

*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**

Student's Name: LP

Date of Birth: [redacted]

ODR No. 1799-10-11-KE

### **CLOSED HEARING**

Parties to the Hearing:

Parents

Representative:

Pro Se

Lower Merion School District  
301 East Montgomery Avenue  
Ardmore, PA 19003-3338

Gail A. Weilheimer, Esquire  
Wisler Pearlstine LLP  
Blue Bell Executive Campus  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422

Dates of Hearing:

July 18, 2011, August 15, 2011, October 21,  
2011, November 9, 2011

Record Closed:

December 7, 2011

Date of Decision:

December 24, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION AND PROCEDURAL HISTORY

The captioned student (Student) is an eligible resident of the captioned school district (District), and attended its elementary school, during the time relevant to the captioned matter. (3NT 83, 2NT 11 to 13, NT 275 to 276.)<sup>1</sup> Student is identified as a child with Specific Learning Disability and Speech or Language Impairment pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (3NT 83, 2NT 11 to 13, NT 275 to 276.)

Parents<sup>2</sup>, named in the caption above, assert that the District failed to provide a free appropriate public education (FAPE) to Student in the 2010-2011 school year; Parents request compensatory education for that year, as well as prospective relief for the 2011-2012 school year. The District asserts that it has provided a FAPE to Student. The hearing was concluded in four sessions amounting to over thirty hours of hearing time, and I incorporated nearly sixteen hours of additional testimony from previous matters into the record in this matter. I also considered several hundred pages of documents admitted into evidence. On the basis of this evidence, I conclude that the District did not violate the requirements of the IDEA and I decline to order either compensatory education or prospective relief.

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<sup>1</sup> Three separate due process matters were heard and decided with regard to Student, under three Office for Dispute Resolution (ODR) case numbers: No. 1698-10-11-KE regarding eligibility for and provision of Extended School Year (ESY) services (hearing date May 4, 2011); No. 1729-10-11-KE regarding appropriateness of the District's evaluation and Parents' entitlement to an independent educational evaluation at public expense (IEE)(hearing date June 7, 2011); and the present matter regarding provision of a FAPE to Student (hearing dates listed on cover of this decision). All of the transcripts and all of the documents admitted as part of the previous matters were admitted into evidence as part of the record in this matter, in order to minimize duplication of testimony. The transcripts of the three matters are referenced in reverse temporal order: "NT" refers to the transcript of the present matter; "2NT" refers to the transcript of No. 1729-10-11-KE; and "3NT" refers to transcript of No. 1698-10-11-KE.

<sup>2</sup> Although both Parents brought the present complaint and participated in the hearing, and though the Student's Father participated in the major educational decisions made in communication with the District, it was the Student's Mother who engaged in nearly all of the communications and activities depicted in this decision. Wherever possible, I have sought to reflect this by referring to "Parent" in the singular to indicate actions by the Student's Mother. However, the decision should be read with the above understanding of the differing levels of involvement of the two Parents.

## ISSUES

1. Did the District fail to provide a free appropriate public education to Student during the relevant period of time from the first day of the 2010-2011 school year until the first day of the hearing in this matter, July 18, 2011?
2. Did the District prevent or fail to permit the Parents' participation in the evaluation and IEP planning process, in violation of the requirements of the IDEA, during the relevant period of time?
3. If the District prevented or failed to permit the Parents' participation in the evaluation and individualized education program (IEP) planning process during the relevant period of time, did such District actions or omissions impede the Student's right to a FAPE; significantly impede the Parents' opportunity to participate in the decision-making process; or cause a deprivation of educational benefits?
4. Should the hearing officer order the District to provide compensatory education to the Student?
5. Should the hearing officer enter an order providing prospective relief with regard to the offered IEP and placement for the 2011-2012 school year?

## FINDINGS OF FACT

1. Student has a history of identification as a child with a disability under the IDEA prior to beginning kindergarten, and attended until second grade in a public school district other than the District. Parents removed Student to a private school for third grade, and to another private school for fourth grade. (S-8.)
2. Student entered fifth grade in a District elementary school for the 2010-2011 school year. (S-8.)
3. The District evaluated Student pursuant to Parents' request in September 2010, and delivered an initial evaluation report (ER) within the sixty days permitted by law. (S-5, 6, 8.)
4. The District identified Student with Specific Learning Disability, with secondary disabilities of Other Health Impairment and Speech or Language Impairment. (S-8.)
5. Student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and has difficulties with regulation of attention, organization, impulsiveness, decoding and

reading fluency, mathematics reasoning and writing. Student has a history of suffering from anxiety. (S-8.)

6. Student has overall average global language skills, but has significant difficulty with auditory discrimination, language organization and word finding. (S-8.)
7. The District convened an Individualized Education Program (IEP) meeting in November 2010 and the IEP team, with Parents participating, created an IEP with goals addressing speech and language, reading, mathematics, and writing. Specially designed instruction (SDI) and related services were provided to address Student's difficulties with attention, impulsivity, organization, auditory discrimination, and fine motor and sensory issues. (S-10.)
8. The IEP team placed Student in supplemental learning support in Student's neighborhood school. Student spent two and one half hours per day in learning support for reading, mathematics and writing. There were six students in the class, and one teacher's aide. (S-10; 3NT 135-136; 2NT 84-85.)
9. The IEP was revised to insert base lines into goals and objectives in January 2011. It was revised to change goals and SDI in March 2011 and to provide ESY services. It was revised further in June 2011 to revise present levels, goals, SDI, supports for school personnel and location of educational placement. (S-28.)
10. The IEP provided one to one speech and language therapy services to Student once per week for thirty minutes per session. (3NT 258-259.)
11. The IEP provided support for the general education teacher who taught Student science and social studies. (S-10.)
12. Student was able to access the general education curriculum without the support of assistive technology devices; nevertheless, the District did provide Books on Tape and a listening device during the relevant period. (NT 766-769.)

#### LEARNING SUPPORT GOALS AND SDI

13. One goal for reading addressed fluency at a fifth grade level of curriculum, although progress monitoring was done at a fourth grade level. Progress was measured from a baseline stated in the goal; the goal was measurable. (S-10, 17; 3NT 126-130.)
14. One goal for reading addressed reading comprehension at a fourth grade level of curriculum. Progress was measured from a baseline established by the teacher early in the instructional process; the goal was measurable. (S-10, 17; 3NT130-133, 192-193.)

15. Goals for mathematics addressed computation fluency and problem solving, including counting money at the fifth grade curricular level. Progress on the goals was measured from a baseline established by the teacher early in the instructional process; the goals were measureable. (S-10, 17; 3NT 112-126, 171-172).
16. Goals for writing addressed fluency, writing mechanics, content, organization and style at the fifth grade curricular level. Progress on the goals was measured from baselines stated in the goals; the goals were measurable. (S-10, 17; 3NT 133-135, 140, 143.)
17. Student was seated close to the special education teacher in the learning support classroom, directly facing the board to support focus and attention. Student was allowed to move Student's seat by request to get away from the rest of the class to work alone. (2NT 85-86, 92-93, 103.)
18. The Student's learning support teacher utilized most of the specially designed instruction or accommodation methods (SDI) listed in the IEP, but did not follow all SDI. The teacher found some SDI to be unnecessary, such as frequent breaks; other SDI were not followed because Student indicated contrary preferences. For example, Student preferred to write, so dictation opportunities were not usually offered. (S-1 p. 46, 100, 134, 404, S-10, S-17; P-70 pp. 91-94<sup>3</sup>; 2NT 107-114, 177-180; NT 596-597, 625-656, 787-803, 1386.)
19. Student worked in a note book in learning support class, to keep Student's writing within the lines on the paper. (2NT 87.)
20. The learning support teacher used research based materials and methods with fidelity. (2NT 96-98.)

#### IMPLEMENTATION OF IEP IN GENERAL EDUCATION CLASSROOM

21. Student's regular education teacher attended all four IEP meetings from November 2010 to June 2011, and a transition meeting in June 2010. In addition, the teacher engaged in frequent conversations with the Student's special education teacher and speech and language therapist; the teacher spoke with the District's occupational therapist about Student occasionally. These conversations focused upon implementation of the Student's SDI. (S-10, 17, 28, 30; NT 603-609, 848-849, 1337.)
22. Student's learning support teacher met with the general education teacher regularly during the relevant period to assist the general education teacher in accommodating for the Student's needs, and modifying work requirements such as class projects as needed.

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<sup>3</sup> In the transcript beginning at 787, the Parent refers to exhibits P-51 and 52, which were marked during the hearing. After the hearing session, the Parent combined these exhibits with others at what is now marked P-70, and the previous marking was ignored. The current marking is observed in this citation, citing to P-70.

