

*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

Child's Name: J.C.  
Date of Birth: [redacted]

ODR No. 17373-15-16-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Mark W. Voigt, Esquire  
Plymouth Meeting Executive Campus  
600 West Germantown Pike, Su. 400  
Plymouth Meeting, PA 19462

Methacton School District  
1001 Kriebel Mill Road  
Norristown, PA 19403-1047

Christina M. Stephanos, Esquire  
Sweet, Stevens, Katz & Williams LLP  
331 Butler Avenue  
New Britain, PA 18601

Dates of Hearing:

April 11, 2016; April 26, 2016; May  
16, 2016

Record Closed:

June 17, 2016

Date of Decision:

July 2, 2016

Hearing Officer:

William F. Culleton, Esquire, CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> was an eligible student of the school district named in this matter (District) from kindergarten until the end of ninth grade. Parents unilaterally enrolled Student in a private school for tenth grade. The Student is classified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disabilities of Other Health Impairment and Specific Learning Disability.

Student's Parent[s] request due process pursuant to the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>2</sup> asserting that the District failed to address Student's unique educational needs when Student was in eighth grade (2013-2014) and ninth grade (2014-2015). Parents seek reimbursement of private school<sup>3</sup> tuition for Student's tenth grade year (2015-2016), as well as compensatory education for the previous two years. In addition, they seek reimbursement for private tutoring that they provided Student, and for the cost of a private psychoeducational evaluation.

The District asserts that its services were appropriate during the relevant period, and that the private school unilaterally selected by Parents is inappropriate for Student. The District asserts that tuition reimbursement would be inequitable, and it seeks dismissal of all claims.

The hearing was completed in three sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that District

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<sup>1</sup>Student, Parents and the respondent District 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>Parents cited section 504 in their complaint, but did not refer to their section 504 claim during the hearing or in written summation. I consider this claim to be derivative of the IDEA claims and thus subsumed in those claims. See, 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 (2011) (M.D. Pa. 2011). Therefore, I will apply both statutes, utilizing only the IDEA analysis.

<sup>3</sup> The private school is referred to in this decision as "School".

services were inappropriate during most of the relevant period, and I order both tuition reimbursement and compensatory education. I decline to order the other requested services and reimbursements.

### **ISSUES**

1. During the relevant period of time, from February 14, 2014 to the first day of school in the 2015-2016 school year, did the District offer and provide Student with a FAPE?
2. Did the District inappropriately fail to provide Student with extended school year services (ESY) during the summers of 2014 and 2015?
3. Is the private placement provided by Parents for the 2015-2016 school year appropriate for Student?
4. Considering the equities, should the hearing officer order the District to reimburse Parents for private school tuition, fees and transportation costs that they paid for the 2015-2016 school year?
5. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant period?
6. Should the hearing officer order the District to reimburse Parents for the cost of private tutoring of Student, expended during the relevant period?
7. Should the hearing officer order the District to reimburse Parents for the cost of a private educational evaluation that they obtained for Student?

### **FINDINGS OF FACT**

1. Student entered the District for kindergarten and remained a student in the District until the end of ninth grade (2014-2015 school year). (P 1 p. 2-3.)
2. Student is of average intelligence. Since first grade, Student has demonstrated significant discrepancies in different areas of cognitive functioning when tested on standardized instruments. Since first grade, Student has demonstrated difficulties with attention to task. (P 1 p. 3.)
3. The District re-evaluated Student in October 2012, when Student was in seventh grade. The re-evaluation report classified Student with Other Health Impairment due to Student's

struggles with attention and organization. The re-evaluation report also classified Student with Specific Learning Disability, due to Student's deficits in listening comprehension. (P 1.)

4. The report recommended placement in a learning support classroom for English, reading and mathematics; it recommended placement in general education for science and social studies. It recommended that IEP goals and specially designed instruction focus on promoting work habits in addition to acquiring academic skills or meeting specific outcomes. (P 1.)
5. The District was aware that Student was struggling with organization during class in September, October and November 2013, when educators discussed Student's difficulty keeping up with class, difficulty understanding instructions and lack of organization. (S 24.)
6. In November 2013, when Student was in eighth grade, the IEP team provided an IEP for Student, placing Student in itinerant level learning support. Student was to be in a special education learning support classroom for English, and in a regular education classroom co-taught by a special education teacher for mathematics. Student was placed in a regular education classroom for science and social studies, with supports set forth in the IEP. Student was to be in regular education classrooms without support for other subjects. (NT 530; P 5.)
7. Co-taught classes are staffed with a regular education and a special education teacher, along with educational aides. Class size averages from 20 to 26 students. Eight to ten of the students have an IEP. Seventy-five percent of those have attention or organizational difficulties; some have other disabilities including emotional disturbance. (NT 551-556, 618.)

#### EIGHTH GRADE

8. Student's eighth grade (November 2013) IEP goals addressed achievement in the grade level mathematics curriculum, and reading comprehension. (P 5.)
9. Student's eighth grade IEP included specially designed instruction and modifications addressing Student's needs with regard to understanding directions, organization and attention. These included specialized techniques to clarify directions; use of an eighth period to support Student with academic concerns and organization needs; modifying tests in science and social studies; preferential seating, prompts and cues; use of a calculator; study guides; and modification of local assessments. (P 5.)
10. Student's IEP provided that Student's local assessments would be accommodated by providing extended time, small group testing, simplifying directions, reading directions aloud, use of highlighters and organizers, and use of a calculator. (P 7.)
11. The November 2013 IEP found Student ineligible for ESY services due to continued progress and lack of regression. (P 7.)

