

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

## **Pennsylvania Special Education Hearing Officer**

### **Final Decision and Order**

#### **CLOSED HEARING**

**ODR File Number:** 20088-17-18-AS

**Child's Name:** J.W.

**Date of Birth:** [redacted]

#### **Dates of Hearing:**

3/2/2018, 3/23/2018, 3/26/2018, 5/2/2018, 5/22/2018 and 5/29/2018

#### **Parents:**

[redacted]

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**Hearing Officer:** William Culleton Esq.      **Date of Decision:** 6/19/2018

## INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) is enrolled in and is a resident of the school district named in the title page of this decision (District).<sup>1</sup> Student is classified with Autism and Speech or Language Impairment pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Parents invoke both the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>2</sup>. Parents contend that the District has failed to offer and provide Student with a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the second half of Student's third grade year, all of fourth and fifth grades, and prospectively for sixth grade. Parents also contend that the District has significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. The District denies the allegations.<sup>3</sup>

The hearing was completed in six sessions, and the parties provided written summations<sup>4</sup> and briefs. I have considered these and all of the evidence of record. I conclude

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<sup>1</sup> Student, Parents and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. References to Parent in the singular pertain to Student's Mother.

<sup>2</sup> The parties stipulate that Student is "otherwise qualified" as required by section 504 and the District admits that it receives federal funding. (NT 16.)

<sup>3</sup> Parents assert claims under the Americans with Disabilities Act, 42 U.S.C. §12101(ADA). I assert limited jurisdiction over the ADA claims and decide them here only insofar as they are "derivative" claims that assert issues and requests for relief that are identical with the issues and requests for relief that they advanced pursuant to the IDEA. 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011). All other ADA claims are dismissed. Therefore, the analysis in this decision will refer only to the IDEA and section 504.

<sup>4</sup> Parents submitted a 25 page document with their summation in the form of an appendix, which they identified in their summation as a "compilation" of home-school log entries. As this in effect exceeds the page limit of fifteen pages that the hearing officer directed, NT 1527, and also consists of an exhibit offered after the close of the record for exhibits and testimony, precluding any opportunity for the District to challenge the admission of the exhibit into evidence, I decline to consider it.

that the District has offered and provided a FAPE in the LRE and has not significantly impeded parental participation. I dismiss Parents' claims.

### **ISSUES**

1. During the relevant period from January 1, 2016 to May 29, 2018 (the date of the last hearing in this matter), did the District offer and provide a FAPE to Student as required by the IDEA and section 504?
2. During the relevant period, did the District offer and provide educational services to Student in the LRE as required by the IDEA and/or section 504?
3. During the relevant period, did the District fail to provide Student with a FAPE by significantly impeding Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student?
4. Should the hearing officer order the District to provide any placement or educational services for Student's sixth grade school year?
5. Should the hearing officer order the District not to remove Student from the regular education classroom for a greater portion of the day?
6. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant period?

### **FINDINGS OF FACT**

1. Student is enrolled in and is a resident of the District. (NT 15-16.)
2. The District has identified Student as a child with the disabilities of Autism and Speech or Language Impairment as defined in the IDEA. (NT 15-16.)
3. At two years of age, the local intermediate unit evaluated Student and reported that Student had exhibited below average development in multiple domains; borderline estimated cognitive ability; significant delays in communication; and below average fine motor skills. (S 28 p. 7.)
4. In March 2012, the District evaluated Student for transition to kindergarten. It obtained scores for cognitive ability in the below average range for verbal and non-verbal reasoning, with age-appropriate adaptive behavior scores; below average fine motor

skills; average school readiness skills; average letter-word identification; and average mathematics problem solving. (S 28 pp. 8-9.)

5. Student received early intervention services from two years of age, including speech and language, occupational therapy, physical therapy and behavior support services. (S 6.)
6. In first grade, Student demonstrated significant difficulties in expressive, receptive and pragmatic language, in particular the use of figurative language, social language, and grammar. (S 6.)
7. In first grade, Student demonstrated significant difficulties in visual-motor skills, pre-writing skills, attention, initiation of classroom tasks, completion of tasks and social skills. (S 6.)
8. Student has received medication for ADHD. (S 6, 17.)

#### COGNITIVE ABILITIES AND NEEDED SERVICES

9. In an April 2014 District re-evaluation, near the end of Student's first grade year, the District classified Student as a child with the disabilities of Autism and Speech or Language impairment. (S 6.)
10. In the April 2014 District re-evaluation, Student's full scale IQ score on a standardized test of intelligence was in the significantly below average or "impaired" range. Student exhibited strength in short term memory, especially in recalling oral prompts rather than written ones. Student's scores in verbal comprehension and processing speed were also in the "impaired" range. Student demonstrated significant difficulty understanding directions. (S 6.)
11. In the April 2014 District re-evaluation, Student's adaptive skills were rated as extremely low on a standardized adaptive skills inventory. Student's teachers noted that some classroom-observed skills were somewhat higher, in the below average range. It was noted that Student was supported by a Therapeutic Staff Support (TSS) worker for most classroom hours, and that Student relied heavily upon this worker for a sense of safety and cues and prompts. (S 6.)
12. In the April 2014 District re-evaluation, Student's composite achievement score was within the significantly below average or "deficit" range, indicating functioning well below expected levels for children of comparable age. Listening comprehension and oral expression were both within that range, as were early reading skills and mathematics skills. Student demonstrated below average skills in written expression. (S 6.)

13. In the April 2014 District re-evaluation, Student's visual-motor integration varied from low to very low, with observed difficulty following the directions on a standardized test. (S 6.)
14. In the April 2014 District re-evaluation, Student's social awareness was considered to be mildly to moderately impaired, based upon a behavior inventory. Student was considered to demonstrate some deficiencies in reciprocal social behavior. (S 6.)
15. In the April 2014 District re-evaluation, sensory evaluation revealed significant dysfunction in the classroom setting with visual stimuli; "some problems" with auditory stimuli; "typical" tactile sensitivity; "some problems" with proprioception; and mixed scores from "some problems" to "typical" with the vestibular system. (S 6.)
16. In the April 2014 District re-evaluation, the evaluator noted that Student's demonstrated strengths were in rote memorization and relatively higher but below average achievement in spelling, decoding, counting and identifying numbers. (S 6.)
17. In the April 2014 District re-evaluation, the evaluator noted that Student's demonstrated needs included reassurance; possible overstimulation in large settings; understanding multiple step directions; and higher level thinking skills. Student performed well below age-level expectation in reading comprehension, mathematics problem solving and formulation of sentences. (S 6.)
18. The April 2014 District evaluator recommended immediate feedback, support for social interactions and support for functional tasks. Recommendations included part-time learning support, in order to provide Student with more individualized interaction with a teacher; more immediate feedback; and reduced anxiety while continuing to provide opportunities for interaction with peers. The evaluator recommended occupational therapy to address Student's sensory needs, visual-motor deficits and difficulties with initiation and completion of assignments. The evaluator recommended speech and language support to address Student's needs regarding articulation and receptive, expressive and pragmatic language. (S 6.)
19. On May 9, 2014, the Parents obtained a private neuropsychological report which diagnosed Student with Autism, Attention-Deficit Hyperactivity Disorder (ADHD) – Combined Type, and Mixed Expressive Receptive Language Disorder (by history). (S 28 p. 11.)
20. The May 2014 private neuropsychological report found Student to be functioning in the "mildly impaired" range for overall cognitive function, as well as verbal and non-verbal cognition. The evaluator found a general IQ of 58, with greatest weakness in visual-spatial processing. The report noted that Student tended to memorize details without understanding the coherent meaningful whole picture. (S 28 p. 11.)

## EDUCATIONAL HISTORY AND SECOND GRADE PERFORMANCE

21. Student is assigned to a District elementary school. (S 35.)
22. In second grade, Student was assigned to a general education classroom in the same elementary school with special education supports for reading, writing and mathematics, both in and out of the classroom, and related services including two 25 minute small group speech/language sessions per week; and occupational therapy, one session per month in the classroom setting where feasible and ten minutes per day during non-instructional time of direct support and practice with using fasteners such as buttons and snaps. (S 17; P 5.)
23. In November 2014, the intermediate unit autism support team reviewed Student's program and suggested modifications and accommodations for Student. It did not recommend electronic assistive technology or sensory strategies. (P 6.)
24. Prior to the IEP meeting of May 2015, in which Student's third grade IEP was developed, in a benchmark assessment of priority word reading, Student met benchmarks in three out of four administrations. In an assessment of word reading and fluency, Student was instructional or below benchmark in four administrations, with words per minute from 29 to 43 at 94% to 100% accuracy. In a third benchmark assessment of reading, Student's reading level was scored at Below Basic and pre-kindergarten in three of four assessments. Student made progress toward Student's goal in reading fluency, but Student's rate of progress was less than half the rate needed to meet the goal. Student made progress toward Student's reading comprehension goal in three marking periods, then regressed in the fourth marking period. Overall, Student made slow progress in reading, while continuing to perform at a first grade level of reading. (S 17, 28 p. 23, 25, 32 p. 5.)
25. Prior to the IEP meeting of May 2015, in a benchmark assessment of mathematics skills, Student scored proficient in one administration with grade level performance, and basic in three administrations with below grade level performance each time. Student made progress toward Student's goal in mathematics concepts and application and was near mastery; however, in mathematics computation, Student made progress but at a slow rate resulting in reduction of Student's goal. Overall, Student made significant progress in mathematics, while continuing to perform at a below basic and below-grade level. (S 17, 28 p. 24, 25.)
26. In writing, Student's teacher reported significant progress in writing complete sentences. (S 17, 32 p. 7.)
27. In speech and language, Student continued to score at low average in antonyms and below average in all other language skills, indicating an overall struggle with language and falling behind Student's cohort in thirteen of sixteen measured language skills. (S 17.)

28. In classroom observations of Student's fine motor skills by Student's occupational therapist, Student demonstrated the visual motor control and ability to write legibly when given assistive technology in the form of special paper with graphic boxes and other accommodations on the paper that provided visual feedback. Student made progress in pre-writing, and met visual-motor and visual-perceptual IEP goals. Student was independent eating lunch in the cafeteria. (S 17.)
29. Student's difficulties with remaining on task and need for frequent redirection interfered with the pace of instruction to peers in small group settings. In the general education classroom in second grade, Student's peers helped Student to attend to instruction. Peers also were eager to play with Student. (P 10.)
30. For the May 12, 2015 IEP meeting, through a parent input form, Parent raised concerns about Student's needs in the areas of executive functions; social conversation and skills; snaps, buttons and tying shoes; pragmatic, receptive and expressive language; and articulation. (S 17.)

