

*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

Student's Name: N.H.

Date of Birth: [redacted]

ODR No. 3366-1213AS

CLOSED HEARING

Parties to the Hearing:

Parents

Norristown Area School District  
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Date of Hearing: 09/13/2012, 11/27/2012, 12/04/2012, 01/03/2013,  
01/17/2013, 02/11/2013, 02/22/2013

Record Closed: 04/08/2013<sup>1</sup>

Date of Decision: 04/29/2013

Hearing Officer: Brian Jason Ford

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<sup>1</sup> The record closed upon the Hearing Officer's receipt of the parties closing briefs.

## Introduction

The Parents, on behalf of the Student, requested this due process hearing against the District.<sup>2</sup> The Parents' Complaint raises claims under the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.* More specifically, and as described in greater detail below, the Parents allege that the Student was denied a free appropriate public education (FAPE), and is entitled to compensatory education for that denial during the 2010-11 (5th grade) school year. The Parents further claim tuition reimbursement for the 2011-12 (6th grade) and 2012-13 school years, including the cost of extended school year (ESY) services in the summer of 2013.

For reasons discussed herein, I find that the District did not provide appropriate Math and Speech/Language instruction to the Student during the 2010-11 school year, and that the Student is entitled to compensatory education for that denial.<sup>3</sup> For reasons discussed herein, I find that the Parents are also entitled to reimbursement for an IEE. For reasons discussed herein, I also find that the Student was not otherwise denied a FAPE, and that the Parents are not entitled to tuition reimbursement.

## Stipulations

The parties jointly entered significant, written stipulations in this matter. The stipulations provide a detailed description of the claims and issues in this case, as well as a comprehensive recitation of the many facts that are *not* in dispute. The stipulations are numbered sequentially, except for a jump from 39 to 42. I adopt Stipulations 1 through 4 as a particularized statement of the Parents' claims and issues presented in this matter. I adopt Stipulations 5 through 47 as findings of fact.<sup>4</sup>

The joint stipulations were submitted in writing, and are copied here with names redacted. As a matter of formatting, rather than inserting a ten-page block quote, I have changed the font to differentiate the parties' words from my own.

### Stipulations as to the claims and issues:

I note, again, that I accept stipulations one through four as a detailed description of the claims and issues (as opposed to adopting them as my own findings of fact).

1. On July 11, 2012, the parents of [Student] filed a due process complaint against the [District]. The due process complaint alleges, inter alia, that: (i) Student attended 4th and 5th grade in

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<sup>2</sup> Except for the cover page of this decision, identifying information has been omitted to the greatest extent possible.

<sup>3</sup> In the Stipulations below, the Parties do not explicitly list denial of "Speech/Language services" as a reason why the Student was allegedly denied a FAPE. I find that this denial falls under the umbrella of "social skills needs," which is clearly listed and was made an issue throughout the hearing.

<sup>4</sup> All stipulated facts are adopted. I also make additional findings of fact herein.

District and received specialized instruction pursuant to District IEPs; (ii) Student was diagnosed with ADHD, anxiety disorder, and significant math disability; (iii) Student also has a significant history of difficulty with reading comprehension (although doesn't merit identification as a SLD in language arts) and significant executive functioning deficits that impact study skills/overall organizational abilities in and out of school; (iv) after two years in the District, Parents unilaterally placed Student at [a private school (Private School)] for 2011 ESY and 6th grade school year (2011-12); and (v) Student is now entering 7th grade at the Private School for 2012-13 school year. (S-1).

2. Parents' request for relief in the due process complaint consists of: (i) compensatory education for the District's failure to provide FAPE during 5th grade school year (2010-11); (ii) tuition reimbursement for costs related to unilateral placement at [the Private School] from start of 2011 ESY through the conclusion of 2012 ESY; and (iii) an order requiring the District to reimburse Parents for cost of continuing Student's placement at [the Private School] for 7th grade school year (2012-13) and 2013 ESY. (S-1).
3. The specific compensatory education claims asserted by the parents in the due process complaint under the IDEA, the Rehabilitation Act and PA statutes and regulations are as follows (S-1):
  - i. District denied Student a FAPE during [Student's] 5th grade school year (2010-11):
    - a. District failed to adequately address Student's learning disabilities such that Student did not make meaningful progress in key academic areas including reading comprehension and math:
      1. Did not receive systematic program of research-based instruction;
      2. Was taught in classes that were too large for Student to enable [Student] to focus and achieve the progress of which [Student] is capable (with the exception of some small group instruction in math);
      3. Student increasingly felt overwhelmed academically; often didn't understand school work; rarely [was] able to complete assignments without a great deal of help from Parents;
      4. When Parents sought District's help to address these issues, teachers responded Student was sufficiently supported in school and should be able to do the work expected of [Student];
      5. At end of 5th grade, Student could not even consistently count change;
      6. Student was rarely compliant with school-related demands; homework sessions became tortuous for Student and Parents;
      7. Student became increasingly resistant to going to school/ getting on school bus or performing any tasks that were expected of [Student] by [Student's] teachers.

- b. District failed to adequately address Student's social skills needs such that Student did not make meaningful progress in this area:
    1. Struggled to fit in with peers due to combination of [Student's] very short attention span, anxiety disorder and pragmatic language deficiency;
    2. Did not make any friends to share activities outside of school;
    3. By spring, felt very isolated, ostracized and, at times, picked on;
    4. When Parents alerted District, no systematic/ scientific efforts were initiated to understand root causes for inability to develop social skills.
  - c. District's IEPs for Student's 4th and 5th grade years were inconsistent with the IDEA. Almost all goals lacked measurable baselines rendering annual progress objectives impossible to quantify. Many goals that should have been in IEP were missing, such as: study and organizational skills and strategies to reduce school-related anxiety. (S-1).
4. The specific tuition reimbursement claims asserted by parents in the due process complaint seek reimbursement for placement at [the Private School] for 5th grade (2010-11) and 6th grade (2011-12) school years and for Extended School Year ("ESY") for 2011, 2012 and 2013 and asserts:
    - a. [The Private School] is an appropriate placement for Student
      1. Student is making meaningful progress socially and with regard to communications skills at [the Private School]
        - i. Social skills/integration into the school community light years beyond where Student was in 5th grade; has friends at school that [Student] sees in community; frequently being invited to out-of-school activities; has bonded with some of [Student's] peers;
        - ii. Much more positive experience; greatly increased quality of life; eliminated [Student's] sense of social isolation; diminished [Student's] sense of insecurity and self-doubt;
        - iii. From Student's experience, much less restricted than [Student] ever was while attending District (although, under legal standard, [the Private School] may be a more restrictive setting);
        - iv. Student no longer appears anxious when topic of school comes up; no longer resists going to school;
        - v. Student has an improved attitude towards learning has spilled over into life beyond the classroom; less anxious overall; stress level at home has been much reduced as a consequence;

