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**Pennsylvania Special Education Hearing Officer**  
**Final Decision and Order**

**CLOSED HEARING**

**ODR File Number:** 19319-16-17

**Child's Name:** D. L.                      **Date of Birth:** [redacted]

**Dates of Hearing:**  
9/1/2017, 10/12/2017, 11/22/2017, 12/15/2017 and 1/24/2018

**Parent:**  
[redacted]

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**Hearing Officer:** William Culleton Esq.

**Date of Decision:** 2/19/2018

## INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)<sup>1</sup> is enrolled currently in a District elementary school. The school district named in this matter (District) is the Student's local education agency as defined in the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Student is classified under the IDEA as a child with Multiple Disabilities.

Parent asserts that the District has failed and continues to fail to provide Student with a free appropriate public education (FAPE) pursuant to the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>2</sup> and their implementing regulations. Parent states that the District failed to administer standardized cognitive and achievement testing, failed to provide appropriate assistive technology, and failed to place Student appropriately and failed to provide an appropriate Individualized Education Program (IEP) to Student. Parent seeks an order for prospective relief as well as compensatory education for Student.<sup>3</sup> The District denies Parent's allegations and seeks dismissal of the complaint.

The hearing was completed in five sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District failed to offer and provide a FAPE to Student in the least restrictive environment and continues to do so. I order the District to provide Student with an appropriate placement and

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

<sup>2</sup> There is no question that Student is otherwise qualified within the meaning of section 504 and that the District receives federal funds.

<sup>3</sup> The District moved to limit Parent's claims to a period no greater than two years prior to the date of filing of this matter. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 620 (3d Cir. 2015)(IDEA statute of limitations bars claims for "all but the most recent two years" if complaint not timely filed). I conducted a hearing and made particularized findings of fact regarding the issues raised in this motion, concluding that the IDEA statute of limitations did not limit Parent's claims because Parent was unable to understand the District actions which form the basis of Parent's complaint. (HO 2)(Hearing Officer Ruling on Motion to Limit Claims). Therefore, this matter addresses Student's entire history with the District from kindergarten to Student's present school year, fourth grade.

program going forward, as well as appropriate services to restore Student to the educational path that Student would have been on if not for the District's violations. G.L., 802 F.3d above at 620.

### **ISSUES**

1. Were the District's April 2013, April 2015 and March 2017 evaluations appropriate?
2. Has the District provided Student with an appropriate placement in the least restrictive appropriate environment?
3. Has the District provided Student with a FAPE in compliance with the IDEA and section 504 during all or any part of Student's kindergarten, first, second, third and/or fourth grade school years?
4. Has the District provided Student with appropriate accommodation for visual impairment pursuant to the requirements of section 504?
5. Should the hearing officer order the District to provide Student with compensatory education services on account of all or any part of the relevant period from the first day of school in the 2013-2014 school year to the date of the first hearing session in this matter on September 1, 2017?
6. Should the hearing officer order the District to provide Student with either a re-evaluation or an Independent Educational Evaluation at the District's expense as a remedy for its failure to provide an appropriate re-evaluation?
7. Should the hearing officer order the District to convene an IEP team meeting to consider whether a re-evaluation would be appropriate and for the purpose of revising Student's IEP with regard to placement, specially designed instruction, related services and any other special education services?

### **FINDINGS OF FACT**

1. Student was born with a visual condition characterized by underdevelopment of the optic nerves; [redacted]; abnormal development of the brain; and abnormal pituitary function. Student's congenital condition can result in intellectual disability, vision problems and other neurological problems. (J 14.)
2. Student's disability affects Student's overall development, both physical and intellectual, and Student's visual acuity. Student is legally blind absent correction, and experiences [redacted]. (NT 109-110; P 1.)

3. Student has a history of delayed development in crawling, walking and toilet training. (P 1.)
4. Student presented at an early age with unusual body position and head turning as a compensation for jerky eye movements and favoring one eye over the other for viewing. Student exhibited difficulty in tracking and visually fixing on an object. Student tended to hold things very close to the eye to see them, although Student also exhibited some medium-distance vision. In preschool, [redacted]. (J 14.)
5. Student demonstrates significant difficulties with maintaining attention to task and focus. (NT 333-334, 433, 619; J 15, 16; P 1.)
6. Student's rate of learning is significantly slower than that of same age peers but Student is capable of learning and retaining what is learned. (J 16.)
7. Student needs to learn age-appropriate social skills. (J 16.)
8. At an early age, Student received a prescription for corrective lenses but has never worn glasses in school. (NT 139-141.)
9. Throughout Student's tenure with the District, Student has made very slow progress in all targeted skills, and has experienced significant regression during summer and other breaks in service, even where Student participated in ESY services. Student's recoupment from regression has been slow in most areas. From Kindergarten to fourth grade, Student regressed in identifying letters; however, within some discrete school terms, Student made progress by recouping previously lost skills of identifying letters. Student's ability to identify numbers and count also has either regressed or stagnated from kindergarten to fourth grade, with minimal progress demonstrated within particular school terms. (NT 332-336, 342-349, 456-463; J 3, J 4, J 5, J 6; P 3.)
10. Parent has difficulty understanding and learning material concerning Student's education, such as reevaluation reports and IEPs. Parent relied upon explanations of the documents at meetings with school personnel, which Parent's mother usually attended to support Parent and help Parent understand what was said. (NT 80-83, 91.)
11. Parent did not know the meaning of the word "cognitive" when Student was in kindergarten and first grade. During those years, Parent did not understand the concept of "achievement" in the sense in which it is used in standardized testing. Parent did understand that cognitive testing referred to determining Student's abilities. (NT 68-72, 74.)

#### EVALUATION OF CHILDREN WITH VISUAL IMPAIRMENTS: STATE OF THE ART

12. It is not possible to validly assess Student's full scale IQ in any valid standardized test; there is no test that is validated for Student's type of visual impairment, nor has there ever been such a test. (NT 587; S 3.)

13. Nevertheless, it is possible to derive educationally useful information about Student's cognitive ability by: 1) administering standardized tests with appropriate accommodations; 2) administering sub-tests of well-regarded standardized cognitive ability tests that do not rely upon vision for participation and valid scoring; and 3) reporting all such scores with caution as to the validity of scores derived with accommodation and caution as to the lack of comprehensiveness of sub-test scores that do not rely upon vision. (NT 580-587; S 3.)

#### KINDERGARTEN: EVALUATION AND SERVICES PROVIDED

14. The District provided a re-evaluation report dated April 19, 2013, prior to Student's transition to kindergarten in the District. The report identified Student as a child with multiple disabilities under the IDEA. It recommended direct physical therapy and occupational therapy support; speech therapy; assistive technology; and vision support. (J 14; P 2.)
15. The April 2013 reevaluation report stated that formal cognitive and achievement testing were not attempted due to Student's visual impairment. This was due in part to Student's young age and in part to the evaluators' inability to determine what Student could and could not see. Nevertheless, an adaptive behavior inventory was administered. The evaluation relied also upon history, diagnosis and reports of educators who had worked with Student. (NT 82-85, 409; J 2, J 14.)
16. The re-evaluation included review of a previous a functional vision evaluation; a current assessment by the teacher of the visually impaired; a speech and language evaluation; an occupational therapy evaluation and a physical therapy evaluation. (J 14.)
17. The April 2013 reevaluation report listed items of assistive technology that would be provided to Student in the classroom. (J 14.)
18. The April 2013 reevaluation report listed a number of Student's pre-readiness academic skills. (J 14.)
19. The District provided an IEP for Student dated May 13, 2013, anticipated to be the governing IEP until May 12, 2014 of Student's kindergarten year. The IEP placed Student in full time life skills support. The IEP indicated that full time was defined as services provided by special education personnel for 80% or more of the school day. It indicated that Student would receive instruction for that amount of time within the special education environment. (J 2.)
20. Although the May 2013 IEP team provided for Student to participate with typically developing peers in morning meeting, lunch and recess for kindergarten, it did not give serious consideration to whether or not Student could be provided with a FAPE in any other regular education setting with the assistance of supplemental aids and services. It placed Student in full time life skills support because Student would need a modified curriculum. (J 2.)

21. From May 2013 through April 23, 2015, Parent knew that Student was to be placed in life skills support and agreed to that placement. However, Parent understood little about the nature of this placement. (NT 49-53, 76-78, 88-89, 92-94; J 8, 9.)
22. The May 2013 IEP provided goals addressing pre-reading skills; pre-mathematics skills; writing Student's name; speech and language; and performing daily living activities independently. There were no goals for self-dressing, navigating stairs, navigating unfamiliar areas, or social skills. (J 2.)
23. The May 2013 IEP listed modifications including items of assistive technology. (NT 89-90; J 2.)
24. Parent attended the May 13, 2013 IEP team meeting, received a copy of the IEP and received a copy of the Parent's procedural safeguards notice. (J 2 pp. 1-3.)
25. Throughout Student's tenure with the District, from kindergarten through fourth grade, Student's eligibility for assistive technology and its provision to Student have been predicated upon Student's placement in the life skills program. (NT 192-193, 213-216; J 3, 4, 5; P 2.)
26. Throughout Student's tenure with the District, from kindergarten through fourth grade, Student's teacher of the visually impaired and the District's assistive technology specialist relied on either the classroom teacher or each other to assure that Student was utilizing the large screen iPad and magnifying device so as to provide appropriate opportunity for access to the curriculum. Neither was responsible for taking data or otherwise assuring that Student was using these devices appropriately. Prior to April 2017, neither attended Student's IEP meetings or multidisciplinary evaluation meetings. (NT 135-136, 194, 203-210, 216, 221, 224-225; J 2, J3, J4, J5; P2.)
27. Throughout Student's tenure with the District, from kindergarten through fourth grade, a personal care assistant has been assigned to Student, funded by the local behavioral health agency. This assistant helps Student with personal care activities and provides prompting to help Student maintain attention to task in the classroom. Other than this, the assistant does not assist the teachers with instruction, modification of instruction or curriculum, or accommodations. (NT 714-715, 835; J 2, J 3, J 4, J 5, P 2.)
28. In kindergarten, Student made slow progress in recognizing the numbers 1 to 10; rote counting to 40; recognizing and stating the sound for 21 letters of the alphabet; and completing personal care activities with prompting. (J 6.)
29. In kindergarten, the teacher did not begin instruction on the goals for writing Student's name. (J 6.)
30. Throughout Student's tenure with the District, from kindergarten through fourth grade, Student was motivated to interact with same age peers and did so. (NT 719, 888-892; J 2, J 3, J 4.)

