This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: J.K.

Date of Birth: [redacted]

ODR No. 3465-12-13-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Caryl Andrea Oberman, Esquire Shannon M. Rafferty, Esquire Law Offices of Caryl Andrea Oberman, LLC 705 North Easton Road Willow Grove, PA 19090
Downingtown Area School District 540 Trestle Place Downingtown, PA 19335-2643	Sharon W. Montanye, Esquire Christina M. Stephanos, Esquire Sweet, Stevens, Katz & Williams,LLP 331 Butler Avenue, P.O. Box 5069 New Britain, PA 18901
Dates of Hearing:	October 8, 2012; October 16, 2012; October 23, 2012; November 7, 2012; November 26, 2012; November 28, 2012; December 6, 2012
Record Closed:	January 7, 2013
Date of Decision:	January 22, 2013
Hearing Officer:	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 8.) Student attends a private high school (School), and previously attended the District's high school. The District has identified Student with Autism, Other Health Impairment and Speech or Language Impairment. (NT 9-10.)

Parents unilaterally removed Student from the District and placed Student in the School after disputes arose with the District at the end of Student's ninth grade. At that time, as part of a settlement agreement of the disputes, the District agreed to fund the private placement for three years. After three years, the District refused to pay tuition for the 2011-2012 and 2012-2013 school years. Parents assert that the District has failed to offer a FAPE to Student for the 2011-2012 and 2012-2013 school years, as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 58-59.) Parents seek tuition reimbursement for Student's placement in the private school during the 2011-2012 school year and the 2012-2013 school year. (NT 58-59.) Parents also seek reimbursement for the costs of transportation to the private school during both school years. Parents additionally allege violations of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504) [redacted].

The District asserts that the settlement agreement was time limited and expired. It further asserts that it offered Student a FAPE for both years in question, that the private school is not appropriate, and that it would be inequitable for the hearing officer to award tuition reimbursement. It denies any violation of section 504 or Pennsylvania law [redacted].

The hearing was concluded in seven half-day sessions[1]. The parties submitted written summations, and the record closed upon receipt of those summations.

ISSUES

1. Did the District fail to offer an appropriate program and placement to Student for the 2011-2012 and 2012-2013 school years?

2. Is the Student's current private high school placement appropriate?

3. Does equity support an order for reimbursement of private school tuition and transportation costs for all or any part of the 2011-2012 and 2012-2013 school years?

4. Did the District discriminate against Student on the basis of handicap, in violation of section 504 by denying Student access to services on the basis of handicap or by retaliating against either Student or Parents because of Parents' advocacy for Student?

5. [Redacted.]

FINDINGS OF FACT

1. Student suffers from multiple disabilities. Student is diagnosed with Oppositional Defiant Disorder, Asperger's Disorder, and Attention Deficit Disorder. Student also exhibits symptoms of depression and anxiety, as well as obsessive and compulsive thoughts and behaviors. Student is classified as a [redacted] child with a disabilities including Autism, Other Health Impairment and Speech or Language Impairment. (P – 27; S–12.)

2. Student has received specially designed instruction in written expression. Student also exhibits problematic behaviors and emotional difficulties. (NT 86 – 87.)

3. Parents and District were involved in a dispute regarding Student's education within the District; in September and October, 2008, the parties entered into a written settlement agreement, in which the District agreed to pay Student's tuition and transportation at the School for that school year and two subsequent school years. The District agreed to pay a specified sum for full tuition during the 2008 – 2009 school year, and one half of the tuition for the 2009 – 2010 and 2010 – 2011 school years. (NT 90, 279 – 283; S – 1, 2.)

4. Parents understood that this agreement would expire after three years. (NT 90, 558.)

[1] I agreed, over the District's objection, to limit the length of the sessions due to Parent's documented physical conditions and limitations. (HO-1, 2.)

5. The District was on notice that the Student would enter ninth grade upon enrollment at the School, and that, therefore, Student would be likely to need one more year of educational services after the agreement expired. (NT 89-95, 284-285, 467-469, 909-913, 1005.)

6. The School did not know the details of the agreement, and the agreement was not provided to them. (NT 91-92; 812-815, 853-854, 945-946.)

7. Through an error on its part, the District paid the tuition in full for the three years specified in the agreement, rather than paying one half of the tuition for the last two years as stated in the agreement. (NT 890-892; P-48 p. 2-3.)

8. Excess payments were carried over into the subsequent years, reducing the amount due from Parents. (NT 559-563; S-19.)

9. Parents brought these excess payments to the attention of the School, but not to the attention of the District. It is the School's standard business practice for the School to notify a school district that overpays, and to refund the overpayment. (NT 562-563, 946-947.)

10. Parents did not receive copies of checks or any notice when the District paid tuition to the School for Student. Parents received notice of payments made by the District when they received invoices from the School stating balances due. These were sent to Parents in the Spring or Summer of each year. (NT 100, 104, 297; P – 12, S-19.)

11. The School expected parents to apply for the following year from February through March; however, Parents were allowed to enroll Student as late as August for the 2011-2012 school year. (NT 815, 839; P-10, 12, 14, 23, 51.)

12. The School awards financial aid to parents depending on their need, after reviewing an application that includes financial information from parents. Financial aid awards are up to one half of the need established through review of family financial records, and are carried against the balance due from year to year. (NT 815-819, NT 837, 863-870; P-10, 12, 14, 23, 51.)

13. The School is a Pennsylvania licensed private college preparatory school with accreditation. It serves a wide variety of children with disabilities, including children with autism, learning disabilities and emotional disabilities or symptoms. (NT 458-459.)

14. The School provided specially designed educational services, including emotional support, as well as supports for written expression and organization. These were provided in a small, structured setting in which the staff coordinate differentiated teaching and emotional supports, a special staff of counselors provided intensive support, and the School demanded a high level of academic performance. (NT 93 – 94, 348-351, 358-380, 402-405, 650-658, 668-673, 683-687; P-25, 28.)

