

*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: A.K.

Date of Birth: [redacted]

ODR No. 18436-16-17-AS

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Michael J. Connolly, Esquire  
McAndrews Law Offices, PC  
30 Cassatt Avenue  
Berwyn, PA 19312

Wilson Area School District  
2040 Washington Boulevard  
Easton, PA 18042-3890

Anne Myers, Esquire  
Comegno Law Group, PC  
521 Pleasant Valley Avenue  
Moorestown, New Jersey 08057

Dates of Hearing:

December 16, 2016; January 25,  
2017; March 13, 2017; April 25, 2017

Date of Decision:

May 31, 2017

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is enrolled currently in a high school within the District named in this matter (District). (NT 6-7; P 11 p. 12.) The District has classified Student under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disabilities of Specific Learning Disability and Other Health Impairment. (NT 6-7.)

Parents assert that the District failed to offer Student a free appropriate public education (FAPE) during a relevant period beginning on the first day of school in the 2013-2014 school year and ending on the date of this decision<sup>2</sup>. This period covers Student's sixth through ninth grades. Parents assert Student's right to a FAPE pursuant to the IDEA, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), and the respective implementing regulations. Parents request an order that the District provide Student with compensatory education for the relevant period, and an order that the District provide Student with appropriate educational services going forward. The District asserts that it has offered and provided a FAPE at all relevant times.

The hearing was completed in four sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District has failed to offer and provide a FAPE to Student during part of the relevant period.

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<sup>1</sup> Student, Parents and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality. References to Parent in the singular refer to Student's Mother, who engaged in most of the interactions with the District discussed herein.

<sup>2</sup> The District filed a motion to limit claims under the IDEA statute of limitations, but I denied that motion in a ruling dated December 13, 2016. (HO 1.)

## ISSUES

1. During the relevant period of time from the first day of school in the 2013/2014 school year until the date of this decision, did the District provide Student with appropriately comprehensive evaluations that identified<sup>3</sup> all of Student's educational needs?
2. During the relevant period of time, did the District offer and provide a FAPE to Student in compliance with the IDEA and section 504?
3. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant period?
4. Should the hearing officer order the District to provide Student with educational services for the remainder of Student's current school year or for Student's next school year, the 2017-2018 school year?

## FINDINGS OF FACT

1. Student is early teen-aged and has received educational services from the District since kindergarten. (P 19.)
2. The District has identified Student under the IDEA with the disabilities Specific Learning Disability and Other Health Impairment. (NT 6-7.)
3. Student's cognitive ability is low-average range generally, but psychological testing shows that Student's crystallized and fluid reasoning ability is within the average range. The crystallized and fluid reasoning cognitive ability score is a more "pure" measure of innate intelligence, because it factors out areas of functioning that, when disabled, impede the child from expressing his or her full measure of intelligence through the standardized testing process. (NT 316-318, 365-368; P 19.)
4. Student's verbal ability is within the average range for children of Student's age. Student's ability to perform numerical reasoning is below average. Student's sequential and deductive reasoning ability is below average. Student's working memory ability is below average, and this limits Student's ability to process complex information, as well as to process information automatically, such as in mastering mathematics facts and operations.

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<sup>3</sup> At the outset of the hearing, I listed as an issue whether or not the District appropriately identified Student. Upon careful review of the Parents' opening statement and written summation, it is clear that Parents asserted a failure to identify all of Student's needs, but did not assert a Child Find claim for failure to identify Student as a child with a disability under the IDEA. (NT 12-22; Parents Written Closing Statement (May 15, 2017). Indeed, Student received special education services through early intervention programs and has been identified under the IDEA since kindergarten. (P19.)

Student's cognitive processing speed is well below average, especially with regard to Student's perceptual speed and visual perception and processing. (P 19.)

5. Although Student's long-term memory is in the average range, Student displays difficulty with story recall while showing average ability to utilize memory strategies to store and retrieve information. (P 19.)
6. Student's executive functions and emotional self-regulation are well below average for children of Student's age. (P 19.)
7. Student experiences significant difficulties with attention to task in school. (P 19.)
8. Student's overall cognitive efficiency is significantly impaired. (P 19.)

#### SIXTH GRADE – DISTRICT KNOWLEDGE OF STUDENT'S EDUCATIONAL NEEDS

9. As reported in District educational documents, Student has a history of multiple childhood diagnoses beginning as early as the age of two and one-half, including Expressive Language Disorder, Impulse Control Disorder, Oppositional Disorder, Disruptive Behavior Disorder NOS, and Attention Deficit Hyperactivity Disorder (ADHD) – Combined Type. (P 1, 19.)
10. As reported in District educational documents, Student demonstrated significant emotional and behavioral difficulties and engaged in significantly inappropriate behaviors in day care settings, including noncompliance, aggressive behavior such as biting and inappropriate social behaviors. Student reportedly engaged in disruptive behaviors in the early elementary school grades, including: demonstrating difficulty maintaining attention to task and following directions; work avoidance; aggression including bumping, shoving and slapping; taking peers' materials; rushing through work; and humming or singing to self while at Student's desk. (P 1, 2, 19.)
11. As reported in District educational documents, Student has a history of educational classifications as a child with the disabilities of Emotional Disturbance, Speech or Language Impairment and Other Health Impairment due to ADHD, with eligibility for occupational therapy services and receipt of speech therapy. (P 1, 2, 18, 19.)
12. In March 2012, when Student was in fourth grade, the District re-evaluated Student and changed Student's classification to Specific Learning Disability in Basic Reading, Written Expression, Mathematics Problem Solving, and Mathematics Calculation, with a secondary classification of Other Health Impairment due to a medical diagnosis of ADHD, for which Student's physicians had prescribed medication. The re-evaluation report also noted Student's history of previous diagnoses. (P 2.)
13. The March 2012 Re-evaluation found Student's general cognitive ability to be within the average range for same-age peers. It found that Student's verbal comprehension ability was high average; Student's perceptual reasoning was average; Student's working memory (including ability to sustain attention, concentrate and exert mental control) was low average; and Student's processing speed was average. (P 2.)

