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Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: J.J.

Date of Birth: [redacted]

ODR No. 18479-16-17-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Michael J. Connolly, Esquire  
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Berwyn, PA 19312

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Dates of Hearing:

February 6, 2017; April 24, 2017;  
May 8, 2017

Date of Decision:

May 25, 2017

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is a resident of the District named in this matter (District), and is enrolled currently in a District middle school. (NT 6-7; P 11 p. 12.) The District has classified Student under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disability of Other Health Impairment. (NT 6-7.)

Parents assert that the District failed to offer Student a free appropriate public education (FAPE) during a relevant period encompassing part of Student's sixth-grade year, starting January 27, 2016, and part of Student's seventh grade year, until the last hearing date in this matter, May 8, 2017. Parents assert Student's right to a FAPE pursuant to the IDEA, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), and the respective implementing regulations. Parents request an order that the District provide Student with compensatory education for the relevant period, and an order that the District provide Student with appropriate educational services going forward. The District asserts that it has offered and provided a FAPE at all relevant times.

The hearing was completed in three sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District has offered and provided a FAPE to Student at all relevant times, and I therefore dismiss Parents' claims.

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<sup>1</sup> Student, Parents and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality. References to Parent in the singular refer to Student's Mother, who engaged in most of the interactions with the District discussed herein.

## **ISSUES**

1. Did the District offer and provide a FAPE to Student during the relevant period from January 27, 2016 to May 8, 2017, in compliance with the IDEA and section 504?
2. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant period?
3. Should the hearing officer order the District to provide Student with educational services for the remainder of Student's current school year or for Student's next school year, the 2017-2018 school year?

## **FINDINGS OF FACT**

1. Student is [pre-teen aged] and transferred into the District from another school district in 2013 at [elementary school age]. (P 1, 2.)
2. Student has a history of difficulties with attention to task. Student has frequently displayed symptoms at school, such as being distracted easily; being off task and not paying attention frequently; often blurting out answers; rushing through assignments; excessive fidgeting; and inappropriate social behavior. Student also has displayed difficulty with planning and organizing school work. (P 1, 2, 3, 6, 7 pp. 11-13, 17.)
3. Student's general conceptual and reasoning ability, verbal reasoning and nonverbal reasoning are within the average range for children of Student's age. Student's visual reasoning, visuospatial reasoning, and overall verbal skills, as well as verbal fluency, are all within the average range. (P 2, 3.)
4. Student's working memory skills are within the low average range for children of Student's age. Student's overall processing speed is within the borderline range. Student's ability to follow complex directions is low average. (P 2, 3.)
5. Student is medically diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Student has a history of moderate to severe symptoms arising from this disorder, and Student is prescribed medication for it. (P 2, 3.)
6. Student struggles with maintaining attention to task, organization, focus, academic fluency, impulsivity, self-monitoring and self-regulation and visuomotor integration. (P 2, 3.)
7. In August 2013, Student's previous school district evaluated Student and found that Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). However, the previous district, despite finding Student to have a disability as defined in the IDEA, did not offer Student an Individualized Education Program (IEP); rather, the previous district provided Student with a section 504 service agreement setting forth accommodations for Student's attention-related difficulties. Thus, Student came to the District with a section 504 service agreement in place, but no IEP. (P 1, 2.)