15. The School required Student to repeat ninth grade; the District was aware of this requirement at the time that the settlement agreement was entered into. (NT 94 – 95.)

16. Student's emotional difficulties and problematic behavior interfered significantly with Student's learning during the 2008-2009 school year; nevertheless, Student was able to make academic progress. (NT 96 – 98, 100-101, 103-105; P – 8, 9.)

17. Student's emotional state and behavior improved during Student's ninth, and tenth grade years at the School, the 2008-2009 and 2009-2010 school years. However, problematic behaviors continued to interfere with learning, including failure to complete homework assignments and problematic social behaviors. Student's difficulty with writing continued to interfere with learning. (NT 96, 100-101, 105; P-9.)

18. In eleventh grade, during the 2010-2011 school year, Student fell behind and barely passed Student's courses; faced with the possibility of being discharged from the School, Student made up work late in the school year and accepted the School's recommendation that Student repeat eleventh grade in the 2011-2012 school year. (NT 107-111; P-9.)

19. In the 2011-2012 school year, Student repeated eleventh grade; Student's behavior, social skills and school performance improved. (P-9.)

20. Student's self control, behavior, daily living, work habits and work product improved substantially during the second eleventh grade year, the 2011-2012 school year. (NT 102-105, 354-357, 388-392, 404, 424, 453-456, 474-475, 482, 488-489, 512-513, 692-696, 705; P-8, 9, 13.)

21. Student's writing has improved while at the School. (NT 403; P-8, 9, 13.)

22. In February 2011, Parents sent a letter to the District's Assistant Director of Support Services, requesting that the District agree to amend the contract for the Student's "last two years of high school" to include payment for transportation to a summer program required by the School for students entering senior year of high school. (NT 111-112; P-15.)

23. The District mislaid the letter, incorrectly stamped the letter as received on April 8, and did not respond to it. Through an error of the District staff, the responsible supervisor did not see it until July 2011. In July 2011, Parents sent another letter, asking the District to renew the contract for payment of tuition. (NT 111 – 117, 900-905, 913-914; S – 2, 3.)

24. The District's Assistant Director of Support Services retired after February 2011. The District's supervisor, responsible for implementing the settlement agreement after February 2011, did not review the settlement agreement until July 2011. The supervisor sent a letter to Parents dated July 22, 2011. In this letter the District declined to pay tuition for the 2012 – 2013 school year and noted a District overpayment of tuition in the amount of $23, 600.00 over the amount of tuition that the settlement agreement had obligated the District to pay in the 2009-2010 and 2010– 2011 school years. The District also offered to credit the balance of the overpayment to the 2011-2012 school year and summer 2012 session, which the agreement had not obligated the District to pay. Parents did not receive this letter until March of 2012. (NT 114, 537, 896-898; S – 3.)

25. Parents have had a recurring problem with mail not being delivered to their home. (NT 563-566.)

26. In its July 22, 2011 letter, the District offered to complete a re – evaluation should Parents choose to return Student to the District, and offered to provide an IEP if Student continued to need special education services. (S – 3.)

27. The District's responsible supervisor believed that the settlement agreement was set to expire in June 2011, that all payments had been received, and that the Student was scheduled to graduate at that time; thus, the supervisor did not believe that anything needed to be done with regard to Student's education. The previous Supervisor did not advise the new supervisor that Student had repeated ninth grade at the School, so the supervisor did not realize that the three year settlement agreement would not cover Student's senior year in high school. (NT 909-915.)

28. On August 17, 2011, the District sent a letter to Parents indicating that it had not received a response to its July 2011 letter, and offering to meet and plan programming for Student in the District for the 2011-2012 school year. (S-4.)

29. Student's father received this letter, called the District and left a message, indicating that he had not received the July 22 letter. The District supervisor mailed the July 22 letter again in September 2011, but did not return the phone call. (NT 114-115, 538, 549-550, 903-908.)

30. The District continued to send the bus to transport Student to the School during the first half of the 2011-2012 school year, Student's repeated 11th grade year. Parents interpreted this as the District's agreement to pay the tuition for the 2011-2012 school year. (NT 117-118.)

31. The District did not forward any Permission to Evaluate form, correspondence about an evaluation, or offer of placement, pertaining to the 2011-2012 school year. (NT 118-121.)

32. In December 2011, Parents were notified that the District had not paid tuition for the 2011-2012 school year. Parents asked their advocate to contact the District regarding tuition, and the advocate did this in February 2012. (NT 118-119; S – 8.)

33. On February 13, 2012, Parents' advocate sent an email message to the District's new Supervisor of Special Education, requesting that the District pay the School's tuition bill for the 2011-2012 school year. The message incorrectly asserted that the settlement agreement was "for the remainder of [Student's] high school tenure." It also incorrectly stated that the Student was "nearing the end of [Student's] high school tenure." (P-48 p. 1.)

34. On February 14, 2012, the District responded, declining to pay the School's tuition for the 2011-2012 school year, asserting that there had been an overpayment and offering to credit the overpayment to the School's tuition for the 2011-2012 school year, reiterating

its offer to re-evaluate and offer an IEP, and giving notice that transportation would be terminated. (P-48 p. 3.)

35. The advocate did not forward this letter to Parents before the District stopped providing transportation on March 5, 2012. (P – 48 p. 4.)

36. Parents sent a letter dated March 5, 2012 to the District's director of special education and pupil services, as well as to the supervisor for special education, grades 9 – 12 (Supervisor), requesting a resumption of transportation, payment of tuition for the 2011-2012 school year, and an independent educational evaluation (IEE). Parents also requested a meeting with the District, to discuss educational placement, prior to any change in placement. (P – 48 p.4.)