2. Student is making meaningful progress academically at [the Private School]. Academic work has improved dramatically, which is directly attributable to: Small group instruction; Highly trained staff in all classes; Instruction in direct and research-based meta-cognitive strategies (i.e., being taught to understand [Student's] disability and how to apply learning skills/ strategies to work around it); Workload constantly bring adjusted by staff so [Student] can meet [the Private School's] expectations and experience success (i.e., now completes [Student's] homework independently); All [of the Private School's] staff members working with Student are familiar with [Student's] language disabilities and anxiety disorder; adjustments being made as-needed to respond to [Student's] needs.

b. Parents also allege that the equities in the case overwhelmingly favor reimbursement to Parents (S-1).

### **Stipulations adopted as findings of fact:**

I reiterate that, unlike the proceeding four stipulations, the remaining stipulations are adopted as findings of fact.

5. The District issued an Invitation to Participate in IEP Meeting on 8/27/09. (S-13). The stated purpose was to discuss the current IEP to review and revise it as needed. (S-13). The IEP Team was identified as Parents, ... (LEA Representative), ... (Special Education Teacher), ... (Regular Education teacher), ... (Guidance Counselor), ... (Other), ... (Other), ... (Principal). (S-13).<sup>5</sup>
6. An IEP meeting was held on 8/27/2009. The IEP team attendees consisted of Parents, ...(regular education teacher), (special education teacher), ... (Principal/LEA), ... (Parent advocate), ... (District Program Support Specialist) and ... (school counselor).<sup>6</sup>
7. On 08/27/2009, the District issued a NOREP which Parent signed and “temporarily approved” with comments on 8/27/09. (S-16). The type of action proposed was to change identification, evaluation or educational placement of Student or provision of a FAPE. The description was that Student would participate in general education curriculum for Homeroom, Intervention, Specials (Phys. Ed., Health, Music, Library, Art), Writing, Science, and Reading; due to a specific learning disability, would receive Math instruction with special education supports.
8. On 08/27/2009, a Physician’s Permission for a physical therapy (“PT”) evaluation was issued by the District. (S-17).
9. On 8/27/2009, a Parent Permission for PT evaluation was signed. (S-17).
10. On 08/27/2009, a Parent Permission for an occupational therapy (“OT”) evaluation was signed 8/27/09. (S-18).

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<sup>5</sup> The original text of the stipulations included the names of the IEP team members. One of the “other” team members was the Parents’ non-attorney educational advocate.

<sup>6</sup> The original text of the stipulations included the names of the IEP team members.

11. On October 1, 2009, revisions to the 08/27/09 IEP were made. (S-14). The IEP Sections amended included the Present Levels of Academic Achievement, Present Levels of Functional Performance, Academic, Developmental, Functional Needs Related To Child's Disability, Participation in State and Local Assessments, Program Modifications and SDI. (S-14, p. 2)
12. On 10/12/2009, a District OT Evaluation Report was issued by ... [a third party OT provider contracted by the District] via ... , OTR/L. (S-19).<sup>7</sup>
13. On 10/14/2009, a letter from ... , Supervisor of Special Education for the District, was sent to Parents forwarding the District OT evaluation and advising that Student qualified for OT services.
14. On 10/30/2009, the District issued a PT Evaluation Report to Parents. (S-21).
15. On 11/20/2009, an Invitation to Participate in IEP Meeting on 12/10/09 was sent to Parent and Parent signed stating that she would attend on 11/21/09. (S-24). The purpose of the meeting was the Annual IEP Review. The IEP Team was identified as Parents, ... (LEA Representative), ... (Special Education Teacher), ... (Regular Education Teacher), ... (Principal), ... (Other), ... (Other).
16. The District issued an IEP dated 12/10/2009. (S-26). The IEP Team members who signed the invitation sheet consisted of Parents, ... (Regular Education Teacher), ... (Special Education Teacher), ... (LEA Representative), ... (OT), ... (Other), ... (Other), ... (Other), ... (Principal), ... (School Psychologist), ... (Other), ... (Instructional Facilitator).<sup>8</sup>
17. The Procedural Safeguards Notice issued by the District was signed by Parent in 12/09. (S-26).
18. On 12/20/2009, the District issued a NOREP which Parent signed and approved on 12/10/09. (S-30). The NOREP proposed continuation of special education services. The specific Action Proposed stated that Student was to continue receiving LS services in Math and proposing the addition of Writing services, which would change placement from Itinerant to Supplemental. The educational placement was identified as Supplemental LS (at [a District elementary school] from 01/04/10-06/15/10; at [a District middle school] from 09/01/10-01/03/11).
19. On 03/05/2010, a Progress Meeting was held. (S-31). The meeting signature page included attendees ... (Special Education teacher), ... (LEA Representative), Mother, ... (Regular Education Teacher), ... (Counselor), ... (After-school Teacher). Parent signed permission for ... , a special education teacher, to provide approximately ten (10) extra minutes of individualized instruction each day to Student.

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<sup>7</sup> The name of the evaluator appeared in the original stipulation.

<sup>8</sup> One of the "Other" members was the Parents' non-attorney advocate, but a different advocate than before. Again, names appeared in the original stipulation.

