

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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

Final Decision and Order
ODR File No. 2335-1112KE

OPEN HEARING

Child's Name: A.M.¹
Date of Birth: [redacted]

Hearing Dates: 11/21/2011, 01/30/2012

Parties to the Hearing

Representative

Parent

Pro Se

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Record Closed: January 20, 2012

Date of Decision: January 31, 2012

Hearing Officer: Brian Jason Ford

¹ Other than this cover page, the child and parent's names are not used to protect their privacy. "Parent" and "Student" is used instead. Other identifying information, such as the Student's gender, is omitted to the extent possible. Citation to the notes of testimony (transcript) are to "N.T.". Citations to exhibits are "P-#" for Parents' exhibits; "S-#" for School District's exhibits.

Introduction

This due process hearing was requested by the Parent who, with the assistance of the Student's Grandparent, participated *pro se*. The Hearing Officer found it equitable to allow the Grandparent to speak on behalf of the Parent and Student, and permitted this over the District's objection.

The Student, who carries a diagnosis of attention deficit disorder (ADD), graduated from the District at the end of the 2009-10 school year. In the Complaint, the Parent alleges violations of the Individuals with Disabilities Education Act, as amended 2004, 20 U.S.C. § 1400 *et seq.* (IDEA). Specifically, the Parent claims that the Student's Individualized Education Programs (IEPs) that were in effect during the 2009-10 school year were inappropriate to address the Student's ADD because they were not measurable and not implemented with fidelity. The Parent argues that these deficiencies constitute a denial of a free appropriate public education (FAPE).

By way of remedy, the Parent demands payment from the District for a program that ostensibly helps young adults manage ADD.

Issues

The issues presented in this hearing are:

1. Were the Student's IEPs measurable during the 2009-10 school year?²
2. Were the Student's IEPs properly implemented during the 2009-10 school year?

Weight and Credibility Determinations

Hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. See *L.E. v. Ramsey*, 435 F.3d at 389 n. 4 (3d Cir.2006); see also *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). Except as explicitly noted, all witnesses testified credibly. However, not all testimony has been given equal weight. While the Hearing Officer believes that all witnesses testified truthfully – or at least conveyed the truth as they perceive it – some witnesses were not involved in the Student's education. That testimony is discounted as described below.

² The Complaint itself says nothing about measurability. Rather, the Complaint makes broad accusations that the IEP did not meet the Student's needs vis-a-vis the Student's ADD and that the IEP was not implemented. During the hearing, the Parent specified that the IEPs in question did not appropriately address the Student's ADD because they were not measurable. See NT at 16, 21-22, 45-47. Some of the Grandmother's remarks made after the issues were defined on the record, in conjunction with the Parent's closing statement, may indicate that the Parent understood the issue to be broader than what is relayed here. In an abundance of caution, the Hearing Officer has made findings of fact supported by evidence and testimony, even if those facts go somewhat beyond what is needed to resolve the narrow issues presented here. More importantly, for reasons explained below, the outcome of this hearing would be the same even if a broad attack against the Student's IEP was an issue in this hearing.

The Parent's case was presented as a narrative by the Student, Parent and Grandparent. Many of their factual averments were general in nature. See, e.g. N.T. at 63 (general comments about meetings that occurred over a span of years). This generalized testimony is valuable for background and context, but cannot serve as the basis for the Hearing Officer to find any particular violation during the period of time in question.

The Assistant Principal of the Student's high school, who served as the District's LEA representative to the Student's IEP team, also testified largely in generalizations and had difficulty recalling the particulars of his involvement with the Student's education. Some of the Assistant Principal's testimony regarding how IEPs are implemented in the Student's high school was helpful for background and context.

Testimony from the Student's high school Principal is given little weight in this decision. The Principal was involved in the Student's education only tangentially, was not a member of the Student's IEP team, and has little expertise regarding special education. See NT at 175. That having been said, the Principal's testimony about the operation of the Student's high school was helpful to a degree.

No weight is given to the testimony from the District's Director of Special Education for the High School Division. The Director had no knowledge of or involvement with the Student until the family requested a due process hearing. See NT at 272. The Director reviewed the Student's records in the shadow of litigation and then testified as to her understating of those documents. This testimony can be reduced to a restatement of the District's position that the Student's IEPs were appropriate. The Director's testimony was not used to make findings of fact, but evidence that was admitted while the Director was on the stand was considered.

