

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: B.W.

Date of Birth: [redacted]

Dates of Hearing:

August 11, 2011, August 23, 2011
August 30, 2011, September 27, 2011

CLOSED HEARING

ODR File No. 2029-1011AS

Parties to the Hearing:

Representative:

Parent[s]

Liliana Yazno-Bartle, Esquire
Law Offices of Caryl Andrea
Oberman
Grove Summit Office Park
607A North Easton Road
Willow Grove, PA 19090

Methacton School District
1001 Kriebel Mill Road
Norristown, PA 19403

Sharon W. Montanye, Esquire
Kathleen M. Metcalfe, Esquire
Sweet, Stevens, Katz & Williams LLP
331 E. Butler Avenue
New Britain, PA 18901

Date Record Closed:

October 21, 2011

Date of Decision:

November 4, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a high school-aged student in the Methacton School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² by reason of a specific learning disability in reading, mathematics, and written expression. Student's Parents filed a due process complaint against the District in June 2011, asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973³ for the 2009-10 and 2010-11 school years, as well as the program proposed for and ultimately implemented at the start of the 2011-12 school year. The Parents sought compensatory education, an order for a private placement at public expense,⁴ and reimbursement for an independent educational evaluation (IEE).

The case proceeded to a due process hearing convening over four sessions, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with FAPE throughout the time periods in question. The District maintained that its special education program, as offered and implemented, was appropriate for Student.

For the reasons set forth below, I find in favor of the Parents on a portion of the claims, and in favor of the District on a portion of the claims.

ISSUES

1. Whether the educational program provided to Student during the 2009-10 and 2010-11 school years was appropriate;
2. Whether the educational program proposed and currently implemented during the 2011-12 school year was and is appropriate;
3. Whether Student was entitled to extended school year program during the summers of 2009, 2010, and 2011;
4. Whether Student is entitled to compensatory education for any of those time periods and, if so, in what amount;
5. Whether Student requires a private school placement at public expense;
6. Whether the Parents are entitled to reimbursement for the IEE.

¹ In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

² 20 U.S.C. §§ 1401 *et seq.*

³ 29 U.S.C. § 794.

⁴ The District does not challenge the authority of this hearing officer to order that Student be placed in the private school chosen by the Parents.

FINDINGS OF FACT

1. Student is a high school-aged student who resides in the District and is eligible for special education on the basis of a specific learning disability. Student currently attends the District high school pursuant to an agreement by the parties on the pendent placement. (Notes of Testimony (N.T.) 18, 35-36)
2. Student was provided with early intervention services through the local Intermediate Unit (IU) to address developmental delay particularly with fine motor skills. Student was initially evaluated for special education by the District in the spring of 2002 in order to prepare for Student's transition to a school-age program. (Parent Exhibit (P) 1)
3. At the time of the initial evaluation, Student demonstrated some attention issues which were described in the evaluation report (ER) as not uncharacteristic for Student's age by both the school psychologist and Student's mother. Cognitive testing revealed average ability, while Visual Motor Integration assessment reflected below average fine motor and perceptual discrimination skills. Letter and number recognition skills were noted weaknesses. Student was identified at that time as a child with a disability based upon developmental delay. (P 1)
4. Student attended kindergarten during the 2002-03 school year with part-time special education and occupational therapy. Student reportedly was forgetful, disorganized, and had difficulty with some academic skills. (P 2)
5. Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) by a neurologist while in the first grade and was prescribed medication. (N.T. 161-63, 188)
6. There is no dispute that Student has very good auditory skills and has been described as an auditory learner. (N.T. 299, 483, 539, 729, 1007-08; P 27; School District Exhibit (S) 15)
7. The District conducted another evaluation of Student in first grade. At the time, Student was having difficulty with reading, writing, and mathematics computation, as well as with organizational skills. Mathematics reasoning skills were a relative strength, and multisensory instructional approaches were successful for Student, particularly with individual attention from a teacher. (N.T. 163-65; P 2)
8. Cognitive assessment using the Wechsler Intelligence Scale for Children – Third Edition (WISC-III) revealed a large discrepancy between verbal and nonverbal skills with a Full Scale IQ of 104. Student demonstrated average to above average overall intellectual and reasoning skills. (P 2)
9. Achievement testing using the Wechsler Individual Achievement Test – Second Edition (WIAT-II) and the Process Assessment of the Learner revealed weaknesses in reading skills, phonological processing, reading comprehension, mathematics, and written expression. (P2)

10. Behavioral assessment using the Behavior Assessment Scale for Children (BASC) and Behavior Rating Inventory of Executive Functioning (BRIEF) in addition to other assessments reflected concerns with anxiety, attention, retrieval of information, auditory working memory, visual processing, and several areas of executive functioning: working memory, initiation, monitoring of work, organization, and planning. (P 2)
11. The September 2003 RR identified Student as eligible for special education by reason of a specific learning disability. The school psychologist opined that Student exhibited characteristics of Dyseidetic Dyslexia, which is consistent with the Parent's reason for requesting another evaluation. (P 2)
12. During the 2008-09 school year (sixth grade), Student's first year in middle school, Student began to experience significant anxiety with respect to difficulties with peers and concern over missing class time. (N.T. 174-76, 178, 186, 193-94, 369)
13. Student's Individualized Education Program (IEP) for sixth grade noted needs in reading fluency, decoding, encoding, and mathematics calculation in addition to organization. Goals addressed mathematics, language arts (reading fluency and encoding), and occupational therapy. The IEP recommended that Student be provided with assistance in organizing assignments and binders, time management, and long term assignments. (P 6)
14. An Assistive Technology Action Plan was devised in the spring of 2009. Student was to be provided with the Read and Write Gold software program at school for writing assignments and tests, and another text to speech software program on CD to be used both at home and at school for reading and writing tasks. (N.T. 178-85; P 8, P 9)
15. Student's Parents requested a re-evaluation of Student in the spring of 2009. (N.T. 200-01; P 5 at 15)
16. Student was determined to be not eligible for an extended school year (ESY) program in the summer of 2009. (N.T. 186)
17. Student's IEP team convened in June 2009 to develop a program for the 2009-10 school year (seventh grade). This IEP contained present levels of academic achievement and functional performance in Reading, English, Mathematics, Science, Social Studies, and Health, as well as fine motor skills. In Reading, the IEP noted that Student had entered the sixth grade reading at a third grade level and had not mastered his reading goal from the prior IEP at the time the June 2009 IEP was developed.⁵ Scores from an administration of subtests of the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III-ACH) reflected standard scores ranging from 75-87 based on Student's age. Strengths were reported with respect to visual perceptual skills, computer skills, and background knowledge in many subjects. Concerns were noted with organization; losing materials; beginning, completing, and/or locating assignments and homework; attention; social skills; and anxiety. Needs included these concerns as well as oral reading fluency, spelling, mathematics computation, and retention of material. (P 11; S 1)