20. On 10/04/2010, the District issued an Invitation to Participate in an IEP meeting on 10/05/10. Parent signed that she would attend. (S-40). The stated purpose was to discuss current IEP and revise it as needed. The IEP Team consisted of Parents, ... (LEA Representative), ... (LEA Representative), ... (Special Education Teacher), ... (Regular Education Teacher), ... (Regular Education Teacher), ... (Regular Education Teacher).<sup>9</sup>
21. On 10/05/2010, a Procedural Safeguards Letter was given by the District to the Parents and Parent signed acknowledging receipt. (S-42).
22. On 10/05/2010, the District issued a Permission Letter to Make Revisions to IEP Without Convening a Formal Meeting and this permission form was signed by Parent. (S-42).
23. On 12/08/2010, an Invitation to Participate in IEP Meeting on 12/20/10 was issued by the District and Parent signed on December 9, 2010 that she would attend the meeting. (S-47). The purpose was to discuss current IEP and to review and revise it as needed. The IEP Team members were Parents, ... (LEA Representative), ... (Special Education Teacher), ... (Regular Education Teacher), ... (Regular Education Teacher), ... (Regular Education Teacher), ... (OT), ... (S/L Therapist), ... (Supervisor of Special Education).
24. The District issued an IEP dated 12/20/2010. (S-49; S-56). The IEP Team consisted of Parents, ... (Regular Education Teacher), ... (Regular Education Teacher), ... (Regular Education Teacher), ... (Special Education Teacher), ... (LEA Representative), ... (OT), ... (S/L Therapist), ... (Advocate), ... (Community Counselor), ... (Supervisor of Special Education), ... (Counselor).<sup>10</sup>
25. On 12/20/2010, the District issued a Procedural Safeguards Letter which Parent signed acknowledging receipt. (S-49).
26. On 12/22/2010, the District issued a NOREP which Parent did not sign. (S-50). The description of action taken was that Student would participate in a learning support program at Supplemental level in [the District's] Middle School. The stated reason was that Student required necessary supports provided by the learning support room to be successful in Math. The recommended educational placement was Supplemental Learning Support at [the District's] Middle School.
27. On 02/22/2011, a Direct Loan Request Form from the District per [a District representative] was made to Pennsylvania's Assistive Technology Lending Library. (S-52; S-61). The equipment requested was a NEO Portable Word Processor with co-writer. It was noted that the assistive technology device would help Student at school. The Support Person was identified as ... , OT.
28. On 02/24/2011, the District issued an Invitation to Participate in IEP Meeting to be held on 03/08/11. Parent signed on 3/1/11 that she would attend the meeting. (S-54). The purpose was to discuss the current IEP and review and revise it as needed. The IEP Team consisted

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<sup>9</sup> As indicated at Stipulation 18, the Student had transferred to middle school, and so new people filled out the various IEP Team positions.

<sup>10</sup> Here, the "Other" continues to be the Parents' second non-attorney advocate.

of Parents, ... (LEA Representative), ... (Special Education Teacher), ... (Regular Education Teacher), ... (Regular Education Teacher), ... (OT), ... (S/L Therapist), ... (Advocate).

29. On 03/10/2011, a letter from ... [a representative] of the District was sent to Parents stating that the District had received Parents request for a speech and language (“S/L”) evaluation for Student. The District requested that Parents sign and return Permission to Reevaluate Consent Form and included Procedural Safeguards Letter. (S-58).
30. On 03/10/2011, the District issued a Permission to Reevaluate – Consent Form which Parent signed and consented to on 3/14/11. (S-59). The IEP team made a determination that there was a need for a speech and language evaluation. The proposed assessment tools consisted of Expressive and Receptive Language Tests and other assessments as determined necessary by the S/L clinician. (S-59).
31. On 03/14/2011, the District issued a Parent Information for Initial Multi-Disciplinary Evaluation which was signed by Parent. (S-60). Parent did not provide a response to identify the Student’s strengths. Parent’s response was “ALL” to the request to identify the Student’s needs. Parent provided no other information on the form. (S-60)
32. On 03/25/2011, the District issued a NOREP. Parent signed on 4/5/2011 that she did not approve the NOREP. (S-63).
33. The NOREP dated 03/25/2011 proposed a middle school placement in learning support at a supplemental level in [the District’s] Middle School with OT (2x/month for 30 minutes) and social skills classes (1x/week for 30 minutes). Parent stated that she did not approve because: “The IEP is not designed to enable [the Student] to make meaningful educational progress. [Student] needs an independent neuropsychological assessment and a S/L assessment immediately in order for proper education.”
34. On 07/25/2011, the District issued a Reevaluation Report (Speech/Language) (S-67).
35. The Reevaluation Report issued by the District stated that Student has a disability and continued to need specially designed instruction with the Primary Disability Category of specific learning disability and Secondary Disability of other health impairment. (S-67).
36. The Reevaluation Report dated 7/25/2011 issued by the District identified Student’s strengths and needs as follows (S-67):
  - Strength
    - Receiving support in math and social groups
    - Strives to do well
    - Pleasant
    - Age appropriate articulation
    - Expressive and receptive language
    - Age appropriate voice and fluency
  - Needs
    - Math support
    - Reading support
    - OT



- Social skills

37. On 08/20/2011, a letter from ... , District Superintendent, was sent to Parents indicating that the District was in receipt of Parents' request for independent reevaluation by Licensed Certified School Psychologist. The District provided a list of local psychologists without endorsing any individual on the list; may inquire about an evaluation from someone not on the list. The District agreed to compensate the evaluator at a rate consistent with fees charged in immediate geographical area. (S-68).

38. On 08/25/2011, the District received letter dated 8/17/11 from Parents to [the District's Superintendent] asserting the following points (S-68):

- Student has not made appropriate progress in school due to [Student] not having received a sufficient IEP for at least two school years
- The IEP proposed by District for upcoming school year (the NOREP for which Parents rejected in March) would not enable [Student] to make meaningful progress, even if fully implemented
- Parents decided to place Student at the [Private School] for the 2011 school year
- [The Private School] would provide Student with the specialized programming [Student] requires
- Parents advised that the District should consider this notice to be 10 days notice of Parents' decision
- Reserving right to seek reimbursement from District for the costs that we incur in placing Student at [the Private School]. (S-68).

39. On 08/25/2011, the District issued a Permission to Reevaluate – Consent Form which Parents did not sign. (S-70). The Proposed Assessment Tools/Tests/Procedures identified consisted of a review of records consisting of an [local Intermediate Unit] Psychological report dated 09/05/06, Neuropsychological Consultation Report dated 10/17/06, [District] Initial Evaluation dated 01/08/07, [District] Reevaluation dated 12/05/08, [District contracted third party] OT Evaluation dated 10/02/09, [District contracted third party] PT Evaluation dated 10/15/09, [regional hospital] S/L Evaluation dated 7/27/10, [District] S/L Evaluation dated 08/2011, anecdotal information and medical records from school nurse, teachers and parent; comprehensive reevaluations to determine current academic achievement levels and conduct classroom observation. (S-70).

42. On 08/26/2011, a letter from ... , Special Education Supervisor, was sent to Parents which forwarded two requests for reevaluations. The letter stated that Student's state-mandated reevaluation was due by December 2011 and would be conducted by a District psychologist. The letter stated that ... , District Superintendent, had provided a letter acknowledging Parents' request for a District-funded independent educational evaluation and that the District would like to set up a meeting with Parent to discuss Student's most recent reevaluation. (S-73).

