

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

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: M. H.

Date of Birth: [redacted]

Dates of Hearing: 2/17/2016 and 4/21/2016

CLOSED HEARING

ODR File No. 17247-15-16

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney
Pro Se

Local Education Agency
Lower Merion School District
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Date Record Closed:
Date of Decision:

May 20, 2016
June 10, 2016

Hearing Officer:

Charles W. Jelley Esq. LL,M.

Introduction and Procedural History

The Student¹ is a middle school age pupil who resides with the parent in the District. The Parties agree the Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA) and their implementing regulations. The Parents claim the District violated the IDEA by not providing the Student a free appropriate public education (FAPE). The Parents also claim the failure to provide FAPE violates Section 504 and the Americans with Disabilities Act (ADA).

The case proceeded to a due process hearing convening over two sessions, at which the parties presented extensive evidence.² The Parents claim the District failed to provide appropriate programming for the 2015-2016 school. To make up for the alleged violations, the Parents hired a one-on-one tutor; the Parent now seek reimbursement for all out-of-pocket tutoring expenses. The District maintains that its special education program, as designed, offered and implemented was at all times appropriate for the Student in all respects. The District contends that many if not all of the Student's difficulties are the result of the transition from 6th to 7th grade.

For the reasons set forth below, I find for the Parents and against the District. The District is ordered to reimburse the Parents for their out-of-pocket tutoring expenses paid from August 2015 to May 30, 2016.

ISSUES

1. During the 2015-2016 school year, did the District provide the Student a free appropriate public education? If the answer is yes, should the District reimburse the parent for the costs of providing a tutor?

¹. But for the cover page of this Decision, in the interest of confidentiality and privacy, the Student's name and gender, and other potentially-identifiable information are not used in the body of this decision. The following District Exhibits 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 80, 81, 83, 84, 85, 86, and 88 were admitted into the record. The following Parent Exhibits 2, 3, 5, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 were admitted. The hearing officer granted the Parent's request for additional time to prepare written closing, and the District's request to extend the Decision Due Date. The District filed its closing on May 20, 2016; the Parents did not file a closing statement.

Findings of Fact

Initial Evaluation

1. The District evaluated the Student in June of 2010. Initially, the Student was found eligible for special education as a student with a primary disability of Emotional Disturbance, along with secondary disabilities of Other Health Impairment (OHI) based on a diagnosis of Attention Deficit Hyperactivity Disorder Primarily Inattentive type (ADHD), and Speech and Language Impairment in the area of pragmatic language (S#23, p.22; S#86 p. 19).
2. In second grade, an aide was with the Student all day (S#23, p.14).
3. The June 2010 evaluation confirmed that the Student has executive functioning deficits, has difficulty sustaining attention, and is distractible (S#23, p.23).
4. The Student was reevaluated again in 2013. The Student continued to be eligible for special education. However, the primary disability was changed to autism, and the secondary disabilities of OHI and speech and language impairment remained (S#37, p.16)
5. The 6th grade Individual Education Program (IEP) includes present levels from the Pennsylvania System of School Assessment (PSSA) and the Degrees of Reading Power (DRP); all of the test scores were either proficient or advanced (S#27, pp.7-8).
6. The 6th grade present levels include an objective summary of the Student's present levels in speech therapy and occupational therapy (S#56, p.10).
7. The present levels note the Student is not able to independently organize materials, homework, and then place assignments in the planner/binder. The Student requires constant prompts and reminders in class to stay on task (S#56, p.8).
8. The IEP lists the Student's strengths as high average reading fluency; high average reading comprehension skills; average math reasoning skills; and high cognitive verbal comprehension skills (S#56, p.11).
9. The present levels note the Student needs to improve social skills and pragmatic language; develop organizational skills; developing independence in completing tasks, managing time, and taking care of belongings; improve math fact fluency; and improve sensory regulation (S#56, p.11).
10. The 6th grade IEP included one speech goal, three short-term objectives, and SDIs to develop pragmatic language (S#56, p.19).

11. To develop organizational and executive functioning skills, the specially-designed instruction (SDI) included one-on-one time with the learning support teacher to assist the Student with reviewing long-term project expectations, breaking down the project into manageable chunks, and ensuring the completion of the steps along the way. Either the learning support teacher or the instructional assistant would provide frequent binder checks to make sure materials were organized along with daily checks to assure the materials needed for homework completion were available. The SDIs included daily checks to ensure that daily assignments are written in the assignment book (S#56, p.22-23).
12. The occupational therapist (OT) meets with the Student once a month for 30 minutes. The OT, the speech therapist, and the special education teacher all worked together to develop “self-regulation strategies” (S#56, p.10).
13. The OT notes the Student is more distracted in the afternoon and benefits from “movement breaks” like stair claiming (S#56, p.10).
14. The IEP lists improving social skills, improving pragmatic language, development of organizational skills, developing independence in completing tasks, managing time, taking care of belongings, and improvement of self-regulation as academic, need areas (S#56, p.11). The Parties agree the Student needs specially-designed instruction to address pragmatic language deficits and executive functioning deficits (S#56, p.11).
15. The 6th grade IEP includes a single speech goal, along with three short-term objectives to describe feelings/perspective of others (S#56, p.19). The IEP did not include a goal to address the Student’s executive functioning defects (S#56).
16. To address the executive functioning deficits, the SDIs included supports like reviewing long-term projects, breaking projects down into manageable parts with due dates, and “ensuring the completion of these steps along the way” (S#56, p.22).
17. The SDIs also include “frequent binder checks” to ensure “materials are organized,” “daily homework checks,” monitoring the Student’s “completion of copying the writing assignments down into the daily assignment book,” along with support from the learning support teacher to “prioritize the work,” and help in deciding, “which place is the best environment to work on certain assignments (S#56, p.23).