#### IEP, SERVICES AND EVALUATIONS – THIRD GRADE

31. Parents attended the May 12, 2015 IEP meeting. (S 17.)
32. The May 2015 IEP did not list either assistive technology or sensory strategies as educational needs. (S 17.)
33. The May 12, 2015 IEP for Student's third grade year placed Student in the same placement as in second grade, itinerant learning support. Placement included 60 minutes per day outside the classroom, 30 minutes for reading and 30 minutes for writing. It also included two 25 minute small group speech and language sessions. The IEP provided 30 minutes per day of mathematics support in the classroom and 30 minutes per month of group occupational therapy. (S 17.)
34. The May 12, 2015 IEP provided nine measurable goals addressing articulation; word structure; answering "wh" questions; pragmatic language; writing sentences and paragraphs; oral reading fluency; mathematics computation; mathematics concepts and applications; and functional skills including clothing fasteners. (S 17.)
35. The May 12, 2015 IEP provided modifications in the general education setting including multisensory delivery of instruction, including modeling; incorporating visual-perceptual and visual-motor activities into academic instruction; modified directions; extra time; decreasing visual distractions; movement or sensory breaks; modified assignments and homework; accommodated assessments, including separate room, reading directions and permitting re-reading of materials prior to comprehension assessments; use of tangible spacers to support writing; time set aside daily to practice fasteners; a communications book between school and home; family opportunity to

preview and practice physical education lessons; and encouragement of collaborative and group play during indoor recess. (S 17.)

36. On June 27, 2015, Parents obtained and subsequently provided to the District a private reading evaluation by their reading specialist consultant. The evaluation was based in part on an “authentic formative assessment” utilizing a “developmental continuum” based upon research through the First Steps Project of the Western District of Australia. The consultant’s methodology allowed the Student to choose the reading passages for the assessment based upon what were of high interest to Student. The methodology allowed for the Student to express ideas about what the Student had read through any means, including pictures and acting out ideas physically. (NT 152-154, 174; S 28 p. 15; P 122 p. 7.)
37. Using this assessment strategy and clinical assessment, the consultant found that Student’s reading ability was in “Phase Three-Early Reading Phase”. Student was able to read 500 words with 100% accuracy at a rate of 10 words per minute; this was described as “grade appropriate”. Student’s comprehension was described as “at a very high level” when Student was given adequate time to process, including grade-level appropriate literal and inferential comprehension. Student was able to write 24 words in 15 minutes, in the form of 4 sentences, described as at a “higher level” when given adequate time and planning opportunity. (NT 152-154, 174; S 28 p. 15; P 122 p. 7.)
38. Ten words per minute is a very low reading rate. (NT 1403.)
39. Use of a continuum for assessment is most valid when there is an accumulation of multiple data points to estimate where reading falls on the continuum. Use of a continuum with few data points is likely to be less valid. (NT 1386, 1417.)
40. The reading specialist consultant attended numerous meetings with the District, including IEP team meetings, and assistive technology trial meetings. (NT 161.)
41. The June 2015 private reading evaluation recommended allowing Student to read and write at Student’s own pace; use of previewing, prior knowledge activation, “think-alouds”, retelling and summarizing; conversations with peers or adults; practicing before reading aloud; Student verbalization of planning for writing, without intervention; and instructing Student at Student’s highest level, not Student’s lowest level. (S 28 p. 16.)
42. On October 21, 2015, the District and Parent agreed to change Student’s IEP reading goal without a meeting, to address reading comprehension instead of oral reading fluency. (S 18, 19.)
43. On February 12, 2016, Parents obtained a private assistive technology assessment from a speech and language pathologist. The evaluator noted that Student seemed to rely upon print presented simultaneously with oral directions and cues to help in comprehension of and responding to oral directions and cues. The evaluator found that



Student did not know the standard QWERTY placement of letters on a keyboard. The evaluator trialed use of software that permitted easier, quicker typing without the need to use the standard keyboard arrangement. (P 23.)

44. The evaluator concluded that Student's lower spelling ability impeded Student's use of Student's full vocabulary in writing, and that Student's visual-motor weaknesses and hypotonia also impeded Student's ability to use a standard keyboard to type. Therefore, the evaluator recommended assistive technology that provided spellings and predicted words in order to help Student to show the full extent of Student's abilities in written expression. The evaluator also recommended software that would help Student learn to type, and software to support note-taking. (P 23.)
45. In February 2016, Student exhibited severe inattention and distractibility, and extreme unresponsiveness to classroom directions. (P 22, 25, 26.)
46. The Student's educators met with Parents and Parents' literacy consultant in January and February, 2016, and discussed the District's academic instruction programs for third grade and Student's program, as well as Parents' desire for additional supports in the general education classroom. (S 30.)
47. On February 24, 2016, the District and Parent agreed to IEP modifications to include extra time for packing up at the end of the day; and two daily checklists for unpacking and packing Student's book bag. (NT 1171; S 19; P 23.)
48. On March 24, 2016, based upon an IEP team meeting, the District revised Student's IEP to add strengths in mathematics basic facts and recall of information, suggesting comprehension, to Student's present levels. The revision also added progress in reading and writing, articulation, word structures, eye contact, social skills and classroom independence. It added a new modification providing for materials to be sent home to enable the family to practice speech skills. (S 20.)
49. Parents presented written input dated April 18, 2016 to the District. (S 30.)
50. On April 18, 2016, the District convened an IEP team meeting. The team revised Student's IEP reading comprehension goal to measure Student's reading comprehension on a second grade level of text, as Student had mastered the previous goal of measured reading comprehension at a first grade, instructional level of text. Student was independent at the first grade level of text. The team also responded to a questionnaire for an assessment of Student's assistive technology needs by the intermediate unit, being conducted at Parents' request. (S 21, 22, 30.)
51. On April 22, 2016, Parents obtained a private sensory processing evaluation. The evaluation found that Student demonstrated some sensory problems and recommended a sensory diet and sensory breaks at least twice per day. (S 28 pp. 16-17; P 33.)

52. District educators were providing sensory therapeutic intervention in third grade, had done so since first grade, and continued to do so in fourth and fifth grades. (NT 598-614, 631-660; S 33 p. 8.)
53. By May 2, 2016, in grades for the end of the third marking period, Student was functioning below benchmark in English language arts reading, except for reading independently. Three different standardized benchmark assessments indicated that Student was below grade level and below basic in most of the skills of reading, performing at a beginning second grade level. Student regressed in reading overall. In progress monitoring of Student's IEP goal, Student scored 40% in reading comprehension at a second grade level. (S 22, 28 p. 23.)
54. By May 2, 2016, in grades for the end of the third marking period, Student was functioning below benchmark in mathematics. Two different standardized benchmark assessments indicated that Student was below basic in mathematics. In progress monitoring of Student's IEP computation goal, Student's rate of progress toward mastery was a small fraction of that required to meet the goal within the IEP year. In progress monitoring of Student's IEP concepts and application goal, Student's rate of progress toward mastery the goal within the IEP year, Student had regressed, with a negative rate of progress. Overall, Student made slight progress in mathematics. (S 22, 28 pp. 24-25.)
55. By May 2, 2016, in grades for the end of the third marking period, Student was functioning below benchmark in science. (S 22.)
56. By May 2, 2016, in grades for the end of the third marking period, Student was functioning below benchmark in social studies. (S 22.)
57. By May 2, 2016, in grades for the end of the third marking period, Student reached benchmark for grade three in English language arts writing in the skill areas of focus, organization and conventions. Student remained below benchmark in content/details and style. Student's teacher subjectively reported progress on Student's IEP writing goal. (S 22.)
58. By May 2, 2016, Student had made progress in speech and language skills, except for the social skills rubric, on which Student had regressed. Student's speech and language therapist reported subjectively that Student was demonstrating improved eye contact and social interaction in the classroom. (S 22.)
59. By May 2, 2016, Student had made progress in handwriting legibility. (S 22.)
60. On May 2, 2016, the District contracted with the local intermediate unit for assistive technology services. (S 28 p. 17; P 32.)

## FOURTH GRADE IEP, EVALUATIONS AND SERVICES

61. On May 2, 2016, the District convened an IEP team meeting, with Parents in attendance along with their advocate. (S 22.)
62. On May 2, 2016, the IEP team changed Student's placement to supplemental learning support with itinerant speech and language services because of a change in the calculation of the number of hours Student would spend in the regular education classroom, which was 79%, 1% less than the Pennsylvania definition of itinerant learning support (80%). (S 22, 23.)
63. The May 2016 IEP provided for Student's instruction in the regular education classroom for all core academic subjects, with the exceptions of daily 30 minute instruction for writing in the learning support classroom and two 25 minute small group speech and language sessions per week. The IEP provided that Student would receive 30 minutes of reading small group support daily in the regular education classroom and 30 minutes of mathematics support daily in the regular education classroom or in a small group. (S 22; P 76.)
64. The May 2016 IEP provided a slightly changed articulation goal reflecting some progress in articulation of the /r/ sound. (S 22.)
65. The May 2016 IEP provided a word structures goal reflecting work on different word forms. (S 22.)
66. The May 2016 IEP provided a goal for answering "wh" questions reflecting a shift from learning antonyms to learning synonyms. (S 22.)
67. The May 2016 IEP provided a pragmatic language goal with an increased goal level. (S 22.)
68. The May 2016 IEP provided a reading comprehension goal reflecting Student's independence at first grade level of text and setting a goal for reading comprehension at the second grade level of text. (S 22.)
69. The May 2016 IEP provided an unchanged writing goal. (S 22.)
70. The May 2016 IEP provided unchanged mathematics computation and concepts/applications goals, to be taught at a second grade level while providing access to the fourth grade curriculum. (S 22, 28 p. 40.)
71. The May 2016 IEP provided modifications in addition to those in the previous revised IEPs, including use of an iPad; graphic visual supports for mathematics and writing; adapted cutting paper providing visual support; and opportunities for peer support. (S 22.)

72. The May 2016 IEP found Student ineligible for extended school year (ESY) services. (S 22.)
73. Parents accepted the May 2016 offered IEP. (S 23.)
74. On May 19, 2016, the intermediate unit provided the District with the Parent-requested assistive technology assessment, which was based in part upon a written Student Concerns questionnaire filled out by Parents and an interview with Parents. The assessment was based also upon interviews and questionnaires filled out by teachers and related services providers, diagnostic tools for reading and writing, and a classroom observation. The intermediate unit's assessor believed that the Parents' evaluator had employed questionable methodology. (NT 887-890; S 28 pp. 17-18; P 38.)
75. For reading, the May 2016 intermediate unit assistive technology assessment recommended against providing a text reader with fourth grade text because it was considered unlikely to help Student's reading comprehension. It recommended trial of a text reader that emulates a teacher explanation of the text, and it offered three specific examples. It recommended trial of software to break down and retell/visualize/discuss text on a sentence-by-sentence basis due to indications that Student had difficulty retaining text beyond the word and sentence level. It recommended trial of software to assist in instructing Student directly in text vocabulary. (S 28 p. 18; P 38.)
76. For writing, the May 2016 intermediate unit assistive technology assessment recommended trial of software to assist Student in writing, including word prediction software and an ABC keyboard, offering specific examples. (S 28 p. 18; P 38.)
77. For mathematics, the May 2016 intermediate unit assistive technology assessment recommended trial of specialized graph paper to help with aligning digits for mathematics computation. (S 28 p. 18; P 38.)
78. For general support of studying and learning, the May 2016 intermediate unit assistive technology assessment recommended trial of three software programs. (S 28 p. 18; P 38.)
79. On August 31, 2016, Parents and their advocate met with District educators to discuss plans for assistive technology trials. (S 30.)
80. Student's fourth grade regular education classroom had a paraprofessional to assist the teacher with instruction, and the paraprofessional worked with Student. (NT 703-704, 930.)
81. In September 2016, the District obtained a review of Student's classroom behaviors by a behavior specialist. (P 45.)