Testimony from the Special Education Liaison (SEL), who also served as the Student's resource room teacher, shows that the SEL – now retired – fundamentally misunderstood certain IDEA requirements. Some of these misunderstandings are discussed below. At the same time, the SEL testified truthfully and to the best of her abilities regarding what services were actually provided to the Student.

Findings of Fact

The testimony and evidence establishes the following facts:

3. During the 2009-10 school year, the Student was educated pursuant to two IEPs. The first IEP, S-10, was in effect during the prior school year through November of 2009. The second IEP, S-3, was in effect from November 17, 2009 through the Student's graduation in 2010.
4. The starting IEP, S-10, provided an itinerant level of special education support for the Student. S-10 at 27, NT at 79-80. That level of support was continued in the Student's second IEP for that year. S-3 at 6, NT 80-81.

5. The Student and Parent approved the first IEP during the 2008-09 school year. S-10 at 27. The second 2009-10 IEP was also approved by the Parent via a Notice of Recommended Education Placement (NOREP). S-3 at 39.
6. The second 2009-10 IEP included a Positive Behavior Support Plan (BSP), which is discussed at length below. S-3 at 32, NT at 70.
7. Both of the IEPs in effect during the 2009-10 school year listed the Student's primary eligibility category as a specific learning disability (SLD) in Math. The second IEP for that year indicates that the Student has met all Math graduation requirements.³ S-3 at 11.
8. During the same period of time, the Parent and Grandparent complained to the District that the Student's primary eligibility category should be related to the Student's ADD.⁴ See NT at 107.
9. The parties stipulate that both IEPs called for the Student to attend a resource room, and that the Student actually did attend the resource room. NT at 127.
10. The Student's resource room teacher was also the District's Special Education Liaison (SEL) for the Student's high school. NT at 175. In this capacity, the SEL worked like a case manager and was responsible for coordinating the implementation of the Student's IEPs in addition to providing direct instruction in the resource room. See NT at 176-177, 211-214.⁵ The SEL did, in fact, coordinate with all of the Student's teachers to implement the Student's IEP. See NT at 215-217.
11. The Student testified, highly credibly on both direct and cross examination, about the supports and services that were provided during the 2009-10 school year, and about attending the resource room:
 - a. The student to teacher ratio in the resource room was usually two or three to one. NT at 133
 - b. The Student could get the teacher's attention in the resource room. NT at 133.
 - c. The teacher would "sometimes" check the Student's assignment book in the resource room. NT at 134.
 - d. The Student could "sometimes" make up missing assignments in the resource room. NT at 134.
 - e. The Student would take time in the resource room to plan larger projects, sometimes with the teacher's help and sometimes without help. NT at 135.
 - f. In addition to the resource room, the Student understood that all of Student's teachers were available for subject-specific help – but subject teachers would often refer the Student to the SEL when help was needed. NT at 135-137.

³ Some testimony was presented by the District through cross examination of the Grandparent regarding the appropriateness of the Math goals in the Student's IEPs. See, e.g. NT at 115. The Parent, however, does not challenge the IEP in a broad sense. Rather, the Parent alleges that the IEP did not provide appropriate services to address the Student's ADD. Since the Parent raised no concerns regarding the provision of special education for the Student's Math disability (neither in the complaint nor during the confirmation of issues at the opening of the hearing), the way in which the IEP addressed the Student's Math disability is not relevant.

⁴ Testimony is not consistent regarding whether the Student has a diagnosis of ADD or ADHD. The distinction is ultimately not relevant. The Hearing Officer has attempted to track whichever term is used in whatever section of the transcript corresponds with these findings of fact.

⁵ This role should not be confused with the part played by the Student's assistant principal, who served as the District's LEA representative to the IEP team. See NT at 213-214.