14. The March 2012 Re-evaluation Report noted Parent's concerns about Student's apparent lack of proficiency in all subjects, and Student's particular difficulties with mathematics, handwriting and writing assignments. (P 2.)
15. Student's third grade PSSA and benchmark testing score was less than proficient. Student met specially designed goals for reading fluency and comprehension. (P 3.)
16. Teachers reported that Student was able to perform at grade level in written expression with accommodations that included use of a small computer for typing text from a graphic organizer, and graphic organizers for spelling. (P 3.)
17. Teachers reported that Student met Student's special education mathematics goal based on overall grade for a marking period. (S 3.)
18. The March 2012 re-evaluation administered a standardized achievement test to Student. Student scored in the average range in oral language; receptive and expressive language; reading; word reading and pseudoword decoding; oral reading fluency and comprehension; essay composition and spelling; numerical operations. (P 2.)
19. The March 2012 re-evaluation did not include a speech and language evaluation, and did not recommend speech therapy services. (P 2, 18.)
20. In the standardized achievement testing provided in the March 2012 re-evaluation, Student scored in the below average range for written expression, including below average scores for sentence composition; mathematics and math problem solving; and math fluency. (P 2.)
21. Utilizing a statistical discrepancy analysis, the March 2012 re-evaluation found that Student displayed a significant discrepancy between ability and achievement in the areas of basic reading, written expression, mathematics problem solving, numerical operations and mathematics fluency. (P 2.)
22. The March 2012 re-evaluation administered standardized testing and observation to assess Student's fine motor and gross motor skills; it found Student to be functioning in the average range in these areas and recommended consultation occupational therapy services to address Student's handwriting and attention in the classroom. (P 2.)
23. The March 2012 Re-evaluation Report noted behaviors including difficulties with telling truth, following teacher directions, completing assignments and respecting others' personal space. Teachers reported that Student responded well to a point-system behavior intervention plan with stated goals including following directions; completing classwork; being kind to others; respecting others' personal space and property; and being truthful. Teachers reported that, during fifth grade when this behavior support plan was in place, Student improved in self-control, respect for others, ability to work independently, homework completion and organizational skills. (P 2, 3.)
24. The March 2012 Re-evaluation Report noted educational needs: improve on-task behaviors and appropriate behaviors; follow directions consistently; improve fine motor skills, especially handwriting; learn basic mathematics facts; improve mathematics problem

solving; improve written expression by improving conventions and spelling and using complete sentences; review science notes more frequently; continue to become an independent learner. (P 2.)

25. The March 2012 Re-evaluation Report specifically determined that Student's academic and behavioral difficulties were not caused by emotional difficulties and that classification with Emotional Disturbance was not warranted. (P 2.)
26. The March 2012 re-evaluation did not include a functional behavioral assessment (FBA). (P 2.)
27. In fifth grade, Student was able to earn high percentages of points on Student's behavioral point system, indicating progress in behavior. (D 50.)

#### SIXTH GRADE – IEP

28. The District convened a meeting of the Individualized Educational Program (IEP) team, including Parent, on April 8, 2013, and the team finalized an IEP of the same date, which was anticipated to be effective for the latter part of fifth grade and from September to April of sixth grade. (P 3.)
29. The April 2013 IEP placed Student in itinerant learning support in Student's neighborhood school. It provided for "additional academic instruction, intervention, and behavioral support as needed in the learning support classroom." It also provided for "structured direct instruction for reading fluency, written expression, spelling and mathematics instruction." The PENNDATA section of the IEP calculated that this time in the special education setting would be approximately 1.3 to 1.4 hours per school day. (P 3.)
30. The term "direct instruction" is often used loosely or informally to mean teaching specific skills to a student. However, the term is a term of art in education, and when used in this way, it means teacher directed activity in a small group setting, providing face-to-face instruction with carefully articulated lessons in which skills are broken down into small units, sequenced deliberately and taught explicitly. (NT 210-211, 362-363, 472-473.)
31. The April 2013 IEP recognized educational needs including on-task behavior; appropriate behavior; following directions; reading fluency; written expression including conventions and spelling; fluency with basic mathematics facts; mathematics problem solving; independent learning; and the fine motor skills of handwriting. (P 3.)
32. The April 2013 IEP provided measurable reading goals addressing grade level reading fluency and comprehension. (P 3.)
33. The April 2013 IEP provided for small group supplemental reading instruction in the modifications section. (P 3.)
34. The April 2013 IEP provided a measurable goal addressing written expression, utilizing the grade level curriculum and regular education grading system for measurement. The goal essentially stated that Student would pass grade-level Reading and Language Arts with an 80% grade. (P 3.)