82. The behavior specialist recommended behavior interventions based upon perceived function, antecedent or proactive interventions, including sensory interventions; modifications to instruction and behavior shaping strategies. (P 45.)
83. During the first part of Student's fourth grade year, Parent's consultant reading specialist observed Student. In addition, Parent observed Student in various classroom and school settings four times in February and March 2017. During these observations, Parent did not see implementation of many of the modifications in Student's IEP, and reported this to District personnel. Parent also expressed concern about classroom events that caused Student to become frustrated, and her concern that the classroom teacher should have taken action to prevent or reduce Student's frustration. (S 28 pp. 56-57.)
84. During Student's fourth grade year, Parent requested documentation regarding physical exercises being performed by Student at the beginning of the day and a word list from the speech and language professional so that Student could practice articulation at home. This information was sent to Parent. (S 28 p. 58.)
85. On September 19, 2016, Parents received a private occupational therapy evaluation report. The report recommended sensory diet; occupational therapy designation of the appropriate time of day for sensory activities; allowing Student work standing or on the floor due to increased sensory needs when sitting at desk; various sensory devices to be utilized at the desk, including those providing deep pressure; provision and outfitting of a calming area; techniques to reduce distracting noise; and reduction of visual distractors. (S 28 p. 19; P 42.)
86. On September 22, 2016, the intermediate unit's assistive technology consultant reviewed the ongoing assistive technology trial of software to assist Student in writing, including word prediction software and an ABC keyboard. The consultant recommended changing to a different software without notifying Parent, who subsequently raised a concern about being included in such decisions. (S 37.)
87. The trials did not include using an ABC keyboard as had been recommended. (NT 364-369, 404-405, 765, 773, 943-944, 968.)
88. On September 23, 2016, the District and Parent agreed to modify Student's IEP without convening an IEP team meeting to include a bathroom schedule in the modification section. (S 24.)
89. In October 2016, Parents obtained a private occupational therapy evaluation. The evaluator recommended that sensory breaks be facilitated by a trained professional overseen by an occupational therapist. The evaluator recommended that the Student be taught to self-regulate through explicit instruction. The evaluator recommended a calming space, and teaching of self-advocacy and social skills. (P 56.)

90. In October 2016, the assistive technology consultant recommended notification and team decision-making on assistive technology changes going forward, as well as training Parent and sending the device home for use of the software at home. (S 37.)
91. On October 24, 2016, Parents received a private occupational therapy report which recommended that a sensory diet be scheduled throughout the school day, provided by a paraprofessional and overseen by an occupational therapist. It recommended teaching Student explicitly to recognize Student's sensory needs and devise Student's own sensory diet. It recommended trialing of various sensory regulation products. It recommended sensory diet, calming space, multisensory instruction, provision of a paraprofessional, provision of a confidential signal to teacher when Student needed a bathroom break, and social skills instruction to include self-advocacy. (S 28 p. 20.)
92. On October 26, 2016, the District's occupational therapist and behavior specialist completed a sensory and behavior report for Student. The report was based upon review of previous reports, including private reports; interviews with parents and educators, including teachers; several classroom observations; and a review of pertinent literature. (S 28 p. 20; P 58.)
93. The October 2016 District sensory and behavior report concluded that Student can be classified as a person with "low registration" that reduces Student's engagement and attention in school. To address this, the report recommended re-instituting behavior interventions emphasizing use of clear expectations and structured, systematic use of positive reinforcement to elicit appropriate behaviors and engagement. It recommended sensory breaks, providing brief sensory activities throughout the day and re-institution of daily exercise with a peer, which had been discontinued due to Parents' objections to the lack of adult supervision. It recommended structuring, modifying and chunking work, as well as giving directions step-by-step. (S 28 p. 21.)
94. On October 24, 2016, Parents' reading specialist consultant observed Student in the regular education classroom during English language arts instruction. (P 57.)
95. On October 26, 2016, the District and Parent agreed to modify Student's IEP without convening an IEP team meeting to modify the specially designed instruction for bathroom breaks to provide only for monitoring of Student if in the bathroom too long, and to expand the modification for "visual/auditory/tactile cues" to all school settings. (S 25.)
96. During Student's fourth and fifth grade years, Student's occupational therapist monitored and consulted on Student's sensory interventions, including the program of morning exercises with a peer. (P 56, 62, 63, 69, 75, 87, 103.)
97. On November 17, 2016, the District convened a meeting with Parents and the IEP team, Parents' advocates, and other service providers to discuss Student's program, including assistive technology. The iPad was returned to the intermediate unit, and Student

returned to using a computer with QWERTY keyboard for the remainder of fourth grade. (NT 773, 776, 968, 970; S 30, 41 p. 50.)

98. The District had other iPads available at that time, but Student's educators concluded that the trial had not succeeded because of the time allocation away from instruction. (NT 773, 978.)
99. On February 24, 2017, the District convened an IEP team meeting after data showed that Student did not recoup sufficiently skills lost over the winter holiday break. The District offered ESY services through instruction at a special education summer program offered by the local intermediate unit. The program would be for academic subjects, 3 hours per day, 4 days per week, during one month starting June 27, 2017. (NT 796-797; S 26; P 68.)
100. Parents rejected the offered ESY services because the location was too segregated; targeted academics were not specified; and Parents desired ESY to include assistive technology instruction and social skills and communication day camp. (S 26.)
101. On March 7, 2017, the District convened an IEP team meeting, including Parents, to discuss assistive the technology trials. (S 28.)
102. By May 10, 2017, Student was demonstrating lower growth and lower achievement in reading, while functioning below grade and in the below basic range. Student continued to perform with difficulty at a beginning of second grade level. Student made at best minimal progress toward Student's goal for reading comprehension at a second grade level. (S 28 p. 26, 32 p. 12; P 68, 77.)
103. By May 10, 2017, Student was demonstrating lower growth and achievement in writing. (S 28 p. 27, 32 p. 15; P 68.)
104. By May 10, 2017, Student was not demonstrating adequate progress in mathematics; Student continued to function below grade level and in the below basic range. Student did not make adequate progress toward goals for computation and concepts/applications at a second grade level; Student regressed in progress monitoring for both goals. Student continued to struggle with two digit subtraction with borrowing. Student continued to struggle with multi-step problems and concepts including least-to-greatest; measuring; understanding graphs and number lines; counting money; and understanding fractions. (S 28 p. 27-28, 32 p. 9, 10; P 68.)
105. By May 10, 2017, Student had demonstrated good progress in articulation, receptive and expressive language, and pragmatic/social language. (S 28 p. 34.)
106. In fourth grade, Student was more distracted in push-in reading and mathematics small groups in the general education classroom than in small groups outside the general education classroom. (NT 1509-1511; S 28 p. 29, 35, 38.)

107. During fourth grade, assistive technology trials had required allocation of instructional time away from academic needs. Student's teachers and staff concluded, over Parents' objection, that the Student received minimal benefit, and the benefit to Student was not worth the lost instruction time. (NT 364-369, 943-944; S 28 p. 36.)
108. During fourth and fifth grades, Student continued to exhibit significant inattention and lack of focus in the classroom. (P 44, 45, 80, 117.)
109. During Student's fourth grade year, Student's teachers implemented at least 21 kinds of interventions for Student, including nonverbal/gestural directions and modeling; short verbal directions; step-by-step directions; clarifying expectations and check-ins for comprehension; wait time offered; breaks and peer assistance with directions. (P 45, 71, 72, 73, 75.)
110. During fourth grade, Student's teachers did not consistently follow the IEP modification for allowing Student time and checking-in with Student to support Student's packing up for the day, or the modifications for bathroom breaks. (P 73, 88.)
111. On May 5, 2017, the District provided a re-evaluation report to Parents. The District scheduled a multidisciplinary/IEP team meeting to discuss the report, which occurred on May 10, 2017. (S 3, 31 p. 14.)
112. The May 2017 re-evaluation report was based upon an interview with Student; Parents' written input and interview with Parent; review of numerous evaluation and assessment reports, from both public and private providers; 3 classroom observations by the school psychologist using time sampling procedures; administration of standardized cognitive and achievement testing; standardized adaptive behavior assessment utilizing a behavior inventory administered to two teachers and Parent; a behavior inventory addressing attention and executive functions, administered to two teachers and Parent; a behavior inventory addressing symptoms of autism, administered to two teachers and Parent; and a standardized assessment of visual-motor integration. (S 3.)
113. Prior to the May 10, 2017 multidisciplinary team meeting, Parents provided 20 pages of written input. Parents also provided summaries of Student's trials of assistive technology software. (S 28 p. 57.)
114. Pursuant to a request for written parental input, Parent submitted a report for the re-evaluation regarding her recommendations for Student's specially designed instruction, including lists of Student's strengths and "concerns"; 46 modifications and accommodations; an additional list of 18 strategies that Parent found to be effective when provided by Student's therapeutic staff support worker; and a list of 8 family concerns about the delivery of instruction in Student's school. (S 28 pp. 53-56.)
115. Parents' concerns included: the content of home-school communications; school criticism of TSS staff communications with Parent, which Parent considered to



be harassment; loss of instruction time due to exclusion from classroom activities as a consequence of Student behavior; loss of services when the assigned TSS worker was on medical leave for four months; an impending functional behavioral assessment (FBA) to be performed in school by the home program behavior support staff; negative remarks believed to have been stated possibly in Student's hearing about Student's performance in school; non-implementation of Student's sensory devices in the absence of a TSS worker for four months; teacher understanding of Student's needs to be placed in a position to succeed; and inappropriate instruction. (S 28 p. 56.)

116. The May 2017 re-evaluation report classified Student with Autism and Speech or Language Impairment. (S 3.)
117. The May 2017 re-evaluation report found Student's cognitive ability to fall within the "borderline" range, with an IQ score of 67 and a General Ability Index (which reduces the weight given to processing speed) of 70, based upon standardized testing comparing Student's scores with those of a sample of children of the same age. Student's scores for verbal comprehension, visual-spatial recognition, and working memory fell within the "borderline" range, while Student's score for fluid reasoning was extremely low. Although underdeveloped, Student's verbal expression and verbal reasoning skills were considered to be a strength. Student's ability to quickly scan and process information was considered a weakness. (S 3.)
118. Student's ability to analyze and synthesize visual information is underdeveloped. (S 3.)
119. Student's difficulty engaging in higher level thinking and reasoning renders these activities very challenging for Student. (S 3.)
120. On a standardized behavior inventory measuring Student's adaptive skills, Student scored in the "extremely low" range for most skills and the "low" range for practical skills as reported by one of two respondent teachers. Student showed weaknesses across all adaptive domains, including functional academics, communication, social interaction, and practical skills. Student showed limited ability to behave safely, maintain health and respond to illness or injury. Student's skills in living at home and school were under-developed, as were Student's skills in accessing and utilizing community resources, such as shopping. (S 3.)
121. The May 2017 re-evaluation reported scores from two measures of academic achievement. On a broad assessment of achievement, Student scored in the "low" range for total achievement, falling in the first percentile compared with a sample of children. Student scored in the "low" range for reading comprehension and fluency, oral language, mathematics and written expression; however, Student scored in the higher "below average" range for total reading and in the "average" range for basic reading, which essentially measures decoding ability. (S 3.)