- g. The subject teachers coordinated with the SEL so that the SEL would know what areas the Student was having difficulty with. NT at 137. The resource room teacher would then focus the Student on those areas. *Id.*
 - h. The Student had no difficulty completing projects in Art class, which was a subject that the Student greatly enjoyed. NT at 138.
12. The Student was hospitalized for medical reasons for about a week in May of the 2009-10 school year. As a result, the Student was permitted to take finals late, but was able to complete a senior project on time with help at home from the Parent and Grandparent. NT at 143-145.
 13. The Student received a functional behavioral assessment and behavior support plan (FBA/BSP) in November of 2008. S-11. This was around the same time that the IEP implemented during the first part of the 2009-10 school year was drafted.
 14. Additional findings of fact concerning the FBA/BSP and both of the IEPs in question (S-3 and S-10) are set forth in the "Discussion" section, *infra*. This somewhat unusual drafting style was used in this decision to avoid a very large quantity of repetition.
 15. The second IEP (S-3) called for the Student to receive color-coded folders to help with organization. S-3 at 30. The folders were supplied by the Grandparent, not the District. NT at 72. There is some conflicting testimony about whether the folders were used. The Hearing Officer finds the Student's testimony, that the folders were used "most of the time" but with little guidance or help from the District, to be the most credible. NT at 132-133.
 16. Throughout the Student's high school career, the Parent and Grandparent were frustrated by interactions with the SEL. Over time, when problems arose, the Parent and Grandparent found it more effective to communicate directly with the Student's subject-specific teachers than through the SEL. See NT at 73-75, 125, 151-153, 159-163.
 17. At several times during the Student's high school career, the Parent received letters indicating that the Student was in danger of failing classes. NT at 75-76.
 18. In May of 2010, the Parent was informed that the Student was in danger of not graduating. NT at 77.
 19. Throughout high school, the Student's grades would often fluctuate over the course of the school year, sometimes dropping to near-failing levels in particular quarters. S-6, P-1. Despite peaks and valleys, the Student consistently finished each class with a passing grade. The Student's final grades during the 2009-10 school year, reported at S-6, were as follows:
 - a. English 4 Honors: C
 - b. Social Science: C
 - c. Sculpture Media: C
 - d. Physical Education 1: B
 - e. American History Honors: C
 - f. Environmental Science: C
 - g. Graphic Design 3: B
 - h. Spanish 2: C

20. These final grades during the Student's senior year were in line with grades in the prior three years, during which time the Student earned Bs, Cs and one D.⁶
21. Whenever the Parent learned that the Student was performing poorly, missing homework assignments or in danger of failing or not graduating, the Parent and Grandparent worked with the Student to reverse the Student's academic trajectory. See, e.g., NT at 94, 124. The Grandparent credibly characterized the family's effort to help the Student as "Herculean." NT at 94.
22. After graduating from high school, the Student enrolled in a four-year college. NT at 102. Ultimately, the Student left college.⁷
23. Both the Student and the Parent testified that the Student was provided answers to tests, implying that the Student's grades are not an accurate representation of the Student's knowledge. NT at 130, 163. This testimony was contradicted by the Student's high school principal, but that testimony was based on the Principal's assumption that he would know of any such incidents. See NT at 182. The SEL was not questioned about this alleged practice.
24. The District requires students to earn 23.5 credits to graduate. The average student attending the particular high school that the Student went to earn 31 credits over the course of their high school career.⁸ The Student graduated with 31.5 credits. S-5, NT at 183-184.
25. The SEL understood that the Parent and Grandparent wanted the Student to have greater support to address organization skills in regular education classes. The SEL was unable to provide the level of support that the Parent and Grandparent requested because the SEL could not accompany the Student to each class.
26. According to the SEL, one-to-one support is "not something the school district offers" but is "handle[d] through parents' health insurance." NT at 223-225.⁹
27. The SEL never saw a need to evaluate the Student throughout high school. NT at 225-226. The SEL understood that evaluations were required only "when there was a desire for a change of program or placement." NT at 225-226.¹⁰
28. Regarding the appropriateness of the Student's IEPs, the SEL testified that given "the limited services that are offered at [the Student's high school], we gave the maximum amount available." NT at 228.¹¹
29. The SEL further testified that, to her understanding, an appropriate IEP would enable the Student to function in a regular education classroom. NT at 230.
30. Regarding the Student, the SEL acknowledged that the Student had the "will to do what was expected... [but] just had the difficulty keeping track of what that would be

⁶ The Student received a D in World History during the 2006-07 (freshman) year. During that year, the Student also earned five Bs and three Cs.

⁷ The Student's college experience, and the relationship between that experience and this hearing, are discussed below.

⁸ The Student attended a special mission school or magnet school, that focuses on a particular content area within the broader context of a college preparatory program. See NT at 173-174.