43. On September 10, 2012, the District issued an IEP Invitation to the Parents scheduling an IEP meeting for September 12, 2012. (S-105@1). The invitation was issued by the District subsequent to the Parents furnishing the District with some reports from the [Private School] and the most recent evaluation report by [an independent evaluator contracted by the Parents]. (S-106).
44. In response to the District's IEP invitation of September 10, 2012, the parent indicated her unavailability due to her work schedule and requested to meet on either October 1, 2012 or October 2, 2012. (S-107@1). Ultimately, October 11, 2012 was agreed to as a mutually convenient meeting date by the parties. (S-107).
45. On September 27, 2012, the District issued an IEP Invitation to the Parents scheduling an IEP meeting for October 11, 2012. (S-105@4). The meeting took place as scheduled and was attended by the parent.
46. District Exhibits S-109 and S-110 respectively, include true and complete copies of the IEP and NOREP offered to the parents by the District at the October 11, 2012 IEP meeting.
47. S-109 at pages 32-33 is an IEP meeting checklist prepared by the District at the October 11, 2012 IEP meeting.

### **Findings of Fact**

As a caution to readers, the findings of fact below have an uneven flow. Rather than intersperse my findings of fact with the parties' stipulations, this section assumes familiarity with the stipulations above. Further, at my suggestion, both parties included proposed findings of fact in their closing briefs. To the extent that the parties have proposed un-hyperbolic, straightforward findings that are consistent with the evidence and testimony, and are clearly supported by precise citation to the record, I have adopted those findings as my own. The fact that both attorneys returned many such proposed findings is a testament to their excellent work and dedication to this matter.

### **Background**

1. At various times, the Student has been diagnosed with the following disabilities:
  - ADHD Combined Type
  - Generalized Anxiety Disorder
  - Developmental Coordination Disorder (Dysgraphia/Writing Disorder)
  - Cognitive Disorder (Due to Executive Functioning Deficits)
  - Developmental Arithmetic Disorder
  - Congenital Cardiac Disorder
  - Seizure Disorder
  - Auditory Processing Disorder
2. The Parents believe, and the District does not dispute, that these disabilities are symptoms of a perinatal brain injury called Periventricular Leukomalacia ("PVL"),

which is characterized by the death of small areas of the brain. Children with PVL frequently have neurological and developmental problems. S-53; NT at 1139.

**2009-10 school year (4th grade):**

A significant amount of testimony and evidence was presented in regard to the 2009-10 (4th grade) school year. That year falls outside the scope of this hearing. Such evidence and testimony was permitted only to the extent that it formed necessary background and context for this matter.

3. The Student returned to the District from a parochial school at the start of the 2009-10 school year.
4. Prior to the start of the 2009-10 school year, the Parents advised the District that the Student had significant school anxiety – to the point that the Student had difficulty getting out of the car to go to school. NT at 622-624.
5. Prior to the start of the 2009-10 school year, the Parents also informed the District of the Student's medical diagnoses. P-4, P-5, NT at 93-94, 103, 111, 159.
6. The District and Parents formed an effective plan to help the Student enter school. *Id.*
7. The Parents also advised the District that the Student was attending an anxiety clinic, and granted permission for the District and clinic to communicate with each other. The District then communicated with the anxiety clinic. The Student stopped attending the anxiety clinic in December of 2009. NT at 631-632.
8. In September of the 2009-10 school year, [an incident occurred]. There were no other similar incidents during the Student's 4th grade year. S-99; NT at 709-710.
9. There is conflicting but equally credible testimony concerning the Student's ability to create and maintain friendships during the 2009-10 school year. Teachers and school personnel testified that the Student was able to form friendships in school. The Parents testified that the Student had no friends outside of school. These circumstances are not mutually exclusive. The conflict is that the Student's mother gave broad testimony about the Student's lack of friendship in school that conflicted with the specific testimony from teachers about the extent and quality of the Student's in-school friendships. I find that the teachers' portrayal of the Student's in-school friendships is accurate. NT at 637-639, 843-847, 1219-1220
10. The District made a social skills group available to the Student during the 2009-10 school year. The Parents terminated the Student's participation in that group because they were concerned about another student who also participated in the group. NT at 658-659.
11. Programmatically, at the start of the 2009-10 school year, the Student received a 90 minute reading block (45 minutes of writing and 45 minutes of reading), and a 90

minute Math block (45 minutes of which the Student was directly instructed by a special education teacher). Starting in December 2009, 30 minutes of the 45 minutes of writing instruction was provided by a special education teacher. Starting in March 2010, the District provided one to one instruction to the Student in Math skills by a special education teacher. NT at 1412-1415, 1532-1533. Some of this instruction was provided one-to-one (1:1) with the special education teacher in lieu of recess and group instruction.

12. The District made an after-school Math program available to the Student, and provided the program instructor a summary of the Student's IEP. The Parents did not send the Student to the program. NT at 1554–1558.

13. The Student's mother and special education teacher were frequently in communication with each other during the 2009-10 school year. The Student's mother frequently reported concerns about the Student's anxiety that were not observed in school.

14. The IEP developed on December 10, 2009, was intended to last for one year and end in December of 2010 (about half way through the Student's fifth grade year). See Stipulations 16, 17.

#### **2010-11 school year (5th grade) – Overview**

15. The Student transitioned to middle school for the 2010-11 school year.

16. During the 2010-11 school year, the Student had emotional outbursts at home. The frequency of these outbursts was greater than during the prior school year. NT at 356.

17. The 1:1 instruction that the Student received from the 4th grade special education teacher were not continued in middle school.

18. Although those services were no longer provided, the IEP called for supplemental learning support services. Instruction in portions of math and reading were provided in a special education classroom and all other classes in the general education classroom. The IEP also provided that the Student receive direct occupational therapy once per week for 30 minute sessions and occupational therapy consults once per month for 30 minutes. The purpose of the OT was to help improve the Student's visual perceptual and visual perceptual motor skills. S-26, S-49.

19. The Parents were frequently in communication with District personnel, and frequently expressed concerns about the Student's inability to complete homework or classroom projects independently.

20. During an IEP Team meeting on October 5, 2010, the Team discussed the Parents' concerns regarding homework, communication with teachers, a concern regarding a classmate in math and type of math instruction, social skills involvement at school, and the results of an independent language survey conducted in July 2010. (S-41;

323-325). The December 10, 2009 IEP was revised to reflect changes to the IEP based on the meeting. (S-42, p. 2; Stipulations # 23 and 24).