⁵ The sixth grade oral reading fluency goal was at the third grade reading level. (P 6)

18. The 2009-10 IEP contained annual goals addressing use of assistive technology; oral reading fluency of 127 words correct per minute at the fourth grade level; spelling at a sixth grade level; mathematics computation at a sixth grade level; keyboarding skills; and completing assignments. Program modifications and items of specially designed instruction provided for a weekly binder check and assistance with organization by the learning support teacher; small group instruction; tests read aloud; eighth period study hall for homework, tests, and other assistance; use of a calculator and multiplication chart; use of audio support software, talking word processor, and screen reader; books on tape for independent reading; long term assignments mailed home; extended time for assignments; and use of printing or typing for written work. Student would receive occupational therapy on a consultative basis as well as individual and group counseling. Student would be provided supplemental special education through learning support. (P 11; S 1)
19. The Parents agreed with the IEP developed for the 2009-10 school year and approved the Notice of Recommended Educational Placement (NOREP). (N.T. 187-88, 349; P 11; S 1)
20. The District re-evaluated Student and issued a re-evaluation report (RR) in the fall of 2009. Cognitive assessment using the Fourth Edition of the WISC (WISC-IV) reflected a Full Scale IQ of 94, but with significant variability across scores and relative weaknesses in the Working Memory and Processing Speed Indices. Student's General Abilities Index of 107 was thought to provide a more accurate representation of Student's cognitive ability. (N.T. 229, 724-37; P 12; S 2)
21. Student's academic achievement was also assessed for the fall 2009 RR, using the WIAT-II and the Kaufman Test of Educational Achievement – Second Edition (KTEA-II). Student's WJ-III-ACH subtest scores reported in the IEP were also included. Student's scores were below expected levels in many areas of reading, mathematics, spelling, and written expression. Information from Student's present levels of academic and functional performance from the IEP were also reported, including occupational therapy. (P 12; S 2)
22. In social and emotional functioning, the RR included information from the Second Edition of the BASC (BASC-2) and the BRIEF. The BASC-2 revealed clinically significant scores in the areas of Internalizing Problems (Parent) and School Problems (Teacher), and on the Behavior Symptoms Index (Teacher); with scores in the at-risk range in some areas of Externalizing Problems (Teacher) and Adaptive Skills (Parent and Teacher). Student's BASC-2 Self Report revealed an at-risk range score for Depression. On the BRIEF, areas of concern identified were within the Behavior Regulation Index (Initiate, Plan/Organize, Organization of Materials, and Monitor Scales), and the Metacognition Index. (P 12; S 2)
23. Teacher concerns in the RR included inappropriate peer interactions, class participation, assignment and homework completion, misplaced materials, and organization. Academic needs were identified in the areas of mathematics computation, oral reading fluency, and spelling. The RR concluded with a determination that Student was eligible for special

education by reason of a specific learning disability in basic reading, reading comprehension, reading fluency, mathematics computation, mathematics problem solving, and written expression. (P 12; S 2)

24. Recommendations in the RR included specially designed instruction in the areas of identified disability, and regular education with support for Social Studies and Science. For organizational needs, the RR recommended individual instruction with review of homework assignments, clear and specific instructions on homework with daily checks on completion, and chunking of longer assignments. A reading program emphasizing decoding skills and strategies to improve reading fluency were suggested. Further recommendations addressed spelling and mathematics. With respect to Student's anxiety and emotional functioning, positive reinforcement and assistance with organization, preferential seating and cues to focus attention, as well as relaxation techniques and counseling, were all recommended. (P 12; S 2)
25. Student's Parents did disagree with the recommendation for continuing special education for Student's Mathematics class, but did not otherwise signify their disagreement with the RR at the time it was issued. (N.T. 234-35)
26. During the 2009-10 school year (seventh grade), Student was in the learning support classroom for English/Reading, which focused on basic reading skills (comprehension, fluency, and decoding). Student was also there for Mathematics at the beginning of the school year before moving to a co-taught class for a trial period. Student was in regular Social Studies and Science classes with support from the learning support teacher. (N.T. 1064-66, 1081-82, 1084-88, 1099-1100; P 11, P 13)
27. Student's learning support classroom had approximately 8-10 students who were provided with the same curriculum as other students but at a slower pace and with more intensive support. The abilities of the students in the learning support classroom varied. Student found that setting to be disruptive. (N.T. 119-20, 132-33, 261-63)
28. Student struggled with but remained in the regular education Mathematics class that year. (N.T. 229-34; P 13; S 4 at 57)
29. Student's organizational needs were addressed during the 2009-10 school year through use of a set of binders to be kept in the learning support classroom, a daily homework check in homeroom, and a weekly binder check conducted for all students. However, the binders that Student brought home at times did not appear to the Parents to be organized, and Student did not consistently have homework completed or papers in their proper places. (N.T. 191-92, 210-12, 214-16, 1069, 1075-77, 1092-93, 1098-99; S 4 at 33-34, 40-42, 60)
30. In seventh grade, Student had tests read aloud, was provided extended time for assignments, had use of a keyboard in homeroom to type assignments and homework which were sometimes modified, and had some books available on tape or CD. (N.T. 1070-71, 1080-83)