⁹ This contradicts very basic IDEA principles in that the services that a student receives are determined by the Student's IEP team and in response to the student's evaluated needs. See 20 U.S.C. § 1414. Any person charged with the duties of a Special Education Liaison know this.

¹⁰ This statement is simply wrong. Evaluations must occur at least once every three years, and more frequently if circumstances warrant. See 20 U.S.C. § 1414. Any person charged with the duties of a Special Education Liaison know this.

¹¹ See footnote 9.

on a given day.” NT at 233. The Student “was oftentimes overwhelmed by the amount of work ... [assigned].” *Id.* Although the Student was a good reader, the amount of work was “stressful,” and “in terms of the organizational skills of getting down to the nitty gritty of getting things done, getting things accomplished, [the Student] was very slow and very lethargic and oftentimes overwhelmed.” *Id.*

31. At the same time, the SEL explained that her work with the Student specifically targeted organizational skills and homework completion. See NT at 234. The SEL also implemented testing accommodations and had other teachers implement a verity of sound teaching practices for students with ADHD. See NT at 234-235
32. When the Student performed poorly or received a failing grade, the SEL worked with the Student in the resource room to re-do the work. The SEL explained that the purpose of this accommodation was both to help the Student manage the ADHD and to bring the Student’s work to a passing level. See NT at 246-247. See *also* P-1, S-6 , NT at 279-301 (reporting mid-semester performance in 11th grade on a per-assignment basis with marks lower than the Student’s ultimate grade in the same classes).
33. The SEL was supervised by the Assistant Principal of the Student’s high school, who also served as the District’s LEA representative to the Student’s IEP team. See NT at 324. The Assistant Principal discussed the Student with the SEL and participated in meetings with the Parent and Grandparent to discuss their concerns.
34. According to the Assistant Principal, some accommodations, such as retesting, were accomplished through negotiation with teachers. NT at 330.
35. As a general matter, teachers are not provided a complete copy of any student’s IEP but rather are given a summary titled “IEP at a glance.” NT at 330, 333. The IEP at a glance is part of the IEP itself, and teachers have access to the entire IEP, should they care to review it. NT at 333.
36. Accommodations such as redoing assignments and retesting were provided to the Student, even though those accommodations were not listed in the Student’s IEP.
37. Regarding the demanded remedy, the Student has not been evaluated to determine if the program in question is appropriate. Rather, the Grandmother has made calls to obtain information about the program and believes it will help the Student. NT at 122, 168. No substantive information was provided about that program, and the Hearing Officer cannot determine if the program is educational or medical in nature.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). In this particular case, the Parent bears the burden of persuasion because the Parent requested the

hearing and is seeking relief. Parent must meet that burden by a preponderance of the evidence. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). Under this standard, the Parent must prove entitlement to the demanded relief preponderant evidence and cannot prevail if the evidence rests in equipoise.

The Right to a Free Appropriate Public Education

In the Third Circuit, IDEA-qualifying students receive FAPE through the implementation of IEPs that are reasonably calculated to confer a meaningful (more than trivial or *de minimis*) educational benefit. See *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). What is meaningful for one student might not be meaningful for another, and so the appropriateness of any IEP is a fact-specific inquiry.

Students are denied FAPE either when their IEPs are not reasonably calculated to confer FAPE at the time they are drafted or when a well-drafted IEP is not implemented in significant part.

Substantive and Procedural Violations

“In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies... impede the child’s right to a free appropriate public education; significantly impede the parents’ opportunity to participate in the decisionmaking process...; or ... caused a deprivation of educational benefits.” 20 U.S.C. § 1415(f)(3)(E)(ii). In other words, violations of the IDEA that do not result in substantive harm neither constitute a denial of FAPE nor warrant an award of compensatory education.

When violations are substantive (either because they are substantive in nature or because they are procedural violations that yield substantive harm) a remedy may be awarded. See e.g. *P.P. v. West Chester Area School Dist.*, 585 F.3d 727 (3d Cir. 2009); *M.C. v. Central Regional School Dist.*, 81 F.3d 389 (3d Cir. 1996).

Discussion

I. The Relevance of the Student’s College Experience

After the Student’s graduation, the Grandmother began taking classes about educating children with learning disabilities. The Grandmother’s increased knowledge and the Student’s experience in college are clearly two major factors that prompted the family to

request a due process hearing. The District also highlighted the Student's matriculation to argue that it met its obligations to the Student.