35. The April 2013 IEP provided for modifications to address written expression, including the use of spelling lists and phoneme-grapheme mapping boxes to prepare for tests; scribing of verbal responses to essay questions; graphic organizers; computer for writing; and adult editing support. (P 3.)
36. The April 2013 IEP provided a measurable goal addressing mathematics, utilizing the grade level curriculum and regular education grading system for measurement. The goal essentially stated that Student would pass grade-level Mathematics with an 80% grade. The goal did not address mathematics fluency, basic facts or problem solving explicitly. (P 3.)
37. The April 2013 IEP provided for small group supplemental mathematics instruction in the modifications section. It also provided for modifications to address mathematics, including use of manipulatives; use of a white board for practice; and modified use of a math notebook for mathematics problems. (P 3.)
38. The April 2013 IEP acknowledged that Student displayed behaviors that interfered with learning. It provided for a behavior support plan that addressed work avoidance, noncompliance, being unkind or invading others' personal space, and lying. The plan provided for both positive and negative consequences for such behaviors. (P 3.)
39. The April 2013 IEP's behavior support plan mimicked the plan that had been in place for Student in the 2012-2013 school year; it directly addressed some but not all of the behavioral needs identified in the March 2012 Re-evaluation Report. It was not based upon an FBA. (P 2, 3.)
40. The April 2013 IEP provided a measurable goal addressing behavior, utilizing the point system already in place for Student. The goal called for earning 90% or more of the daily point allotment in the point system. (P 3.)
41. The April 2013 IEP provided for modifications to address behavior, including conferencing with an adult to make better choices and home/school communication. (P 3.)
42. The April 2013 IEP provided for accommodated local testing, including small group setting; reading instructions and mathematics problem questions to Student; extra time; frequent breaks; movement opportunities; and transcribing typed responses into test booklets. (P 3.)
43. The April 2013 IEP did not provide goals explicitly and measurably addressing attention to task; organization; handwriting; basic mathematics facts and fluency; and mathematics problem solving. (P 3.)
44. The April 2013 IEP provided for modifications to address attention, including multi-sensory activities; preferential seating; and visual prompts and cues. (P 3.)
45. The April 2013 IEP provided for modifications to address organization, including reducing the number of homework problems; study guides and open-ended notes; visual prompts and cues; home/school communication through a planner, email and phone calls; and adult conferencing. (P 3.)

46. The April 2013 IEP provided for modifications to address handwriting, including adult monitoring; rewriting; and lines and boxes on worksheets. (P 3.)
47. The April 2013 IEP provided for occupational therapy consultation, but did not clearly specify the quantity of such services. (P 3.)
48. In September 2013, at an IEP team meeting, the Student's behavior support plan was revised to focus upon remaining primary behaviors of concern, including learning-related behaviors (following directions, completing work, asking for help); respecting others' personal space and property; and lying. Modifications were revised to begin to fade Student's point system scoring methods and to change Student's motivators and negative consequences. (P 5, D 16<sup>4</sup>.)

#### SIXTH GRADE - PROGRESS WITH THE APRIL 2013 IEP, REVISED IN SEPTEMBER 2013

49. In sixth grade, Student made significant progress in reading decoding and fluency. However, Student's benchmark scores for reading were below basic and basic in the first and second marking periods. Student struggled with reading comprehension, inferential reasoning and a less developed vocabulary, but was able to attain a passing grade. (P 6, 29.)
50. Student continued to struggle with written expression and handwriting, requiring significant interventions to attain a passing grade in reading/language arts. (P 6.)
51. Student struggled with mathematics, including basic mathematics facts, fluency and problem solving. Student required both push-in support for repetition and pull-out support for supplemental teaching in order to attain a passing grade in the first two marking periods. (P 6.)
52. Student continued to struggle with behaviors that interfered with learning, including inattention and lack of focus on task; not following directions; not completing assignments; not respecting others' personal space and property; and lying. (NT 36-37; P 6, P 28 p. 16, P 29.)

#### SEVENTH GRADE IEP

53. The District convened an IEP team meeting, including Parent, on March 6, 2014, and the team finalized an IEP of the same date, anticipated to govern the end of sixth grade and most of seventh grade, until March 2015. This would also be the IEP in place as Student, if promoted, was anticipated to change from receiving all regular education instruction in a single classroom to receiving instruction in multiple classrooms, more similar to a high school model, which is a challenging change for a child of that age, because the Student must adjust to multiple teachers and movement between classes. (NT 189-190; P 6.)

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<sup>4</sup> The District marked its exhibits "D #", and District exhibits are cited accordingly herein. Many of the Parent and District exhibits were duplicative, and I have cited to more Parent exhibits because I reviewed them first in making my findings. I have reviewed all District exhibits, however.

54. The IEP team recognized that Student continued to have essentially the same educational needs in sixth grade as had been noted in fifth grade, except for reading, in which new needs had become manifest. (P 6.)
55. The March 2014 IEP provided placement in itinerant learning support, and indicated that Student would receive supplemental instruction in the learning support classroom for about one period per day, to address unspecified needs, on an as-needed basis. (P 6, 13.)
56. The IEP team revised Student's reading goal to address Student's needs regarding reading comprehension. The goal was measurable. (P 6.)
57. The March 2014 IEP provided for small group supplemental reading instruction. It provided no other modifications. (P 6.)
58. The March 2014 IEP provided a goal addressing written expression, which expressly addressed structure, conventions and spelling, but the goal was not formulated in measurable terms. The IEP provided the same modifications and accommodations as the April 2013 IEP. (P 6.)
59. The March 2014 IEP provided a goal addressing spelling, which was measurable in that it relied upon Student scoring 80% or better on tests in the seventh grade curriculum. The IEP provided the same modifications and accommodations as the April 2013 IEP, except that it allowed Student to complete all writing activities on a computer, and it required adult editing support for all graded activities. (P 6.)
60. The March 2014 IEP provided a goal addressing mathematics, which was measurable in that it relied upon Student scoring 80% or better on tests in the seventh grade curriculum. The goal did not address mathematics fluency, basic facts or problem solving explicitly. The IEP provided the same modifications and accommodations as the April 2013 IEP. (P 6.)
61. The March 2014 IEP provided the same behavior support plan as the April 2013 IEP, with the revisions dated September 2013. (P 6.)
62. The March 2014 IEP provided for many of the same modifications and accommodations addressing attention and organization that had been provided in the April 2013 IEP. No new modifications were added. (P 6.)
63. The March 2014 IEP provided no related services. (P 6.)
64. The March 2014 IEP provided for local testing accommodations; these were small group setting, reading directions and mathematics problems to Student, frequent breaks and movement opportunities. (P 6.)