21. On November 11, 2010, an informal meeting was held to discuss [Student's] health issues [redacted], the independent S/L report, request that OT push in rather than pull out, additional math assistance during physical education time, use of a different math curriculum, signed agenda book, parents receiving prior notice of long term assignments, verbal prompts to attend chorus, social skills classes, and a buddy system. (S-44; S-45).
22. During the November 11, 2010 meeting, the Parents suggested needing a private placement for the Student. (S-44). The December 10, 2009 IEP was revised to reflect changes to the IEP based on the meeting. (S-42, p. 2; Stipulations # 23 and 24).
23. On December 20, 2010, the District held an annual IEP meeting. The resulting IEP removed the Student from the learning support classroom for reading instruction. The Student began receiving [Student's] reading instruction in the general education classroom. (S-49, p. 20-21; S-50; 2118 - 2120). The December 20, 2010 IEP also updated and/or revised the present education levels, parental concerns, strengths, needs, goals, SDI and related services sections of the IEP. (S-49, p. 5-7, 12-18).
24. The December 20, 2010 IEP revised and/or added new goals to address [Student's] then-current needs. The IEP contained a reading comprehension goal, a PSSA Writing Rubric goal, a math word problem goal, a timed math computation goal, a money-counting goal, a math computation goal (with a calculator), an organization goal, and an OT goal. (S-49, p. 12-15).
25. The December 20, 2010 IEP also revised and/or added new Program Modifications/SDI to include: replacement Math instruction in LS environment, preferential seating as teacher and [Student] deem appropriate; "wait time" so [Student] can organize [Student's] thoughts and respond to questions; extended time if needed to finish copying from board; limit the amount of visual information on worksheets; limited short directions for tasks; opportunity to e-mail homework to parent; visual supports (i.e., pictures, charts, maps, or overheads) to accompany auditory presentations; re-teach material if the Student is unsuccessful on classroom assessment; extra copy of textbook to keep at home, unless text is available online; modified tests/quizzes/assignments in all classes as teacher sees fit; extended time for tests and quizzes; bi-weekly progress reports will be sent home by special education teacher; opportunity to use calculator and manipulatives when applicable for Math; access to social skills instruction; modified schedule for PE class, replaced by remedial instruction. (S-49, p. 17-18).
26. The December 20, 2010 IEP also changed the amount of direct OT provided from one 30 minute session per week to two 30 minute sessions per month but continued providing for a 30 minute OT consult each month. (S-49, p. 17-18).

27. Following the IEP meeting, the District issued a NOREP dated December 22, 2010, but Parents did not return it signed. (S-50).
28. On March 8, 2011, the District convened an IEP Team meeting to discuss the Parents' concerns regarding the Student "shutting down" at home and showing signs of depression, Parents' feeling that the school wasn't meeting the Student's needs, and Parents' perception that the Student was struggling in all classes but one. (S-55).
29. At the time of the March 8, 2011 meeting, the Parents believed that the social studies teacher was doing a singularly good job of modifying materials for the Student, was responsive to their communications, and responded with regularity. S-55, NT at 486.
30. The Student's teachers reported progress during the March 8, 2011 meeting. (S-55).
31. In Reading, WRAP scores from March, 2011 place the Student's fluency at a 6th grade level and the Student's comprehension on grade level. Writing skills were also improving, but were not at grade level. (S-55).
32. All teachers reported that the Student was becoming more engaged, socially and academically, as the school year progressed. S-55.
33. During the March 8, 2011 meeting, the Parents again suggested a private placement. At that time, the Parents expressed their belief that the Student would benefit from a small group setting in which the Student "will not feel different." (S-55).
34. A S/L Pathologist attended the March 8, 2011 meeting. The S/L Pathologist concluded that the Student did not qualify for S/L services. At the same time, the S/L Pathologist hypothesized that the District could address the Student's auditory processing disorder with SDI. (S-55).
35. No changes were made to the December 20, 2010 IEP as a result of the March 8, 2011 meeting. (S-57).
36. The District issued a Permission to Reevaluate Consent Form dated March 10, 2011 for a speech and language evaluation was sent to Parents and it was signed by Parents on March 14, 2011. (S-58; S-59).
37. The District issued a NOREP dated March 25, 2011, which Parents returned to the District on April 4, 2011 noting their disapproval and requesting an independent neuropsychological assessment and a S/L assessment. (S-63, p. 3).
38. A S/L assessment was conducted by the District and a Reevaluation Report issued on July 25, 2011. (S-67). The RR concluded that, even though the Student performed within the average range for most subtests on the receptive and expressive language assessments, the Student qualified for S/L services based on

the results of a social language assessment. The RR concluded that the Student's needs could be met with SDIs through speech and language support. (S-67, p. 7).

### **2010-11 school year (5th grade) – Math**

39. A certified special education teacher provided math instruction to the Student from the beginning of the 5th grade school year until September 29, 2010 and from the third week of April 2011 through the remainder of the 5th grade school year. (NT at 2083-2084, 2088). A different certified special education teacher provided math instruction to the Student for the remaining portion of the school year. (2102-2103). Both math teachers communicated with each other during that time period and observed the class weekly. (2102-2104).
40. The Student received instruction in Everyday Math, which is a research-based program. (NT at 2084; 2104-2105; 2106; 2150). The Math class convened in the learning support classroom daily for 86 minutes each class period throughout the entire 5th grade school year. (NT at 2081-2082). There were between 8 and 10 students in [Student's] learning support math class. (NT at 2083).
41. The District re-administered the Key Math assessment in December of 2010. In that administration, the Student's overall math performance was assessed at an overall grade equivalency of 2.5; a half year decline from the previous assessment. (S-46, NT at 345).
42. The focus of the Student's Math instruction was the sequence of the Everyday Math curriculum, as opposed to the Student's IEP goals. The Student received a relatively small amount of instruction towards IEP math goals. The data that the District took is confusing and does not indicate more-than-trivial progress towards IEP goals. (S-62; NT at 2204-2208, 2214-15, 2247-2261, 2262-2277, 2306-08).
43. The Student had 22 absences, and 7 early dismissals during the 5th grade school year. As a result, the Student missed more than 10% of the math instruction that year. (NT at 2082; 2145-2148; S-82). The Student's absences interfered with the Student's ability to make progress in Math. (NT at 2147-2148).
44. The District administered the 4Sight assessment in September, November, February and May of the 2010-11 school year. On September 11, 2010, the Student scored a 12 out of 42 (Below Basic). On November 11, 2010, the Student scored a 10 out of 42 (Below Basic). On January 3, 2011, the Student scored an 11 out of 42 (Below Basic). On May 15, 2011, the Student scored a 25 out of 42 (Basic) (S-116, p. 1). The Student obtained these scores independently. (NT at 2098; S-116).