Testimony about the Student's college experience, though troubling (see NT at 154-158) is ultimately not relevant to the issues presented in this hearing. The Hearing Officer has no jurisdiction concerning the services that were or were not provided to the Student by the college, and the Student's ultimate academic success or failure in college does not prove or disprove the appropriateness of the 2009-10 IEPs.

Even to the extent that the Complaint and issue presented could be construed as an attack on the transition planning portions of the 2009-10 IEPs, the Student's actual college performance by itself does not conclusively demonstrate the appropriateness of transition goals at the time they were drafted nor the fidelity with which those goals were implemented. The number of possible intervening factors is too high to calculate and, for a student with disabilities transitioning into college and adulthood, impossible to ignore. Success in college, by itself, is not proof that a student received FAPE and failure in college is not proof that FAPE was denied. This Hearing Officer does not discount the concept that college performance could be an indicator of FAPE in some cases. In this case, no evidence was presented to support causation, and the correlation does not imply causation in and of itself.

II. Difficulty with the SEL

Evidence preponderantly demonstrates that the relationship between the family and the SEL was dysfunctional. Throughout the Student's time in high school, the Parent and Grandparent felt unheard at best and ignored at worst. Fortunately, it appears that communications breakdown did not substantially interfere with the student-teacher relationship between the Student and the SEL. Moreover, establishing the family's frustrations with the District in general, and the SEL in particular, does not resolve the issues presented in this hearing. The Parent does not allege a denial of meaningful parental participation. The Parent alleges a denial of FAPE via an inappropriate IEP that was improperly implemented.

III. Analysis of the Student's IEPs

One of the issues that the Hearing Officer must decide is whether the IEPs were measurable. In this case, deciding that issue requires careful analysis of the IEPs in their entirety; not just the particular sections containing goals.

The 2009-10 school year started with the Student receiving special education under the IEP at S-10. This IEP identifies the Student as having a specific learning disability in Math, and qualifies the Student to receive special education on that basis. There is no reference to the Student having ADD in the Student's "Present Levels of Academic Achievement and Functional Performance," and the IEP indicates that the Student does not have behaviors that impede learning. S-10 at 5-7.

The IEP at S-10 includes three transition goals, one of which was for the Student to pursue enrollment in a community college or four-year college or university. S-10 at 9. Pursuant to that goal, the District was to help the Student review college catalogs, identify desirable outcomes from completing a college program and identify desirable outcomes from completing a post-secondary training program. *Id.* at 9, 14. Although the Parent and Student testified that the Student applied to college and the Parent helped the Student complete the application, the measurability of the transition goals in S-10 were not challenged during the hearing and neither was their appropriateness.

The IEP at S-10 includes a math goal. S-10 at 13. Neither the appropriateness nor measurability of this goal were challenged during the hearing. The appropriateness and measurability of a summer employment goal and an independent living goal (both falling under the umbrella of transition) were also not challenged. S-10 at 15, 16.

The IEP at S-10 has no goals to address the Student's organization needs resulting from the Student's ADD. This is surprising because, at the same time the IEP at S-10 was drafted, the District was also completing a Functional Behavior Assessment (FBA) and a Behavior Support Plan (BSP) for the Student. The FBA and BSP, S-11, are dated November 21, 2008 – two days after the IEP meeting that produced the IEP at S-10. The FBA/BSP at S-11 unambiguously identifies difficulties with organizational skills, including homework completion.

The record as a whole indicates that the SEL worked with the Student in accordance with the BSP at S-11 during the entirety of the 2009-10 school year. Although they are not labeled as such, the BSP includes two mostly measurable goals. First, the Student was to “demonstrate [the] ability to maintain a daily assignment book as well as a subject divided binder.” S-11 at 2. This goal says what the Student is expected to do and how often the Student is expected to do it. The goal also says how and how often the goal should be monitored (essentially examination of the Student's assignment book on a bi-weekly basis). *Id.* Second, the Student was to “keep an accurate assignment book and have it initialed by the teacher(s) and parent daily. Organize paperwork to increase efficiency.” S-11 at 4. Again, with the assignment book, the goal explains what the Student should do and how often the Student should do it. The second part of that goal, however, is not objective or measurable as no criteria for organization are provided.