31. In March 2010, Student's Parents contacted the District and expressed disagreement with the recommendations in the RR from the fall of 2009. They also requested an IEP meeting. (N.T. 142-43; P 13 at 2)
32. The IEP team discussed different assistive technology for Student for the 2009-10 school year, including the Read and Write Gold computer program, which was not made available until the end of the 2009-10 school year. Student did not have access to other assistive technology such as books on tape for independent reading or content area materials. Student was provided with a keyboarding device which was not completely effective for Student. (N.T. 181-82, 189-91, 206-07, 213-14, 227, 1072-74, 1101-02; P 13)
33. Although Student was to be provided with both individual and group counseling for the 2009-10 school year, Student did not begin to meet with the special education support counselor for either individual or group sessions until April of 2010 and many sessions after that time were missed due to assemblies, field trips, and other activities. Individual counseling was specified as 20 minutes once during each six-day cycle, and group counseling was to be for 40 minutes once during each six-day cycle. (N.T. 152-53, 192-94, 217-18, 563-65, 585; P11; S 1)
34. An incident involving a peer at school occurred in April 2010 that required the involvement of the school guidance counselor. That matter was resolved and was an isolated incident. (N.T. 614-18, 651)
35. Student's IEP team convened on a few occasions before the end of the 2009-10 school year but did not finish drafting an IEP. (N.T. 255-56)
36. An Assistive Technology Team Action Plan was developed in May 2010 which provided for training on Read and Write Gold for Student and the Parents as well as exploration of other forms of assistive technology, in addition to the provision of textbooks on alternative formats for the 2010-11 school year. (N.T. 250-53; P 15)
37. Student's grade averages at the end of the 2009-10 school year were Passing/Below Average in Art and Health; Satisfactory in Family and Consumer Science, Music, Mathematics, Reading, and English; and Above Average in Tech Education, Social Studies, and Physical Education. Teacher comments included late, missing, or incomplete assignments and homework, unprepared for class, low quiz scores, and a need to improve effort; positive comments were satisfactory effort and active participation in class. (S 3)
38. At the end of the 2009-10 school year, all students were tested for participation in the Read 180 program the following year. It was determined that Student would benefit from that program. Student's IEP was revised to provide the Read 180 program during the 2010-11 school year. (N.T. 1089; P 17; S 6)
39. Student was determined to be not eligible for ESY services in the summer of 2010. (N.T. 220)

40. Between May and September 2010, after the Parents learned that school counseling had not been provided for most of the 2009-10 school year, they arranged for Student to receive private psychological counseling due to concerns with Student's self-esteem, academic performance, and social issues. That psychologist conducted an evaluation and agreed with Student's ADHD diagnosis, and also reported an anxiety disorder. (N.T. 218, 362-63, 395, 410-21, 428-29; P 16)
41. Student and Student's Parents were provided with a trial version of and opportunities for training on Read and Write Gold during the summer of 2010. (N.T. 54-57, 235-39, 351-52, 1072, 1101-12; P 13)
42. Student's IEP team met in August 2010. Student's present levels of academic achievement and functional performance were summarized, and needs were noted in reading fluency and comprehension, spelling, mathematics computation, homework completion, organizational skills, initiative and motivation, class participation, retention of information, coping skills, perceptual skills, focusing attention, and self-esteem, as well as keyboarding skills and ability to copy from the board. (N.T. 256; P 18; S 7)
43. Annual goals addressed assistive technology use for completing assignments, reading comprehension, written expression, mathematics computation, keyboarding, and occupational therapy goals for completing assignments. Program modifications and items of specially designed instruction included tests read aloud, scribing answers or use of printing or typing, use of a calculator and portable writing device, audio support software, extended time for tests and quizzes in an alternate location and/or taken electronically, extended time for assignments which were to be scanned and emailed home, chunking of long-term assignments, a daily binder check at the beginning and end of the day with use of homework folder for scanned assignments, textbooks in electronic format, visual cues, preferential seating, a flash drive, study guides and outlines, and a study buddy. (S 7; P 18)
44. Student's program was for supplemental learning support, and included occupational therapy and individual and group counseling as related services. (S 7; P 18)
45. The Parents approved the NOREP for eighth grade on September 18, 2010. (N.T. 120-21, 349-50; S 7 at 33-37)
46. During the 2010-11 school year, Student was in co-taught Science and Social Studies classes with support from the learning support teacher. Student's Social Studies and Mathematics textbooks were available online, and the Science textbook was available on CD. (N.T. 914-15, 940-44, 982-83, 1027, 1042)
47. Student also was provided with the Read 180 program in eighth grade which is designed for students who are two or more grade levels behind. The class had fourteen students and met every day for 90 minutes. Read 180 addressed reading comprehension, fluency, and vocabulary and, to a limited extent, decoding. Decoding was not viewed as a primary deficit for Student. The Reading class period typically began with whole group instruction for 20 minutes followed by 3 small group rotations of 20 minutes each.

Between September 2010 and the end of April 2011, Student achieved a Lexile score just below the eighth grade year-end proficiency range for reading comprehension. However, it was recommended that Student continue with Read 180 based on exit criteria placing Student in the Below Basic range. (N.T. 81, 329, 946-57, 1024-27; S 12)

48. Student had the use of a wireless keyboard for taking notes during eighth grade. Student did not like to use this device and eventually brought a laptop to school. Student was also provided with several flash drives over the course of the school year but Student tended to misplace them. (N.T. 965-68, 987-88, 1038-39)
49. Student was provided with individual counseling services in eighth grade which were to be conducted once per cycle for approximately twenty minutes. Some sessions were shorter or longer, and many were missed entirely because of schedule changes or other reasons. Topics discussed with Student during individual sessions included problem solving, academic difficulties, and peer interactions. Student also attended eight group counseling sessions over the course of that school year. Group sessions involved 6-9 students from seventh and eighth grade who would discuss a topic relating to social skills. The group did not begin meeting until November because of lack of space, and ended in May for the same reason; some sessions were missed during the year due to holidays and weather. (N.T. 566-79, 586-87, 589-93, 596-97, 598-600, 605-07; S 8)
50. Student experienced difficulties with peers and peer relationships over the course of the 2010-11 school year. The school guidance counselor intervened on several occasions when Student experienced conflict with peers. All but one of those situations were addressed by the guidance counselor and the students without involving the principal. In the incident requiring the principal's involvement, the two other students involved were disciplined after the principal met with all three students. (N.T. 206-11, 596-98, 618-36, 672-74, 679-84, 691-95, 702-10, 958-60)
51. Twice daily binder checks were to be conducted during eighth grade. However, assignment folders that Student brought home during eighth grade contained papers other than assignments and did not appear to the Parents to be organized. For the first half of the year, Student's learning support teacher or the instructional assistant tried to model good organizational strategies, and in the second half of the year it was more Student's responsibility. Student's homework was often not completed, and Student's learning support teacher did not believe the folder system was effective for Student. (N.T. 214-16, 271-72, 279-80, 385-86, 915-19, 934-35, 986-87, 1005-06, 1013, 1029-31, 1052-53; P 19)
52. Student displayed difficulty with attention throughout the 2010-11 school year, requiring frequent redirection, more individualized attention, and breaking up of assignments. (N.T. 995-97, 1013-17, 1040, 1055-56)
53. In November 2010, Student's Algebra I and learning support teachers became concerned about Student's difficulties in that class and suggested Student be moved into a supplemental pre-Algebra class, but the Parents did not agree. (N.T. 938-40, 1028-29)