12. The District's progress monitoring for Student's eighth grade, third and fourth marking periods in mathematics showed that Student was consistently performing below baseline. Thus, Student did not achieve Student's IEP goal in eighth grade. Student's report card grades for the third and fourth quarters also were below the baseline of 86, at 82 and 81, respectively. (P 7; S 22.)
13. The District's progress monitoring for Student's eighth grade, third and fourth marking periods in reading comprehension showed that Student was consistently performing below Student's baseline of 73. Thus, Student did not achieve Student's IEP goal in eighth grade. Student's report card grades for the third and fourth quarters in Literature were inconsistent at 85 and 65, respectively. (P 7; S 22.)
14. In April 2014, Student participated in Pennsylvania System of School Assessment (PSSA) testing. In mathematics, Student scored below basic in one test of numbers, as well as in geometry. Student scored basic to proficient in algebraic concepts, and proficient in data analysis and probability. (S 23.)
15. On May 12, 2014, the District, with Parents' agreement, modified the November 2013 IEP to modify Student's placement for ninth grade English, placing Student in a regular education classroom co-taught by a special education teacher. Student was placed in a non-co-taught class for Algebra I. No other changes were made. (NT 530; P 7.)
16. On May 28, 2014, Student was evaluated by a local behavioral health agency and diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (P 17.)
17. The behavioral health agency provided services to Student in the home, including services to address difficulties with attention in class and organizational skills. These included teaching Student to utilize a binder for worksheets and school papers; an agenda book; and a monthly calendar. Parents and the agency taught Student how to organize, utilizing these tools. This included prompts, reminders, and periodic checking for Student's compliance. (P 17.)

## NINTH GRADE

18. In the first quarter of Student's ninth grade year, Student scored an average of 68 on tests and quizzes in mathematics. Student obtained a report card grade of 74 for that marking period. (S 23.)
19. In the first quarter of Student's ninth grade year, Student scored an average of 75 on tests and quizzes in English, which was two points above baseline. Student obtained a report card grade of 83 during that marking period. (S 23.)
20. In November 2014, Student's mathematics teacher noted that Student had trouble with multi-step problems, to the point of being overwhelmed. The teacher also noted that Student was "slowing [the rest of the class] down." (P 34 p. 6; S 25.)

21. Early in November 2014, Parents began providing a mathematics tutor privately to Student, one time per week. (P 9.)
22. On November 24, 2014, Student's IEP team provided a new annual IEP. The IEP continued Student's placement in learning support at an itinerant level. It placed Student in a regular education class co-taught by a special education teacher for English. It did not place Student in co-taught mathematics because of scheduling difficulties. (NT 644; P 10.)
23. The November 2014 IEP provided a goal for mathematics, to be assessed "tri-weekly". The team reduced the percentage accuracy stated in the goal from 90 to 85, in order to make the goal more attainable for Student, and in light of Student's baseline of 68. (P 10.)
24. The November 2014 IEP provided a goal for reading comprehension, to be assessed "tri-weekly". The team increased Student's baseline for reading comprehension to 90% from 85% at Student's request, in order to encourage and motivate Student. (P 10.)
25. The November 2014 IEP recognized the same three Student educational needs that had been recognized in the November 2013 IEP. These included multi-step directions in mathematics problems; mathematics problem-solving and calculations; and listening comprehension. (P 10.)
26. Student's special education teacher recognized that Student's most serious deficits were in attention and organization. (S 28.)
27. Student's mathematics teacher was unable to use prompting and cues to support Student's attention to task without detrimentally slowing the pace of the entire class. (NT 335-336; P 10 p. 7; S 16 p. 15.)
28. Student's mathematics teacher assisted Student one-to-one after school on a number of occasions. Student was unable to obtain one-to-one assistance from the mathematics teacher consistently due to the teacher's inconsistent availability. (NT 328-329, 337-339.)
29. The November 2014 IEP continued the modifications for local assessments that had been provided in the November 2013 IEP. (P 10.)
30. The November 2014 IEP continued or amended slightly all but one of the specially designed instruction and modifications set forth in the November 2013 IEP. It eliminated use of the eighth period to support Student with academic concerns and organization. It added three 15-minute sessions per six-day cycle of instruction for mathematics calculation and problem solving, during study hall periods. (P 10; S 23.)
31. The November 2014 IEP found Student ineligible for ESY services due to continued progress and lack of regression. (S 23.)
32. In the second third and fourth marking periods of Student's ninth grade year, Student's average progress monitoring scores for mathematics were consistently below baseline. Thus, Student did not achieve Student's IEP goal in ninth grade. (S 23.)
33. Student's report card grades in mathematics for those marking periods declined significantly; they were 71, 71 and 57, respectively. Student's midterm examination score

was 62 and Student's final examination score was 36. Student finished ninth grade with a final average of 64. (S 23.)

34. Student scored in the below basic range in mathematics on benchmark monitoring given in the spring of 2015. (P 24.)
35. Student struggled with organization in ninth grade, contributing to confusion and reduced grades. (NT 313, 582-584, 593.)
36. Student experienced confusion in ninth grade mathematics. Student struggled with remembering the multiple steps required to solve algebraic problems. (NT 308, 317, 326-327.)
37. Student struggled with reading comprehension at the ninth grade level. (NT 308-312.)
38. In the second marking period of Student's ninth grade year, Student's average progress monitoring score for reading comprehension was above baseline at about 83.8; however, in the second and third marking periods, Student's average scores were below baseline. Thus Student did not achieve Student's IEP goal in ninth grade. (S 23.)
39. Student's report card grades for those marking periods were 84, 79 and 72, respectively. Student's midterm examination score was 67 and Student's final examination score was 56. Student finished ninth grade with a final average of 76. (S 23.)
40. Student's special education teacher employed modifications and accommodations not found in Student's IEP. These included using visual aids to help with timelines of events, daily check-ins with Student at the end of the day to address organizational issues, and prompts to write down homework and keep Student's binder organized. (NT 584-585; S 28.)
41. In the spring of 2015, Student experienced difficulty taking Student's medications regularly. (S 13.)
42. Student lost confidence in Student's academic abilities during ninth grade. (S 28 p. 19, 20.)
43. Student was unable to maintain the pace of regular education classes, as reflected in Student's grades in ninth grade. (NT 578-581; S 16, 23; P 10, 24.)
44. The co-taught model in conjunction with the "push-in" model of special education services did not provide enough structure or intervention to support Student in making progress on self-organization skills, mathematics achievement or reading comprehension achievement. These models were not significantly effective in accommodating Student's organizational and academic deficits to enable access to the general education curriculum to a level that would be consistent with Student's cognitive abilities. (NT 376-382.)
45. In April 2015, Parents requested a meeting due to Student's declining grades and struggles. A meeting was held, and teachers noted Student's struggles with starting work, losing an assignment book, rushing and inability to find papers or homework, and inappropriate socializing during class time. Parents indicated that they were considering private school placement during this meeting. (S 13, 25 p. 57.)