122. The May 2017 re-evaluation found that Student, though delayed across domains, demonstrates relative strength in foundational academic information, such as memorized categories of information (such as lists of animals by name), decoding, memorized vocabulary, memorized mathematics facts, spelling and correct ending punctuation. (S 3.)
123. The May 2017 re-evaluation found that Student struggles in applying foundational information. Student struggles to comprehend what Student can read with facility; to solve mathematical word problems using operations that Student can perform when presented in mathematics symbolism; and to formulate written responses to writing cues, such as in writing an essay or formulating full sentences. (S 3.)
124. The May 2017 re-evaluation included a second instrument that was administered only to address Student’s reading comprehension, using a “cloze” procedure that allowed Student to fill in blanks in sentences with the correct word. Student’s score on this assessment was consistent with the findings from the broader achievement subtest for reading comprehension; Student scored in the very low range. (S 3.)
125. The May 2017 re-evaluation included a standardized behavior inventory measuring Student’s functioning with regard to attention and executive functions, and associated behaviors and problems. Responses confirmed elevated levels of inattention; activity and movement; learning problems; impulsivity; difficulties with planning and organizing materials and work; planning and managing time; and relations with peers. (S 3.)
126. The May 2017 re-evaluation included a standardized behavior inventory measuring Student’s functioning with regard to symptoms of Autism. Respondents’ scores corroborated Student’s diagnosis and classification with Autism, and revealed substantial difficulties with reciprocal social behavior that significantly impact Student’s performance at school. (S 3.)
127. The May 2017 re-evaluation included a standardized assessment of visual-motor integration skills. Student’s scores in the “low” range corroborated cognitive test scores that indicate under-developed visual-motor integration abilities. (S 3.)

#### FIFTH GRADE IEP, EVALUATIONS AND SERVICES

128. On May 10, 2017, The District convened an IEP team meeting to discuss the May 2017 re-evaluation and produce an annual IEP for Student’s fifth grade year. (NT 1493-1494; S 28.)
129. As of May 10, 2017, both District educators and Parents agreed that Student needed additional supports. (NT 1485-1487; S 3, 28.)

130. The May 10, 2017 IEP proposed to increase Student's daily instruction time in the special education classroom by 30 minutes. It proposed to continue Student's placement in supplemental learning support, with 30 minutes per day of instruction in the special education classroom for reading, writing and mathematics. (S 28.)
131. The May 10, 2017 IEP proposed to provide Student with 200 minutes per month (two 25 minute sessions per week) of pull-out speech and language instruction to address articulation and receptive, expressive and pragmatic language. (S 28.)
132. The May 10, 2017 IEP proposed to provide Student with one 30 minute session per month of occupational therapy, to be provided during Student's speech and language pull-out to provide direct instruction in the utilization of sensory items and exercises. (S 28.)
133. The May 10, 2017 IEP proposed four speech and language goals addressing previous and new articulation, receptive language and expressive language skills. The new skills did not state a baseline, but set a measurable goal. (S 28.)
134. The May 10, 2017 IEP proposed goals addressing self-recognition of arousal states and utilization of sensory techniques to regain attention to task. (S 28.)
135. The May 10, 2017 IEP proposed a measurable goal addressing writing of topic sentences; these are called "echo" sentences for instruction purposes because they are to "echo" words or ideas in the writing prompt. (S 28.)
136. The May 10, 2017 IEP proposed a measurable goal addressing reading comprehension utilizing "Maze" passages and multiple choice questions at a second grade level. (S 28.)
137. The May 10, 2017 IEP proposed two measurable goals addressing mathematics computation and mathematics concepts/applications at a second grade level. The computation goal addressed double digit subtraction with regrouping. (S 28.)
138. The May 10, 2017 IEP proposed modifications to provide sensory activities, including "brain breaks", a special cushion for Student's chair; permitting Student to work in different positions other than at the desk; and provision of various sensory devices. It also proposed providing Student with an iPad daily with monthly training in its use. (S 28.)
139. During Student's third and fourth grade years, District educators considered the option of providing academic instruction in reading, writing and mathematics in the general education classroom with supplementary aids and services. They considered 35 modifications and accommodations that were being provided in the general education classroom. They considered the Student's greater distractibility in the push-in special education small group sessions that had been provided in the general education classroom during fourth grade. They considered the positive effects for

Student of being able to socialize with typically developing peers; and the negative effects to Student of slow acquisition of basic academic skills, as well as the fact that the fourth grade curriculum required abstract and higher-level thinking, which Student's disability impedes. The District also considered the deleterious effects of Student's vocalizations on the attention of other students in the general education classroom. (NT 78-79, 119, 122-125, 1396, 1405, 1413, 1423-1426, 1491; S 3, 9, 28; P 119 p. 1.)

140. The IEP team implemented the 35 modifications and accommodations in the general education classroom in fourth grade and fifth grade, along with some recommendations of Parents' literacy and other consultants. (NT 174-175, 278-281, 288-291, 317, 330-332, 373-374, 414-417, 447-451, 931-932, 1014, 1085-1086, 1095-1096, 1152-1153, 1396, 1404, 1420-1423, 1431-1432, 1443-1444, 1517-1518; P 2, 45, 57.)
141. At the May 10, 2017 IEP meeting, Student's IEP team considered the recommended practice of providing speech and language instruction in a separate setting at first, followed by increasing push-in speech and language services to support generalization of learned skills. (S 28.)
142. At the May 10, 2017 IEP meeting, Student's IEP team considered the assistive technology trials in fourth grade, in which the District educators concluded that the devices did not provide substantial benefit and that teaching Student to use the devices would divert substantial instruction time from academic instruction. (S 28.)
143. The May 10, 2017 IEP found Student eligible for ESY services and proposed ESY services through instruction at a special education summer program offered by the local intermediate unit. The program would be for academic subjects, 3 hours per day, 4 days per week, during one month starting June 27, 2017. (S 28.)
144. At the May 10, 2017 IEP team meeting, the team did not finalize Student's IEP; instead, Parents requested that certain documents be provided and/or attached to the IEP, and that team members complete the SAS Toolkit, a state-facilitated process for identifying and developing interventions to overcome barriers to inclusive instruction. (S 29 p. 58; P 102.)
145. The District obtained a consultation report dated June 22, 2017 from the District's literacy coach. The literacy coach reviewed Student's program, including IEPs and a re-evaluation report. The literacy coach interviewed Student's regular and special education teachers and two TSS paraprofessionals, and observed Student in the classroom on three different occasions, including using structured observation techniques. The literacy coach solicited Parents' input, but the Parent did not provide any input. (NT 1382-1385, 1395-1399, 1435-1436; S 9.)

146. In August 2017, the District obtained a report from the intermediate unit autism consult team. The observer concluded that Student was prompt-dependent. (NT 1026; S 10.)
147. Beginning in September 2017, the District began providing Student with 45 minutes per day of structured, multisensory instruction in a small group of 3 peers, beginning at Student's instructional level, for reading, mathematics, writing, speech and language and life skills. (S 29.)
148. Student's fifth grade general education classroom had a paraprofessional who assisted the teacher with instruction. (NT 312-314, 440.)
149. The fifth grade special education writing class provided 45 minutes per day of practice of foundational skills and writing paragraphs. (S 29.)
150. The District provided a language class in the separate small group setting that was coordinated with the small group writing class. (S 29.)
151. Student utilized both a laptop computer in the general education classroom and an iPad in the special education classroom for writing. (NT 251-252, 331-332, 450-451.)
152. From September 6, 2017 to December 22, 2017, Student made significant progress in writing topic sentences. (S 29.)
153. The fifth grade special education reading class provided instruction, remediation and practice at the pace set by the small group including Student, in foundational reading skills and reading comprehension, including understanding directions. It included pre-reading of stories by the teacher, followed by student reading; chunking of content and assessing comprehension step-by-step; and techniques to teach the drawing of inferences from text. It included individualized guided practice and group responses. (S 29.)
154. From September 6, 2017 to December 22, 2017, Student made progress in reading comprehension, although not at a rate calculated to master Student's goal within the IEP year. Student remained at an instructional second grade level. (S 29.)
155. The fifth grade special education mathematics class provided sequential, step-by-step instruction directed to mathematics concepts and applications. It included fast pace, intermittent reinforcement, and practice time. (S 29.)
156. On September 18, 2017, Parents and Student's IEP team met and engaged in the SAS Toolkit process with a State facilitator. The team did not complete the process by listing possible interventions to support inclusive instruction. Parent completed the process alone, as did one or two other IEP team members. (S 36.)

157. From September 6, 2017 to December 22, 2017, Student made progress in mathematics concepts and application, although not at a rate calculated to master Student's goal within the IEP year. Student remained at the below basic level. (S 29.)
158. From September 6, 2017 to December 22, 2017, Student made no progress in the foundational skill of double-digit subtraction with borrowing. (S 29.)
159. From September 6, 2017 to December 22, 2017, Student continued to receive speech and language instruction in the therapy room pursuant to IEP goals. Student made significant progress in articulation; minimal progress in receptive language; minimal progress in expressive language; and significant progress in social language. (S 29.)
160. From September 6, 2017 to December 22, 2017, Student received social skill instruction in a small group setting utilizing social stories. (S 29.)
161. In fifth grade, Student's first period grades for English Language Arts Reading, English Language Arts Writing, Mathematics, Social Studies and Science were all at the lowest level on a scale of three, all well below benchmark. There were two exceptions: reading grade level text and reading independently, which showed progress but remained below benchmark. (S 29.)
162. Parents sent the District an agenda for the next IEP team meeting. (S 30 p. 63.)
163. On December 12, 2017, Parents obtained a private psychoeducational evaluation, which corroborated teacher reports and prior testing indicating that Student exhibited significant weaknesses in processing speed, comprehension and higher level skills. The private evaluator recommended placement in a life skills program to learn functional academics. (P 117.)
164. On December 22, 2017, the District proposed a revised IEP that included updated present levels of academic achievement and functional performance. The IEP proposed to increase Student's time in the learning support classroom to include all academic instruction except for the following instruction which would be provided in the regular education classroom: 30 minutes per day of shared reading; thirty minutes per day of academic content; all special subjects; and lunch, recess and school-wide activities. The IEP proposed to provide two 25 minute sessions per week of speech and language instruction in the speech therapy room; and an added two 30 minute sessions of direct occupational therapy per month in the therapy room, for a total of three sessions per month. (S 29.)
165. The December 22, 2017 IEP proposed to continue providing Student with structured, sequential instruction in a small group setting, beginning at Student's instructional level, for reading, mathematics, writing, speech and language and life skills. (S 29.)

