

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

Pennsylvania

## Special Education Hearing Officer

### DECISION

Student's Name: K.A.

Date of Birth: [Redacted]

ODR No. 2694-11-12-KE

### CLOSED HEARING

Parties to the Hearing:

Parents

Hatboro-Horsham School District  
229 Meetinghouse Road  
Horsham, PA 19044

Dates of Hearing:

Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Sharon W. Montanye, Esquire  
Sweet, Stevens, Katz & Williams,LLP  
331 Butler Avenue, P.O. Box 5069  
New Britain, PA 18901

March 27, 2012, April 3, 2012,  
May 3, 2012, May 8, 2012, May 9,  
2012

June 8, 2012

June 22, 2012

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

## INTRODUCTION AND PROCEDURAL HISTORY

The Student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District). (NT 11-13.) The District has identified Student with Other Health Impairment and Specific Learning Disability. (NT 11-13.) Parents assert, (P-39), that the District has failed to provide the Student with a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Parents seek compensatory education for a period beginning in September 2005 until February 2, 2010 (P-39; S-15); Parents also seek tuition reimbursement, both for private school placement from February 3, 2010 to date, (S-15), and for private occupational therapy services, (P-39).

The District raises two defenses: first, that the IDEA statutory limitation of actions (SOL) bars Parent from raising Parent's claims for most of the period claimed; second, that the District offered appropriate services for the period of time not barred by the SOL.

The hearing was concluded in five sessions. The parties submitted written summations, and the record closed upon receipt of those summations. On the record, (NT 830-848), I ruled that the SOL precludes all claims for any action or inaction of the District prior to the date, December 30, 2009,<sup>1</sup> that is two years before the date of filing.

## ISSUES

1. Did the District fail to identify all of Student's educational needs during the time relevant to this matter for compensatory education purposes, December 30, 2009 to February 2, 2010?<sup>2</sup>

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<sup>1</sup> The Complaint Notice in this matter was dated December 30, 2011. (NT 51; P-15.) Regarding any District action or inaction prior to that date, Parents would have been required to file for due process within two years; thus, their claims would have been barred by the SOL prior to the date of filing.

<sup>2</sup> February 2, 2010 was the last day on which Student was enrolled in the District. (FF 44.)

2. Did the District fail to offer or provide a FAPE to Student from December 30, 2009 until the last day of hearings in this matter, May 9, 2012?<sup>3</sup>
3. Should the hearing officer order the District to provide compensatory education for all or part of the time relevant to this matter for compensatory education purposes?
4. Were the two private placements, in which Parents enrolled Student from February 3, 2010 until the present, appropriate?
5. Should the hearing officer order the District to pay private school tuition, transportation, book costs and associated fees for Student from February 3, 2010 to the last day of hearings in this matter, May 9, 2012?
6. Should the hearing officer order the District to reimburse Parents for any fees or costs incurred due to private payment for occupational therapy services?

#### FINDINGS OF FACT

1. Student has been enrolled in the District's schools since kindergarten. Student completed elementary and middle school in the District, and is now in high school. (S-10.)
2. Student was diagnosed with Attention Deficit Disorder (ADD) when Student was in first grade; the District identified Student as a child with a disability in the same year. Due to side effects of medications, Student is not medicated for ADD. (S-10, 19.)
3. The District evaluated Student three times for occupational therapy services. Student's fine motor skills were commensurate with Student's grade level peers. (NT 695; P-20 p. 15, 34.)
4. In middle school, Student began to experience increasing difficulty due to the greater demands of the middle school curriculum, and Student's overall grades and academic achievement in mathematics fell during middle school. (NT 107-128; S-19, P-24 p. 10-12, P-25 p. 6-12, P-26 p. 2, P-28 p. 2.)
5. When Student was in eighth grade, Student began to receive private counseling from a psychologist. Student developed symptoms of depression and anxiety that interfered with Student's functioning in all areas, including academic areas. The private counselor did not report the severity of Student's emotional difficulties to the District. (NT 534-546, 563-571; S-8.)

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<sup>3</sup> Although no date was specified for the period under consideration here, I cannot make any findings or conclusions past the last day of hearings; thus, I specify the last hearing date as the ending date for the period under consideration in this matter with regard to the tuition reimbursement claim.