46. On April 20, 2015, Student's Parents applied to the School for its summer 2015 program. (S 28 p. 21.)
47. The District became aware of Student's placement for summer school with the School, and Parents' intention to consider private school for Student's tenth grade year, in May 2015. (NT 586-587; S 28.)
48. On May 26, 2015, Parents applied to the School for Student's admission for 10th grade. Parents paid an application fee. (S 28.)
49. In June 2015, Parents notified Student's special education teacher that they were exploring the possibility of private school placement. (S 13 p. 7, S 25 p. 66, 69.)
50. In June 2015, Student understood that Student would be attending a private school for tenth grade. (NT 330-331.)
51. Parents provided Student with private ESY services during the summer of 2015. Parents selected the private School for children with learning differences to provide this service. Student reported a positive experience at the School. (NT 184-189; S 13 p. 5.)
52. Parents again notified the District of their intent to enroll Student in the School for tenth grade in writing on or about August 15, 2015. (NT 588; S 16.)
53. The District convened an IEP team meeting on August 20, 2015, at which Parents requested that the District pay for placement of Student at the School, so that Student could be placed in smaller classes. (NT 588-589; S 16.)
54. On August 20, 2015, the IEP team provided a new IEP for Student. The IEP continued Student's placement in learning support at the itinerant level, placing Student in regular education with co-teaching by the special education teacher for English, mathematics, science and social studies. Student was to receive other subjects in a regular education classroom without co-teaching. (NT 590; P 14.)
55. The IEP team concluded that Student needed varied instructional techniques, accommodations and specially designed instruction, in addition to pacing. The team added organization and study skills to the list of Student's educational needs. (P 14.)
56. The August 2015 IEP revised Student's mathematics goal. The goal was to be measured by Student's performance over three consecutive probes at 85% accuracy. Student's ninth grade, fourth quarter scores on the previous goal were listed as a baseline, assuming that these would be averaged. (NT 597; P 14.)
57. The August 2015 IEP stated Student's ninth grade, fourth-quarter scores as the baseline for the reading comprehension goal in the IEP. (P 14.)
58. The August 2015 IEP added six new goals, addressing writing, arithmetic operations, organization and post-secondary transition. These goals were drafted in measurable form, but did not have baselines; the IEP promised to create baselines during the first six weeks of Student's 10th grade school year. (P 14.)



59. The August 2015 IEP added 19 accommodations or modifications, including use of the Student's school Curriculum Support Room or case manager to check with Student daily at the beginning and the end of the school day; parent-teacher meeting; Student's restatement of directions to check for understanding; outlines of notes and larger assignments; chunking and setting timelines for extended projects; evaluation for assistive technology; repetition and review of concepts; direct instruction in writing within the Curriculum Support Room, three days per six day cycle, 15 minutes per session; replacement instruction for math, three days per six-day cycle, 15 minutes per session; replacement instruction for reading comprehension, three days per six day cycle, 15 minutes per session; study guides; breaking tests into two parts; math formula sheet for math assignments; frequent checks for understanding; encouragement of self-efficacy; direct instruction in organizational skills daily, 15 minutes per day; quarterly IEP team meeting; use of the Curriculum Support Room for study hall periods; and scheduling Student for a special course for direct instruction in executive functioning skills, daily, 15 minutes per day. (P14.)
60. The class for executive functioning offered in the August 2015 IEP was designed for students looking forward to post-secondary education, to develop needed study skills for those settings. (NT 591-593.)
61. The August 2015 IEP found Student ineligible for ESY. (P 14.)
62. Parents provided a copy of the behavioral health agency treatment plan, including interventions with regard to Student's organization of schoolwork, in May 2015. (P 14.)
63. At the August 2015 IEP team meeting, Parents signed permission for the District to perform a re-evaluation of Student, because the three-year re-evaluation was due as provided by law. At the meeting, it was decided that additional testing would be performed, including cognitive testing, an instrument designed to assess executive functioning, and a general emotional and behavioral assessment instrument. (P 14.)
64. On August 14, 2015, and again on August 31, 2015, Parents notified the District that they were enrolling Student in the School. (P 35; S 25 p. 74.)
65. The District provided a re-evaluation report on October 26, 2015. The reevaluation classified Student as a child with the primary disability category of Other Health Impairment, and a secondary disability category of Specific Learning Disability. Specific Learning Disability was found in the areas of mathematics computation, mathematics problem-solving and listening comprehension. The report identified educational needs as mathematics problem-solving, mathematics calculation, reading comprehension, attention and working memory. (P 23.)
66. The 2015 re-evaluation report confirmed that Student has cognitive ability in the average range. It also confirmed that Student has not achieved automaticity in mathematics operations. It confirmed that Student struggles with reading comprehension. It confirmed that Student struggles with attention and organization. (P 23.)
67. The 2015 re-evaluation report found Student ineligible for ESY services. (P 23.)

