

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: R.B.
ODR #17099 / 15-16 AS

Date of Birth:
[redacted]

Dates of Hearing:
January 19, 2016
March 9, 2016
March 29, 2016
April 5, 2016

CLOSED HEARING

Parties to the Hearing:
Parent[s]

West Chester Area School District
829 Paoli Pike
West Chester, PA 19380

Date Record Closed:

Date of Decision:

Decision Due Date:

Hearing Officer:

Representative:
Tanya Alvarado, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19380

David Painter, Esquire
Sweet, Stevens, Katz & Williams
331 Butler Avenue PO Box 5069
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May 3, 2016

May 25, 2016

June 3, 2016

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a late teen-aged eligible student attending 12th grade in the District and receiving special education programming under the Individuals with Disabilities Education Act [IDEA]². Student's current eligibility classification is Other Health Impairment (ADHD). As such, Student is also a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973.³

The Parents asked for this hearing, alleging that the District denied Student a free, appropriate public education (FAPE) and are seeking compensatory education, an independent Functional Behavior Analysis, prospective IEP revisions in the areas of behavior support and transition, an appropriate placement for the 2016-2017 school year (a 13th year), reimbursement for tutoring services, and reimbursement for the costs of a privately-obtained IEE. They also are requesting that they be reimbursed for the time the independent evaluator spent testifying at the due process hearing. The District maintains that it has at all relevant times provided Student with FAPE and that the requested relief should therefore be denied in its entirety.

The testimony of every witness, the content of each exhibit, as well as the parties' written closing statements, were reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. After careful consideration I find for the Parents in part and for the District in part.

Issues⁴

1. Has the District failed to provide Student with a free appropriate public education (FAPE) by not addressing Student's deficits in executive functioning, written expression and social skills?
2. Should the District be required to fund an independent Functional Behavior Analysis (FBA), develop a Positive Behavior Support Plan (PBSP), and revise Student's transition plan?
3. Should the District be required to reimburse the Parents for the funds they expended on tutoring services?

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ In their written closing statement the Parents added reimbursement for fees associated with the time the independent evaluator expended to communicate his findings at the due process hearing which is not permissible under the IDEA but is permissible under Section 504. Although this issue was not articulated during opening statements I will address it in this decision in the interest of finality for the parties. [NT 10-30; Parents' Closing Statement]

4. Should the District provide Student with an appropriate placement for the 2016-2017 school year, as the Parents plan that Student will spend a 13th year in the District?⁵
5. Was the District's November 2013 reevaluation of Student, issued to the Parents on January 28, 2014, inappropriate, and if so should the Parents be reimbursed for the cost of an Independent Educational Evaluation (IEE) they obtained?
6. Should the District be required to pay for the time the independent evaluator spent testifying at the due process hearing?

Findings of Fact

The Student

1. Throughout Student's time in the District Student has continued to receive IEPs for special education services under the special education disability category of Other Health Impairment associated with ADHD.⁶ [S-1, S-5, S-9, S-12, S-15, S-19, S-23, S-32, S-34, S-39, S-48, S-60, S-62, S-64, P-14, HO-1]
2. Student has attended District schools since Kindergarten. During Kindergarten the pre-referral process was begun because within the classroom setting Student demonstrated inattentiveness, impulsivity, noncompliance, lack of energy, failure to consistently follow classroom instructions, difficulty staying on task, difficulty focusing on tasks, inability to cope with frustration, need for constant redirection, missing teacher instructions, procrastination, and requiring support to start and finish assigned work in the classroom. [P-1]
3. By mid-first grade Student was diagnosed with Attention Deficit Hyperactivity Disorder, Combined Type (ADHD) and Oppositional Defiant Disorder (ODD). Student received a 504 Service Plan to address ADHD and the IU provided a one-to-one Therapeutic Staff Support (TSS) worker and behavior management consultation to address ODD. In 4th grade a Personal Care Assistant (PCA) was substituted for the TSS worker. [S-1, S-2, P-1, P-14]

⁵ As of the closing of the record and the writing of this decision, I do not know whether Student's Parents intend to follow through with their stated decision to have Student take a "13th year" if indeed the Student would agree, or whether they will permit Student to go on to college.

⁶ Although a District re-evaluation dated January 31, 2011 during 7th grade indicated that Student had made "significant progress" and recommended exiting Student from special education and instead providing a 504 Service Plan, the IEP team decided to continue Student's eligibility for special education in part due to consideration of a private evaluation report from the autism center of a leading hospital for children confirming the diagnosis of ADHD and ruling out Autism Spectrum Disorder. In addition, in September of 8th grade in a psychiatric evaluation dated September 26, 2011 the private psychiatrist who had originally diagnosed Student with mild Asperger's Disorder (formerly a stand-alone diagnosis in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders Fifth Edition - DSM5 - but now subsumed under Autism Spectrum Disorder) agreed with the discontinuation of that diagnosis. [S-1, S-2, S-62, P-11]

4. ADHD is a disorder characterized by a core deficit in executive functioning. Inconsistent attention, inconsistent performance and difficulties initiating tasks are inherent in ADHD. ADHD has been present throughout Student's educational career and Student is unlikely to "grow out of" ADHD. [NT 50, 71, 77-79, 163-164, 173-174, 563-564; S-62]
5. Vestiges of ODD remain, as Student has a passive oppositional streak which, while not manifesting externally in maladaptive behaviors or overt defiance, is a tendency to do things the way Student wants in opposition to the demands being placed by others. [NT 90-91]
6. On September 26, 2011 Student received a private psychiatric evaluation. Needs identified in that evaluation included becoming distracted and easily sidetracked; having problems managing time; not always writing everything down in the assignment book; not always completing school work; making careless errors, failing to check work, and underestimating how much effort is necessary for the accurate completion of a task; perceiving self to be on top of things even when not; wanting to be successful but having difficulty persevering to complete the work necessary to achieve success; struggling with learning from mistakes and adjusting behaviors accordingly; and, becoming resentful and frustrated when people made suggestions about things that might be helpful; [P-11]
7. The psychiatrist recommended that the District continue with interventions to help Student remain organized, self-monitor progress related to completing school-based expectations, and offer a monitoring system to help Student understand the progress that Student was making. [P-11]
8. During the psychiatric evaluation Student denied having a disability and very much wanted to be viewed as a normal student with no specific special education issues or needs. Nearly five years later, at an IEP meeting on June 3, 2015 Student indicated that Student did not think the needs being discussed were important and thought there wasn't a need for improvement. [NT 81, 90-91; S-60, P-11]
9. Following the September 2011 private psychiatric evaluation in 8th grade, although the diagnosis of ADHD had been conferred by mid-first grade, Student for the first time began to take medication to address ADHD. Student briefly took Strattera and then switched to Concerta through the conclusion of 9th grade. During 10th grade, Student briefly switched to Adderall but returned to Concerta which Student took through September 2015 of the 12th grade. At that point the prescribing psychiatrist discontinued medication after determining that Student was not experiencing a positive impact to ADHD related needs, as Student's needs did not appear to be dramatically changed whether or not Student was on medication.⁷ [NT 777-780; P-11]
10. The District completed its last re-evaluation of Student in November 2013 (provided to the Parents in January 2014). Concluding the Student continued to be eligible for and in need of special education as a student with the Other Health Impairment of ADHD the 2013/2014 10th grade RR recommended instruction and support for organization,

⁷ Whether a trial of medication at a much earlier formative stage would have been of benefit is an open question.

planning, dependability, self-regulation, initiation and self-advocacy. Participation in a Study Skills class was recommended along with written expression interventions and follow up transition counseling with the guidance counselor. [NT 52, 69-70; S-15⁸, S-70]