8. On June 9, 2014, at Parents' request, the District issued an Evaluation Report. It found that Student was not eligible for special education under the IDEA. The evaluator found that Student's cognitive ability was in the average range, with scattered standard scores and subtest scores ranging from low average to superior. Student was deemed ineligible because Student's symptoms of ADHD were not found to be interfering with Student's educational achievement sufficient to require special education and related services. (P 1.)
9. Parents obtained a private evaluation during Student's fifth grade year. The private psychologist issued a report dated April 17, 2015, and Parents provided the report to the District. (P 2, 3.)
10. The private evaluator found that Student was eligible for special education under the IDEA classification of Other Health Impairment (OHI) due to the effects of Student's diagnosed ADHD upon Student's academic functioning. (P 2.)
11. The private evaluator recommended placing Student in a setting with low teacher to student ratio, specialized instruction in study skills and general learning and memory strategies, support for overall organization and specific intervention for multistep projects. The evaluator recommended note-taking accommodations and testing and assignment modifications. In addition, the evaluator recommended a comprehensive functional behavioral assessment and behavior intervention plan, as well as an occupational therapy evaluation. (P 2.)
12. The private evaluator recommended research-based instruction and accommodations for Student's struggles and deficits in writing and written expression. (P 2.)
13. The private evaluator recommended modifications and accommodations to address Student's educational needs. (P 2.)
14. In May 2015, Student was reading independently at grade level. (S 8 p. 12.)
15. On June 4, 2015, the District issued an Evaluation Report to address the private evaluation report. The evaluation concluded that Student's ADHD-related weaknesses had become more apparent as the academic demands and expectations increased with a higher grade level curriculum. The evaluation concluded that Student's weaknesses associated with ADHD remained a substantial detriment to Student's academic performance despite the beneficial effect of medication. The evaluation identified Student as a child with the disability of OHI due to the effects of Student's diagnosed ADHD. (P 3.)
16. The June 2015 District evaluation report recommended a list of modifications and accommodations, including provision of a highly structured environment; previewing, chunking and repetition of lessons; visual delivery of information; supports for note-taking, written expression, organization and following multi-step directions; teaching of reading comprehension strategies, self-monitoring skills, and study strategies; consideration of performing a functional behavioral assessment and an occupational therapy assessment regarding Student's sensory needs; and provision of accommodations for testing and assessments. (P 3.)

17. The District's June 2015 evaluation report concurred with most of the private evaluator's recommendations. It did not concur with the recommendation for placement in a small setting, although it called for a "highly structured" setting and emphasized Student's need for structure and clear rules and expectations. It did not recommend a behavior intervention plan, although it recommended consideration of an FBA. It did not call for specialized instruction in general learning and memory, although it called for modifications to address Student's short term memory deficits. It did not recommend direct instruction in written expression, although it called for supports to address Student's difficulties with written expression. (P 3.)
18. On July 16, 2015, the District convened an IEP team meeting, with Parent participating by telephone because of scheduling difficulties. The anticipated duration of the proposed IEP was until July 15, 2016, which is partially within the relevant period. (NT 61-65; P 4.)
19. The July 2015 draft IEP was not finalized, because Parent did not receive a Notice of Recommended Educational Placement immediately, having participated by telephone. When Parent later received the NOREP, Parent did not realize that it was necessary to return a signed NOREP for initial special education services to begin. (NT 61-65; P 4, 6; S 6.)
20. The July 2015 draft IEP indicated that Student did not exhibit behaviors impeding learning. (P 4.)
21. The July 2015 draft IEP reported present levels based upon Student's performance during the first and second trimesters of Student's fifth grade year, as well as upon curriculum-based measures taken in May of that year. In all areas of the curriculum, Student's performance was on grade level and was assessed to be either "developing" (the middle category of three performance categories) or "consistently demonstrating" (the highest category of performance). (P 4.)
22. The July 2015 draft IEP provided for placement in itinerant learning support, with one period per day of direct, explicit teaching in the areas of writing, learning-related behaviors and attention, by a special education teacher, in either a small group setting in the special education classroom, or a group setting in the regular education classroom. (P 4.)
23. The July 2015 draft IEP provided two measurable goals addressing written expression; classroom organization, classroom attention, behavioral self-regulation, following directions and completing assignments. (P 4.)
24. The July 2015 draft IEP provided no goal regarding reading comprehension. (S 4.)
25. The July 2015 draft IEP provided specially designed instruction and modifications addressing Student's organizational and attention-related needs, including research-based instruction in writing; a daily behavior checklist; an assignment book for homework organization and completion; chunking of larger assignments; a weekly check-in with a teacher to address behavior and organization needs; and preferred seating. (P 4.)
26. The July 2015 draft IEP provided for testing accommodations, including small group testing, prompts to stay on task and frequent breaks. (P 4.)

