; P 44, 71.)
103. In the District's regular education settings, in seventh, eighth and ninth grades, Student has been subjected frequently to aggressive behavior directed by peers toward Student, and this has led to inappropriate behavior by Student, disciplinary incidents, disruption of classroom assignments and schedules, distraction from learning and loss of access to educational services due to suspension. (NT 342-345, 372-374, 1096-1097, 1101, 1106-1107, 1549-1553; S 42; P 44, 66, 71.)
104. The District did not offer to provide assistive technology that Student needed in order to address Student's educational needs, such as ear plugs for seat work; access to

word processing and keyboard training to reduce the impediment of Student's laborious handwriting. (P 41, 42; S 6, 18, 21, 24, 35, 41, 62.)

105. The District did not provide counseling services during the period in which the Student's IEPs offered such services. (NT 153-154, 347-348, 358.)
106. Student did not receive the full number of hours of pull-out special education services that were offered in Student's eighth grade IEPs. (NT 937-940; S 47, 48.)
107. The District did not provide Student with direct instruction in writing. (NT 131.)
108. Student has graduated to high school. At Student's high school, the District is attempting to provide special education to Student through two computer-based instruction programs, one for basic reading skills and one for mathematics remediation. This is not appropriate for Student's needs. (NT 1047-1058, 1547-1548, 1642-1643.)
109. Student needs provision of educational services in a small, structured environment with controlled sound and distraction levels, utilizing multisensory modalities in a sequential, specially designed curriculum, individualized for Student to remediate gaps in knowledge and skill while not repeating already-mastered skill and content areas. (NT 155.)
110. The District did not consistently honor litigation hold correspondence from Parents' counsel, and educational records were not produced within a reasonable time in several instances. (NT 297-298, 308-309, 408-409, 838-839, 923-933, 1107.)
111. The District has failed to pay for evaluative services obtained pursuant to a settlement agreement between Parent and the District with regard to Student's sibling. Parent was required to retain and become indebted to counsel in order to enforce the settlement agreement. The District failed to comply with a court order for payment of the bill for the evaluations for ten months. The District delayed payment for another evaluation covered by the settlement for five months, and then paid it. (NT 1419-1431, 1453, 1456, 1468-1469; P 69.)
112. The School offers small class sizes with low student-teacher ratios and a structured environment that meets Student's educational needs. It individualizes its services for each student and provides explicit, multisensory, sequential instruction in basic reading, writing and mathematics. Its teachers are qualified to provide special education services to children such as Student, who exhibit disabilities in language processing. The School also offers speech and language training through a certified speech and language pathologist, and occupational therapy through a qualified professional. The School personnel address attention problems through modifications of teacher behavior and environment, according to research-based principles. (NT 972-976, 977, 979-98, 995-997, 1024-1025, 1392, 1557-1559.)
113. The School offers assistive technology, including earplugs and other accommodations for audiological, organizational and attention to task needs, as well as computers for writing. (NT 985-986, 1005-1006.)

114. The School provides a school-wide behavior support system that is based upon the principles of applied behavior analysis, and overseen by a board certified behavior analyst. (NT 988-995.)
115. The School provides individual and group counseling as well as social skills training, and an anti-bullying program. (NT 991-992, 997-1004.)
116. The School has admitted Student and will receive Student as soon as Student is ready to begin. (NT 1378-1380; P 32.)

## 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.<sup>5</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>6</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier

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<sup>5</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 (which in this matter is the hearing officer).

<sup>6</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.



evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claim, or if the evidence is in "equipoise", the Parent cannot prevail under the IDEA.

## 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). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following credibility determinations.