54. At least twice a week during the 2010-11 school year during the last period of the day when the afternoon binder checks were performed, Student would go see Student's Algebra I teachers at their suggestion for remediation and assistance or to complete homework assignments. (N.T. 919-22)
55. Sometime prior to January 2011, the Parents began exploring private schools for Student. Student applied to one particular private school which serves students with learning differences, primarily language-based learning disabilities, in preparing them for college. This school enrolls students of any age and has an enrollment of approximately 240. Class sizes are very small, approximately seven students with a ratio of three students to one teacher. The private school has each student evaluated by a learning specialist, then a program of individualized instruction is developed. Emphasis is on multisensory instruction and a flexible program, with assistive technology and counseling services available as well as extracurricular activities. This school operates on a nine-month schedule with an optional summer program. (N.T. 301-02, 326-28, 369-72, 392, 783-89, 796-800, 815; P 22)
56. At the end of the second quarter of the 2010-11 school year, Student had grades of Below Average in Algebra I and Social Studies; Satisfactory in Physical Education and Science; Above Average in Family and Consumer Science and Reading (Read 180); and Incomplete in Health. Teacher comments noted a need to improve effort and a failure to seek extra help in Algebra I, but were otherwise positive. (P 20)
57. An IEP meeting convened in January 2011. District personnel suggested moving Student to a Mathematics class with more support because Student was struggling with Algebra I, but the Parents did not agree with that suggestion. The team also discussed assistive technology, counseling, and the specially designed instruction relating to the study buddy and sending homework home via email. (N.T. 64-67, 69, 258-61, 396-97; P 18)
58. In late January 2011 following the most recent IEP meeting, the Parents sent a letter to the Supervisor of Special Education expressing concerns about the implementation of certain items of specially designed instruction in Student's IEP, including matters raised at the meeting held a few days prior. Those concerns included use of and availability of assistive technology; Student's struggles in Algebra I; Student's need for counseling and difficulties with peers; use of the study buddy; providing individual, incomplete homework assignments and worksheets through scanning and email; and chunking of long-term assignments. (P 23)
59. The Parents had Student evaluated by a different private psychologist in the late winter/early spring of 2011 to obtain information about Student's current level of functioning. The private evaluator reviewed Student's records, obtained information from the Parents and teachers, and observed Student in two classes, in addition to interviewing and conducting assessments of Student. (N.T. 440-50, 501; S 14)
60. This independent psychologist conducted a number of assessments, including the WISC-IV, subtests of the WJ-III-ACH, subtests of the Woodcock-John Tests of Cognitive Abilities – Third Edition (WJ-III-COG), and the Third Edition of the WIAT (WIAT-III).

She also obtained information using the Achenbach System of Empirically Based Assessment (ASEBA) through a Child Behavior Checklist, a Teacher Report Form, and Self-Report Form, as well as the BRIEF. (S 14)

61. The cognitive testing in the IEE revealed a Full Scale IQ of 92 on the WISC-IV with a significant strength in verbal reasoning skills and significant weaknesses in working memory and processing speed. The selected subtests of the WJ-III-COG confirmed Student's weaknesses in processing speed and cognitive fluency. (S 14)
62. In achievement testing reported in the IEE, Student demonstrated weaknesses in rate, accuracy, and fluency in reading with average oral language abilities; weaknesses in mathematics computation and problem solving; and weakness in written expression skills and spelling. (S 14)
63. Information using the ASEBA revealed clinically significant scores on the Anxious/Depressed (one Parent), Withdrawn/Depressed (one Parent), and Somatic Complaints Scales (Teacher and one Parent); the Internalizing Problems Scale was rated as clinically significant by both Parents, the teacher, and Student, and the Total Problems Scale and ADHD Problems subscale were rated as clinically significant by the teacher. (S 14)
64. Results of the BRIEF revealed a number of significant areas of concern, with scores in the clinically significant range on the Initiate and Plan/Organize scales, and the Metacognition Index (one Parent); and on the Shift, Emotional Control, Initiate, Working Memory, Plan/Organize, Organization of Materials, and Monitor scales, the Megacognition and Behavior Regulation Indices, and the Global Composite (one or both teachers). Student's own scores reflected no concerns with executive functioning. (S 14)
65. The evaluator who conducted the IEE concluded that Student demonstrated significant needs relating to academic achievement and particularly reading skills (accuracy, rate, and fluency), as well as social/emotional and executive functioning. She made a number of recommendations: a small classroom setting for the entire school day; trained staff; diagnostic teaching; instruction in learning strategies; assistance with executive function skills throughout the day; instruction in metacognitive strategies; "hands-on" teaching and assessment (S 14 at 26); and information presented in a variety of formats. This evaluator specifically recommended an intensive summer program to address reading deficiencies, individual counseling at school, use of auditory instruction, appropriately paced instruction with opportunities for practice, extended time for and adaptations to assignments, instruction in organizing material and information and self-monitoring, and development of problem-solving strategies. (S 14)
66. The Parents provided the IEE to the District in May 2011, but did not ask the District to fund an IEE prior to the due process hearing. (N.T. 124-25, S 14)
67. Following receipt of the IEE, the District issued a Permission to Evaluate (PTE) form. The sole purpose of the PTE was to review the IEE, then put the information from the IEE into a standard evaluation report format with any additional information from the

parents and teachers, as well as to provide the time frame for doing so. The Parents provided their consent. (N.T. 124-25, 155, 345, 743-48; S 14 at 1-2)