27. Parent proposed revisions to the draft IEP and the draft IEP was revised on October 1, 2015, by telephone conference with Parent. (NT 61-67; P 6; S 6.)
28. Student's assigned special education case manager became aware of and reviewed the report of Parents' private evaluator sometime between October 10, 2015 and January 15, 2016. (NT 99.)
29. On January 15, 2016, the District convened an IEP team meeting. The anticipated duration of the proposed draft IEP was until January 13, 2017, within the relevant period. (NT 101; P 6.)
30. The IEP team considered the recommendations of the Parents' private evaluator in proposing and discussing the draft January 2016 IEP. (NT 99.)
31. The draft January 2016 IEP indicated that Student did not exhibit behaviors impeding learning. (P 6.)
32. In the first half of sixth grade, Student's performance was on grade level in all areas of the curriculum, and Student's grades in core subjects were "A"s or "B"s. Student's 2015 PSSA scores were Proficient in reading and Basic in Mathematics. Student's teachers reported that Student struggled with mathematics, word problems, and writing. In spelling, Student's performance on a curriculum based measure addressing fluency was below average for sixth grade. (NT 102-103; P 6; S 6.)
33. Student's teachers reported that Student continued to display difficulty sustaining attention, distractibility, blurting out, rushing through work, missing social cues, frequent fidgeting, and difficulties with organizing classroom materials, homework, and short-term and long-term assignments. In mathematics, Student worked at a slower pace than same-grade peers. In science and social studies, Student's attention difficulties were not typical, and Student responded well to redirection. (P 6; S 6.)
34. The draft January 2016 IEP provided for placement in itinerant learning support, with one period per day of direct, explicit teaching in the areas of writing, mathematics fluency, learning-related behaviors and attention, by a special education teacher, in a small group setting in the special education classroom, or in the regular education classroom. (P 6.)
35. The draft January 2016 IEP provided a measurable goal addressing written expression; specially designed instruction in sentence structure and organization strategies, as well as graphic organizers, teacher conferences, checklists and models. (P 6.)
36. The draft January 2016 IEP provided a measurable goal addressing mathematics fluency. (P 6; S 7.)
37. The draft January 2016 IEP provided a measurable goal addressing Student's focus on assigned tasks in the classroom for all core subjects. (P 6.)
38. The draft January 2016 IEP provided no goal regarding reading comprehension. (S 6.)
39. The draft January 2016 IEP provided specially designed instruction and modifications addressing Student's organizational needs, including notifying Parent of upcoming

assignments and assessments; a daily behavior checklist; chunking of larger assignments through numbered multi-step directions and use of a highlighter; and providing Student with time to organize materials. (P 6.)

40. The draft January 2016 IEP provided specially designed instruction and modifications addressing Student's attention-related needs, including provision of a structured learning environment; study guides to accommodate note-taking difficulties; opportunities for preview and repetition; visual presentation of information; extended time and reduction of demands for assignments; the use of forced-choice questions and word banks for assessments; and cues both verbal and visual. (P 6.)
41. The draft January 2016 IEP provided specially designed instruction and modifications to accommodate Student's reduced fluency in mathematics calculation, by providing for Student's use of flash cards for drilling mathematics facts, and use of a calculator when mathematics facts were not being assessed. (P 6.)
42. The draft January 2016 IEP provided for testing accommodations, including small group testing, prompts to stay on task and frequent breaks. (P 6.)
43. The draft January 2016 IEP provided for an occupational therapy evaluation. (P 6.)
44. The draft January 2016 IEP did not provide for a functional behavioral assessment. (P 6.)
45. Parent declined to sign a NOREP authorizing initiation of services during the January 2016 IEP team meeting, because Parent wanted more services for Student and was dissatisfied with the District's perceived refusal to provide pull-out services in the learning support classroom for testing. (NT 41-42, 80-82.)
46. After the January 2016 IEP revision meeting, and before the IEP was finalized and the NOREP signed, the District began to implement some but not all of the modifications and accommodations set forth in the January 2016 draft IEP. (NT 69-70, 82-83, 124.)
47. On February 10, 2016, Parent sent proposed IEP revisions to the District, after consulting with counsel. The District made the changes on the same day. (NT 69-75; P 12 pp. 6-8; S 7.)
48. Parent proposed no further revisions after this date. (NT 41-42, 80-82; P 12 pp. 6-8.)
49. Parent did not send a signed NOREP to the District in February after the changes were made. The District requested a signed NOREP and sent a form ready for signing on February 26, 2016. (P 12 p. 5; S 13 p 14.)
50. The District provided an occupational therapy report sometime after March 22, 2016, which recommended eligibility for services and recommended goals and modifications to address Student's measured deficits in visual-motor skills. (NT 50; S 5.)
51. The April 20, 2016 IEP provided for placement in itinerant learning support, with about 35 minutes per day of direct, explicit teaching in the areas of writing, mathematics fluency, learning-related behaviors and attention, by a special education teacher, in a small group

setting, in either the special education classroom or the regular education classroom. (P 6; S 6.)