(2NT 115-116; NT 772-773, 664-665, 668-669, 674, 681, 712, 722, 733-735, 787-788, 806-807.)

23. The District's speech and language pathologist who evaluated Student discussed the IEP during team meetings in the presence of the Student's general education teacher. (S-8, 10; NT 312.)
24. The Student's regular education teacher consulted as needed with the counselor assigned to Student's school, and the counselor followed up on any incidents or allegations with regard to Student. (NT 610-611, 772-773, 806-807.)
25. The school counselor and the general education teacher coordinated with each other in dealing with Student's efforts to read Student's stories to the counselor. (NT 1056-1060.)
26. The recess captain discussed Student's social behavior during recess with members of the IEP team as needed. (NT 1423-1425.)
27. The learning support aide pushed in to the general education classroom as needed to assist Student. (NT 1391-1392.)
28. Student in the general education classroom was seated as far away from the air conditioner as possible while remaining in the front of the room. (NT 627-629.)
29. Student's general education teacher was experienced in implementing IEPs in the general education setting, having served as a teacher intern in Philadelphia for two years. (NT 574-575, 668-669.)
30. Student's general education teacher implemented Student's IEP in general education with fidelity. (NT 664-665, 672, 674-676, 729.)
31. Student's general education teacher did not repeat everything the teacher said when lecturing; Student frequently asked the teacher questions about the lectures. Student retained the information most of the time. (NT 672-673, 681.)
32. Student's general education teacher provided supports for Student's attention and organization skills as a general education accommodation in the beginning of the school year. (NT 772-773.)
33. The Student's regular education teacher did observe Student being anxious or desiring to move about at times, and addressed these situations when they came to the teacher's attention. (NT 745-748, 824-825.)
34. Student's general education teacher provided supports for Student's writing skills as a general education accommodation in the beginning of the school year. (NT 773-776.)

35. Student's general education teacher provided science and social studies vocabulary words to the Student's speech and language therapist for speech and language therapy purposes. (NT 776-777.)
36. Student made progress in attentiveness in general education class during the relevant period. (NT 596-597.)
37. Student was able to access the general education curriculum in science and mathematics, even though the text books were written at a fifth grade level; Student's reading and writing skills at the fifth grade level were sufficient to allow access to the curriculum and the method of teaching emphasized oral presentation of curriculum rather than reading. (NT 763-764, 1201.)
38. Although the Parent requested assistance numerous times to utilize the "eBoard" available on the District's web site for homework and project assignments, the Student was able to access it without support throughout the school year, except for the beginning of the year when Student required supports. (S-1 p. 36-43; NT 753-760.)
39. Student was given opportunities to work on keyboard skills in both the regular education and learning support settings. (NT 609-610.)
40. The Student's special education teacher did not consider assistive technology to be necessary for Student was making adequate progress in the learning support classroom. (2NT 168-169.)
41. The Student's speech and language pathologist did not recommend an FM monitor for Student because it was deemed appropriate to wait and see if Student could access the curriculum before requiring Student to wear a cumbersome piece of equipment. (NT 387-388, 431-434.)

## PROGRESS

42. Student made measured progress in mathematics and reading from December 2010 to March 2011. (S-10, 12, 27; 3NT 114, 132; 2NT 54-76, 81-83, 195, 202-206; NT 664, 762-764, 1237.)
43. Student was able to read fifth grade material sufficiently to perform mathematics problem solving without reading support. (S-27; NT 174-175, 1237.)
44. Student made measured progress from baseline in writing fluency and mechanics, after falling below the baseline in writing fluency. (S-12; P-23; 3NT 135; 2NT 54-81; NT 1562-1564.)
45. Student's progress in writing mechanics as assessed by the correct word sequence method showed progress toward the goal set in the IEP for most of the relevant period, but the

progress was at a lower rate than required to keep performance above the growth rate established by the IEP goal. (S-12; 3 NT 143-145.)

46. Student made measured progress in writing as assessed according to the fifth grade writing rubric. (S-17; 3NT 141-143, 2NT 78-81; NT 664.)
47. Student scored “proficient” in reading and mathematics on the PSSA test for fifth grade students. The PSSA test was given to Student in the spring of 2011. (S-27; NT 612-621.)

#### LISTING PARENTAL CONCERNS IN IEP

48. The IEP lists Parents’ concerns as slurring of speech and omission of words in sentences. In addition, the IEP lists Parents’ input on potential placement and accommodations, including small class size, repetition, visual learning and hands – on learning. (S-10, 17, 28.)
49. Parents listed numerous additional concerns in meetings, telephone calls, letters and email messages. In particular, at various points in time, Parents expressed concerns about anxiety, not wearing glasses, being bullied, misunderstanding of social cues, interaction with peers, escaping behavior by going to visit the school nurse, and enuresis. The IEP does not list these parental concerns. Some of these concerns were not communicated to District personnel at the beginning of the school year, but arose during the school year: not wearing glasses, visiting the school nurse and toileting accidents. The Parents did not communicate Parents’ concern with toileting accidents to District personnel during the relevant period. (S-1, 7, 10, 17, 28; NT 971-972, 1353, 1641, 2017.)
50. Parents did not at any time communicate to District personnel any parental concern about Student having thoughts of self harm in September. (NT 1027, 1546-1549.)

#### SPEECH AND LANGUAGE SERVICES

51. Student has well developed global language skills, and can understand directions in most instances. (S-8; 3NT 381; 2NT 108-110; NT 320, 398, 420.)
52. Student has a speech or language impairment, which encompasses a history of weaknesses in auditory discrimination, ability to organize language and ability to retrieve words from memory. This speech or language impairment impedes learning and access to the fifth grade curriculum. (3NT 240-242; 2NT 351-357.)
53. There was a history of services from the Intermediate Unit for auditory discrimination problems; the report indicated that services had been completed with documented progress. The District’s speech pathologists found that the data were unclear as to whether the auditory discrimination problem was a re-emergence of auditory



discrimination problems demonstrated in the past, or due primarily to the Student's attention problems. (P-43; NT 287-290.)

54. The Student's difficulty with word retrieval slows response time but usually Student is able to retrieve the word if given time to do so. (2NT 110; NT 324-325.)
55. Parents perceive that the Student often slurs Student's speech or mumbles so that the Parents cannot understand Student's speech. Parents also perceive that Student cannot pronounce certain words, and misperceives social interactions. (3NT 337-339, 376-377.)
56. The speech and language specialist who tested Student with regard to suspected speech and language impairment found no articulation problem. (2NT 371-372.)
57. At the time of the Student's evaluation, the school psychologist did not perceive an articulation problem, nor was the Student hard to understand. However, the school psychologist did conclude that the Student rushes through speech at times, which can make Student difficult to understand. (2NT 258-260.)
58. The Student's speech and language therapist did not observe any articulation problem that required special education intervention or supports; in particular, the therapist did not observe any slurring of speech or incorrect utilization of the tense of verbs. (3NT 270-272; NT 917.)
59. The Student's learning support teacher observed that the Student does not articulate all of the sounds in the selected words; however, the teacher attributed this to speaking quickly and not to an articulation problem attributable to a speech or language pathology. (2NT 158-160.)
60. Student's regular education teacher also perceived that Student's language is harder to understand when Student speaks too quickly, and that Student exhibits no articulation problems when Student speaks more slowly. (2NT 410-411.)
61. Student's reading specialist did not have any difficulty understanding the Student. (NT 1216.)
62. The Student's IEP did not have an SDI for prompting Student to slow down when speaking in order to articulate clearly. It did provide for "thinking time" when Student was called upon in class, and increased time to answer questions. The thinking time SDI helped with slowing down the rate of speech. The learning support teacher was reminding Student to speak more slowly where necessary, as were Student's peers in the classroom setting. (S-10, 17, 28; 2NT 158-161, 220-221; NT 324-326.)
63. During the relevant time period, the Student's speech and language therapist and Student's special education teacher utilized cues to get the Student to slow down in speech so that Student's speech would be clearer. (NT 960-961.)