6. In a February 2009 re-evaluation report (RR), revised in March 2009, the District identified Student with Other Health Impairment due to ADD and with Specific Learning Disability in the areas of mathematics calculation and mathematics reasoning. (S-10.)
7. The revised March 2009 re-evaluation noted Student's needs as including basic mathematics and mathematics reasoning skills; organization to solve multi-step mathematics problems; functional mathematics application; writing focus, style and content; attention and focus; organizational skills; and consistent work completion. The report noted school related behaviors of concern and transition needs, and recommended counseling. (S-10.)
8. The report addressed emotional concerns through the Behavior Assessment Scale for Children – Second Edition (BASC-2), including teacher, Parent and Adolescent rating scales. It addressed adaptive behavior through the Adaptive Behavior Assessment System – Second Edition (ABAS-II). The report also included a functional Behavior Assessment (FBA), interviews with Parent<sup>4</sup>, teachers and the Student, and classroom observations. The report noted a need for further assessment with regard to Student's learning related problems. (S-10.)
9. The report noted that Student felt that Student was "picked on" at times, and that it was difficult for Student to make friends in the high school setting. (S-10.)
10. The report noted fine motor skills commensurate with Student's peers and no need for occupational therapy. (S-10.)
11. Parent declined to sign the revised March 2009 re-evaluation. (S-11 p. 3.)
12. The District offered an IEP in June 2009, after rescheduling the IEP meeting date from March 2009. The IEP placed Student in supplemental learning support, with direct mathematics instruction to be delivered in the learning support classroom, and all other instruction to be delivered in the general education classroom. (S-12.)
13. The June 2009 IEP offered detailed baseline data on writing, based upon classroom based assessments, and a goal with measureable detailed criteria for improvement in writing, to be measured through a graphic organizer at the high school level, which indicated to Student's teachers that state PSSA rubrics would be utilized at the high school level. (NT 897-898, 1023-1027; S-11.)
14. The June 2009 IEP offered measurable goals that addressed metacognition of Student's distractibility, and emotional acceptance of Student's learning differences, as well as self advocacy, to be implemented by the school counselor and a

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<sup>4</sup> "Parent" in the singular refers to Student's Father, whose interactions with the District, and participation in the educational planning process were extensive.

- psychologist counselor providing individualized counseling sessions. (NT 915-917; S-11.)
15. The June 2009 IEP offered two measurable goals that addressed attention and time on task, to be implemented by the school counselor. (S-11.)
  16. The June 2009 IEP offered a measurable goal for organization. (S-11.)
  17. The June 2009 IEP offered a measurable goal for work completion. (S-11.)
  18. The June 2009 IEP did not offer a goal in mathematics. (S-11 p. 16-26, 34.)
  19. The District had a system in place for monitoring Student's progress on goals. Data was taken, compiled and reported to Parent. (NT 1023 to 1046, 1217-1218; P-16 p. 46, P-29.)
  20. The June 2009 IEP offered specially designed instruction (SDI) in writing in the form of highly structured, explicit, systematic instruction, using graphic organizers, with placement in the general education classroom and assistance from learning support staff. (S-11.)
  21. The June 2009 IEP offered specially designed instruction in mathematics, including direct instruction in a modified grade level curriculum in a small group setting in the learning support classroom; the modified curriculum would be explicit and sequential, with emphasis on repetition and practice, as well as application to real life problems. Student would be given use of a calculator and graph paper. (NT 435; S-11.)
  22. The June 2009 IEP offered individualized direct supports to student in the general education classroom, including fading of prompts using a prompt hierarchy, and offered transfer to the learning support classroom within thirty days should Student not be able to succeed in the general education classroom. (S-11.)
  23. The June 2009 IEP offered accommodations and specially designed instruction that addressed Student's needs in attention, organization, understanding directions, memory and note taking. (S-11.)
  24. Specially designed instruction was to be delivered with attention to Student's sensitivity to being singled out through direct teaching of organizational skills. (S-11.)
  25. The June 2009 IEP offered related services including psychological counseling, twice weekly for ½ hour for two quarters, and then once weekly for ½ hour for two quarters. The IEP also offered guidance counseling and parent training, and supports for school personnel in the form of consultation with psychologist and special education staff. (S-11.)