166. The December 22, 2017 IEP proposed updated speech and language goals. The updated goals proposed to add baselines for articulation, expressive language, receptive language and social skills goals. (S 28, 29.)
167. The December 22, 2017 IEP proposed to provide a peer socialization coach as a modification of instruction. (S 29.)
168. The December 22, 2017 IEP proposed to provide Student with ESY at the intermediate unit program, four days per week, three hours per day, over a one month period. (S 29.)
169. Parents rejected the proposed IEP on December 29, 2017 and requested due process on January 1, 2018. (S 1, 29.)
170. On January 18, 2018 and January 31, 2018, Parents' consultant reading specialist observed Student for a full day of classes and one other class, respectively, including homeroom; regular education mathematics; speech and language pull-out session; indoor recess; music; lunch; English language arts reading testing; learning support writing; science; learning support reading testing; and dismissal. (P 119, 122.)
171. By February 2018, Student was making significant progress toward Student's goal of writing a topic sentence. (S 32 p. 21.)
172. On February 10, 2018, Parents' consultant reading specialist assessed Student's reading and writing; the consultant produced a report, summarizing numerous past assessments and Student's educational history. The report included a "qualitative formative assessment" of Student's reading and writing, utilizing a "developmental continuum" based upon research through the First Steps Project of the Western District of Australia. Using this assessment strategy and clinical assessment, the consultant found that Student was exhibiting reading skills in the Independent Reader phase and Advanced Reader phase, skills at grade 6 and above, with indicators of reading ability at the Independent Reading phase, grades 7 to 12. The consultant reported that Student was able to read parts of four books and an article on the internet in a two hour testing session with Lexile scores from 4<sup>th</sup> to 12<sup>th</sup> grade and above. (NT 197-198; P 122.)
173. The consultant concluded that Student's literal comprehension was at least at the fourth grade level, with some inferential comprehension. (P 122.)
174. The consultant reported that Student had conducted internet research on the Airbus A380, and then contrasted and compared the article and a book that Student had just read. During the assessment session, Student also conducted internet research on the word "Emirates", eventually demonstrating the ability to book a flight to Bahrain. (P 122.)
175. The consultant recommended inclusion of Student "to the maximum extent possible, citing research that indicates that in general teenage children included in

regular education demonstrate greater improvement in literacy than those not instructed in the regular education setting. (P 122.)

176. The assessment included a silent reading assessment, with a word count of over 1,440 total words read with 99% accuracy. From this data, the consultant concluded that Student's reading rate was appropriate for text at levels fourth grade and above. (P 122.)
177. The assessment included a spoken reading assessment, in which Student demonstrated appropriate speed, inflection, expression, incorporation of punctuation, pitch and tone. The consultant noted Student's preference for smaller print, such as 9 point print. (P 122.)
178. The consultant assessed Student's writing, concluding that it demonstrated logical sequence and appropriate phrasing. The consultant concluded that Student's writing was better when dictated through computer software, noting regression in Student's handwritten work. (P 122.)
179. The consultant recommended providing speech and language support in the general education classroom, citing recent supportive research. (P 122.)
180. The consultant advised that Student learns best through abstract processing schemata, and recommended "whole to part" instruction, rather than the "part to whole" instruction that she concluded is the approach of the District with Student. The consultant recommended "reciprocal teaching" and "KOWL" instructional methods. (P 122.)
181. The consultant also questioned the appropriateness of the District's assessment instruments because they measure parts first, do not allow Student to discuss, and are in some cases timed, recommending sole use of "authentic" assessment methods. (P 122.)
182. The consultant repeated her prior recommendation that Student be taught comprehension strategies through techniques of prior knowledge activation, prediction, "think-alouds", retelling and summarizing. The consultant also recommended that Student be allowed to process text at Student's own speed, visualize, preview text, think about it, and not be subject to pressures to read aloud or with timed fluency. (P 122.)
183. For writing, the consultant recommended that Student be given flexible time for written work; a scribe or voice-to-text software; leeway to verbalize Student's plan for writing; and freedom from too many prompts prior to writing. The consultant also recommended that Student be taught at higher levels of curriculum than the District presently is providing to Student. (P 122.)
184. The consultant recommended encouraging of conversation about reading; use of a laptop for research; a personal electronic dictionary; "authentic" literature that



holds Student's interest; book selections that Student enjoys reading; and repeated assessment for assistive technology. (P 122.)

## **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>5</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>6</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)(applied to least restrictiveness analysis).

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 “equipose”. 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.

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<sup>5</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>6</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.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents to show that the District has not performed its obligation to offer a free appropriate public education in the least restrictive environment. L.E. v. Ramsey Board of Education, 435 F.3d above at 392. To the extent that Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in “equipoise”, then Parents cannot prevail under the IDEA.

#### CREDIBILITY AND WEIGHT

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I have weighed the evidence with attention to the reliability of the testimony.

#### WEIGHT ACCORDED TO OPINIONS OF PARENTS’ LITERACY AND INCLUSION CONSULTANT

I accorded reduced weight to the opinions expressed by the Parents’ literacy and inclusion consultant. I considered this witness’ extensive knowledge and experience, as well as the record evidence concerning the witness’ methodology and its application to the facts. While the witness’ qualifications and comprehensive knowledge of the educational record suggest that the witness’ opinions are likely to be reliable, her methodology and its application to the data strongly indicated that many of her opinions were unlikely to be reliable.

I found that this witness is eminently qualified to offer opinions on Student's reading ability, including comprehension; whether or not the Student should be instructed in the general education classroom; and the degree to which Student could be helped by assistive technology. The witness' education consists of multiple post-secondary degrees, culminating in the Doctor of Philosophy degree in curriculum and instruction. The witness has extensive recognition and experience as a teacher of college and graduate students in subjects related to education and special education. The witness has several years of experience as a teacher in a public school setting in Minnesota, as well as many years functioning as a consultant in special education cases in Pennsylvania, dealing with issues of placement and IEP development. The witness has published research in the field of education, and has made many presentations on education to conferences and training programs.

In addition to these qualifications, the witness developed extensive knowledge of Student's educational history and the District's services. The witness reviewed the extensive documentary record in the matter, including multiple psychoeducational evaluations extending over a period of almost a decade of Student's life. The witness had the benefit of multiple agency and private evaluations in the fields of speech and language; occupational therapy; sensory functioning; assistive technology; and behavior. The witness observed Student on three occasions in multiple school settings, and attended numerous meetings with Parents and Student's IEP team, as well as with District and intermediate unit specialists – thus, the witness had the opportunity to hear the reasoning of District educators as they presented their opinions and recommendations.

My concern is with how this qualified and knowledgeable witness applied her expertise to the facts at hand in order to derive the opinions that she presented in testimony and written

reports. The witness relied upon presumption regarding the least restrictive environment issue in this matter. The witness based her conclusions about Student's academic ability on a single methodology that was not well explained or justified. The witness was unable to explain how her recommendation of full inclusion was reasonably calculated to provide appropriate and meaningful benefit to Student in particular. The witness was unable to cogently explain why her conclusions were likely to be correct in the face of numerous evaluations and years of District educators' experience to the contrary.

The evidence is preponderant that the witness presumes that full inclusion is appropriate for every child, regardless of unique individual need. Her curriculum vitae indicates that her consulting work is "for inclusive education". She indicated that she consults primarily if not exclusively for parents. She repeatedly testified that children do better when instructed in the general education classroom; in the case of assistive technology, this general proposition alone was the basis for her syllogistic conclusion that Student would not make progress with assistive technology in the separate special education classroom. Thus, her testimony convinced this hearing officer that the witness would support inclusion in every case, according absolutely no credence to the more restrictive parts of the placement continuum. This is not the IDEA standard. 34 C.F.R. §300.115 (requiring districts to make available the full spectrum of alternative placements and requiring consideration of effect of placement on the "quality of services that he or she needs ..."); accord, 22 Pa. Code §14.145(5).

The witness' conclusions about Student's ability to read and to comprehend what Student was reading were based upon a single assessment conducted over a two hour period. This was the basis for the bulk of the witness' conclusions and recommendations for Student's programming, thus departing from the standard set forth in the IDEA, 34 C.F.R.

§300.304(b)(2)(evaluations may not “use any single measure or assessment as the sole criterion ... for determining an appropriate educational program for the child ... .”)

Despite the witness’ vast knowledge and experience in this area of literacy, which is the heart of her expertise, I must weigh the evidentiary record before me in determining the weight to be accorded to this methodology. I conclude that this methodology is not likely to be reliable for the purposes of determining the appropriate programming for Student, for three reasons.

First, the methodology is unlikely to have been valid as applied in this case. The witness described it as a “continuum” type of assessment, in which behaviors are rated according to a continuum – in this case, a continuum of literacy development that the witness indicated could be correlated with grade levels relevant to Student’s education in the District here in Pennsylvania.<sup>7</sup> Opposing the use of this methodology in the present matter, the District’s literacy specialist testified credibly and reliably that a “continuum” methodology is less likely to be valid when utilized in a single session such as the witness employed, because the method is stronger when multiple data points are placed into the continuum.<sup>8</sup> The Parents’ literacy specialist did not explain how the “continuum” methodology would be valid in these circumstances.

Second, Parents’ literacy specialist did not explain how her findings as to Student’s grade-level reading comprehension could be harmonized with the vast body of evidence that she had reviewed. Her findings as to Student’s higher level comprehension abilities appear to

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<sup>7</sup> Although the continuum was developed in Australia rather than in the United States, the witness did not explain how it correlated with American or Pennsylvania grade levels.

<sup>8</sup> The Parents’ witness also noted a very few observations of Student utilizing “higher level” reasoning in comprehending and responding to questions during the witness’ classroom observations. Thus, the witness’ observations arguably added a very few more data points to the continuum; however, this additional information does not negate the criticism of the District’s literacy specialist.

contradict multiple psychoeducational evaluations over time. These evaluations, both by agencies and by private evaluators, consistently found Student to be functioning in the low or very low range of cognitive ability, and to have commensurately low reading comprehension ability. Student's educators measured Student's reading comprehension with well-known and generally accepted standardized instruments and consistently found Student to be performing in the low range with regard to reading comprehension. In addition, this was the anecdotal report of multiple teachers over several years of day-to-day experience with Student in the classroom. Yet the literacy expert did not demonstrate reasoning that would possibly harmonize her findings on reading comprehension with all of the other data that she had reviewed.

Third, I find unconvincing the witness' explanation as to why all of the assessments of Student's reading comprehension so far were incorrect. The witness distinguished all prior assessments of Student's reading comprehension by reference to an observation during her two hour assessment session with Student, which she described as "whole to part" comprehension.

The witness explained that, during her two hours observing Student, it became apparent to her, based upon her expert observation and judgment, that Student learned and understood better if instructed according to a whole-to-part<sup>9</sup> sequencing of reading instruction. If given a way to see or visualize the entirety of a given text – the big picture – Student was able then to fit the pieces – sentences and words – into the big picture and then comprehend what the text was saying. Without this whole picture, Student was unable to understand the parts, while if

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<sup>9</sup> The corollary to this principle is the witness' recommendation that Student's educators strive to teach Student at Student's highest level of ability, which the witness placed at high-school-to-college level of comprehension ability. For the reasons expressed above, I do not find the witness' methodology to be a reliable underpinning to this recommendation.

presented with the whole picture at the outset, Student was able to understand details or parts of the puzzle. The witness even used a jigsaw puzzle in the hearing to illustrate this concept.

The witness further explained that all of the assessments of Student's reading comprehension contrary to hers were based upon an approach that ran contrary to Student's unique learning style or approach. All previous evaluations, according to the witness, were based upon probes of parts of texts, without first providing Student with the "whole picture". Therefore, all previous evaluations failed to reveal the Student's true level of reading comprehension.

I find this unconvincing as a way of distinguishing all prior evaluations of Student's reading comprehension, because it is based solely upon the witness' two hour assessment session with Student, during which she was able to observe this unique aspect of Student's processing. In addition, it is based upon a subjective conclusion from observation, not supported in this record by any systematic or standardized data. Nor is it based upon the single "continuum" methodology that the witness had employed. It is the purely subjective impression of a single, albeit highly expert, individual at one point in time. I conclude that this observation is not as reliable as almost ten years of repeated standardized and curriculum-based assessments of Student's reading comprehension.