64. At the beginning of the school year, Parent raised the concern that Student's speech and language deficits interfered with Student's ability to understand and appropriately respond to social cues. (S-1 p. 23, 42.)
65. The Student's learning support teacher and learning support aide perceived the Student as able to make friends easily and did not perceive the Student as having difficulties relating to other students or making friends. (2NT 150-151, 1390-1396, 1418-1427.)
66. The Student's regular education teacher perceived Student as very social and motivated to engage in deep conversations with people. (S-10; 2NT 405-408; NT 592.)
67. The Student's regular education teacher perceived that Student experienced incidents of social difficulty or misunderstanding more often than Student's peers. (NT 597-600.)
68. The school psychologist who evaluated Student did not find any social skills deficit that interfered with Student's education. (2NT 298, 318-319.)
69. The speech and language pathologist who tested Student found no impact of Student's deficits on Student's understanding of social language and cues, social interactions and relationships. (2NT 398-399; NT 435-436, 922-923.)
70. The school counselor perceived Student as a role model in how to interact with other students. Student seemed to be making friends and to be well adjusted socially. Other school, personnel who monitored Student's social interactions made reports consistent with this perception. (NT 1106-1108, 1130-1151.)
71. The school principal perceived Student as socially adept with adults. (NT 2022-2023.)
72. The evaluating speech and language pathologist and the speech and language therapist collaborated to design the IEP for speech and language impairment in order to address the needs in language organization, word retrieval and auditory discrimination according to professional judgment as to the scope and sequence of the intervention. Goals were considered appropriate to provide explicit training on language organization and word retrieval that would assist Student in overcoming Student's neurological deficit in auditory discrimination. Goals were chosen according to a strategy to begin with the most basic areas of deficit, with the intention of moving up the hierarchy of skills as appropriate functioning was attained in each of the more fundamental skills. (2NT 381-382, 394-397; NT 303-333.)
73. The IEP listed goals that addressed language organization and word retrieval. These goals were drafted by the speech and language specialist who did the testing that identified the Student's speech and language impairments, and the speech and language therapist who was going to implement the IEP. (S-8, 10, 17, 28; 3NT 243-255; 2NT 363-364.)

74. The IEP addressed Student's speech and language impairment by providing a goal for word associations. (S-10, 17, 28.)
75. The IEP provided objectives for working at the Student's fourth grade instructional level to approach attainment of the speech language goals. (S-10; 3NT 262.)
76. The two District speech and language professionals concluded that the goals and objectives in the IEP were appropriately calculated to help remediate the Student's language organization and word retrieval impairments. They concluded that the level of services was sufficient to enable the Student to access the curriculum. (S-8, 10, 17, 28; 2NT 363-364; NT 297-347, 367-373.)
77. The IEP listed research based SDI that directly addressed the Student's needs for support with regard to auditory discrimination. (S-8, 10, 17, 28; 2NT 381-382; NT 393-394.)
78. The speech and language therapist addressed Student's needs with regard to language organization and word retrieval during the relevant period. (3NT 307-309.)
79. The speech and language pathologist missed two sessions and they were made up by pulling Student from other classes. (3NT 284-286.)
80. The school counselor observed two speech and language therapy sessions and perceived the Student as performing well and being in a positive frame of mind during the sessions. (NT 1104-1105.)
81. The District's speech and language therapist, measured progress on categorization, inclusion and exclusion at a fourth grade vocabulary level. Data indicated measured progress in these areas. The baselines stated in the IEP were not utilized for this progress monitoring. (S-17; 3NT 251-256, 279, 319-320, 833-842, 847.)
82. The speech therapist measured progress on word association and its sub-skills. Data indicated measured progress in word associations (S- 17 p. 19; 3NT 260-261.)

## SOCIAL SKILLS AND RELATIONSHIPS

83. Teachers and school staff did not report any social problems to the school counselor with regard to the Student. (S-26; NT 1030-1035, 1039.)
84. The District provided a program called "responsive classroom" that emphasizes helping children feel welcomed in school, and teaches social skills, through daily class meetings. The school counselor attended these meetings periodically in Student's general education classroom. (NT 1073-1081.)

85. The District provided Student with explicit instruction in social skills through a program called Second Step, which provides 26 lessons, often delivered during class meetings. (S-15; NT 1053-1054, 1073-1081, 1112-1129.)

## BULLYING

86. Student's Parent notified the general education teacher of several incidents in which Student and peers were involved in disagreements and verbal conflicts. In some cases, peers were acting inappropriately toward Student. The teacher looked into all incidents brought to the teacher's attention, referred as appropriate to the guidance counselor, and spoke to the parents of the other children so as to prevent additional inappropriate behavior toward Student. The teacher did not consider the incidents as rising to the level of bullying. (S-1 p. 40, 41, 62, 65, 72, 233, S-33; NT 688-700, 818-821, 1130-1151, 1997-1999.)
87. Parent brought a number of incidents to the attention of the school counselor, in which Student was allegedly treated inappropriately by other students. The counselor investigated all incidents and took action to stop any inappropriate behavior. The counselor also set up procedures to monitor Student's social interactions to make sure that Student was developing appropriate social interactions. (S-1 p. 41; NT 1002-1012, 1130-1136, 1387-1389.)
88. After Parent reported that Student was being bullied in March, 2011, the special education teacher monitored Student's lunch and recess activities and required Student to report events and Student's feelings about events every day; this was reduced to writing and sent home to Parents every day. Student reported no bullying incidents. (S-19; 2NT 120-125, 216-219.)

## ANXIETY

89. Parents informed the District that the Student suffered from ADHD and anxiety, and was taking medications for these conditions, in the emergency information form filled out upon registration. (P-21; NT 978-981.)
90. In the health history form filled out upon registration, Parents advised the District that Student might visit the school nurse with anxiety, and asked to be informed if that should happen. (P-21; NT 978-981.)
91. At the beginning of the 2010-2011 school year, Parent notified District personnel that the Student was suffering from anxiety, but said nothing about depression or thoughts of self harm during the relevant period. (S-1, S-1 p. 4, 23, 55, 59-60, 62-69, 76, 78-82, 125-126, 137-144, 159-165, 182-183, 232-234, 238-241, 368-377, 399-404; NT 1026-1029.)

92. Parents only occasionally mentioned anxiety and the Student's relatively frequent visits to the school nurse in their voluminous correspondence with District officials. Visits to the school nurse were mentioned only twice in the correspondence between December 2010 and May 19 2011. The Parents began to characterize untoward social incidents at school as "bullying" only in May 2011. The bulk of Parents' concerns as expressed in their correspondence centered on speech and language, Student's social interactions with peers, Parents' needs for additional answers to questions and for documentation of all details of the District's services to Student, and academic concerns. (S-1, S-1 p. 484, 544-545.)
93. The Parent did not notify school officials that the Student was having toileting accidents at school. (NT 971-972, 1353, 1665.)
94. Student was aware that Student could meet with the school counselor about emotional and social concerns; Student did visit the counselor. (NT 1056-1060.)
95. The Student's learning support teacher encouraged Student to discuss Student's emotional needs and feelings with the teacher during their frequent contacts. (2NT 125-126.)
96. The school psychologist and special education teacher did not observe the Student exhibiting any symptoms of anxiety. (3NT 231-232; 2NT 116-118, 334; NT 807-814.)
97. The school counselor often observed Student in school and always perceived Student as happy, well liked and well adjusted in school. (NT 1106, 1130.)
98. The Student did not exhibit anxiety at school and no teachers ever referred Student to the counselor for anxiety. (S-8 p. 8; NT 1029-1030.)
99. The Student's learning support teacher perceived Student as a friendly, outgoing person who easily interacted with others and performed the tasks demanded in school without visible signs of anxiety. (2NT 150-151, 213, 215-216.)
100. Parents thanked the learning support teacher at the end of the school year for helping Student to feel safe in the teacher's class. (S-24.)
101. Student's general education teacher perceived Student as enjoying lunch and recess periods as much as any other student. (NT 602-603, 697.)
102. Student's general education teacher observed the Student at the graduation ceremony for elementary students and did not perceive the Student to be experiencing any distress. Student was observed to be calm. (NT 663.)
103. Student's classroom aide never perceived Student to be anxious. (NT 1354.)

104. The District's Supervisor of Special Education observed Student at a school dance and concluded that the Student was happy, social, not ostracized, and not reacting defensively to loud speakers being operated by a disc jockey. (NT 1829-1836.)
105. The Student's speech and language therapist found Student to be positive and smiling in their weekly sessions. (3NT 266.)
106. Student was known to have visited the school nurse over forty times during the relevant time and while this was a significant behavior that should be inquired about, it did not necessarily indicate a problem in and of itself. (S-8; 2NT 260-262; NT 996-997, 1552-1553.)
107. School staff observed the behavior early on; the school principal was aware that Student frequently visited the nurse; the principal believed that Parent did not want this behavior to be interdicted. Student went to the nurse in part to continue a relationship with an adult that Student valued, and to get away from the cafeteria when it was too noisy. (S-7 p. 5, S-8; NT 1991-1994.)
108. After investigating this upon Parents' inquiry in the spring, the school counselor concluded that the Student was seeking escape from a noisy condition in the cafeteria at the end of lunch in some cases, and seeking an adult relationship in other cases. (NT 971-972, 996-1001, 1019-1025.)
109. The school psychologist and special education teacher did not observe the Student exhibiting any behaviors that impeded learning. (3NT 231-232; 2NT 116-118, 334; NT 807-814.)