37. On March 5, 2012, the Supervisor responded, reiterating the District's position with regard to reimbursement of tuition, transportation, asserted over payment of tuition, the District's offer to reevaluate, an offer to begin a review of the last agreed upon IEP, and offering to schedule a meeting with Parents. (P – 48 p. 5.)

38. Parents orally requested a re-evaluation, and the District provided a Permission to Evaluate request form on a routine ten day schedule from date of oral request. (NT 915-920.)

39. Parents responded on March 12, 2012, expressing an intention to "plan [Student's] return to [the District] … ." and asserting that they had not received the July 2011, August 2011, February 14, 2012 and March 5, 2012 letters sent by the Supervisor until March 11, 2012. The Supervisor had sent copies of these letters to Parents' email address on March 5, 2012. (NT 129 – 130; P – 48 p. 6-10.)

40. By email dated March 12, 2012, the Supervisor attached a Permission to Re-Evaluate form and requested that Parents sign it. The Supervisor also offered to meet with Parents to plan Student's transition back to the District. The District met with the Parents on March 22, 2012 and discussed transition planning. The District also provided a draft IEP to Parents for review and subsequent discussion, but did not offer a NOREP or interim IEP to provide for Student's transition back to the District for the remainder of the school year. (NT 131-136, 146-147, 920-926; P – 48 p. 10.)

41. In March, 2012, Parents requested changes in the Permission to Re – Evaluate form, and the District added cognitive testing to the list of evaluation strategies. In April, the District received Student's educational records from the School. On or about April 24, 2012, Parents sent reports of Student's psychological and psychiatric evaluations to the District. (P – 19, 27, 48 p. 12.)

42. District personnel evaluated Student at the School in April 2012. The District's school psychologist observed Student in the classroom using a time sampling method, and administered various tests, including cognitive and achievement tests, a standardized test battery designed to assess memory, two standardized behavior rating scales, and a behavior rating inventory to assess executive function. The behavior rating scales and inventories solicited information from Parents, the Student and Student's teachers. In

addition, the psychologist reviewed extensive school records, and medical and psychiatric reports. An occupational therapist and speech and language pathologist provided evaluations. (P – 31.)

43. The District issued a re-evaluation report dated May 15, 2012, and Parents received it on May 19, 2012. The report identified Student with Autism, Speech or Language Disability, and Other Health Impairment. [Redacted.] The report recognized previous medical diagnoses of Attention Deficit Hyperactivity Disorder, Specific Learning Disability in written expression, "auditory and language problems" (in 2003) and Asperger's Syndrome. It noted a history of rule out diagnoses including Mood Disorder Not Otherwise Specified and Depressive Disorder Not Otherwise Specified. The report also noted a history of symptoms related to Obsessive Compulsive Disorder and Oppositional Defiant Disorder. (S-12.)

44. Student had been diagnosed with Oppositional Defiant Disorder, Mood Disorder NOS, Provisional, and Parent-Child Relational Problem. (P-35.)

45. Parents asserted various deficiencies in the District's re-evaluation report and requested an Independent Educational Evaluation (IEE). Parents asked the District's school psychologist to provide raw data from testing to the independent evaluator but the documents had been destroyed. (NT 152-158; P-32, 40.)

46. In June 2012, Student was hospitalized for threatening behavior after cancellation of a planned meeting to discuss transition to the District high school. At about the same period of time, Student admitted to a psychologist evaluating for eligibility for home services that Student had thoughts of suicide but would not act on them, and that Student was sad due to the impending transition from the School to the District's high school. (NT 163-170; P-35, 38.)

47. On June 27, 2012, the District convened an IEP meeting to discuss a draft IEP. The draft IEP was based upon the May 2012 re-evaluation report and listed the disabilities and educational needs that the May 2012 re-evaluation report had identified. The IEP present levels listed academic, developmental and functional needs regarding attention; fine motor skills; expressive language; planning; writing output, organization and planning; social skills; emotional self regulation; materials management and organization; cognitive rigidity; continued development of career interest areas; expressive and receptive language; and summarization and analysis. (P – 39.)

48. The IEP listed services that Student was receiving at the School, as reported by Parents. (P – 39.)

49. The IEP offered placement in itinerant learning support, with direct, explicit teaching in social skills and organizational skills for 2 to 3 class periods per cycle, in the special education setting, as well as structured academic monitoring by special education staff, to support task completion and focus. (P – 39.)

50. The IEP offered goals for postsecondary education and training, including enrollment in specialized programs according to student's interests and aptitudes; a summer program at

a local university; self advocacy; time management; completion of an interest inventory; completion of a personal resume; and information, counseling and guidance on accommodated post secondary education. The IEP also offered an independent living goal for accessing community supports and services; and direct social skills instruction for emotional regulation, peer interactions, and self advocacy skills. (P – 39.)

51. In discussion at the IEP meeting and in the IEP, the District raised the possibility of Student attending a two year post secondary school, but also adverted to the possibility of Student attending a four year college; the IEP provided opportunities and support for Student to find appropriate programs of each kind. (NT 566-567; S-13.)

52. The IEP offered measureable goals for organizational skills, behavioral self-monitoring, and producing independent assignments. The IEP also offered speech therapy goals for receptive and expressive language, social pragmatics and conversation skills. (P-39.)

53. The IEP offered modifications and specially designed instruction that addressed Student's needs with regard to: rigidity and aversion to change; planning and organizational skills; attention and focus; understanding of instructions; planning and completion of long-term writing assignments; misinterpreting directions; processing speed; note taking during class; scaffolding for writing assignments; organizational skills; chunking of assignments into sequential steps; difficulty working with others (teacher to select lab partner expected to complement Student); laptop with organizational software; email access to teachers; written directions for assignments; need to leave classroom to visit bathroom and nurse; and locker organization. The IEP did not offer to provide software for writing supports, and did not offer direct one to one support for written expression. (NT 188-189; P – 39.)