#### WEIGHT ACCORDED TO OPINIONS OF PARENTS' ASSISTIVE TECHNOLOGY EVALUATOR

Parents' assistive technology expert witness is a well-credentialed speech pathologist with many years of experience and excellent credentials. Practicing in this medical field, the witness has developed a specialized practice in providing assistive technology to people with language deficits. The witness discussed his observations of Student's functioning and

recommended software that might help Student with reading and writing. The record shows that his report was helpful to Parents and generated extensive consideration by the District. Yet when weighed against the evidence of the District's efforts, I conclude that it must be given relatively less weight than the results of the District's intermediate unit assessment, as discussed below.

The witness conducted an office-based trial of various software for a period of some hours. The witness used his own software that is not designed to assess for assistive technology. The witness did not interview Student's educators, nor did the witness observe Student in a classroom setting. The agency assessment did these things, and then specific software was trialed in the classroom. Therefore, I accord the private evaluator's opinions less weight relative to the weight accorded to the opinions of the District's assessors and educators on the ultimate utility of assistive technology for Student.

#### WEIGHT ACCORDED TO OPINIONS OF PARENTS' SENSORY NEEDS EVALUATOR

I accord reduced weight to the opinions of the Parents' expert in sensory needs. This witness presented a formidable expertise in sensory needs and how to address them clinically. The witness presented herself as a clinician with some experience consulting for public school programs through her work with an intermediate unit. The witness provides a treatment program that includes a class for teaching children social skills. However, it is plain that the witness based her opinions and recommendations solely upon her clinical experience with Student, without making any effort to speak with the occupational therapist who had been providing services to Student for third grade and was providing them in fourth grade. The witness never observed Student's program, and never observed Student in Student's program.



The witness never contacted teachers or other members of Student's IEP team before formulating and communicating her opinions. In fact she repeatedly testified that she saw no need to do so, and that she could tell that Student was not receiving sensory supports in school based solely upon what she saw in the clinic.

The witness seemed to be personally offended at how she was treated at an IEP team meeting that she attended. Consequently, she was very critical of District educators and somewhat dismissive of their efforts. She felt free to make recommendations as to paraprofessional support and teaching social skills that exceeded her expertise.

In sum, I conclude that the witness, though highly qualified within her clinical area of expertise, failed to inform herself sufficiently to apply her clinical opinions to the question of how to implement support for sensory needs in the educational setting. I also found her testimony to be influenced by personal concerns for how her input was received by the IEP team. Therefore, I accord reduced weight to her opinions.

#### CREDIBILITY OF OTHER WITNESSES

I have no reason to question the credibility or reliability of the other witnesses who testified in this matter. I found few if any conflicts in the vast record before me that led me to conclude that any witnesses were deliberately attempting to misstate or distort the truth. I noted witness' demeanor, and while some were somewhat defensive, and others exhibited lapses of memory, I did not draw conclusions from these characteristics of the testimony that required according lower weight to their testimony on facts that they did remember. In addition witnesses' appearance in all cases was consistent with truth, based upon how the witnesses chose to respond to questions and their visible demeanor.

In particular, I found Parent to be credible. Nevertheless, her opinions about the quality of Student’s school services were not informed by education or training in education. Thus, I accorded greater weight to the opinions of District educators whose expertise and experience of Student in school were necessarily greater.

#### PROVISION OF FAPE TO STUDENT – LEGAL STANDARD

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

“appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

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

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

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The program’s appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

During the relevant period, Student presented as a child with complex learning needs, low cognitive ability according to standardized tests, and significant delays in development,

including in pre-academic, functional, adaptive, social, communication, fine motor, gross motor and behavioral regulation skills. For this child, passing grades and advancement grade-to-grade were not a reasonable measure of progress. Rather, Student's circumstances dictate that Student's progress – both reasonably anticipated and actual - must be measured by “dramatically” different measures. Andrew F. v. Douglas County Sch. Dist., RE-1, \_\_ U.S. \_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017).

Applying these standards to the above findings and the record as a whole, I conclude that the District provided a FAPE to Student.

#### READING COMPREHENSION AND LITERACY

Parents argue that the District failed to provide appropriate instruction to Student in the area of reading comprehension, thus denying Student a FAPE. Their argument is based primarily on the opinion testimony of their literacy consultant, whose opinions I have accorded reduced weight. Weighed against the contrary opinions of the District's school psychologists and educators – that they provided services that were reasonably calculated to provide Student with a FAPE – I conclude that the evidence preponderates in favor of the District psychologist's and educators' opinions.

The record is more than preponderant that the District properly employed individualized instructional techniques at an appropriate instructional grade level. It employed instructional techniques that are consistent with the state of the art and properly directed to teaching Student reading comprehension techniques at a level at which Student could understand and retain what was being taught. The District provided goals that were reasonably based upon the present levels and needs identified in Student's IEPs and corroborated by the

District re-evaluation. It employed program modifications calculated to help Student develop reading comprehension abilities, including “chunking” reading passages into smaller units; using multisensory techniques; opportunities for discussion with typically developing peers; extra time; and re-reading of passages prior to assessment. By educating Student in general education for core academic subjects other than reading, it provided Student with an opportunity to increase Student’s fund of general knowledge, which is known to support growth in reading comprehension. It also provided substantial speech and language instruction that addressed vocabulary and the forms of words and sentences. I conclude that its efforts delivered a FAPE to Student in the area of reading comprehension.

Similarly, the District provided substantial interventions to improve Student’s written expression. It provided separate, intensive instruction. It provided goals for writing sentences and paragraphs. It provided various visual/graphic organizers and supports, as well as extra time to respond to prompts; and verbalization time prior to writing. It modified assignments, home work and assessments. Student’s speech and language intervention addressed Student’s use of language.

Parents argue that the District’s services were misdirected because Student was capable of functioning at a higher level, if only Student would be taught from the whole to the part, rather than from part to whole. While the District did not incorporate this strategy into every phase of teaching both reading comprehension and writing, the record shows that the whole-picture approach is part of everyday instruction by trained teachers in Pennsylvania. Therefore, the record shows that this approach was applied when deemed appropriate.

Yet the District’s educators also testified credibly that it is often preferable to teach Student smaller parts of a skill, such as teaching words before sentences before paragraphs for

both reading and writing. This frank disagreement about teaching strategy is not a denial of FAPE. The IDEA does not impose teaching strategies upon school districts. The IDEA does not require a district to acquiesce in any and all parental requests for services, and it does not preclude the District and its experienced educators from determining the methodology to be employed in educating a child enrolled in its schools. T.L. v. Lower Merion Sch. Dist., No. 15-0885, 2016 U.S. Dist. LEXIS 80315 (E.D. Pa. June 20, 2016); K.C. v. Nazareth Area Sch. Dist., 806 F.Supp.2d 806, 813-814 (E.D. Pa. 2011)(upholding agencies' discretion under the IDEA to select their own educational methodology); See, Leighty v. Laurel School Dist., 457 F.Supp.2d 546 (W.D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgment). I conclude that Parents have failed to show a denial of FAPE.

#### ASSISTIVE TECHNOLOGY

Parents argue that the Student needed, and the District failed to provide, various forms of software, in violation of its obligation to provide a FAPE. The IDEA does not explicitly require a district to provide assistive technology; rather it requires a district to “[c]onsider whether the child needs assistive technology devices and services.” 34 C.F.R. §300.324(a)(2)(v). Therefore, I must consider whether or not the District considered Student’s need for assistive technology. H.G. v. Sch. Dist. of Upper Dublin, No. 13-cv-1976, 2014 U.S. Dist. LEXIS 183544 (E.D. Pa. Oct. 16, 2014)(failure to consider is procedural violation.) If it failed to do so, or failed to provide needed assistive technology, I must consider whether or not its failure to provide assistive technology rose to the level of a deprivation of a FAPE. School Dist. of Phila. V. Williams, 2015 U.S. Dist. LEXIS 157493 (E.D. Pa. 2015)(IEP team having determined that assistive technology was an “important tool” for Student’s ability to

receive appropriate or meaningful educational benefit, failure to provide assistive technology was a deprivation of FAPE.)

It is clear that the District considered Student's need for assistive technology in Student's third and fourth grade years. Student's IEPs for those years provided special paper and graphic supports to help Student plan writing assignments. The IEP team did not find a need for computer devices or software to support Student in second or third grade, but when Parents' experts recommended such technology in the second half of Student's third grade year, the District proceeded within a reasonable time to assess the suggested need. The District also added modifications to subsequent IEPs to provide Student with an iPad for class work.

The District contracted with the intermediate unit to assess the need for assistive technology. The evaluator, who questioned the private evaluator's methodology, conducted her own more thorough assessment, including input from Parents and other IEP team members, as well as her own observations in the classroom and administration of diagnostic tools.

The evaluator's recommendations disagreed with some of the private evaluator's recommendations, but agreed with others. Therefore, in fourth grade, after meeting with Parents to discuss assistive technology trials, the District conducted trials of devices and software for several months.

Ultimately, Student's educators concluded that the recommended software was not benefitting Student and was actually detracting from the intensive services that Student needed in writing and reading. They found that Student was not using the vocabulary-enhancing aspects of the software, but was using Student's already acquired vocabulary, words that Student knew how to spell. So they concluded that the benefit was minor in contrast to the

amount of instructional time being devoted to teaching Student to use the software and assisting Student in navigating it.

Parents strenuously disagree with the District's conclusions. Parent cites her own experience in working with Student to use educational software at home. Parents cite the private evaluator's recommendations, and the record shows that the intermediate unit evaluator also recommended trials of word prediction and vocabulary support software. Parents point out that the trials never included use of the iPad with an ABC keyboard, which had been recommended by both the intermediate unit evaluator and the private evaluator.

Yet this evidence does not prove preponderantly that the District's judgments were wrong. Parents cite the fact that the trials ended when time expired according to an intermediate unit time frame, but they do not show preponderantly that the trials were cut off prematurely. Nor do they show preponderantly that the District's educators were wrong to weigh the limited benefits of the recommended and trialed software against the instruction time taken from teaching other skills. The record does not show that the trial of an ABC keyboard was likely to make the use of the software sufficiently more functional so as to substantially increase /student's writing speed or production, especially where additional trials would have taken even more time from instruction on basic academic skills. In short, they have not proven that the ending of the assistive technology trials denied Student meaningful educational benefit or opportunity for progress, reasonable in light of Student's circumstances during the relevant period of time.



## SENSORY NEEDS

I conclude that the Parents have failed to prove by a preponderance that the District failed to provide a FAPE by failing to provide appropriate services to address Student's sensory needs. On the contrary I conclude that the District responded appropriately and timely to information from Parents and its own evaluators that indicated a sensory basis for Student's attention difficulties and other behaviors.

The record shows that the District's occupational therapist had assessed Student's needs and provided interventions to address those needs throughout Student's tenure in the District. Parents began to seek more formal assessments at the end of Student's third grade.