#### OCCUPATIONAL THERAPY

110. Based upon an occupational therapy checklist, observations of Student and interviews with Student's teachers, the District occupational therapist concluded that Student's hypersensitivity to noise did not interfere with Student's functioning in the classroom; nevertheless, there were SDI on the IEP to address hypersensitivity to noise, and occupational therapy consultation with teachers was provided. (P-64; S-10, 25; NT 1303-1307, 1324-1325, 1332-1336.)
111. The school occupational therapist found that Student's keyboarding skills were below those of Student's peers, and recommended additional keyboarding practice time. (P-64; NT 1274-1275, 1328.)
112. The school psychologist found no manual dexterity deficits requiring specially designed instruction. (2NT 290.)
113. The School psychologist found no sensory issues requiring specially designed instruction. (2NT 289.)

114. Student's learning support teacher found no basis to believe that Student needed direct occupational therapy services, in part because the teacher found that the Student's problems with neatness in handwriting were due to rushing rather than due to a problem with holding the pencil. (2NT 118-120.)

#### RESPONSIVENESS TO PARENTS' INQUIRIES AND REQUESTS

115. The Student's special education teacher sent progress monitoring data to Parents on a monthly basis from December 2010 to the end of the school year, except for February, when the teacher did not send such data; the teacher sent progress monitoring at the time of report cards, sent the full report in March 2011, and continued to send data periodically until the end of the year. (S-12; 3NT 146, 207, 360-362, 372-373; 2NT 45-46, 184-187.)
116. The Student's special education teacher sent graded assessments, such as homework, tests, quizzes and class work, to Parent by placing it in Student's back pack. The teacher sent these home throughout the relevant period. (3NT 146, 356-360, 391-392.)
117. The student's special education teacher sent home Student writing samples during the relevant period. (3NT 234.)
118. The Student's special education teacher sent baselines to Parents in December 2010. (3NT 213-214.)
119. The Student's speech and language therapist did not report progress data to Parents on a monthly basis from December 2010 to March 2011, because this was not required in the IEP. Thus, Parents first received the data in March 2011. In March, the IEP was revised to require the therapist to provide written feedback monthly. (S-10, S-17; 3NT 263-265.)
120. The Student's speech and language therapist provided weekly information to parents regarding the skills being addressed in weekly therapy sessions. (3NT 320-322.)
121. Beginning in March 2011, the therapist provided data on a monthly basis, and also provided vocabulary words being used in the categorization probes. (3NT 289.)
122. The District's personnel engaged in an unusual volume of email correspondence during the relevant period, amounting to over 100 email messages and over 540 pages. This was supplemented with a significant number of lengthy telephone conversations and informal meetings with one of Student's parents. (S-1, 18, 29, 30, 34; 2NT 127-133; NT 582-584, 687-688, 816-818, 1530-1533, 1757-1807, 2026.)

123. There were four IEP meetings during the school year from December 2010 to June 2011. One meeting lasted over three hours, to answer parents' questions. (S10, 14, 16, 17, 18, 28; NT 133-149.)
124. Parents sent email messages to the District in December, after an extensive IEP meeting in which their concerns were addressed orally, listing numerous issues, some of which the District was not seeing in school, some of which were not found in testing that should have found the issues, and others of which pertained to the level of service being provided in the IEP that had just been discussed. These issues were addressed, but the IEP was not changed until March 2011. (S-1 p. 80; 2NT 209-210.)
125. There were two meetings with the school psychologist to answer questions about the tests that underlay the evaluation report. (2NT 241-252.)
126. The speech and language specialist who tested the Student regarding speech and language difficulties met with Parents two additional times during the relevant period and responded to Parents' questions. (S-1 p. 247, S-17; 2NT 362-367; NT 427-430, 850-856.)
127. The special education teacher responded to a Parent's complaint that certain grades did not appear on the report card, and had the information sent to Parents. (3NT 183-184.)
128. The IEP was revised three times during the relevant period. One of the IEP meetings was about four hours long. (S-28 p. 2; 392.)
129. In March 2011, the District sent written responses to Parents' questions at the request of the Parents. (S-18 p. 9 to 14.)
130. The Parents did not receive all actual test protocols showing the questions and the Student's answers. Parents did receive some of the curriculum based, teacher-created probes, quizzes and tests with Student's answers; however, Parents did not receive copyrighted test protocols from research based probes and tests used in progress monitoring, which amounts to a substantial part of the underlying basis for the progress monitoring scores. Scores were provided to Parents regarding the latter category of probes and tests. (3NT 59-61, 65-68, 333-334, 391.)
131. At the November 30 IEP meeting, after discussion of the IEP, the District presented parents with a Notice of Recommended Placement (NOREP) for a placement of learning support for two and one half hours per school day. Student's Mother expressed uneasiness with agreeing to the recommended placement. The Student's special education teacher indicated that IEP baselines could not be established unless Parents signed the NOREP. (3NT166, 168-169.)

#### FAILURE TO FOLLOW IEP FROM PRIOR SCHOOL



132. Parents signed a release authorizing the District to obtain all records of previous schools, including [private specialized school], [private specialized school] and [previous school district's] Elementary School. The release indicated that there was an IEP for Student in May 2008, but when the school counselor asked to see a copy, Parents indicated that the Asserted IEP had not been finalized and that there was not a pendent IEP at the time. (S-1 p. 31, P-21; NT 1094-1100.)
133. The Student's school counselor asked for copies of documents from previous schools in September, but Parents did not provide a copy of the IEP at that time. (NT 975.)
134. The Parents did not give any IEP to District staff prior to the IEP meeting in December 2010. (2NT 236; NT 1240.)
135. The school counselor made arrangements from the beginning of the school year to help Student integrate socially and feel comfortable with the new school. (S-1 p. 8, 9, 23; NT 1082-1084.)
136. The school counselor notified the general education teacher at the beginning of the school year about the Parents' concerns regarding homework becoming overwhelming. (NT 1166-1169.)
137. The District provided Student with reading tutoring through a reading specialist from the end of September or beginning of October 2010 until the IEP was in place in December 2010. (NT 593-597, 1197-1198, 1236.)
138. Student's regular education teacher observed that Student needed extra support with regard to reading, especially identifying words; attention, especially restraining the impulse to blurt out irrelevancies, sitting still and writing fluency. (NT 593-597.)

#### PROSPECTIVE RELIEF

139. In June 2011, the District offered an IEP to Parents that addressed Student's needs with regard to speech and language therapy. (S-28; NT 858-860.)
140. The District convened a meeting in June 2011 with members of the Student's IEP team, including the speech and language therapist, Parents, and representatives of the Middle School for purposes of planning for the next school year when Student would transition to middle school. (NT 946-947.)
141. The speech and language therapy goals and objectives offered in the June 2011 IEP were identical to those offered for the year before, except that the goals were for 6<sup>th</sup> grade level words rather than fifth grade level words. (S-10, S-17, S-28.)

142. The school counselor met with the counselor that would be assigned to Student in sixth grade and discussed Student's needs and Parent's perceptions of Student's needs. (NT 1041-1042.)
143. In June 2011, the District proposed an IEP for the 2011-2012 school year at middle school that provided the same level of supports for attention, speech and language, reading and mathematics, key boarding, occupational therapy consultation, and specially designed instruction, as was provided for the 2010-2011 school year, except that reading support is with a reading specialist, rather than a special education teacher; this, reading support is a general education service, but it offers the equivalent support that Student was receiving in elementary school. (S-28, 31; NT 1801-1807, 1825-1829, 1868, 1874-1877, 1888-1919.)
144. All goals on the offered IEP would be for performance at the sixth grade level of curriculum in reading, mathematics, and writing. (NT 1888-1889.)
145. Speech and language therapy is provided on a five day cycle, even though the middle school operates on a six day cycle, despite any implication in the IEP. (NT 1907-1909.)
146. The District has offered a revised IEP as of September 2011 for the 2011-2012 school year, offered to discuss it with Parents in more than one meeting date, revised it according to parental preferences, and offered a NOREP to Parents for their signature. (S-36, 39, 40, 41; NT 1810-1826.)
147. The revised IEP would be provided by a state certified, highly qualified teacher. (HO-7; NT 1880-1882.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).<sup>4</sup> In Schaffer v. Weast, 546 U.S. 49,

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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.