68. Student was determined to be not eligible for ESY services in the summer of 2011. (N.T. 283-84, 1051, 1056-57; P 18 at 29)
69. Student received detention on six occasions during the 2010-11 school year because Student was tardy arriving to school. Student arrived late because Student did not want to go to school, perceiving that other students were teasing Student. Detentions occurred either after school or at lunchtime. The assistant principal became involved because he is responsible for students with attendance concerns. (N.T. 290-96, 386-87, 662-73, 675-77, 696-98, 701-07, 719; P 40)
70. Student's scores on the PSSA in the spring of 2011 were Basic in Writing and Science and Below Basic in Mathematics and Reading. (P 25)
71. On the STAR Reading Test at the end of May 2011, Student scored in the average range for ninth grade students at the beginning of the school year in general reading skills. (P 20 at 5; S 12 at 5)
72. Progress monitoring reports from the 2010-11 school year reflected that student correctly identified and were explained main ideas (reading comprehension) with 90-100% accuracy on grade level probes by the end of the school year; improved in the use of conventions on writing samples from a baseline score of 1 point a rubric to a year-end score of 3 on the same rubric; and in mathematics computation, student correctly computed answers with inconsistent accuracy ranging from 22 to 77%. (P 19, P 29)
73. Student's grades at the end of the 2010-11 school year were reported as Failing in Algebra I; Below Average in Art and Social Studies; Satisfactory in Health and Science; and Above Average in Physical Education, Family and Consumer Science, Music, Tech Education, and Reading (Read 180). Teacher comments since the end of the second quarter were overall positive with the exception of having incomplete homework in Art and being unprepared in Algebra I. (P 20; S 11)
74. Student's IEP team met at the beginning of June 2011 to develop a program for the 2011-12 school year. Information on Student's present levels of academic achievement and functional performance was included, with description of how Student was performing in each class at the time. In addition to Student's strong auditory processing skills, the IEP reflected strengths in reading comprehension and written expression, and noted willingness to cooperate with and help others as well as improved self-confidence and a rich vocabulary. Weaknesses included spelling, attention, class participation, homework and assignment completion, and lack of organizational skills, and academic concerns in writing conventions and mathematics achievement. (P 27; S 15)
75. Annual goals for the 2011-12 school year IEP addressed use of assistive technology to complete assignments; grade-appropriate writing conventions; mathematics computation; and timely assignment/homework completion. Program modifications and items of

specially designed instruction were essentially the same as in the previous IEP. Keyboarding was discontinued, with occupational therapy limited to consultative service. Individual and group counseling remained as related services. (P 27; S 15)

76. Student's Parents wrote to the learning support teacher following the June 2011 IEP meeting and expressed a number of concerns with the program, including accessibility of Student's homework, the Read and Write Gold software, homework and assignment completion, transition services, elements of the goals and objectives and specially designed instruction, as well as Student's needs. They also stated that they disagreed with the ESY determination for 2011, placement for ninth grade, and the lack of responsiveness of the IEP to Student's educational needs as well as the IEE. At that time the Parents rejected the June IEP, requested due process,⁶ and informed the District that they wanted Student to attend the private school. (N.T. 316-26, 372-73, P 27 at 1-4, P 29; S 15)
77. Another meeting of the IEP team convened on July 12, 2011, and the Parents did attend. Present levels were updated to add the final grades from the 2010-11 school year. New goals addressed organizational skills, reading comprehension at grade level, spelling, and implementation of an intensive reading intervention program with explicit instruction. The study buddy was removed as an item of specially designed instruction, and group counseling was omitted. In all other respects, the July 2011 IEP was essentially the same as that proposed in June 2011. Student's Parents did not approve the July 2011 NOREP. (N.T. 114-15, 312-13; P 32 (*compared with P 27*), P 34, P 41; S 17)
78. The program proposed for and ultimately implemented at the start of the 2011-12 school year pursuant to agreement was the July 12, 2011 IEP, which provided for a co-taught classes for Mathematics (Algebra I), Science, and Social Studies, and the READ 180 program (for ninety minutes each day) with a decoding component. Student is in a regular physical education and health class as well as an elective. Program modifications and specially designed instruction included modified tests for elective courses, a morning and afternoon organization check, and Curriculum Support twice each day (morning and last period in the afternoon) for organization and other support. Individual counseling was specified as a related service. As assistive technology, Student was to have access to text-to-speech software. (N.T. 41-46, 52, 70, 85-87, 90, 101-02, 380-81, 870-74, 892-93, 899-900, 902; P 32; S 17)
79. Curriculum Support at the high school is similar to a study hall but with support. It is available for all students in the high school. There is a space for test-taking, small group and individual tutoring, and large group activities. This class is staffed by both general and special education teachers and instructional assistants with a ratio of approximately 6-7 staff members to 15-20 students. When students need an alternate location to take tests, another room is available for that purpose. (N.T. 45-51, 107-13, 116-18, 872)

⁶ The due process complaint was filed on June 22, 2011. (P 31; S 16)

80. In August 2011, Student was accepted into the private school to which Student had applied in early 2011. (N.T. 392, 781; S 22 at 3)
81. Student has been provided with textbooks in electronic or CD format for the 2011-12 school year. Tests and quizzes are read to Student in the Curriculum Support Room. (N.T. 881-82, 885-88, 908-09)
82. The Read and Write Gold program was installed on Student's laptop in September 2011. (N.T. 51, 53, 876-77)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁷ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent. Credibility of particular witnesses is discussed further as necessary.