## FIRST GRADE IEP AND SERVICES

31. On April 30, 2014, the District provided Student with an IEP to govern special education services for first grade (2014-2015 school year). The IEP continued Student's placement in full time life skills support in a life skills classroom. The IEP indicated that full time was defined as services provided by special education personnel for 80% or more of the school day. It indicated that Student would receive instruction for that amount of time within the special education environment. (J 3.)
32. The April 2014 IEP was based upon the April 2013 reevaluation report and updated reports of teachers and related services providers. (J 3 p. 5-7.)
33. Cognitive and achievement testing had not been performed due to Student's visual impairment. (J 3 p. 5.)
34. The April 2014 IEP team did not give serious consideration to whether or not Student could be provided with a FAPE in any academic or special subject classrooms with the assistance of supplemental aids and services. It placed Student in full time life skills support because Student would need a modified curriculum. (J 3.)
35. The April 2014 IEP provided goals addressing pre-reading skills; pre-mathematics skills; writing; speech and language; and performing daily living activities independently. There were no goals for self-dressing, navigating stairs, navigating unfamiliar areas, or social skills. (J 3.)
36. Student participated in a direct instruction reading curriculum named "Foundations". (J 5.)
37. The April 2014 IEP listed modifications including items of assistive technology. (J 3.)
38. During Student's first grade year, Parent became aware of assistive technology that might have helped Student. (NT 62-65.)
39. When Student was in first grade, Parent expressed to school staff that Parent thought that Student could achieve more if educated with typical peers in regular education settings. Parent was concerned at that time about the appropriateness of the placement. However, Parent decided at that time to trust the educators and accept their recommended placement. (NT 54-55, 78-81.)
40. From kindergarten to first grade, Student regressed in the skills of naming upper case and lower case letters; identifying numbers 1 to 10; and performing personal care skills with two or fewer prompts. (J 6.)
41. In first grade, Student regressed in the skills of naming lower case letters and their sounds and naming the numbers 1 to 10. (J 6.)

42. In first grade, Student made slow progress in naming upper case letters and their sounds; recognizing pre-primer sight words (6 of 41); using pronouns, adverbs, adjectives and regular past tense verbs; and answering “wh” questions. (J 6.)
43. In first grade, Student made no progress in performing personal care skills with two or fewer prompts. (J 6.)
44. In first grade, the teacher did not begin instruction on the goal for writing Student’s name. (J 6.)

#### APRIL 2015 RE-EVALUATION REPORT

45. The District provided a re-evaluation report dated April 17, 2015. The report identified Student as a child with multiple disabilities under the IDEA. It recommended direct physical therapy and occupational therapy support; speech therapy; assistive technology; and vision support. (J 15.)
46. The April 2015 reevaluation did not include formal cognitive and achievement testing due to Student’s visual impairment. It was based upon a review of records. (J 15.)
47. The evaluation relied upon history, reports of educators who had worked with Student, and reports of related services providers including the teacher of the visually impaired; the speech therapist; occupational therapist; and physical therapist. It contained recommendations from the assistive technology specialist. It included a classroom observation; Parent’s concerns; and teacher reports. (J 15.)
48. The April 2015 reevaluation report listed items of assistive technology that would be provided to Student in the classroom. It did not list items specific to vision impairment such as a large screen iPad or magnifying device. (NT 197-198; J 15.)
49. The April 2015 reevaluation report listed a number of Student’s pre-readiness academic skills. (J 15.)
50. The April 2015 reevaluation report noted that Student’s rate of acquisition was slower than that of Student’s peers, due to Student’s placement required by Student’s cognitive needs. (J 15 p. 7.)

#### SECOND GRADE IEP AND SERVICES

51. On April 23, 2015, the District provided Student with an IEP to govern Student’s second grade year (2015-2016 school year). The IEP ambiguously changed Student’s placement to supplemental life skills support in a life skills classroom with the exception of ESY services, which would be in full time life skills support; however, the Penn Data portion of the IEP indicated full time life skills support, specifying that Student would be in the special

education classroom for 76% of the school day. It offered to include Student with typically developing peers for unspecified special subject classes in addition to lunch and recess. (NT 233-234; J 4.)

52. In second grade, Student did not attend any classes with typically developing peers, but was integrated with them nominally for only lunch and recess. (NT 233-234; J 4.)
53. Life skills students were assigned to a separate table outside of the cafeteria for lunch during Student's second grade school year. (NT 324-325.)
54. The April 2015 IEP was based upon the April 2015 reevaluation report and updated reports of teachers and related services providers. (J 4.)
55. The IEP team did not give serious consideration to whether or not Student could be provided with a FAPE in any academic or special subject classrooms with the assistance of supplemental aids and services. (NT 233-235, 838-839; J 3, J 4.)
56. Student received direct physical therapy during second grade until April, when the service was reduced to consultative service only because Student's progress had "plateaued". (J 5.)
57. In second grade, Student was functioning at a kindergarten level, about two years below grade academically. Student was instructed in identifying letters and the sounds that letters represent; identifying numbers and understanding what they represent; identifying coins and their value; reading a clock to the hour; tracing one's name and eventually printing one's name independently; learning to write on lines and learning to use basic punctuation. (NT 252-253; J 5.)
58. In second grade, Student had social skill needs because, while Student was comfortable socializing with adults, Student did not socialize with peers to an appropriate extent. (NT 236-238.)
59. Student's IEP did not address Student's need to socialize more with peers. (NT 238-240.)
60. The April 2015 IEP provided goals addressing pre-reading skills; pre-mathematics skills; writing; speech and language; and performing daily living activities independently. There were no goals for self-dressing, navigating stairs, navigating unfamiliar areas, or social skills. (J 4.)
61. The April 2015 IEP listed modifications including items of assistive technology. (J 4 p. 12.)
62. Student's visual abilities seemed variable, because sometimes Student seemed to need the magnifying device and sometimes Student seemed not to need it. (NT 255.)

63. Student's teacher of the visually impaired did not attend the April 2015 IEP team meeting. Although the IEP summarizes the functional vision evaluation by the teacher of the visually impaired, and it identifies needs for vision support, the IEP does not provide vision support explicitly as a related service. (NT 148; J 4.)
64. The District's assistive technology specialist did not attend the April 2015 IEP team meeting that produced the IEP governing Student's third grade school year. (NT 210; J 4.)
65. The April 2015 IEP does not have goals to address Student's vision-related needs. (NT 151, 442-455; J 4, J 16.)
66. At the beginning of Student's second grade year, Student's assigned teacher of the vision impaired worked with Student to help Student learn how to use a magnifying device in the classroom. During the school year, the teacher worked with Student's classroom teacher on how Student should use the magnifying device. (NT 143, 153.)
67. Student's second grade teacher used the classroom smart board to enlarge materials for Student. The teacher also used manipulatives and believed that Student was able to use these to learn. (NT 229-231, 254.)
68. Student's second grade teacher used the magnifying device and slant board provided for in the IEP, and assisted Student in using these by prompting and physically placing things in position for Student to use the technology. (NT 241-243, 254.)
69. Student's second grade teacher provided Student with special reading materials for children with visual impairments as provided in the IEP. (NT 245-246.)
70. Student's second grade teacher used pictures of coins or manipulative facsimiles of coins rather than actual coins in order to teach Student's IEP goal of recognizing the value of coins. (NT 246-248, 263-264.)
71. Student did not make progress in Student's goal of learning kindergarten sight words, and had to be instructed in pre-primer words; Student made progress with identifying a small number of pre-primer sight words. (NT 259; J 6.)
72. In second grade, Student made slow progress in recognizing a penny and a nickel; counting coins to a set value; performing personal care skills with two or fewer prompts; speech articulation; and stating the functions, attributes and differences in pictures or objects. (J 6.)
73. In second grade, Student made no progress in writing Student's name. (J 6.)