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 other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

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

With regard to the merits of the Parent’s claims in the present matter, Parents bear the burden of persuasion as required by the Supreme Court’s decision discussed above. If the Parents fail to produce a preponderance of the evidence in support of their claims, or if the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

#### LEGAL STANDARD: FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg'l

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<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. Dispute Resolution Manual §810.

High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his 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).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert.

den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

#### PROVISION OF A FAPE TO STUDENT

In the present matter, the evidence is heavily preponderant that the District did offer and provide a FAPE to Student. The IEP appropriately addressed every educational need of the Student as identified in the evaluation report. (FF 1-12.) The IEP and subsequent Notice of Recommended Educational Placement (NOREP) placed Student in a relatively high level of learning support, supplemental. (FF 8.) This means that the Student spent two and one half hours per day in learning support for reading, mathematics and writing. Ibid. Student was placed in general education only for science, social studies and specials. Ibid. Multiple goals and objectives were provided to address Student's learning disorder in reading, mathematics and writing. (FF 7, 9, 13-15.) In addition, multiple goals and objectives were provided to address Student's speech and language impairment. (FF 7, 72-77.) The goals and objectives were measureable and data was collected to show Student's progress with regard to the goals and objectives. (FF 9, 13-16, 42-47, 81-82.) The IEP provided for modifications and SDI to address Student's attention<sup>6</sup>, organization, and impulsivity difficulties, as well as sensory, auditory

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<sup>6</sup> The evidence is preponderant that the IEP as implemented supported Student's attention needs and needs associated with ADHD throughout the school environment. (FF 7, 17, 18, 19, 20, 22, 28, 30, 62, 63.) Seating in general education was designated. (FF 28.) Attention was monitored and cued. (FF 30, 31, 32.) Schedules were placed on the board and Student's note taking was addressed. (FF 17, 18, 19, 27, 38.) Student was afforded time

discrimination and other speech and language needs. (FF 7.) It provided for additional keyboarding time to address an occupational need. (FF 39.) Related services included speech and language therapy and occupational therapy consultation. (FF 7, 10.) Extended School Year services were ultimately provided in a timely fashion. (See Decision in No. 1698-10-11-KE, upholding ESY offered by District.)

The record preponderantly proves that the District implemented this educational program with fidelity. (FF 20, 30.) The learning goals were implemented by a highly qualified and certified special education teacher. (FF 13-20.) The speech and language goals were devised by two certified and very experienced speech and language pathologists<sup>7</sup> and implemented by one of them. (FF 72-82.) Both the general education teacher and the special education teacher implemented the modifications and SDI with some exceptions that are reasonable and appropriate. (FF 17-19, 27-32, 34, 35, 37, 39, 62, 63.)

There was a great deal of testimony from the regular education teacher and the other members of the Student's IEP team that the special education teacher and the speech and language therapist coordinated with and supported the general education teacher in implementing the modifications and SDI. (FF 21-27.) The teacher placed Student as far away from noise as possible while still keeping Student near enough to the teacher to keep Student's attention. (FF 28.) The teacher differentiated teaching methods for Student and modified tests in consultation with the special education teacher. (FF 22, 23.) The evidence is heavily preponderant that the Student's special education program was well coordinated. (FF 21, 27, 62, 63, 70, 72, 86-88,

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away from other students. (FF 17.) Nearly half of the day was provided in a small classroom setting that enabled one to one or at most small group (no more than six) explicit teaching. (FF 8.) Student was monitored during recess and lunch time to keep Student involved in recreational activities with others. (FF 26, 88.) The result was progress in remaining attentive, as teachers and other observers attested during the hearing. (FF 36.) Thus, I do not credit Parents' assertion that Student's attention-related needs were not provided for under the Student's IEP.

<sup>7</sup> For ease of reference, I refer to one of these pathologists as the evaluator and the other as the therapist; however, both are experienced, qualified speech and language pathologists. (2NT 345-346; 3NT 236-237.)

114.) Only one or two assistive technology devices were provided to Student, because the Student did not need such supports. (FF 12, 19, 37, 38-41.)

The evidence is more than preponderant that the Student received educational benefit from these special education services. Student's progress data showed substantial progress in reading, mathematics and writing. (FF 42-47.) Student demonstrated proficient skills in reading and mathematics at grade level on the state PSSA tests for fifth grade. (FF 47.) Student demonstrated the ability to access the science and social science curriculum with Student's limited grade level reading skills. (FF 37.) While progress in writing was far less than grade level proficiency, there was some progress in that more difficult area of achievement. (FF 44-47.) I conclude, based upon more than a preponderance of the evidence, that Student's program as a whole provided meaningful educational benefit.<sup>8</sup>

#### LISTING PARENTAL CONCERNS IN IEP

Parents assert that the IEP for the Student was deficient because it did not list all of the Parents' concerns with regard to the Student's functioning. Factually, their assertion is accurate; the IEP listed two concerns about the Student's speech and language deficits, several of the strategies that Parents suggested to support Student in school, and the results of a behavior inventory, one part of which was submitted by Parents. (FF 48.) Many of the issues raised during this hearing were not listed as parental concerns in the IEP. (FF 49, 50.)

Nevertheless, the law does not require school districts to list all of the parents' concerns in the IEP. The IDEA section on evaluations and IEPs, 20 U.S.C. §1414(d) lists the information

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<sup>8</sup> This conclusion undercuts Parents' assertion that the District provided an inadequate number of hours in learning support and that the Student needed more hours in that placement. Parent provided no evidence to support this assertion, and the record as a whole contradicts it. Because I conclude that FAPE was provided, logic dictates that the number of hours in the placement were necessarily sufficient.

that IDEA requires to be included in an IEP, and parental concerns are not one of the mandatory items. 20 U.S.C. §1414(d)(1)(A)(i). Further, the IDEA provides that no additional information is required beyond what is “explicitly required in this section ... .” 20 U.S.C. §1414(d)(1)(A)(ii). Therefore, the District did not violate the IDEA by not listing all of the Parents’ concerns in the IEP.

#### SPEECH AND LANGUAGE SERVICES

Parents’ main concern is speech and language therapy. Parents correctly point out that speech and language affects functioning in all areas of schooling, so that it is imperative that the IEP address this area appropriately.

Parents assert that the IEP fails to appropriately address this area of deficit. They point out that the IEP goals for this need are very limited, picking out only two areas of functioning, language organization and word retrieval – whereas a third area of weakness, auditory discrimination, is not addressed through a goal; Parents also express skepticism about the objectives being worked on in furtherance of these goals, identifying categories and associated words. Parents note that the District has provided only 30 minutes per week for direct, explicit language training or therapy, whereas Student was given twice that much time at recent previous private placements, and prior evaluators have recommended more. Parents complain strenuously that the District’s speech and language teacher did not send progress monitoring data to them monthly, and that the therapist failed to respond to their concerns when brought to the therapist’s attention.

Reviewing Parents’ expert reports, there is an historic context that explains in part why Parents expect greater services in the speech and language area. In the summer before Student



entered second grade, a private consultant evaluated Student and recommended placement in a private school with small class sizes and “language based teaching”, two language therapy sessions per week, and a lengthy list of goals. (P-8.) It is not surprising that Parents conclude that nothing less would be appropriate to meet Student’s needs, nor would anyone suggest that they should seek anything less for their child.

Unlike the private settings recommended when Student was entering second grade, however, the public school’s obligation is not measured by what is conceivable, or by what would help the child the most. As discussed above, the IDEA does not require a school district to maximize a student’s potential, no matter how desirable that may be. Rather, the law sets a minimal standard: the District must provide enough service to provide Student with no more than a “meaningful” opportunity to learn or to access the grade level curriculum. Thus, the District’s obligation to provide speech and language services extends only to the point where it supports the Student’s learning in fifth grade. It need not provide the best, or even the industry standard service. If the Student is able to learn fifth grade curricular information and skills, despite Student’s speech and language weaknesses, then the District has provided a FAPE. I conclude that the services offered in this area meet the IDEA’s minimal standard.

The District’s evaluation, which virtually mirrors that of the evaluator four years ago, identified three areas of weakness that need to be addressed in order to enable Student to access the fifth grade curriculum: auditory discrimination, language organization and word retrieval. (FF 51-54.) The IEP team decided to address the first of the three weaknesses, auditory discrimination, through specially designed instruction. (FF 77.) The remaining two weaknesses (language organization and word retrieval) were addressed through goals and objectives and the related service of speech and language therapy. (FF 72-76.) Because the District addressed all

three weaknesses through the IEP, I conclude that the IEP was reasonably calculated to provide a FAPE; moreover, I conclude, based upon a preponderance of the evidence, that the decision not to set forth a goal for improving auditory discrimination was based upon a reasonable exercise of professional judgment as to the appropriate method by which to address each of the three weaknesses so that the Student's speech and language impairment was addressed appropriately.