54. The IEP offered a transition goal providing an independent living opportunity at a local university; Parents would have to pay part of the fee for this opportunity. The IEP offered a goal for self-monitoring of behavior. It also included teacher-directed specially designed instruction with regard to locker organization and clean out. The IEP did not offer direct, explicit teaching of skills to replace hoarding behavior or doing household chores. (NT 345 – 346, 398-401; P – 39.)

55. The IEP did not include a transition plan for transitioning Student to the District, until after Parents requested due process and a resolution meeting was held, at which time the District was aware that Student would be returning to the District. (NT 1096; P – 39, 41.)

56. The IEP offered a crisis intervention plan, including passes for nurse; pre-determined contact persons on staff; pre-determined "safe places"; staff awareness of triggers and signs of anxiety; positive coping strategies for anxiety; follow-up and reflection on negative behaviors; positive consequences; and case manager follow-up to assure completion of missed assignments when student needs to leave the classroom. The School provided many elements similar to the elements of this plan. (NT 439-444, 700-703, 710; P – 39.)

57. The IEP offered a Functional Behavioral Assessment to be completed within the first month of Student's return to the District's high school. (P – 39.)

58. The IEP offered the following related services: counseling (15 minutes per week for one semester); occupational therapy consultation (45 minutes per semester); and speech and language therapy (two 30 minute sessions per week for one year). (NT 198 – 201; P – 39.)

59. [Redacted.]

60. The Notice of Recommended Educational Placement (NOREP) offered on June 28, 2012, reflected the services provided in the IEP provided on June 27, 2012. (NT 178 – 180; P – 39.)

61. The NOREP also provided that Student would graduate from high school by the date of expiration of the IEP, June 28, 2013. This had not been discussed in the IEP meeting. Parents did not decline to sign the NOREP due to disagreement with this provision. (NT 178 – 180, 338 – 339; P – 39.)

62. Specific courses were listed in the IEP; however, certain courses were retained in the list despite Student's indication that Student was not interested in those courses. [Redacted.] Student also indicated that Student did not want placement in the vocational technical high school, but the IEP offered it nonetheless. (NT 183 – 184.)

63. During the IEP meeting, District staff told Student that some of Student's unusual behaviors when experiencing anxiety might lead to discipline, because not all high school staff would accept those behaviors, or know that they were related to Student's disabilities. Given the size of the high school, and the number of staff, such consequences could not be avoided, if Student should choose to be oppositional when redirected for such behaviors. (NT 187 – 188, 226 – 229.)

64. During the IEP meeting, District staff indicated that the program in conjunction with a local university could be obtained without charge; however, the operators of the program advised Parents that a fee would be required of them. (NT 189 – 190.)

65. On July 6, 2012, Parents disapproved the IEP and NOREP and requested mediation. By letter dated July 9, 2012, the District declined to participate in mediation with regard to the IEP and NOREP. (P – 41, 42, 43.)

66. Parents' primary concern was that Student's transition from a small, highly supported school for children with learning differences to a large public high school required such complex plans for transition and support that there was too much risk of failure. (NT 193 – 195, 233 – 239.)

67. In the summer of 2012, Student believed that Student was going to transition back to the District high school. Student joined [two high school activities] and did well participating in these activities at first, although Student later withdrew due to Student's

emotional difficulties and the anxiety caused by the prospect of transferring from the School to the District's high school. (NT 243 – 251.)

68. Student recently visited Student's sibling who was living away at college. (NT 781.)

69. Parents currently owe over $5000.00 to the School on account of tuition and fees not paid as of the end of the 2011-2012 school year. (NT 837; P-23.)

70. In the summer of 2012, the School offered to allow Student to continue at the School despite the non-payment of tuition for the 2012-2013 school year and despite the balance due as of the end of the 2011-2012 school year, pending the results of this due process request. (NT 838.)

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.[2] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[3] 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

[2] 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).

[3] 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.

"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 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 (3rd 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 (3rd 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 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd 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. Parent alleges a failure to provide a FAPE during two school years: the 2011-2012 school year and the 2012-2013 school year. Regarding the 2011-2012 school year, I conclude that the District failed to offer a FAPE. Regarding the 2012-2013 school year, I conclude that the District offered a FAPE.

2011-2012 School Year

The District made no offer of services at all during this year. This was not a deliberate decision on its part, but is due to a series of misunderstandings and a remarkable lack of communication among the three parties involved. The issue before me is whether or not the District's errors were sufficient to deny Student a FAPE. I so conclude.

The record is preponderant that, when the District entered into the settlement agreement that provided for three years of Student's education, the District knew that Student would repeat ninth grade at the School. This was a decision by the School as a condition of admitting the Student. Parent credibly testified that the former supervisor of special education knew this; the District did not present any evidence to the contrary. The record shows preponderantly that this was not conveyed to the replacement supervisor when the supervisor with knowledge of this retired. Nevertheless, by a preponderance of the evidence, I conclude that the District was on notice that the three year settlement agreement would not provide educational services for Student's senior year at high school, based upon what the parties knew when the settlement agreement was executed[4].

Parents notified the District that Student would need additional educational services in February 2011, by letter. If planning had commenced within thirty days of this date, there would have been enough time for the District to evaluate and for an IEP team to develop an educational plan including a plan for Student's transition back to the District. Given the School's flexibility

[4] When they executed the settlement, the parties expected that the 2011-2012 school year would be Student's senior year; however, Student repeated eleventh grade in that year. Nevertheless, this distinction does not obscure the essential point that the District was on notice when entering into the settlement agreement that Student would need educational services in the 2011-2012 school year.

with application dates, the record shows that Parents would not have been forced to enroll Student before any District planning process would have been completed.[5]

The District received this letter, but, through a series of clerical errors, did not respond to it until July 2011. Meanwhile, the responsible supervisor of special education was unaware that there was a problem, and did not take any steps to ensure that the Student would receive services for the 2011-2012 school year. Parents credibly testified that they did not receive the July letter, due to problems with their receipt of mail generally at their post office address. In August, the supervisor sent a follow-up letter. This one was received, and the Student's Father called the supervisor, leaving a message that the supervisor admitted receiving in a timely fashion; however, the supervisor did not return the telephone call. Instead, at some time in September, 2011, the supervisor sent the July letter again in response to the Father's telephone message.