52. The April 20, 2016 IEP provided for all of the services offered in the January 2016 draft IEP, with additional provisions. (S 8.)
53. The April 20, 2016 IEP added the results of an occupational therapy evaluation which found Student eligible for occupational therapy services. The evaluation found no sensory processing needs. (S 8.)
54. The April 20, 2016 IEP added related services in the form of direct occupational therapy services at least 45 minutes per month. (S 8.)
55. The April 20, 2016 IEP added two occupational therapy goals to address Student's visual-motor perception and visual-motor integration deficits, including filling out a worksheet and copying notes from a board. (S 8.)
56. The April 20, 2016 IEP added three occupational therapy modifications to address Student's visual-motor perception and visual-motor integration deficits. (S 8.)
57. The April 20, 2016 IEP added language to the goal for focus on assigned tasks; the added language provided for Student's use of a daily self-rating checklist. (S 8.)
58. The April 20, 2016 IEP added a new goal for organization of materials that Parent had suggested. (S 8.)
59. The April 20, 2016 IEP added specially designed instruction in the form of daily check-in and check-out with a teacher to support organization and assignment completion. (S 8.)
60. The April 20, 2016 IEP incorporated multiple recommendations of the Parents' private evaluator, including instruction individually or in a small group for mathematics fluency; teaching self-regulation of attention to task; supports for organizational difficulties, including a goal and modifications; support for Student's written expression needs, including a goal and modifications; previewing and repetition; chunking of assignments;; testing accommodations; and an occupational therapy evaluation. (S 8.)
61. The April 20, 2016 IEP did not incorporate all of the private evaluator's recommendations. In particular, it did not offer unconditionally to provide direct instruction in a small-group environment for mathematics fluency skills, written expression, organization, study and learning skills, short term memory strategies, and attention to task strategies. Rather, it offered to address mathematics fluency skills, written expression, learning-related behaviors and attention, in either a small classroom setting or in the general education setting, as needed. (S 8.)
62. Preferential seating and movement breaks were not a listed modification in the IEP because these were provided as part of general classroom instructional strategies; breaks in attention to instruction were not needed or appropriate. (NT 109, 132-134, 286.)
63. The District had the capability to provide Student with one period per day of direct instruction in the learning support classroom at Student's neighborhood school; however,



Student's assigned special education teacher, who was also Student's case manager, determined, consistent with the April 2016 IEP, that such services were not necessary and that needed specially designed instruction could be provided to Student with regard to mathematics fluency, organization and attention strategies through push-in services in the regular education setting and through one-to-one instruction and monitoring through the check-in/check-out procedures of the IEP, as well as implementation of specially designed instruction such as checklists that chunked multi-step instructions and note-taking aids such as study-guides. (NT 88-91, 95-96, 104-105, 108, 119-122, 132-143, 152, 163-164, 169-171; P 9; S 8.)

64. Also consistent with the April 2016 IEP, Student's special education teacher determined that a written expression goal and specially designed instruction, including graphic organizers, checklists and editing support, and accommodations through assistive technology, would be appropriate to address Student's written expression needs. (NT 113-114, 129-130.)
65. The April 20, 2016 IEP offered to provide most of the special education services recommended by the District's June 2015 Evaluation Report, but it did not offer to provide forced-choice assessments and word banks, an FBA, a behavior intervention plan and specially designed instruction for reading comprehension. (P 3; S 8.)
66. The IEP team discussed the recommended FBA, but decided not to do that at the time, because it was more important to do the occupational therapy evaluation. Student's case manager and special education teacher did not consider a behavior plan to be needed. (NT 101-102, 129.)
67. Student did not need specially designed instruction for reading comprehension at the time of finalization of the April 2016 IEP. (NT 269-270, 285; S 8, 10.)
68. Parent signed and returned a NOREP authorizing initial provision of special education services on April 26, 2016. (NT 37-39, 74-76, 126-128, 143-145, 213; P 12 pp 4-5; S 8 pp. 1, 5, 6, 8, 67, 68.)
69. Student's special education teacher, teachers and related services providers implemented the April 2016 IEP substantially during the relevant periods of Student's sixth and seventh grade instruction. (NT 59, 88-91, 93-96, 104-105, 113-122, 130-143, 152, 163-164, 169-171; P 9; S 8.)
70. Student's special education teacher provided Student with push-in special education services for one period per day, supporting Student for attention to task and organization and addressing Student's mathematics fluency and organizational needs. (NT 88-91, 120, 141-142.)
71. Student's special education teacher provided Student with individual instruction in organizational strategies and attention self-monitoring strategies through two-hours of pull-out, one-to-one instruction and in the context of daily check-in/check-out supervision that also addressed Student's needs regarding organizational strategies and completion of assignments. (NT 135-141; P 9; S 7.)

72. Student's special education teachers, regular education teachers and occupational therapist implemented Student's IEP goal for written expression and occupational therapy goals that addressed the visual-motor aspects of writing; instructed Student in seventh grade directly; and assured that the specially designed instruction and modifications addressing Student's writing needs were implemented. (NT 148, 173-183, 213-214, 250-252, 257, 273-274; S 9.)
73. Student's occupational therapist implemented Student's occupational therapy goals and specially designed instruction addressing Student's visual-motor weaknesses and attention needs. (NT 241-242, 246-252; P 8.)
74. Student's regular education teachers implemented IEP modifications that addressed and supported Student's needs regarding attention and organization, including study guides to accommodate note-taking and previewing/repetition to address Student's needs regarding attention and short term memory; modified assignments; accommodated local assessments; and checklists. (NT 268, 272-276, 294, 301, 303, 306.)
75. During the relevant period of Student's sixth and seventh grades, Student made progress on IEP goals with regard to some aspects of written expression; mathematics fluency; organization of materials and homework completion, except for homework completion in the second marking period of 2017, when Student's completion rate regressed. Student made progress with regard to the goal for attention until the second marking period in 2017, when measurement could not be made due to Student's lack of cooperation. (S 9.)
76. In seventh grade, Student mastered the occupational therapy goals for filling out a mathematics worksheet in a one-to-one, low distraction setting, and far point copying. (P 9.)
77. During the relevant period, Student has achieved at an average level and on grade level in reading and mathematics, despite struggles with mathematics fluency. (NT 292-296, 301-303; P 2, 4, 6; S 10.)
78. During the relevant period, Student has achieved on grade level and at an average level in other academic and special classes and activities. (NT 201, 268-272, 284, 286-288, 301-303; P 2, 4; S 10.)
79. Student's work completion, motivation and grades, as well as organizational skills, regressed within two months of the hearing in this matter. (NT 303-312; S 9 p. 6, S 10.)

#### CREDIBILITY/RELIABILITY

80. Parent believed that pull-out services were not available for testing in a quiet area, yet the Student and others with this accommodation were pulled to quiet areas for testing. (NT 42, 93-94, 134-135, 161-162, 212, 272, 273, 281, 294, 303.)
81. Parent believed that the IEP was being implemented even though Parent had not signed an initial NOREP, because District personnel began sending notifications of Student's school

performance after the January 2016 IEP meeting. However, at the January 2016 meeting, it was explained to Parent that this was a regular education service being provided because Parent had expressed a desire for more notifications. District personnel informed Parent that the IEP could not be implemented fully until Parent should return a signed NOREP. (NT 62-64, 69-76, 79, 153-154; P 12 p. 8.)

82. Parent believed that Parent had received a NOREP form in Student's backpack and had returned it in February 2016, but Parent did not return a signed NOREP until April 2016. (NT 39, 74-76.)

## **CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

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

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

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<sup>2</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>3</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

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

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

### CREDIBILITY/RELIABILITY

It is the responsibility of the hearing officer to determine the credibility and reliability of witnesses' testimony. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following determinations.

Considering the testimony in light of the documentary evidence, I find all of the District witnesses to be credible and reliable. All of these witnesses' statements were substantially in accord with the documentary record. I found the demeanor of these witnesses to be consistent with truth, and their manner of answering questions to be suggestive of an effort to be truthful and accurate.

I accord reduced weight to Parent's testimony, particularly with regard to Parent's explanation of the delay in returning a NOREP from January 15, 2016 to April 26, 2016, and Parent's depiction of the Student's difficulties in the school setting. While I do not question

Parent's truthfulness at the time of Parent's testimony, I find that Parent's testimony was not reliable in these areas.

While Parent – admitting only a hazy memory of the signing of the NOREP – testified twice under oath that Parent signed and returned the NOREP in February 2016, the evidence of record directly and convincingly contradicts this assertion. I conclude that Parent, although her memory was unclear, was still willing to make a definite assertion as to the NOREP, which was not reliable.

Parent's understanding of what was happening at school was drastically limited, and she has limited understanding of curriculum and teaching methodologies, as she forthrightly admitted in testimony. Parent admitted that Parent never once visited Student's classroom or saw Student there. Consequently, Parent's testimony reveals a significantly inaccurate understanding of the services available to Student at school and how they were implemented.

In particular, Parent testified that she was unhappy that Student would not have a quiet place for testing, due to an apparently confusing statement at an IEP meeting about pull-outs being unavailable; yet, multiple witnesses testified credibly that the Student and others with this accommodation were pulled to quiet areas for testing routinely. Similarly, Parent's confused belief that Student's IEP could be implemented without Parent's delivering a signed NOREP also bespeaks her lack of understanding of special education services and procedures. I find that these misunderstandings reduce Parent's reliability regarding the offering and implementation of Student's program.

#### FAILURE TO OFFER OR PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a “free

appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is “special education and related services”, at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive appropriate services in light of the child’s individual circumstances. Andrew F. v. Douglas County Sch. Dist., RE-1, \_\_\_ U.S. \_\_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Andrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

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

A school district is not necessarily required to provide the best possible program to a student,

or to maximize the student's potential. Andrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; 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.) The program's appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District offered and provided a FAPE to Student during the relevant period. I conclude that the offered program was reasonably calculated to provide meaningful benefit, appropriate in light of Student's circumstances, for four reasons. First, the District offered services based upon an appropriate understanding of Student's educational needs. Second, it offered services that addressed all of those needs appropriately in light of Student's circumstances. Third, District educators implemented the IEP appropriately in view of Student's circumstances and needs. Fourth, retrospectively, the record shows that Student made appropriate progress during the relevant period of time.

## THE PROGRAM WAS BASED UPON APPROPRIATE UNDERSTANDING OF STUDENT'S NEEDS

By January 27, 2016, the evidence shows preponderantly that the District was proceeding on the basis of an appropriate understanding of Student's needs. The IEP offered in January 2016 was based upon two comprehensive evaluations – the private evaluation report of April 2015, and the District's consequent Evaluation Report of June 2015. The evidence is preponderant that the District considered the findings and recommendations of the private evaluation report in determining what services to offer in the Student's initial IEP, and incorporated many of the private evaluator's recommendations in the proposed IEP. In addition, the District, through the IEP team, discussed its offered program extensively with Parent over a period of several months, through meetings and correspondence extending from July 2015 to April 2016. Parent made a significant number of suggested revisions to the IEP, and the District accepted many of them in its offered program, including several final offered revisions that were incorporated in the final IEP verbatim.

One area of need was not fully evaluated by the beginning of the relevant period for decision. Although both the private April 2015 evaluation and the District's June 2015 Evaluation Report recommended IEP team consideration of an occupational therapy screening or evaluation, this was not completed until April 2016. The IEP team decided to obtain an occupational therapy evaluation in January 2016 after a team discussion. The evaluation was completed in due course by the April 2016 IEP team meeting, at which time the IEP was revised to incorporate its results and recommendations. Although the private evaluator had recommended the report in large part to explore possible sensory needs, the evaluation found none. Rather, it uncovered deficits in areas of visual-motor integration. These were addressed in the April 2016 IEP that Parent eventually approved. There is no evidence that the District inappropriately delayed this evaluation during the



relevant period from January 27, 2016 to May 8, 2017. Therefore, I find no record basis to conclude that this aspect of Student's needs was not addressed appropriately in a timely fashion.

#### THE DISTRICT PROPOSED AN IEP THAT ADDRESSED ALL AREAS OF NEED

The resulting proposed and final IEPs addressed all areas of Student's educational needs. Although the parties revised the District's proposed draft IEPs several times, reflecting disagreement over how to address the needs uncovered in the evaluation reports, this is not an indication of a failure to address Student's needs appropriately. On the contrary, while evaluation reports must be considered by the IEP team, it is the IEP team that is responsible for determining how to address needs, and what special education and related services are appropriate to the child in view of the child's circumstances. 34 C.F.R. §300.306(c)(2), 300.320(a). Agencies have the right under the IDEA to select their own educational methodology and exercise their professional judgment, as long as they provide appropriate services. K.C. v. Nazareth Area Sch. Dist., 806 F.Supp.2d 806, 813-814 (E.D. Pa. 2011); See, Leighty v. Laurel School Dist., 457 F.Supp.2d 546 (W.D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgment).

As the present record preponderantly shows, the salient circumstances were that Student functioned on grade level in all core and special subjects, that Student was progressing from grade to grade, that Student's academic performance was consistent with Student's tested cognitive potential, and that Student benefitted from and remained motivated in the regular education environment, with all its social educational benefits. I conclude that the District consistently proposed draft IEPs that appropriately addressed Student's educational needs, taking into account these circumstances. Andrew F. 137 S. Ct. above at 999 (2017).

In view of the benefit to Student of placement in regular education classes, rather than in more restrictive learning support environments, the District proposed a placement that permitted the delivery of an itinerant level of learning support in either the regular education setting or, as needed, in a learning support classroom environment.<sup>4</sup> The IEP continued to propose instruction in small group settings to address writing, mathematics fluency, learning-related behaviors and attention. Although “pushed-in” rather than “pulled-out”, services were provided in a small group setting, the record is preponderant that the Student did not need a more restrictive setting for such services.

Similarly, the IEPs permitted Student’s teachers to address Student’s attention, organization and self-monitoring needs through informal one-to-one instruction by a special education teacher, either in the regular education classroom or during “check-ins” and “check-outs” in the regular education environment. It offered to provide instruction through a research-based explicit and sequential curriculum as needed, but left the option to educators to provide such instruction informally in the regular education environment. In view of the circumstances, Student’s special education teacher determined that such formally “direct” instruction was not necessary, and that her instruction was appropriate. Parents have not provided preponderant evidence to show that this judgment was not appropriate; on the contrary, the record shows that this approach was appropriately successful. The IDEA entitles Student to an appropriate educational opportunity, but an IEP does not have to incorporate every program that parents desire for their child. Ridley Sch. Dist. v. M.R., 680 F.3d 269 (3d Cir. 2012).

The proposed supports included goals and/or specially designed instruction and modifications that addressed all of Student’s educational needs; as the IEP team repeatedly revised

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<sup>4</sup> While I find that this somewhat ambiguous prescription of placement did not, on this record, amount to a denial of FAPE, I do not intend to condone such ambiguous IEP draftsmanship as a general matter.

the draft IEP from January 2016 until it reached its final form in April 2016, the draft IEPs addressed these needs through increased numbers of goals and modifications, providing for utilization of assistive technology as appropriate. The final IEP offered goals addressing written expression; mathematics fluency; attention, focus, impulsiveness and self-monitoring in the classroom; organization; and occupational therapy needs. It offered specially designed instruction and accommodations addressing all of these needs<sup>5</sup>. I conclude that these offered services were appropriate for Student and were reasonably calculated to provide Student with the opportunity for meaningful benefit.

Parents seem to argue that the delay from January 2016 to April 2016 deprived Student of a FAPE and therefore requires a compensatory education order. As noted above, this delay was part of the process of Parent and the District reaching a program with the mix of goals and modifications that Parent could accept. The evidence shows preponderantly that Parent withheld consent to initiation of special education services during this entire period of negotiation, rather than consenting to an IEP and continuing these negotiations for revision of the IEP. The record is not preponderant that Student was denied meaningful or appropriate opportunity for educational benefit during this period. For these reasons, I find no denial of FAPE during this period.

#### DISTRICT EDUCATORS IMPLEMENTED THE IEP APPROPRIATELY

Although the record disclosed some flaws in the implementation of the IEP, on the whole the record shows preponderantly that it was implemented appropriately. Student's special education teacher provided structure in the general education classroom for attention and

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<sup>5</sup> Although the evaluation reports, dated a year or more before the final IEP was approved, reflected some difficulties in reading comprehension deriving from Student's attention and short-term memory deficits, the record is preponderant that Student was able to access the curriculum in the area of reading comprehension, and that no specific or direct teaching was needed in that area. Thus I find no denial of FAPE on this account.

impulsiveness, and taught Student organizational and self-monitoring techniques in small groups and on a one-to-one basis in the regular education classroom. In addition, this teacher taught organizational and self-monitoring skills, one-to-one, during two hour-long pull out sessions and in daily “check-outs” and “check –ins”. The occupational therapist also addressed these needs in conjunction with implementing goals addressing visual-motor deficits, in small group and individual settings.

Student’s written expression needs were addressed in the general education curriculum through goals and specially designed instruction, including graphic organizers and editing support. Although the IEP called for some small group instruction, the Student’s regular education teachers testified credibly that Student was making progress in their classes with the supports in place. Therefore, this evidence of seemingly inappropriate deviation from the requirements of the IEP, did not establish by a preponderance of the evidence that Student was deprived of meaningful or appropriate educational benefit. Thus, I conclude that the District did not deprive Student of a FAPE in its implementation of the IEP with regard to written expression.

The record is preponderant that the special education teacher took appropriate data and provided appropriate progress monitoring data to teachers for transmission home; although Parent asserted that this was not received, there is no evidence that District personnel failed to send the data to Parent. Therefore, I conclude that Student’s teachers implemented the IEP goals appropriately.

The record is preponderant that Student’s teachers appropriately implemented the specially designed instruction, modifications and accommodations set forth in the IEP as needed. One teacher testified to implementing the bulk of these services as needed. In some cases, the teacher admitted to not providing checklists in writing, as obviously presumed in the IEP, and in some

cases, the teacher found IEP modifications unnecessary in view of the circumstances and Student's needs. Nevertheless, on the whole, this testimony provided preponderant evidence of substantial compliance with the IEP, and Parent introduced no countervailing evidence of any weight that District personnel failed to implement specially designed instruction, modifications and accommodations called for in the IEP. On this record, I do not conclude that any imperfect implementation denied Student a FAPE.

#### STUDENT MADE APPROPRIATE PROGRESS DURING THE RELEVANT PERIOD

The record is more than preponderant that Student made appropriate and meaningful progress during the relevant period of time. Student functioned at grade level in all subjects. Student's marks were passing throughout the period, and indeed were often "A"s and "B"s.<sup>6</sup> Some of Student's courses were advanced, and Student still obtained satisfactory grades in all subjects. Teachers testified credibly that Student was making progress throughout the period, except for some regression in the middle of student's seventh grade year, which they considered to be atypical. Parent introduced no preponderant evidence to the contrary.

Student also made some progress on IEP goals. Progress monitoring data was mixed, but they showed progress on a number of goals. Student's occupational therapist credibly reported mastery of her IEP goals. Teachers credibly corroborated the data, in that they reported Student's overall satisfactory behavior in class in the areas of attentiveness, focus and impulsiveness. They reported that Student continued to struggle with these issues but was able to access the curriculum

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<sup>6</sup> Although local assessments were accommodated, these accommodations were limited to attentiveness concerns. Assignments and homework were sometimes reduced in length or number of probes, to deal with organization concerns. There is not preponderant evidence that the Student's grades were substantially supported so as to distort the grades as a measure of appropriate progress. Andrew F. 137 S. Ct. above at 999.

and succeed academically. Therefore, on the whole, Student made progress on Student's IEP goals.

#### SECTION 504 VIOLATION

I conclude that the District provided a FAPE to Student during the relevant period of time. The record preponderantly shows that the District provided appropriate services and accommodations to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1). Thus, I find no violation of section 504.

#### CONCLUSION

I conclude that the District provided Student with a FAPE during the relevant period of time. Therefore, I will dismiss Parents' claims and deny the requested equitable relief.

#### ORDER

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

*William F. Culleton, Jr. Esq.*

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

DATED: May 25, 2017