Neither goal in the BSP includes criteria for mastery, and the BSP does not indicate what the District should do to enable the Student to meet the goals. In an IEP, goals set expectations for a student's performance while specially designed instruction and program modifications explain how a school district will enable the student to achieve the level set by the goal. By implementing the BSP, the District may have mitigated some of the harm caused by not addressing the Student's ADD in the IEP. That mitigation does not, however, rectify deficiencies in the IEP at S-10 because the BSP was not made part of the IEP at S-10.

The IEP at S-10 was implemented from the first day of the 2009-10 school year until November 17, 2009. Then, that IEP was replaced with the IEP at S-3. This IEP acknowledges the Student's ADD diagnosis, and the Parent's concerns about the same, in the present education levels. S-3 at 11. The IEP at S-3 also reports that the Student's behaviors impede learning. S-3 at 10. Even so, the IEP at S-3 continues to predicate eligibility on a specific learning disability in Math, even though the Student had met all Math requirements. The IEP does not indicate that the Student was entitled to services under the Other Health Impairment category as a result of ADD. The IEP does, however, reference the BSP at S-11. See S-3 at 30. More importantly, the BSP was incorporated into the IEP itself. S-3 at 31-35. Through the process of incorporation, progress reporting were added to the BSP goals, along with related services and supports for school personnel. *Id.* These BSP goals are rightfully considered goals of the IEP at S-3. Unfortunately, the incorporated BSP goals do not indicate criteria for mastery.

In addition to the incorporated BSP goals, the IEP at S-3 includes a behavioral goal targeted at organization. S-3 at 18. That goal is predicated on an evaluation by a third party that occurred in 2004; not the BSP at S-11. The 2004 evaluation was not offered as evidence. Regardless, the goal is for the Student to "keep track of future homework assignments and tests ... [with support, on] 4 out of 5 trials at 80%." This means that the goal would be met when the Student was keeping track of 80% of homework and tests on 4 out of 5 probes. The goal includes benchmarks that explain how the student was supposed to track homework and assignments: "[the Student] will get a binder with color coded folders in which to keep important papers and this will be monitored by the resource room teacher and by the parent." Further, the Student would be provided an "opportunity to print out assignments in the resource room along with stationary and necessary supplies as needed." S-3 at 19. These objectives are generally in line with the BSP at S-11.

The IEP at S-3 contains similar transition goals to those founding the IEP at S-10. *C/f* S-10 at 9, 14 with S-3 at 14, 20-22. These were not challenged in either document.

Although the IEP at S-3 reports that the Student is eligible for special education on the basis of a math disability, it contains no math goal.

IV. Measurability

Based on the proceeding analysis, the IEP at S-10 was not measurable in terms of addressing the Student's ADD needs, but the IEP at S-3 was measurable in this regard.

From November of 2008, the District recognized that the Student had organizational needs and had drafted a BSP to address those needs. S-11. The same document recognizes the Student's ADD diagnosis. Although the BSP included objective goals, those goals did not set forth criteria for mastery and were not made part of the Student's IEP at S-10. The IEP at S-10 implemented from the start of the 2009-10 school year through November 16, 2009. As a result, the "goals" to address the Student's ADD were

not actually part of the Student's IEP, and were not measurable because there was no way to tell when they would be accomplished.

From November 17, 2009 through graduation, a new IEP was drafted and implemented for the Student. S-3. This new IEP references and incorporates the BSP and acknowledges the Student's ADD diagnosis. The incorporated BSP provides a more detailed description of the supports that will enable the Student to meet the goals in the BSP, but still does not specify criteria for mastery. However, as well an additional organization goal provided that was both measurable and objective.

V. Implementation of the IEPs

There is virtually no evidence or testimony to support the Parent's contention that the IEPs in question were not implemented. There was testimony about the special education and related services that the Student received. It is obvious that the Parent and Grandparent wanted the Student to receive more services than were provided, and they communicated that desire to the District. The desire for more (or better) services, however, is not evidence of an implementation failure.

Similarly, the record of this hearing clearly demonstrates that both the Parent and Grandparent worked with the Student at home and were involved in the Student's education. This Hearing Officer is convinced that their tireless efforts contributed to the Student's academic success in high school. These efforts, however, are not evidence of an IEP implementation failure.