In May 2016, and again in September of Student's fourth grade year, Parents provided two private evaluations to the District, indicating sensory needs, and recommending a range of sensory strategies. In October 2016, the District provided a sensory assessment that indicated that a sensory diet would be appropriate. The District's occupational therapist developed a number of sensory interventions, including scheduled breaks and various items and activities meant to restore Student to sensory equilibrium and thus enhance Student's ability to attend and focus in the classroom. The therapist introduced these interventions to teaching staff and monitored their implementation as a consultation-based service. In May 2017, the occupational therapist concluded that more intervention - direct service - was indicated, in order to teach Student to recognize Student's own arousal states and take action to utilize sensory devices and breaks as needed.

Parents argue that the District did not do enough to implement the various strategies that their private consultants had recommended. However, I conclude that the District's sensory interventions did not constitute a denial of a FAPE, for three reasons. First, the Parents'

expert was not in a position to make detailed recommendations for a school program, because she did not familiarize herself with Student's school program. Second, the District by its actions showed that it considered the recommendations, because it implemented the key recommendations in the Parents' expert's report, including scheduled breaks, movement at the beginning of the day, teaching sensory self-awareness, and supervision of the program by an experienced occupational therapist. It appropriately devised its own interventions that its occupational therapist considered most appropriate in the educational setting. Third, Parents failed to provide preponderant evidence that the District's sensory interventions, even if insufficient, were of such a magnitude as to result in a denial of FAPE.

## SOCIAL SKILLS

Parents argue that the District has not provided appropriate services to help Student learn to interact with peers. Student's social skills are substantially delayed due Student's autism. Parents argue that the Student's IEP modification for creating opportunities for social interaction is limited to five to ten minutes, has been in place since 2015, and has not changed to increase the amount of time for such opportunities. While this is true, it does not constitute preponderant evidence that the District has failed to provide appropriate services to address Student's social skills.

The record shows that the District has indeed implemented the modification for social interaction opportunities, by encouraging Student to play ball with peers during recess, and the record shows that the Student's peers have willingly cooperated and played with Student. Yet, this is not the sum total of the District's efforts. The District's speech and language instruction includes pragmatic communication and social skills. Student has had a goal for improvement

on a social communication/social skills rubric. Student's sensory exercise program was designed to be performed with a peer in order to increase Student's exposure to reciprocal interaction with peers<sup>10</sup>. Student's IEPs included modifications calling for peer buddies or, in the most recent IEP, a peer socialization coach.

#### ONE-TO-ONE SUPPORT

Parents argue that the District's omission to assign a paraprofessional to Student on a one-to-one basis was a denial of FAPE. I conclude that the record does not support this claim preponderantly. Although a paraprofessional was not assigned exclusively to Student, Student's fourth and fifth grade classrooms were staffed with paraprofessionals who assisted Student as they did Student's peers. In addition, Student's special education teacher spent substantial amounts of time in the general education classroom instructing Student or assisting with Student's instruction. Thus, the District provided staff assistance in the classroom for Student. Parents have not shown that the District's services were inappropriate in the absence of a paraprofessional assigned exclusively to Student.

Parents point to Student's TSS workers' classroom support as evidence that Student should have had this level of support at all times. However, the record is mixed on this point. The TSS workers were present in the general education classroom three days per week. Witnesses indicated that Student was able to attend much better when they were present and redirecting Student. However, witnesses also indicated that Student was highly prompt-dependent on the TSS workers, and also displayed visible signs of increased anxiety when they

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<sup>10</sup> Parents argued strenuously that this program was unsafe because there was no adult supervision. While this is a valid concern, the proposition is not self-evident, nor is there substantial evidence that the program was unsafe. Parents pointed to no policy, protocol or professional educational standard suggesting that this is an inappropriate approach, and they did not provide evidence to prove that this program was a denial of a FAPE.

were present. It is not at all clear on this record that exclusive assignment of a paraprofessional was the best educational approach for Student. Thus, the evidence about Student's better attention with TSS support is not preponderant to show that exclusive paraprofessional support was necessary to provide Student with the opportunity for reasonable or meaningful progress.

#### LACK OF PROGRESS

The District's services are not undercut on this record by the fact that Student did not make satisfactory progress in fourth and fifth grades. As noted above, the FAPE obligation is a prospective one; a District is required only to provide a placement and program that is reasonably calculated to provide meaningful and appropriate progress. The review by a hearing officer or by the courts is not a retrospective assessment. In this case, I conclude that the District provided appropriate services based upon the evaluations and assessments that it received before and during the relevant period, considering that it was making every effort to maximize Student's time in general education. It considered the Parents' concerns and input, and the private evaluations that they provided. It convened an extraordinary number of meetings and revised Student's IEP to meet needs as they became apparent. Any deviations from appropriate implementation of the IEP were not substantial enough to prove a denial of FAPE. 34 C.F.R. §300.513(a).

#### CURRENT OFFER OF SERVICES

Given my findings above, I conclude that the District's current offer of services is appropriate. The proposed December 2017 IEP increased the amount of direct instruction or small group instruction for all academic subjects, including reading, writing and mathematics.

It provided for inclusive education in academic content areas like science and social studies, and in specials and non-academic parts of the day. It continued the speech and language interventions that had yielded progress, and increased the amount of occupational therapy. It added a modification in the form of a peer socialization coach. It continued to offer ESY services. I conclude that this was an appropriate offer.

#### LEAST RESTRICTIVE ENVIRONMENT

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). But the 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).

The Court also recognized a "presumption" in favor of placing the child in the neighborhood school or the school closest to the child's home. Oberti, 995 F.2d above at 1224 n. 31. The IDEA regulations provide that placement must be "as close as possible to the child's home . . ." 34 C.F.R. §300.116(b)(3). Unless otherwise required by the child's Individualized Educational Program (IEP), the child must be educated "in the school that he or she would attend if nondisabled . . ." 34 C.F.R. §300.116(c). Thus, although there is not an absolute right to services in the neighborhood school, it is presumptively required in the absence of an appropriate reason for excluding the child from the neighborhood school.

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 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.

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 this case the hearing officer) must determine whether or not the child can be educated satisfactorily<sup>11</sup> in the regular education setting with supplementary aids and services. Second, the court 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.

I understand the first level of the Oberti analysis to concern the option of “full inclusion” for Student. Can Student be educated in the regular education classroom full time (or “for the major portion” of the child’s program, Oberti, 995 F.2d above at 1215) with supplementary aids and services? If so, the District is compelled by law to provide the aids and services that are needed to educate Student in the least restrictive environment. Only if the District cannot provide an appropriate public education “satisfactorily” in the regular education setting will I conclude that the District is authorized to place Student in a more restrictive setting. Oberti, 995 F.2d above at 1215-1216.

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

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<sup>11</sup> The Court has interpreted the word “satisfactorily” to mean that level of inclusiveness that enables the child to receive a FAPE. L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006)

“satisfactorily”: First, has the agency taken sufficient steps<sup>12</sup> to conclude that it has 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.

Applying the Oberti analysis to the present record, I conclude that the District has given serious consideration to the full range of supplementary aids and services available to enable children to learn in the least restrictive environment. I conclude that, for Student, the benefits of the District’s proposed reduced level of general education for sixth grade (approximately 36% of the day) outweigh the benefits of inclusion in the general education setting for the major part of the Student’s program, which for fourth grade consisted of approximately 90% of Student’s time in school. I conclude that Student’s presence in the general education classroom does not cause an unacceptable degree of disruption or impede the learning of others. I conclude that the IDEA does not restrict the District from providing instruction for the major portion of Students program (approximately 64% of the school day) in a more restrictive setting for sixth grade.

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<sup>12</sup> The extent to which an agency has attempted to provide education in the least restrictive environment is thus a key indicator of whether or not the agency has “seriously considered” providing full inclusion. L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006).



## SERIOUS CONSIDERATION

I first inquire as to whether or not the District gave “serious consideration” to whether Student can be provided with a FAPE “satisfactorily” while placed in the general education classroom with supplementary aids and services. Oberti, 995 F.2d above at 1216. 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).

The Parents have failed to show by a preponderance of the evidence that the District gave only a perfunctory nod toward the option of full inclusion. On the contrary, for a period of three school years, the District placed Student in regular education for the major portion of Student’s program. During those three years, the District provided an array of aids and services, including modifying Student’s curriculum in English Language Arts for both reading and writing, as well as modifying the mathematics curriculum for Student. The District modified the method of delivering instruction through teacher differentiation of directions, teacher modification of classroom work, and implementation of numerous specially designed supports, including sensory and movement breaks; multimodal instruction; wait time for response in the classroom for Student; pre-teaching and review; built-in opportunities for peer conversation about texts being read; peer support with instructions; specially designed forms and graph paper; access to an iPad; and numerous communications with Parents to monitor and improve the programming being provided.

The District provided services through additional staff, including paraprofessional support; separate, small group instruction within the general education classroom by a special

education teacher; and limited pull out speech and language instruction twice per week. It also provided occupational therapy support for handwriting and, as evaluations recommended, sensory processing. This included movement breaks; scheduled morning exercise programming to provide proprioceptive and vestibular input; and the use of various devices to provide input for purposes of calming Student and enhancing Student's attention to task and focus.

The District called in the intermediate unit's autism consultation team, to review the services that it was providing and offer suggestions for improvement. Thus, although not all of the District's staff were afforded extensive training on inclusive practices, I conclude by a preponderance of the evidence that the District did support their efforts and provided outside support in an effort to educate Student in the least restrictive environment.

Parents argue that, while the District included Student in regular education during those three years, it failed to provide staff with appropriate training. Because District staff were not adequately trained, they argue, the District's attempts at providing inclusion necessarily failed because staff did not know how to provide proper inclusive instruction. Without employing or knowing about appropriate inclusive practices, they argue, the District's extensive attempts to provide instruction in the general education classroom cannot be considered to be "serious consideration" of inclusive education.

I conclude that Parents have failed to prove by a preponderance that a lack of up to date staff training negated the District's serious consideration of the full time general education option for Student. There was some concerning evidence that District staff were not well versed at all levels in the state of the art regarding inclusive practices. Several testifying staff indicated a paucity of up-to-date training in this realm of education. There was some anecdotal evidence

that small group sessions in the general education classroom may not have been properly “essentialized” at all times to grade-level content being taught simultaneously to the typically developing peers. Parents suggest that this evidence should be extrapolated to the entire program of supplementary aids and services provided to Student, such that Student’s unsatisfactory performance and growth can be attributed substantially to inappropriate inclusive practices.

The evidence does not justify such a broad negative inference about the District’s efforts. The evidence shows that the IEP team planned Student’s IEPs with an unusual amount of input, including much from Parents and their advocate, consultants and private evaluators. Contrary to Parents’ assertion that the District simply refused to listen, the evidence is preponderant that the District not only listened to Parents’ numerous suggestions, but also made reasonable attempts to implement many of those suggestions. At hearing, Parents did not provide preponderant evidence that any lack of staff training in state of the art inclusive practices caused all or even many District efforts to be inappropriate inclusive practices.