### **2010-11 school year (5th grade) – Language Arts**

45. A small amount of evidence suggests that the Student did not understand some Language Arts coursework in 5th grade and that particular parental requests for materials (books on tape) were ignored. (S-44; NT at 130, 358-359).

46. No evidence or testimony supports a lack of meaningful progress in Language Arts in 5th grade. The evidence and testimony, generally, supports a finding that the Student made progress in this area (e.g. report cards, progress reports, and standardized assessment scores). (NT at 2117-2118; S-48; S-62; S-79).
47. The Woodcock Reading Mastery Test-Revised was administered to the Student on September 15, 2011, only 2 weeks into the beginning of the Student's first year at the Private School. As such, this assessment measured the Student's performance coming out of the District (as opposed to the benefit of the Private School's instruction). (See NT at 1535, 1537-1538; S-112). Assessment results reveal that all standard scores were within average range (between 85 and 115) for all of the skills identified. (NT at 1537-1539). These standard scores are more accurate than grade equivalencies, but the Student's scores on this assessment indicate that the Student was performing at grade level. (NT at 1538-1539).

### **2010-11 school year (5th grade) - Speech / Language**

48. The Student was diagnosed with an auditory processing disorder by way of an independent S/L evaluation from a regional hospital on July 27, 2010. (S-32, p. 2, 3). The same report found that the Student exhibited appropriate expressive and pragmatic language. The evaluator recommended therapy due to an impaired ability to understand language in a functional conversational and/or academic setting and understanding nuances during spoken speech. (S-32).
49. More specifically, the S/L evaluation recommended participation in a social skills group to "practice interpretation of language in a structured setting with peers" and seven proposed therapy goals such as following increasingly complex directions and learning to evaluate facial expressions. (S-32).
50. Parents shared the July 27, 2010 S/L evaluation with the District at a meeting on October 5, 2010. (NT at 2128-2129; S-41).
51. Upon receipt of the independent S/L evaluation, the District indicated that it would seek to conduct its own assessment. The District did not seek permission to complete its own assessment until it issued a Permission to Evaluate form on March 10, 2011. The Parents executed the form, granting permission, and returned the form to the School District on March 14, 2011. (S-58, S-59).
52. After the District received the independent S/L evaluation, but before the District offered to conduct its own evaluation, the District convened an IEP meeting on December 29, 2011. No speech and language services were added at that time, and no speech and language pathologist participated in the meeting. (S-49).
53. The District did not begin its speech and language evaluation until June, 2011. The Parents made the Student available for testing during the summer break. (S-85)
54. On June 14, 2011, the District issued a speech and language evaluation report in which it found that the Student was ineligible for speech and language therapy as a



related service. This conclusion was based on the fact that the Student's processing skills were assessed to be within normal limits. (S-85, p. 132-133).

55. In a phone conversation with the Parents, District's speech pathologist explained that, when conducting the assessment, she has been unaware of the parents' concerns regarding the Student's social language skills. The District's speech pathologist offered to perform additional testing. (S-66; NT at 511-514).
56. On July 25th, 2011, nine months after receiving the independent S/L evaluation report, the District issued the parents a revised Reevaluation Report recommending the addition speech and language as a related service to address the Student's social language skills. (S67; NT at 515-519).
57. The School District scheduled a meeting to review the revised S/L findings on August 29, 2011 (a little over a month after the report was completed; approximately one week prior to the start of the school year; and after the District had received notice of the Parents' decision to place the Student at the Private School). (S-85; NT at 263).
58. At the meeting, the District advised the Parents that the Student's auditory processing disorder could be managed through SDIs, most of which were already in the Student's IEP (preferential seating, limit ambient noise, give short simple directions, break larger tasks down into smaller tasks, face the student and obtain [Student's] attention prior to giving directions, break larger tasks down into smaller tasks, face the student and obtain [Student's] attention prior to giving directions, graphic organizers, visual supports, assistance with note-taking). (S-85, S-26).

#### **2010-11 school year (5th grade) – Behavioral/Social**

59. Throughout the 2010-11 school year, the Parents reported that the Student displayed concerning behaviors at home (crying, screaming, slamming door, out of control). Notes taken during a March 8, 2011 IEP meeting demonstrate that the home behavior issue was discussed and that [Student] was presenting very differently at home than at school. (S-55, p. 2).
60. A District-employed behavioral specialist attended some of the meetings and would come into the classroom to observe the Student on occasion. (2138; 2140-2141; S-55).
61. During the October 5, 2010 meeting, social skills group involvement was discussed and the IEP was revised to include social skills instruction as a SDI. (1356; S-41; S-42, p. 2; S-49, p. 18).
62. The Student participated in a social skills group in the fifth grade but, SDIs notwithstanding, the group was not pursuant to the Student's IEP. Regardless, the group began meeting November. The group members were selected by the instructor, a school counselor, based on the students' ages and school schedules.

The Student had no contact with any of the other participants outside of the group sessions. Group sessions met for thirty minutes per week. (NT at 1362-65, 1399).