I found the Parent's expert psychoeducational evaluator to be highly credible and I found this witness' expert opinions to be highly reliable. This expert is very qualified to evaluate Student and recommend educational programming for Student. The expert conducted a thorough evaluation. Her opinions were solidly grounded in data, and she resisted any temptation to offer opinions not grounded in her data. Her demeanor was relaxed and not in the least contentious or defensive. Likewise, I found the Parent's experts in speech and language therapy, occupational therapy and curriculum-based evaluation to be credible and reliable. These experts, also, supported their opinions with substantial data and their testimony remained grounded in that data. All were proven to be thoroughly qualified to render the assessments and conclusions to

which they testified, demonstrating command of the testing instruments about which they testified.

Similarly, I found the Student's seventh grade special education teacher to be credible. This witness, while she was at pains to present the facts in a light favorable to the District, also admitted frankly the numerous serious deficiencies in the educational services that the District had provided to Student in seventh grade. In addition, the witness' demeanor throughout was an indicator of credibility. However, I gave reduced weight to some of this witness' opinions about Student's progress in seventh grade, as they were contradicted by Parents' experts' opinions based upon more reliable data.

I found Parent to be credible, despite her position as the complainant in this matter, based upon the way in which she answered questions, and corroboration of many of her assertions in the record.

I assigned reduced weight to the District occupational therapist supervisor's opinions, because of her lack of direct experience with Student.

I assigned reduced weight to the District's supervisor of special education for Student's eighth grade, due to her admitted deliberate falsification of documents of record, and her sometimes glib and defensive way of answering questions. Based upon these factors, the testimony was relatively unconvincing.

Similarly, I assigned less weight to the District's speech and language therapist, whose testimony was highly defensive, and whose opinions as to progress were contradicted in the record.

Similarly, I assigned reduced weight to the opinions of the District's school psychologist, who displayed very limited command of the facts of the matter, and seemed predisposed to defend the District's position at every turn in the testimony.

Finally, I assigned reduced weight to the District's SEL witness, whose testimony was obviously intended to avoid admitting District mistakes.

I found the private School witnesses to be credible, taking into consideration that their testimony was somewhat self-interested and that much of the information that they conveyed was rote information about the school that would be part of the witness' memorized characterization of the School, and thus would be designed to place the school in the best light. In spite of these considerations, I found that the witness' demeanor was credible and their assertions were largely uncontradicted in the record.

I found Parent's attorney-witness to be credible and reliable. This witness was clearly careful to limit her assertions to facts in the record. Her demeanor was consistent with truth, and her material testimony is corroborated in the record.

#### FALURE TO PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is "special education and related services", at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be "reasonably calculated" to enable the child to receive

“meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“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 a FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). 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 program 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 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).

Applying these standards to the above findings and the record as a whole, I conclude that the District failed to offer to or provide Student with a FAPE during the relevant period of time. The District failed to conduct comprehensive re-evaluations in compliance with the procedural requirements of the IDEA. Consequently, the District failed to offer or provide an appropriate placement for Student. Its IEPs were not reasonably calculated to provide Student with an opportunity for meaningful educational benefit. The District did not offer or provide appropriate related services. The District failed to provide the services offered in its IEPs with consistency or fidelity. The District disregarded IDEA procedural requirements for IEP team meetings, resulting in IEPs generated by District staff without a good faith effort to seriously consider Parent's input.

#### Re-evaluations

The District's re-evaluations were not comprehensive. Student's IEP for seventh grade was based upon a 2011 re-evaluation from when Student was in fourth grade. That report noted, but did not further delineate, a severe discrepancy between Student's verbal and non-verbal cognitive

functioning. There was no investigation of Student's auditory processing. There was no treatment of Student's severely delayed writing skills. Student's below-grade-level mathematics needs were not addressed. Although the report made recommendations for related services and social skills training, it did not make recommendations concerning Student's severe delays in academic achievement.

Subsequent to this report, the District's IEPs reported present levels that were frankly contradictory and confused. Although District personnel consistently reported that Student was unable to keep up with the pace of the general education classroom, District evaluations and assessments did not address this educational need. Speech and language present levels for most IEPs were based upon subjective teacher report, not data.