The Parents denied receiving this re-sent letter, and the District offered no evidence other than the supervisor's statement that he re-sent it in September 2011, by U.S. mail. I find the testimony of the supervisor and both parents to have been credible; however, Parents provided one additional piece of evidence. The District muddled its message when, on day one of Student's 2011-2012 school year, the District sent transportation pursuant to the very agreement that the District was now disavowing. Indeed, the District continued to provide the Student with transportation to the School until March 2012; apparently the responsible supervisor was unaware that it was doing so. I therefore cannot conclude, in the face of these contradictory

[5] The record shows that the Parents might have been required to make a deposit to hold Student's place in April, as Parents had done previously. However, the School was lenient with Parents twice in allowing them to enroll Student at the School in August for the upcoming school year. Thus, even a plan offered in June would have most likely allowed Parents to participate meaningfully without losing Student's place in case they should ultimately decline any ensuing offer from the District.

facts, that Parents were clearly on notice that the District was not going to pay for the 2011-2012 school year at the School.[6]

Aside from the issue of whether or not the Parents were fairly on notice in September that the District would not pay tuition, it is critical that the District did not even attempt to communicate their refusal of tuition payments until July. Even if an evaluation and IEP planning process had been started at this point – in the middle of summer when the schools are closed – there would not have been time to plan a careful transition for Student back to the District's high school by September. I find by a preponderance of the evidence that any plan to move Student back to the District would have required considerable lead time. Such a move would have seemed enormous to Student at Student's stage in life. Student at that time was fragile emotionally and behaviorally. Student exhibited a rigid emotional resistance to transitions (especially without adequate advance notice), emotional lability, serious oppositional tendencies, severe anxiety and the propensity to engage in self-defeating and even violent behavior at times. I conclude that any plan to move Student during Student's second eleventh grade year would have required a gradual transition with multiple levels of support. This most likely would not have been accomplished by September, even if started in July; thus, the District's expression of its position, even in July, came too late to prevent Parents from incurring tuition costs for Student at the School for the 2011-2012 school year.

By September, the Student was back at the School for the start of the Student's repeat of eleventh grade. The Student evidenced improved behavior, commitment to learning and cooperation. Student participated appropriately, did Student's homework, and showed success in

[6] The ambiguity thus conveyed by the District with regard to its position disposes of the District's argument that the Parents knowingly accepted a benefit because of which they now owe recompense based upon the equitable principle of quantum meruit.

the repeated eleventh grade. Teachers noted that Student seemed to have matured and seemed to have shed some of the labile emotions and behaviors, including compulsive behaviors, that had interfered with learning in the previous year. Student improved academically and made notable academic progress.

It was not until January 2012 that the Parents were notified that the District was not paying for Student's tuition for the 2011-2012 school year. They engaged an attorney, who limits her services to attempting to negotiate disputes, to attempt to obtain payment for the 2011-2012 school year. By the end of February or the beginning of March, it became clear to Parents that the District was unwilling to pay the tuition for the 2011-2012 school year. An evaluation process started, and by June 2012 the District had offered an IEP for Student's transition back to the District for Student's senior year. From February forward, the District moved forward with deliberate speed to provide a comprehensive plan of special education services and transition lead time and support.

On this record as a whole, I conclude that the parents have proven by a preponderance of the evidence that the District failed to offer Student a FAPE for the 2011-2012 school year. The evidence does not show that this failure is attributable to the Parents' behavior. Therefore, I conclude that the first stage of the Burlington-Carter analysis is met with regard to the 2011-2012 school year. Before addressing the second stage of that analysis, however, I will address whether or not the District offered Student a FAPE in the 2012-2013 school year.

2012-2013 School Year

The record on both sides provided this hearing officer with both facts and expert opinions assessing whether or not the District's offered IEP, when conveyed to the Parents, was

reasonably calculated to provide student with a reasonable opportunity to receive educational benefit. I heard this testimony and read the experts' reports. I also reviewed the re-evaluation report and the IEP ultimately offered, as well as the NOREP embodying the placement offered for the 2012-2013 school year, and the other pertinent documents. On the record as a whole, I conclude that the District offered a program and placement to Student that met the standards of the IDEA.

The District re-evaluation provided evaluations by three qualified evaluators, a school psychologist, occupational therapist and speech and language pathologist. The psychologist utilized a variety of strategies, including standardized cognitive and achievement testing, personal observation utilizing a time sampling methodology, soliciting behavior inventories from Parents, teachers and Student, and review of Student's educational records and private medical reports. The psychologist utilized multiple cognitive tests, and reported in detail the School's curriculum based testing. The occupational therapist and the speech and language pathologist utilized multiple tests, some of which were standardized, as well as personal clinical observation. I conclude that these strategies and this methodology were appropriate to uncover all of Student's suspected disabilities.

The District re-evaluation report appropriately identified all of Student's educational needs, and its offered IEP addressed them appropriately. While certain summary paragraphs in the re-evaluation report did not include every medical diagnosis that Student had received over Student's lifetime, I conclude that the report as a whole fairly set forth the diagnostically significant medical and educational history. While certain diagnoses had been rendered that were addressed in the report as merely symptoms of disorders, rather than diagnosed disorders, I conclude it was sufficient that the report recognized the significant symptoms that interfered with

learning, so that the educators could address those concerns. Overall, the re-evaluation did an appropriate job of identifying those concerns, and the educational needs arising from them.