11. Because of their ongoing concerns related to Student's academic struggles, low motivation, emotional status and social skills the Parents obtained an independent educational evaluation (IEE) conducted on January 19, 2015 and July 3, 2015, the report of which was reviewed by the IEP team on August 27, 2015. [S-1, S-62]
12. The independent evaluator assessed all possible areas of need that could impact Student's executive functioning skills, investigating whether any other factors impacted Student's educational needs. The independent evaluator found that other than ADHD, Student is not experiencing significant or pervasive behavioral or emotional difficulties. [S-62]
13. The independent evaluator used nationally-normed self-report instruments to assess emotional functioning. On the Beck Youth Inventories - Second Edition, the Piers-Harris Children's Self-Concept Scale - Second Edition, the Children's Depression Inventory - Second Edition, and the Multidimensional Anxiety Scale for Children - Second Edition, Student did not stand out from other adolescents of the same age and gender in the areas of anxiety, depression, anger, or engagement in disruptive behavior. [NT 87; S-62]
14. The Student, a Parent and teachers completed the Comprehensive Executive Functioning Inventory rating scale, the Behavior Assessment System for Children, Second Edition (BASC-2), the Conners' Scales, the Social Skills Improvement System (SSIS), and the Social Responsiveness Scale, Second Edition (SRS). The results on each instrument consistently showed the Student's self-ratings as average, the Parent's ratings as well below average, and the teachers' ratings variable but well above the Parent's ratings. [S-62]
15. Administered as part of the IEE, on the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) Student's Full Scale IQ was 112 (High Average range: 110-119). Index scores were variable, with a Verbal Comprehension Index of 127 (Superior range: 120-129), a Perceptual Reasoning Index of 107 (Average range: 90-109), a Working Memory Index of 89 (Low Average range: 80-89) and a Processing Speed Index of 111 (High Average range: 110-119).⁹ In contrast to the WAIS-IV working memory score, Student's working memory as assessed on the Woodcock Johnson III Test of Cognitive Abilities was solidly Average as follows: Working Memory 104, 59th %ile; Numbers Reversed 99, 47th %ile; Auditory Working Memory 109, 73rd %ile. [NT 86; S-62]

⁸ The date of the re-evaluation report was in error due to a peculiarity of the District's computer program. It did not reflect the date the reevaluation was completed, but the date the case manager created the file in advance of the 12-5-2013 IEP team meeting to review existing data. [NT 42-45, 72-74, 431-433]

⁹ Compare these scores to the scores obtained on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) as reported on the District's January 31, 2011 evaluation: Student's Full Scale IQ was 113 (High Average range: 110-119); Verbal Comprehension Index was 110 (High Average range: 110-119); Perceptual Reasoning Index was 110 (High Average range: 110-119); Working Memory Index was 110 (High Average range: 110-119); Processing Speed Index was 106 (Average range: 90-109). [S-1]

16. A comparison of the results of two fairly comparable Wechsler cognitive assessment instruments done in 2011 (WISC-IV) and 2015 (WAIS –IV) shows a significant 17-point increase on Verbal Comprehension, comparable scores on Perceptual Reasoning and Processing Speed, and a significant 21-point decrease in Working Memory. [S-1, S-62]
17. On the Wechsler Individual Achievement Test - Third Edition (WIAT-III) Student achieved the following Standard Reading Scores: Reading Comprehension 114, 82nd percentile; Word Reading 107, 68th %ile; Pseudoword Decoding 110, 75th %ile; Oral Reading Fluency 103, 58th %ile; Total Reading 110, 75th %ile; Basic Reading 108, 70th %ile; Reading Comprehension and Fluency 110, 75th %ile. [S-62]
18. On the Wechsler Individual Achievement Test - Third Edition (WIAT-III) Student achieved the following Standard Mathematics Scores: Math Problem Solving 108, 70th %ile; Numerical Operations 105, 63rd %ile; Math Fluency Addition 70th %ile; Math Fluency Subtraction 123, 94th %ile; Math Fluency Multiplication 90, 25th %ile; Mathematics Composite 108, 70th %ile; Math Fluency Composite 108, 70th %ile. [S-62]
19. On the Wechsler Individual Achievement Test - Third Edition (WIAT-III) Student achieved the following Standard Written Language Scores: Sentence Composition 117, 87th %ile; Sentence Combining 108, 70th %ile, Sentence Building 121, 92nd %ile; Essay Composition 114, 82nd %ile; Word Count 108, 70th %ile; Theme Development and Text Organization 117, 87th %ile; Spelling 98, 45th %ile; Written Expression Composite 112, 79th %ile. [S-62]
20. Student’s 8th grade Reading, Math, and Science PSSA exam scores were “Advanced” and the Writing score was “Proficient”. Throughout high school Student’s GPA has consistently been above 3.0. [S-5; S-73]
21. Student’s SAT scores were 1130 on the 1600 scale and 1600 on the 2400 scale. The SAT scores for the math and verbal areas placed Student above average in the group of college-bound students while Student’s SAT score in writing was just below average for college-bound students. [NT 232; S-73]
22. Student has been accepted at every college to which Student applied.¹⁰ All the colleges where Student was accepted have offices for disability services. [NT-224, 227-228, 268-270; P-14]
23. The Parents have declared their intent to have Student take a post-12th grade “13th year” of enrollment in the District because they are concerned about Student’s continued approach to/resistance to the educational process. When contemplating the chances of Student’s not performing well in college the Parents are “not willing to put [their] money on that risk at this point in time.” [NT 820]
24. District witnesses who have worked closely with Student and who have many years of experience working with high school students believe Student is ready to transition to

¹⁰ Kutztown, West Chester, Rosemont, Widener and Penn State.

post-secondary education. Parents and the independent evaluator believe the Student is not ready. [NT 254-255, 576-577, 594-596, 633-634, 697]

25. The independent evaluator acknowledged that predicting whether Student will be successful in college were Student to enroll in the fall of 2016 is far from a precise science. [NT-594-596]

9th Grade 2012-2013 (provided for background – not in relevant period)

26. Beginning in 9th grade and continuing through high school Student received guidance counseling services addressing the identification of academic and personal goals as well as post-secondary transition planning including discussing the results of a career interest inventory. The guidance counselor and the Learning Support Case Manager (case manager) collaborated when providing Student's services. [NT 191, 197-198, 201-205, 219, 221-223, 225-226, 234-237, 247-248, 259-260; S-19]

27. At the beginning of 9th grade Student was to meet with the case manager twice weekly to address ongoing needs in the areas of self-advocacy, independent planning and organization, but Student was at times resistant to this assistance, for example, not wanting to meet during homeroom because of a full schedule that included taking two electives with parental approval. At the October 23, 2012 IEP team meeting the frequency of meetings was reduced to once per week in an effort to elicit Student's participation. [NT 286-290, 325-332. 406-409; S-5]

28. Although Student was inconsistent with writing down assignments, Student usually knew what the assignments were when asked. Student also sent emails to teachers, private tutors and the case manager. Student always received responses from the teachers. [NT 94-96, 438-440; S-71]

29. Student's final grades for 9th grade were: African Asian History Honors 88; Biology 1 Honors 82; Computer Programming C Honors 78; Computer Programming C++ Honors 75; English 9 Honors 80; Geometry Honors 83; Health and Fitness 89; and Spanish 1 85. [S-73]

30. Data suggested that Student was not a particularly good "test taker" as points earned were higher on homework and classwork and lower on tests and quizzes. [NT 308-311; S-5].