#### SEVENTH GRADE - PROGRESS WITH THE MARCH 2014 IEP

65. During Student's daily period in the special education classroom, Student's special education teacher did not deliver "direct instruction" in the formal sense of the term of art,

because the teacher did not teach from a structured curriculum. The teacher was responsible to provide interventions to about sixteen other children. (NT 136-137, 211.)

66. When the teacher “pushed in” to Student’s regular education classes, she was assigned seven other students and this was too many students to enable the learning support teacher to address all of Student’s needs as set forth in the IEP. (NT 138-139.)
67. On the 2014 PSSA tests, Student scored proficient in reading. (P 12.)
68. On the 2014 PSSA tests, Student scored Below Basic in mathematics, and Student performed below average in mathematics. (P 12.)
69. Student’s rostering system changed for seventh grade to a high-school-like list of different classes with different teachers. (NT 189-190.)
70. Student continued to struggle with written expression and mathematics in the first marking period of seventh grade. (P 28, 29.)
71. Student struggled with reading comprehension, written expression and mathematics in the second marking period, but was able to elevate Student’s marks in those subjects significantly. (P 29.)
72. Student reached Student’s goal of a mark of 80% in reading and written expression in the third marking period of seventh grade. Student continued to perform below Student’s mark-based goal in mathematics. (P 29.)
73. Student performed below the proficient level in most core academic subjects. (P 12, 28.)
74. Student’s teacher reported that Student often turned in incomplete or illegible work in science. (P 12, 35 pp. 5-24.)
75. Student’s behavior deteriorated during seventh grade. Student engaged in frequent inappropriate behavior toward peers and staff, and frequent lying. (P 12, 13.)
76. Student lacked “age appropriate social skills” and had weaknesses in legible writing, basic reading, mathematics calculation, mathematics problem solving and written expression. (P 13.)
77. Student was suspended, in-school, for one day each in October 2014, November 2014 and January 2015. The infractions were inappropriate classroom conduct, inappropriate language toward a peer, and sending an inappropriate, threatening text message to a peer. (P 9, 10, 25.)
78. The January infraction was deemed to be serious and Student’s principal indicated that repetition could result in more serious disciplinary consequences. (NT 51.)
79. Parent requested a recommendation from Student’s therapist, and in March, at Parent’s request, Student was placed in a partial hospitalization program in another school within the District. Student remained in that setting until the end of the school year. (NT 50-54.)

## EIGHTH GRADE – MARCH 2015 RE-EVALUATION AND PERFORMANCE DATA

80. On November 25, 2014, the District convened an assistive technology planning process known as the SETT (Student, Environments, Tasks, Tools) process. The planning process addressed Student's continuing difficulties with handwriting. The District took no further action. (NT 50-51; P 8.)
81. The District issued a Re-evaluation Report dated March 2, 2015. It relied upon the testing done in the previous re-evaluation of March 2012, and performed no testing. It relied also upon parental input, record review and teacher reports. No classroom observation was reported. The re-evaluator determined that no additional information was needed to determine that Student continued to be a child with a disability, and the report made no changes to Student's classification. (P 12.)
82. On the parental input form for the March 2015 re-evaluation, Parent raised a concern about Student's social skills and asked for intervention regarding social skills. (P 12.)
83. On three seventh grade benchmark tests for reading, Student performed below basic twice and basic once; in three seventh grade benchmark tests for mathematics, Student performed below basic in all three. (P 17.)
84. In seventh grade and the first two marking periods of eighth grade, Student continued to struggle with handwriting. (P 17.)

## EIGHTH GRADE – IEP AND REVISIONS

85. On March 10, 2015, the District convened an IEP team meeting with Parent in attendance. The team finalized an IEP of the same date, anticipated to govern the end of seventh grade and most of eighth grade, until March 2016. (P 13.)
86. The March 2015 IEP, in anticipation of Student's transfer to the partial hospitalization program, placed Student in full-time emotional support. (P 13.)
87. The IEP present levels noted that Student lacked "age appropriate social skills". It noted weaknesses in legible writing, basic reading, mathematics calculation, mathematics problem solving and written expression. (P 13.)
88. The IEP present levels inaccurately stated that Student was "successfully performing at grade level with learning support." It noted teacher reports of inappropriate behavior, struggles with (sic) (P 13.)
89. The March 2015 IEP listed Student's "needs" as things that the IEP team believed Student needed to do, rather than as areas of weakness or services that the District needed to address. (P 13.)
90. The March 2015 IEP provided goals for reading, mathematics calculation, mathematics problem solving and written expression that measured progress by reliance upon marks in the general education curriculum. These goals did not specify or measure the component skills that they were intended ostensibly to target, with the exception of basic mathematics facts and fluency. Regarding the latter, the IEP specified an objective that provided for

assessing mastery of basic addition and subtraction facts through a one-minute mathematics assessment. (P 13.)