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

⁷ The burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The IDEA further requires that eligible students be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id.*

2009-10 School Year

Student’s IEP for the 2009-10 school year was developed before the fall 2009 RR. (Findings of Fact (FF) 17, 20) Nevertheless, this IEP set forth a number of needs: oral reading fluency, spelling, mathematics computation, and retention of material, as well as additional concerns with organization, assignments and homework, focusing attention, social skills, and anxiety. (FF 17) Goals addressed assistive technology, oral reading fluency, spelling, mathematics computation, keyboarding skills, and completing assignments; and a comprehensive list of specially designed instruction addressed many other areas of concern, including homework/assignments, organization, books provided in alternate formats, audio support software and word processing, as well as counseling. (FF 18) With the exception of acknowledgement of Student’s reading decoding needs, this IEP, on its face, appeared to be reasonably calculated to respond to Student’s significant and well-known weaknesses, as well as strengths.

Information contained in the September 2009 RR merely confirmed much of what was already known: that student demonstrated a discrepancy between Student’s ability and achievement in the areas of basic reading, reading comprehension, mathematics computation, mathematics problem solving, and written expression; and that Social/emotional concerns

including peer interactions, as well as Student's difficulties with attention, organization, and homework/assignments, remained at least as significant if not more so. (FF 20, 21, 22, 23) The RR did, however, highlight Student's need for a reading program that emphasized reading decoding skills in addition to reading fluency. (FF 24)

Student's reading program for the 2009-10 school year did include some focus on basic reading skills (FF 18, 26); however, it could not be described as one which emphasized decoding. Also concerning was that Student's reading progress was only reported in terms of how many points Student earned on various assignments, which were modified and adapted as necessary (N.T. 1067-68, 1082); there is no documentation of how Student did on the reading fluency goal that school year. Student did, however, plainly continue to struggle with mathematics. (FF 28)

In other areas, there was significant testimony about the absence of appropriate assistive technology consistently throughout the school year, and it is clear that the devices made available were not very effective. (FF 30, 32, 41) This was a student who was and is an auditory learner and who was not reading at grade level, (FF 6, 17, 18), and for whom assistive technology and audio support was critical to accessing the curriculum. The strategies employed to address Student's significant and well-documented organizational needs were similarly inefficient, and Student demonstrated extreme difficulty with completing homework and other assignments throughout that school year, which negatively affected Student's academic performance. (FF 27, 29, 37) Additionally, Student was not provided with any counseling services until April 2010, and even then the sessions were not consistently held; as a result, the Parents obtained private counseling services for Student. (FF 33, 40)

In short, the program as implemented for Student during the 2009-10 school year was not appropriate for Student in many respects and denied FAPE, for which a remedy will be ordered.

2010-11 School Year

The IEP developed for and implemented during the eighth grade school year was different in some aspects from that in the prior year, and the same in others. With respect to reading, Student was started on the Read 180 program which did not emphasize decoding because that weakness was not viewed as a primary concern. (FF 38, 47) Student showed some progress through the Lexile score, but remained at the Below Basic level after one year of instruction. (*Id.*) As in the prior year, the failure to address decoding through a systematic, intensive program clearly failed to respond to Student's identified need in this area, and resulted in Student falling farther and farther behind Student's peers.

With a noticeable deterioration in already difficult peer relationships, many of which required intervention by the guidance counselor, Student no longer wanted to go to school to avoid teasing by other students and ended up serving a number of detentions. (FF 49, 50, 69) Student did receive individual counseling on a somewhat more regular basis than the prior year, but many sessions were missed for various reasons, and group counseling was very limited. (FF 49) Difficulties with Student's homework intensified over the prior year, with the Parents' frustration becoming increasingly more evident because the information sent home was not

specific to Student. (N.T. 271-77, 281-82, 385-87, 389-92, 1034-35)⁸ Problems with assistive technology continued (N.T. 224, 227-28, 275, 240-41), and while some strategies were effective (N.T. 252, 967-69, 979-80, 988-89), others were not, requiring the teacher to look for alternatives that permitted Student to access the curriculum. (*See, e.g.*, N.T. 969-72, 988-89, 1008) Organizational difficulties persisted which clearly adversely affecting Student's performance throughout the school day (FF 52, 53, 56, 58, 73, 74), and despite clear indication that the strategies in place were not effective, Student's program was changed or intensified to determine how this need could be successfully addressed. Moreover, Student's struggles with Algebra I prevented Student from utilizing the last period of the day for organization and support on a regular basis. (FF 54)

Viewing the evidence as a whole, this hearing officer concludes that the educational program provided to Student during the 2010-11 school year was inappropriate and denied Student FAPE, for which a remedy will be awarded.

2011-12 School Year

The IEP developed for the 2011-12 school year must be viewed in the context of information known and available at the time it was offered. *Fuhrman, supra*. It should be noted that the final hearing session convened several weeks into this school year, but only limited information was presented relating to Student and the current school year. The status of the IEE, however, merits some discussion at this point.

Upon receipt of the IEE from the Parents, the District promptly issued a Permission to Evaluate form. (FF 67) This policy is rather puzzling since the only purpose of the practice appears to be to provide the IEP team with sixty calendar days to review and consider the document, omitting days over the summer between the end of one school year and the beginning of the next pursuant to 22 Pa. Code §§ 14.123(b) (relating to evaluations) and 14.124(b) (relating to re-evaluations). In this case, the specific language of the Permission to Evaluate form, as well as the testimony of the Supervisor of Special Education, reflect that the District did not intend to do anything other than review the IEE. (N.T. 155; S 14 at 1-2) The relevant federal regulation requires that, "If the parent ... shares with the public agency an evaluation obtained at private expense, the results of the evaluation [m]ust be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child[.]" 34 C.F.R. § 300.502(c). Here, the IEE was provided to the District in May 2011, and two IEP meetings convened thereafter in June and July 2011 and, thus, issuing the form in this case merely served to delay consideration of the IEE by the IEP team⁹ despite the fact that it was making important decisions about Student's program as Student was about to enter high school.

⁸ Copies of email messages sent from District staff to Student and the Parents, with attachments noted, do not contradict the Parents' testimony cited in the text accompanying this footnote reference that the information provided was not sufficient to determine whether some work was done at school or to enable Student to complete assignments. (S 9, S 18)

⁹ There has been no suggestion that the IEE did not meet agency criteria.