District assessments of behavior were not consistent with applied behavior analysis principles, or any research-based principles, and failed to effectively identify strategies for modifying Student's behaviors that increasingly disrupted Student's education and that of others. District occupational therapy assessment failed to address Student's sensory needs and motor planning difficulties.

In June 2014, the District provided a skeletal re-evaluation report three years after the 2011 report, in response to Parent's request. This report contained no updated standardized cognitive or achievement testing. It reported no classroom observation. Its teacher reports were boiled down to a short statement that teachers recommended continued support for reading, mathematics and behavioral difficulties. Thus, the June 2014 re-evaluation report was as seriously flawed as the 2011 report. I conclude that this report failed to identify what additional data were required to determine Student's present levels of academic achievement, and whether the IEP needed to be

changed in order to enable Student to meet Student's IEP goals and access the general education curriculum. 20 U.S.C. §1414(c)(1)(B).

After Parent provided a private psychoeducational evaluation to the District, it issued a re-evaluation report in June 2015. This report again repeated previous re-evaluation reports in detail; it added new cognitive testing, consistent with the scores obtained in 2011. The report contained more recent speech and language testing, which revealed continued difficulties in grammar, sentence structure, semantics and figurative language. Expressive language scores were up to two standard deviations below the mean. Nevertheless, the District reported scores for language that were within the average range, suggesting some progress. The report recommended continuation of speech and language therapy at the existing levels. Based upon an incomplete occupational therapy evaluation in 2014, the report recommended no need for occupational therapy services. There was no classroom observation data. The report was not comprehensive, as it contained no academic achievement testing.

### Placement

By the start of Student's seventh grade year, the District knew or should have known that this Student was struggling with profound deficits in basic academic skills in reading, writing and mathematics, combined with cognitive deficits in language-related functioning, attention deficit disorder with hyperactivity, and concurrent behavioral and social difficulties. It knew that Parent was repeatedly requesting reconsideration of a more intensive placement. It knew that Student had not progressed beyond a third grade level in most basic academic skills. These facts obligated the District to consider providing Student with an intensive, small-classroom environment to remediate basic skills. Yet, in the face of these overwhelming reasons to do so, and despite Parent's

repeated entreaties, the District adamantly refused to consider a placement reasonably calculated to address these deficits. Instead of offering full-time learning support, the District insisted upon placing Student in supplementary learning support, which allowed the District to place Student for the majority of the school day in larger classrooms with higher student-staff ratios with some co-teaching settings.

The District also knew that it was especially difficult for Student to tolerate the often loud and busy atmosphere of a public school, while maintaining attention and concentrating on deciphering routine classroom instructions that Student could not process completely and therefore needed special accommodations to comprehend. Still, there is no evidence that it ever seriously considered placing Student in a small, special education environment.

In Student's seventh grade year, the result was predictable. Student made negligible progress in academic functioning, and regressed in behavior and social relationships. Nevertheless, Student was graduated to eighth grade.

At the beginning of eighth grade, aware of this lost seventh-grade year, the District, again at Parent's insistence and instead of Parent's requested transfer to a private school for children with learning disabilities, transferred Student to a different District school. For the first time it offered two class periods per day of intensive, structured, research-based instruction on basic skills.

I conclude that this placement was too little and too late. By this time, Student's third-grade level basic academic skills were a critical deficit requiring full-time, intensive and structured intervention. Instead, Student received the same co-taught and regular general education classes and many of the same IEP goals that had proven inappropriate for seventh grade – all based upon essentially a re-hash of the fourth grade re-evaluation report that was inadequate in 2011, let alone



three futile years later. While the offer of research-based instruction in reading and mathematics was at least calculated to address Student's real academic needs for the first time in Student's academic career, the large public school setting, and the regular education placements for the remainder of Student's day, were inappropriate in view of Student's severe language processing problems and significant problems with attention, impulsivity, hyperactivity and disorganization.