26. The June 2009 IEP found Student eligible for and offered extended school year services. (S-11.)
27. Parent did not sign the NOREP for the placement and services set forth in the June 2009 IEP. (S-11.)
28. In the summer of 2009, Student attended individual tutoring in mathematics, based upon a modified regular education curriculum. This was to complete requirements for passing mathematics in eighth grade. Student passed this course work, and was scheduled for the learning support class in mathematics in September 2009, pursuant to the June 2009 IEP. Parents objected on grounds that Student had passed the tutoring course work in the summer. (NT 142-151; S-14, P-37 p. 30.)
29. In September 2009, the District offered repeatedly to provide specially designed instruction in mathematics to Student, in the form of an explicit, sequential curriculum with remedial capability. Parent declined those offers, opting instead for regular education courses in mathematics, based upon Student's success in the summer course. (NT 129-133; 141-160, 435; P-37 p. 1, 2, P-51, S-11 p. 3.)
30. Pursuant to Parent's objections, Student was then placed in a co-taught regular education mathematics course. Subsequently, Student was transferred to the learning support class for mathematics. (NT 142-151; S-14, P-37 p. 30.)
31. Student attended group counseling sessions in eighth grade, but reported that these sessions did not address Student's concerns, rather, sessions revolved around sexual and substance abuse issues. Parent did not want Student to continue in those sessions. (NT 97-101, 246-248; P-26 p. 5, P-36.)
32. The District made both group and individual counseling available to Student in September 2009; however, Parent objected to the group sessions, and withdrew permission for Student to attend one-to-one counseling, because Parent was providing such counseling privately, and it was considered inappropriate to have two courses of counseling occurring at the same time. (NT 99-105,530-533, 583-584, 916; S-13, P-26, 36.)
33. Parent attended an IEP meeting in September 2009, in which changes were made to the SDI regarding communication with and training of Parent regarding homework and assignment completion, quiet classroom for study and assignment completion, learning support monitoring and intervention in Student's general education programs, counseling, course changes, and grading. (S-13.)
34. At an IEP meeting in October 2009, at Parent's request, a mathematics goal was added, and the content of mathematics instruction was modified to remove reference to real life problems. SDI for organization was amended for more specificity. The extra set of text books was limited to areas on which Student was not completing work. (S-13.)

35. The District provided a variety of assistive technology, including graph paper, calculators, graphic organizers and computer educational software. (NT 329 -334, 897-898, 1023-1027; S-11.)
36. In October 2009, Parents declined a meeting for parent training as offered in the IEP. They accepted training materials by mail. (NT 910-912; P-46.)
37. In October 2009, Parent alerted District personnel that Student was being threatened with physical harm by two other students. The appropriate District personnel investigated, and the perpetrators were disciplined. A second follow-up incident not rising to the level of a threat was reported and investigated; this involved further contact between Student and one of the perpetrators. Student and the perpetrator were counseled to cease all contact. No further incidents were reported. (NT 64-82; S-23, P-24.)
38. In January 2010, it was noted that Student's grades continued to drop, including grades in mathematics. Student was reported to be depressed, victimized by peers, and not demonstrating skills ostensibly learned in summer tutoring. (S-14.)
39. Student exhibited substantial absenteeism from September through December 2009. (S-14 p. 47.)
40. In January 2010, the District offered an IEP with updated present levels of academic achievement and functional performance. These noted that Student was resistive to some specially designed instruction, including accommodations for tests and classroom assessments, use of graph paper for writing, and a one-to-one learning support aide, due to sensitivity to being singled out as different. (S-14.)
41. The January 2010 offered IEP provided a more specific and measurable self-advocacy goal. It added measureable reading comprehension and vocabulary goals, and added a metacognition and self advocacy goal. It added SDI for grading homework assignments. (S-14.)
42. District personnel in January 2010 offered full time learning support to Student, both to address Student's continuing needs for organization and support in all areas, and to address Student's stress and diminished self esteem. District personnel also offered to change Student's mathematics curriculum to a life skills mathematics curriculum. Parent requested placement in a private school setting, but District personnel declined, on grounds that services available through the District's high school program had not been attempted. (S-14.)
43. Parent disapproved the NOREP that was based upon the January IEP. (S-14.)
44. By letter dated January 19, 2009 (actually created January 19, 2010 and delivered thereafter), Parents gave notice that Student would be withdrawn from the District and placed in a private school in ten days. Parents requested tuition reimbursement. Student was withdrawn as of February 3, 2010. (S-15.)