Nevertheless, review of the July 2011 IEP reflects that it was appropriately responsive to Student's identified needs. Student was to be provided with a decoding component of the Read 180 program, with the District again acknowledging this weakness. (FF 78) Necessary individual counseling would be provided at school as a related service. (*Id.*) The Read and Write Gold software program had finally been installed on Student's laptop, providing access to it both in school and at home, and the use of the laptop during the school day was more effective for Student than many of the other forms of assistive technology and audio support had been. (FF 48, 82) Audio support including books in alternative format was also specified and provided. (FF 81) The annual goals in the IEP addressed use of assistive technology to complete assignments; grade-appropriate writing conventions; mathematics computation; timely assignment/homework completion; organizational skills; reading comprehension at grade level; spelling; and an intensive reading intervention program. (FF 77, 78) Program modifications and specially designed instruction (tests read aloud, scribing answers or use of printing or typing, use of a calculator and portable writing device, audio support software, extended time for tests and quizzes in an alternate location and/or taken electronically, extended time for assignments, assignments to be scanned and emailed home, chunking of long-term assignments, a daily binder check at the beginning and end of the day with use of homework folder for scanned assignments, textbooks in electronic format, visual cues, preferential seating, and study guides and outlines) relate to Student's continued needs identified in the District's most recent RR, as well as Student's need for presentation of material in an auditory format. (FF 20, 21, 22, 23, 24, 43, 75, 77, 78; P 32; S 17)

Significantly, the July 2011 IEP also contains a number of elements which were recommended by the Parents' expert who conducted the IEE, with a noted exception of a very restrictive private school placement. The related specific recommendation of individualized attention in small class settings for the entire school day to minimize distractions does not take into consideration the District's obligation to educate all of its students in the least restrictive environment, providing inclusion with non-exceptional children to the maximum extent possible. Conversely, her recommendations for an intensive reading program, extended time and adaptations to assignments, use of auditory instruction, individual counseling, assistance with executive functioning weaknesses throughout the school day, are all part of Student's July 2011 IEP. (*Id.*) While this private psychologist also suggested that Student would not be able to keep up the pace of a regular education classroom due to Student's disabilities and that Student would need time to process information and directions (N.T. 472-73), the evidence is not preponderant that the provisions for co-taught classrooms in Algebra I, Science, and Social Studies, as well as Curriculum Support twice each day with a smaller ratio of students to teachers (FF 78, 79), would not provide the external support that Student requires through the numerous program modifications and items of specially designed instruction.

That is not to say the July 2011 IEP is perfect. For example, the goal and specially designed instruction relating to assistance with organization will clearly require direct instruction and not simple assistance, as is particularly evident in that Student has demonstrated difficulty with these skills for a number of years and the less intensive approach taken in the second half of the 2010-11 school year was clearly inadequate to meet this need. (FF 51) Mention must also be made that the parties had not, as of the final session of the due process hearing, met to consider the IEE and determine whether any changes should have been made to the IEP. While

it is evident that the Parents have ongoing concerns with the District's current provision of an appropriate program, it should also be noted that this hearing did not involve the issue of whether the actual implementation of Student's IEP for the 2011-12 school year was appropriate for Student. Indeed, all but one of the hearing sessions convened before that school year began, with the final session only a few weeks into the start of the term. While this hearing officer has determined that the District denied Student FAPE during the 2009-10 and 2010-11 school years, she cannot conclude based on this record that the District is unable or unwilling to provide an appropriate educational program to Student as set forth in the July 11, 2011 IEP.

ESY Services

The Parents also claim that the District denied FAPE by failing to offer and provide ESY services during the summers of 2009, 2010, and 2011. "Extended school year services must be provided only if a child's IEP Team determines, on an individual basis ... that the services are necessary for the provision of FAPE to the child." 34 C.F.R. § 300.106. Under the Pennsylvania regulations, IEP teams must make ESY eligibility determinations through consideration of the following factors, although no single factor is determinative:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
- (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
- (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
- (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
- (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.
- (vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

22 Pa. Code § 14.132(a)(2).

The only evidence with respect to Student's need for ESY services was the opinion of the private psychologist who conducted the IEE that "because [Student] has not made progress in reading, [Student] requires an intensive summer program[.]" (S 14 at 26) Almost any child, of

course, would likely benefit from additional instruction, including summer programming. It is also not unreasonable to suggest that with Student's complex learning needs and significantly below grade level performance in reading, ESY programming may appropriately be recommended by the IEP team. Nevertheless, school districts are only required to provide ESY services if they are necessary to provide FAPE. Although the Parents contend that the District placed too much emphasis on regression, there was no evidence that the specific criteria set forth in the Pennsylvania regulations warranted the provision of ESY services to Student during the summers in question, nor that such was required in order to provide FAPE. Accordingly, this hearing officer is therefore compelled to conclude that the evidence is insufficient to establish a denial of FAPE on this basis.

FAPE Remedies

The next question is what relief is warranted. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This hearing officer finds little if any evidence to support a determination of what position Student would have been in had Student been provided with appropriate educational programming throughout the time period in question. Thus, this hearing officer concludes that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Student in this case. Because the District was already quite familiar with Student and Student's needs as they presented at the start of the 2009-10 school year, there will be no reasonable rectification period included in the award.

Compensatory education is calculated consistent with the foregoing discussion as follows. During the 2009-10 school year, Student was not provided with counseling for much of the school year, and sessions were inconsistent once it did begin. With 20 minutes of individual counseling and 40 minutes of group counseling during each six-day cycle for a 180-day school year, Student should have had 30 total hours of counseling services, and will accordingly be

awarded compensatory education in the form of 30 hours of individual counseling services.¹⁰ The evidence is also preponderant that Student's reading program did not address Student's identified weaknesses, and the record lacks any indication of what, if any, progress Student made in reading during the 2009-10 school year. Student will, therefore, be provided with 45 minutes¹¹ of compensatory education for each school day to remedy the denial of an appropriate reading program, for a total of 135 hours of reading services. Finally for this school year, the denial of appropriate programming to consistently and appropriately address Student's organizational and assistive technology needs also warrants a remedy, although it is difficult to estimate the amount of time which would remedy the deprivation. Because Student clearly did derive some meaningful educational benefit over the course of the 2009-10 school year, and the difficulties encountered with respect to the needs with organization and assistive technology were not continuous and constant, this hearing officer equitably estimates that half of Student's school hours/days were adversely impacted by the denial of these services over the course of the school year. Accordingly, Student will be awarded 495 hours¹² of compensatory education as a remedy.