By the beginning of ninth grade, the District was aware that Student's difficulties had continued with little progress, in spite of its transfer of Student to a different school with better structure and educational control. Still, it insisted upon offering the same placement to Student, now in a large public high school setting, with little change in the services offered in the IEP. I conclude that this offer was inadequate in view of the Student's history of failure in the offered placement, especially in light of evidence adduced at the hearing indicating that Student's behavioral adjustment to the new school is problematic, and that Student is subjected to aggressive behavior of peers, leading to further distractions from needed instruction.

#### Individualized Education Programs

The District's IEPs did not address all of Student's educational needs. They posited contradictory and confused present levels of academic performance that failed to establish appropriate baselines for IEP goals. They appeared not to be individualized, and, for seventh grade, they were not measureable through any logical, empirical process. The IEPs did not offer appropriate related services.

Goals seemed to be designed to fit the Student's age and assigned grade level classroom curricula, rather than the much lower the level of Student's academic functioning. Reading goals addressed comprehension skills without dealing with Student's very regressed decoding and

fluency. Mathematics goals addressed operations with fractions and algebraic equations for a student who had not mastered subtraction, multiplication and division. A writing goal in November 2013 addressed higher-level skills of organization and structure without addressing Student's basic deficiencies in conventions and spelling. Thus, many of the IEP goals offered to Student in seventh, eighth and ninth grade were inappropriate.

Seventh grade IEP goals were not measurable. Present levels provided no baselines, and progress was to be monitored by obtaining 80% on any test given during the IEP term. Goals were stated in vague terms, so that the behavior to be measured was unclear. One goal was ostensibly directed toward social interactions with peers, but was to be measured by teacher observation of the absence of negative classroom behavior, such as handing in classroom assignments on time and refraining from hitting peers in the classroom. Some of the seventh grade goals were repeated in eighth grade IEPs, positing the same curricular levels of achievement that Student had failed to attain during the previous IEP term. Thus, the eighth grade IEP contained inappropriate goals.

Ninth grade offered IEP goals were technically measurable for the most part, requiring consistent evidence of mastery through maintenance of 80% performance in 80% of opportunities. New goals were offered, addressing basic academic skills. However, the District offered to provide direct instruction in basic academic skills through two computer-teaching programs, which would be monitored by a special education teacher. I conclude, based upon the credible and reliable opinions of Parent's expert witnesses, that this modality is inappropriate for Student, who needs much more directed, intensive instruction than these computer-teaching programs can provide.

### Related Services

Throughout the relevant period, the District offered a paltry number of speech and language therapy hours in its IEPs, and, despite evidence that Student's language deficits were preventing any progress in academic areas, it never revisited its offer. The District insists upon expressing speech and language services in hours per IEP term, a figure which is reasonably calculated only to confuse parents and obscure the fact that the actual amount of services offered is miniscule. Here, the offer was 300 hours per IEP term, an amount that reduces to several minutes per week, and far less than even a thirty-minute session per week. Based upon Parents' credible and reliable expert opinion testimony, I conclude that this offered amount of service was inappropriate. The evidence showed that the speech and language therapists in seventh and eighth grade endeavored to provide Student with weekly half-hour sessions, far exceeding the amount of service offered in the IEPs. Based upon the same expert opinions, I conclude that this delivered service was inappropriately small, as well.

The District did not offer or deliver occupational therapy services. Based upon Parents' credible and reliable expert opinion testimony, I conclude that the District failed to provide these services inappropriately, because its refusal of such services was based upon an inappropriate evaluation that failed to account for Student's sensory and motor planning needs.

IEPs did not offer assistive technology recommended by parent's private evaluators, including use of ear plugs for seat work and availability of keyboards and word processing for written work.