I further conclude that the IEP appropriately addressed all of Student's educational needs, sufficient to reasonably enable Student to benefit from the District's pertinent educational services. I reviewed the IEP carefully with regard to the needs identified in the re-evaluation, as a basis for this conclusion. 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.

The IEP was individualized, in that it took into consideration Student's earned academic credits from the School and adjusted Student's schedule so that Student could receive considerable post-secondary transition services and related services. The latter would have included explicit training and other opportunities to learn social and expressive language skills addressing needs identified in the re-evaluation report. In addition, the IEP was individualized in that it offered a number of opportunities for enriched learning, including advanced courses and an opportunity to participate in a summer program at a local university; while the latter would have required financial participation by Parents, the District's share of the cost was far greater, and the suggestion was not unreasonable from that point of view.[7]

The IEP offered an appropriate program. It offered explicit training in a special education setting for social and expressive language skills and organizational skills. It provided for inclusion in academic courses, specials and social opportunities. It offered goals to address postsecondary education and training, and an independent living goal for accessing community

[7] Parents point out that the cost to Parents for room and board at the university contrasts with the IDEA's requirement that educational opportunities must be "free." However, the Parents' share would have been for room and board, not the educational portion of the opportunity offered.

supports and services[8]. It included goals addressing organizational skills, behavioral self-monitoring, and producing independent assignments receptive and expressive language, social pragmatics and conversation skills. The program modifications and specially designed instruction (SDI) were comprehensive. I conclude that the goals addressed Student's educational needs sufficient to provide Student with a reasonable opportunity to receive meaningful educational benefit, given Student's educational potential.

The IEP also offered a crisis intervention program that provided for extensive supports to help Student integrate into the District's high school. I conclude that these provisions were appropriate supports, both for crises and for transition to the District[9]. Some of the strategies set forth in the crisis plan mirror supports provided by the School's program for Student. All of them address the most acute need for support: the Student's emotional and cognitive inflexibility, emotional lability, and atypical behaviors when under stress.[10]

---

[8] Parents argue that the IEP inadequately addressed many of Student's poor habits regarding independent living, such as various issues of personal hygiene and self care. I agree that the IEP could have addressed these issues more directly; however, I note that the record shows that these self-care and hygiene issues arose habitually when Student's emotions became labile due to stress. The IEP addressed emotional self-regulation through a goal and through support by various staff – similar to the supports offered at the School, where self care and hygiene issues had dissipated over the years. It was reasonable, therefore, for the District to conclude that the best way to address these issues was not direct explicit teaching, as Parents seem to suggest, but indirectly by addressing the emotional regulation issues that caused the personal care issues to arise from time to time.

[9] The absence of a transition plan was a defect in the District's offering at the time of the IEP meeting. The subsequent and belated transition plan offered by the District offered additional elements. Given the obvious need for care regarding transition, I considered whether or not this defect was fatal to the IEP. I conclude that it was not sufficient to negate the appropriateness of the IEP, because substantial support was provided in the crisis plan, and the failure to provide the added elements of a transition plan was due to the repeated impasses reached between the parties on other issues not related to transition. When Parents rejected the IEP and NOREP, they were doing so out of a disagreement with the placement, not the lack of a transition plan; it would have appeared superfluous to the District at that point to offer a transition plan.

[10] Parents argue that the crisis plan was not a transition plan; however, Parents did not show by a preponderance of the evidence both that they had proposed additional measures to be part of a transition plan and that the District was unwilling to add supports to its plan if needed. Based on the record as a whole, I conclude that the District was more than willing to provide additional supports if reasonably thought to be needed.

[Redacted.]

Parent introduced evidence to show that the placement offered by the District was inappropriate. This included testimony and opinions from Student's Mother, an expert in [educational] programming, the Student's special education teacher at the School, a psychiatrist who treated Student for one week in a psychiatric crisis unit, and a behavior specialist from Student's home program.

Student's Mother offered her opinion based upon her experience with Student's fragile stability and tendency to over-react to adverse events with oppositional and even violent behavior, and a tendency to increase social withdrawal, hoarding and symptoms of depression (such as anxiety, irritability, sleep problems and abandoning personal hygiene). While I credit Student's Mother with knowledge of Student in the home, sufficient to opine about Student's likely reaction to transitioning back to the District, I give her opinion reduced weight with regard to the likelihood that the District's supports would be appropriate within the meaning of the term as applied under the legal standards of the IDEA. Student's Mother is not sufficiently knowledgeable regarding the District's resources and the programming that it could provide. This is illustrated by her inaccurate characterizations of a number of the services that the District offered in its IEP. I compared Parent's testimony about what the District was offering with the written IEP in some detail. I found that Parent repeatedly failed to acknowledge offered services that addressed many of her own concerns for Student.[11]

[11] Moreover, in a number of matters, the District offered services and the Parent's chief criticism was that it did not offer something else or something more. Given that the IDEA requires a "basic floor of opportunity" rather than maximization of a child's opportunities, it follows that the IDEA does not require school districts to offer everything that a parent might desire or ask for. Sinan L. v. School Dist. of Phila., 2007 U.S. Dist. Lexis 47665 (E.D. Pa. 2007). The Student's Mother's approach was, understandably, to demand the best possible services, far exceeding the lesser demands of the law.

Parents also offered a written report by an expert in the education of adolescents with [exceptionalities including autism]. This expert opined that Student was just learning to control behavior and function within the framework of the educational system at a highly structured and supportive school; the expert concluded that Student would not be able to succeed in the general education environment of a large public high school.

I am not persuaded by this report, and I give it minimal weight. The expert did not testify, and was not subjected to cross examination. Moreover, the expert's report did not disclose any depth of knowledge regarding what services the District was offering. The report mentions only that the expert reviewed the District's re-evaluation report; it does not mention even a review of the IEP. While Parent testified that she provided the IEP to the expert, the report does not advert to it in any detail. The ultimate opinion is based upon a contrast between the supportive environment of the School and a purely regular education environment. There is no assessment of whether the District's offered supports would change the expert's opinion.