63. In November 2010, Parents emailed the District questioning the appropriateness of the social skills group. (1909-1911; S-43). The District addressed the Parents' concerns, and the Student continued to participate. (S-85, p. 268).
64. The social skills group ended on January 31, 2011 and Parents were given an option at that time of having the Student continue with individual sessions with the instructor, or move on to a new social skills group with a different instructor. The Parents chose to have the Student participate in the new social skills group. (NT at 1324; 1329-1330; 1332; 1334; S-85, p. 266-267).
65. The new instructor is a certified special education teacher with a master's in differentiated instruction. (NT at 1317). The new group met once a week for 30 minutes each session in an empty classroom. (NT at 1336-1337). The social skills class always started with an opportunity to share something with the group, including recent events or difficulties they were having. (NT at 1338). The instructor would then provide direct instruction of the skill chosen for the week with some guided practice, such as testing strategies, relaxation techniques, anxiety issues, peer relationships, and gaining positive attention. (NT at 1338-1340; 1344-1345). The group would then practice the skill with scripts and role playing. (NT at 1338). The final portion of the class would be some sort of application of the skill and then the students would set a goal for the week. (NT at 1338; 1341).
66. There were a total of 7 students in the new group, five of which were fully included students who demonstrated success in the general education environment with minimal supports. (NT at 1336-1337; 1339; 1347-1348). All of the students in the group except for the Student were on the autism spectrum, one had a specific learning disability as well. (NT at 1349). The instructor credibly testified that it was appropriate for the Student to be included in the second social skills group despite the other students' particular disabilities because all of the students were the same age, had the same schedule, displayed same/similar behaviors, and had the same/similar needs. (NT at 1349-1350).
67. The Student attended only one session of the second group. That session convened on February 7, 2011, and the Student was an active participant. (NT at 1342-1343; 1353). The Student already knew some of the other students in the group and engaged them by name. (NT at 1360). The Instructor also started to observe the Student walking in the line down the hallway, participating in general education settings like the classroom, the cafeteria, and specials. (NT at 1344-1345). The instructor emailed Parents to let them know that the Student fit into the group well and that she was pleased with [Student's] participation.
68. Around the same time, the Parents learned that the other students in the group had Autism diagnoses and, for no other reason, became concerned that the Student would be exposed to inappropriate behavior. (1351; 1353; 1911; S-85, p. 273-274,

280, 283, 287). Ultimately, the Parents chose to remove the Student from the second social skills group for no other reason than the other members of the group were diagnosed with Autism.<sup>11</sup> (1331; 1355; 1358; S-85, p. 21).

### **Independent Educational Evaluation**

69. The Parents asked the School District to fund an independent neuropsychological evaluation of the Student as early March 2011. (S-55, NT at 487-88). The Parents reminded the District of the request on March 21, April 3, and April 5, 2011. The District neither refused this request nor requested a hearing to prove the sufficiency of its own evaluations. (S-85 at pp. 240, 253, 260; NT@497-98, 510).

70. The District's response to the IEE request was by a letter of 8/20/11, approximately three days after receiving the parents' notice of their intent to place the Student at the Private School. The District offered a list of psychologists from which to choose, none of whom were acceptable to the Parents. (S-68). By this time, the Parents had already decided to have the work done by a neuropsychologist who had evaluated [Student] years earlier. (NT at 523-525).

71. The Parents obtained a neuropsychological IEE, and shared that report with the District. S-101, NT at 554-56.

### **Legal Framework**

#### **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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. 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). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

#### **Free Appropriate Public Education (FAPE)**

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

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<sup>11</sup> Testimony concerning appropriate behaviors in the second social skills group was credible. Speculation to the contrary was not credible. The Parent testified that the Student began to use inappropriate language after starting the second social skills group. (NT at 425-428). No evidence whatsoever indicates that the Student picked up that language from the group. All evidence suggests that no such language was present in the group. Therefore, even if the Student started to use inappropriate language after one session in the second group, that correlation does not prove causation – particularly in light of the compelling evidence against causation.

Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued, to offer a meaningful educational benefit to the Student in the least restrictive environment.

### **Compensatory Education**

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. Sch. 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)(explaining that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)

*M.J. v. West Chester Area Sch. District*, ODR No. 01634-1011AS (Skidmore, 2011)

### **Tuition Reimbursement**

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993).

The first step is to determine whether the program and placement offered by the District is appropriate for the child. Only if that issue is resolved against the District are the second and third steps considered, *i.e.*, is the program proposed by Parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *See also, Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

### **Right to an IEE at Public Expense**

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either— (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense...” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

It should be noted that parents always have the right to obtain an IEE, even when an LEA is not obligated to fund it. *See* 34 C.F.R. § 300.502(b)(3).

## **Discussion**

### **Math During the 2010-11 School Year**

During the hearing, substantial energy was spent to develop a record as to whether the District-selected Math program, “Everyday Math,” was research-based. Everyday Math is research based, but the relevance of that point is so small in this case that focus on this point was little more than a distraction. What matters here is that both parties acknowledge that the Student’s Math disability<sup>12</sup>, and that the Student did not make meaningful progress in Math. According to Key Math assessments, the Student regressed about half a school year during the first half of fifth grade. Even looking at the more favorable 4Sigh math assessment, the Student stagnated at the “below basic”

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<sup>12</sup> See S-109 at 11.

level from September until May. Then, the Student climbed to the “basic” level as measured by a single assessment.

The fact that the Student missed about 10% of all Math instruction is important, but not determinative.<sup>13</sup> The testimony and evidence, taken as a whole, shows that the near-exclusive focus of the Student’s Math instruction was designed to push the Student through the Everyday Math program. To whatever extent the Student missed Math instruction, it is a near certainty that the Student missed Everyday Math – as opposed to specially designed instruction targeting the Student’s disability.

The data that the District points to as evidence of progress on IEP Math goals is both scant and ambiguous. This is not to say that the Student’s Math teachers were not working hard, or that the Student derived no benefit whatsoever from Math instruction. Rather, there was a disconnect between the Student’s IEP and the Math programming that the Student actually received. Further, the Math goals are drafted in such a way that it is difficult to know what is to be measured.

Moreover, three standardized probes administered by the District demonstrate that the Student had not made progress. Not only did the Student remain “below basic” despite the teachers efforts, the Student’s numerical score on the 4Sight testing never deviated more than two points over three assessments. In Math, according to the District’s data, the Student was running in place. The District, therefore, had reason to know that the Student’s math programming was ineffective. This constitutes a denial of FAPE for which compensatory education is owed. Specifically, I will order one (1) hour of compensatory education for each day that the Student attended school during the 2010-11 school year to remedy the District’s failure to provide appropriate Math instruction to the Student.

### **Speech/Language During the 2010-11 School Year**

District personnel testified uniformly that the Student did not present as a student in need of Speech or Language support during the 2010-11 school year. This testimony evidences a focus on articulation (the mechanics of language) and expressive language (the ability to communicate thoughts linguistically). By focusing on these areas, the District overlooked the Student’s social language needs.

This oversight reached its zenith in the summer of 2011, when the District’s S/L pathologist did not know that social language was the Parents’ primary concern, and failed to evaluate that domain. Once the error was corrected, the District’s evaluation recommended the addition speech and language as a related service to address the Student’s social language skills. As noted, this conclusion came nine months after the Student was diagnosed with a central auditory processing disorder by an independent evaluator. Even then, the District’s S/L pathologist recommended SDIs that were already in the Student’s IEP.