91. The March 2015 IEP provided modifications addressing mathematics, including in-class learning support, review and repetition of basic addition and subtraction facts, and use of a calculator. (P 13.)
92. The March 2015 IEP provided new modifications, including study guides, modified tests and redirection, which addressed attention and organization. (P 13.)
93. The March 2015 IEP omitted many of the modifications provided in the March 2014 IEP, including mathematics manipulatives; spelling word lists; graphic organizers and use of a computer for writing; adult editing support; visual prompts; home/school communication; rewriting when illegible and monitoring of handwriting; and movement opportunities. (P 6, 13.)
94. The March 2015 IEP noted behaviors that impede learning, including frequently inappropriate behavior toward peers that resulted in suspensions. However, the March 2015 IEP provided for a reduced behavior intervention plan dealing only with work avoidance behaviors, and not addressing inappropriate behaviors toward peers. (P 13.)
95. The March 2015 IEP provided new related services, to be provided by the partial hospitalization program, including individual counseling at least once per week; daily group counseling; and transportation. (P 13.)
96. The IEP changed the local testing accommodations. It omitted movement breaks and reading questions and mathematics problems to Student, and it substituted use of a scribe for open ended questions. (P 13.)
97. The District revised the Student's eighth grade IEP on September 30, 2015. The revision was to change Student's placement and offered services in view of Student's return to Student's neighborhood school for the start of eighth grade. It was anticipated to govern eighth grade until March 2016. (P 15.)
98. The September 30, 2015 revised IEP changed Student's placement to itinerant learning support, to be provided in regular education for all subjects, and in the learning support classroom for one period per day, to provide re-teaching, review, homework review and other non-specified services. (P 15.)
99. The September 30, 2015 revised IEP removed all related services from Student's program. (P 15.)
100. During the first two marking periods of Student's eighth grade year, Student's marks declined substantially from Student's seventh grade marks in all core academic subjects; and declined substantially from Student's initial September 2015 marks in all core subjects except reading. Student did not meet IEP goals of 80% performance in the regular education curriculum in reading or pre-algebra. (P 17 p. 8-9, P 28 p. 17, P 29.)

101. By the end of the second marking period in eighth grade, curriculum based probes showed that Student was performing below average in eighth grade oral reading fluency, reading comprehension, mathematics concepts and applications, and written expression; Student was performing below average in sixth grade mathematics computation. (P 17.)
102. By the end of the second marking period in eighth grade, Student was continuing to display behaviors impeding learning, including work avoidance, failure to complete assignments, lack of independence in learning and dishonesty, including lying. Student continued to lack age-appropriate social skills, including inappropriate comments to peers and disrespectful behavior toward adults. (P 17.)
103. By letter dated February 9, 2016, Parent, through counsel, requested that the District provide an independent educational evaluation at public expense, to include a neuropsychological evaluation with cognitive and achievement testing, a speech and language evaluation, a functional behavioral assessment (FBA), and evaluation of Student's executive functions, memory, learning, social and emotional functioning. (P 16.)
104. On February 12, 2016, the District invited Parent to attend an IEP team meeting to review Student's IEP and to revise it to provide post-secondary transition plan. The meeting took place on February 25, 2016, with an anticipated duration of any revisions to February 2017. (P 17.)
105. The February 25, 2016 revised IEP continued Student's placement in itinerant learning support with one class period per day in learning support for re-teaching, review, homework review and other non-specified services. The revision added the two services to this daily hour of learning support in the small group environment: supplemental instruction in mathematics and guided assistance in completing assignments. It did not specify what areas of the mathematics curriculum would be addressed, and it added vaguely the possibility of "additional pull-out periods." (P 17.)
106. The amount of time allocated to learning support in the learning support classroom was not reasonably calculated to address all of Student's needs appropriately. (NT 370-371; P 19.)
107. The February 2016 revised IEP listed educational needs in mathematics computation, written expression and social skills. It also listed as needs some behavior changes for which it appeared to place responsibility solely upon Student. (P 17.)
108. The February 25, 2016 revised IEP provided a written expression goal that was not measurable because it posited ability to score 80% on a grade level rubric but did not indicate how goal mastery would be measured. (P 17.)
109. The February 25, 2016 revised IEP provided a measurable goal for attainment of self-advocacy skills measured by an Inclusion Support Student Skills Checklist in regular education English. (P 17.)
110. The February 25, 2016 revised IEP provided two measurable mathematics computation goals, one for sixth grade level achievement, and one for seventh grade level achievement. (P 17.)

111. The February 25, 2016 revised IEP provided a measurable goal for attainment of self-advocacy skills measured by an Inclusion Support Student Skills Checklist in regular education Pre-Algebra/ Algebra I. (P 17.)
112. The February 25, 2016 revised IEP provided some of the modifications in the previous IEP, and added new modifications to address mathematics computation (“Direct instruction”; use of calculator) and grade-level mathematics curriculum (guided practice); written expression (adult support in brainstorming and organizing written assignments, use of computer); organization (agenda book, classroom check-ins, check-outs, homework make-ups, home/school communication); attention and memory (re-teaching/review of new material); and social skills (embedded opportunities to teach skills, opportunity for social skills counseling group participation). (P 17.)
113. The February 25, 2016 revised IEP provided no related services. (P 17.)
114. The February 25, 2016 revised IEP provided a behavior intervention plan directed only at work avoidance behaviors. It did not address failure to complete assignments or lying. (P 17.)
115. The February 25, 2016 revised IEP provided for accommodated local assessments, and added back one previous accommodation that had been omitted from the previous IEP and revision: reading mathematics questions to Student. (P 17, P 13 p. 15.)