45. On September 2, 2010, Parent met with the District's Director of Special Education, and there was discussion of the District's available programming. Parent declined to re-enroll Student in the District. (S-17, 18.)
46. By letter dated September 3, 2010, Parents requested tuition reimbursement for the private school (School 1) in which Student had been enrolled on February 3, 2010, as well as a second private school (School 2) in which Student was to be enrolled on September 7, 2010. (S-17.)
47. Parents' September 3, 2010 letter also requested an independent educational evaluation at public expense (IEE), and the District agreed to pay for an IEE. (S-17 to 19.)
48. After receiving the IEE, the District scheduled another IEP meeting with Parent in March 2011, offering an IEP that acknowledged the input from the IEE in present levels, but offered essentially the same programming as had been offered in the previous year. (S-20.)
49. In July 2011, Parent requested tuition reimbursement for Student's continuation at School 2 for the 2011-2012 school year. (S-21.)

## 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

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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).



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)

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipoise”, the Parents cannot prevail.

#### TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student’s needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district’s program legally adequate? Second, is the parents’ proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second

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<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. Dispute Resolution Manual §810.

and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007).

#### FAILURE TO OFFER OR PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

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

denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

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

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

#### PROVISION OF A FAPE TO STUDENT

The first step in deciding whether or not the District must either provide compensatory education or pay tuition reimbursement is to determine whether or not the District offered or provided a FAPE during the relevant period of time. As noted above, the SOL precludes Parent from obtaining findings or a decision about District actions or

omissions before December 30, 2009. Nevertheless, actions taken in the Student's ninth grade year, and the beginning of Student's tenth grade year in the District, carried over into the relevant period. The re-evaluation that was the basis of the District's offered IEPs was provided in March 2009 (FF 6, 7); the IEPs provided thereafter were designed to govern the educational services for Student during the relevant time period. (FF 12, 33, 34, 40, 48.) Thus, I have made findings of fact with regard to these documents.

I conclude that the District offered special education and related services that were reasonably calculated to provide the Student with meaningful educational benefit and that addressed all of Student's educational needs. Thus, the District did offer a FAPE to Student at all relevant times. In reaching this conclusion, I am mindful that the appropriateness of an offer of FAPE must be judged according to the information that the District had at the time that it made the offer, as noted above.

The District appropriately identified all of Student's educational needs, and addressed them appropriately in its IEPs.<sup>7</sup> It correctly identified Student's attention and organization difficulties, and offered both measurable goals and SDI to address those difficulties throughout the Student's school day. (FF 1, 2, 4, 6, 7, 8, 9, 12-26.) It correctly identified Student's learning disability in mathematics and provided an appropriate learning support environment for delivery of a modified curriculum that even Student's expert

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<sup>7</sup> Parents' expert's reported medical diagnoses such as dyscalcula and non-verbal learning disability do not establish areas of learning need that the District failed to address. I conclude that these areas of need are encompassed in the categories in which Student was found to need special education, and that the educational services that the District offered appropriately addressed the educational needs arising from these medical diagnoses. Similarly, while the District did not identify a learning disability in written expression, because its test results did not establish that disability, (NT 943-944; S-10), the District did not ignore Student's weakness in that area, but addressed them with special education services. The central requirement of the IDEA is that the local education agency address the student's educational needs appropriately; since the District did this, I conclude that it offered a FAPE to Student.

witness called for in testimony. (FF 6, 7, 12, 19, 21; NT 641.) The District recognized Student's emotional and behavioral difficulties and addressed them through offers of individual and group counseling, as well as goals addressing Student's difficulties in recognizing Student's own learning differences and coming to both accept them and advocate for the accommodations and services these differences make necessary in the learning environment. (FF 4, 8, 9, 14-17, 23, 24, 25.) While not identifying Student with a learning disability in written expression, the District did acknowledge Student's difficulties with this skill and provided specially designed instruction and a goal to address those difficulties. (FF 7, 13, 16, 17, 19, 20, 23.) Thus, I conclude that the District offered Student special education services that were, at the time at which they were offered, reasonably calculated to enable Student to receive meaningful educational benefits in all areas of educational need.