The IDEA requires an IEP to contain a statement of measurable annual goals designed to meet the child's needs that interfere with access to and progress in the curriculum and all other educational needs. 34 C.F.R. §300.320(a)(2)(i). Guidance from the Office of Special Education Programs (OSEP) interprets this requirement to mean that goals need not be stated for related services (which includes speech and language therapy, 34 C.F.R. §300.34(a)). However, where the related service provides instruction, then a goal must be stated. Letter to Hayden, 22 IDELR 501 (OSEP 1994). Thus, the crucial distinction is whether or not a skill is being taught.

Applying the above requirements and guidance to the facts at hand, I conclude, based upon a preponderance of the evidence, that Student's auditory discrimination weakness is a neurological deficit, comprised of an inability to process heard language and the complication of attention weaknesses associated with Student's ADHD. (FF 52, 53.) As a neurological deficit, this was not amenable to explicit teaching of skill at Student's age. (FF 72, 73, 76.) Therefore, the best approach was deemed to be accommodation through the SDI section of the IEP. This decision was also influenced by the strategy chosen by the professionals to begin with the most basic skills and to work upwards through a hierarchy of skills as Student progressed. (FF 72.) I find that these determinations were based upon the reasonable exercise of professional judgment by two highly qualified speech and language pathologists after careful consideration of Student's needs. Deferring to that professional judgment as I must, I conclude that the decision not to

provide a goal for auditory discrimination was appropriate under the circumstances and was consistent with the requirements of the IDEA.

Parents also assert that Student demonstrates articulation problems at home and that the District failed to address this need as required by the IDEA. While there is a factual basis for this assertion, the record shows by a strong preponderance of the evidence that it is based upon a misinterpretation of Student's speech, and that the District was appropriately addressing the problem in Student's educational program. (FF 55-63.)

Parents credibly asserted that the Student often slurs Student's words and seems to mumble when speaking. (FF 55.) District personnel corroborated that this indeed happens. (FF 57, 59, 60.) However, while Parents attributed this to a problem with articulation<sup>9</sup>, District personnel attribute it to Student's ADHD. (FF 56-61.) District witnesses credibly explained that the slurring is due to the Student's impatience and impulsiveness secondary to Student's ADHD. Ibid. Student tends to speak rapidly, which causes the slurring effect. Ibid. When Student is prompted to slow down, Student's articulation is clear and understandable. Ibid. District personnel all prompt Student to slow down in speech, using various cues. (FF 62, 63.) This is supported with a Specially Designed Instruction providing for "think time". (FF 62.) While "think time" does not directly address the rapidity of speech, it does address the underlying impulsivity and impatience; this in turn is proving to have a beneficial effect in helping Student slow down in speaking in class and in social situations. Ibid. Student is slowly learning to slow down so as to speak clearly. (FF 63.)

Parents strenuously assert that the District failed to inform them of Student's progress in speech and language therapy because formal progress reports were not provided from December

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<sup>9</sup> Parents' concerns about articulation appear to be rooted in the early private evaluations that found some articulation problems in Student's speech at an early age. I note that the reports suggest that this problem was developmental in nature and was largely resolved by the summer after second grade. (P-5 p.5, P-6, P-7 p. 6.)

2010 until Parents requested such information in March 2011. (FF 119-121.) While the evidence suggests that the District did not provide cohesive data regarding Student's progress during this time, this does not make out a violation of law. The IDEA does not require any set schedule of reporting progress; rather, it requires the IEP to state when such reporting will be provided to the parents. 34 C.F.R. §300.320(a)(3). In this matter, the IEP specified frequent reporting by the Student's special education teacher, but not by the speech and language therapist. (FF 119.) Thus, the therapist was not aware that Parents expected more frequent reporting; when Parents complained about this, the IEP was amended to require monthly reporting by the therapist. (FF 121.) I conclude that this misunderstanding between the parties did not constitute a procedural violation, and did not vitiate the appropriateness of the services provided.

Parents assert that the amount of speech and language services provided was half of what Student had been receiving in two prior years and that it was so inadequate as to constitute a denial of a FAPE. Student's private evaluators when Student was in second grade recommended two thirty minute sessions of speech and language therapy per week. The District's IEP provides for one thirty minute session per week. (FF 10.) I conclude, based upon a preponderance of the evidence, that the amount of speech and language service provided by the IEP was sufficient to meet the IDEA standard of providing Student with a "meaningful opportunity" to receive educational benefit.

The IEP provided objectives for each goal, and the speech and language therapist took data and provided a progress report on the Student's performance on the objectives. (FF 7, 73-76.) The objectives called for instruction at a fourth grade level of vocabulary, the Student's instructional level. (FF 81.) Both District speech and language pathologists judged that this was

the appropriate level at which to start. (FF 76.) The therapist measured progress on the objectives, but not on the goals, because Student's goals were at the fifth grade level of vocabulary. (FF 81, 82.) While base lines had been established at zero for the objectives by the speech and language evaluator (due to a lack of data), the therapist set base lines based upon Student's performance during the initial sessions. Ibid. By the end of the school year, Student had attained all of the objectives in the IEP, but had not attained the goals, because Student had not performed the categorization and word association tasks at grade level vocabulary. Ibid.

I conclude that this progress was meaningful, even though the Student did not attain the goals. It is not necessary to attain IEP goals in order to make meaningful progress. This is especially so in the present matter, where, Student was working on a neurologically based disability through learning a specific skill, a difficult task because of the severity of Student's auditory processing disorder. Moreover, this was Student's first IEP with the District, which could have led to overly optimistic goal setting. Finally, the Student attained the objectives in little more than half of a school year; if given a full year, the data suggest that Student would have made further progress toward the IEP goals with grade level vocabulary. In this matter, slow progress was still meaningful progress.

This conclusion is bolstered by the fact that Student displayed the ability to access the fifth grade curriculum for purposes of general education. (FF 37.) Moreover, Student did not demonstrate any difficulty with social situations, which was an important part of Parents' concerns. (FF 64-71.) Thus, all the data indicate that Student made meaningful progress in and through the speech and language therapy provided by the District. While more progress might

have been possible with greater hours of therapy – and while greater progress is always to be desired – the law requires no more.<sup>10</sup>

## SOCIAL RELATIONSHIPS

Parents argue that the inadequacy of the District’s speech and language services prevents Student from making meaningful progress in learning social skills. Student’s social skills have been of concern in Student’s early years because Student was struggling with receptive language to the point where it was believed that Student would not be able to maintain satisfactory friendships and would become a target of ostracism and bullying. (P-1to7.) Parents assert that, even as Student entered fifth grade, Student’s language deficits were impairing Student’s social relationships and preventing Student from developing a normal social life.

Consistent corroborative testimony from a variety of District personnel directly contradicts this asserted problem with social skills. (FF 64-71, 83.) The evidence shows that District personnel took special measures to monitor Student’s social activities and found that Student was very social and had satisfying relationships. (FF 66, 70, 86-88.) Moreover, the evidence shows preponderantly that the District provided direct, explicit instruction on social skills and that Student received that instruction. (FF 84, 85.) Thus, to the extent that social relationships are a challenge for Student due to Student’s disabilities, the District provided substantial support.

## ANXIETY

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<sup>10</sup> Parents also asserted that there were problems with the speech and language therapist missing sessions and making up the sessions by “pulling” Student from other class work without parental permission; I do not find that this disagreement rises to the level of a denial of a FAPE. (FF 79.) Parent also argues that Student disliked speech and language therapy, thus adding to Student’s difficulties with self esteem and anxiety; however, there was no evidence of this, and any evidence on the subject was to the contrary. (FF 80.)

Parents also asserted that the results of these deficits were making Student anxious to the point of toileting accidents and even suicidal thoughts. The Parents asserted that Student was afraid of school, afraid of being ostracized and afraid of being bullied because of Student's disabilities.

The great weight of the evidence disproves these allegations with regard to Student's experience in school. Parents' disclosures to District officials, when Parents ostensibly were disclosing all of Student's problems in order to get Student all the help that Student needed, contradict these assertions. (FF 89-93.) The most glaring of the assertions were never disclosed to District personnel until the very end of the relevant school year. Ibid. District officials uniformly and credibly reported observing diametrically opposed affect and demeanor. (FF 94-99, 101-105.)

A careful review of the correspondence in this matter discloses some attention to the issue of anxiety at the beginning of the school year, but it was far from the focus of Parents' concerns at that time. (FF 92, 124.) On the contrary, Parents emphasized their effort to obtain an evaluation for special education services, Student's academic needs and Student's social needs. Ibid.