68. The 2015 re-evaluation report recommended specially designed instruction including organizational strategies, preferential seating, cueing, peer tutoring, collaborative learning, announcing and planning transitions and other disruptions, a stimuli-reduced study area, use of a calculator, chunking information, repetition of assignments, reduced workload, frequent teacher check ins, modified assessments, extended time, clarification of directions, checking for comprehension, co-taught classes for mathematics and English, and use of the Curriculum Support Room throughout the day for study hall purposes. (P 23.)
69. In November 2015, the District offered a new IEP, and it revised this IEP on February 8, 2016. (P 28.)
70. In December 2015, the District received the report of a speech and language evaluation, obtained by the District based upon the Parents' private educational evaluation conveyed to the District in November 2015. The evaluator noted weaknesses in following directions and semantic relationships. She also noted that Student is a "slow namer", and falls below average by one standard deviation for naming category words, indicating borderline word-finding difficulties. The evaluator recommended specially designed instruction to address these weaknesses, but found Student ineligible for special education due to overall scores in the average range for expressive and receptive language, as well as articulation and speech skills. (S 20.)
71. The IEP as revised in February 2016 recognized a new diagnosis of Tourette's syndrome, based upon the report of the private psychologist that Parents had retained; the report had been provided to the District in November 2015. (P 28.)
72. The November 2015 IEP, as revised in February 2016, made changes to the offered IEP goals. The IEP eliminated a mathematics problem-solving goal. The reading comprehension goal was written so as to be measurable, but there was no baseline; baseline was to be determined within four weeks of Student's return to school. (P 28.)
73. The November 2015 IEP, as revised in February 2016, made changes to the offered modifications and specially designed instruction. It added a requirement to provide teacher notes to Student and study guides at least five days prior to assessments. It added nine new modifications and specially designed instruction, including assuring placement in co-taught sections of each core curriculum class; reduced amount of work; redirection by teacher when off task; encouraging eye contact when speaking with Student; providing reading assignments in advance; positive reinforcement for time on task; numbered task analysis for assignments; meeting with the school counselor to discuss Student's Tourette's syndrome; and strategies to assist with word finding difficulties. (P 28.)
74. The November 2015 IEP, as revised in February 2016, provided related services in the form of individual counseling, once per six day cycle, 25 minutes per session. (P 28.)
75. On January 19, 2016, the District received a speech and language evaluation. (P 29.)
76. On February 6, 2016, Parents signed an application for financial aid with the School. (S 28 p. 55.)

77. On February 8, 2016, the District revised its IEP offered to Parents, declining to provide speech and language therapy services. (P 28.)
78. The School provides a curriculum aligned with state standards, through small classes designed to meet the needs of children with a variety of learning differences, including attention, organization, reading problems and mathematics difficulties. (NT 248-253, 256-257.)
79. The School's educational environment is designed to address Student's needs for organizational skill development and slower-paced academic instruction more effectively than the environment of a large public school, even with co-taught classrooms. (NT 372-375, 383-384.)
80. The School's educational environment helped Student to improve academically. Student's grades improved to low 80s for most courses in September 2015, and Student continued to do well subsequently. (NT 329-330, 261-275; S 28 p. 73, P 41.)
81. The School addressed Student's attention and organization difficulties and Student's issues with multiple-step processes. (NT 313-316, 262-270.)

## **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>4</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>5</sup> that the

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<sup>4</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>5</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.

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 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 Parents, who initiated the due process proceeding. If the Parents should fail to produce a preponderance of the evidence in support of Parents’ claim, or if the evidence is in “equipoise”, the Parents 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.

I found Student’s Mother (referred to as Parent in this decision) to be credible. Parent’s testimony appeared to be sincere and, despite some defensiveness during cross-examination, Parent’s way of answering questions overall suggested truthfulness. Parent’s testimony was for the most part consistent with the documentary record. I gave weight to the private evaluator’s opinions

on the reasons for Student's lack of progress, and the benefit of the School for Student; I found these to be consistent with the documentary record.

I gave reduced weight to the Student's case manager's testimony, which I found to be contrary to the documentary record, especially with regard to Student's performance during ninth grade. I gave full weight to all other District witnesses.

#### THE OPERATION OF THE STATUTE OF LIMITATIONS

Parents seek an order that the District failed to offer or provide Student with a FAPE from the beginning of school in the 2013/2014 school year to the first day of school in the 2015-2016 school year. Thus, they ask the hearing officer to determine that the District's services during that period of time were inappropriate, including any evaluation that identified Student's needs and any IEP delineating the services to be provided. This would require adjudication of the appropriateness of the Re-evaluation Report dated October 19, 2012 and the IEP dated December 7, 2012, because these documents set forth Student's District-recognized educational needs, and stated the special education services that the District promised to implement, during part of the 2013-2014 school year for which Parents claim compensatory education.

The District moved to dismiss any claim based upon District actions prior to February 14, 2014, which is exactly two years prior to the date on which the Parents filed their due process complaint. The District argued that the IDEA statute of limitations, 20 U.S.C. §1415(f), bars adjudication of all claims brought more than two years after parental knowledge or notice of the District actions on which such claims are based. The District argued that, consequently, the statute bars any adjudication of the appropriateness of the October 2012 re-evaluation report, the

December 2012 IEP, and any failure to provide a FAPE from the first day of school in 2013 to February 14, 2014.

I deferred ruling on the District's motion until I could hear pertinent evidence. Parents addressed the District's motion based upon a counter-argument that the IDEA limitation period starts to run, not upon parental discovery of the disputed District action, but upon parental discovery that inappropriate District actions have injured the child. Parents base this argument upon dicta in the recent decision of the Third Circuit, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015), in which the Court repeatedly referred to parental discovery of the child's "injury" as the start date from which the limitations period is intended to run.

While I recognize and accept the binding nature of the Third Circuit's decisions in Pennsylvania, I do not read the G.L. decision to discard the word "action" as it appears in the IDEA's statute of limitations and the regulations that implement it. Therefore, I do not accept the Parents' argument. On the contrary, and as instructed by the G.L. court itself, I give meaning to the statutory word "action" by reference to the remainder of the statutory section in which it is found. Thus governed by the statutory language, I conclude that the District's argument is correct, and that the IDEA statute of limitations bars any adjudication of the appropriateness of the District re-evaluation, IEP and provision of special education services prior to February 14, 2014.

The G.L. Court indeed frequently characterized the start date for the running of the statute of limitations as the date on which a parent receives notice of the child's "injury" or "injuries". See, e.g., G.L., 802 F.3d above at 604-5, 607-8, 611-15, 618, 620, 625, 626. Yet the issue of the start date for running of the IDEA statute of limitations plainly was not before the Court. In G.L., the parties had stipulated to a start date (labeled the "knew or should have known" or "KOSHK")

date.) G.L., 802 F.3d above at 606. Thus, the Court’s characterization of the start date in that case was dicta.