Parent argues that the 2009 IEPs lacked mathematics goals, and that more than one mathematics goal should have been added to the IEP, since mathematics was Student's primary difficulty academically. While the absence of a goal in the March and September 2009 IEPs, (FF 18, 33), is of concern, these IEPs did address Student's learning disability in mathematics, by offering a learning support placement and specially designed instruction, including modified curriculum. (FF 21, 26, 29, 33.) I find no failure to provide a FAPE during the relevant time due to this omission. Moreover, in October 2009 and January 2010, the District offered a mathematics goal, (FF 34, 40), and Parent introduced no evidence to show that Student needed more than one mathematics goal.

Parent argues that the goal of 70% performance in this goal was not individualized because that is considered satisfactory for all students of the District. However, this

misreads the goal. The 70% standard is for attainment of the defined calculation and problem solving skills in the goal. The overall score of 70% in classes is the standard for all other students, and this is influenced by class-work and assignments other than tests or quizzes on the calculation and problem solving skills measured by this goal. (NT 1044-1045.) Thus, the mathematics goal in the Student's IEP is appropriately individualized. Parent's argument that this goal was not monitored ignores the fact that it was not implemented because Student left the District before it could be implemented. (NT 1046.)

Parent argues that Parent never saw progress monitoring data, thus seeking to draw into question the special education supervisor's testimony that data was taken and compiled. (NT 1125-1151.) I give no weight to this testimony, (FF 19), because it is contradicted by the parent's own documentary evidence, which contains a page of progress monitoring data exactly in the form the District witnesses testified to. (P-16 p. 46.)

Parent argues that the District failed to provide assistive technology to Student as needed. On the contrary, the evidence is preponderant that the District provided a variety of assistive technology, including graph paper, calculators, graphic organizers, computers and educational software. (FF 35.)

Parent argues that the District failed to protect Student from bullying, and that its teachers singled Student out as different, thus exacerbating bullying. I conclude that the evidence is not preponderant that there was bullying, that the District failed to address it properly, or that teachers exacerbated the problem. Parent produced evidence of a single incident of verbal threats of physical harm directed to Student in writing. (FF 37.) The evidence showed also that the District responded properly to this incident, and that, aside from a less serious subsequent contact with the perpetrators, no further incidents were

reported. (FF 37.) This does not constitute bullying, which is of a continuing nature, not limited to a single threat, or even two encounters. 24 P.S. §13-1303.1-A(e). Moreover, there was scant testimony of teachers inappropriately singling Student out for ridicule or oppression. Student's episodic accounts did not convince me that there was a pattern of teacher behavior that could expose a child to bullying. (NT 258-259.)

Parent argues that the SDI did not address Student's depression and anxiety directly. Parent offers no evidence on how those emotions should be addressed more directly. Moreover, it is not the District's role or obligation to directly treat a medical condition such as clinically significant anxiety or depression, but only to address its impact on learning. I conclude that the goals and SDI offered in the 2009 and 2010 IEPs reasonably addressed Student's emotional impediments to learning.<sup>8</sup> (FF 4, 5, 8, 9, 12, 14-17, 22-25, 31-33, 38, 40-42, 48.)

Parent argues also that the District did not provide a positive behavior support plan, even though Student's behavior was interfering with educational progress – especially Student's resistance to special education interventions. (FF 24, 31, 40, 41, 42.) However, the issue before me is whether or not this omission deprived Student of a FAPE. The District's special education teacher testified that the behavior was addressed through goals in the IEP, (NT 893-894), and I find that this is the case, and that the IEP goals, placement in supplemental learning support and offered related services were reasonably calculated to

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<sup>8</sup> Student's private psychologist-counselor advocated that the District provide Student with a "mentor" to deal with Student daily and help Student navigate the logistic, organizational and academic challenges of the high school environment. (NT 518-521.) While this may have been a worthy suggestion, the District was within its rights to address those challenges in a different way. It did so by placing Student in the learning support classroom daily and by providing counseling twice weekly for two quarters, then once weekly for two quarters. (FF 12, 25, 40, 48.)

address those behaviors appropriately. Thus, the omission of a positive behavior support plan was not a deprivation of a FAPE.