18. The IEP provides that the regular education staff will, “If necessary, the teacher will prioritize the ‘essential’ parts of the assignment that Student needs to complete in order to have Student finish in the same time that it takes the Student’s grade-level peers” (S#56, p.24).
19. On March 24, 2015, the Parent attended an IEP meeting to discuss the Student’s advancement to 7th grade (S#54, p.6).
20. The IEP team included both parents, the special education teacher, the speech therapist, the OT, the assistant principal (LEA), the school nurse, and a regular education teacher(S#56, p.3).
21. On March 24, 2015, the District issued a Notice of Recommended Educational Placement (NOREP) reducing the Student’s speech/language from two 30-minute sessions, to one 30-minute session a week. The Parents agreed to the proposed action (S#55, p.1-2)
22. In 6th grade, the mother did not recall a single instance of the Student being unprepared for class or any miscommunication about assignments or projects. The learning support teacher was successful at breaking things down for Student (NT 114).
23. On June 11, 2015, the IEP met again to discuss the 7th grade IEP. Both parents, special education teacher, speech and language therapist, assistant principal acting as the local agency representative (LEA) and a regular education teacher attended the meeting (S#58, p.2 & 4)
24. Although the IEP team recommended daily Instructional Support Lab (ISL) for autistic support, learning support was also discussed. In early August, the team reconvened to finalize the 7th grade IEP (S#58, p.11). ISL is the District’s terms to describe instructional time dedicated to provide special education.
25. On July 31, 2015, the IEP team met once again and discussed the pros and cons of a “six day versus a four day” ISL cycle of support (S#60, pp. 24, 25, 26, 30). The assistant principal explained a six-day ISL cycle would focus on executive functioning skills like organization, planning, prioritizing assignment, study skills and provide additional time to complete in class assignments. However, the team discussed that a four-day cycle would allow the Student to take [a foreign language]. The District agreed to start the school year with a four-day cycle of ISL, with the caveat that after six weeks the team would meet to review progress and discuss the need to change the frequency of ISL time (S#85, p. 346). On July 31, 2015, the District gave the family a NOREP proposing a four out of a

- six-day cycle in ISL with autistic support. On August 27, 2015, the Parent disapproved the NOREP and requested an IEP meeting (S#61, pp 2 & 4).
26. On June 10, 2015, the IEP team met to discuss the Student's promotion to 7th grade. The IEP included the Parent's input noting concerns about the Student's hyperactivity, disruptive behavior, and executive functioning deficits (S#58 p.21). The IEP team did not modify the speech goal, but did delete one SDI focusing on the teacher's use of a calculator to grade the Student's work (S#58 pp.21-25, S#56 p.22).
 27. On July 31, 2015, the IEP team met to discuss the Student's 7th grade educational placement. The IEP team recommended the Student receive autistic support on a four-day cycle in the ISL (S#60, p.8). The IEP also modified the SDIs to reflect the autistic support teacher would be responsible for the implementation of the executive functioning SDIs (S#60, p.24-27).
 28. On August 22, 2015, the Parent disapproved the District's Notice of Recommended Educational Placement (NOREP) offering autistic support on a four-day cycle ISL, rather than request a due process hearing the Parent requested an IEP meeting as soon as possible (S#61, p.4).
 29. On September 17, 2015, the IEP team met and after discussing the Student's executive functioning needs, revised the IEP noting the Student would receive autistic support from the learning support teacher on a six-day out of six-day cycle in the ISL (S#65, p.7). The SDIs were changed to reflect the learning support teacher rather than the autistic support teacher would be responsible for the executive functioning SDIs (S#65, pp.21-25, S#65, p.28). The six-day out of six-day cycle allowed the Student to meet with the special education teacher every school day for 45 minutes.
 30. On September 25, 2015, the Parent approved the District's NOREP offering autistic support on six-day out of six-day cycle in the ISL (S#66 p.2).
 31. When the Student attends ISL class, the student teacher ratio is five other students two days a week, four students for two days a week, and two other students for two days a week (NT p.267).

7th Grade 2015-16

32. On September 17, 2015, the parents, the 7th grade special education teacher, a regular education teacher, the LEA representative, the speech therapist and the interim supervisor of special education met to discuss the 7th grade IEP (S#65, p.5). At the meeting, the IEP team agreed not to make any changes to the IEP.
33. On September 21, 2015, the Parents approved the NOREP. The District agreed to provide itinerant learning support on a six-day out of six-day cycle in the ISL, all other classes were scheduled for the general education classroom; speech and OT are one time per week for 30-minute sessions (S#66, p.2 & 3). The Student met with the special education teacher in the ISL room for 45 minutes each day (S#65, p.28; NT 184).
34. The learning support teacher worked with the Student on prioritizing assignments, and time management (NT 32-33).
35. On November 5, 2015, concerned that the Student earned a “C” in science and learning that the Student was not turning in assignments, the mother requested an IEP conference (S#85, pp. 411-413). Due to a schedule conflict, the IEP team met on November 17, 2015. To ease the transition to 7th grade, the District members of the team suggested the Student drop [the foreign language] class (S#70, p.10).
36. The IEP team also discussed how the learning support teacher in the ISL would provide the organizational and time management SDIs. The IEP team reviewed the SDIs and discussed how many class periods a day the Student would meet with the learning support teacher to receive direct executive functioning instruction (NT p.136).
37. At the November 17, 2015 meeting, the District revised the Student’s present levels. The Parent stated the Student was overwhelmed and needed additional one-on-one direct instruction to address the executive functioning skill needs. The Parent stated the Student was not writing down the assignments and was not following teacher directions on how to complete projects (NT pp. 242-246). The District members of the team disagreed and suggested the Student was experiencing typical 7th grade reaction to increased work demands. Rather than provide the dedicated one-on-one executive functioning instruction, the IEP team suggested the Student drop [the foreign language class] to lessen the

- workload (S#70, p.10). In the first quarter of the school year, the Student had a B average in [the foreign language class] (P#19).
38. On November 17, 2015, the District gave the Parent a NOREP stating the Student would continue to receive learning support on a six-day cycle (S#71).
 39. To address the alleged violations, the Parent hired a tutoring service. The tutors provide one-on-one instruction for one hour, one to two times a week to remediate the Student's executive functioning deficits (P#17). The hourly rate for the tutors ranged from \$80.00 to \$120.00 dollars an hour (P#14).
 40. On January 5, 2016, the District issued a Permission to Reevaluate (PTE); the Parent signed and returned the PTE (S#77, p.3).
 41. On January 11, 2016, the Parent requested a due process hearing (P#1).
 42. On February 4, 2016, the IEP team proposed, and the Parent agreed to include two new goals to address the Student's executive functioning deficits. The SDIs were revised listing new executive functioning SDIs, while other existing SDIs were designated as executive functioning (S#83, p.27). Baseline data was not included in the present levels or the goal statement for either of the new executive functioning goals. The executive functioning goals were added to the IEP before the completion of the RR (S#83).
 43. The first executive functioning goal called for the Student to use an assignment book to independently record assignments, prioritize tasks, and file papers in a binder. The second goal required the Student to apply learned strategies to break down assignments into manageable parts with periodic due dates (S#83, p.27). While the goals were otherwise measurable, the use of the notebook, prioritizing tasks, organizing the notebook, and breaking down assignments into manageable tasks were carried over as SDIs from the 6th grade March 2015, the July 2015, the September 2015, and the November 2015 IEPs (S##70, 83, 87).
 44. The February IEP 2016, like the March, July and September 2015 IEPs, repeated, the 6th grade SDIs for reviewing long-term projects with completion dates for steps along the way (S#83, p.29), frequent binder checks to ensure materials are organized to complete projects, all assignments are written down and prioritized in the planner (S#83, p.30), regular education staff will encourage the Student to write assignments in the planner (S#83, p.32), and completion of a daily agenda to help organize, prioritize and plan daily and long-term assignments (S#83, p.32). For the first time the February 2016 IEP, however, included a sample daily schedule, a weekly reflection sheet, and a work

- timeline planner (S#83 pp.3-6). The daily schedule closely resembled the format used by the Student's private tutor (P###10, 16, 17).
45. The February 2016 IEP called for the Student to receive autistic support and speech and language support (S#83, p.36). Although the IEP notes Parent participation, the attendance sheet is unsigned. Unlike the previous IEP meetings, the District did not issue a NOREP and the IEP was sent to the Parent by email (S#83 pp.7-11).
 46. On March 11, 2016, the District provided the Parent with the results of the Reevaluation Report (RR) (S#86).
 47. The RR summarized the Student's previous testing, included an observation of the Student, updated Parent Connors ratings, and the Parent ratings on the Behavior Rating Inventory of Executive Functioning (BRIEF). On the BRIEF, the Parent rated the Student in the very elevated range indicating significant difficulty with all the executive functioning skills (S#86 p.7). On the Connors, the Parent rated the Student as having elevated problems with focusing, hyperactivity, executive functioning, peer relations, restlessness, impulsivity, and mood swings (S#86, p.6).
 48. The evaluator used selected subtests of the Woodcock Johnson –V Test of Achievement to evaluate the Student's academic fluency. The Student earned an overall academic fluency standard score (SS) of 88, in the low average range; a SS of 66 in math facts in the significantly below average range; and two SS in average in sentence reading fluency and sentence writing fluency (S#86, p.15).
 49. The evaluator also used selected subtests from the Woodcock Johnson –V Test of Cognitive Abilities to evaluate the Student's cognitive ability. On the Woodcock test of Cognitive abilities, the Student earned a well below average SS of 79 in perceptual speed; a below average SS of 83 in letter-pattern matching; a below average SS of 82 in number pattern matching; a below average SS of 82 in visual processing; a low average SS of 85 in visualization; and a below average SS of 83 in picture recognition (S#86, pp.15-16). Past intellectual testing placed the Student in the average range or better for reading, math, and writing skills (S#86, p.19).
 50. The Student's Conner self-ratings are consistent with the Parent's elevated scores on focusing, hyperactivity, and executive functioning ratings (S#86, p.17).

51. The March 2016 RR concluded the Student is a person with autism, who also has a pragmatic language deficit requiring speech and language support, and is a Student with an Other Health Impairment (OHI) of attention hyperactivity disorder (S#86 p.22).
52. On March 17, 2016, the IEP team met, reviewed the RR, and updated the IEP.
53. The March 17, 2016 IEP present levels included the recent Woodcock Achievement SS, the Student's PSSA results, the District's Power Reading benchmark results, and updates from the speech therapist, the OT, and the Spanish teacher (S#87, pp.7-10).
54. The March 2016 IEP included three goals; the first goal is a continuation of the previous speech pragmatic language goal. The second and third goals target the Student's executive functioning-organization needs. The executive functioning goals target learning how to record assignments, record project due dates, prioritize assignments, break projects down into smaller pieces, and file class notes/papers in a binder ((S#87. pp. 23-25). The SDIs although slightly reworded from previous IEPs remain unchanged (S#87, pp.26-31). The March 2016 IEP called for the Student to receive autistic support and speech and language support" (S#87, p.36). As in the past, the IEP continued to include a speech goal and SDIs (NT Vol II., 281, 283).

The Oral History Project

55. The history teacher assigned an oral history project with multiple intermediate deadlines (P#10). The history teacher testified the Student failed to follow the teacher's written instructions on how to prepare the final project, failed to record the interim project dates in the planner, and failed to meet any of the 19 interim project deadlines (NT pp.109-110). Although the instructions called for the Student to complete only one history project for credit, the Student completed and turned in two different history projects for the same assignment (NT p.108).
56. The SDIs called for the learning support teacher, the aide [redacted], and the regular education teacher to check the Student's planner for long-term project due dates. A review of the Student's daily planner reveals that the Student's writings, are disorganized, cryptic, and failed to include the interim project due dates (NT pp. 243-250).

57. Even though the teacher and the aide checked the planner, the reviews failed to notice the fact the Student did not record the 19 history project dates or reveal the fact the Student was working on the wrong project or the fact that the Student did not understand the assignment (NT pp. 243-250).
58. The pendant IEP, when the Student worked on the history project, included targeted SDIs on how to break a project down into manageable steps; the team either failed to instruct the Student or overestimated the Student's ability to understand the scope of the project and how to prioritize work (S#70, pp.23-26).
59. The staff completely missed the Student's failure to calendar any of the 19 project due dates (P#8 A-B, P#10, p.16, S#65 pp. 20-25, S#63 pp. 1-17, NT pp. 119-125). On a more disturbing note, the learning support teacher testified that she did not review the history project deadlines or the project with the Student (NT pp.242-256).
60. A week before the project due date, the parent emailed the learning support teacher stating that the Student did not know what needed to be done to complete the project (NT p.249).
61. The learning support teacher was not aware of what tasks the Student needed to perform to finish the project on time (NT pp.248-249).
62. The learning support teacher did not review the history teacher's project outline with the Student (NT p.247, P#9, p.24).
63. The learning support teacher was not aware the Student turned in two history projects instead of one (NT pp.254-255).
64. The Student earned a C in history class (NT p.144). The Student's history project grade was not lowered although the Student failed to meet any of the project deadlines or complete the correct assignment (NT pp.148-149).

The Failure to implement the IEP in English Class

65. In English class, all of the students were given a blank book to create and write a parody.
66. The English teacher and learning support teacher regularly collaborated and discussed the parody project. After discussing the project, the teachers decided the Student, unlike the others in class, should work alone in a group of one to complete the project (NT pp.183-186, P#20, NT p.256, P#11).

67. The Student failed to place the project deadlines in the planner, missed all of the project deadlines, did not turn in a parody, and missed the final project deadline (NT p.190-193).
68. The learning support teacher in an email to the parent acknowledges that the Student was off track in completing the parody project for over a month (NT pp. 254-255).
69. The learning support after checking the Student's writing was aware the Student was writing a fictional piece instead of a parody (NT pp. 254-255). The learning support teacher was mindful of the fact that the Student missed the deadline to pick a book for the parody project and that the parent took the Student to the public library to select a book after the deadline (NT pp. 263-265).
70. After reviewing the Student's written work product, the English teacher concluded that the Student fulfilled the requirements of the assignment, and the Student was permitted to read the fictional story to a group of [other students]. The teacher testified that when he compared the Student's fictional writing project with the work turned in by two other groups in the class the Student's work was better (NT p.188).
71. Although the Student failed to organize, research, pick, write, edit, illustrate, and turn in the assigned parody project in time the teacher testified the Student earned an "A" for completing the wrong writing project (NT pp.188, P#20).
72. The English teacher and the learning support teacher each testified they spoke to the Student about the parody project requirements; the Student did not write a parody (NT pp.183-186, NT pp.242-255, P#20).
73. The English teacher was aware of the Student's pragmatic language social skills goal. However, the teacher was not aware the Student was a person with autism (NT pp. 180-181).
74. When the Student was working in a group, the English teacher observed how the Student's pragmatic language and social skill deficits interfered with Student's learning. The teacher did not tell the Parent or the speech teacher about the severity or the frequency of the observed skill deficits (NT pp. 180-181).
75. The learning support teacher testified she was aware the Student needed a lot of one-on-one coaching to function in the social situation of working in a group (NT p. 265-266).

76. When the Student could not manage the social dynamics of working in a group, the English teacher, after speaking with the learning support teacher directed the Student to work alone in a group of one (NT pp. 177-180).
77. The Student's poor social and language skills in-group projects are a manifestation of the Student's autism. The direction to work alone in a group of one is inconsistent with the pragmatic language goals and SDIs (S#70 pp. 21-22).
78. The teacher failed to explain why the speech goal and SDIs were not implemented to support the Student in the regular education setting (NT pp. 179-182).

The Student's performance in other classrooms

79. The Student's executive functioning deficits did not prevent Student from learning [a foreign language]. The [foreign language] teacher described the Student as a terrific learner of [the foreign language] (NT p. 212).
80. The [foreign language] teacher, like the English teacher, was not aware the Student did not write down the [foreign language] assignments in the planner (NT pp. 213).
81. The [foreign language] teacher testified the Student regularly had terrific answers, and seemed to be learning quite a bit of [the foreign language] (NT p. 217).
82. The [foreign language] teacher testified that although the Student did misbehave on one occasion the Student's behaviors did not appear to be interfering with learning (NT p. 215).

Applicable Legal Principles and Discussion

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party asking for the hearing. If the moving party provides evidence that is equally balanced, or in equipoise, then the party asking for the hearing cannot prevail, having failed to present sufficient evidence. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3^d Cir. 2012). In this case, the Parents asked for the hearing and thus bore the burden of proof. There were instances of conflicting testimony where credibility and persuasiveness determinations were made to establish

a fact. Some witnesses were, however, more persuasive on some points than others. In each instance, this hearing officer was able to draw inferences from which one could ultimately determine the facts.

Credibility and Persuasiveness

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing Officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).³

Thus, all of the above findings are based on a careful and thoughtful review of the transcripts, a reading of all of the exhibits and a direct observation of each witness; therefore, the decision is based upon a preponderance of the evidence presented. While some of the material evidence is circumstantial, the hearing officer can derive inferences of fact from the witnesses' testimony and the record as a whole. On balance, despite inconsistencies, the hearing office found all of the witnesses' testimony represents their best recollection and understanding of the events.

IDEA Free Appropriate Public Education

The IDEA requires that a state receiving federal education funding provide FAPE to disabled children. 20 USC §1412(a)(1); 20 USC §1401(9). FAPE is special education and related services at public expense that meets state standards 20 USC §1401(9).

School districts must provide FAPE by designing, implementing and administering a program of individualized instruction that is outlined in an IEP. 20 USC §1414(d). The IEP must be reasonably calculated to enable the child to receive meaningful educational benefits and significant learning 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).

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). To provide FAPE, the child's IEP must specify and provide

³ *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014)

specially-designed instruction to meet the child's unique needs and must be accompanied by such supplemental or related services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 181-182 (1982). 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 (3d Cir. 1996).

A school district is not required to provide the best possible program to a student or to maximize the student's potential. *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program, device, or service that parents desire for their child. *Ibid.* Rather, an IEP must provide a basic floor of opportunity for the child. *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995).

The appropriateness of the program must be determined as of the time, at which it was written, and the reasonableness of the program should be judged based on the data known or what should have been known to the school district at the time at which the FAPE offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Section 504's Nondiscrimination Standards

Section 504 states, in relevant part, “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”. 29 U.S.C. §794(a). The statute defines program or activity to include all of the operations of local educational agency. 29 U.S.C. §794(b)(2)(B). To prevail on a Section 504 discrimination claim, parents must show the Student has a disability, is otherwise qualified to participate in a school program, and, was denied the benefits of the program or otherwise subject to discrimination because of their disability. *G.C. v. Pa. Dep’t of Educ.*, 735 F.3d 229, 235 (3d Cir. 2013).

The IDEA on one hand governs the LEA's affirmative duty to provide a FAPE to disabled students, while Section 504 establishes a negative prohibition against depriving disabled students, based upon a disability a FAPE. *W.B. v. Matula*, 67 F.3d 484, 492-93 (3d Cir. 1995). The IDEA provides a remedy for inappropriate educational placement decisions, regardless of discrimination, while Section 504 prohibits and provides a remedy for discrimination. *Hornstine v. Twp. of Moorestown*, 263

F. Supp. 2d 887, 901 (D.N.J. 2003) (although the student received a FAPE, the district's policy denying her valedictorian status was nonetheless discriminatory under Section 504).

Section 504 Denial of a FAPE

The Section 504's implementing regulations provide a detailed scheme for fashioning FAPE for students with a qualifying Section 504 disability. 34 C.F.R. §104.30-104.36. Similar to the IDEA requirements, Section 504 requires districts to conduct a comprehensive evaluation of the student needs 34 CFR §104.33, and provide a FAPE, including regular and special education, in the least restrictive educational environment 34 CFR §§104.33-104.34. When the parties disagree about the provision of a FAPE, the District must provide procedural safeguards 34 CFR §104.36.⁴

The Section 504 regulations provide that the implementation of an IEP under the IDEA may also meet the substantive FAPE requirement of Section 504, but not necessarily all of Section 504 FAPE requirements of 34 CFR 104.33 (b)(1)(ii) and 34 CFR 104.33 (b)(2).

Title II of the ADA

The Congressional findings contained in the ADA state that “discrimination against individuals with disabilities persists in such critical areas as . . . education. . . .” 42 U.S.C. § 12101(a)(3). The ADA requires that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. To prove a Title II claim, a student must show (1) he or she is a qualified individual with a disability; (2) he or she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and, (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. *Id.*

The Title II regulations set forth the general prohibitions against discrimination that apply to schools as public entities. *See* 28 C.F.R. § 35.130(a). Schools may not, on the basis of disability, deny students with disabilities the opportunity to participate in

⁴ .34 CFR 104.34 (a), *Letter to Williams*, 21 IDELR 73 (OSEP 1994) (Section 504 requires districts to educate students with disabilities in the LRE); *In re: Student with a Disability*, 113 LRP 42334 (SEA NY 2013) (concluding that a violation of Section 504's LRE requirement at 34 CFR 104.34, requiring comparable services and activities, is not analogous to any IDEA regulations).

or benefit from the aid, benefit, or service the entity provides. § 35.130(b)(1)(i). Nor may schools deny students with disabilities an equal opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others. § 35.130(b)(1)(ii). Schools must provide all services, programs, and activities in the most integrated setting appropriate to the needs of the individual with disabilities. §35.130(d). Also, schools must make reasonable modifications to their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity, or would result in undue financial or administrative burdens. §35.130(b)(7); §35.164.

[C]omplying with the IDEA is sufficient to disprove educational discrimination under the Section 504 and the ADA. *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 487 (W.D. Pa. 2010) (noting that if an IDEA claim fails, ADA and RA claims brought on the same core facts must also fail); *Miller v. Bd. of Educ.*, 565 F.3d 1232, 1246 (10th Cir. 2009). Conversely, the “[f]ailure to provide a FAPE violates Part B of the IDEA and generally violates the ADA and RA because it deprives disabled students of a benefit that non-disabled students receive simply by attending school in the normal course—a free, appropriate public education. *CG*, 734 F.3d at 236. However, if the IDEA claim and the Section 504 or the ADA claims do not share a similar factual basis, they will be addressed separately. *GC* 734 F.3d at 235; *Taylor* 737 F. Supp. 2d at 487-88; *Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003).

In *CG v. Pennsylvania Dep't of Educ.*, 734 F.3d 229, 234 (3d Cir. 2013), the court held, “With limited exceptions, the same legal principles govern ADA and RA claims”. Both require parents to (1) establish the person has a disability as defined under the statutes, (2) the person is otherwise qualified to participate in the program, and, (3) the qualified individual was precluded from participating in a program or receiving a service or benefit because of their disability. *CG*, 734 F.3d at 235. However, under the ADA, unlike Section 504, the student does not need to show the school receives federal funds. *Id.*

In *CG*, the court discussed the differences between, “The statutes' respective causation elements...” see 42 U.S.C. § 12132 (by reason of such disability); 29 U.S.C. § 794(a) (solely by reason of her or his disability). The RA allows a plaintiff to recover if he or she were deprived of an opportunity to participate in a program solely on the basis of disability, while the ADA covers discrimination on the basis of disability, even if there is another cause as well. *CG*, 734 F.3d at 236. However, Title II claims like Section 504 discrimination claims do not require intentional or overt discrimination. *CG*, 734 F.3d at 236, citing with approval *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d

Cir. 1995) ([W]e will not eviscerate the ADA by conditioning its protections upon a finding of intentional or overt discrimination.)