At no time did Parents disclose two glaring assertions that later took on prominence in the hearing of this matter. Although Student is said to have developed depression and suicidal thoughts, this was not mentioned at all at the time it was allegedly happening. (FF 91.) Moreover, though Parent repeatedly emphasized that Student was having toileting accidents at school during the school year, this was never disclosed in all the voluminous correspondence with the District's personnel. (FF 93.) At the end of the school year, in contradiction to the Parents' assertion that Student was suffering from fear and anxiety at school, Parents wrote to the

Student's learning support teacher and thanked the teacher for making Student feel safe in the teacher's classroom. (FF 100.)

The testimony was unanimous from every District witness that Student was happy and energetic at school, and that Student enjoyed both the environment and the work in fifth grade. (FF 96-105.) Student was described as having a positive demeanor and an outgoing personality. Ibid. These observations, all which I find to be credible, directly and preponderantly contradict the Parents' assertion that Student was suffering from anxiety at school.

Parent presented the testimony of Student's psychiatrist, who diagnosed Student with ADHD and also noted certain traits of high functioning autistic spectrum disorder, although not sufficient to diagnose such a disorder. (NT 1687-1688, 1691-1692.) The psychiatrist noted that Student presents with anxiety, perseveration, obsessive thinking, likely articulation problems and social skills difficulties. (NT 1694-1700.) The psychiatrist depicted an episode of depression in the beginning of September 2010, which the psychiatrist treated with medications. (NT 1689-1695.) The psychiatrist opined that Student's needs were not being addressed comprehensively through the IEP. (NT 1701-1708.) The psychiatrist emphasized the need for greater support for social and emotional needs at school. (NT 1708.)

Upon cross examination, the psychiatrist admitted that the psychiatrist had not observed Student's school or the Student's behavior and functioning at the school, nor had the psychiatrist interviewed any District staff. (NT 1708-1712.) The psychiatrist sees the Student only about once every three months, for less than an hour, and sometimes these sessions include Parents and siblings. (NT 1712-1714.) Prominent in the psychiatrist's testimony was the observation of disagreements and inappropriate behavior by Student toward Student's Mother. (NT 1713-1714, 1724-1725.) Key factual underpinnings of the psychiatrist's evaluation, such as difficulty and



anxiety at school, the Student being bullied, Student's inability to understand social cues and social problems at school, toileting accidents at school, and aggression were all based upon the Parents' report. (NT 1711, 1715, 1728.)<sup>11</sup>

The psychiatrist agreed that the District did not need to address behaviors and social concerns if it found evidence of problems, and was not aware of the data that the District had collected showing a lack of behavioral or social problems. (NT 1715-1723, 1730-1731.) The psychiatrist admitted that Student's anxieties could have been related to entering the fourth school in four years, and the Parent's social expectations for Student. (NT 1723-1727.)

I give the psychiatrist's testimony limited weight. I find that the psychiatrist's opinions were based upon very limited observation of the Student and very limited information about Student's school experience, most of which came from the Parents. This data was not comprehensive or reliable enough to give substantial weight to the opinions expressed. Weighed against the data, documentation and testimony placed in evidence by the District, I conclude that the psychiatrist's testimony is substantially outweighed.

Parents credibly asserted that the Student had visited the school nurse over forty times during the course of the school year. (FF 106.) Parents asserted that this behavior was a way of escaping an uncomfortable situation at school. Parents requested a Functional Behavior Assessment and the development of a Positive Behavior Support Plan.

District personnel looked into the Student's behavior and found no behavior that interfered with Student's education. The nurse visits had been allowed because school personnel believed that the Parents had asked that it be permitted to continue. (FF 107.) Some of the visits

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<sup>11</sup> The psychiatrist relied heavily upon hearsay report from a private school that had rejected Student's application for admission based upon social skills deficits and behavioral issues, but it was not clear whether that report had been based upon any data from the Student's behavior and social relationships during the relevant period at the District's elementary school. (NT 1700-1701, 1704-1706, 1722.)

were for legitimate injuries or discomforts. (FF 108.) Some were to escape noisy conditions in the cafeteria at lunch time or recess time. Ibid. Some were attributed to Student's desire to maintain a relationship with an adult whom Student liked and with whom Student wanted to interact. Ibid.

The evidence is preponderant that Student does not exhibit problematic behavior, even though the nurse visits need to be monitored and perhaps curtailed. (FF 109.) The District has no reason under the law to investigate Student's behavior or put in place a behavior intervention.

## BULLYING

After March 2011, Parents repeatedly asserted that Student was being bullied. Prior to that time, Parents reported incidents of conflict between Student and Student's peers without characterizing them as bullying. (FF 86, 92, 122.) The District personnel looked into every allegation and found no evidence of bullying. (FF 86-88.) The District personnel began interviewing Student every day about Student's social activities at recess or lunch; these were recorded on a form and sent home to Parents. Ibid. Student never reported being bullied. Ibid.

I conclude, by a preponderance of evidence, that Student was not bullied. Student did experience negative interactions with other students, and District personnel took reasonable action to interdict the problems and make sure that they did not recur. There is no basis in the record to conclude that the District failed in any legal duty to address such allegations by the Parents.

## OCCUPATIONAL THERAPY

Parents sought an order that the District provide direct occupational therapy services to Student. However, the record was preponderant that the Student did not need that level of service intensity. The District's occupational therapist evaluated the Student and found no fine motor coordination problems requiring intervention. (FF 110, 112, 113.) Student's handwriting was very poor, but the therapist reasonably concluded that the Student's poor handwriting was due to rushing when writing, a concomitant of ADHD. (FF 110.) Moreover, the therapist found that the Student's hypersensitivity to noise did not interfere with Student's participation in school or progress in education. Ibid.

Nevertheless, the occupational therapist recommended modifications and SDI to ameliorate Student's noise sensitivity, and consultant occupational therapy services to address any needs that might arise. (FF 110, 111.) The therapist was asked once during the school year to address Student's pencil grip, which was observed to be too tight. (FF 114.) The therapist worked directly with the Student on this issue. Ibid.

I conclude, based upon preponderant evidence, that the therapist's conclusion and recommendations do not violate any duty imposed upon the District by the IDEA.

## RESPONSIVENESS TO PARENTS' INQUIRIES AND REQUESTS

Parents assert that the District failed to respond to all of their inquiries and requests. The District is required to "consider" the Parents' concerns during the IEP development process. 20 U.S.C. §1414(d)(3)(A)(ii). The record is overwhelmingly preponderant that the District did indeed consider all of the Parents' concerns that were brought to its attention.

Parents' inquiries and requests fell into a pattern over time, as evidenced by the correspondence in this matter, which I reviewed. (FF 49, 92, 124.) At the beginning of the

school year, parental concerns seemed largely focused upon Student's transition to the new school, social concerns, and conveying the Parents' concerns with speech and language deficits, the Student's below grade achievement, especially in reading, the request for evaluation, and incidental issues of communication with the classroom teacher. Ibid. There was little mention of a previous IEP on the part of the Parents, except in response to District inquiries. Ibid. There was scant mention of Student's asserted anxiety, and no mention at all of the September evaluation in which Student is asserted to have expressed thoughts of self harm or even suicide. (FF 91.) The volume of correspondence was substantial and unusual, but was understandable given Student's needs and the circumstances.

It was not until Parents became dissatisfied with speech and language therapy services – especially their feeling that the therapist was not sufficiently communicative and their apparent disagreement with the therapist's approach to therapy – that the volume of correspondence increased exponentially, and the variety of parental concerns expanded to a very broad range of concerns that affected every aspect of the evaluation and IEP process. (FF 91, 92.) Beginning in March 2011, Parents began demanding broad disclosure of documents, and the District officials began denying these requests based upon the FERPA. (FF 130.) This further increased the volume and adversarial quality of the correspondence, which seemed to reach its peak in March and April 2011. (FF 49, 92, 124.) Nonetheless, District officials continued to respond and continued to schedule meetings and telephone calls for the purpose of explaining Student's educational program. (FF 122-126.)

In addition to demands for inquiry into Student's day to day activities, social experiences and academic work, the Parents frequently seemed to repeat allegations that had been dealt with previously, sometimes repeating their allegations several times, to various personnel. (FF 49, 92,

124.) Many allegations arose during the course of the school year for the first time, adding to the list of concerns to be addressed. Ibid. Regarding many of the allegations and concerns, staff observation and investigations into specific allegations did not corroborate what the Parents were asserting. (FF 96-109.) While it is the obligation of District officials to consider and reasonably inquire into all of Parents' concerns, nothing in the IDEA suggests that District personnel are required to repeat the process over and over for each of the numerous complaints and concerns that were brought to the attention of District officials.