The Student's lack of progress in ninth grade and the beginning of tenth grade, (FF 4, 5, 38), does not alone prove that the District's offered program was inappropriate<sup>9</sup>. This is true especially in light of the fact that the Parents did not agree to the recommended special education program, and the Parent actually withdrew consent for the placement recommended by the District to address Student's learning disability in mathematics. (FF 11, 27, 28-32, 36, 42-45, 49.) Instead of a learning support classroom with a specially designed curriculum, with explicit, sequential and remedial instruction, as offered by the District, the Parent insisted in placing Student in general education for mathematics. (FF 28-30.) It was clear shortly thereafter that Student was failing in this setting. (FF 30, 38, 39.) Parent ultimately removed Student to a private school, (FF 44), providing the above described type of program, and Student began to improve and make slow progress in mathematics. (P-21.)

Similarly, the District offered Student group and individual counseling to address Student's emotional needs arising from Student's ADD and learning disability. (FF 31, 32.) Parent, based upon an experience in the previous year with group counseling, in which the group did not address Student's concerns, forbade the District from providing group counseling to Student. (FF 32.) When the District also offered one to one counseling, the Parent withdrew consent because Parents were already providing private counseling to Student. (FF 32.) While Parents were within their rights to withdraw consent for

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<sup>9</sup> The record is preponderant that the District repeatedly adjusted its offered services in an attempt to address Student's declining school performance. (FF 28-34, 38-42.)



counseling, and while their reasoning was not inappropriate as to the desire not to have two counselors at the same time, the fact remains that the District offered appropriate services to address Student's emotional difficulties in school. Having declined that service, Parent will not now be heard to claim that the District failed to address the Student's needs for emotional support at school.

In sum, I have weighed the evidence to determine whether or not the District failed to offer a FAPE to Student prior to Student's disenrollment from the District. Parent argues in effect that the interventions that the District offered simply did not work in Student's case, thus forcing Parent to enroll Student in a private school. However, the argument must fail because the Parent did not allow the District to implement its recommended services; Parent refused to consent to placement and related services that were an integrated plan of intervention to deal with the two most serious of the Student's needs, a learning disability in mathematics and emotional difficulties arising from Student's learning differences. Since the District never had the opportunity to implement its plan for intervention, the evidence does not prove preponderantly that the District's plan was not reasonably likely to succeed for Student.

In reaching this conclusion I considered the reliability of the evidence given by witnesses in the matter. Much of the case presented for Parents was based upon Parent's testimony, and I found Parent's reliability as a witness to be somewhat limited. While I did not see evidence that would call into question Parent's sincerity, it was plain that Parent did not understand many of the offers that the District was making to Parents, and that Parent demonstrated a lack of patience with District personnel that interfered with collaborative problem solving. Clearly, Parent's advocacy was influenced by frustration, anger, and

profound worry for the wellbeing of the Student. However, on the record as a whole, I conclude that Parent was not sufficiently inclined to consider the expert judgment of school personnel with regard to the many difficult educational judgments that needed to be made on behalf of Student, who was clearly in crisis.

I also considered the weight to be accorded to Parents' expert witnesses, the neuropsychologist who evaluated Student in 2010, and the psychologist who provided therapy to Student during Student's middle school and high school years. I accord reduced weight to the opinions of each of these witnesses.

The neuropsychologist is a forensic expert of repute, whose academic qualifications are at the highest level, whose experience is great, and who is both certified as a school psychologist and licensed as a psychologist in Pennsylvania. Thus, I find that this witness' clinical opinions are well founded in the literature and standards of practice in the expert's field. Nevertheless, for the expert's critique of the District's offers in 2009 and 2010, I find the expert's opinions unreliable. Two facts in the record give me concern as a fact finder.

First, the expert's report characterized WIAT-III written expression subtest scores in a way that could have been misleading. The expert reported the score, for Parents' reference, in the beginning of the report, as below average; however, the manual for the test indicates that the score is to be characterized as average. (NT 675-676; S-19 p. 7, 43.) The expert explained that the characterization of the score is not important in psychometric terms, and that there is an anomaly in the way the Wechsler tests characterize the scores in that area, which could cause confusion. Thus, the expert made a judgment to characterize the score in deviation from the publishers' recommended characterization in the initial data presented to Parents, but to report the score as characterized by the publisher in the

appendices of the report. However, this deviation was nowhere noted in the report. While I understand the reason for this characterization, and do not question it for the expert's clinical purposes, it leads me to question whether or not other similar judgments were made, not noted in the report, that might make a difference in the report as evidence in a due process matter.

Second, I find the expert's characterization of the 2009 and 2010 IEPs in the written report to be contrary to my own reading of these documents. The report states that these documents were non-specific regarding SDI and lacked baselines for the IEP goals and progress monitoring. However, to my eyes, these documents are highly specific regarding SDIs, and contain sufficient baseline information in the present levels to allow the goals to address Student's needs in a measurable way. (FF 13-24.) Thus, I discount the reliability of the expert's report as it characterizes the District's offers. In addition, the expert evaluated Student after Student left school, and the expert frankly admitted that these opinions were based upon only a document review and the reports of the family.

The psychologist-private counselor's testimony was based almost entirely upon the expert's therapy sessions with Student, Student's report of events at school, and Parent's reports. (NT 553-555, 588-595.) The expert did attend an IEP meeting in 2007, but did not observe Student at school or talk to teachers about Student's emotional needs as they manifested themselves at school. The expert's opinions at the hearing in this matter were directed to inadequacies found in reports prior to the relevant time, as well as a reading and critique of the 2009 re-evaluation report. I find the expert's critique unconvincing. Contrary to the expert's factual finding, I find that the 2009 re-evaluation report did address Student's anxiety and emotional needs, by recommending attention to those needs at what it

then perceived to be the source: Student's attention and organization difficulties. (NT 514-517, 529-532.) Moreover, the subsequent IEP went further, offering goals for counseling Student in self-understanding, self-acceptance and self-advocacy. (FF 14.) The expert was not familiar with the full range of services that the District offered, nor with the fact that the Parent had declined much of what was offered. (NT 577-581.) Thus, I disagree with the factual underpinning of the expert's opinion criticizing the offer of FAPE in 2009, and I accord less weight to that opinion.

#### OCCUPATIONAL THERAPY

The Parent asserted that Student should have been evaluated for occupational therapy, despite the repeated findings in the District's evaluations that Student's fine motor skills were commensurate with grade level peers. (FF 3, 10.) Parent produced no evidence to support this assertion except a line in present levels of the 2010 IEP saying that Student's handwriting was "somewhat large." In particular, neither of Parents' experts, both of whom were school psychologists, testified that Student needed an occupational therapy evaluation. Thus, the evidence is preponderant that Student needed no occupational therapy services, and that the District's omission to evaluate in this regard was not a denial of a FAPE.

#### CONCLUSION

I conclude that the District properly identified all of Student's educational needs during the relevant period for compensatory education and offered Student a FAPE prior to Student's disenrollment from the District in February 2010. Consequently, Parent is not entitled to an order for compensatory education or tuition reimbursement. In light of this

conclusion, it is not necessary to reach the question of the appropriateness of the private schools that Student attended, nor is it necessary to reach the question of equity that is part of the legal test for tuition reimbursement. Moreover, I conclude that the district did not fail to provide needed occupational therapy services. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District did not fail to identify all of Student's educational needs during the time relevant to this matter for compensatory education purposes, December 30, 2009 to February 2, 2010.
2. The District did not fail to offer or provide a FAPE to Student from December 30, 2009 until the last day of hearings in this matter, May 9, 2012.
3. The hearing officer will not order the District to provide compensatory education.
4. The hearing officer will not order the District to pay private school tuition, transportation, book costs and associated fees for Student from February 3, 2010 to the last day of hearings in this matter, May 9, 2012.
5. The hearing officer will not order the District to reimburse Parents for any fees or costs incurred due to private payment for occupational therapy services.

*William F. Culleton, Jr. Esq.*

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

June 22, 2012