The same is true for the Student's fluctuating grades. In total, the record of this hearing supports the Parent's contention that the Student's grades fluctuated over the course of any given semester throughout high school, including the 2009-10 school year. Failing discrete assignments or tests does not prove that the District failed to provide services mandated by the IEP. In fact, the record supports the District's assertion that such failures prompted retesting and resource room support that brought the Student's grades to a passing level by the end of each marking period.

Testimony that the SEL fed answers to the Student during retests is concerning. This is especially so because the SEL did not contradict this testimony. The Principal's rebuttal of this testimony was based on assumptions, not first hand knowledge or any sort of investigation. Assuming, for the sake of argument, that answers were fed to the Student does not prove an implementation failure. Clearly, such behavior is abhorrent and nullifies the Student's final grades. But saying that the District *did* something that it was not supposed to do is not the same as saying that the District *did not* do something it was supposed to do. The latter is an implementation failure, the former is not.

There is no preponderant evidence that the IEP called for the Student to receive services that were not provided – with one exception. The IEP did call for the Student to receive color-coded folders to organize important papers. S-3 at 30. The District was responsible for providing those folders. Instead, the folders were purchased by the

Parent. This accommodation is found an objective calling for the both the SEL and Parent to monitor the use of those folders. Requiring a family to purchase the materials necessary to effectuate an objective of the Student's IEP violates the Student's right to FAPE because, at that point, the public education is no longer *free*.

V. Entailment to Remedies Not Established

The Parent has successfully proven that the Student's IEP was not measurable from the start of the 2009-10 school year through November 16, 2009. The Parent has also successfully proven that the district failed to implement part of the IEP that was in place from November 17, 2009 through the Student's graduation. It must be noted that the District failed to implement an objective attached to the very goal that makes the IEP at S-3 measurable. As such, the District cured the measurability defect in the IEP at S-10 by offering the IEP at S-3 and then failed to implement that cure.

Assuming, *arguendo*, that these violations constitute a substantive denial of FAPE, the remedy must somehow relate to the denial. The most common remedy for a denial of FAPE is compensatory education. Generally speaking, the primary purpose of compensatory education is to put the student in the position that the student would be in but for the denial of FAPE. See *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005)). The record of this case does not establish that the intended remedy would comport with that goal. No argument was made that the demanded program would remediate the Student. Even if that argument could reasonably be inferred from the Parent's pleadings and statements during the hearing, no evidence or testimony was presented to advance that theory.

Moreover, the Parent demands a highly specific form of relief: payment for the Student's enrollment in a program designed to help adults with ADHD. Currently, the Student has not been assessed for that program. The record contains no information either about the program's admission criteria or about what services the Student would receive through that program. The Hearing Officer has no information about that program except for what it costs. This lack of evidence is consequential.

To be clear, the Parent did not demand compensatory education. The demanded relief is fairly characterized as post-graduation tuition reimbursement. The District walked to the edge of challenging the Hearing Officer's authority to award such relief, but ultimately did not press that argument. However, even assuming that the Hearing Officer has the authority to issue such relief, it would be improper to do so in the absence of a record establishing facts about the program or how the program would remediate the student. It is the Parents obligation to demonstrate the appropriateness of the program for which reimbursement is demanded. See *Mary Courtney T. v. Sch. Dist. of Phila.*, 575 F.3d 235 (3rd Cir. 2009).

As a result of the foregoing, it is not necessary to determine if the violations described above are substantive or procedural. It does not matter whether those violations

constitute a denial of FAPE, and it does not matter whether the Hearing Officer has authority to award post-graduation tuition reimbursement. Assuming that FAPE was substantively denied and the the Hearing Officer has the authority to award the demanded relief, the Parent still did not establish entitlement to that relief. This is also the reason why the end result of this hearing would be the same even if the broader issue implied by some of the Grandparent's remarks was properly before the Hearing Officer.

An order consistent with the foregoing follows.

ORDER

And now, January 31, 2012, it is hereby **ORDERED** as follows:

1. The Student's first IEP during the 2009-10 school year (S-10) was not measurable as that document relates to the Student's ADD.
2. The District failed to implement a particular component of the Student's second IEP during the 2009-10 school year (S-3).
3. The Parent did not establish entitlement to the relief demanded.
4. Any claims not specifically addressed in this Decision and Order are denied and dismissed

/s/ Brian Jason Ford
HEARING OFFICER