In its scholarly opinion in G.L., the Court made no attempt to define the start date; in fact, it used multiple terms for it, in addition to the term “injury”. The Court used the characterizations “violation” or “violations”, G.L., 802 F.3d above at 604-5, 607-8, 610-15, 617, 620-23, 625; “claim or claims”, G.L., 802 F.3d above at 604, 608-14, 616-618, 620, 625, 626; “deprivation”, G.L., 802 F.3d above at 604, 606; “basis for claims”, G.L., 802 F.3d above at 611; “cause of action”, G.L., 802 F.3d above at 611; “facts constituting the violation”, G.L., 802 F.3d above at 614; and “denied a FAPE”, G.L., 802 F.3d above at 606, 607. The Court made no attempt to show how the statutory term “action” could be construed to take on the meaning of these terms or of the term “injury”.

Read in context, the Court’s use of a variety of terms for the start date negates any inference that the Court intended to read the word “action” out of the IDEA’s statute of limitations, and substitute parental knowledge or notice of “injury” to the child as the touchstone for finding the KOSHK date. Rather, the context shows that the Court utilized the word “injury”, along with several other terms, listed above, as shorthand references to the statutory term, “action”, without attempting to define that term.

As noted above, I rely upon the statutory language in determining what issues are within my authority. I conclude that the statutory limitation period begins on the date on which the parent knows or should know what the District did or did not do; from the date of that knowledge, the parent has two years to request due process. If Parents file for due process regarding a particular District “action” more than two years after that KOSHK date, their complaint as to that “action” is barred by the IDEA statute of limitations.

The meaning of the word “action” in the statute of limitations is clarified elsewhere in the same section of the statute.<sup>6</sup> The IDEA procedural safeguards provision, 20 U.S.C. 1415, uses the word “action” to refer to the behavior of the local education agency for which the statute requires prior written notice to the Parents. At 20 U.S.C. 1415(b)(3), it requires that the local education agency provide Parents with prior written notice whenever it “(A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.” Immediately following this subsection, another subsection enumerates the procedural safeguard of filing a due process complaint notice, using terms set forth in the written prior notice subsection above (20 U.S.C. 1415(b)(3)(B)), and referring to “the alleged action which forms the basis of the complaint.” 20 U.S.C. §1415(b)(6)(A)(matters subject to complaint and request for due process); 20 U.S.C. §1415(b)(6)(B)(“alleged action”). A subsequent subsection, again referring to prior written notice, refers again to initiation or change in the enumerated services, and it refers to this as “action”. 20 U.S.C. §1415(c)(1)(A),(B)(characterizing agency initiations or changes as “action[s]”). Thus, the prior written notice subsections of the procedural safeguards section of the IDEA provide a context that clarifies the meaning of “action” as used in subsection 1415(f)(3)(C).

I conclude that the word “action” in section 1415(f)(3)(C) refers to the local education agency’s initiation or change of the identification, evaluation, placement or provision of a FAPE to the child. As the Third Circuit noted in G.L., “[I]t is ‘[a] standard principle of statutory construction . . . that identical words and phrases within the same statute should normally be given the same meaning.’” G.L., 802 F.3d above at 617 (citing Powerex Corp. v. Reliant Energy Servs.,

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<sup>6</sup> See G.L., 802 F.3d above at 616 (citing F.D.A. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).)(instructing that “[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”)



*Inc.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007)). Thus, I conclude that the term “action” as used in the statute of limitations subsection of the IDEA procedural safeguards section, 20 U.S.C. 1415(f)(3)(C), has the same meaning as the statute itself gives to that term in the procedural safeguards subsections, 20 U.S.C. §1415(b)(3) and §1415(c)(1)(A),(B). Compare, Hall v. Knott County Bd. Of Educ., 941 F.2d 402 (6<sup>th</sup> Cir. 1991)(applying common law “notice” rule to special education limitations case, court found that parental knowledge or notice that the educational agency was not providing certain educational services constituted notice tolling the limitation period, even where record showed that parents were unaware of their rights); Cf. James v. Upper Arlington City Sch. Dist., 228 F. 3d 764, 771 (6<sup>th</sup> Cir. 2000) (Guy, U.S.C.J., concurring), cert. den., 532 U.S. 995, 121 S. Ct. 1655, 149 L.Ed.2d 637 (2001) (Parental notice that services were not being provided).

Consequently, in the present matter, I will not adjudicate the appropriateness of the re-evaluation, the IEPs or the provision of special education services to the Student, if such District “actions” occurred prior to February 14, 2014<sup>7</sup>. For the same reason, I will not order the provision of compensatory education on account of that period of time.

## TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student’s needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three-part test to determine whether or not a school district is obligated to fund a private placement when parents

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<sup>7</sup> Nevertheless, I did take evidence and I do make findings regarding District actions prior to February 14, 2014, where such evidence and findings are material to the appropriateness of District actions after that date.

unilaterally remove a child and enroll the child in a private school. *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district’s program and placement legally appropriate under the IDEA? Second, is the parents’ proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, *Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). This three-part test is referred to as the “Burlington-Carter” test for tuition reimbursement claims under the IDEA.

#### IDEA OBLIGATION 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<sup>8</sup> 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.

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<sup>8</sup> The District is a local educational agency under Pennsylvania law, and thus assumes all of the obligations of a local school district. See generally, 34 Pa. Code Chapter 711.

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).

In this matter, I conclude that, for part of the relevant time period, the District failed to provide Student with a placement and program reasonably calculated to give Student an opportunity for meaningful educational benefit. Therefore, I conclude that it deprived Student of a FAPE for part of the relevant period.

In weighing the pertinent evidence, I have given weight to the evidence of Student's average-range general intelligence, and to the evidence that the Student demonstrated the ability in earlier years to achieve at a level commensurate with this ability. Therefore, even though Student was attaining passing grades in eighth and ninth grades, I weighed that achievement against Student's cognitive potential, Shore Reg'l High Sch. Bd. of Ed., 381 F.3d above at 198. I also gave grades reduced weight because they are not purely objective measures of achievement, and because in this case Student's grades were based in part on accommodated and supported local testing. See, e.g., D.S. v. Bayonne Bd. Of Ed., 602 F.3d 553, 567 (3d Cir. 2010)(grades in special education accorded less weight).