#### STUDENT’S PROGRESS IN SECOND HALF OF EIGHTH GRADE

116. Student continued to display difficulties with distractibility, inattentiveness to task, impulsiveness, organization, following directions, and completion of assignments. Student is often defiant and untruthful. Student displays immature social skills. (P 19.)
117. Student continued to display limited academic skills in the areas of basic reading, reading comprehension, mathematics calculation, basic writing and written expression. Teachers reported that Student continued to perform at a below average rate in Student’s grade level curriculum. Student’s handwriting continued to be illegible often. Student functioned well below average in grade level mathematics. (P 2, 19, 28.)
118. Student’s marks improved somewhat in the second half of eighth grade, but remained lower than in previous years in most subjects. (P 23, 28.)
119. On or about June 30, 2016, the independent psychologist provided the IEE agreed to by the District. The psychologist confirmed the District’s classification of Student as a child with specific learning disabilities in mathematics calculation and problem solving, as well as in written expression, and with a secondary disability of Other Health Impairment. The evaluator noted meaningful weaknesses in written language and broad written language. (P 19.)
120. Based upon standardized testing, the independent psychologist found that Student’s basic reading skills, were in the low average range, including limited word identification and decoding skills, with limited reading automaticity, but with average reading fluency. Student displayed average reading comprehension skills. (P 19.)

121. Based upon standardized testing, the independent psychologist found that Student's basic mathematics skills were very limited, with very low performance in calculation, computational fluency and mathematics problem solving, and very limited ability to analyze complex relationships among numbers. (P 19.)
122. Based upon standardized testing, the independent psychologist found that Student's spelling and written expression skills fell within the limited to average ranges. (P 19.)
123. Based upon standardized testing, the independent psychologist found that Student was generally well-adjusted and not experiencing any significant emotional difficulties. However, testing disclosed that Student was experiencing significant social problems and difficulties working with others in school. (NT 368; P 19.)
124. Based upon standardized testing, the independent psychologist found that Student's adaptive skills were below average in the areas of self-direction, social, communication, school living, leisure, home living and community access. (P 19.)

#### PRIVATE EVALUATORS' RECOMMENDATIONS

125. The independent psychologist recommended that the IEP team consider providing supplemental learning support to address spelling; written expression; mathematics fluency, calculation and problem solving; basic reading skills including fluency; and to address Student's cognitive limitations. (P 19.)
126. The independent psychologist recommended that the IEP team consider providing research-based Direct Instruction that is systematic, explicit, targeted and intensive, delivered in a small classroom setting, to address Student's limited achievement in mathematics calculation, fluency and problem solving. (P 19.)
127. The independent psychologist recommended that the IEP team consider providing direct instruction in spelling, word recognition, prefixes and suffixes and unusual English word spellings. The psychologist recommended consideration of utilizing computer software programs to help Student to learn written expression skills. (P 19.)
128. The independent psychologist recommended that the IEP team consider providing various interventions and modifications to address Student's needs with regard to reading comprehension, encoding, orthographic recognition and sight word automaticity. (P 19.)
129. The independent psychologist recommended that the IEP team consider providing various interventions and modifications to address Student's cognitive deficits and teach Student strategies to improve functioning in the areas of deficit. These areas of deficit requiring interventions include short-term memory, automaticity, cognitive fluency, analyzing complex information or tasks, perceptual speed, numerical reasoning, pattern recognition, and spatial visualization. (P 19.)
130. The independent psychologist recommended that the IEP team consider providing weekly school based counseling sessions to address Student's social skills, anxiety and defiant and aggressive behavior toward peers and adults. (P 19.)

131. The independent psychologist recommended that the IEP team consider providing intervention and coaching to address student's considerable executive functioning needs, as well as progress monitoring of Student's growth as a result of any interventions. These needs include the areas of attention, initiation, flexibility, organization, planning, self-monitoring and working memory. (P 19.)
132. The independent psychologist recommended that the IEP team consider providing interventions and teaching of adaptive skills in the areas of weakness identified in the report. (P 19.)
133. The independent psychologist found that Student's auditory processing ability was within the average range. (P 19.)
134. In March and April, a speech and language therapist completed a speech and language evaluation as part of the IEE at public expense. The evaluator diagnosed Student with an auditory memory and listening comprehension impairment and recommended a Central Auditory Processing Battery to rule out Central Auditory Processing Disorder, as well as a Behavioral Ophthalmologic Examination to address Student's history of fine motor and handwriting difficulties of a visual nature. (NT 390-444; P 18.)
135. The Speech therapist recommended specialized, explicit, structured and multisensory instruction in language with ongoing guided practice, in a small classroom setting. The therapist recommended two thirty minute speech and language therapy sessions per week and consultative services in the amount of sixty minutes per month. The therapist recommended gestural cues, an FM system and a Study Buddy system. (P 18.)
136. On August 10, 2016, the District convened an IEP team meeting, including Parent, to revise Student's IEP in light of the independent educational evaluations by the psychologist and the speech therapist. (P 20.)
137. The IEP team placed Student in supplemental learning support, estimating that Student would spend about 4.2 hours in the school day or 60% in the learning support classroom. There, Student would be provided with Direct Instruction in mathematics calculation, fluency and problem solving, as well as written expression. Additional services to be provided in the learning support classroom included direct, explicit instruction in reading, language arts (English) and functional skills. Student was to be instructed in the learning support classroom for science and functional skills as well as supported study hall. (P 20.)
138. The August 2016 IEP revision did not provide for school based counseling or explicit social skills instruction. It provided for no related services except for 15 minutes of speech and language consultation services. However, the specially designed instruction section of the IEP provided for weekly counseling sessions, 30 minutes per session, with the Student Assistance Program counselor. (P 20.)
139. The August 2016 IEP revision provided for the modifications of the previous IEP and added modifications recommended in the neuropsychological IEE addressing attention; executive functions; organization; functional skills; copying difficulties; anxiety;

and deficits in long and short term memory, perceptual and processing speed, analyzing complex materials and directions, impulsiveness, anxiety and social skills. (P 20.)