The Student's special education teacher opined that Student was not able to succeed outside of a structured and supportive school setting such as offered by the School. The teacher was particularly concerned about the discussion at the IEP meeting in which Student was told that some of Student's recurrent behaviors when stressed would result in discipline in the public school – including Student's [particular behaviors].

I was not persuaded by this opinion testimony. The teacher did not show any familiarity with the District's environment or programs beyond attending one IEP meeting and reviewing the IEP. I also accorded less weight to this opinion in context of the teacher's other less convincing testimony, in which the teacher was not hesitant to criticize some of the speech language goals in the IEP with no expertise in speech and language pathology, very little

background in writing IEP goals, and very limited knowledge of the District's speech and language program. This reflected on the reliability of the teacher's assessments of the District's programming.

This witness also criticized the related services offered in the IEP, particularly that the counseling offer was far too little time. The witness based this entirely upon the allocation of responsibility at the School, without considering whether or not some of the Student's counseling needs would be provided by other members of the District staff at the District's high school. (NT 1064.) Thus, I cannot give this opinion sufficient weight to conclude that the related services in the IEP are facially inadequate.

I accord little weight to the affidavit by the psychiatrist. This physician saw the Student in course of only a one week inpatient stay. There is no evidence that the psychiatrist knew anything about the programming options recommended in the re-evaluation report, and no evidence that the psychiatrist's opinion was ever conveyed to the District prior to its offer of services in June and July 2012.

The psychiatrist's factual assertion (that Student confessed suicidal thoughts due to the impending transfer to the District) was not subjected to cross examination; however, it is consistent with other reports in evidence that Student reported suicidal thoughts at about this period of time, when the impending transfer to the District was causing stress. Nevertheless, the affidavit gives no context, and does not quote Student. Thus, the causal link to the impending transfer cannot be given weight, since it is the psychiatrist's impression, rather than a reliable recounting of the entirety of what Student actually said. Moreover, the affidavit gives no hint of the severity of the alleged suicidal thoughts – that is, there is no context from which to conclude that the thoughts might be acted upon. Nor can it be assumed that the thoughts would re-occur

later upon an increase of stress such as a transfer to the District, especially given that the psychiatrist had prescribed medication which could have been expected to lessen the risk of such thoughts.

In sum, the psychiatrist's warning is not to be taken lightly, and it clearly warrants reliable monitoring. However, it does not furnish a basis for reliably predicting that Student would fail to make a transition to a District school. Nor is it clear that the District was aware of Student's confidential statement to a psychiatrist at any time before it offered services – many of which promise careful monitoring of Student. Thus, on the legal issue before me, the affidavit is insufficiently convincing that the District's offered placement was not reasonably calculated to provide a FAPE at the time at which it was offered.

Parents also brought forward a behavioral specialist who worked with Student in the home program. This individual opined that the amount of counseling services offered in the IEP was inadequate. However, similar to the School's teacher, this witness did not demonstrate knowledge of the District's programs, and did not know what these counseling sessions would entail. The witness had not even read the IEP. The witness did not know whether or not other District staff would be providing the kind of day to day support and guidance that the witness opined was necessary. For these reasons, the witness' opinion was not persuasive to me.

While I find all of these opinions to be of concern, and have given some of them weight, I do not find them sufficient to warrant the conclusion that the law requires as a predicate for finding that the District failed to offer a FAPE. As discussed above, the District is required to offer special education services that are reasonably calculated to provide Student with

meaningful educational benefit. This evidence, while it gives pause, is not preponderant that the District's placement and IEP are not so reasonably calculated.[12]

Parents argue that the IEP was deficient because it did not address deficits in written expression. I conclude that this is not enough to render the IEP inappropriate, because the re-evaluation report did not identify Student with a specific learning disability in written expression. Moreover, the Student's recent performance in the School at the time included successful performance on written reports, indicating reasonably to the District that the Student had made progress in those skills to the point that there was not need for special education on basic written expression skills. Yet the written assignment goal was reasonably calculated to address any needs that this high school senior might have in that area.

Parents raise the argument that the District conditioned its offer of FAPE inappropriately upon Parents' agreement to Student's graduation at the end of the 2012-2013 school year. I conclude that this argument does not render the District's offer inappropriate, because the Parents did not base their rejection of the NOREP upon the graduation provision in the NOREP. (NT 338-339.) Therefore, I do not reach the question whether or not an otherwise valid offer of a FAPE is rendered invalid by inappropriately conditioning the offer on parental acceptance of an inappropriate graduation requirement.

In a line of their summation, Parents assert that the District pre-judged Student's placement to be the District's high school. The only evidence that they point to is that the District offered to plan for Student's return to the District. There was not preponderant evidence

[12] I note that the weight of evidence is a function of its persuasiveness and quality, not its quantity. The quantity of expert opinions on placement certainly gave me concern, but when analysed, each expert opinion failed to take into account the realities of the District's programming and offer of services. Even taken together, these opinions failed to supply that missing predicate to a valid prediction that Student would likely not succeed in transition to the District.

that the District LEA at the IEP meeting was unwilling to consider an alternative placement; thus, Parents have not proven this contention.

APPROPRIATENESS OF THE SCHOOL

Under the Burlington Carter analysis, I am required to determine whether or not the School was an appropriate placement for Student. In so doing, I am not required to apply the same standards that the IDEA applies to District programs. Sinan L. v. School Dist. of Phila., 2007 U.S. Dist. Lexis 47665 (E.D. Pa. 2007). In particular, I am not required to apply the IDEA's mandate for the least restrictive environment. Ibid. Thus, the law recognizes that when faced with a failure of the public schools to offer what the IDEA requires, Parents are not to be denied relief because they were unable or even unwilling to find a placement that meets IDEA standards.