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<sup>13</sup> The vast majority of the Student’s absences were medical in nature and were excused.

In sum, preponderant evidence demonstrates that the Student has social language needs resulting from an auditory processing disorder. The District first failed to identify this language need, and then, for nine months, failed to act on the information that it had. As a result, the Student never received programming to address social language needs during the 2010-11 school year. This is a denial of FAPE, but calculating what compensatory education is owed is a challenge. The record does not reveal precisely how many hours of programming the Student would have received even if the District had adopted every recommendation from the independent evaluation. The record is equally silent as to what effort it will take to remediate the Student. The clearest evidence on this point is the recommendations for “practice interpretation of language in a structured setting with peers” and direct instruction in the seven areas detailed in the independent report. (S-32, pp. 3-4). It is difficult to imagine any scenario in which those interventions could be provided effectively in less than two (2) hours per week. Therefore, I award the Student an additional two (2) hours of compensatory education for each week that school was in session during the 2010-11 school year.

### **Other Alleged Denials of FAPE During the 2010-11 School Year**

Other than the Math and Speech/Language deficits described above, the District provided a FAPE to the Student during the 2010-11 school year. The Parents’ claims regarding Language Arts are not persuasive, particular in light of the Private School’s testing. Whatever procedural defects there may be, independent, standardized testing reveals that the Student was not only working to potential, but was average as measured against a wide population of typical peers.

The other alleged denials of FAPE highlight the Student’s different presentations at home and at school. I have no doubt that the Parents’ testimony painted an honest picture of the Student’s behavioral presentation at home. The Parents’ efforts to have the Student complete homework were remarkable. But the Student’s refusal to do homework at home does not prove an inability to do the work itself, and the various teachers’ description of the Student in school were equally credible. The Student was hard-working and cooperative in school.

Further, no evidence supports the Parents assertion that the Student was socially ostracized or incapable of making friendships in school. Despite this, in recognition of the Parent’s concerns (and, maybe, upon seeing some symptoms of the Student’s undiscovered auditory processing disorder) the District recommended and offered participation in a social skills group. Preliminary evidence shows that the Student’s participation in the group (particularly the second group during the 2010-11 school year) was promising. Unfortunately, the Parents terminated that service simply because they did not want the Student to associate with other students who carry an Autism diagnosis. Consequently, even if I had been persuaded by the Parents’ testimony concerning the Student’s ability to form friendships in school, I would not hold the District liable for any failure to provide services that the Parents rejected.

## Tuition Reimbursement

As a threshold matter, the first prong of the *Burlington-Carter* test requires analysis of whether the District had offered a FAPE before the Student enrolled in the Private School. Some evidence and testimony suggests that the Parent refused to participate in IEP development at the start of the 2011-12 school year. Even if so, this fact may go to the equities of the matter, which are considered only if the first two prongs of the test are satisfied. Factually, the District's offer was the IEP in place at the end of the 2010-11 school year; set to expire in December of 2011.

As the analysis for compensatory education reveals, the Student's IEP at that time was neither entirely appropriate nor entirely inappropriate. Rather, the Student had been denied a FAPE in Math and, to a lesser extent, Speech/Language. The services that the Student received – thought the IEP – were otherwise appropriate.

The first prong of the *Burlington-Carter* test is often viewed as binary: FAPE was or was not offered. I decline to give such a literal reading to the test. I also decline to establish some arbitrary threshold at which an IEP is appropriate enough to pass (or inappropriate enough to fail). Rather, I look at the totality of the circumstances. In this case, many of the alleged programmatic deficiencies were not established. Of the two deficiencies that the Parents proved, one (Speech/Language) is interwoven with appropriate social skills services that the Parents rejected. The Math deficiency is far more serious. Even so, I decline to find that the District has failed to offer a FAPE in the broad *Burlington-Carter* sense of that term simply because the District failed to correct a correctable problem with its Math instruction. As such, the Parents have not satisfied the first prong of the *Burlington-Carter* test, and the analysis for the 2011-12 school year ends.

The Parents also claim tuition reimbursement for the 2012-13 school year, including ESY. The District offered a new IEP to the Student for the 2012-13 school year.<sup>14</sup> At this point, the Student had been out of the District for a year. Appropriately, the District obtained and considered all available information about the Student that was generated during that time, including IEEs and information from the Private school.

The Parents attack this IEP on the basis that it is vague and that it contains too few goals. The Parents also argue that I should look to the District's past practices and conclude that the District will not appropriately implement the IEP. I respectfully reject these arguments. The IEP captures an accurate snapshot of the Student's performance at the time it was written, clearly identifies the Student's needs and programs for them. Specific testimony regarding how the IEP would be implemented was credible. Consequently, I find that the District offered a FAPE to the Student for the 2012-13 school year. As such, the Parents have not satisfied the first prong of the *Burlington-Carter* test, and the analysis for the 2011-12 school year ends.

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<sup>14</sup> The offer was delayed by the Parents unavailability to participate in team meetings until October 2012.



## **IEE Reimbursement**

Under a traditional analysis, the Parents demand for reimbursement for the September 2011 IEE would fail. The Parents did not request an IEE in response to any District evaluation. However, when the Parents requested public funding for an IEE, the District neither granted the request or initiated a due process hearing. Rather, the District provided a list of evaluators, none of whom were acceptable to the Parents.

Noting in the applicable regulations allow the District to dictate who the Parents select to conduct the evaluation, and the District is affirmatively prohibited from delaying the process. 34 C.F.R. § 300.502(b)(4). Moreover, to whatever extent any school district believes that a parentally-selected evaluator “does not meet agency criteria”, it is the District’s obligation to request a hearing. *Id.*

Said simply, in this case, the Parents asked the District to fund an IEE and the District said “yes.” Because the District did not request a due process hearing, the District cannot now rely on the fact that the Parents did not choose one of its recommended evaluators as a defense. The District is, therefore, ordered to reimburse the Parents for the cost of the September 2011 IEE.

## **ORDER**

And now, April 29, 2013, it is hereby ordered as follows:

1. The District denied the Student a FAPE during the 2010-11 school year by failing to provide appropriate Math and Speech/Language instruction.
2. The Student is awarded one (1) hour of compensatory education for each day that the Student attended school during the 2010-11 school year to remedy the District’s failure to provide appropriate Math instruction to the Student.
3. The Student is awarded an additional two (2) hours of compensatory education for each week that school was in session during the 2010-11 school year.
4. The Parents are awarded reimbursement for the cost of the September 2011 IEE.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER