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Pennsylvania

## Special Education Hearing Officer

### DECISION

Student's Name: A.R.

Date of Birth: [redacted]

ODR No. 13764-12-13-AS

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Dave Frankel, Esquire  
Frankel & Kershenbaum, LLC  
1230 County Line Road  
Bryn Mawr, PA 19010

Abington School District  
970 Highland Avenue  
Abington, PA 19001-4535

Claudia L. Huot, Esquire  
Wisler Pearlstine, LLP  
Blue Bell Executive Campus  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422-2323

Dates of Hearing:

June 13, 2013; July 24, 2013; August 5, 2013; August 8, 2013; September 11, 2013; September 12, 2013; September 23, 2013

Record Closed:

October 14, 2013

Date of Decision:

October 29, 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 52.) The District has identified Student with Speech or Language Impairment and Other Health Impairment. (NT 52.) Parents assert that the District has failed to offer or provide a free appropriate public education (FAPE) to the Student, as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and the Vocational Rehabilitation Act of 1973, 29 U. S. C. §794 et seq. Parents request compensatory education from April 15, 2011 through June 13, 2013, the date of the first hearing session in this matter.<sup>1</sup> The District asserts that it offered and provided a FAPE to Student.

The hearing was concluded in seven sessions.<sup>2</sup> The parties submitted written summations, and the record closed upon receipt of those summations.

## ISSUES

1. During the period from April 15, 2011 until June 13, 2013, did the District fail to offer to, or provide Student with, a FAPE, in violation of the IDEA or section 504?
2. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from April 15, 2011 until June 13, 2013?
3. Should the hearing officer order the District to reimburse Parents for all or any part of the cost of private tutoring that they provided to Student at their expense during the period from April 15, 2011 until June 13, 2013?

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<sup>1</sup> The parties agreed, in compliance with the IDEA limitation of actions, that the Parents' claims do not extend to District actions or inactions prior to April 15, 2011, which is the date that is two years before the filing of the complaint. (NT 100-102.) The parties did not object to ending the period under scrutiny in this matter on the first day of hearing, June 13, 2013. Ibid.

<sup>2</sup> Several of these sessions were short or evening sessions, due to the unavailability of witnesses during the summer months.

4. Should the hearing officer order the District to reimburse Parents for all or any part of the cost of private educational and other related evaluations that they provided to Student at their expense during the period from April 15, 2011 until June 13, 2013?

#### FINDINGS OF FACT

1. At an early age, Student displayed delayed developmental motor milestones, low muscle tone, and delayed speech. Student received physical therapy at the age of eight and speech therapy throughout Student's preschool and school-age years, starting at twelve months of age. Between the ages of three and five, Student participated in an intermediate unit language enrichment program, two to three days per week. (J 3.)
2. In kindergarten and first grade (2003-2004 and 2004-2005 terms), Student attended a speech and language support class, and in second grade (2005-2006 term), Student was in a learning support class at a different school district. Student began third grade (2006-2007 term) with the District, receiving learning support in a resource room for reading and mathematics. (J 3.)
3. In 2007, Parents obtained a private psychoeducational evaluation of Student. The evaluator found full scale IQ score of 77; this was deemed an underestimate of Student's cognitive ability, because variable functioning in testing and Student's significant processing difficulties. Student displayed weaknesses in memory, receptive and expressive language, retrieval fluency and processing new information. Student's achievement was below average in reading comprehension, spelling, mathematics reasoning and problem solving. Educational progress was predicted to be slow because of the number of factors that interfere with learning processes. (J 1, P 17.)
4. Student attended part of third grade and all of fourth grade (2007-2008 term) and fifth grade (2008-2009 term) at a private school for children with learning differences. Student received small group instruction with some 1:1 support at the private school. In Student's fifth grade year, the private school tried using an FM system in the classroom, but it was found to be ineffective in improving Student's performance. During these years, Parents provided Student with private tutoring in reading and private language therapy. (J 1, 3.)
5. When Student was in fifth grade (2008-2009), educators at the private school were concerned that Student was not making adequate progress in their curriculum, especially because of Student's poor reading comprehension. Parents removed Student from that school at the end of that school year. (NT 562-565.)
6. In 2009, Parents obtained another private educational evaluation of Student. Student's achievement scores were consistent with previous scores. Student was scored at the .4 percentile in oral language; at the sixth percentile in broad reading; at the fourth percentile in broad mathematics; at the sixth percentile in mathematics

- calculation; at the fifth percentile in reading fluency; at the ninth percentile in story recall; at the .3 percentile in understanding directions; at the fifth percentile in calculation; at the second percentile in passage comprehension; and at the sixth percentile in applied problems. (J 25.)
7. In March, April and May 2009, Student was evaluated by a speech and language pathologist privately at Parents' request. Student displayed a moderate-to-severe speech and language disorder affecting word retrieval and vocabulary, language processing, morphology and syntax, articulation and fluency. (P 1.)
  8. In May 2009, at Parents' request, the District evaluated Student for special education services, and found Student eligible under the classifications of Speech or Language Impairment and Specific Learning Disability. (J 1.)
  9. The May 2009 evaluation included cognitive testing, and the scores obtained were consistent with those obtained in the private testing in 2007. Student's full scale IQ was in the borderline range, but was considered to be an underestimate of Student's ability due to scatter in the sub-tests, which ranged between the "low average" and "borderline" ranges. (NT 1630; J 1.)
  10. The May 2009 evaluation included achievement testing. By the end of fifth grade, Student was still experiencing considerable difficulty in reading comprehension, despite low average achievement in decoding and sight word vocabulary, and despite participation in specialized learning environments in pre-school and early elementary school. Student also displayed impairments in expressive and receptive language, despite receiving speech and language services from the first year of life. Student also demonstrated needs with regard to writing and mathematics concepts and problem solving. (J 1.)
  11. In June 2009, Parents obtained a private auditory and language processing evaluation by a board certified audiologist who was also a state licensed speech pathologist. Student's hearing was average for all purposes. Student demonstrated a significant auditory processing disorder and delays in the development of auditory skills. Student experienced difficulty processing spoken language in the presence of any noise, even background sounds in relatively quiet settings, auditory overload, misunderstanding of rapid speech, misinterpreting words, fatigue, distractibility, and a marked word finding difficulty impacting Student's ability to answer questions rapidly on demand and impacting Student's ability to write. The word finding problems were likely to contribute to problems with oral and written fluency and inconsistency in performance. At the time of the evaluation, testing indicated that Student was reading fluently at a fourth grade level. (P 3.)
  12. The private evaluator recommended among other things, one to one support with reading, speech and language therapy addressing listening for the main idea and details, sequencing, summarizing, use of elaborative words, listening for directions, chunking information, preferential seating away from distractions, structure and

- routine in the classroom, wait time, repetition of directions, and pre-learning strategies. (P 3.)
13. The District offered an IEP with related speech and language services, but Parents elected to enroll Student for sixth grade (2009-2010 term) in a different private school for children with learning differences, where Student received speech and language intervention and Wilson reading instruction. There, Student was unable to keep up with a class of four to ten students for Wilson instruction, English and writing. In November of that year, the private school removed Student from those classes and started providing one to one Wilson instruction five times per week and reading comprehension instruction five times per week. Throughout the year, it provided Student with speech and language therapy three times per week; however, it was not willing to continue the extraordinary extent of one to one tutoring that Student was receiving, and Parents again withdrew Student from the private school after sixth grade. (NT 564-568, 707-713; J 1, 3.)
  14. In the Wilson program, Student advanced in one term from level 1.4 to level 4.1 during sixth grade. (J 3.)
  15. In May 2010, again at Parents' request, the District re-evaluated Student. By re-evaluation report dated August 4, 2010, the District again classified Student with Speech or Language Impairment and Specific Learning Disability. The District evaluator identified Student's needs as reading decoding and reading fluency, morphology (prefixes and suffixes), vocabulary, reading comprehension, application of writing skills, application of mathematics concepts, listening comprehension, retrieval fluency, auditory processing, articulation, receptive and expressive vocabulary, following oral directions and classroom participation. The evaluation also listed the need for accommodations to address processing speed deficits, maintaining focus, retention of skills, and study and organizational skills. (J 3.)
  16. In May 2010 achievement testing, Student was "frustrational" in reading comprehension at the first, second and third grade levels. Student's reading fluency was below average. Student's mathematics skills were below proficient. Student's achievement in numbers and computation was below basic at the sixth grade level. Geometry and measurement achievement was below basic at the fifth grade level. (NT 1939-1941; J 3.)
  17. On August 31, 2010, the District offered a placement and an IEP for Student. The offered placement was supplemental learning support, with a special education classroom for all core subject areas. Student was placed in a double period Wilson reading class, using both the Wilson and the FastTrack programs. For social studies, science and mathematics, Student was placed in a different learning support classroom that uses an alternative curriculum. (J 7.)
  18. In September 2010, Student was demonstrating mastery in the Wilson reading program for both decoding and encoding for Wilson books 1 through 11. Student also demonstrated strong reading fluency skills, and good knowledge of vocabulary.

- In contrast, Student's reading comprehension scores were low, demonstrating great need in this area of reading. (J 16, 21.)
19. Student's Wilson teacher recommended graduating Student from the Wilson program, but Parents did not agree. Student continued in the Wilson class, and at Parents' request, the District provided Student with direct instruction in reading comprehension two periods per week through the FastTrack program, which was delivered by a District reading specialist. (NT 990-1008; J 16, 21.)
  20. In September 2010, the District's reading specialist, pre-tested Student in the FastTrack program, which addresses reading comprehension. Student scored 60% in levels 1 through 3 (with 2 or fewer miscues) and 80% in level 4 (with 5 miscues). The specialist placed Student at level 3. (J 16.)
  21. In September 2010, Student scored 1.6 on an assessment of writing; this is an average of scores for focus, content, organization, conventions and style based upon a grade level writing rubric. This score is in the low "basic" range. (J 21.)
  22. In September 2010, Student demonstrated over 80% mastery in subtraction, recall of single digit multiplication facts and solving basic long division problems. Student showed weakness in adding and subtracting negative integers, performing operations with fractions, long division of multi-digit numbers with remainders, multiplication of multi-digit numbers and solving word problems. (J 16.)
  23. In an October 4-Sight mathematics assessment, Student scored basic in algebraic concepts and below basic in numbers and operations, measurement, geometry, data analysis and open ended response. (J 21.)
  24. The IEP team reviewed and revised the IEP on October 13, 2010, at Parents' request, changing Student's classroom location for science and social studies, from an alternative curriculum to a modified general education curriculum. (J 7, 12.)
  25. The IEP team planned to reduce the Student's participation in Wilson instruction, because the Student was mastering the Wilson curriculum. However, Parents asked for a delay in any change of placement away from the Wilson class. (J 13, 16, 17.)
  26. The IEP team recommended that Student participate in alternative statewide testing, PASA. (J 12.)
  27. In November 2010, Parents had Student assessed by the Lindamood-Bell company. (P 6.)
  28. In November 2010 in speech, Student was able to speak in sentences of five to six words with prompts in structured therapy from a baseline of 6.1 words per elicited utterance. Student was able to demonstrate understanding of age appropriate or curriculum appropriate vocabulary with 60% accuracy from a baseline of 50%. (P 25.)

29. In November 2010 in reading, Student was able to demonstrate mastery of the Wilson curriculum through book 12 in decoding. (P 25.)
30. In November 2010, in writing, Student was able to produce two compositions at grade level that were scored by a rubric at 1.75 and 2.5 for focus, content, development, organization and conventions. (P 25.)
31. In January 2011, in speech, Student mastered the goal for asking for a hint when not sure of the question or the answer. Student was able to understand and use age appropriate or curriculum appropriate vocabulary with an average of 85% accuracy from a baseline of 70%. Student was able to complete language tasks involving oral directions, main idea, problem solving, and story comprehension with 76% accuracy from a baseline of 70%. (P 24.)
32. In January 2011, in writing, Student was able to write a multi-paragraph composition with an average score of 2.4 from a baseline of 1.9. (P 24.)
33. In January 2011, in reading comprehension at approximately grade three level, Student was able to answer comprehension and vocabulary questions with 88% accuracy from a baseline of 50%. (P 24.)
34. The IEP team reviewed and revised the IEP on February 24, 2011, at Parents' request. The revision found Student eligible for Extended School Year services (ESY) for reading, mathematics and speech or language. The District offered ESY in the amount of four hours per day, five days per week, for five weeks. (J 16.)
35. At approximately the end of the third marking period in seventh grade, Student was demonstrating mastery in the Wilson reading program for both decoding and encoding at book 11, and was being instructed at book 9.3, vowel diagraphs and diphthongs. Student was demonstrating strong reading fluency scores. Student's Wilson teacher recommended graduating Student from the Wilson program, but Parents did not agree. Student continued in the Wilson class. (J 21.)
36. By contrast, Student continued to show significant weakness in reading comprehension in the third quarter of seventh grade. At approximately the end of the third marking period in seventh grade, Student was scoring 60% in level 3 of the FastTrack program, which addresses reading comprehension skills. Student's scores for the term in FastTrack were poor. April testing with Study Island at the third grade level yielded a score of 60% for context clues; 50% for main idea and details; 40% for characters and plot; 30% for inferences and conclusions; and 20% for summary. Compass Learning testing yielded scores in comprehension ranging from 38% to 67% in similar categories of skills. Both the reading specialist assigned to instruct Student in reading comprehension and the Wilson reading teacher recommended consideration of either instructing Student at FastTrack level 2 or increasing the amount of time for instruction at FastTrack level 3. (NT 1105-1106, 1944-1951; J 21.)

37. At approximately the end of the third marking period in seventh grade, Student's writing of persuasive, narrative and informational passages was in the low "basic" range, with an average score of 1.9 out of a possible 4.0. (J 21.)
38. In a Pacemaker diagnostic assessment in March 2011, Student scored 58% in basic operations of addition, subtraction, multiplication and division, with and without regrouping; 13% in operations with fractions; and 0 in understanding of and operations with decimals. Student also scored 0% in measurement, geometry and algebraic concepts. (J 21.)
39. In April 2011, The District's coordinator of mathematics evaluated Student for a District re-evaluation report that addressed mathematics only. Standardized achievement testing showed that Student had progressed at a pace approximately equal to the pace of same age peers during seventh grade, but was still functioning below grade and age expectations. Student remained at the borderline level of achievement in broad mathematics; improved to the low average level in calculation (increasing Student's standard score by ten); remained at the borderline level for applied problems; and remained at the average level for mathematics fluency. (NT 1339-1341; J 25.)
40. Student maintained "A" and "B" averages in learning support science and social studies in the first three marking periods of seventh grade. Student maintained good grades in Fitness, computer literacy and art. Student was provided access to these curricula through modified delivery of material according to the modifications and specially designed instruction in the IEP. (NT 1396-1411; J 21.)
41. In the first three marking periods of seventh grade, Student maintained good homework completion in English, Wilson reading, Science and social studies. Student maintained good homework completion in the first two marking periods of seventh grade for mathematics, but earned a failing grade for the third marking period in homework. Overall, Student's grade in mathematics ranging from 75% to 85%. (J 29.)
42. As part of the annual IEP development process, and at Parents' request, the IEP team reviewed and revised the IEP on April 6, 2011. The April 2011 IEP placed Student in Supplemental Learning Support, with instruction in all core academic subjects located in a learning support classroom. Student would be instructed in reading comprehension with the FastTrack reading program; Student would be instructed in mathematics with an alternative program; and Student would be instructed in English, social studies and science with a modified general education curriculum. (J 17, 21.)
43. The April 2011 IEP set forth measurable goals that addressed expressive language (only the skill of asking for clarification when something is not understood); receptive language (following oral two and three part directions, main idea, story comprehension, problem solving and answering "wh" questions); understanding and correctly utilizing curriculum and age appropriate vocabulary; reading comprehension at a third grade level (summarization, sequencing, identifying story conflict and

- resolution, plot, cause and effect, inferencing, character, predicting, and utilizing context clues); written communication (organization, conventions, content); and mathematics skills (solving problems and performing mathematics operations with fractions, subtraction with regrouping, making change, long division, solving problems with decimals and percents, including monetary units, measurement and geometry). The goals addressed all of the needs identified in the August 2010 re-evaluation report, as modified based upon Student's achievement in the first three quarters of seventh grade. (J 3, 7, 21.)
44. The IEP team determined that post-secondary transition goals were not needed at the time of the April 2011 IEP meeting. (J 21.)
  45. The IEP team determined that the Student should take the alternative state wide assessment, PASA. (J 21.)
  46. The April 2011 IEP provided for accommodations and specially designed instruction that addressed the needs set forth in the August 2010 re-evaluation report as modified based upon the first three marking periods of Student's seventh grade. (J 3, 21.)
  47. The April 2011 IEP provided for speech therapy services on a one-to-one basis for one period weekly, and in a small group for two periods weekly; it provided for four thirty minute speech therapist consultations with teaching and other staff per semester. (J 21.)
  48. The April 2011 IEP provided for ESY services in the amount of four hours per day, five days per week, for five weeks during the summer. (J 16.)
  49. On June 3, 2011, the District provided a re-evaluation report reflecting testing in mathematics in April 2011. The report continued Student's classifications of speech or language impairment and specific learning disability. It specified Student's educational needs in mathematics and recommended specially designed instruction for mathematics. (J 25.)
  50. On June 13, 2011, the IEP team revised the IEP. The June 2011 IEP placed Student in Supplemental Learning Support, with instruction in all core academic subjects located in a learning support classroom. Student would be instructed in reading comprehension with the FastTrack reading program; Student would be instructed in mathematics and English with an alternative program; and Student would be instructed in social studies and science with a modified general education curriculum. (J 29.)
  51. The June 2011 IEP set forth measurable goals that addressed expressive language (asking for clarification when something is not understood and correct use of curriculum and age appropriate vocabulary); receptive language (following oral two and three part directions, main idea, story comprehension, problem solving and answering "wh" questions); understanding and correctly utilizing curriculum and age appropriate vocabulary; reading comprehension at a third grade level (summarization, sequencing, identifying story conflict and resolution, plot, cause and effect,

- inferencing, character, predicting, and utilizing context clues); written communication (organization, conventions, content); and mathematics skills (solving problems and performing mathematics operations with fractions, subtraction with regrouping, making change, long division, solving problems with decimals and percents, including monetary units). The goals addressed all of the needs identified in the August 2010 re-evaluation report, as modified based upon both Student's achievement in the first three quarters of seventh grade and the June 2011 re-evaluation report. (J 3, 7, 21, 25, 29.)
52. The IEP team determined that the Student should take the alternative state wide assessment, PASA. (J 29.)
  53. The June 2011 IEP provided for accommodations and specially designed instruction that addressed the needs set forth in the August 2010 re-evaluation report as modified based upon both the first three marking periods of Student's seventh grade and the June 2011 re-evaluation report. (J 3, 7, 21, 25, 29.)
  54. The June 2011 IEP provided for speech therapy services on a one-to-one basis for one period weekly, and in a small group for two periods weekly; it provided for four thirty minute speech therapist consultations with teaching and other staff per semester. (J 29.)
  55. The June 2011 IEP provided for ESY services in the amount of four hours per day, five days per week, for five weeks during the summer. (J 29.)
  56. On July 25, 2011, Student began attending the Lindmood-Bell program for private tutoring in reading, writing oral listening and critical thinking skills. Tutoring continued through the beginning of September 2011. (P 6.)
  57. Lindmood-Bell testing scores (utilizing a variety of test instruments, some of which were parts of larger test batteries) from November 2010 to September 2011 indicated no progress or regression in picture vocabulary, oral reading, passage recall, spelling, mathematics computation, and reading fluency; scores indicated slow progress in word attack, paragraph reading and oral reading comprehension. (P 6.)
  58. In November 2011, the IEP team revised the IEP at Parents' request, removing two mathematics goals and all objectives for speech therapy, reading, mathematics and writing. The team added seven new modifications or specially designed instruction items, based upon recommendations of the Parents' expert consultants, who attended the IEP meeting. The team made no change in the offered placement, speech and language services and ESY services. The team continued Student's alternate state assessment by PASA. (J 41, 42.)
  59. In eighth grade, Student received grades of "A" and "B" in all classes for the first three marking periods. Student's grades for homework completion were perfect for all marking periods in all classes except one, where the grades were over 90%. (J 46.)

60. By March 26, 2012, in mathematics, Student demonstrated 50% accuracy from a baseline of 13% on the IEP goal for determining the appropriate operation and solving word problems. Student demonstrated 95% accuracy from a baseline of 83% on the IEP goal for subtraction with regrouping; 60% accuracy with zeros; and 100% accuracy with making change up to \$100.00. Student demonstrated 100% accuracy from a baseline of 75% with one digit divisors with no calculator and 55% accuracy with 2 and 3 divisors with a calculator. Student demonstrated 95% accuracy from a baseline of 40% on the IEP goal for creating statistics, with supports including a calculator. By March, the probability goal had not been taught. (J 46.)
61. By March 26, 2012, in reading, Student demonstrated an average of 85% over two assessments on the IEP goal for identifying the main idea and supporting details; over 85% over two assessments for restating plot of a story; 70% in one assessment for identifying cause and effect; and 90% in one assessment for identifying context clues. For the goal of sequencing story facts, Student scored 80% or higher in two assessments and 90% in one assessment using a manipulative. For the goal of making inferences, Student scored 50% in one assessment. Summarization and characterization were not yet addressed. (J 46.)
62. By March 26, 2012, in writing, Student demonstrated overall rubric scores (from a baseline of 1.9) of 1.6 in September 2012, 2.2 in November 2012 and 1.8 in January; this averages to less than the baseline of 1.9. In organization, Student scored 1.0, 3.0 and 1.0 in the same months; this averages to no more than the baseline. (J 46.)
63. In Student's eighth grade year, the District began instructing and assessing Student with a new alternative mathematics curriculum called Number Worlds. At the beginning of the school year, the District placed Student in Level E of the program, approximately a third grade level. (J 46.)
64. On March 26, 2012, the IEP team created the Student's yearly IEP. The team maintained Student in the same placement, supplemental learning support, but changed the classes and supports for different subjects. Student continued to be assigned to special education classes for all major subject areas. For reading, mathematics and English, Student would be instructed from an alternative curriculum. For all other subjects, Student would be instructed from the general education curriculum. (J 46.)
65. Student continued eligible for alternate state testing in the PASA assessment. The District offered ESY at the same level of service as offered for the previous summer. (J 46.)
66. Speech and language therapy was altered to one 30 minute period per week individual, one 45 minute period per week in small group, and one 45 minute period per week of classroom support. (J 46.)
67. Present levels were established for reading, writing and mathematics, but the District speech and language therapist did not report present levels for the previous speech

- and language goals for asking for clarification of questions, understanding and use of vocabulary, and language tasks including the skills of following oral directions, main idea, problem solving and story comprehension. The therapist began addressing articulation of /r/ in eighth grade, and reported present levels on that. (J 46.)
68. The March 2012 IEP revised the goals for speech and writing, eliminating the goal of asking for clarification. The team included the measurable goal for expressive and receptive language tasks, eliminating reference in the goal to the skills of following oral directions, main idea and story comprehension; instead, the goal included reference to the skills of identifying cause and effect, making inferences, making predictions and problem solving. The team included a rewritten measurable goal for vocabulary development and use. (J 46.)
  69. The March 2012 IEP revised the goals for mathematics, changing the measurement criteria and increasing the baseline of the goal for solving word problems; changing the measurement criteria and reducing the baseline of the goal for subtraction; changing the measurement criteria and establishing a baseline of the goal for finding probability; and replacing the long division goal from the previous IEP with a new measurable goal for numbers and operations, to be assessed for progress in the new curriculum. (J 46.)
  70. The March 2012 IEP revised the goal for writing, substituting a measurable goal counting specific structural elements, including paragraphs, sentences, descriptor words and complex sentences. (J 46.)
  71. The March 2012 IEP revised the goal for reading, establishing baselines at the third, fourth and fifth grade levels, and establishing baselines and satisfaction criteria for objectives addressing main idea, plot, cause and effect, comparison and contrast, inferences, character traits and distinguishing fact and opinion. (J 46.)
  72. By May 2012, FastTrack Assessments of Student's reading comprehension skills showed that Student was listed as able to answer reading comprehension questions or perform reading comprehension tasks with 87% accuracy at a grade three level and 41% accuracy at a grade four level. (P 12, P 17.)
  73. In May 2012 Parents obtained an independent evaluation of Student's academic achievement in reading. Test scores were consistent with those obtained by the District generally, though they were lower in some areas than the District's scores. (J 60, P 17.)
  74. In November 2012, Parents requested a re-evaluation of Student. (J 53.)
  75. On December 6, 2012, the IEP team revised Student's IEP. It did not change the placement, curricula, ESY offered, related services, goals or PASA alternative assessment provided in the March 2012 IEP. It made some changes to present levels to update Parent on progress, and made some changes to modifications and SDI; the modifications and SDI continued to address Student's educational needs. (J 56.)

76. On December 21, 2012, the District issued its re-evaluation report. The evaluator found Student's cognitive ability to fall within the borderline range, and found no significant discrepancy between Student's ability and academic achievement. The evaluator removed Student's classification of Specific Learning Disability, and, based upon Student's history and diagnosis of Attention Deficit Hyperactivity Disorder, classified Student with Speech or Language Impairment and Other Health Impairment. (J 60.)
77. Based upon standardized testing with the Woodcock Johnson Achievement, 3d Edition, Normative Update, the evaluator found that Student had progressed in reading, mathematics and writing from 2010 to 2012, remaining within the borderline range of achievement, in comparison with same aged peers. Curriculum based testing and the evaluator's clinical observations during that testing indicated significant progress from below third grade reading comprehension achievement in seventh grade to scores indicating that Student was instructional third grade and was applying comprehension skill taught in the District's curriculum. The evaluator found that Student's achievement scores were commensurate with overall cognitive functioning. (NT 1655-1656, 1966-1971; J 60.)
78. As part of the re-evaluation, the District's speech and language therapist conducted a speech and language re-evaluation. Standardized scores indicated that Student made progress between 2010 and 2012 in synonyms, antonyms, sentence completion, non-literal language, meaning from context, and ambiguous sentences. Student also demonstrated progress in vocabulary, and increased sentence length. (J 60.)
79. The evaluator recommended continued special education and related services in speech and language, reading comprehension, mathematics, writing, oral vocabulary and language processing skills. In addition, the evaluator recommended direct instruction in working memory and study skill strategies and work checking habits. (J 60.)
80. On January 15, 2013, the IEP team considered a draft IEP that continued Student's placement, instruction in alternative curricula, ESY eligibility and alternate state assessment with PASA. (J 63B)
81. The January 2013 draft IEP offered revised goals addressing reading comprehension (main idea, plot, context clues and inferences), mathematics (numbers and computation, geometry and measurement, probability and statistics, algebraic concepts, functional measurement), writing (number of paragraphs, number of sentences, sentence types, descriptor words) and speech and language (synonyms, antonyms, similarities, differences, inferences, vocabulary, figurative language). (J 63B.)
82. The January 2013 draft IEP offered modifications and specially designed instruction - some new and others from previous IEPs - that addressed Student's educational needs. (J 63B)

83. By February 1, 2013, in speech and language, Student was able to perform language tasks involving synonyms, antonyms, similarities, differences, inferences and vocabulary correctly 80% of the time with prompts and choices. Student had shown some ability to understand figurative speech, but progress had not been measured at that point, as the subject had been introduced in only two instances. (J 63A.)
84. By February 1, 2013, in reading comprehension at a fourth grade level, Student was able to answer questions involving main idea, plot, context clues, inferences and parts of plot with 50% accuracy. (J 63A)
85. By February 1, 2013, in mathematics at a sixth grade level, Student was able to solve problems involving probability and statistics with 69% accuracy; problems involving numbers and computation with 56% accuracy; problems involving geometry and measurement with 25% accuracy; and problems involving algebraic concepts with 47% accuracy. At a third grade level, Student was able to solve problems involving functional measurement with 71% accuracy. (J 63A.)
86. By February 1, 2013, in writing, Student was able to write a three to five paragraph composition with a minimum of five sentences per paragraph, including two descriptor words per composition and one to two compound or complex sentences per paragraph in one of three trials. (J 63A.)
87. On March 21, 2013, the IEP team revised Student's IEP for the next school year. The District offered an IEP meeting but Parent agreed to the District staff making revisions without a meeting, subject to Parent's review and approval. (J 63, 71 p. 42.)
88. The March 2013 IEP continued Student's placement, instruction in alternative curricula, ESY eligibility and alternate state assessment with PASA. (J 63A.)
89. The March 2013 IEP provided revised goals addressing all of the educational needs addressed in the January 2013 draft IEP. It offered modifications and specially designed instruction that addressed Student's educational needs. (J 63A.)
90. In April 2013, Student was able to tell elapsed time to five minutes with 80% accuracy; tell elapsed time to one minute with 70% accuracy; count to the nearest penny and nickel with 80% accuracy and count to nearest 5, 10, 20 and 100 with 75% accuracy. (P 26.)
91. In Student's eighth and ninth grade years, the speech and language therapist consulted with and coordinated with Student's teachers to help them accommodate or specially design instruction to address Student's speech and language difficulties. (NT 1661-1665; 1774-1786.)
92. In the 2012-2013 school year, teachers did not follow the specially designed instruction in the IEP that calls for Student to write homework in a planner book and have the assignments initialed by teachers. Student handed in a significant number of assignments late; however, Student earned good marks for homework completion in

that year, Student's eighth grade year. District personnel believed that this specially designed instruction was not necessary. (J 78; P 35.)

93. Although it was offered consistently during the relevant time, Student did not participate in ESY services, due to schedule conflicts with summer camp plans. (NT 684-688.)
94. On April 15, 2013, Parents requested due process by filing a Complaint-Notice pursuant to the IDEA. On April 16, Parents rejected the NOREP for the March 2013 IEP. (J 64.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>3</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>4</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called

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<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>4</sup> A “preponderance” of evidence is a weight of evidence that is greater than the weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

“equipose”. 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 “equipose”, the Parents cannot prevail.

#### FREE APPROPRIATE PUBLIC EDUCATION – LEGAL STANDARD

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

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as

are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

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

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

evidence known to the school district at that time. See, D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).<sup>5</sup>

#### THE DISTRICT PROVIDED A FAPE TO STUDENT

Based upon a preponderance of the evidence, I conclude that the District provided a FAPE to Student. The District provided appropriate placement, and research based programs that addressed the Student's educational needs. The District implemented these programs through qualified educators. It provided appropriate IEPs and modifications and specially designed instruction, extended school year services and related services, all appropriate to address the needs of Student. The District was highly responsive to the requests of Parents, and made extensive and appropriate efforts to include Parents in genuine collaboration with regard to Student's educational programming. A preponderance of the evidence shows that, as a result, Student made slow but meaningful progress in all areas of educational concern, including reading, writing, mathematics, speech and language.

There is no contest that the District provided an appropriate placement to the child and that it provided research based programs to address Student's educational needs. It is also uncontested that the District implemented these services through qualified professional educators. Moreover, the evidence is preponderant that any changes made in the programming provided to Student were predicated upon Parental consent.

I conclude, based upon a preponderance of the evidence, that the District provided appropriate IEPs during the relevant period. All IEPs provided extensive summaries of the data

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<sup>5</sup> Section 504 defines FAPE differently, requiring that the education provided be designed to meet the individual needs of the child "as adequately as the needs of non-handicapped persons are met." 34 C.F.R. §104.33(b)(1). I address this different standard below.

available for Student, including present levels of academic and functional performance that were updated to the latest available assessments. The IEP goals and modifications and specially designed instruction addressed all of Student's educational needs in an appropriate fashion. A careful review of the record persuades me that all goals during the relevant period were measurable, and that the District provided appropriate progress monitoring to the Parents<sup>6</sup>, based upon metrics stated in the goals and proceeding upon baseline data contained in the goals and in the present levels of academic and functional performance.

The evidence also is preponderant that the District made appropriate efforts to include Parents in a collaborative effort to create Student's special education program in the District. In 2 years and 2 months, the District provided 6 IEPs (2 annual IEPs, 3 revised IEPs and 1 draft that was subsequently revised). In the same relevant period of time, the District provided two re-evaluations (1 reevaluation to add new mathematics assessments, and one complete re-evaluation). The record as a whole shows numerous communications between Parents and District educational professionals and administrators, including emails, formal written reports, correspondence and a substantial number of meetings, most of which were IEP meetings in compliance with federal and state regulations. Some of these IEP meetings were devoted in part to discussing Student's needs with private evaluators and service providers that had been retained by Parents. Subsequent IEPs reflected the District's incorporation of at least some of these providers' recommendations. Thus, the evidence is preponderant that the District was appropriately responsive to the Parents' frequently expressed desires and concerns.

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<sup>6</sup> Parents argue that the progress data were confusing to them; however, the evidence is preponderant that District personnel made every effort to explain the educational program to Parents. I conclude that, with help and explanation available to them, Parents were not prejudiced by any difficulty understanding the progress data. Therefore, this fact does show a denial of FAPE or parental participation.

I conclude by a preponderance of the evidence that the Student made meaningful progress during the relevant period of time as a result of the District's special education services. The record shows that this progress was slow, and not surprisingly, Parents argue that the pace of any of Student's progress in the District was too slow to be meaningful. However, as explained above, the law requires this hearing officer to determine meaningfulness in light of the Student's abilities. The record is preponderant that the Student's abilities were compromised significantly by Student's disabilities. I conclude, based upon this evidence, that relatively slow progress was meaningful for this Student within the intent of the IDEA.

The parties made an extensive record regarding Student's history, both clinical and educational. Student was identified literally within one year of birth as a child in need of intervention. Student received this intervention by way of speech and language services, among other things. Student received early intervention services, and the speech and language therapy continued throughout Student's preschool life. Student received speech and language services in the early elementary school years, and also received special educational interventions.

I consider it significant that, despite the very intensive interventions that this child received, Student's performance in reading comprehension, writing, speech and language skills and mathematics showed very little progress from kindergarten through 6<sup>th</sup> grade. By the time Student entered the District in 7<sup>th</sup> grade, Student remained at approximately a 3<sup>rd</sup> grade level of reading comprehension, with serious difficulties at even that level of instruction, and a need to be taught at a second grade level for some purposes. Student had not yet mastered basic mathematical facts and operations. Student was unable to write paragraphs with complex sentences consistently. Student was working on similarities, differences, synonyms, antonyms

and other basic language skills in speech and language therapy. Standardized testing scores produced a similar picture of markedly slow progress in these areas.

Parents enrolled Student successively in 2 private schools during the period between November 2007 and the end of school in June 2010. The 1<sup>st</sup> private school, which taught Student for approximately 2 and one half years, advised Parents that Student's progress was so slow that they were concerned for Student's well-being should Student be challenged any further within their highly supported system. The very next year, a 2<sup>nd</sup> private school, after approximately ½ year within its regular program and another one half year of one to one tutoring in all major academic areas, again advised Parents that Student was likely to fall unacceptably behind peers if Student should remain at that 2<sup>nd</sup> private school. Thus Parents came to the District for Student's 7<sup>th</sup> grade experience.

This history shows preponderantly that Student's pace of learning in reading comprehension, writing, speech and language skills and mathematics had been slow during Student's life prior to entering the District's schools. I conclude that this slow pace of progress, despite Parents' provision of a variety of educational settings and supports, provides an appropriate context within which to view Student's progress with the District during the relevant period of time.

In this context, I conclude that Student did make progress during the relevant period of time, and that this progress was meaningful for Student. Standardized achievement tests, curriculum based assessments and performance in the classroom all demonstrate preponderantly that Student made educational progress in three of the areas most affected by Student's disabilities: reading comprehension, mathematics and speech and language skills.

Standardized achievement tests in reading (including reading comprehension) and mathematics, as well as standardized assessments conducted by the District's speech and language therapist, demonstrate that Student was able to maintain Student's position relevant to a national cohort of same age peers from 2010 until 2012, a period of approximately 2 years. Although Student did not "close the gap" with same age peers during this period, remaining one to two standard deviations and sometimes more below the mean, nevertheless, these data show approximately one year's growth in one year for this Student, a pace of progress that compares quite favorably with the pace of Student's progress prior to entering the District.

The District utilized an extensive array of curriculum based assessments, and many of these also reflected significant progress in reading, writing, mathematics and speech and language skills. Student showed an improvement of approximately 1 grade in 2 years with regard to reading comprehension. Assessments indicated that Student's age appropriate and curriculum based vocabulary increased substantially. Student's phonics, reading fluency and even reading expression improved. Assessments indicated that Student improved in writing based upon a grade level writing rubric; moreover, when the goal was changed to a more particularized measurement, based upon number of paragraphs, number of sentences, number of more complex sentences and use of descriptive terms, again Student showed some progress over a period of several months. In mathematics, Student improved in curricular assessments in the areas of numbers and operations, measurement and algebraic concepts. With regard to speech and language, the District's therapist reported improved scores in one to one language tasks, as well as in observed and graded expressive language exercises in the group setting.

Student also demonstrated improvement in classroom performance, including volunteering and participating in classroom discussions, and teachers' subjective reports of

Student's performance in the areas of reading, mathematics, writing and speech and language skills.

Parents criticize the District's many IEPs and IEP revisions, arguing that there were errors in dates, in baselines, and in the progress reports. Parents assert that the progress reporting was confusing to Parents, and that one IEP iteration failed to contain any objectives. I agree that Parents can make out some errors and some confusing entries in the IEPs. No doubt, too, the District's strenuous attempts to report every piece of data in the present levels sections of the IEPs made it difficult to trace progress through a plethora of data from numerous types of progress monitoring. Still, reading these documents very carefully, this hearing officer found that the IEPs and the progress monitoring data were intelligible. Once stitched together, the strands of data were sufficiently coherent to show Student's admittedly modest progress in the areas of concern. Thus, I conclude that the preponderant evidence shows that the IEPs were appropriate.

#### IMPLEMENTATION OF THE IEP

Parents argue that there was a pattern of failure to implement Student's IEP. They point to two instances in which modifications or specially designed instruction in the IEP was not followed. I will address these below, but I do not find them preponderant, when contrasted with the substantial evidence of appropriate programming and progress discussed above.

Parents showed that, on one occasion, the District failed to implement the modification regarding Student's asserted propensity to faint when exposed to [redacted]. The teacher admittedly failed to warn Parents that the triggering course material would be coming up in class, and the Student reported feeling faint when the material was addressed in class. The Student was

not harmed; the emergency procedure in the IEP modification was invoked; the teacher apologized; and there is no evidence that this kind of lapse ever repeated. I conclude that this was an isolated mistake that does not imply any wider failure to implement this or any other modification or SDI.

Parents also showed that the District failed to implement one SDI appropriately: the SDI for teacher signing of Student's assignment planner. The IEPs consistently required the Student to write all assignments in the planner and for teachers to initial the entries. One teacher admitted not doing this; a supervisor admitted not monitoring implementation of this SDI. The book itself was made an exhibit and it shows some entries with teacher initials, but these are at best sporadic. I conclude that the District did fail to implement this item of specially designed instruction appropriately.

The District argues that this failure was procedural in nature and did not cause any deprivation of educational benefit. I disagree with the characterization, but agree that the record shows no detriment from the District's failure. I conclude that the District did fail to implement this item of specially designed instruction appropriately. The promise in the IEP is not merely procedural in my view. It is a substantive service to be provided. 34 C.F.R. §300.513(a)(1). There is documentary evidence that a significant number of Student's assignments were marked late at various times during the relevant period. Nevertheless, this evidence itself is not enough to prove that the Student was deprived of educational benefit, because there was no testimony showing that these purportedly late assignments were not made up at a later time, or were not modified pursuant to the extended time and other modifications in the IEP. Moreover, several District witnesses credibly testified that Student's performance in completing and turning in homework and other assignments was excellent, and Student's grades reflect good performance

in homework and assignments. Thus, the Parents have not proved by a preponderance of the evidence that the Student was deprived of educational benefit. As discussed, Student received a FAPE and this lapse in one modification does not negate or outweigh the educational benefits that Student received.

Parents argue that the Student's science and social studies classes were not modified appropriately to allow Student to access the curricula for these subjects. However, taken as a whole, the record demonstrates the contrary by a preponderance. While separate textbooks and modified curricula were not provided (consistent with the statements in the Student's IEPs providing general education curricula for Student in science and social studies), the evidence shows that other methods were utilized to modify the delivery of the curricula to Student so that Student could access the information being taught.<sup>7</sup>

## READING

Parents argue that the District failed to provide appropriate programming to address Student's profound disability affecting reading comprehension. The record does not support this argument preponderantly. The District attempted for months to move Student to a classroom where Student's learning support instruction could focus on reading comprehension skills instead of decoding skills (which are the primary focus of instructional time in the Wilson classroom to which Student had been assigned originally). Parents disagreed and resisted the change for months, because they felt that the teacher was a good fit for Student. The teacher thereupon

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<sup>7</sup> Parents also piece together some testimony from a biology teacher that seems to negate the credible testimony of other District witnesses that science classes were modified as needed to enable Student to access the curriculum. Most of these responses attested to a lack of memory. I conclude that this testimony is insufficiently convincing of the Parents' assertions, weighed against the entirety of the record.

crafted a modified Wilson class experience for Student, which reduced the time spent in Wilson curriculum in order to add time for Student in a computer-based reading comprehension program, with explicit teaching by a District reading specialist.

This history vitiates the argument that the teacher's creative programming was not enough, when it was Parents who prevented the District from providing more instruction for reading comprehension. This history also contradicts preponderantly any argument that the District failed to individualize its program for Student in reading.

Parents argue that the Student's reading teacher did not provide appropriate programming for Student when the teacher assigned literature for reading that was above Student's instructional level. I find this focus on the reading assignment to be unpersuasive in context of the whole record. The teacher made clear that he assigned this in order to allow Student to read and learn with the rest of the class. The teacher testified credibly that he carefully accommodated the assignment to account for Student's lower reading level and kept the assignments short to mitigate any frustration Student might experience. I find that the teacher exercised sound educational judgment with regard to this assignment, and that it was not an example of inappropriate programming, nor was it emblematic of any broader deficiencies in the District's programming for Student.

## MATHEMATICS

Parents argue that Student's mathematics instruction was inappropriate because the District instructed Student in skills at lower grade levels than fifth grade, which Student had attained at the previous private school; as a consequence, Parents assert, Student was bored and began to lose Student's motivation, confidence and passion for mathematics. I find that there is

some evidence of this in the record, consisting of a short composition that Student wrote confessing to this boredom and Student's discouragement. Nevertheless, this evidence does not prove preponderantly that the District's programming was inappropriate for Student.

The greater weight of the record demonstrates that the District's programming was designed by a very qualified director of mathematics, who conducted extensive testing over a three year period of time, and who carefully selected curriculum for Student that would address Student's deficiencies in mathematics. Programs were vetted by the District and this educator, and were provided by qualified teaching staff. Both standardized and curriculum based assessments showed that Student made significant progress during the relevant period in mathematics, and I conclude that this progress was meaningful for Student.

#### SPEECH AND LANGUAGE

In speech and language, Parents argue that this should not have been designated as Student's primary disability. The record is preponderant to the contrary, especially given Student's extensive history of speech and language intervention going back to the Student's first year of life. All evaluations throughout these years, to the extent reflected in the record, indicated that Student had a speech or language impairment, and the record is preponderant that that impairment was a significant factor in the Student's educational disabilities, impeding Student's reading comprehension, writing, mathematics problem solving, participation in classrooms across all subjects, and ability to understand and carry out classroom instructions. I find no basis in the record to criticize the District's designation of speech and language impairment as Student's primary disability.

## PARENTAL PARTICIPATION

Parents argue that they were denied meaningful participation because of IEP changes made at a meeting that occurred among educational staff without their presence, and without the presence of the full team mandated by law. On the record as a whole I find that this was not a procedural violation of the IDEA. The record is clear that Parents asked that the changes be made without an IEP meeting, and that District staff believed that they were thus permitted to go forward.

However, even if this were a procedural violation, the record is preponderant that it did not significantly impede Parents' ability to participate in the decision making process. 34 C.F.R. 300.513(a)(2)(ii).<sup>8</sup> Parents were aware of the changes and did not object to them, and the District demonstrated repeatedly that its educators welcomed parental input, considered it at every turn – including meeting with and accepting recommendations by private evaluators and providers – and repeatedly revised IEPs and conducted evaluations to address Parents' concerns.

## POST SECONDARY TRANSITION

This issue arose in the course of the hearing and very little evidence was developed on it. It was not mentioned in the Parents' complaint, nor was it mentioned in Parents' opening statement. I conclude that, under the circumstances, the record is not sufficiently developed to address this issue. Further, I would consider it unfair to the District reach this issue where there was essentially no notice to them that the issue was before me, until mid-way through the hearing itself. Under these circumstances, I dismiss the issue thus raised, without prejudice.

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<sup>8</sup> There is no evidence that any such procedural violation impeded Student's right to a FAPE or deprived Student of educational benefit. 34 C.F.R. §300.313(a)(2)(i), (iii).

## CREDIBILITY

I accord little weight to the Parents' expert opinion testimony. I found the expert to be apparently sincere and helpful, but the expert plainly had little knowledge of the Student's educational program, yet was asked essentially to criticize it. The expert had little direct knowledge of how Student was functioning at the time of the hearing or in the year preceding that date. Thus, I can give no weight to any opinion as to Student's progress or its significance. The expert never definitively opined with any reliability that Student either had failed to make progress because of the District's program or would have made more progress but for the District's allegedly deficient program. I found that the expert was asked to, and tried to, go beyond her expertise in answering questions about the Student's PASA eligibility, and repeatedly answered questions in a tentative, sometimes vague way. The expert demonstrated a lack of memory on an important issue. She did not remember telling the District's supervisor of special education at the time of her on site observation that the District was doing a good job – a fact sworn to credibly by the supervisor. Thus, I conclude that the expert's testimony is simply not reliable enough in this matter to rely upon her opinions.

In general, I found all of the witnesses to be credible, based upon consistency of testimony with the record (with a few minor and not determinative exceptions) and their helpful, non-argumentative, and fair approach to answering questions.

## COMPENSATORY EDUCATION

I have found a substantive deprivation of IEP services in that the District did not implement the homework assignment book modification appropriately. On the other hand, nowhere in the very comprehensive documentary record of this case do I find significant

evidence of a chronic problem with homework completion. Thus, despite the District failure, the evidence is preponderant that the Student received educational benefit from homework assignments; moreover, the record is preponderant that Student received a FAPE despite the District's failure to implement the homework book SDI appropriately. Consequently I will not order any compensatory education due to this lapse.

Compensatory education is a remedy which aims to restore educational benefit that should have been provided to a child, but was not provided. In this matter, I conclude that such a remedial order would not be equitable because there is no loss of educational benefit to restore. Therefore none is ordered.

#### SECTION 504

I conclude that the District did not violate the IDEA by failing to offer or provide a FAPE. I also conclude that the District offered and provided educational services that were appropriate to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1).<sup>9</sup>

#### CONCLUSION

I conclude that the evidence is preponderant that the District provided Student with a FAPE during the relevant period. Consequently, I find that there is no basis for an order directing the District to provide compensatory education. While the District did fail to implement one modification promised in the IEP, I find no deprivation of educational benefit and

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<sup>9</sup> The District does not deny that the District is federally funded, that Student has a handicap within the meaning of section 504, and that the Student is "otherwise qualified" for section 504 purposes.

therefore do not order compensation. In light of these conclusions, I find no basis to order the District to provide reimbursement for either private evaluations or tutoring services. I dismiss the transition issue without prejudice, because it was raised too late in the hearing and the record is not adequately developed. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

NOW, this twenty-ninth day of October, 2013, it is hereby ORDERED that all of Parents' claims are DISMISSED with prejudice, except that Parents' allegations concerning the appropriateness of transition planning and services are dismissed without prejudice.

*William F. Culleton, Jr. Esq.*

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

October 29, 2013