140. The August 2016 IEP revision recommended a planning process for assistive technology needs. (P 20.)
141. The August 2016 IEP revision provided for accommodated local testing (small group, modified tests) in the modifications section of the IEP. (P 20.)
142. In September 2016, Student entered a District high school for ninth grade. (P 20.)
143. Student made some progress at the beginning of the school year and attained some “A”s and “B”s. Student made some progress in reading fluency scores, but continued to function below average in reading fluency and below grade level in mathematics. Student’s behavior was improved in the new school, but Student continued to display needs in functional behavior and social skills. (P 22, 23, 26.)
144. Student was able to display improved attentiveness, focus and initiative, as well as following directions better, in the first part of ninth grade. (NT 287-300.)
145. Student continued to struggle in the beginning of ninth grade with planning, homework completion, self-regulation and social skills. (NT 187-300.)
146. The District issued a re-evaluation report on October 21, 2016. Based upon a review of the speech and language IEE conducted in March and April 2016, and upon the District evaluator’s own testing, teacher reports and classroom observation, the report continued student’s previous classifications of Specific Learning Disability and Other Health Impairment, although it determined that such disability was only in mathematics calculation and problem solving and written expression. It ruled out classification with speech or language impairment. (P 22.)
147. On October 21, 2016, the District convened an IEP team meeting, including Parent, and revised the August 2016 IEP. The revision updated the IEP to reflect that Student would not receive direct speech and language services, but would receive consult services weekly. (P 23.)
148. On November 10, 2016, the District sought Parents’ permission to conduct an updated FBA. (D 56.)

### **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>5</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>6</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 “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claim, or if the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

#### CREDIBILITY/RELIABILITY

It is the responsibility of the hearing officer to determine the credibility and reliability of witnesses’ testimony. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer

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<sup>5</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>6</sup>A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. 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.

to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following determinations.

Considering the testimony in light of the documentary evidence, I find that parent's testimony was credible and reliable. I base this finding upon the lack of substantive conflicts with the record, as well as Parent's way of answering questions, which was consistently forthright and helpful.

Based upon the same criteria, I found no reason to doubt the credibility of any of the other witnesses, and found them all to be reliable. As to conflicts in the testimony of expert witnesses, I accorded differing weight based upon their degree of experience, the extensiveness of their data, and their care in rendering only those opinions that were supported by their data. In this respect, I gave greater weight to the testimony and extensive report of the IEE psychologist than to those of the other expert witnesses.

## COMPREHENSIVE EVALUATION

I conclude that the District failed to provide appropriately comprehensive evaluations of Student during the relevant period of time, because they did not include an FBA as required by Chapter 14 of the Pennsylvania Code, 22 Pa. Code §§14.101 et seq., specifically 22 Pa. Code §§14.133(a), (b). Student's inappropriate school behavior was a longstanding problem of which the District was aware well before the relevant period began. It was documented in Student's educational history and Student's report cards. Student's teachers reported it. Student's IEPs acknowledged behaviors impeding learning throughout the relevant period. These included inappropriate classroom behavior, aggressive behavior, and immature, inappropriate social

behavior toward peers and adults. Yet, the District failed to conduct an FBA either before or during the relevant period. Thus the District violated Pennsylvania law by failing to conduct an FBA. Id. In the long run its failure deprived Student substantively of the benefits of the data-based, collaborative analysis that an FBA would have provided to shed light on the “functions” – the environmental reinforcers – that resulted in Student’s well-known and perennial inappropriate behavior throughout the relevant period.

With regard to the March 2012 re-evaluation, I do not find any other area of deficiency in terms of comprehensiveness. An evaluation or re-evaluation must address all areas related to the suspected disability, 34 C.F.R. §300.304(c)(4); it must also be sufficiently comprehensive to identify all of the child’s special education and related services needs, 34 C.F.R. §300.304(c)(6). The record shows that Student was suspected of disabilities related to core academics, attention and focus, classroom and study skills, and inappropriate behavior, including social conflict and study skills. I conclude that the March 2012 re-evaluation addressed all of these areas of suspected disability. Therefore, it met the legal standard, with the exception of its failure to assess Student appropriately in the area of inappropriate behavior.

With regard to the March 2015 re-evaluation, however, I conclude that this re-evaluation was not appropriately comprehensive for several reasons. First, the evaluator did not report conducting a classroom observation, as required by the IDEA, 34 C.F.R. §300.305(a)(1)(ii), nor did the report rely upon any classroom observation. Second, the evaluator relied upon three-year-old cognitive and achievement data, although Student continued to struggle with academic achievement during that three year period; thus, the re-evaluation was not sufficiently comprehensive to identify all of Student’s special education and related services needs. Third, the re-evaluation did not address Student’s unabated difficulties with social relationships, despite the

fact that this was an area of suspected disability based upon Parental input. Fourth, the re-evaluation ignored the recently engaged SETT assistive technology assessment and planning process in which the Parent had engaged with District educators; thus again, it failed to address all special education needs, contrary to the IDEA regulations. In short, this re-evaluation was not sufficiently comprehensive, in violation of the IDEA.