Parents argue strenuously that they repeated their questions because those questions were not being addressed. However, I am satisfied that the record demonstrates a District that was making a great effort to respond to these concerns, and in most cases, the concerns were addressed. I conclude that, in some cases, the Parents did not understand the responses or accept them, leading to repeated questions. In other cases, the questions were about the process of communication, evaluation and educational planning, about which Parents often expressed confusion even after procedures were explained to them. Indeed, this hearing officer experienced Parents' similar inability to understand procedures or follow them during the course of this proceeding. There came a point where the repeated request for explanations of procedure threatened to block the ability of the participants to address the merits. I conclude that this phenomenon was operating between the District and the Parents as well, especially in March and April 2011.

No doubt there were imperfections in the District's response to Parents' inquiries and requests. In particular, the special education teacher failed to provide progress monitoring data in February, though the teacher faithfully provided the data in every other month. (FF 115-121.) I also observed with some concern that there were basic documents requested – like attendance

records and the school nurse's progress notes - that Parents claimed not to have received until the eve of hearing, though they had requested all of Student's records for months. I attempted to insure that Parents received some basic documents needed for the hearing, and the District cooperated graciously, even though it was their not implausible position that Parents had received many of the requested documents that they later claimed not to have received.

Nothing in the IDEA suggests that perfection is required of either districts or parents in the complex and continuous process of educating children. Especially in this matter, the District should not be in jeopardy of censure or intervention in the exercise of their difficult task, based upon minor miscommunications or even lapses in attention to a parent's requests. I conclude that there was no imperfection in the District's communication with Parents in this matter that can be characterized as a deprivation of a FAPE or an interference with Parents' right to participate in the IEP planning process and the education of their child.

#### FAILURE TO FOLLOW IEP FROM PRIOR SCHOOL

Parents request compensatory education for the period of time from the first day of school in the 2010 school year until the IEP was implemented in December 2010. Parents assert that the District failed to implement an IEP that existed prior to Student's enrollment in the District's elementary school. I find no basis for such a claim and I decline parents' request.

There is no evidence that the Student had a current, agreed upon IEP or placement from a public school or local educational agency at the time of enrollment in the District. Student came to the District after two years in private schools. (FF 1.) Although the Parents notified the District that there had been an IEP, the only reference in the documents is to an IEP written prior to the two private placements. Ibid. When District staff made repeated requests for the IEP

referenced in the initial registration documents, Parent stated that the document could not be found and that Parents had not agreed to it and it had never been implemented. (FF 132-134.)

I find that the District addressed Student's needs for support with anxiety, social relationships, reading and writing during the autumn of 2010, while the evaluation was being completed. (FF 135-138.) For this reason and those stated above, there is no basis for ordering any relief with regard to the period from the beginning of the 2010-2011 school year until the IEP was implemented in December 2010.

#### PROSPECTIVE RELIEF

Parents request an order that the District place the Student in a private school with small classes and services for children with attention and learning differences. I decline to order such relief. My conclusions in this case provide no rationale for such an order, because I find that the District has complied with its obligations under the IDEA, and that the IEP, placement and program provided to Student has provided Student with a FAPE. Moreover, I find that the District has offered an IEP, program and placement for Student for the 2011-2012 school year that meets the standards of the IDEA and appropriately addresses Student's educational needs. (FF 139-147.) I conclude that the IEP, program and placement thus offered is reasonably calculated to provide Student with meaningful educational benefit.

#### CREDIBILITY DETERMINATIONS

In reaching the above conclusions, I made determinations of the weight of the evidence proffered by each party. The weight of the evidence depended in part upon the credibility and reliability of the witnesses and the documents admitted into evidence. Repeatedly, the assertions

of Parent proved to be inaccurate or untrue. I do not attribute this to deliberate untruth. I found that the Parent, admirably, was a fierce advocate for the best interests of the Student; in taking on this role – unaccustomed in a formal hearing situation – the Parent was prone to exaggeration that I concluded was sincerely held but still unreliable. Parent also repeatedly demonstrated an inability to process what was being said at the hearing, and I conclude that this dynamic very likely was at play during the extensive and tortuous path of negotiations between the parties in this matter over the course of the 2010-2011 school year. The bottom line, however, is that I accord little weight to the Parent’s assertions. I do accord weight to the assertions of the Student’s Father, who I found to be, while protective of Student, more clearly understanding of the situation and carefully accurate in giving testimony.

Conversely, I found nearly all of the District’s witnesses to be forthright, measured in their responses to questions, and ready to concede a point or correct a misimpression. The District witnesses’ testimony repeatedly corroborated that given by other District witnesses. I concluded that these corroborations were sincere, and not the product of preparation, because most of these witnesses were called by Parent initially and their testimony under questioning by Parent was consistent with questioning by District counsel and for the most part was consistent with the testimony of other District witnesses. Moreover, the District witnesses’ testimony was corroborated with prior consistent statements made in the documents admitted of record. Therefore, I gave considerable weight to the evidence of nearly all of the District witnesses, and found all of them sufficiently reliable to reach findings and conclusions in this matter.

Parents proffered a number of evaluation reports<sup>12</sup> and I admitted them into evidence. In particular, I reviewed reports of a speech and language evaluation, a functional behavior analysis

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<sup>12</sup> In addition to a lengthy list of District personnel, pro se Parents desired to bring in ten private evaluators and therapists as expert witnesses; some of these had evaluated the Student as much as three years before the hearing.



by a certified school psychologist who also is a board certified behavior analyst, and a “Brief Academic Evaluation” by a certified school psychologist. All of these reports were based on evaluations of the Student when Student was in second grade. All included recommendations for the Student’s specially designed instruction.

I cannot give these reports determinative weight on the issues presented in this case, for several reasons. First, they are hearsay and none of their assertions of fact were subjected to cross examination. Second, and equally troubling from my point of view, these reports were three years old and were evaluations of a second grader; Student is now in fifth grade, and there is every reason to believe that Student has matured in every way since the dates of these evaluations. Moreover, Student has had the benefit of two years of education in specialized private schools with small class sizes, one to one explicit training, and substantial speech and language training, all of which are most likely to have helped improve Student’s functioning.

I am struck by the extent to which the evaluations are consistent with the District’s more recent evaluation in terms of the Student’s weaknesses that interfere with learning, and the recommended strategies. Thus, I conclude that the Student is most unlikely to be functioning now with the same degree of deficit in speech and language skills, reading, mathematics and writing skills, social skills and emotional needs as was reported in these evaluations from second grade. If, as I conclude is most likely, Student’s needs have been ameliorated through two years

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Some had evaluated Student within the year or proposed to evaluate Student during the course of the hearing. The admitted reports were among that group of experts. This was discussed during the first hearing session on Parents’ complaint of a denial of a FAPE, which was the third of three companion cases, two of which had been heard and decided already. The matter had been pending for months when Parents indicated to the hearing officer that they intended to bring in these experts. In the exercise of my discretion, I ruled that the Parents would be limited to three experts of their choice. I did this in part to assure fairness to the District, which should not be placed in a position of trying to defend against fresh expert evaluations in the midst of a hearing. I also did this because the proposed testimony would have protracted the hearing far beyond what the issues required, based upon my experience as a special education hearing officer, and the general procedural directions which I adopt that limit hearings to between two and four full days. Parents ultimately were unable to obtain the presence of two of their three chosen experts at the hearing. (NT 158-186, 446-501.)

of private special education, it is likely that Student would need less intervention now. Thus, the reports corroborate the District's present recommended specially designed instruction by inference.

## CONCLUSION

I conclude that the District provided a FAPE to the Student and appropriately supported Parents' participation in the IEP process. Neither compensatory education nor prospective relief is warranted and I decline to order either form of relief.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

## ORDER

1. The District did not fail to provide a free appropriate public education to Student during the relevant period of time from the first day of the 2010-2011 school year until the first day of the hearing in this matter, July 18, 2011.
2. The District did not prevent or fail to permit the Parents' participation in the evaluation and IEP planning process, in violation of the requirements of the IDEA, during the relevant period of time.
3. No District actions or omissions impeded the Student's right to a FAPE; significantly impeded the Parents' opportunity to participate in the decision-making process; or caused a deprivation of educational benefits.
4. The hearing officer will not order the District to provide compensatory education to the Student.
6. The hearing officer will not order prospective relief with regard to the offered IEP and placement for the 2011-2012 school year.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.

HEARING OFFICER

December 24, 2011