Parents also failed to prove by a preponderance of the evidence that supposedly better inclusive practices would have overcome the existing barriers to full inclusion. When Student was in fourth grade, the District and Parent participated in a brainstorming/problem solving process facilitated by the Pennsylvania Department of Education, called the “SAS Toolkit”. Although the parties differ as to whether or not the District was willing to complete the process by brainstorming solutions to overcome the barriers<sup>13</sup>, the process did reveal 17 problems that Student was experiencing in the general education classroom. The predominant difficulty –

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<sup>13</sup> It appears not to have been completed, but the District offered to complete it, and may have considered it completed. (NT 109, 163; P 102; S 41 pp. 102-103.) Considering the whole record of the District’s efforts, the level of District participation in the SAS Toolkit process does not prove preponderantly that the District failed to consider supplemental aids and services as a way of educating Student in the general education classroom.

one that is supported by more than a preponderance of the evidence in this matter – is that the general education environment distracts Student very frequently and disturbs Student’s already difficult efforts to maintain focus. This includes group projects, which can be distracting. It also includes small group instruction that Student needs in academic fundamentals; Student also finds distracting the differences in curricular material and in mode of presentation. Parents have not shown by a preponderance that there are more appropriate inclusive practices that would have overcome these barriers that are inherent in the method of delivery of needed instruction to Student.

The record as a whole demonstrates preponderantly that the District implemented a full range of supplementary aids and services. It modified the fourth and fifth grade curricula to address Student’s continuing needs to learn basic skills in reading, writing and mathematics. It taught Student grade level concepts in science, social studies, art, music and physical education. It provided substantial direct instruction in articulation, receptive and expressive language, and social pragmatic language. It addressed Student’s fine motor and sensory needs. It taught social skills. The District not only considered using these aids and services; it also did use them, implementing them in the general education classroom in Student’s fourth and fifth grade years.

Parents argue that speech and language professional standards and educational literature hold that speech and language interventions are more effective when provided in the general education setting. This does not prove that Student’s speech and language services would have been more effective in that setting. As Student’s speech therapist explained, the general standards of the speech and language association must be considered, but are not meant to preclude professional judgment as to the appropriate setting for services in an individual

case. Here, the therapist made a reasonable decision based upon her extensive knowledge of Student that the Student needed services in a separate setting during the relevant time. Although Parents suggest that this judgment was due to administrative convenience, they do not point to preponderant evidence to contradict the therapist's testimony that her judgment was based upon Student's individual needs at the time.

I conclude that providing these services over several years, monitoring Student's progress in the inclusive setting, and adding or adjusting services to enhance Student's access to the curriculum constituted "serious consideration" of instruction in the general education classroom with supplementary aids and services. Any deficiencies in the delivery of these services did not undercut the basic conclusion of the District that the full array of supplementary aids and services would not be likely to enable the District to continue to educate Student in general education "satisfactorily" in sixth grade.

#### RELATIVE BENEFITS OF PLACEMENT OPTIONS

The second Oberti consideration requires that I weigh the relative benefits of the available placement options. In this case, the parties are divided between two placements: the District's proposed separate special education for the majority of Student's day (about 64%) in sixth grade, and placement in regular education for the majority (about 90 %) of Student's day in the neighborhood school, as it was in the third and fourth grades. I conclude that the balance favors the District's offered placement.

The record shows that Student has significant needs for basic academic, language and social skills that the District has been unable to address satisfactorily in the general education setting. The evidence is preponderant that Student has not yet mastered foundational reading

skills in reading comprehension and vocabulary. Student needs to learn to write complete and correct sentences and paragraphs. Student needs to learn double-digit subtraction with [borrowing] (the evidence shows that [borrowing] is a concept that is essential to higher level mathematics), as well as to know how to read a graph and to understand the concept of fractions.

Student needs to learn functional academics, so that Student can read signs and labels, make purchases of food, and access community resources as Student grows older. A recent evaluation found that Student still lacks all the knowledge Student needs to navigate the community safely, maintain Student's health, and deal with illnesses and injuries independently.

The principal benefit of increasing Student's time in the separate special education setting would be to enable the District to teach both needed foundational academic skills and some basic functional academic and adaptive skills more effectively and hopefully increase Student's rate of acquisition of these skills. The District has proved on this record that such a changed placement would be reasonably calculated to do so in Student's sixth grade year.

The District has shown preponderantly that the separate special education setting, with its smaller class size and significant reduction in distractions, would be more likely than the third and fourth grade placements or the current fifth grade placement to permit more pre-teaching; more frequent, faster and more consistent redirection of Student's attention; remediation of gaps in Student's knowledge; more frequent and longer periods of wait time to enable Student to pre-read text, and practice for oral reading; greater opportunity to write at Student's own pace with scaffolding and chunking of classroom work and longer term assignments; more opportunity to practice receptive and expressive language skills with more

repetition; and more intensive development of social skills for later generalization in the regular education classroom and the community.

The record supports the District's calculation. Prior to fourth grade, Student received a combination of pull-out small group instruction and made progress. When Student was provided special education in the general education classroom in fourth grade, Student's progress slowed substantially. In fifth grade, Student was provided more time in separate classes for more direct instruction in reading comprehension, writing and mathematics. Progress monitoring showed progress in basic skills in reading comprehension in writing, but none in mathematics. Still, Student's history of varying levels of inclusive instruction supports the appropriateness of the District's offer of more time in the special education classroom for sixth grade.

The principal benefit of placing Student in the general education classroom would be to provide Student with the opportunity to learn appropriate social communication and pragmatic skills. The general education setting would provide Student with opportunities to interact with typically developing same-age peers in a normal setting. The record is preponderant that Student can benefit from such opportunities. Student showed a propensity to emulate typically developing peers in following classroom routines. Student was the recipient of assistance and attention from those peers, and Student had the opportunity to learn to socialize with them.

Nevertheless, recent reports show preponderantly that Student has not developed social language skills sufficient to initiate conversation or play with peers, and Student's overall listening comprehension casts doubt upon Student's ability to benefit as much as one would hope from listening to typically developing peers. Student's expressive language skills also

impede Student's ability to benefit from discussion with typically developing same age peers. Therefore, the evidence is preponderant that the benefit of interacting with peers and peer modeling is limited for Student at this time.

Another benefit of full inclusion would be to enable Student to increase Student's general fund of knowledge at a level consistent with that of Student's same age peers, and to be exposed to a greater portion of the sixth grade curriculum. The record shows that exposure to the sixth grade curriculum and typically developing peers' wider funds of knowledge might benefit Student's reading comprehension. It might also benefit Student's motivation to learn and overall learning in science and social studies. The record shows that Student is able to benefit from this, as Student has demonstrated areas of knowledge at a higher level than would be expected in a child at Student's second-grade and lower level of instruction for speech, language, reading comprehension, mathematics calculation and problem solving, and writing.

Yet Student has become highly prompt-dependent upon adults in the general education setting, often seeking one-to-one TSS workers' permission or approval before trying to answer questions or fill out worksheets, even when the teacher is differentiating instruction specifically for Student. Thus, while the record supports some benefit to Student from instruction in the general education setting, it shows preponderantly that such benefit is likely to be attenuated at this time.

On this record, the balance of benefits clearly favors increased time in the special education classroom, as the District has concluded. Parents have failed to prove preponderantly that the general education classroom would provide greater or more appropriate benefits to Student.



## IMPEDING THE LEARNING OF OTHERS

The third area of concern set forth in Oberti is the effect upon the learning of others in the general education setting. Teachers indicated that Student's more recent disruptive and attention seeking behaviors have become distracting to peers. Yet I do not find support for substantial negative impact on peers on the record as a whole. Parents have demonstrated by a preponderance of the evidence that this factor does not support the District's proposed increase in separate instruction.

## CONCLUSION– INCREASED TIME IN SEPARATE EDUCATION

In sum, I conclude that the Parents have failed to show by a preponderance of the evidence that the District is obligated to offer placement in full time or substantially full time general education. On the contrary, I conclude that the District's offer for sixth grade would place Student in the least restrictive environment.

Parents objected to the offer of ESY services in a separate program, for the same reasons as discussed above. For the same reasons, also, I conclude that the offer for this summer and previous summers was appropriate.

## PROVISION OF FAPE IN GENERAL EDUCATION TO THE EXTENT FEASIBLE

Turning to the second Oberti test, I conclude by a preponderance of the evidence that the District has provided Student with a general education setting "to the extent feasible", Oberti, 995 F.2d above at 1215. The proposed placement would be a continuation of the Student's fourth grade supplementary learning support placement (10% in separate setting), with a change in that approximately 64% of the day would be spent in a separate special

education setting. Student would be included in the general education setting for thirty minutes per day of shared reading and thirty minutes per day of instruction in “content” courses. Student would attend all specials, lunch, recess, and school-wide activities with typically developing peers. On this record, I conclude that the District has offered to provide Student with a general education setting to the extent feasible, consistent with its obligations under the IDEA.

#### LEAST RESTRICTIVE ENVIRONMENT - THIRD, FOURTH AND FIFTH GRADE

While the above discussion relates to the proposed change in placement for sixth grade, pursuant to Parents’ request for an order forbidding the change, it applies equally – and even more strongly – to a retrospective analysis of the District’s provision of Student’s placements during the second half of third grade, all of fourth grade, and all of fifth grade. I apply the same analysis to placements that in third and fourth grade were much more inclusive. As I conclude that the offered placement for sixth grade is compliant with the District’s LRE obligations on this record, I reach the same conclusion for the less restrictive placements of prior years. Indeed, a principal fact underlying the above prospective analysis is that the District not only contemplated but also implemented lower levels of restrictiveness, concluding at the end of fourth grade and during the beginning of fifth grade that more separate education would be needed going forward.

As to fifth grade, the record indicates that the District provided substantially more time of instruction in separate special education classroom during fifth grade. Yet this change did not exceed the level of restrictiveness set forth in the offer for sixth grade, so the analysis for sixth grade restrictiveness applies equally to the fifth grade placement. Therefore, I find the

fifth grade placement to be compliant with the District's least restrictive environment obligations under the IDEA.

#### IMPEDING OF PARENTS' PARTICIPATION IN EDUCATIONAL DECISION MAKING

As the record shows, Parents' participation in the planning of Student's education was robust and detailed. The District convened many meetings with Parents and considered numerous suggestions of Parent to improve Student's education. It also reviewed and responded to a large number of private evaluations and assessments. That the District did not always agree with or implement these suggestions does not prove that they failed to provide Parents with the opportunity to participate that is Parents' right. I conclude that the District did not deny FAPE to Student by impeding significantly Parents' participation in the decision-making process regarding the provision of FAPE.

#### SECTION 504 AND ADA

Parents assert violations of section 504 I conclude that the District's compliance with the IDEA also constitutes compliance with section 504 in this matter. 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 provided Student with appropriate services and accommodations to meet Student's individual needs. I conclude that the District's services

were 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, the District's compliance with the IDEA is preponderant evidence that the District complied with section 504. Cf. 34 C.F.R. §104.33(b)(2).

Section 504 requires that school districts provide their services in the least restrictive environment. However, the test under section 504 is identical to that under the IDEA. 34 C.F.R. §104.34(a). Therefore, the District's compliance with the IDEA's least restrictive environment requirement constitutes compliance with section 504's identical requirement.

#### CONCLUSION

I conclude that the District did not fail to comply with the IDEA and section 504 in providing a FAPE to Student, that it complied with those statutes' requirement to provide services in the least restrictive environment, and that it did not significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Accordingly, Parents' claims are dismissed and their requests for relief are denied.

#### ORDER

In accordance with the following findings of fact and conclusions of law, the requests for relief are hereby **DENIED** and **DISMISSED**.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

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

June 19, 2018