In the present matter, I conclude that the placement was appropriate. The School provided Student with a small, highly structured academic environment that addressed Student's academic, emotional, social and life skills needs effectively at a time when Student's emotions and behaviors were a serious impediment to learning. The School individualized its response to Student's needs, bending rules when necessary, and providing a virtual "wraparound" support during the school day. Teachers in the small School staff differentiated instruction and accommodated classroom structures to meet Student's emotional need to disengage and seek support during the school day. The School maintained a staff of counselors who provided active intervention in Student's emotional highs and lows, as well as counseling to help Student learn self awareness and emotional and behavioral control. The academic program was nevertheless demanding, and when Student failed to meet high academic expectations appropriate to

Student's cognitive potential, the School refrained from dismissing Student; rather it required Student to repeat eleventh grade, a consequence that proved remarkably effective. Student made progress academically, emotionally and socially.

In sum, the School provided an appropriate program and placement to Student. Thus, with regard to the 2011-2012 school year, the Parents have met their burden under the second level of the Burlington Carter analysis for tuition reimbursement.

EQUITIES

As discussed above, I conclude that the District must bear some responsibility for the fact that it was unable to offer a FAPE for the 2011-2012 school year in a timely fashion. The lack of communication from February 2011 to September 2011 was largely its responsibility, as discussed above. The further delay in proceeding with re-evaluation and IEP planning - due to the District's mistaken provision of part of the services agreed upon in the settlement agreement – cannot be laid at the feet of the Parents; at worst, they only share responsibility with the District for this miscommunication. Given these facts as I have found them, I conclude that the equities do not favor the District with regard to this year. Rather, at worst, Parents and the District share the responsibility for this year equally. Therefore, I conclude that the equities do not militate against ordering the District to pay Student's tuition and transportation costs at the School for the 2011-2012 school year, and I will so order.

Nevertheless, the District raised its overpayment of tuition for the 2009-2010 and 2010-2011 school years. The District had agreed to pay one half of the School's tuition for those years, but, again through some error on the part of the District, it paid the full tuition. Neither the Parents nor the School notified the District of this error; rather, both accepted these payments

and the payments were applied to reduce the Parents' obligations over the three year period. It would be inequitable not to credit these overpayments to the District's obligation pursuant to the order below. Therefore, I will order the District to pay to the School the full tuition and transportation costs for the 2011-12 school year, minus the District's overpayment of tuition in the 2009-2010 and 2010-2011 school years.

The District argued that it should also have been credited with any "scholarship" discounts that the School made available to the Parents in the three years. I have no basis to accept that argument. I agree with Parents that an administrative hearing officer under the IDEA has no jurisdiction to construe a settlement agreement. Therefore, I cannot determine whether or not the District's agreement encompassed hardship "scholarship" awards by the School to Parents pursuant to the Parents' applications. On the record as a whole, and without resort to the agreement itself, I see no equitable basis to offset the District's obligation under this decision by all or part of the scholarships awarded to Parents in this matter.

SECTION 504 DISCRIMINATION

I conclude that the District did not violate section 504 by denying Student a FAPE in the 2012-2013 school year. Parents, however, couch their section 504 argument in terms of discrimination and retaliation on the basis of advocacy on behalf of a student with a handicap as defined under section 504. I find no evidence of this in the record, and I deny this basis for Parents' claim for relief.

Parents did not provide preponderant evidence that the District retaliated against them or the Student on account of their advocacy. The District's failure to comply with the IDEA was not advertent. It was a failure to communicate internally due to an imperfect transition to a new

supervisor responsible for managing the settlement agreement. At most the failure was negligent. There was no evidence of discriminatory animus or that the District's negligence was somehow because it was dealing with the interests of a child with a section 504 handicap. Nor was there evidence that the failure was due to Parents' advocacy on behalf of their child. On the contrary, the record is replete with evidence that the District listened to Parents and solicited their views during the re-evaluation and planning process. Therefore I do not conclude that the District violated section 504.

[Final discussion paragraphs redacted.]

CONCLUSION

I conclude that the District failed to provide or offer a FAPE in the 2011-2012 school year, but did offer a FAPE in the 2012-2013 school year. I find that the School provided an appropriate placement, and that the equities do not preclude an order for tuition reimbursement and travel costs for the 2011-2012 school year. I conclude that there was no retaliation in violation of section 504 [redacted]. Consequently, Parent is entitled to an order for tuition reimbursement and transportation costs for the 2011-2012 school year. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The School District failed to provide Student with a FAPE during the entire 2011-2012 school year, but did not fail to offer a FAPE for the 2012-2013 school year.

2. The School was an appropriate placement for Student during the 2011-2012 school year.

3. The equities do not prohibit an order for tuition and transportation cost reimbursement for the 2011-2012 school year.

4. I hereby order the District to reimburse parents the cost of tuition and transportation for the entire 2011-2012 school year. The amount of tuition reimbursement shall be the School's published full tuition charge for that entire school year, not including summer programming. The amount of transportation reimbursement shall be calculated at the federal income tax law mileage rate for ordinary business mileage expenses for every day on which Parents transported Student to and from the School from March 5, 2012 to the last day of school in that year, not including summer programming. If Parents paid for transportation on any of those days, the actual costs of such transportation shall be reimbursed.

5. The amount of reimbursement shall be reduced by the amounts that the District overpaid for tuition in the 2009-2010 and 2010-2011 school years. This reduction shall be calculated as one half of the School's published tuition rate for the full 2009-2010 and 2010-2011 school years, not including summer programming.

6. The District did not violate section 504 of the Rehabilitation Act of 1973 by retaliating against either Student or Parents, and did not fail to offer Student a FAPE for the 2012-2013 school year within the meaning of section 504.

7. [Redacted.]

William F. Culleton, Jr. Esq.

_____

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

HEARING OFFICER

January 22, 2013