### THIRD GRADE IEP AND SERVICES

74. In April 2016, Student's IEP team provided an IEP to govern special education services during Student's third grade (2016-2017) school year. (J 5.)
75. The IEP changed Student's placement to full time life skills support in a life skills classroom. It specified that Student would be in the special education classroom for 76% of the school day. It offered to include Student daily with typically developing peers for lunch and recess only. It provided for inclusion in some school-wide activities and trips. (NT 233-234; J 5; P 1.)
76. Student's IEP did not provide a one-to-one paraprofessional. Student's IEP team relied upon the availability of a personal care assistant provided by a behavioral health agency. (NT 516; J 5.)
77. Student received consultative physical therapy in third grade until April 2017, when Student was discharged from physical therapy. This decision was made by the physical therapist in consultation with Student's teacher, based upon the observations of these educators that Student did not seem to have difficulty accessing Student's curriculum and the environment in which it was being delivered. There was no assessment of specific physical skills that were found to be below age expected level, such as negotiating stairs with only one hand on the railing and navigating unfamiliar areas. No data was taken. There was no specific IEP goal regarding these skills. (NT 450-455, 983-999; P 2.)
78. The IEP team did not give serious consideration to whether or not Student could be provided with a FAPE in any academic or special subject classrooms with the assistance of supplemental aids and services. It did not consider placement with typically developing peers for any classes because the curriculum and pace of instruction would have to be modified, and Student might experience frustration and withdrawal. (NT 233-234, 238-239, 838-839; J 5.)
79. In September 2016, Parent inquired as to Student's eligibility for an afterschool tutoring and enrichment program that was provided with typically developing same age students. The program hours were from 3 to 6 PM, four days per week. (NT 508-529; P 18 p. 139, 143.)
80. Student attended the program during some days in November 2016. (P 18 pp. 10-18.)
81. The District was willing to support Student in that program, but in December 2016 the program indicated that Student was not allowed to participate without a nurse available to give emergency medications. The District became aware of this problem on December 7, 2016. (NT 508; P 18 p. 18.)
82. From December 7, 2016 to April 24, 2017, Student was unable to attend the afterschool program because the District was unable to provide a school nurse for that purpose and no

personal care assistant was available. (NT 508-513, 529-530, 732-734; P 18 pp. 10, 18, 85-143.)

83. Due to the difficulties obtaining a nurse and/or personal care assistant, Student was unable to attend the afterschool program from December 15, 2016 to April 24, 2017. (NT 732-733; P 18 pp. 108-109.)
84. Parent enrolled Student in a summer version of the same program that offered afterschool services. The program was available to Student for half days, five days per week, from June 21, 2017 to August 4, 2017, with a one week break for July 4. (P 18 p. 84.)
85. In third grade, Student was functioning at a primer and kindergarten level in reading and mathematics, significantly below grade academically. Student's IEP goals included identifying letters and the sounds that letters represent; identifying sight words at a kindergarten level; identifying numbers and counting to 100; identifying coins and their value; printing neatly and consistently; and printing Student's name, telephone number and address. (NT 252-253; P 2, P 18 p. 93.)
86. Student's third grade special education teacher provided individual instruction in reading and mathematics. (NT 274-276.)
87. Student continued to have social skills deficits. Student's life skills curriculum included instruction on social skills. Student's IEP did not provide for additional specially designed social skills instruction. (NT 328-330; J 5.)
88. The April 2016 IEP provided goals addressing pre-reading skills; pre-mathematics skills; writing; speech and language; and performing daily living activities independently. There were no goals for self-dressing, navigating stairs, navigating unfamiliar areas, or social skills. (J 5.)
89. In third grade, Student was provided with a large screen iPad, magnifying device and slant board. (NT 276-277.)
90. In the Student's third grade year, the teacher of the visually impaired showed educators and Student how to use a magnifying device for taking notes from the classroom board, as well as a slant board for writing. The IEP did not provide measureable goals related to Student's use of these devices and there was no systematic progress monitoring to measure Student's progress in learning how to use them most effectively for learning. (NT 115, 287, 290-291, 442; J 5.)
91. In the Student's third grade year, Student's special education teacher provided Student with accommodations and modifications recommended by the teacher of the visually impaired as set forth in Student's IEP. (NT 286-289; J 5 p. 10.)
92. In October of Student's third grade year, Student's class went to a weekly computer lab as part of the life skills curriculum. Student was unable to access the computer due to Student's visual impairment. Student's special education teacher obtained appropriate

software settings for Student which enabled Student to access the computer during this special class. (NT 311-314; P 18 pp. 41-42.)

93. Due to cognitive limitations, Student is unable to remember from week to week how to access the appropriate computer settings, so an educational professional or paraprofessional sits with Student and helps Student to adjust the settings during the computer lab period. (NT 311-315.)
94. In January 2017, Student's curriculum included identifying coins, and the assigned teacher of the visually impaired corrected the method of teaching this skill shortly after this instructional unit began, by providing actual coins so that Student could feel the coins with ridges on the edges to assist Student in identifying the coins. (NT 341-344, 363.)
95. Student's teacher of the visually impaired did not attend the April 2016 IEP team meeting. Although the IEP summarizes the functional vision evaluation by the teacher of the visually impaired, and it identifies needs for vision support, the IEP does not provide vision support explicitly as a related service. (NT 134-135; J 5.)
96. The April 2016 IEP does not have goals to address Student's vision-related needs. (NT 141-142; J 5.)
97. Throughout Student's third grade year, Student's teacher of the visually impaired provided consultative vision service to Student's District educators and related services providers. Consultative services were delivered to the educators and related services providers primarily, but they also included a functional vision assessment and working directly with Student to trial interventions for the purpose of improving specially designed instruction and use of assistive technology. Services were delivered in the classroom. (NT 135-136, 290-294; J 5.)
98. Although Student's IEP called for the trial or provision of various assistive technology devices, the teacher of the vision impaired assisted Student only with the magnifying device. The teacher of the visually impaired did not monitor Student's utilization of assistive technology in the classroom. (NT 144-147.)
99. Student did not use the magnifying device from the beginning of the school year in third grade because Student was focusing on the device and its functions and capabilities and it was distracting Student from classroom assignments. After Parent became aware of this in December and obtained the assistance of an advocate, this was discussed at a meeting in January 2017. Thereafter, Student began using the magnifying device and by the spring of third grade Student was using the device more often during instruction. (NT 200-202, 292-300, 310-311.)
100. In third grade, Student's life skills support teacher relied upon the teacher of the visually impaired to determine the extent to which goals or monitoring was needed in order to assure Student's appropriate use of assistive technology. (NT 299-300.)

101. Student was not able to navigate unfamiliar areas. Student also demonstrated difficulty navigating stairs at an age-appropriate pace without holding the railing with both hands. Student consistently demonstrated difficulty dressing self; Student often put clothes on backwards and put shoes on the wrong feet. The third grade IEP provided no measurable goals for these functional needs. (NT 155-159, 442-445, 470-474, 897-899; J 5, 16; P 1, 2.)
102. Student's assigned teacher of the visually impaired assisted the school psychologist in providing accommodations to Student so that standardized cognitive and achievement testing could be administered. (NT 168-169.)
103. Student's special education teacher believed, based upon her experience in instructing Student for two years, that Student was able to access Student's curriculum and materials with the aid of accommodations being provided to address Student's visual impairment. (NT 301-302, 315-316, 340-344, 353-354, 362-363.)
104. Student is not in need of instruction in the use of Braille. Rather, student needs to develop pre-reading skills and pre-academic skills before learning to use Braille. These are addressed in Student's life skills curriculum. (NT 169-172, 280-285; S 2 p. 2.)
105. In third grade expressive language, Student made progress in using age appropriate and grammatically correct sentences, use of irregular plural nouns, and use of irregular past tense verbs. Student made no progress in articulation. (J 6; P 1.)
106. In third grade, Student made slow progress in identifying letters and the sounds that letters produce; identifying nine pre-primer level sight words inconsistently (IEP progress monitoring not attempted); writing Student's first name without a visual model; counting to 100; identifying coins and their value; (NT 333-336; J 6; P 1.)
107. In third grade, the teacher did not begin instruction on the goals for kindergarten level sight words; writing Student's address; and counting coins up to a given value. (J 6.)
108. After third grade, Parent chose to place Student in a special program that would allow Student to socialize with typically developing peers instead of the ESY program, which was not with typically developing peers. (NT 356-361, 457-458.)

#### MARCH 2017 RE-EVALUATION

109. The District provided Parent with a re-evaluation of Student in March 2017. The psychoeducational evaluation was conducted by a certified, masters-level school psychologist with at least eight years' experience in school psychology. (NT 368-369; J 16.)
110. The school psychologist had no prior experience in evaluating children with vision impairments, and the psychologist did not review professional literature on testing children

with visual impairments before conducting testing with Student. (NT 368-369, 378, 380-382, 391.)

111. The psychologist relied upon the advice of the Student's assigned teacher of the visually impaired as to how to accommodate the standardized testing for Student, as well as upon a functional vision assessment that the teacher of the visually impaired conducted. (NT 368-369, 378, 380-382, 391, 411, 580-581.)
112. The evaluation included results of a functional vision evaluation including standardized testing. Student completed a visual discrimination work sheet with 100% accuracy. (NT 577-581; J 16; S 3.)
113. The psychologist encouraged Student to utilize the magnifying device during cognitive testing; Student is proficient in utilizing this device as demonstrated during testing in the third grade classroom as well as during repeated administration of standardized tests. (NT 276-277, 292-295, 385-389, 411-412, 420-421, 604-611; P 1 p. 9.)
114. Student was able to see many of the visual prompts and materials used in standardized cognitive testing, with the use of accommodations that the psychologist provided, as demonstrated by Student's successful performance on the initial probes of tests that progress from easier to harder questions or tasks. (NT 383-384.)
115. The psychologist administered standardized tests and sub-tests that the psychologist, in consultation with the teacher of the visually impaired, accommodated for Student's visual impairment. (NT 380-382, 581-585; J 16; S 3.)
116. The school psychologist did not entirely follow accepted standards for testing individuals with visual impairments, because the psychologist administered and scored tests and subtests such as timed tests and those requiring visual-spatial skills, incorporating scores from these sub-tests into composite scores and the full scale IQ. The psychologist also did not report the scores derived from such testing appropriately, because the psychologist reported those scores without indicating caution or invalidity. (NT 391-393, 396-397, 550-555, 575-576, 597-601, 625-626; P 1; S 3.)
117. On a standardized achievement test, Student's general intelligence was in the very low to extremely low range for almost all composite and subtest scores. There was not significant variation in Student's performance in verbal comprehension, fluid reasoning and processing speed. Student's working memory and processing speed were markedly low. (J 16.)
118. On a standardized achievement test, Student's achievement in all academic areas was in the very low range for children of Student's age. Student's scores were below the .1 percentile, indicating that there are virtually no children with achievement lower than Student's in the tested areas. (J 16.)
119. Student's need to utilize assistive technology (such as the magnifying device to see materials used in the testing) adversely affected Student's performance on timed tasks and sub-tests requiring visual-spatial skills. The scores derived from these tasks and sub-tests

were invalid and as reported in the re-evaluation report were misleading as to the severity of Student's cognitive disabilities. (NT 385-389, 597-601; P 1; S 3.)

120. The school psychologist administered an adaptive behavior inventory, receiving responses from both Student's third grade special education teacher and Student's Parent. Student's teacher's responses produced ratings of Student's adaptive ability in school in the low to extremely low ranges. Student's Parent's responses produced ratings of Student's adaptive ability at home in the significantly higher ranges of average and below average. (J 16.)
121. Student's social skills are below an age appropriate level. Student needs to improve social skills. (NT 328-329, 944-947; J 16.)
122. Student's scores on some cognitive ability tests that rely upon vision were consistent with or greater than Student's overall cognitive ability scores, possibly indicating greater cognitive ability than the composite and full IQ scores suggested. (NT 421; S 3.)
123. The functional vision evaluation revealed that Student continued to have difficulty with concepts of left and right when asked to touch body parts. Student continued to place shoes on the wrong feet. Student continued to identify numbers and letters incorrectly. Student demonstrated the ability to count to 20 and recite the letters of the alphabet with one error. (J 16.)
124. The evaluation included results of a speech and language evaluation. Student continued to demonstrate articulation errors at the first percentile of achievement. Student's scores in expressive language also were higher than the general intelligence scores, but were significantly lower than Student's scores for receptive language. Student's scores for morphology and syntax were in the average range. (J 16.)
125. Student's standardized scores for receptive language were below average but significantly higher than Student's scores in general intelligence testing. Student demonstrated significantly higher comprehension skills when listening to a story than when attempting to read a story. (NT 387-388, 400-401; J 16.)
126. Parent provided a private evaluation to the District, performed in August 2017, which was based upon different cognitive tests that did not include items that rely upon vision at all. This test was performed by a specialist in evaluating children with visual impairments. (P 1.)
127. The private standardized testing was not comprehensive as to all areas of Student's cognitive ability. (NT 591-594; P 1.)
128. On the private evaluation, Student's cognitive scores were in a higher range than those derived by the District's testing. Nevertheless, the scores placed Student in the low or very low range of functioning in all areas except story recall (low average) and word memory (average). (P 1.)

129. On privately administered standardized achievement testing, Student was able to count by 10s and do simple addition and subtraction utilizing pictures. (P 1.)
130. Student's cognitive ability is higher than the District's test results indicate; nevertheless, Student's cognitive ability at best is significantly below average. (NT 387-388, 400-401, 564-565,602-604; J 16; P 1.)
131. Student's relative strength in expressive language skills and verbal comprehension apart from reading indicates a need to expose Student to peers who have at least the same level of expressive language ability and conversational ability. It also indicates a potential that Student could derive educational benefit from being instructed with typically developing peers. (NT 387-388, 400-401, 430-433, 623-637, 710-711, 822-825, 888-892, 947-954; P 1; S 3.)

#### FOURTH GRADE IEP AND SERVICES

132. In April 2017, Student's IEP team provided an IEP to govern special education services during Student's fourth grade (2017-2018) school year. The school psychologist who completed the psychoeducational evaluation of March 2017 did not attend the IEP team meeting, nor was the school psychologist consulted in the formulation of the IEP. (NT 374-375; P 2.)
133. The IEP continued Student's placement in full time life skills support in a life skills classroom. It specified that Student would be in the special education classroom for 76% of the school day. It offered to include Student with typically developing peers for lunch and recess only. (P 2.)
134. Student's IEP relied upon a personal care aide to escort Student within the school building in the hallways and to prompt Student to perform functional activities such as toileting, washing and tooth brushing. Once prompted verbally, Student was able to perform these activities independently. (NT P 2.)
135. The IEP team did not consider the Student's higher cognitive ability scores and oral and social strengths as reported in the private evaluation report in determining whether or not Student could be provided with a FAPE in any academic or special subject classrooms with the assistance of supplemental aids and services. (NT 556-555; P 1, P 2.)
136. The IEP team did not give serious consideration to whether or not Student could be provided with a FAPE in any academic or special subject classrooms with the assistance of supplemental aids and services. It did not consider placement with typically developing peers for any classes. (NT 431-432, 835-848, 947-952; P 2.)
137. In fourth grade, Student was functioning at a primer level in reading and mathematics, significantly below grade academically. Student was instructed in identifying letters and the sounds that letters represent; identifying sight words at a kindergarten level; identifying numbers and counting to 100; identifying coins and their value; printing neatly

and consistently; and printing Student's name, telephone number and address. (NT 275-276.)

138. Student's fourth grade special education teacher provided individual instruction in reading and mathematics. (NT 274-276.)
139. Student continued to have social skills deficits. Student's life skills curriculum included instruction on social skills. Student's IEP did not provide for additional specially designed social skills instruction. (NT 328-330; P 2.)
140. Currently, the local intermediate unit provides consultative vision services to Student's District educators and related services providers through a certified teacher of the visually impaired. Consultative services are delivered to the educators and related services providers primarily, but they also include a functional vision assessment and working directly with Student to trial interventions for the purpose of improving specially designed instruction and use of assistive technology. Services are delivered in the classroom. (NT 108, 110-116; P 2.)
141. The functional vision assessment does not diagnose whether or not the cause of Student's education-related disabilities is inability to see or cognitive deficits. (NT 176-177.)
142. Student's IEP offered consultative services by the teacher of the visually impaired four times per year. The teacher visited the classroom to provide such services to Student between four and eight times. (NT 164, 290-294.)
143. In fourth grade, Student's life skills support teacher relied upon the teacher of the visually impaired to determine the extent to which goals or monitoring was needed in order to assure Student's appropriate use of assistive technology. (NT 299-300.)
144. In fourth grade, Student continued to have difficulty dressing, often putting clothes on backwards or shoes on the wrong feet. Student could remedy these concerns without hands on assistance when prompted. Student's teacher of the visually impaired did not assess whether or not this difficulty was due to Student's vision impairment in whole or in part. The teacher of the visually impaired did not intervene because Student was in a life skills program. (NT 125; P 2.)
145. In fourth grade, Student continued to have difficulty navigating areas of Student's school that were unfamiliar to Student. Student's teacher of the visually impaired did not assess whether or not this difficulty was due to Student's vision impairment in whole or in part. The teacher relied upon other related services providers and teachers to address this need. (NT 127-132, 278-279; P 2.)
146. In fourth grade, Student continued to have difficulty navigating stairs by holding the railing with one hand. Student's teacher of the visually impaired did not assess whether or not this difficulty was due to Student's vision impairment in whole or in part. The teacher relied upon other related services providers and teachers to address this need. (NT 130-134, 303-308; P 2.)

147. The April 2017 IEP provided goals addressing pre-reading skills; pre-mathematics skills; writing; speech and language; and performing daily living activities independently. There were no goals for self-dressing, navigating stairs, navigating unfamiliar areas, or social skills. (P 2.)
148. Student's current IEP provides for delivery of consultative vision support services up to four times per year, each session being thirty minutes long. (NT 112; P 2.)
149. Student's vision support related services through the teacher of the visually impaired do not include instruction or addressing of sensory and motor skills; orientation and mobility; auditory skills or social skills. (NT 114-120.)
150. Student's current IEP does not offer any goals for vision support services, because related services providers do not provide IEP goals in the District as a matter of general practice. It does not track all pre-Braille skills that Student would need to start learning Braille; for example, it does not track tactile discrimination skills. (NT 120-121, 185-186; P 2.)
151. Student was provided with a large screen iPad, magnifying device and slant board for use in the life skills program, to accommodate Student's vision impairment. (NT 194-195.)
152. As a matter of general practice, the District does not provide goals to monitor Student's use of assistive technology. (NT 197.)
153. There is no data concerning whether or not Student utilized a large screen iPad or the magnifying device in the classroom, nor is there data to indicate that Student received benefit from Student's use of those devices. (NT 199-200.)
154. In the Student's fourth grade year, Student's special education teacher provided Student with accommodations and modifications recommended by the teacher of the visually impaired as set forth in Student's IEP. (NT 286-289, 300-302; J 5 p. 10; P 2 p. 18.)
155. The District's assistive technology specialist is planning to trial a new device that transmits what is on the classroom smart board directly to a student's iPad, which would obviate or reduce the need to use the magnifying device. (NT 212-213.)

## **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.<sup>4</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>5</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claims, or if the evidence is in “equipoise”, the Parent 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

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<sup>4</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>5</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

of fact). I carefully listened to all of the testimony in light of the documentary evidence, and I reach the following determinations.

While I found Parent to be a sincere and devoted advocate for Student, Parent has a severely limited understanding of special education, both its terminology and its fundamental concepts. I conclude that Parent was not able to understand reliably what the District promised, provided or explained to Parent regarding Student's special education. Therefore, I accorded reduced weight to Parent's testimony in this matter.

Conversely, I accorded substantial weight to the testimony of Parent's advocate. The Parent did not retain or pay for the advocate, who is employed by a third party agency; thus, there is no evidence of bias or a reason to be biased. Based upon this, the advocate's manner of testifying, and the consistency of the advocate's testimony with the documentary and testimonial record, I conclude that the advocate was a credible and reliable witness. I accord full weight to the advocate's testimony, to the extent that it is based upon either personal knowledge or appropriately corroborated hearsay.

Applying the same criteria, I find that most of the District employee witnesses were credible and reliable. I gave particular weight to the testimony of the Student's teachers, whose expertise and extensive work with Student enabled them to provide needed perspective and helpful opinion evidence. I found the District's school psychologist to be credible, although the weight of the evidence proves that the psychologist's methods were flawed as discussed below.

I accorded reduced weight to the testimony of the District's assistive technology witness. This witness understandably and justifiably lauded the program available to Student; however, based upon my observation of the witness, the witness' manner of answering questions, and the contrast between some of the witness' statements and other evidence, I found that the witness

repeatedly went beyond what was needed to answer the question and elaborated in a way that put the District's case in the best possible light. This led the witness to offer discussion and opinions that were not based upon sufficient knowledge of Student's program in areas other than assistive technology. It led also to some overstatements that raised doubts about the reliability of the testimony, although there is no doubt of the sincere pride that this educator has concerning his services and those of his colleagues.

## EVALUATION

The IDEA requires every school district to provide a comprehensive evaluation to every child who is identified as eligible for special education under the IDEA. The IDEA sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child ... ." 20 U.S.C. §1414(a)(1)(C)(i). An evaluation must address all "areas of suspected disability", 20 U.S.C. §1414(b)(3)(B),

The IDEA regulations prescribe in detail the procedures to be used in evaluations. 34 C.F.R. §300.301 to 300.311. These procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information ... ." 20 U.S.C. §1414(b)(2)(A), 34 C.F.R. §300.304(b). The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B), 34 C.F.R. §300.304(b)(2). The evaluator must be trained and knowledgeable. 20 U.S.C. §1414(b)(3)(A)(iv), 34 C.F.R. §300.304(c)(1)(iv). The evaluation must utilize testing instruments that are valid and reliable for the purposes for which they are utilized. 20 U.S.C. §1414(b)(3)(A)(iii), 34 C.F.R. §300.304(c)(1)(iii), and all tests must be administered in

accord with the applicable instructions of the publisher, 20 U.S.C. §1414(b)(3)(A)(v), 34 C.F.R. §300.304(c)(1)(v).

The District provided Student with three re-evaluations<sup>6</sup>, dated April 19, 2013; April 17, 2015; and March 16, 2017. Parent argues that the first two re-evaluations were inappropriate because they failed to provide standardized cognitive and achievement testing. Parent argues that this failure led the re-evaluation report and consequent IEPs to mischaracterize Student's mental abilities and school accomplishments. In short, Parent argues that the District treated Student as if Student's intelligence were much lower than it really is, because it did not provide appropriate tests of Student's intelligence; Parent also asserts that the school psychologist treated Student as though Student knew less than Student really knows, because she did not provide standardized achievement tests.

Parent challenges the third re-evaluation in 2017 for a different reason. Parent asserts that the school psychologist who performed this re-evaluation administered standardized cognitive tests to Student, but performed them incorrectly. Parent argues that the school psychologist made two mistakes. First, she administered the parts of the tests that rely upon the child's vision to perform the actions and give the required answers; Parent argues that she should not have administered them at all. Second, the school psychologist reported the scores of those vision-dependent parts of the tests without noting that those scores are statistically invalid because Student's vision impairment led Student to do worse on the tests than Student would be able to do if Student could see better.

I conclude that a preponderance of the evidence proves only the last argument about reporting the scores. Therefore I conclude that the 2013 and 2015 evaluations were not

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<sup>6</sup> Student had been identified for early intervention services prior to enrolling in the District.

inappropriate, but the 2017 re-evaluation was inappropriate and could have misled the IEP team when it determined Student's placement.

### 2013 and 2015 RE-EVALUATIONS

As noted above, the IDEA requires school districts to provide re-evaluations that "gather relevant functional, developmental, and academic information about the child ... ." 34 C.F.R. §300.304(b)(1). It also requires use of "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 34 C.F.R. §300.304(b)(3). I conclude that the District's 2013 and 2015 re-evaluations did not violate these requirements.

While the above regulation mentions cognitive factors that may contribute to a child's struggles in school, it does not mandate the use of standardized cognitive testing in all cases. Parent asserts that the failure to perform such tests on Student in 2013 and 2015 was either negligent or based upon ignorance of how to do cognitive testing for a child with Student's type of vision impairment. But I find that, at the time of these re-evaluations, there was no available method for providing standardized testing for Student that was known to be valid or reliable for determining Student's cognitive ability or intelligence. Indeed, the record shows that at Student's very young age, the results of standardized cognitive testing in 2013 or 2015 would have been of limited usefulness, because children's intelligence changes as they mature until about eight years old. Thus, at that age, a child's maturing can render a standardized score incorrect and misleading for educational planning.

Moreover, even if attempted, the evidence in this matter is preponderant that standardized testing cannot yield valid overall IQ scores because every child's vision impairment is different and the tests were not validated based upon children with vision impairments. Even with a score for

Student's ability or intelligence, the District would have had to rely upon other sources of information to make an accurate determination of the level of special education that would have been appropriate for Student in kindergarten through third grades. I find that the District accumulated such other sources of information.

The 2013 report relied upon an adaptive behavior inventory that showed what Student could do in a practical way in daily life; such an inventory is considered an adjunct to cognitive testing when a child's functioning is relatively low – it is used to corroborate or call into question the standardized scores when scores can be obtained. The 2013 report also relied upon Parent's input and teachers' day to day observations of Student. The psychologist made classroom observations. The report also contained a review of a previous functional vision evaluation; a current assessment by the teacher of the visually impaired; a speech and language evaluation; an occupational therapy evaluation and a physical therapy evaluation. I conclude that all of these sources of information informed the evaluator and the IEP team as to Student's level of functioning and educational needs at the time of the re-evaluation, and that the professional judgment to rely upon them without standardized cognitive and achievement testing was not inappropriate.

The 2015 re-evaluation report was based upon a similar strategy and similar kinds of data. The evaluation relied upon history, reports of educators who had worked with Student, and reports of related services providers including the teacher of the visually impaired; the speech therapist; the occupational therapist; and the physical therapist. It contained recommendations from the assistive technology specialist. It included a classroom observation; Parent's concerns; and teacher reports. Given this varied data, the record does not preponderantly prove that this re-evaluation report was inappropriate due its omission to conduct standardized cognitive testing.

## 2017 RE-EVALUATION

I reach a different conclusion regarding this most recent re-evaluation. Here, the school psychologist administered a complete standardized cognitive test to Student. Many of the sub-tests of the cognitive test relied upon Student's vision to answer the questions or perform the actions called for in the sub-tests. The psychologist and the teacher of the visually impaired testified that they consulted and decided to administer the tests and sub-tests using the assistive technology that Student had learned to use for class, especially the magnifying device to enlarge pictures and words so that Student could see them. The psychologist noted that Student was proficient in using this device and, based upon Student's correct answers to some questions and the psychologist's overall observation, the psychologist was convinced that Student could see the items in the sub-tests. The psychologist reached the same conclusion for Student's performance on the standardized achievement tests that the psychologist administered.

Despite these educators' efforts to accommodate the standardized cognitive and achievement tests for Student in 2017, the evidence in this case is preponderant that these scores were invalid. The evidence shows preponderantly that experts in the field of testing children with visual impairments (one of whom testified) do not report standardized scores of tests and sub-tests when the subject is visually impaired, because such scores are always invalid. This is because the standardized tests of intelligence and achievement are not based upon a population that includes sufficient individuals with visual impairments to make the scores valid for such people. Moreover, visual impairments are not of one kind; there are many kinds, many degrees of impairment, and so each person's impairment is unique. This further invalidates standardized scores for people – including Student – who have visual impairments.<sup>7</sup>

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<sup>7</sup> The evidence supporting this is the Full Position Paper of the American Printing House for the Blind (APH): Intelligence Testing of Individuals Who are Blind or Visually Impaired (APH 2011)(S 3) (APH Paper) and the

The District's school psychologist reported these scores without a cautionary statement indicating that they are considered either invalid or of questionable validity. This was inappropriate, based upon the preponderance of the evidence in this matter. The 2017 re-evaluation report was misleading because of this error in the report. It established a cognitive ability level and level of academic accomplishment for Student, based upon invalid tests, contrary to the IDEA, 34 C.F.R. §300.304(c)(1)(iii)(assessment materials must be valid and reliable for their intended purposes); 34 C.F.R. §300.304(c)(3)(assessment results must accurately reflect the aptitude or achievement level being measured).

Parent argues that the District should not have administered the sub-tests that relied upon Student's vision at all. This was the opinion of the specialist from the Western Pennsylvania School for Blind Children. That expert administered only sub-tests that did not depend upon vision, and derived significantly higher scores. Yet the APH Paper from which the expert derived her standards did not support this view; it would permit the testing with appropriate accommodations as long as the scores were either not reported or reported with caution. Thus, the expert's opinion appeared to be based upon her own practice, not upon an independent source of professional standard in this field. I give that expert practice less weight than the independent professional standard upon which the expert's testimony was based. I conclude that the fatal flaw in the District's report was the failure to report the scores with caution.

The District argues that this was at most a procedural defect that did not prove a substantive failure to provide a FAPE. 34 C.F.R. §300.513. On the contrary, I conclude that the inappropriate reporting of scores deprived Student of a FAPE. FAPE is defined as special education and related services that are, among other things, provided in accordance with an IEP. 34 C.F.R. §300.17(a).

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testimony of a psychologist specializing in assessment of children with visual impairments for the Western Pennsylvania School for Blind Children (NT 543-638.)

Special education is specially designed instruction “to meet the unique needs of a child with a disability ... .” 34 C.F.R. §300.39(a). Specially designed instruction, among other things, includes adapting the content, methodology or delivery of instruction “as appropriate to the needs of an eligible child ... .” 34 C.F.R. §300.39(b)(3). It must “ensure” the child’s access to the general curriculum. 34 C.F.R. §300.39(b)(3)(ii). See generally, Andrew F. v. Douglas County Sch. Dist., RE-1, \_\_\_ U.S. \_\_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 1000 (2017).

I conclude that the IEP in this case could not fulfill these requirements that define FAPE according to the IDEA, because the IEP team was given misleading information as to Student’s cognitive ability. The misleading information limited educators’ expectations without a valid basis. In short, the failure to warn of the invalidity of the scores in the 2017 re-evaluation led to a substantive deprivation of a FAPE.

#### EVALUATION OF BEHAVIORS INTERFERING WITH ATTENTION TO TASK

Parent argues that the District failed to evaluate Student’s classroom behavior appropriately. Parent notes that Student evidenced a substantial difficulty with attention to task, and the record bears this out preponderantly. Parent argues that this alone required that the District perform a Functional Behavioral Assessment to deal with the functions of Student’s inattentiveness. I conclude that Parent has failed to prove this by a preponderance of the evidence.

The IDEA does not require a district to perform an FBA whenever a student’s behavior creates difficulty in the classroom. The IDEA requires an FBA in disciplinary violations involving a change of placement 34 C.F.R. §300.530(d)(1)(ii); 34 C.F.R. §300.530 (f)(1)(i); 34 C.F.R. §300.532 (d)(2)(iii). Chapter 14 additionally requires a FBA when the IEP team determines that the Student’s behavior interferes with learning. 22 Pa. Code §14.133(b). Other than these mandates, the

law relies on the professional judgment of educators and the determinations of local and state educational agencies to decide when an FBA is needed.

In the present matter, the evidence shows that Student's attention to task was a significant concern, but it does not show that it interfered with Student's learning during the relevant period of time. Teachers and evaluators consistently testified that they were able to redirect Student easily when Student's attention wandered. Witnesses offered expert opinion that Student's difficulties with attention did not interfere with Student's learning or that of others. Thus, the IDEA and Chapter 14 did not require Student's evaluations to include FBAs.

#### FAILURE TO SERIOUSLY CONSIDER LESS RESTRICTIVE PLACEMENT

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, "to the maximum extent appropriate ... ." 20 U.S.C. §1412(a)(5)(A). Separate schooling, or other removal of children with disabilities from the regular education environment is permissible only if education in regular classes "cannot be achieved satisfactorily" through the use of supplementary aids and services. 34 C.F.R. §300.114(a)(2)(ii). Removal is not permitted if the sole reason is "needed modifications in the general education curriculum." 34 C.F.R. §300.116(e). United States Supreme Court has interpreted this mandate to require districts to educate children with disabilities with non-disabled students "whenever possible." Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 3049, 73 L.Ed.2d 690 (1982).

The United States Court of Appeals for the Third Circuit has construed the statutory language to set forth a "strong Congressional preference" for integrating children with disabilities in regular classrooms. Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d 1204, 1213-1214 (3d Cir. 1993). The Court characterized this preference as creating a "presumption" in

favor of educating children with disabilities in the general education environment, id. at 1214, at least for “a significant portion” of the school day. Id. at 1215 n.21.

The IDEA prescribes procedural and substantive requirements for school districts’ selection of placements for children with disabilities. The placement decision must be made “by a group of persons, including the parents . . . .” 34 C.F.R. §300.116(a)(1). Potential harm to the child or to the quality of educational services must be considered. 34 C.F.R. §300.116(d).

The Commonwealth of Pennsylvania has adopted and further articulated the IDEA requirements in its regulations implementing the IDEA. 22 Pa. Code §14.145. In addition to incorporating the language of the statute, the regulation adds the requirement that a district may not remove a child from the regular education classroom, or determine a child to be ineligible for such placement, solely because of the nature and severity of the child’s disability, or because of considerations of cost or administrative convenience. 22 Pa. Code §14.145(4).

The Court in Oberti set forth a two part analysis for determining whether or not a local educational agency has complied with the least restrictive environment requirement. First, the court (or in the first instance the hearing officer) must determine whether or not the child can be educated satisfactorily in the regular education setting with supplementary aids and services. Second, the court or hearing officer must determine whether or not the agency has provided education in the general education setting to the extent feasible, such as inclusion in part of the general education classes and extracurricular and other school activities. Oberti, 995 F.2d above at 1215.

The Court set out three considerations that must be examined in order to make a determination of whether or not Student can be educated in the regular classroom: First, has the agency given “serious consideration” to utilizing the full continuum of placements and

supplementary aids and services? Id. at 1216. Second, what are the comparative educational benefits that the child can receive in the regular education and segregated settings, particularly considering the benefits of learning social and communication skills in the general education context. Ibid. Third, is the child's behavior in the regular education setting so disruptive that the child is not benefitting and that the behavior is interfering with the education of the other children in the general education setting? Id. at 1217. The Court emphasized that if supplementary aids and services would prevent these negative consequences, the determination of a negative effect on peers would not warrant removal from the regular education environment. Ibid.

The Court in Oberti emphasized that the central consideration in determining whether or not a district has provided a FAPE in the least restrictive environment is the "proper use of supplementary aids and services." Oberti, 995 F.2d above at 1214. The Court pointed out that each district must make available the "continuum of alternative placements", including special classes and special schools, 34 C.F.R. §300.115(a). Districts must also provide "supplementary services ... in conjunction with regular class placement." 34 C.F.R. §300.115(b)(2); Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d above at 1216.

Applying the Oberti analysis to this record, I do not employ the two step Oberti analysis because I conclude that the District did not seriously consider any amount of general education placement for Student. I conclude, as discussed below, that it did not seriously consider full time general education for Student, nor did it seriously consider placement to a lesser extent, such as placement in one or more general education special classes. Such consideration must be more than a perfunctory nod toward the option of full inclusion, as the word "serious" implies. See, Blount v. Lancaster-Lebanon Intermediate Unit, 2003 WL 22988892 (W.D. Pa. 2003). Moreover, such

consideration must be performed by a group, including the parents . . . .” 34 C.F.R. §300.116(a)(1). The District did not do this when deciding Student’s restrictive placement.

A preponderance of the evidence proves that the District has failed to meet its threshold obligation under the IDEA and its regulations to provide a FAPE in the least restrictive environment (LRE). It has not given serious consideration to the full range of supplementary aids and services available to enable Student to learn in the least restrictive environment. Nor has it seriously considered the benefits of inclusion in the general education setting for Student and whether or not they outweigh the detriments.

Student’s IEPs provide no evidence of such serious consideration by the IEP team. They contain perfunctory language in response to the LRE questions on the state-approved form, and the answers seem to avoid the question of the relative benefits and detriments of instruction with typically developing peers. The answers state incongruously that supplementary aids and services were not only considered but also “accepted” for Student. The District’s answer to the last question of the LRE section, which calls for a conclusion as to how the relative benefits and detriments of inclusion were weighed by the IEP team, is simply filled in by a conclusory statement indicating that Student would be educated in a life skill setting. It is notable that these responses did not change materially from year to year, even as Student matured and might have become somewhat more amenable to education with typically developing peers due to that maturation. This further demonstrates the perfunctory nature of the District’s and the IEP team’s consideration of the least restrictive environment mandate of the IDEA.

There is no evidence in the IEPs that the IEP teams or the District gave serious consideration to the central consideration, Oberti, 995 F.2d above at 1214: the use of supplementary aids and services to enable Student to be educated with typically developing peers.

The only aids and services noted in this LRE section of the IEP are those already accorded to Student in other parts of the IEP. There is no evidence that additional aids and services were considered, such as providing a one-to-one educational paraprofessional; increasing vision support to direct service; increasing or reinstating physical therapy; modifying the general education curriculum through essentialization; utilizing a co-teaching classroom model to permit greater differentiation of instruction; or enhancing and increasing speech therapy services, which were an area in which Student appeared to be making modest gains.

Although the record demonstrates (and indeed the LRE sections of the IEPs declare) that Student is able and likely to benefit socially from being instructed with typically developing peers, the IEPs evidence no effort to weigh such anticipated benefits against any negative consequences, such as missing opportunities for more intensive academic and life skills instruction. I conclude that this also is a failure to give serious consideration to instruction with typically developing peers.

Aside from the IEPs themselves, various District witnesses testified to their opinions that Student should not be included in any general education classes. Almost all based their opinions upon their concerns that Student is too far behind Student's grade level peers, and Student's rate of acquisition, coupled with Student's pronounced regression during breaks in programming, would make it difficult to accommodate Student in the general education setting, and would necessitate modification of the general education curriculum. These concerns show preponderantly that the District and Student's IEP teams did not give "serious" consideration to instructing Student with typically developing peers, because the criteria that the various witnesses espoused are forbidden by law. A child may not be excluded from age-appropriate regular classrooms "solely because of needed modifications in the general education curriculum." 34 C.F.R. §300.116(e).

In sum, I conclude that Student was placed in the life skill class due to the nature and severity of Student's disabilities, contrary to Chapter 14. 22 Pa. Code §14.145(4)(forbidding placement due solely to the nature and severity of a child's disabilities). Moreover, this was done based upon a lack of serious consideration of using supplementary aids and services to educate Student in the general education setting, including an IEP team discussion of the relative benefits of full time life skills placement versus placement in full day general education or in one or more special classes. Thus, the District has failed to provide services in the least restrictive environment, contrary to its obligations under the IDEA.

#### FAILURE TO OFFER OR PROVIDE A FAPE UNDER THE IDEA

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 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). As discussed above, the IEP must be tailored to meet the "unique" needs of each eligible child.

In addition, the IEP must be "reasonably calculated" to enable the child to receive appropriate services in light of the child's individual circumstances. Andrew F., 137 S. Ct. above at 999. 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).

For a child not progressing smoothly from grade to grade – a child such as Student, who clearly is not advancing in grade level performance academically, functionally or socially – a district must offer and provide educational services that are “appropriately ambitious” in light of the child’s circumstances. Andrew F., 137 S. Ct. above at 1000. The child must have a chance to meet “challenging objectives.” Ibid.

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 failed to provide Student with a FAPE in the kindergarten through fourth grade school years. The evidence is preponderant that, during those years, the District failed to provide special education and related services that afforded Student the opportunity to receive appropriate educational benefit in light of Student's unique circumstances. Although Student was regressing academically over the years, the District provided virtually identical IEPs throughout Student's tenure. It also failed to provide Student with reasonably ambitious and challenging goals and objectives in all areas of educational need, failing to address appropriately Student's educational needs in the areas of self-dressing, navigating stairs in an age appropriate manner, and navigating unfamiliar areas. It failed to address Student's below-grade-level social skills. It failed to address appropriately Student's pronounced tendency to regress during breaks and in summer, which was a major factor in Student's overall regression in many skills, especially pre-academic skills, from the beginning of kindergarten to the mid-point of fourth grade. It failed to provide sufficient and appropriate vision support. It failed to provide individualized paraprofessional support.

#### FAILURE TO CHANGE STUDENT'S IEPs FROM YEAR TO YEAR

Although Student was regressing overall from kindergarten through fourth grade, Student's IEPs were remarkably similar from year to year. The District and its IEP teams did not seem to recognize a need to intervene by providing different educational services, in order to provide Student with an opportunity to make appropriate progress through the provision of appropriately challenging instruction. Student's goals addressed the same needs in each IEP.

The District did change academic goals for reading and mathematics. Yet the evidence shows that reading and mathematics goals were abandoned even though Student had not mastered them. Therefore, new substituted goals for reading and mathematics skills did not advance Student's academic skills – they merely changed the focus when Student did not make progress in the areas measured by the previous goals. In short, the Student's IEPs did not provide meaningful interventions from year to year to address the fact that Student was regressing academically.

The one exception to this conclusion is the academic area of writing, where Student appeared to make progress in the physical mechanics of kindergarten-level writing with assistive technology to allow Student to see what Student was writing. There is some evidence to indicate that Student made progress in written expression as well, learning to create simple sentences at a kindergarten level. Still, Student's progress was markedly slow in this area, and the District also failed in this area to attempt new or different strategies to accelerate Student's rate of learning.

#### FAILURE TO ADDRESS ALL EDUCATIONAL NEEDS

In all years, Student's IEPs noted the following educational needs: reading, mathematics, writing, self-dressing (putting clothing and shoes on backwards), navigating stairs using one hand on the hand rail, navigating unfamiliar areas, and social skills. In all years, the District offered IEPs that contained goals to address the academic areas of reading, mathematics, writing, and speech and language. In kindergarten, first and second grades, there also was a functional goal for independent performance of daily living activities.

In none of these years did Student's IEP provide goals regarding the functional and social needs of self-dressing (putting clothing and shoes on backwards), navigating stairs using one hand on the hand rail, navigating unfamiliar areas, or social skills. Thus, the District failed to provide

goals to address all of Student’s educational needs in all years. These functional and social educational needs continued to be noted throughout Student’s tenure at the District. Yet there was no data to track whether or not Student was learning to put on clothes properly, navigate stairs in an age-appropriate fashion, navigate unfamiliar areas or engage in more age-appropriate social interactions with peers. On this record, the District simply failed to address these needs.

The District argues that related services providers are not required to posit IEP goals at all. I find no basis for this argument in the IDEA regulations or in the Pennsylvania regulations implementing the IDEA, Chapter 14 of the Pennsylvania Code. Rather, the IDEA requires the District to provide goals that address all of Student’s educational needs as noted in the IEP. IEPs “must include” goals designed to “meet each of the child’s ... educational needs that result from the child’s disability ... .” 34 C.F.R. §300.320(a)(2)((i))(B). The District has failed to do so.

The District argues that Student has no school-based need to navigate unfamiliar areas. Yet this is not the appropriate criterion for determining whether or not there is an educational need to address. The IDEA regulation defines orientation and mobility services as a related service whose purpose is to enable students “to attain systematic orientation to and safe movement within their environments in school, home, and community ... .” 34 C.F.R. §300.34(c)(7); see also, 34 C.F.R. §300.39(a)(2)(ii) and 34 C.F.R. §300.39(b)(4)(ii) (defining special education to include “travel training”, defined as skills “necessary to move effectively and safely ... in school, in the home, at work, and in the community ... .”) Thus, the IDEA does not limit the District’s responsibility for orientation and mobility services to only those services that enable a child to navigate the current school environment. Rather, it requires the District to provide services aimed at teaching Student to navigate at home and in the community as well.

Even in school, the record is preponderant that Student will need to learn to navigate new environments in order to have the opportunity to transfer to a middle school and eventually to a high school. Currently, that opportunity is closed to Student, due to the District's unwillingness to address Student's educational need for orientation and mobility services addressing this need.

The District argues that Student can manage stairs sufficient to access the areas where Student needs to go in school, and that Parent never reported any problems with Student's use of stairs at home. Both of these arguments miss the educational need identified in the IEPs. Student needs to be able to navigate stairs in an age-appropriate way. Neither Student's educators nor Student's Parent have used age-appropriateness as the measure of educational need. Yet the District is obligated to address this. 34 C.F.R. §300.320(a)(2)(i)(IEP goals must include both academic and functional goals).

#### FAILURE TO ADDRESS SOCIAL SKILLS

The record shows that Student is an outgoing child who enjoys the company of others; yet Student's social skills are those of a much younger child. Student does not engage in age-appropriate conversation. Student does not understand how to respect others' expectations as to appropriate personal space. Student has a habit of directing others inappropriately. All of these social behaviors need to be taught explicitly. Yet at no time did Student's IEP provide for a goal or data gathering to address Student's social skills. At no time did the District provide direct, explicit instruction in social skills for Student. This omission is magnified in that social and oral communication are strengths for Student. Yet Student's areas of strength have not been challenged appropriately, Andrew F., 137 S. Ct. above at 1000, with the aim of teaching Student age-appropriate social skills.

## FAILURE TO PROVIDE APPROPRIATE EXTENDED SCHOOL YEAR (ESY) SERVICES

Student demonstrated a prominent tendency to regress during breaks in service, especially during the summer. Even where Parent enrolled Student in ESY programming for the summer, Student's profound regression showed that normal ESY services were not enough for Student. Even with after-school programming, Student continued in a downward spiral of regression and partial recoupment. As a result, from kindergarten to fourth grade, Student actually regressed in basic pre-academic and kindergarten-level academic skills. Nowhere did the District evidence an intention to revisit the ESY services that had been offered, to offer lengthier or more intensive services to try to reduce the degree of Student's regression during breaks and the summer. ESY is required to assure that FAPE is delivered, precisely by limiting regression. The District failed to do this. 34 C.F.R. §300.106(a)(1)(requiring ESY services when necessary to provision of FAPE).

## INAPPROPRIATE VISION SUPPORT SERVICES

The District employed the services of the local intermediate unit's teacher of the visually impaired. This teacher observed Student in the life skills classroom, assessed Student's ability to participate with accommodations and assistive technology, modeled for and assisted Student and teachers in using assistive technology, and suggested new accommodations and devices from time to time.