Appropriate Relief includes Reimbursement for Tutoring Expenses

The IDEA appropriate relief provision offers comprehensive educational solutions to directly address educational losses. 20 U.S.C. § 1415(i)(2)(C)(iii); *Bucks Cnty. Dep't of Mental Health/Mental Retardation v. Pennsylvania*, 379 F.3d 61, 69 (3d Cir. 2004) (reimbursement order for time spent working with her disabled daughter, even though parent had no actual out-of-pocket expenses). Reimbursement may also include the costs for tutoring services. *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 498-499 (3rd Cir. N.J. 2012) (appropriate relief includes reimbursement for tutoring, counseling, or other support services); *See also Pihl v. Mass. Dep't. of Educ.*, 9 F.3d 184, 188 n.8 (1st Cir. 1993) (noting that compensatory education can take many forms, including tutoring and summer school).

Analysis and Conclusions of Law

The Student's Executive Functioning Deficits and Needs

The Parties agree the Student's executive functioning deficits are a unique need that requires specially-designed instruction. Initially in March 2015, at the conclusion of 6th grade, they disagreed over how to meet the Student's instructional needs for the 7th grade. First, they disagreed about the number of days a week and the amount of time the Student would spend in the ISL class. Second, they disagreed about the title of the support, autistic support vs. learning support. Third, they disagreed about whether the Student should receive one-on-one support in school as Student did in 6th grade or instruction in a small group outside of the regular classroom. Throughout the controversy, the Parent focused on what the Student needed to learn, when the instruction would take place, i.e. during the school day or after school, where the support would be provided-regular education class, autistic support or learning support-and how to measure and report the Student's progress. The Student has average to above average ability and has been relatively successful in the regular education classroom; therefore, given proper instruction significant learning is achievable.

Granted, the District staff were courteous, the Student received passing grades, and for the most part the staff regularly communicated with the Parent. However, those attributes do not make up for the fatal flaws in the design of and the implementation of the Student's IEP. The staff's good intentions do not explain how

given all the time the Student had with the regular education teacher, the aide, and special education teacher somehow the Student managed to do the wrong projects, turn them in late and still earn an “A.” The omission of the measurable present levels and targeted executive functioning goals to monitor progress denied the Student FAPE. Neither the regular education teacher nor the special education teacher took a moment to make an anecdotal record explaining what SDIs they used to instruct the Student. When challenged by the Parent at the hearing, the staff could not explain how they instructed the Student to place the due dates in the planner, organize the project materials, do the research, and complete the right projects. The fundamental material omissions of present levels, measurable goals, and progress monitoring contributed to and caused a denial of FAPE. Without data, the IEP team, and the parent are left to speculate what SDIs, or if any, SDIs promoted significant learning and meaningful benefit. Absent some form of data collection system, the IEP team cannot plan for instruction, assess, and calculate if the Student is receiving meaningful benefit.

It is no strange coincidence after the action had begun in January 2016; the District modified its stance and developed an IEP that included two executive functioning goals. The February 2016 IEP, however, lacked baseline present levels linked to the two new goals. The failure to include baseline present levels, six months into the school year in this instance, is a significant omission that contributed to the denial of FAPE. It is axiomatic, that absent a measurable starting point, the team cannot gauge when the Student will reach the destination. Given the Student’s long-standing profile dating back to 2010, the need to provide targeted instruction was evident.

Equally curious is the fact that within 30 days of the February 2016 IEP, after the RR was completed, the IEP team reconvened. This time, however, the March 2016 IEP included vague present levels, virtually identical goal statements, and the same SDIs that resulted in the Student turning in the wrong assignments late. The vague present levels do not reflect what the student can do, instead, they describe how the teacher prompts the Student. For a Student with average intelligence, the present levels are inadequate, insufficient, and inappropriate. Even assuming *arguendo* the executive functioning present levels are measurable, the fact remains that three quarters of the way into the school year, the statement the Student still needs to be prompted 5 out of 5 prompts to perform routine tasks like writing down homework and writing due dates in the planner is de minimis if not trivial progress. Given the resources of daily contact with the special education teacher for 45 minutes, the speech therapist, the OT, and the aide in the regular education classroom, the Student should have recorded the due dates and turned in the right assignment. These facts lead me to wonder if the SDIs are either ineffective or insufficient.

The record is preponderant the Student does not know how to break down projects into small steps. The record is also preponderant the Student does not, after three quarters of a year in 7th grade with the current SDIs, know how to record, plan and organize a project with due dates using the planner. Initially, the aide wrote down all assignments, when the Parent complained the Student was not learning, the support stopped, and no other useful strategies were substituted. Somehow, the aide, the regular education teacher, and the special education teacher did not notice the 19 missing history due dates in the planner. Although the Student met with the special education teacher daily for 45 minutes, the special education teacher testified she did not review the parody project, the history project or track the project due dates. One would expect, that if the SDIs were implemented the Student would have at least completed the correct assignments on time.