#### EIGHTH GRADE (2013-2014)

By the beginning of the relevant period in February 2014, the District was on notice of Student's difficulties in English, especially with reading comprehension, and mathematics. It was aware that Student was experiencing substantial difficulty with attention and organization. Its

teachers had communicated about these concerns as early as September, and Student's teachers discussed Student's organizational needs in October 2013 and November 2013.

In February, the District was on notice of the result of its November 2013 placement of Student in a learning support classroom for English and in a co-taught regular education class for pre-algebra instruction. It was aware of Student's progress monitoring data on the two November 2013 goals for reading comprehension and mathematics problem solving. Student evidenced some progress in reading comprehension in the second marking period, but Student regressed in mathematics in that marking period. Nevertheless, Student was able to obtain good grades, well above 80%, for English, literature and mathematics in the first two marking periods. I conclude that this evidence is not preponderant that the District was failing to provide a FAPE or that the District was on notice that Student needed a change in program and placement by February 14, 2014.

Nevertheless, Student's performance declined substantially from that day forward, during the third and fourth marking periods, in regard to Student's two goals in reading comprehension and mathematics. Student's progress monitoring scores for marking periods three and four in mathematics averaged 78 and 78.2, respectively, remaining well below the baseline of 86. In reading comprehension, scores averaged 57.2 and 65.5, respectively, again well below the baseline of 73.

Student's grades and statewide testing also showed a lack of progress. Student's mathematics grades were 82 and 81, completing a steady decline from the first marking period grade of 85. In addition, Student scored Below Basic on two of the four subjects tested by the PSSA for mathematics. In Literature, Student's grades were inconsistent, with the fourth period grade at 65.

These scores made it evident that Student's special education program was not succeeding, because Student was making no progress on Student's goals. I conclude that, by May 1, 2014, the District was on notice that its program and placement were not appropriate, and that it was obligated at this point to intervene and change its program and/or placement. M.C. v. Central Regional School District, 81 F.3d above at 397 (school district with notice "that a child has an inappropriate IEP or is not receiving [FAPE] must correct the situation.")

In May 2014, the District modified Student's IEP, for the transition to high school, but instead of increasing the supports provided, it reduced them. Student was moved from co-taught regular education for mathematics to a regular education class without co-teaching. For reading comprehension, Student was moved from learning support to co-taught regular education. Other supports remained the same. I conclude that this IEP planning for ninth grade, as revised in May 2014, was not reasonably calculated to provide Student with a FAPE, because it had been shown to be inadequate during the previous two marking periods, and because it provided less support for Student for ninth grade than had been provided unsuccessfully in eighth grade.

## NINTH GRADE

Predictably, Student struggled and failed in ninth grade mathematics. Student's teacher observed that Student was overwhelmed, and Student clearly demonstrated that Student's attention and organization deficits demanded a slower pace than the regular education algebra class could provide. Student was often confused. The modifications and accommodations in Student's IEP were not used effectively in the classroom. Student's organizational difficulties were prominent and Student appeared unable to cope without assistance. Student's progress monitoring showed no

meaningful progress toward Student's mathematics goal. Student's grades were palpably lower. Student's mid-term and final examination grades were 62 and 36, respectively.

Student's reading comprehension also failed to improve meaningfully. After a first marking period with probes scored above baseline, Student's progress monitoring average scores for the next two marking periods were substantially below baseline. Student's grades, meanwhile, declined steadily after the mid-term examination. Student's score in that examination was 67, and Student's final examination score was 56.

While Student's overall grades (supported by modifications in the IEP) were passing, Student lost confidence in Student's own academic ability during ninth grade. Student made no meaningful progress in Student's areas of weakness, including attention to task, organization, reading comprehension and mathematics. I conclude that Student's placement in regular education with itinerant supports was inappropriate for Student, who needed substantially more intervention, and that the District knew or should have known that Student needed more supports as of May 1, 2014.

In November 2014, Parents employed a tutor privately to help Student with mathematics. Parents also obtained the assistance of the local behavioral health agency to help Student with organizational challenges. The agency treatment plan included teaching Student organizational strategies. I conclude that the District should have been delivering these services.

Student's annual IEP review was due in November 2014, and the District convened an IEP meeting on November 24, 2014. Inexplicably, the District continued Student's placement in regular education mathematics without co-teaching, despite the mathematics teacher's strongly worded written recommendation to the contrary. Although the District cited scheduling issues,

there was no explanation of how scheduling issues were considered to be so disruptive that a child should remain in a placement where the child had made on progress on IEP goals for a full year.

Instead of learning support or co-teaching for mathematics, the District provided three 15-minute sessions per six-day cycle of instruction for mathematics calculation and problem solving, during study hall periods. The Student testified that this arrangement confused Student because a different mathematics teacher was helping Student after school when the regular mathematics teacher was unavailable, and the two teachers were demonstrating different approaches to solving mathematics problems. (FF 36.) Thus, in ninth grade, Student was being taught Algebra by three different teachers (including the private tutor). I conclude that this jury-rigged approach was inappropriate for Student, whose unique constellation of disabilities (attention deficit, organization and executive functions deficits, and a specific learning disability in mathematics) made it especially hard for Student to juggle the numerous and varied interactions with these teachers.

The mathematics goal remained the same in the November 2014 IEP, except that the baseline was reduced from 86% to 65% and the goal itself was reduced from 90% to 85% accuracy for three consecutive trials. Thus, the District made few changes in its approach to teaching Student through the November 2014 IEP.

In English, the IEP team reduced the level of support from learning support classroom to co-taught regular education. Although there was evidence of Student's continued difficulty with grade-level reading comprehension, and despite the Student's failure to make progress on the IEP goal in the previous year, the District raised the goal for comprehension questions to 90% correct over three marking periods, from 85% correct. The IEP notes that this was at the Student's request to help Student with motivation. While I do not presume to criticize the IEP team's judgment in



responding to Student's wishes in this way, I conclude that this amendment failed to address Student's more fundamental educational need in reading comprehension appropriately.

Presumably in order to accommodate this and other uses of the study hall period, the IEP dropped the specially designed instruction that provided for check-ins at the end of the day to help Student with organizational challenges, even though the special education teacher deemed those to be needed in order to address Student's organizational challenges. (FF 40.) There was no goal for teaching organizational strategies. There was not specially designed instruction to teach Student to regulate Student's own attention and organizational difficulties. The IEP relied upon the same accommodations and modifications that had proven inappropriate during the previous IEP year. I conclude that the November 2014 IEP provided inappropriate intervention and support for Student's attention and organizational challenges, mathematics deficits and reading comprehension deficits.

In ninth grade, Student regressed in mathematics. In mathematics, IEP goal progress monitoring scores were below baseline consistently, while Student's grades declined significantly. Student's mid-term and final examination grades were failures. Student was confused and unable to keep pace.

In ninth grade English, Student did not make significant progress. Progress monitoring for reading comprehension in the last two marking periods showed regression. Student's grades in English dropped off in the last two marking periods, with a below average grade in the mid-term examination and a failure in the final examination.

Student's attention and organizational problems in school were equally prominent or more prominent in ninth grade. Student seemed overwhelmed. Student's special education teacher provided additional supports to Student that were not set forth in the IEP. I conclude that the

District did not address Student's attention and organizational difficulties appropriately in ninth grade.<sup>9</sup>

In sum, I conclude that the District failed to provide Student with an appropriate level of intervention to address Student's unique constellation of needs. See Alloway Twp. Bd. Of Ed. v. C.Q., 2014 U.S. Dist. LEXIS 33328 (D.N.J. 2014)(least restrictive environment required only to extent that the LRE placement is "appropriate" – "i.e., satisfactorily educates the child" – citing Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir. 1995).) I also conclude that, as a result, Student did not receive meaningful educational benefit, because these areas of need are fundamental to Student's ability to make academic progress in the remainder of high school and in post-secondary education.

#### THE OFFERS OF AUGUST 2015 AND THEREAFTER

When it became aware that Parents intended to remove Student unilaterally to the private School, the District convened an IEP meeting and completely revamped Student's IEP. Although Parents' intentions were apparent in May and June, the District convened this meeting late in August, a few days before the beginning of the school year. Although the District promised numerous changes to Student's IEP, I conclude that it failed to change the level of support sufficiently to be reasonably calculated to provide meaningful educational benefit.

Fundamentally, the District failed to change the level of support offered by Student's placement. Student remained in regular education with an itinerant level of learning support. While it now offered co-taught special education classes in mathematics, retained that placement for

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<sup>9</sup> Although here was some evidence that the Student also struggled with taking attention – related medications consistently during this year, the record as a whole does not support a conclusion that this was the sole cause of Student's difficulties.

English, and added that placement for science and social studies, the setting was still regular education, and Student had already failed in past years in that setting to make meaningful progress in reading comprehension and mathematics. The evidence is preponderant that, at this point, Student needed a more restrictive educational placement, with smaller classes and slower pacing<sup>10</sup> through the curriculum, to give Student a meaningful opportunity to learn to self-regulate Student's attention and organizational deficits, while making progress academically in subjects that required more intensive, direct and sequential teaching. Student needed a simpler daily routine, fewer teachers and tutors, and much more support than could be provided at an itinerant level of learning support, even with the co-teaching model. The record shows preponderantly that Student's unique profile of needs did not fit the co-teaching service model. Thus, I conclude that the August 2015 IEP was not an offer reasonably calculated to provide the opportunity for meaningful educational benefit.

There is another reason to conclude that this offer was inappropriate. The goals had no baselines; the goals stated that these would be determined within four to six weeks of the start of Student's tenth grade year. I do not conclude (as Parents urge) that determining the baseline for a goal only after a child begins school is per se deficient in view of the IDEA requirement of measurability. Nevertheless, I do conclude that such a baseline determination process would have been inappropriate in Student's unique circumstances. Student had failed for an inordinate amount of time to make progress in Student's IEP goals for mathematics and reading comprehension. Student's IEPs had no goals and monitoring at all for the six new areas of functioning that the IEP

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<sup>10</sup> The pleas of the Student's mathematics teacher were based in part upon Student's inability to keep up with the regular education pace. Student's Mother also testified that Student seemed to be shoring up grades in one area while neglecting others, another indication of an inability to keep up with the regular education classes. (NT 237.) This may have been due to attention and serious organizational issues. Yet, regardless of the cause, at this point in time, with more than a year's experience of failure, Student did not need to be held to the same pace that had proven overwhelming to Student.

team now determined to be necessary areas of intervention. Given this history, I conclude that it would have been unreasonable to delay Student's special education progress monitoring further by delaying the start of baseline-creation for essentially another marking period.

Moreover, this plan would have meant that Parents would not have known whether or not Student had started to make progress until the end of the second marking period, almost half a year into tenth grade. Given Student's profound lack of progress for over a year before, I conclude that the pace of change offered by the District to this Student was unreasonable.

The District conducted a re-evaluation and a speech and language evaluation in the months after Student began school in the private School. It also offered a series of incremental amendments to its offered IEP, all in an effort, apparently, to reach the "reasonably calculated" level of services required by the IDEA for offers of FAPE. These amendments added an array of accommodations and modifications to the Student's regular education placement. They also dealt with the questions posed by Student's private evaluator, who diagnosed a listening comprehension disorder and Tourette's syndrome. I conclude that none of the IEP amendments changed the fundamental nature of the offer, which was itinerant learning support to be delivered in regular education classrooms. It would not have been appropriate to transfer Student back to public school based upon these amended IEPs.

#### APPROPRIATENESS OF THE PRIVATE SCHOOL

I am satisfied by a preponderance of the evidence that the Parental placement at the School was appropriate. The School is designed for students with learning differences and average or above cognitive potential. It offers a small-classroom environment that was better able to address Student's needs for intervention at the time of enrollment. The School's environment offered a

simpler schedule and roster of teachers, and its slower pace of learning, along with more individualized one-to-one intervention, was better calculated to address Student's complex of disabilities in a more structured fashion, more likely to enable Student to develop the ability to organize self and attend to academics. Student's early performance indicated that this more restrictive setting was enabling Student to do just that.

#### THE EQUITIES FAVOR TUITION REIMBURSEMENT

I conclude that the District had fair warning that Student's IEPs were not appropriate and that Student was not making progress in fundamental academic and functional skills. Independent of parental warnings, the District had ample data to show that it needed to change Student's placement, as discussed above. Thus, it cannot now be heard to argue that it was caught unawares when Parents conveyed their dissatisfaction to Student's case manager.

Parents did not obfuscate about their intention to consider a private school for Student in April and May 2014. Student's Mother told the special education teacher and case manager at a meeting in April, and openly discussed this option with Student at that meeting. Parents again told the District in May that they were applying to the School for summer programming, and experienced District personnel knew full well that summer programming is often a prelude to unilateral enrollment in a private school. In June, Parents indicated their intention to enroll Student in the School for tenth grade. District teachers wrote recommendation letters to the School on behalf of Student. Therefore, equitably, there is no reason to conclude that the District was unaware of Parents' dissatisfaction until it received the formal notice on August 15, 2015. I conclude that the District received equitably adequate notice and opportunity to correct Student's IEP and placement.

The District argues that it was not notified until August 15, 2015 that Parents intended to request District reimbursement of tuition. They cite the IDEA, which at 20 U.S.C. §1412(a)(10)(C)((iii)(I)(aa) and (bb) authorizes (“may be reduced or denied”) reduction or elimination of tuition reimbursement if the parent fails to state an intent to remove the child at public expense during an IEP meeting or in a “ten day letter”. I have reviewed the communications on this subject, and I conclude that the District was fairly on notice of Parents’ intent. Even if they did not include an explicit request for public funding of the School’s tuition and costs, the IDEA does not bind hearing officers to require such an explicit statement. In any event, they made such a request explicitly at the August 20, 2015 IEP meeting, and there is no evidence that they signed a contract or paid part of the tuition, beyond a small application fee, within ten days of that date.

In this case, I conclude that Parents were not acting inequitably. The District was not prejudiced. It offered an IEP that I find to have been inappropriate, as explained above, even after several months of amendment. Therefore, I exercise the equitable authority vested by the IDEA in the hearing officer to conclude that the equities weigh in favor of reimbursement.

I will so order, and will require reimbursement of costs of the School’s basic program, including fees and book and extracurricular participation fees. I will also order payment for the costs of transportation of Student to and from the School during school days, not to exceed either actual expenditures or current IRS mileage allowances. I will not order the reimbursement of extra fees for related services, including one-to-one tutoring or remediation fees above the base tuition for the School for Student’s tenth grade year, because there was no evidence that such services were necessary to Student’s education at the School.

## COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a “make whole” approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010). Compensatory education may be ordered for the “period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” M.C. v. Central Reg. Sch. Dist., 81 F.3d above at 397.

Here, I have concluded that the District failed to provide Student with a FAPE from February 14, 2014 until Student was removed from the District at the beginning of Student’s tenth grade year. I have concluded that the District was on notice of this failure of its IEP and placement by May 1, 2014. Excluding a reasonable period of time for rectification, I conclude that the District should provide compensatory education to Student for the entire ninth grade year.

The evidence does not support an order for “make whole” services; therefore, I will order compensatory services on an hour-for-hour basis for the services that were denied. I conclude that the evidence supports an order for one hour on account of inappropriate instruction in mathematics, one hour on account of inappropriate instruction in reading comprehension and one hour of needed support services for organizational difficulties that Student had been experiencing, for a total of three hours for each school day on which Student was present.

## ESY

There is no evidence that the Student qualified for ESY based upon Chapter 14 criteria, and I decline to order compensatory education for the District's decisions not to offer it.

## TUTORING

While I find that the Parents should not have been required to pay for tutoring in mathematics during Student's ninth grade year, I will be ordering compensatory education to replace the hours of instruction that the District should have provided. To the extent that Parents have already replaced this instruction, the compensatory education ordered in this decision will serve as reimbursement. Therefore I will not order additional reimbursement for the cost of private tutoring services.

## PRIVATE EVALUATION REPORT

I decline to order reimbursement of the cost of Parents' private evaluation report. There is no evidence that the Parents followed the procedures of the IEP for seeking an Independent Educational Evaluation at public expense, 34 C.F.R. §300.502(b). Nor is there evidence that the private evaluation contributed anything to the IEP team's understanding of Student's educational needs, except for the diagnosis of Tourette's syndrome, which must be verified by a medical diagnosis; there is not preponderant evidence that the District had reason to be aware of this during the relevant period, nor is there preponderant evidence that Student's education was impacted.



## CONCLUSION

I conclude that the District failed to provide Student with a FAPE from February 14, 2014 to the first day of school in the 2015-2016 school year. I also conclude that the Parents' unilateral placement of Student at the private School was appropriate and equitable. Therefore, I order the District to provide compensatory education services on account of part of the relevant period and to reimburse the District for their expenditures for tuition, costs and transportation for Student's tenth grade year at the School. I decline all other requested relief.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District shall provide compensatory education to Student in the amount of three hours for every school day on which Student was present during the 2014-2015 school year.
2. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parents, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parents. Such services may be provided to Student until Student reaches twenty-one years of age.
3. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parents.
4. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service, within a fifty mile radius of the District's headquarters.
5. The District shall reimburse Parents for their expenditures for tuition and costs including fees and book expenses, for Student's attendance at the School in the 2015-2016 school year. It shall also reimburse Parents for transportation of Student to and from the School on school days. Transportation reimbursement will be limited to cost actually paid by Parents if not provided by private automobile, and, if provided by private vehicle, to the current IRS approved mileage rate.

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., CHO  
HEARING OFFICER

DATED: July 2, 2016