During Student's entire tenure with the District, however, the Student's IEPs provided for only four sessions per year of consultative vision support services<sup>8</sup>, with no provision for direct instruction in vision-related skills such as use of assistive technology and orientation and mobility skills. The teacher relied upon the classroom teacher and physical therapist to provide Student with

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<sup>8</sup> The vision support teacher believed that she may have addressed Student's needs more often during the year when in Student's classroom, but always on a consultative basis.

direct instruction regarding self-dressing, navigating stairs and navigating in the school building. Yet the evidence shows that the classroom teacher and physical therapist each relied upon the other – or upon the teacher of the visually impaired - to address these educational needs. The record shows preponderantly that these needs went unaddressed.

Based on this record, I find that the classroom teacher, physical therapist and teacher of the visually impaired failed to coordinate their services to ensure that Student's needs regarding self-dressing and navigating stairs would be met appropriately. In addition, the teacher of the visually impaired failed to coordinate with the assistive technology specialist and classroom teacher to ensure that Student was utilizing assistive technology effectively and consistently for accessing the curriculum. This was demonstrated when, for several months in third grade, Student did not use the provided magnifying device properly, and the teacher simply stopped offering the device to Student to see classroom materials. In sum, Student's vision support services were inappropriate.

#### FAILURE TO PROVIDE INDIVIDUALIZED PARAPROFESSIONAL SUPPORT

The evidence is preponderant that the District relied upon a personal care assistant provided through a behavioral health agency to provide Student with the only individualized paraprofessional services that Student received in four years at the District. The aide was tasked only with assisting Student in personal care and daily living activities, not with assisting the classroom teacher in providing instruction. The aide nevertheless did help the teacher by redirecting Student when Student was distracted from instruction and directions.

The record shows that Student's educational needs included needs for repetition, review and prompting to utilize learned skills during the day, including social skills. Educational

paraprofessionals commonly provide such services. There is no evidence that the District or Student's IEP teams considered assigning a one-to-one paraprofessional educator to Student at any point during Student's tenure, even though Student was regressing academically and was not making meaningful progress functionally or socially.

#### FAILURE TO PROVIDE A FAPE IN VIOLATION OF SECTION 504

Under section 504, federal regulations define the District's obligation to provide a FAPE differently than under the IDEA. Districts must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of [persons with disabilities] as adequately as the needs of [non-disabled] persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of section 504. 34 C.F.R. §104.33(b)(1). The evidence is preponderant that the District failed to provide Student with appropriate services and accommodations to meet Student's individual needs, and that Student did not make appropriate progress in light of Student's circumstances, as other District students do and are expected to do. Therefore, I conclude that the district's services were not designed to meet Student's needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1). On this record, failure to comply with the IDEA is preponderant evidence that the District also failed to comply with section 504. Cf. 34 C.F.R. §104.33(b)(2).

#### FAILURE TO ACCOMMODATE AFTERSCHOOL SERVICES CONTRARY TO SECTION 504

Parent decided to place Student in an afterschool program in September 2016. The program was at a different school location and operated from 3:00 P.M. to 6:00 P.M., four days per week. The program offered to help Student with homework, review classroom instruction, and provide

enrichment and social activities for Student; Student would be grouped with typically developing peers for this program. Student was able to attend on some days in November 2016.

In December 2016, the District became aware that Student could not attend the program unless a nurse was present to administer emergency medications and provide needed personal care services. The District made efforts to provide these services but was unable to retain the needed nursing services until April 2017. Parent asserts that the District thus discriminated against Student in violation of section 504.

I find no evidence that the District failed to accommodate this service in violation of section 504. On the contrary, the evidence shows that the District was willing to accommodate Student's needs and made efforts to do so. That the District was unable to obtain the necessary services is not in itself discrimination. The Parent has not introduced preponderant evidence that the District failed to comply with its section 504 obligations in this respect.

### **CONCLUSION**

I conclude that the District failed to offer and provide a FAPE in the LRE to Student and continues to fail to do so. Therefore, I order the District to provide services aimed at restoring Student to the educational path that Student would have been on if the District had provided appropriate services, based upon a comprehensive re-evaluation. Andrew F., 137 S. Ct. above at 1000; Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

## ORDER

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

1. Within ten days of the date of this order, the District shall convene a meeting of the Student's IEP team to revise Student's IEP for the period from the date of such meeting until such time as the Student's IEP is revised in accordance with paragraph fourteen of this order.
2. Upon consideration in the meeting ordered in paragraph one above, and within twenty days of the date of this order, the Student's IEP team shall revise Student's IEP to provide Student with thirty minutes per school day of appropriate research based, direct instruction in reading or pre-reading skills. This instruction shall be appropriate to Student's current academic levels and curriculum. It may include remedial instruction and/or review as determined by the Student's IEP team and may be delivered by such educational staff as the IEP team shall determine.
3. Upon consideration in the meeting ordered in paragraph one above, and within twenty days of the date of this order, the Student's IEP team shall revise Student's IEP to provide Student with thirty minutes per school day of appropriate research based, direct instruction in kindergarten level or pre-kindergarten level academic or functional mathematics. This instruction shall be appropriate to Student's current academic levels and curriculum. It may include remedial instruction and/or review as determined by the Student's IEP team and may be delivered by such educational staff as the IEP team shall determine.
4. Upon consideration in the meeting ordered in paragraph one above, and within twenty days of the date of this order, the District shall revise Student's IEP to provide Student with one hour per week of direct vision support services, which shall address Student's appropriate utilization of assistive technology; Student's age-appropriate navigation of stairs; and Student's orientation and mobility needs in Student's environments at school, at home and in the community.
5. Upon consideration in the meeting ordered in paragraph one above, and within twenty days of the date of this order, the District shall provide Student with an educational paraprofessional on a one-to-one basis in the classroom. The paraprofessional shall perform such educational duties as shall be assigned to him or her by Student's classroom teacher.
6. Within ten days of the date of this order, the Parent, through counsel, shall identify an evaluator to conduct an independent, comprehensive psychoeducational evaluation of Student at District expense. The evaluator shall meet the current guidelines of the District for independent educational evaluations, except that the District shall take into account the appropriate fee for an evaluation of a child with vision impairment, regardless of its current fee limitations. The evaluator shall be able to complete the evaluation ordered herein within eighty days of the date of this order.

7. Within twenty days of the date of this order, the District shall retain the evaluator chosen by Parent.
8. The independent evaluation shall take into account all previous District re-evaluation reports and the August 2017 private evaluation report of the school psychologist from the Western Pennsylvania School for Blind Children.
9. The independent evaluation shall include such standardized cognitive and achievement testing as the evaluator shall deem appropriate, and any such testing shall conform to the current guidelines of the American Printing House for the Blind for psychological evaluation of individuals with vision impairments.
10. The evaluation shall conform to the procedural requirements of the IDEA. It shall address Student's current developmental, functional, social and academic educational needs. The evaluator shall consult with members of the Student's IEP team including Student's current life skills teacher.
11. The evaluation shall provide recommendations for placement; research-based instruction in academic and functional skills; supplementary aids and services that may be appropriate in support of instruction in the general education setting; related services; and ESY services both during the school year and during the summer.
12. Within thirty days of the date of this order, the District shall consult with the appropriate representative of the Bureau of Special Education (BSE) of the Pennsylvania Department of Education and schedule a facilitator from BSE as available to attend a meeting of the Student's IEP team for the purpose of giving serious consideration to providing Student with instruction in the general education setting, either full time or to the greatest extent feasible.
13. Within one hundred days of the date of this order, the District shall convene a meeting of Student's IEP team with the BSE facilitator for the purpose of giving serious consideration to providing Student with instruction in the general education setting, either full time or to the greatest extent feasible.
14. Within one hundred twenty days of the date of this order, the District shall convene a meeting of Student's IEP team to revise Student's IEP in accordance with the IDEA. The team shall permit attendance by one advocate and one additional consultant of Parent's choice, and a representative of the local intermediate unit, either in person or by telephone or video meeting technology. A representative of BSE shall be allowed to attend if and as requested by BSE.
15. The IEP team shall seriously consider any and all supplementary aids and services that may assist in providing Student with a FAPE in the general education classroom.
16. The IEP team shall determine Student's placement in accordance with the information available to it at the time of the meeting, including the recommendation of the independent educational evaluation and any recommendations provided as a result of the meeting ordered in paragraph thirteen above.

17. To the extent, if any, that the IEP team determines that Student shall be instructed with typically developing peers, the District shall provide coaching to the educational staff, including the regular education teacher, special education teacher, and any paraprofessional assigned to Student. Coaching shall be provided by an educator selected by the District who is qualified by training and experience to provide such services. Coaching services shall be provided to the extent and in the amount deemed appropriate by the Student's IEP team.
18. The IEP team shall provide measurable goals that address all of Student's educational needs, whether academic, functional, behavioral or social, as identified by the IEP team in consideration of the independent educational evaluation ordered herein.
19. The IEP team shall determine what if any research based instruction, related services and ESY services (both during the school year and during the summer) shall be provided to Student for the summer of 2018 and for the following school year, in order to ensure that Student receives a FAPE.
20. The IEP team shall consider the provision of one-to-one paraprofessional services; vision support services; transportation and other related services; parental training and support; and assistive technology in compliance with the IDEA.

It is **FURTHER ORDERED** that nothing in this order shall preclude the parties from reaching an agreement to alter the terms of this order.

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: February 19, 2018