### Implementation of IEPs

Compounding the District's failure to offer appropriately intensive services directed to Student's basic academic skills deficits, the District also failed to implement those services with

fidelity and consistency. For seventh grade, the evidence is preponderant that the District failed to ensure that a special education teacher would assist Student in general education classes as promised, because that teacher was reassigned in March to cover for the extended absences of other teachers. Environmental modifications to address Student's language processing were not provided. Specialized instructional techniques and accommodations were not provided consistently. Delivery of special education services was delayed at the beginning of eighth grade pending an IEP team meeting. Pull-out research-based instruction in reading and mathematics was not provided for the full 45-minute periods promised in the eighth grade IEP. Behavior analyses in seventh and eighth grades did not result in provision of a positive behavior support plan until the spring of eighth grade. Promised counseling sessions were not provided. Progress monitoring was not appropriately designed to measure progress toward goals, and it was reported in terms that were unintelligible and in some cases implausible. Curriculum based assessment scores were scored incorrectly in such a way as to incorrectly report higher Student functioning.

#### IEP Meeting Procedures

During the relevant period, the District showed a surprising level of disregard for the procedures required by IDEA for parental and teacher involvement in IEP team decisions. Repeatedly, teachers were absent from IEP team meetings without the written consent of Parent; more than once, the regular education teacher was not present, as required by the IDEA. 20 U.S.C. § 1414(d)(1)(B)(ii). At times, the speech and language therapist was not in attendance for this child with a severe language processing disability. 20 U.S.C. § 1414(d)(1)(B)(vi). Often, the agency's representative was unavailable, and Parent was informed that the IEP team was not authorized to change the IEP to place a child in a private school setting. 20 U.S.C. § 1414(d)(1)(B)(iv).

In a frank admission of ignorance with regard to IDEA requirements, and the commonly recognized obligation to tell the truth, the District's supervisor of special education admittedly falsified the record of IEP team attendance, deliberately, by obtaining signatures of non-participants on the participants' sign-in sheet, after the meetings. The supervisor stated that this was necessary in order to get the computer system to finalize the IEPs ultimately determined by the District for Student's education. I find this rationale to be, at best, an insufficient justification, and at worst, incredible.

In a striking echo of the District's disingenuous IEP team attendance records in this matter, the hard-won educational records in this case also showed alteration of scores in assessments of academic levels, and improper testing and scoring practices. I cannot write these off to simple incompetence. These materially misled Parent, as well as creating a materially misrepresentative record of Student's progress, which in reality was negligible.

The record is preponderant that the Parent was barely tolerated, and certainly not treated as a full member of the IEP team. Team meetings were held without Parent, and without a waiver. Parent was asked to obtain private evaluations, and then these were ignored. At one meeting, the school principal threatened to send Student back to the previous school if Parent did not simply accept the IEP that the District was willing to provide.

In sum, the educational program offered and delivered by the District was not individualized, was not delivered with fidelity, and was not conceived as the product of a collaborative IEP team process as required by the IDEA. In consequence, Student languished during the relevant period and has begun high school with academic skills that do not prepare Student to access the curriculum. The record is preponderant that the District has failed to offer or provide a FAPE to Student.

## COMPENSATORY EDUCATION IN A SPECIAL NEEDS TRUST

I have concluded that the District has deprived Student of a FAPE during the entire relevant period. Therefore, the District owes Student compensatory education to replace the educational services that Student was entitled to, and did not receive, due to the District's failure to comply with the IDEA. In this case, I conclude that an hour-for-hour order will provide no more and no less remedial service than is necessary in order to attempt to make the Student whole for the educational deprivation that Student has suffered. Therefore, I will award compensatory education on an hour-for-hour basis.

The preponderance of evidence in this matter is clear: Student made only negligible educational progress during the relevant period. Student's grades – which were supported through accommodations – were barely above passing grade in most major subjects. Student's behavior, although it improved, is still highly problematic. Student has not learned to control Student's impulses and behavior in a school setting to a degree appropriate to Student's age, grade and educational needs; moreover, Student's behavior in school has interfered fundamentally with Student's ability to maintain attention to task and to be accessible to instruction.

Student's speech and language disabilities, combined with Student's inappropriate behavior, have impacted negatively upon social relationships. The record is replete with examples of conflicts between Student and other peers. Relationships with educational staff are similarly strained.

In sum, Student's multiple disabilities have impacted Student's performance in school on all levels, academic, behavioral and social. The District has failed to appropriately address these impacts through the provision of a FAPE. Therefore full days of compensatory education are warranted in this matter, on account of the relevant period as defined above at note 2, as well as

for every school day from the date of this decision until Student begins school in an appropriate placement. Therefore, I order the District to provide 2288 hours of compensatory education, plus six hours per day for every school day until Student attends class in the School.<sup>7</sup>

Parents argue that the hearing officer should order the District to reduce the compensatory education hours to a dollar figure and place that funding in a special needs trust. While they thus request an unusual form of relief, this is an unusual record. There is a pattern and practice of obfuscation and delay regarding Student and Parent, and it extends even to Student's sibling. With regard to Student's sibling, the District pursued a practice of forcing Parent to retain counsel in order to enforce payment for services that were part of compensatory education agreed upon by the District. The District's conduct in the litigation of the present matter appears to be part of a similar pattern, in which educational records to which Parent had a right were not preserved, or if existent, were not provided within a reasonable time of counsel's request; indeed, numerous pages of records came to light during the course of hearings in this matter.

In sum, I have great concern about allowing the District to administer compensatory education with regard to Student and Parent. This Student is years behind age and grade level academic, behavioral and social skill levels, and is in need of immediate, well-designed and effective educational services, if Student is to have any hope of restoration to the level at which Student could have functioned if the District had provided appropriate services to the Student. The relationship between these parties is irrevocably damaged, and I fear that the District will take an adversarial and dilatory approach to any compensatory education order. As a practical matter, further obfuscation and delay could permanently sabotage any aspiration for effective educational

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<sup>7</sup> Parents requested compensatory education for inappropriate hours of extended school year services; however, I do not include any hours for such services, because the record does not support such an order by a preponderance of the evidence. There was not preponderant evidence that the District failed to offer or provide appropriate ESY services for purposes of maintaining Student's educational skills during the summer breaks in 2014 and 2015.

remediation for this child. I conclude that, in this case, it is a more equitable and effective remedial approach to reduce the compensatory education to a sum and order it placed in a special needs trust, so that the corpus can be managed by a neutral third party.

Under the IDEA, a hearing officer has broad equitable authority to remedy a denial of FAPE. Ferren C. v. School Dist. of Phila., 612 F.3d 712, 715-718 (3d Cir. 2010)(teaching that all relevant factors must be considered in determining equitable relief under the IDEA, and not questioning the appropriateness of monetary awards as compensatory education). A funded special needs trust is an appropriate form of compensatory education and hearing officers' equitable authority supports such an order. D.F. v. Collingswood Borough Bd. Of Educ., 694 F.3d 488, 498-499 (3d Cir. 2012)(compensatory education fund is appropriate under the IDEA).

Therefore, I will order that the District reduce the compensatory hours to a dollar figure and place those funds in a special needs trust. In line with the calculation of hourly rate for services in another due process hearing involving the District<sup>8</sup>, Parents request that each hour of compensatory education be valued at \$78.67 per hour; I conclude that this is a reasonable figure under all the circumstances, and I so order.

#### PLACEMENT AT A PRIVATE SCHOOL OF PARENT'S CHOICE

While I have concluded that the District has failed to offer a FAPE to Student for the current IEP term, it does not follow that I have the authority to order the District to place Student in the specific private school that Parent desires. The parties have briefed the issue of a hearing officer's authority to do so, and I am convinced that there is ample judicial authority for such an order, where the unusual and urgent case presents itself to justify such relief. D.S. v. Bayonne Bd. of

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<sup>8</sup> Decision of Hearing Officer McElligott, [Redacted] v. School District of Philadelphia, No. 16378-14-15-AS, odr-pa.org/uploads/hearingofficerdecisions/16378-14-15.pdf.



Educ., 602 F.3d 553, 569 (3d Cir. 2010)(approving order to place child in specific private school named by parents); see also, Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1287 (11<sup>th</sup> Cir. 2008)(approving order to place in private school).

I am reluctant to order any local education agency to contract with a private entity in most cases, for obvious prudential reasons. Yet, in the instant matter, the evidence is more than preponderant that the District is most likely to fail Student for yet another IEP term, as it has done manifestly throughout Student's tenure within its schools. Thus, in this case, prudence counsels against ignoring the stark likelihood that the District will again fail this Student. I conclude that it would contravene the intent of the IDEA and Commonwealth policy to simply stand back and let it happen again. Cf. G.L. v. Ligonier Valley Sch. Dist. Auth., 2015 U.S. App. LEXIS 16776 at 59 (3d Cir. 2015)(declaring that the remedy for a district's failure to fulfill its "profound responsibility" to provide a FAPE is to make the child whole with nothing less than a complete remedy). Therefore I will order what I consider to be extraordinary relief for an administrative tribunal. I will order that the District place Student forthwith in the private school to which Student has been accepted, and which Parent has chosen for Student.

Applying the prevailing test for the analogous situation of a request for tuition reimbursement, Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985), I conclude that the Parent's choice of schools is an appropriate one. The evidence shows preponderantly that the School provides the small, structured environment and all of the specially designed instruction that the private evaluators recommended for Student.

Again following Burlington, I conclude that the equities favor Parent on this record. The District has failed continually to provide the educational services that Student needs; moreover, it

has acted with disregard for its procedural obligations<sup>9</sup> to Parent and Student. Its behavior toward Parent has been characterized by obfuscation and delay. Parent has made substantial efforts to work with the District for a better program for Student; her efforts have been met with disregard and a “take it or leave it” attitude.

#### REIMBURSEMENT FOR EXPERT EVALUATIONS

I will order the District to reimburse Parents for the educational evaluations that Parent obtained privately, based upon my equitable authority to remedy the Student and make the Student and Parent whole for the District’s failure to re-evaluate Student appropriately during the relevant period of time. Parent, correctly determining that the District’s re-evaluations were not comprehensive (for reasons discussed above), obtained a psychoeducational report (P 44) from a qualified psychologist (P 49), which was later brought up to date when the District repeatedly failed to re-evaluate Student appropriately (P 45, 46). Again correctly determining that the District’s re-evaluations and the assessments reported in present levels of IEPs during the relevant period were either incorrect or incomplete, Parent obtained a speech and language evaluation privately (P 47), again through a qualified evaluator (P 51). Moreover, finding inadequate the District’s confusing and self-contradictory reports of Student’s academic grade levels of functioning, in its re-evaluations and in the present levels of its IEPs, Parent obtained curriculum based testing (P 48), through a qualified evaluator (P 53). These private evaluations demonstrated beyond cavil that the District had vastly underestimated the complexity and intensity of Student’s multiple disabilities, and had overstated Student’s levels of academic functioning. These private

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<sup>9</sup> The U.S. Supreme Court has emphasized that the IDEA’s procedural requirements, designed to ensure the full participation of a parent in designing the educational program for his or her child, is the chief vehicle that Congress chose to safeguard the child’s right to a FAPE. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690, 1982 U.S. LEXIS 10, 50 U.S.L.W. 4925 (U.S. 1982)

evaluations brought to light aspects of Student's disabilities that the District's superficial re-evaluation procedures had failed to uncover. Eventually, under the pressure of impending litigation, the District gave silent credence to the findings of these private evaluations when it completely revamped Student's IEP goals and specially designed instruction in September 2015, even though it did not go so far as to offer an appropriate placement.

The District argues that the Parent did not follow the procedural requirement of the IDEA for obtaining an Independent Educational Evaluation (IEE) at public expense, 20 U.S.C. §1415(b); 34 C.F.R. §300.502, by disagreeing with its re-evaluations and thus giving the District an opportunity to amend any errors therein. Regardless of whether or not Parent followed the preconditions in the IDEA regulation for obtaining an IEE, I conclude that the hearing officer's remedial authority supports an order for reimbursement of Parent in the unusual circumstances of this matter. Given the "take it or leave it" message that the District consistently conveyed to Parent in this matter, and given its continuous pattern of ignoring Parent's requests for services for her child, it would be inequitable to deny reimbursement for private evaluations based upon the preconditions set forth in the regulations. Moreover, I conclude that these conditions are not meant to be the exclusive conditions under which reimbursement can be ordered; rather, I conclude that, in the circumstances of this matter, the hearing officer has equitable remedial authority to order reimbursement, G.L., 2015 U.S. App. LEXIS, above. Based upon the above findings of fact and conclusions of law, I will exercise that equitable authority.

### **CONCLUSION**

I conclude that the District provided inappropriate re-evaluations, an inappropriate placement, inappropriate IEP goals and modifications, and inappropriate related services. It also

failed to comply with IDEA procedural requirements that mandate the inclusion of the child's parent in the formulation of the IEP. Taken together, these failures constituted a failure to provide Student with a FAPE. Therefore, in the exercise of the hearing officer's equitable authority to remedy Student's injury completely, I will order the District to provide Student with compensatory education in the form of a funded special needs trust, to place Student for the current school year in the private school selected by Parent, and to reimburse Parent for the cost of the private evaluations that have at long last pointed the way to a hopeful educational future for this child.

### **ORDER**

In accordance with the findings of fact and conclusions of law set forth in the Decision of even date herewith, it is hereby **ORDERED** as follows:

1. During the relevant period of time (September 21, 2013 to the last day of hearing, October 7, 2015), the District failed to provide Student with an appropriate re-evaluation.
2. During the relevant period of time, the District failed to provide Student with a free appropriate public education (FAPE) by failing to offer or provide an appropriate placement.
3. During the relevant period of time, the District failed to provide Student with a FAPE by failing to offer or provide an appropriate Individualized Education Program (IEP), including appropriate goals, specially designed instruction and related services.
4. During the relevant period of time, the District failed to provide Student with a FAPE by failing to comply with the procedural requirements of the IDEA for parental participation in the educational planning process and required participants at IEP team meetings.
5. The District shall provide compensatory education to Student in the amount of 2288 hours of compensatory education, valued at \$78.67 per hour. The monetary value of this compensatory education shall be paid into a special needs trust for Student, selected by Parent, and any distribution of this sum shall be governed by the terms of that trust. In addition, the District shall provide compensatory education in the amount of six hours for every school day from November 10, 2015 until and including the day before the first day on which Student attends classes at the School. The monetary value of this additional compensatory education shall be \$78.67 per hour, and it shall be paid into the special needs trust for Student referenced herein.

6. Within fifteen days of the date of this order, the District shall convene an IEP team meeting for the purpose of revising Student's IEP to offer Student immediate placement in the School at public expense. The IEP team shall place Student in the School for a full, one year IEP term, starting on the day on which the Notice of Recommended Educational Placement (NOREP) placing Student in the School is signed; moreover, the placement shall continue until the end of the school year, including any extended school year services recommended by the School, in which the IEP term, referenced herein, expires, or until the parties agree to return Student to the District, whichever date occurs first.
7. At the IEP team meeting ordered herein, the IEP team shall revise Student's IEP in consideration of the report of school psychologist A.R., Ph.D. (P 44). The IEP team shall revise the related services provided to Student to increase the amount of speech and language services consistent with Dr. A.R.'s recommendations, and to provide occupational therapy services that are appropriate to address Student's sensory and motor planning needs. The IEP meeting shall include all IEP team members mandated by the IDEA, unless excused by Parent's written waiver, and the team shall consider Parent's input as an equal member of the team.
8. The District shall reimburse Parent in the amount of the invoices pertaining to the educational reports entered into evidence in this matter and authored by Dr. A.R., K.C., M.S., and F. H., Ph.D., as set forth in exhibits P 50, 52 and 54.

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

November 9, 2015