With respect to the 2010-11 school year, this hearing officer agrees with the Parents that the educational deprivation during the school years in question pervaded Student's entire day and ability to access the eighth grade curriculum. While Student did manage to pass some classes, Student's difficulties were not limited to any particular subject or area but rather encompassed Student's experience throughout each day during that school year. It would be next to impossible to calculate any hours during which Student derived meaningful educational benefit throughout this time period given *See Keystone Cent. School Dist. v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (affirming award of full days of compensatory education and explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education). Therefore, full days of compensatory education, or 5.5 hours per day, will be awarded for each day that Student attended school during the 2010-11 school year.

The hours of compensatory education which are not specified by particular service are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. There are financial limits on the parents' discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries

¹⁰ Individual counseling is awarded because group counseling is no longer recommended for Student. (FF 78)

¹¹ Class periods in the District are 46 minutes long (N.T. 911), and are rounded down to 45 minutes for convenience of calculation.

¹² Pursuant to the Pennsylvania School Code, school districts are required to provide a minimum of 990 hours of instruction to students in grades 7-12. 22 Pa. Code § 11.3.

and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

Finally with respect to remedy, having concluded that the July 2011 IEP did propose an educational program which was reasonably calculated to provide meaningful educational benefit, there is no need to address the request to order placement in the private school.¹³

IEE Reimbursement

When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); *see also* 20 U.S.C. § 1415(b)(1). When a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, the Parents did not seek an IEE at public expense which would have triggered one of these responses by the District.¹⁴

In conducting an evaluation, a local education agency must ensure that it uses procedures to determine whether the child has a disability and to determine the child's educational needs. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c)(2). Re-evaluations are also subject to specific requirements and limitations. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303. The IDEA regulations provide further guidance for conducting the evaluation or re-evaluation.

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the Parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

¹³ The evidence does, however, suggest that the private school which accepted Student would meet Student's needs as well as provide most if not all of the recommendations made by the private psychologist who conducted the IEE. (FF 55; N.T. 487-89)

¹⁴ The Parents do suggest that the [one parent] requested another evaluation in the spring of 2010. However, the record suggests that the discussion about the evaluation request in April 2010 related to that made in the spring of 2009, not 2010. (FF 25, 31) The testimony on the Parents' disagreement with the September 2009 RR was limited to mathematics, which was addressed by the IEP team and not pursued further at that time. (FF 25)

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R.. § 304(b); *see also* 20 U.S.C. § 1414(b)(2). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Assessments must be administered in a manner which is nondiscriminatory, in a form designed to yield accurate information, and for the purpose for which the assessments were designed, by a trained professional, and in accordance with the test maker’s instructions. 20 U.S.C. § 1414(b)(3); 34 C.F.R. § 300.304(c)(1). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Further, the team must ensure that it considers existing information about the child through the following.

(a) *Review of existing evaluation data.*

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—

(1) Review existing evaluation data on the child, including—

- (i) Evaluations and information provided by the Parents of the child;
- (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
- (iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child’s Parents, identify what additional data, if any, are needed to determine—

(i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;

(ii) The present levels of academic achievement and related developmental needs of the child;

(iii)(A) Whether the child needs special education and related services; or

(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable

annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

34 C.F.R. § 305(a); *see also* 20 U.S.C. § 1414(c)(1).

After review, this hearing officer concludes that the District's RR of Student in September 2009 was appropriate according to the applicable law. The evaluation included functional, developmental, and academic information from a variety of sources about Student. (FF 20, 21, 22, 23) Specifically, the evaluation included a review of existing information as well as input from the Parents and teachers. (FF 22, 23) The school psychologist administered both cognitive and achievement testing using appropriate norm-referenced, technically sound instruments, and obtained appropriate social/emotional and executive functioning ratings. (FF 20, 21) All of this information was summarized in detail in the RR and, taken together, comprised a thorough assessment of Student's present levels of academic achievement and functional performance from which Student's eligibility for special education could be and were determined. Appropriate recommendations for Student's educational program based upon Student's needs were also included. (FF 24) In sum, this hearing officer concludes the District's September 2009 RR was appropriate.

There can be no doubt that the IEE provided valuable and more current information about Student and Student's strengths and weaknesses which supplemented what was already known to the District. For example, the Parents' expert pointed out that Student's executive functioning skills are more impaired at the present time than was the case in 2009. (N.T. 463-64) The independent psychologist clearly has a great deal of expertise and provided credible and detailed testimony about her recommendations and the reasons for them. Nevertheless, reimbursement for an IEE is not determined by whether the IEE was helpful, or more current, or even whether it was arguably better in some respects than a school district's evaluation. Having determined that the RR was appropriate, the Parents are not entitled to reimbursement for the IEE.

Section 504 Claims

The obligation to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the District did deny FAPE to Student for the 2009-10 and 2010-11 school years, and that Student is entitled to compensatory education; that the Parents are not entitled to reimbursement for the IEE; and that an alternate private educational placement for Student at public expense is not warranted.

ORDER

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

1. The District failed to provide individual and group counseling services during the 2009-10 school year, and Student is accordingly entitled to, and the District is ordered to provide, compensatory education in the form of 30 hours of individual counseling services.
2. The District did not provide FAPE to Student in its reading program for the 2009-10 school year, and Student is accordingly entitled to, and the District is ordered to provide, compensatory education in the form 135 hours of individual, appropriate reading instruction.
3. The District did not provide FAPE to Student in appropriately addressing Student's organizational and assistive technology needs during the 2009-10 school year, and Student is accordingly entitled to, and the District is ordered to provide, 495 hours of appropriate parentally-selected compensatory education for that school year, subject to the conditions and limitations set forth above.
4. The District did not provide FAPE to Student in appropriately addressing all of Student's educational needs for the 2010-11 school year, and Student is accordingly entitled to, and the District is ordered to provide, 5.5 hours of appropriate parentally-selected compensatory education for each day Student attended school that year subject to the conditions and limitations set forth above.
5. The District is not ordered to take any further action.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: November 4, 2011