The history and the English teacher each testified that they discussed the project with the Student, and after the discussion concluded, the Student was on track. When asked, at the hearing, they could not explain what work product they graded and reviewed, or how the Student got so far off course that the wrong projects were turned in late. The history and the English teachers could not explain why they did not tell the speech teacher or the parent the Student missed the intermediate due dates. Granted the completed work product may have been good, but the fact remains the Student did the wrong assignment.

The fact that the teachers gave the Student full credit for doing the wrong assignments highlights the overall disconnect and misunderstanding the regular education teachers, and to some extent, the special education teacher have with the fundamental purpose of the IDEA. Putting aside the IEPs from August through February did not include an executive functioning goal, did not include present levels, and lacked progress monitoring; fully aware of the Parent's conflicting emails; the Staff could not clearly explain why a reasonable person would conclude the Student knew what was expected to complete the project. The testimony and the record as a whole exemplify what a proctor might do to spot check the Student, as compared what one would expect to happen for a Student with a known executive functioning need and clear SDIs. The staff failed to testify persuasively about how, even when the February 2016 executive functioning goals were in place, they implemented the goals or used formative and summative assessment data to modify instruction.

The instant action resembles *J.L. v. Mercer Island Sch. Dist.*, 2006 U.S. Dist. LEXIS 89492 (W.D. Wash. Dec. 8, 2006), *reversed on other grounds*, *J. L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 2010 (9th Cir. Wash. 2010). In *J.L.* the trial court found the emphasis on accommodations, here the SDIs, rather than on the goals resulted in de minimis progress rather than meaningful benefits. *id.* at 13. Using SDIs, accommodations and other compensatory strategies without increasing a student's skill level does not represent compliance with the IDEA, or provide for meaningful progress; it is simply not sufficient to merely give the Student a passing grade on the wrong project and call it meaningful progress or for that matter FAPE. *id.* at 16.

Equally disturbing was the decision to place the Student in a group of one, rather than implement the single pragmatic language goal and SDIs, when the Student did not perform as expected in the group project. The justification that other students did the project alone, coupled with the rationale that not all students get along, denied the Student equal access to the benefits of participating, with clearly defined accommodations, in the regular education class.

The speech therapist testified persuasively when the Student participated in the small group instruction with other disabled students the Student was making progress. The significance of the progress is all but lost when well-meaning people isolate the Student, for what they erroneously perceive, is in the Student's best interest. A climate of benign discrimination denied the Student an equal opportunity to participate and benefit from the aids, services, and benefits otherwise available to the Student's non-disabled and disabled peers. The Student lost a valuable chance to apply the speech therapist lessons. In reality, the Student's isolation, in a group of one, is impermissible discrimination based solely on the Student's pragmatic language disability.

The speech therapist collected data, reviewed data, and made instructional decisions on how to stimulate pragmatic language across settings. Despite the agreed-upon pragmatic language goal and SDIs, the front line staff unilaterally altered the Student's path when they failed to implement the pragmatic language goal and SDIs. The unilateral modification was a material failure to implement the IEP. The staff was well aware of the pragmatic language goal, the pragmatic language SDIs were clear, and the therapist was ready, willing, and able to support the Student in the regular education setting. The failure to implement the pragmatic language goal and SDIs caused the Student to be temporarily placed in a restrictive environment in violation of the IDEA. The exclusion was based solely on the Student's disability and is tantamount to discrimination within the meaning of Section 504.

It is no curious coincidence that the District's daily schedule and executive functioning goals match what the private tutors were using to teach executive functioning. Whether influenced by the Student's progress with the tutors, or discovered by the staff on their own, the adoption by the IEP team of the same executive functioning strategies used by the tutors, coupled with the recognition that the Student did require direct instruction to learn, is tantamount to a tacit admission that the private tutoring was appropriate and necessary for the Student to learn.

Accordingly, I find the District denied the Student FAPE from August 2015 to April 2016. I also find after a careful review of the record the private tutoring was appropriate, and the equities favor reimbursement of the tutoring costs.

ORDER

In accordance with the preceding findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The Parent's claim of a denial of FAPE from August 2015 to May 30, 2016 is granted.
2. The Parent's claim for reimbursement for tutoring expenses for the 2015-2016 school year is granted
3. The Parent's claim of discrimination from August 2015 to May 30, 2016 is also granted.
4. The Parents are entitled to reimbursement for the cost of the private tutorial services related to executive functioning skill development.
5. The District is directed to reimburse the Parent for the out-of-pocket tutoring costs from August 2015 to May 30, 2016.
6. The Parent shall submit all tutoring expenses, paid or due and owing, along with proof of payment to the District within ten business days of this Order. Within 15 calendar days of its receipt of an itemized invoice for those services, the District shall provide the reimbursement to the Parent or schedule the payment for action, at the next regularly scheduled School Board meeting.

It is **FURTHER ORDERED** that any claims not specifically addressed by this Decision and Order are denied and dismissed.

Dated: June 10, 2016

Charles W. Jelley Esq. LL.M.
Charles W. Jelley Esq. LL.M.
HEARING OFFICER