31. Interpersonal skills generally met expectations. [S-5]

Relevant Period, November 2013 (10th grade) through April 5, 2016 (12th grade)

32. The IEPs do not necessarily begin or end congruent with the start and end of each high school year in the relevant period. There were four IEPs in effect during the relevant period November 30, 2013 through April 5, 2016¹¹.

¹¹ For clarity I am referencing the Exhibit Number of only the last iteration of an IEP because that exhibit is the original IEP and its revisions.

33. The IEP dated April 10, 2013 [S-9] was created in 9th grade and carried over into 10th grade at the start of the relevant period. Revised April 29, 2013; Revised May 29, 2013; Revised September 3, 2013 with Notices of Recommended Educational Placement (NOREP) dated May 31, 2013 [S-10] and September 3, 2013 [S-13].

34. The IEP [S-9] of April 10, 2013 as revised which was in effect on November 30, 2013 provides as follows:

Transition Goal: Attending a four year college.

Relevant service/activity related to goal: Support study skills through meetings with case manager; support study skills during study skills class; improve self-advocacy.

Annual goal: Given Student and learning support teacher weekly review of academic performance as displayed on the online portal system for tracking tasks and grades, with adult modeling and verbal prompting faded to elimination, Student will develop a plan of action consisting of a series of concrete steps to address independent study skills and self-advocacy skills such as, but not limited to strategies to improve grades below 80%, issues with homework or classwork, missed deadlines, or test scores.

SDI: Encourage Student to reread written work to improve self-editing; provide instruction in independent study skills; encourage Student to develop formula sheet/index cards for reference in completing assignments and for use in studying for tests; inform Student of the material that will be covered on the test at least three days in advance and encourage Student to make a study guide to be checked by teacher for completeness and accuracy; encourage Student to write upcoming tests/quizzes and homework assignments in the assignment book and to study for tests/quizzes several days ahead of time in smaller increments; develop a formula sheet/index cards for reference when completing assignments and for use in studying for tests; long-term assignments need to be broken down into manageable steps with specific monitored due dates for any assignment that is expected to take more than three days; provide Student a second set of textbooks to be kept at home when online textbooks are not available; at least one time per week during assigned study skills time assist and monitor Student with e-mailing teachers and parents two days before the end of the school week regarding missed assignments, long-term projects, and upcoming tests/quizzes; prompt Student for attention/focus on task at hand during independent classwork time; pending the successful completion of Health 10 over the summer Student will participate in a study skills class with the focus on, but not limited to, preplanning self-monitoring self-advocacy and use of available resources; direct supplemental instruction in study skills as described in IEP goals.

May 31, 2013 NOREP neither approved nor disapproved, the Parents noting that completion of Health 10 was pending.

Revision: On September 3, 2013: SDI added for Student to attend a study hall two times per week.

September 4, 2013 NOREP approved.

35. The April 10, 2013 IEP was revised on May 29, 2013 in response to the Parents' request for additional support for "pre-planning, self-monitoring, self-advocacy, and the use of available resources." The IEP team proposed that Student schedule a Study Skills class for 10th grade to provide a set time and place to work on these skills. [S-9]
36. The April 10, 2013 IEP was revised again at a meeting held on September 3, 2013 to specify Student would attend study hall in the Learning Support classroom two times per week. Student was to meet with the case manager twice a week and participate in a Study Skills class two periods per week. At the Parents' request the Study Skills class was listed in Student's schedule as a "Study Hall", and did not appear on the transcript or factor into the calculations for the proportion of Student's day spent in special education. [NT 341-45; S-12, S-73]
37. Parents chose for Student to enroll in an online Health class during the summer "so [Student's] schedule will include some study halls" and to give Student room in the schedule for electives, specifically an AP Computer Programming class. This was despite Student's experience with an Honors Computer Programming course in 9th grade when Student had difficulty writing the code and keeping up with the class and received grades in the 70s. [NT 321. 413-416; S-6, S-73]
38. Student dropped the AP Computer Science class during the 3rd marking period of 10th grade and was scheduled for additional periods of Study Skills instruction. [NT 428-430, 437; S-32, S-73]
39. Due to Student's struggle with Honors Chemistry, the Chemistry teacher recommended that Student transfer to an Academic Chemistry class that was co-taught with a learning support teacher. [S-73]
40. The next IEP in the relevant period was dated February 27, 2014; Revised April 1, 2014; Revised June 10, 2014; Revised June 18, 2014; Revised October 3, 2014 with NOREPs dated March 4, 2014 [S-20], April 8, 2014 [S-24], June 12 [S-33], June 19, 2014 [S-36], October 10, 2014 [S-40].
41. The IEP [S-9] of February 27, 2014 as revised provides as follows:
Transition Goal: Attending a four year college. Student is undecided about a course of study. Relevant service/activity related to goal: support planning and preparation for classes; scheduling into classes that support postsecondary education goal; provide information to student and parents for applying for extended time on ACT testing; support in developing a life plan.
Annual Goal: Given a weekly one-to-one conference with the study skills teacher with prompting faded to elimination student will check weekly e-mails and current grades from teachers, identify any areas of focus, develop a plan of action to address the areas of concern, and successfully implement the plan in 7/9 consecutive weeks.
Revision on June 10, 2014: Given a weekly one-on-one conference with the study skills teacher with prompting faded to elimination student will check weekly e-

mails and current grades from teachers, identify any areas of focus, develop a plan of action to address the areas of concern, and successfully implement the plan in 8/9 consecutive weeks.

Revision on June 18, 2014: Given at least twice weekly one-on-one conferences with the study skills teacher with prompting faded to elimination student will do the following: check weekly e-mails, write down daily assignments, check current grades from teachers, identify any areas that need attention to promote improvement, develop a plan of action to address the areas of concern, and successfully implement the plan. 80% accuracy in each of the six areas for 7/9 consecutive weeks.

Annual Goal: In response to verbal prompting and modeling faded to elimination, and using career interest inventories, student will draft a "life plan" in which student identifies at least three careers of interest, identifies the post-secondary training or education required to participate in those careers, and identifies the academic and functional skills needed to participate successfully in such post-secondary training or education, and use the plan to develop a course with the counselor needed to obtain the academic and functional skills.

SDI: Encourage Student to reread written work to improve self-editing; provide Student with a pre-writing activity such as but not limited to brainstorming, a graphic organizer, discussion, sentence starter, etc.; allow Student to submit graded writing assignments in to teacher two days prior to the due date for editing by teacher for focus, content and organization; allow Student 50% extended time for all in-class timed writing assignments; access to word processor for writing assignments. With regard to test taking, inform Student of the material that will be covered on the test at least three days in advance; encourage Student to make a study guide formula sheet or note cards to be checked by teacher for completeness and accuracy and to use it as a reference when completing assignments or studying for tests; encourage Student to write upcoming tests/quizzes in the assignment book and to study for tests/quizzes several days ahead of time in smaller increments; provide Student with 50% extended time for tests and quizzes. Long-term assignments need to be broken down into manageable steps with specific monitored due dates for any assignment that is expected to take more than three days; provide extra set of textbooks to be kept at home when online textbooks are not available; allow Student the opportunity to e-mail teachers two days before the end of the school week regarding missed assignments, long-term projects, upcoming tests quizzes; prompt Student for attention focus on task at hand during independent classwork time; direct supplemental instruction and study skills to include but not be limited to notetaking strategies, test preparation, planning and preparation for classes self-advocacy and organization; provide instruction in the Cornell Method of notetaking; provide extra time on assignments in chemistry or math when Student speaks to the teacher requesting an extension due to not understanding an assignment – the new deadline is to be determined between teacher and Student at time of Student's self-advocacy; Student's schedule will be reviewed to attempt to schedule study skills at the end of the day and to schedule Student in an Honors Pre-Calc class that runs the same period as an academic class; teachers will

encourage Student to use the SDI which allow Student extended time for timed writings.

March 4, 2014 NOREP approved.

April 1, 2014 revision: Added the SDI of providing extra time on chemistry and math assignments when Student self-advocates.

April 8, 2014 NOREP neither approved nor disapproved.

June 10, 2014 revision: Updated present levels of academic functioning and the specially designed instruction.

June 12 NOREP neither approved nor disapproved.

June 18, 2014 revision: Changing original text from "Development and implementation of a behavior contract with Student to address issues and motivation" to "Behavior contract will focus on writing down daily homework assignments and specific expectations will be developed by learning support teacher with Student input in September 2014".

June 18, 2014 revision: Consultation with behavior specialist to be initiated with the school team between November 14 and December 14. The purpose is to determine which strategies may be effective to address identified behaviors of concern as well as determining the need for an FBA.

June 19, 2014 NOREP not approved.

October 3, 2014 revision: The above was revised as follows: Consultation with behavior specialist to be initiated with the school team to begin October 13.

October 2014 revision: Study skills class reduced from five periods per five-day school week to four periods per five-day school week in order to have Student be with the math specialist one period per week.

October 2014 revision: Change from "Study skills time will focus on getting homework assignments written down and prioritize in student assignment book" to "During the study skills class Student will be provided with adequate time for getting daily homework, implied homework, and long-term assignments written down in assignment book".

October 10, 2014 NOREP not approved.

42. The IEP developed on February 27, 2014 reported progress on goals for setting weekly academic goals, developing a plan of action, checking grades and assignments online and seeking tutorial assistance from the Honors Algebra 2 teacher. The Parents requested extended school year services (ESY) because they believed Student "regressed on [the] goal of emailing teachers and recording [the] assignments." [S-19]
43. Teachers supported Student in checking grades and assignments on-line and sending emails to teachers concerning missing assignments or upcoming assignments. In response to information gleaned on-line and from teachers, with support from the learning support teachers Student was to develop a plan of action. [NT 348-355; S-19, S-22, S-29, S-30]
44. At the request of Parents, the IEP team met again on June 10, 2014 and made various revisions. Accommodations concerning the scheduling of a study skills class in 11th grade were added to the IEP. [S-32]

45. On June 18, 2014 the Parent, the Special Education Supervisor and the Learning Support case manager held a telephone conference. The Parents requested ESY services, the inclusion of private tutoring services from a tutoring agency in Student's IEP, and that Student's subject area teachers be available during Student's Study Skills class to tutor Student individually "to help with understanding content." It was agreed that a behavior contract would be revised, the District would obtain a behavior consultation by a BCBA and Student's study skills goal would be revised. The District did not authorize ESY and did not agree to pay for tutors. [S-34]
46. Following the telephone conference the Parents disapproved the NOREP. [S-36]
47. Student's final grades for 10th grade were: Algebra 2 Honors 75; Chemistry 1 Honors 75; English 10 Honors 82; Physical Education 98/97; Spanish 2 74; Western World History Honors 87. [S-73]
48. The Parents elected to override teachers' recommendations that Student take Pre-Calculus and Physics 1 at the Academic level and Spanish 2 for 11th grade. Instead, Parents and Student selected Pre-Calculus and Physics 1 at the Honors level and Spanish 3 at the Honors level. Parents and Student also elected to have Student take an Advanced Placement Psychology course for 11th grade. [NT 210-212, 242, 360, 433-435; S-18]
49. On the course waiver form Parents requested that the Study Skills course not appear on Student's transcript and therefore Student did not earn credit toward graduation for attending Study Skills classes until those credits were added back in retroactively. [NT 242-245, 260-261, 266-267; S-18]
50. The Parents requested a meeting to revise the February 27, 2014 IEP; the meeting was held on October 3, 2014. The team discussed and decided upon: checking Student's recording of assignments on a daily basis to also include "implied homework" and long term assignments; the structure of the Study Skills class (four times per week) and data collection for progress-monitoring of the IEP goal; creation of a schedule for Student to meet with subject area teachers for extra help; consultation by a Board Certified Behavior Analyst (BCBA); a behavior contract where Student earns points toward a gift card for online gaming for writing down assignments.¹² [NT 372; S-39]
51. The Parents rejected the NOREP for the October 3, 2014 revision of the February 17, 2014 IEP. [S-40]
52. As agreed upon during the October 3, 2014 meeting, the IEP team sought consultation from a BCBA to "explore motivation" and to determine the need for a functional assessment of behavior. The BCBA made direct observations, conducted interviews and reviewed Student's records and issued a behavior consultation report dated December 31, 2014. [S-43]

¹² The record is silent about any positive incentives the Parents may have provided such as access to video games, getting a learner's permit/driver's license, etc.

53. According to the BCBA, although Student did not demonstrate “problem behaviors” (as in acting-out behaviors) Student also did not display certain behaviors expected of a student of Student’s age on a consistent basis. These behaviors included: writing down assignments and tests in an assignment book; taking notes in class; completing assignments thoroughly and/or on a timely basis; studying for tests; asking for or seeking out clarification, help or support; and accepting help or support when it is made available. [NT 373-375; S-43]
54. The BCBA concluded that Student engages in avoidance of tasks and social interaction with adults and that Student has learned that the absence of consistent behaviors expected of students has had “no significant impact on [Student’s] academic standing because [Student] has always managed to pass every class by the end of the year.” [S-43]
55. The BCBA consultant hypothesized that Student “may have learned that if [Student] holds out long enough expectations will be diminished and/or additional support will be provided.” The BCBA recommended encouraging Student to utilize resources and accommodations made available and “fading... [Student’s] dependence on adults for so many things...and allow [Student] to experience the natural consequences associated with [Student’s] using (or not using them).” [S-43]
56. Not all IEP team members believed that Student would be motivated by the natural consequence of failure if adults were to withdraw all supports and prompting from Student. [NT 381-382]
57. The next IEP in the relevant period is dated February 5, 2015 [S-64]: Revised June 3, 2015; Revised August 27, 2015 with NOREPs dated February 12, 2015 [S-50], June 8, 2015 [S-61], September 7, 2015 [S-65].
58. The IEP of February 5, 2015 as revised provides as follows. [S-64]
- Transition Goal: Student has the goal of attending a four year college. Student is undecided about a course of study.
- Relevant service/activity related to goal: Support study skills during study skills class; support planning and preparation for classes; scheduling into classes that support postsecondary education goals; strategies for improving written expression and work habits; support planning and preparation for classes.
- Annual goal: Given a weekly review of grades with prompting faded to elimination student will identify grades of concern parentheses below 70%), develop a specific action plan that is relevant to the factors adversely impacting grade, and evaluate the effectiveness of this of the implementation of the plan through self-reports to the special education teacher in 80% of opportunities for three out of four marking periods.
- Annual goal: When in English class with the teacher requiring notetaking, with modeling and prompting faded to elimination, Student will take notes of the relevant material in 90% of the periods that require notetaking with 90% accuracy in 4/5 consecutive school weeks.

SDI: Encourage Student to reread written work to improve self-editing; provide Student with the pre-writing activity such as, but not limited to, brainstorming, a graphic organizer, discussion, sentence starter etc.; allow Student to submit graded writing assignments in to teacher two days prior to the due date for editing by teacher for focus, content and organization; allow Student 50% extended time for all in class timed writing assignments; access to word processor for writing assignments. Test taking - inform Student of the material that will be covered on the test at least three days in advance; encourage Student to make a study guide formula sheet or note cards for up-coming tests; encourage Student to use study guide formula sheet or note cards as a reference when completing assignments or studying for tests; encourage Student to write upcoming tests/quizzes in the assignment book and to study for tests/quizzes several days ahead of time in smaller increments; allow Student 50% extended time for tests and quizzes. Long-term assignments - broken down into manageable steps; provide an extra set of textbooks to be kept at home when online textbooks are not available; allow Student the opportunity to e-mail teachers two days before the end of the school week regarding missed assignments and long-term projects upcoming tests and quizzes; prompt Student for attention focus on task at hand during independent classwork time; direct supplemental instruction in study skills to include, but not be limited to, notetaking strategies, test preparation, planning, and preparation for classes. Self-advocacy and organization - schedule will be reviewed to attempt to schedule study skills at the end of the day; use of the school issued laptop for the purpose of notetaking organization and homework completion for both home and school use (tryout.)

February 12, 2015 NOREP not approved.

Revision June 3, 2015: Allow Student to make and use a note card to use during math exams; encourage Student to do this three days in advance of tests with input from the regular education teacher; the tests must be taken in the special education environment if Student chooses to use the note card during the test.

June 8, 2015 NOREP neither approved nor disapproved.

Revision August 27, 2015: Team considered the results of the independent educational evaluation. Discontinuation of the current study skills goal to be replaced with two goals as follows:

Annual goal: As measured through a 0 to 6 point Likert scale Student will improve social skills in the areas of assertiveness, communication, engagement, and empathy for others by increasing teacher average aggregate rating by 1.49 consecutive weeks over two marking periods.

Annual goal: Given a weekly review of grades with prompting faded to elimination Student will identify a task that needs to be initiated, develop a timeline in completing the task, and self-evaluate the completion of the tasks in 80% of opportunities for three out of four marking periods.

Addition of individual counseling by the district psychologist for social skills development.

SDI: Review with Student the times and places that extra help is available in math and science.

September 7, 2015 NOREP both approved and disapproved.

59. The Parents invited tutors from the private tutoring agency to attend the IEP meeting. At that time Student was “on track to graduate” by June 2016. On the Keystone Exams Student achieved Proficient scores on Algebra, Biology and Literature. [S-48]
60. According to the teachers, Student “met expectations” for the ability to deal with changes, attendance, getting along with others, accepting criticism, handling anger and frustration, and using appropriate language. The teachers noted Student needed improvement on dependability, organizational skills, making good use of time, being on time, working independently, attempting to do [Student’s] best work, showing initiative, demonstrating a positive attitude toward school work, asking for help, working cooperatively in a group and encouraging appropriate behavior in others. [S-48]
61. The Parents disapproved the NOREP associated with the February 6, 2015 IEP. [S-50]
62. During 11th grade the case manager kept a record of Student’s assignments so that Student’s assignment book could be compared against the case manager’s book for accuracy. [NT 388-392; S-56, S-57]
63. Student’s final grades for 11th grade were: American History Honors 74; English 11 Honors 84; Photography 1 93; Physics 1 Honors 84; Pre-Calculus Academic 87; AP Psychology 83. [S-73]
64. The IEP team met on June 3, 2015 to discuss the Parents’ request for cognitive and achievement testing. Tutors from the private tutoring agency again attended and the independent evaluator participated by telephone. The independent educational evaluation was pending and the IEP team did not identify a need for additional updated cognitive and achievement testing in order to revise Student’s educational program. [NT 93-95; S-60]
65. The Parents overrode teacher recommendation and Student registered for Calculus Honors for 12th grade year. The IEP team decided that if Student was not successful, Student could transfer to Pre-Calculus Honors. An accommodation for the use of notecards for exams in math classes was agreed upon. The Parents requested ESY to prepare Student for Calculus class, and asked the District to pay for summer online Physical Education class. [S-60]
66. The Parents neither approved nor disapproved the NOREP associated with the June 3, 2015 revision to the February 6, 2015 IEP, writing, “I do not believe that the IEP is appropriate. As [the independent evaluator] is evaluating [Student] and has not completed his testing, I ask that we reconvene an IEP meeting once [the independent evaluator’s] report is complete.” [S-61]
67. The IEP team met again at the Parents’ request on August 27, 2015 to discuss the results of the independent evaluation and to review the February 6, 2015 IEP as revised on June 3, 2015. The existing goal related to study skills was eliminated and two new goals

related to task initiation and social skills counseling with the school psychologist were included. [S-64]

68. Parents both approved and disapproved the NOREP associated with the August 27, 2015 revisions to the February 6, 2015 IEP stating that they agreed Student “needs special education services” but “the IEP does not fully address all of [Student’s] needs. On November 30, 2015, the Parents filed the Due Process Complaint [S-65]

69. The final IEP for the relevant period is dated February 5, 2016. [P-14]; Revised March 17, 2016, [HO-1]

70. The February 5, 2016 IEP provides as follows: [P-14, HO 1]

Transition Goal: Student has the goal of attending a four year college. Student is undecided about a course of study.

Relevant service/activity related to goal: Documentation of disability to apply for services at the post-secondary level according to the specific guidelines of the Office of Disabilities at the post-secondary institution which Student has decided to attend; direct instruction in study skills.

Annual Goal: Given one to one meetings with school personnel such as, but not limited to, the school psychologist, the guidance counselor, and case manager, with verbal prompts and modeling and using a graphic organizer to collect and organize information Student will identify at least two academic and two cognitive strengths and two academic and two cognitive deficits; outline at least one accommodation Student will need to use to compensate for each of Student’s identified deficits; research the services that are available through the Office of Disabilities at three colleges in which Student has been accepted; describe the procedures for accessing services at three colleges in which student has been accepted.

Annual Goal: Given one to one meetings with special education personnel in the development of a behavior contract with the reinforcement schedule student will generalized social skills in educational settings by demonstrating: assertiveness by expressing feelings asking for assistance were standing up for self; communication skills by responding well to conversations initiated by teachers or initiating conversation; engagement by initiating conversations with peers interacting well with others or inviting others to join in an activity; empathy by comforting others feeling bad but others are sad or showing concern and kindness.

SDI: Encourage Student to reread written work to improve self-editing; provide Student with a pre-writing activity such as but not limited to brainstorming a graphic organizer discussion starter etc.; allow Student to submit graded writing assignments into the teacher two days prior to the due date for editing by teacher for focus content and organization; allow Student 50% extended time for all in class time writing assignments; access to word processor for writing assignments. Test taking: inform Student of the material that will be covered on the test at least three days in advance; encourage Student to make a study guide formula sheet or note cards for upcoming tests; encourage Student to use study guide formula sheet or note cards as a reference when completing assignments were studying for tests;

encourage Student to write upcoming tests/quizzes in the assignment book and to study for tests/quizzes several days ahead of time and smaller increments; allow Student 50% extended time for tests and quizzes; allow Student to make use of notecards to use during math exams and encourage Student to do this three days in advance of tests with input from regular education teacher the test must be taken in the special education environment if Student chooses to use the notecards during the test; long-term assignments need to be broken down into manageable steps; provide Student an extra set of textbooks to be kept at home and online textbooks are not available; allow Student the opportunity to e-mail teachers two days before the end of the school week regarding the assignments, long-term projects, upcoming tests/quizzes; prompt Student for attention/focus on task at hand during independent classwork time; direct supplemental instruction and study skills to include but not be limited to notetaking strategies test preparation planning and preparation for classes. Self-advocacy and organization - review with student times and places that extra help is available in math and science; prompting in study skills class to focus on math homework – completing checking answers and identify areas of confusion that need to be followed up; counseling with the school psychologist to identify academic and cognitive strengths of deficits and accommodations that can be implemented to compensate for identified deficit; study hall will be changed to a study skills class and Student will earn elective credit for this course upon successful completion; implementation of a behavior contract to focus on generalization of social skills; referral for executive functioning support with consultant with a specialty in executive functioning coaching; executive functioning coaching development with Student of a behavior contract using natural reinforcement with a focus on post-high school success.

March 17, 2016 revision: Present levels of achievement revised. On annual goal number two the phrase “and development of a behavior contract with the reinforcement schedule” was stricken.

SDI added: Executive functioning coaching

71. Another IEP team meeting was held on 3/17/2016 at the request of the Parents to review recommendations made by the independent evaluator who participated by telephone. An executive functioning coach also attended the meeting. The annual IEP dated February 5, 2016 was revised to reflect the participation by the independent evaluator and to reflect the participation of the executive functioning coach to focus on post-secondary transition. Discussion of a 13th year in high school was deferred. Executive functioning coaching focusing on transition was added to the SDI section of the IEP. The independent evaluator suggested that someone the Student trusted should work with Student on motivation [P-17]
72. Although Student’s guidance counselor has observed Student to communicate socially with peers and to have an appropriate relationship with a girl, possibly a girlfriend, and in an earlier assessment the District psychologist did not find a deficit in social skills, upon review of available data from the IEE the IEP team added an annual goal regarding social skills to the IEP. [NT 88-89, 100-101, 250-255; S-62, S-64, S-72]

73. At the time of the due process hearing information available for the first two marking periods indicated that Student's grades in four core subjects ranged from 100% (1st marking period English) to 65% (2nd marking period Calculus Honors)¹³. Progress was shown on the task initiation and social skills goals. [S-73]
74. Student was self-advocating for extra time on Calculus tests and reported to the Calculus teacher that Student independently used web-based resources and the teacher's Schoology page for extra assistance. [NT 651, 655, 681]
75. The District's psychologist provided six counseling sessions to assist Student to identify consequences to thoughts that may lead to maladaptive behavior. Student, demonstrating lack of insight or resistance to intervention, did not indicate the need to improve or change. [NT 81-84; S-62]

Tutoring:

76. During 8th grade the Parents engaged a private tutoring company that provided services to Student once per week through the end of 10th grade. In addition, during 10th grade, the Parents obtained tutoring services from another tutoring agency two to three times per week continuing through the end of summer of the 11th grade. [NT 781-782, 784]
77. In August 2015, the Parents signed a contract and paid in full for tutoring services for Student during the 12th grade school year, but Student has not chosen to access these tutoring services. [NT 784]

The District's Latest Evaluation

78. The District completed its last re-evaluation of Student in November 2013 (provided to the Parents in January 2014). The District did not conduct norm-referenced cognitive or achievement testing for purposes of that evaluation. Based on the review of existing data the IEP team determined no additional data were needed for purposes of the triannual re-evaluation starting in December 2013. The re-evaluation consisted only of a records review and reported data from teachers' ratings of Student's executive functioning skills in the classroom setting. [NT 52, 69-70; S-15]
79. To assess executive functioning the District used a 4-point Likert scale, which lacked standardization and norming necessary to render this scale reliable and valid. The results suggested that the teachers were not given clear/consistent instructions on how the skills on the scale should be measured, and the District averaged all the teachers' responses such that it is impossible to determine whether Student demonstrated significant needs in any particular class. [S-15]

¹³ At the time of the hearing it was uncertain whether Student would or would not pass Calculus for the year mostly due to low test and quiz scores. According to the Calculus teacher as of April 5, 2016, if Student handed in an extra credit assignment Student would be passing for the 3rd marking and passing cumulatively for the year. A passing Calculus grade was not needed for credit toward graduation. [NT 311, 648-649, 689, 691]

80. The writing assessment used for purposes of the re-evaluation was neither standardized nor norm referenced, being based on an essay completed for English Honors class, where Student nevertheless scored lower than peers in Focus (Student 12 out of a possible 28 points, Class 16 out of a possible 28 points), Content (Student 7/20, Class 13/20), Organization (Student 6/20, Class 11/20). Despite these results the teacher reported that Student was performing at an average level as compared with other students in the English Honors class [S-15]
81. The work habits data reported on the District's winter 2013 re-evaluation was out-of-date as it was based on reports of the Student's previous, 9th grade, teachers which were gathered in spring 2013. The 10th grade teachers did not provide work habits input. [S-15].
82. No classroom observation was conducted for purposes of the District's re-evaluation. [S-15]
83. The District's November 2013/January 2014 re-evaluation did not attempt to explore possible underlying emotional factors for Student's continuing difficulties with executive functioning including difficulty with organization, planning, and sustaining attention, lack of motivation, and lack of sustained attention in the classroom. [S-15]

Current Identified Needs: Executive Functioning and Self-Awareness/Social Skills

84. The independent evaluator identified specific areas of Student's need related to executive functioning as follows: Initiation (initiating tasks, starting tasks easily, being motivated, taking initiative when needed); Organization (managing personal effects, work, and multiple tasks including organizing tasks and thoughts while managing time effectively and working neatly); Planning (developing and implementing strategies to accomplish tasks, planning ahead and making good decisions); Self-monitoring (evaluating own behavior in order to determine the different approaches necessary, noticing and fixing mistakes, knowing when help is required, understanding when a task is completed); Attention (avoiding distractions, concentrating on tasks, and sustaining attention); Flexibility (ability to adjust behavior to meet circumstances, including coming up with different ways to solve problems, generating many ideas about how to do things, and being able to solve problems using different approaches); Emotional Control (thinking about consequences, maintaining self-control, keeping commitments).¹⁴ [S-62]
85. Although Student's self-reports on written inventories placed Student in the average range for age and gender among peers, during conversation with Student the independent evaluator was successful in eliciting Student's own acknowledgment of some needs such as being distracted frequently, having difficulty sustaining attention in school, having difficulty focusing and concentrating both within and outside the school environment. Student reported noting these difficulties across all classes, but indicated that they were more pronounced in courses that Student found boring or repetitive. Student additionally

¹⁴ Although during the IEE Student demonstrated a weakness in the area of Working Memory on the WAIS-IV, this was not a weakness identified at the time this skill was formally assessed on the WISC-IV, and another assessment instrument given at the time of the IEE showed average functioning in this area.

acknowledged experiencing some difficulty competing tasks, making decisions, and planning. [S-62]

86. Student also acknowledged difficulty consistently utilizing feedback in an appropriate manner and indicated that Student would change or alter Student's behavior only if Student agreed with the feedback. The independent evaluator opined that it is very important for Student to have a trusting and invested relationship with the individual providing direct instruction, otherwise Student may reject the instruction.¹⁵ [S-62]
87. Teacher ratings reflected that "[Student] is not a student with any significant deficiencies in reciprocal social behavior with the SRS derived scores falling within normal limits." Student has the cognitive skills needed for behavior change, but the task is to elicit Student's exercise of these skills. The independent evaluator concluded that Student's social skills needs are based on performance deficits, in that Student has in fact acquired the age-appropriate social skills yet does not always put the skills into practice, choosing to use them infrequently. The SSIS Social Skills subscale results led the independent evaluator to conclude that Student experienced difficulty expressing feelings, asking others for assistance, stating when there is a problem, and standing up for self or others. [NT 85, 88-89, 100-101; S-62]
88. An important aspect of Student's program should be targeted toward assisting Student to gain insight into weaknesses and needs and to develop motivation to put forth effort to learn and to implement the strategies and interventions that are offered. This should include fostering a relationship with an individual in the school setting who can provide direct instruction to Student about executive functioning skill strategies and who can support Student's engagement in developing these skills. [S-62].
89. Counseling services are a necessary component to Student's acceptance of the assistance offered, so Student can acquire understanding of and acceptance of Student's disability which is likely to be life long and be open to requesting help and seeking appropriate accommodations and available assistive technology and which will help independent skill performance and compensate for limitations. [S-62]
90. At the time of the IEE, after reviewing Student's then-current IEP, the independent evaluator noted that "numerous strategies are being attempted in order to address [Student's] needs" and recommended that the IEP team continue to try to find ways to motivate the Student to be more invested "toward accepting the services offered through special education" further noting that a "large component to the implementation of additional strategies for enhancing [Student's] executive functioning skills will be engaging [Student] and ensuring that [Student] gains insight as to [Student's] weaknesses and needs, as well as ensuring that [Student] is willing to put forth effort in [the] use of strategies and interventions that are made available to [Student]. [S-62]

¹⁵ The District is contracting with an outside individual from the IU to develop such a relationship. N.T. 856-857.

91. The independent evaluator opined that “considering [Student’s] age, without [the] willingness to take advantage of available accommodations, participate in interventions, and put forth effort toward further developing [Student’s] skills in these areas and learning compensatory strategies, little progress will be made.” [S-62]

13th Year:

92. As of the closing of the record, the hearing officer does not know whether the Parents will have Student take a “13th year” or if the Student would agree. As of the closing of the record and the writing of this decision the hearing officer does not know whether the District will issue a diploma to Student in June 2016 if Student meets graduation requirements. The District’s supervisor of special education for one of its feeder patterns testified with hesitation that there would have to be a meeting to make that decision. [NT 865]

93. If Student is in fact slated for a 13th year, then although Student could walk with Student’s graduating class in June 2016 Student would receive a blank paper rather than a diploma, and the diploma would be withheld until Student completes the 13th year. [NT 864-865]

94. If part of Student’s 13th year includes part time enrollment at a local college, the District would require Parents to pay that tuition. [NT 867-868]

Legal Basis and Discussion

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case therefore the Parents asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). All witnesses appeared to be testifying truthfully and the variations in their testimony usually seemed due to

their different perspectives on the facts rather than a basic disagreement about the facts themselves.

Independent Evaluations: The IDEA requires initial evaluations to determine eligibility and identify educational needs. Identification, classification or placement are not the only reasons students are evaluated, as the IDEA requires re-evaluations to determine whether any programmatic changes are warranted based on a student's emerging needs. Re-evaluations are subject to the same substantive and procedural requirements that the IDEA applies to evaluations. Substantively, then, an evaluation or re-evaluation must be sufficiently comprehensive to identify all the Student's special education and related services needs. Re-evaluations are required every three years, unless the agency and parents both agree that the re-evaluation is unnecessary and the parent waives the three-year re-evaluation requirement 34 C.F.R. §300.301(c)(2)(ii); 34 C.F.R. §300.303; 34 C.F.R. §300.304(c)(6). In Student's case the District opted to conduct an abbreviated re-evaluation in November 2013 (report given to the Parents in January 2014).

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency..." 34 C.F.R. § 300.502(b)(1). However, failure to express disagreement is relevant but not controlling as part of the equitable analysis for IEE reimbursement. In a 1999 decision the Third Circuit concluded that "the parents' failure to express disagreement with the District's evaluations prior to obtaining their own does not foreclose their right to reimbursement." *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999). Whether a school district's evaluation was appropriate is, obviously, the central test, as has been demonstrated when the issue has come before previous Appeals Panels. Several panels concluded over the years that the IEE must answer questions not previously raised, provide essential new information, or add something to the prevailing understanding of the student's disability. A mere showing of differences between the district and independent evaluations is not sufficient. See *In Re the Educational Assignment of K.B.*, Special Education Opinion #1111; *In Re the Educational Assignment of D.S.*, Special Education Opinion #899; *In Re the Educational Assignment of P.C.*, Special Education Opinion #1140; *In Re the Educational Assignment of C.S.*, Special Education Opinion #1116; *In Re the Educational Assignment of J.G.*, Special Education Opinion #1565.

Reimbursement for Expert Testimony: Fees for expert testimony at a due process hearing are not reimbursable under the IDEA. *Arlington Central School District v. Murphy*, 548 U.S. 291 (2006). However, expert fees are available to prevailing parties under Section 504. See, e.g., *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, Civ. A. No. 11-574, 2012 U.S. Dist. LEXIS 15215, 2012 WL 400686, at *12 (M.D. Pa. Feb. 8, 2012); *L.T. ex rel. B.T. v. Mansfield Twp. Sch. Dist.*, Civ. A. No. 04-1381(NLH), 2009 U.S. Dist. LEXIS 70133, 2009 WL 2488181, at *2 (D.N.J. Aug. 11, 2009). While the Rehabilitation Act "does not explicitly provide for the recovery of expert fees as part of the costs, the Rehabilitation Act incorporates the remedies available under the Civil Rights Act of 1964, which specifically provides for the taxation of expert fees." *L.T. ex rel. B.T.*, 2009 U.S. Dist. LEXIS 70133, 2009 WL 2488181, at *2; see also Civil Rights Act, 42 U.S.C. § 2000e-5(k) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's

fee (including expert fees) as part of the costs . . ."). *S.M. v. Sch. Dist. of Upper Dublin*, 2012 U.S. Dist. LEXIS 101047, *18-19 (E.D. Pa. July 20, 2012).

FAPE: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). "Special education" is defined as specially designed instruction...to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that Student or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."

Benefits to the child must be 'meaningful'. Meaningful educational benefit must relate to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "...the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than "trivial" or "*de minimus*" benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts "need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity"). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) Thus, what the statute guarantees is an "appropriate"

education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child’s educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue. Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method (“hour for hour”), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, more recent method (“same position”), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the school district’s violations of the IDEA.”). The “same position” method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The “same position” method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default “hour for hour” approach will be used.

Section 504: With respect to the Section 504 claims, the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood*, *supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Although the majority of the Parent’s claims have been addressed pursuant to the IDEA, their request for reimbursement for the independent evaluator’s testimony at the due process hearing is properly brought under Section 504.

Discussion

Despite Student’s clearly frustrating the Parents and at times the teachers, there is ample evidence to demonstrate that Student has acquired the basic reading, math and writing skills that are required for success in college. Norm-referenced standardized testing revealed Student to be functioning in Reading Comprehension and Fluency at the 75th percentile, in Mathematics and Math Fluency at the 70th percentile, and in Written Expression at the 79th percentile. In addition,

from an assessment in 2011 to the IEE in 2015 Student's Verbal Comprehension Index has increased significantly, by seventeen (17) points on the bell-shaped curve placing Student on that measure in the Superior Range.¹⁶ These scores demonstrate that throughout Student's 13-year tenure in the District, the early part of which was marked by such severe behavior problems that one-to-one behavior management was needed, Student has been taught the reading, writing and arithmetic skills necessary for success in post-secondary education and beyond. It is quite remarkable and to the District's and the Parents' great credit, that Student's behavioral trajectory has improved to the point where the record is devoid of any recent acting out behaviors.

Student's functioning in the educational setting has been adversely affected by Attention Deficit Hyperactivity Disorder, a life-long disability, and remnants of Oppositional Defiant Disorder such that Student's grades in coursework do not reflect Student's ability. Student's executive functioning skills are diminished by ADHD and additionally there is an admixture of egocentrism, oppositionality, and somewhat inadequately developed social skills for age that intertwine to make it difficult for Student to acknowledge needing help, asking for it, and/or accepting it when offered. It is of concern, then, given Student's life-long ADHD and clear remnants of ODD, and the chronicity of Student's failure to learn/implement/understand the need for techniques to improve executive functioning, that the District has not consistently provided a very clear, structured, regularly scheduled, research-based individual intervention to address acquisition of executive functioning skills, and in light of Student's high resistance to help, individual counseling to help Student understand and overcome what lies beneath the resistance.

I agree with the independent evaluator that the District has attempted numerous strategies to address Student's needs. I also note that in addition to Student's resistance, factors outside the District's control such as Student's and Parents' focus on Student taking higher level courses in spite of having difficulty with the precursor courses, and taking extra electives that crowded Student's schedule, certainly cannot be ignored. Nevertheless, I find two weaknesses in the District's programming for Student. Although the District offered study skills instruction at various times and in various amounts, the very extensive record does not reveal that the District provided what Student seems to have needed: individual direct systematic research-based instruction in executive functioning skills with close monitoring, in concert with Student's and an instructor's regular analysis of exactly what Student needed to do next. The fact that Student did not always attend what was offered was a barrier to learning executive functioning skills. This barrier, Student's sensitivity to criticism and Student's exceptionally strong resistance to acknowledging the need for help and accepting help, should have triggered the District to provide Student with individual counseling around these specific issues in addition to whatever outside psychotherapy the Parents provided. Notably, except for the six sessions with the psychologist who may have given up too quickly, the guidance counseling given to Student involved transition services [career exploration, college admissions] rather than psychological counseling.

Therefore, given Student's presentation with executive functioning deficits and the significant barrier that Student's resistance presents, I find that FAPE should have included a one-to-one session for 30 minutes three days a week, or 45 minutes two days a week, focusing on direct

¹⁶ Student's Working Memory decreased significantly on one measure but on another measure Student was in the average range.

teaching for the development of executive functioning skills and co-monitoring their implementation with Student, as well as 30 minutes of individual counseling per week to address resistance, reality checks, and motivational issues. I recognize that the District made an attempt to provide the counseling services and that the Student thwarted the District's efforts on Student's behalf, and this will be taken into consideration when fashioning an equitable remedy.

Student may use the compensatory education until Student's twenty-sixth (26th) birthday or college graduation with an undergraduate degree, whichever comes first. This period will encompass a 13th year as well as the years Student could be expected to be pursuing an undergraduate degree in light of the national trend toward students taking more than four years to acquire their first degree.¹⁷ The compensatory education is intended to supplement, and not be a substitute for, the direct instruction in executive functioning and the counseling that will be provided under Student's IEP if Student takes the 13th year. The hours of compensatory education shall be valued at the cost to the District of providing such services, cost being salary and fringe benefits for the professionals qualified to provide these services.

The District's 2013 re-evaluation was inappropriate as it did not appropriately explore factors other than ADHD that were contributing to Student's ongoing needs. The IEE provided a thorough review of all possible areas of need, in particular social/emotional factors, and was able to rule out serious contributory emotional factors. The IEE also provided recommendations to guide the IEP team in fashioning Student's 12th grade IEPs. I will order the District to reimburse the Parents for the IEE.

The Parents brought this action under Section 504 as well as under the IDEA. As they are the "prevailing party" on the IEE issue and because the independent evaluator's testimony was very helpful to the hearing officer in understanding Student's needs I will order the District to reimburse the Parents for his professional services rendered when testifying at the hearing.

The Parents have adduced no evidence to prevail on the issue of the need for an independent FBA and on the issue of reimbursement for tutoring services. Their requests on these issues will be denied.

The issue of a 13th year is addressed in Dicta below and also in the Order should Student take a 13th year.

Dicta: Unless Student graduates and receives a high school diploma Student is entitled to stay in school and receive special education services until the end of the school year in which Student turns twenty-one. I completely understand the Parents' concerns about spending money for college in light of the possibility that Student will fail some or all courses. However, I am compelled to point out that withholding graduation and requiring Student to be in high school another year may be damaging to Student's self-esteem and may compromise Student's relationship with the Parents. It may also create a negative attitude toward education in general. By the end of 11th grade Student did pass all subjects except one with grades in the 80's, two of

¹⁷ http://www.nytimes.com/2014/12/02/education/most-college-students-dont-earn-degree-in-4-years-study-finds.html?_r=0. December 1, 2014: "The vast majority of students at American public colleges do not graduate on time, according to a new report from Complete College America, a nonprofit group based in Indianapolis."

these courses being Honors and one being AP, and the efforts that Student expended to achieve these grades should not be ignored or negated. Based on descriptions by the psychiatrist and the independent evaluator it is a concern that Student may feel demeaned by having to do a 13th year, and may deliberately sabotage college when Student eventually does enroll there. Consideration should be given to letting Student graduate, have Student defer college acceptance and take a “gap year” (a choice that is becoming more widely utilized), and during that year seek employment for the first time, learn basic self-care skills needed for college such as shopping for food, simple cooking and doing laundry, and use the compensatory education awarded for executive functioning instruction and counseling. In order to provide a “lab” for Student to practice implementing learned executive functioning skills, Student could enroll in one or two basic courses day or evening at a local community college. This year could prove much more valuable in the long run than a 13th year and I recommend it for the Parents’ and the Student’s careful consideration.

Order

It is hereby ordered that:

1. The District has failed to provide Student with a free appropriate public education in the area of direct explicit systematic individual instruction in executive functioning skills and the necessary counseling services to benefit from such instruction.
2. Student is due ninety (90) minutes of compensatory education in the area of executive functioning for every school week that the District was in session during the regular academic year from November 30, 2013 to the last day of the hearing, April 5, 2016. The compensatory education is to be used solely for direct instruction in executive functioning skill acquisition and monitoring.
3. As individual counseling to assist Student in the understanding of and willingness to accept assistance for accommodating Student’s life-long disability is necessary for Student’s acquisition of executive functioning skills, Student is due thirty (30) minutes of compensatory education in the area of counseling for every school week or part of a school week that the District was in session during the regular academic year from November 30, 2013 to the last day of the hearing, April 5, 2016. The total time that Student received the six counseling sessions from the District psychologist will be deducted from the total hours due. The compensatory education awarded is to be used solely for counseling services.
4. The compensatory education shall be used in accord with the specifications above.
5. The District shall reimburse the Parents for the independent educational evaluation they obtained in January and July 2015.
6. The District shall reimburse the Parents for the cost of the independent evaluator’s professional services when he provided in-person testimony at the due process hearing.

7. The District is not required to fund an independent Functional Behavior Analysis (FBA).
8. The District is not required to reimburse the Parents for tutoring expenses.
9. The Student shall have the option of completing a 13th year in the District. Should Student remain enrolled in the District for a 13th year, prior to the start of the 2016-2017 school year the IEP team must convene and design an IEP for Student that addresses the needs identified in the IEE. At a minimum the IEP must address direct instruction in executive functioning as well as provide counseling services. In order to provide a “lab” for Student to practice and hone the taught skills, Student will need to be enrolled in coursework at the high school, or if the parties agree, one course at an additional supplementary location. The Parents along with the District must design a system of consequences and rewards to be implemented at home and at school until Student learns to value success as the sole reward.

Any claims not specifically addressed by this decision and order are denied and dismissed.

May 25, 2016

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official