On this record, I find no fault with the October 21, 2016 re-evaluation. This was conducted in response to an IEE by a private psychologist and by a private speech therapist. The re-evaluation relied upon and corroborated many aspects of these reports. These reports were broadly comprehensive; they addressed extensively Student's cognitive ability, academic achievement, adaptive and functional abilities, executive functions, behavior, emotional wellbeing and social maturity and skill, as well as speech and language skills. In all of these areas – especially cognitive ability, academic achievement and executive functions – the private reports were extraordinarily intensive in delving into the neuropsychological roots of Student's ongoing and debilitating cognitive difficulties, as well as the emotional sources of Student's ongoing behavioral and social dysfunction. The October 21, 2016 re-evaluation also included District testing as part of a thorough speech and language evaluation, which incidentally shed further light upon Student's executive functions and attention and focus. The re-evaluation also included parental and teacher input, review of records, and a classroom observation by the evaluator. I conclude that this re-evaluation was appropriately comprehensive.

#### FAILURE TO OFFER OR PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C.

§1401(9). FAPE is “special education and related services”, at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive appropriate services in light of the child’s individual circumstances. Andrew F. v. Douglas County Sch. Dist., RE-1, \_\_\_ U.S. \_\_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “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 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Andrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

In order to provide a 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).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Andrew F., 137 S. Ct. above at 999 (requiring what is

reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; 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.) The program's appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District failed to provide Student with a FAPE during part of the relevant period of time. I conclude that the District's offered and provided services for the first part of Student's sixth grade year were appropriate based upon what the District knew at the time, and that in this matter, it is appropriate to accord the District a reasonable period of time to identify and rectify deficiencies in its special education program for Student that became apparent during Student's sixth grade year, including the failure of its behavior intervention plan in sixth grade.

I conclude that the District's interventions, once it was on notice of the need to revise its services to Student, were woefully inadequate until it received notice that Parent had hired an attorney; during this period of time encompassing part of sixth grade and all of seventh and eighth grade, I conclude that the District failed to provide Student with a FAPE. I also conclude that the District's offer and provision of special education services was appropriate during Student's ninth

grade year, because the District responded appropriately to the IEE reports which it received by June 2016, and at that point it revised and augmented Student's special education services in a way that was reasonably calculated to afford Student with appropriate and meaningful educational progress in view of Student's circumstances.

## SIXTH GRADE – INITIAL PROVISION OF SERVICES

I conclude that the District provided Student with a FAPE from the beginning of Student's sixth grade year. At the start of this school year, the District had in place an IEP based upon the March 2012 re-evaluation, which identified Student's needs in the areas of basic reading, written expression, mathematics problem solving, and mathematics calculation, as well as Student's long-standing diagnosis of ADHD and consequent identification as a child with Other Health Impairment. The re-evaluation noted Student's low-average working memory and low average ability to sustain attention, concentration and mental control, as well as Student's struggles with handwriting, although testing revealed average fine motor functioning. Speech and language functioning was not a suspected disability at that time.

Although the re-evaluation noted significant problems with inappropriate behavior, all reports available at that time indicated that Student was responding to fifth-grade interventions based upon a point system and rewards.<sup>7</sup> Student was at that time reportedly improving in self-control, respect for others, ability to work independently, homework completion and organizational skills. I conclude that, at this point in time, given what the District knew, it was

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<sup>7</sup> Although the behavior intervention plan in place in fifth grade, adopted for sixth grade, indicated negative consequences for inappropriate behaviors, along with positive interventions based upon the point system, I do not conclude that this was in violation of 22 Pa. Code §14.133(a), as Parents urge. The regulation requires an intervention plan to be based upon positive interventions, not negative ones, but it goes beyond practical reason to suggest that it forbids any and all negative consequences for inappropriate school behavior. Certainly, its language does not go that far. On this record, I conclude that the District's intervention plan was based upon positive interventions within the meaning of the regulation, in spite of its inclusion of negative consequences as well.

reasonable for it to offer a program that addressed Student's educational needs as set forth in the March 2012 re-evaluation, despite its inappropriate failure to conduct an FBA – that procedural failure had no substantive effect upon the appropriateness of the offer of FAPE at that point in time. 34 C.F.R. §300.513(a)(1).

I conclude that the District offered and provided special education services that were reasonably calculated to provide Student with the opportunity for appropriate, meaningful progress and educational benefits in sixth grade, based upon what the District knew at the time. It provided interventions that addressed all of Student's identified needs, including itinerant placement, small group instruction and supplemental instruction, measurable goals, and specially designed instruction, a behavior support plan addressing the identified behaviors that had not extinguished in fifth grade, assistive technology. At the start of the year, these interventions were reasonably calculated to meet all of Student's needs effectively.

Parents argue that the sixth grade program violated the IDEA because it did not provide a goal for every identified need, and goals were nothing more than requiring good grades in school. I conclude that these deficiencies were procedural in nature and did not rise to the level of a substantive failure to provide a FAPE.

Parents argue that the sixth grade program should have provided Direct Instruction as defined as a term of art, usually delivered through a specialized curriculum, for academic concerns, executive functions, study skills, social and other skills. However, they offered little evidence to this effect, and no preponderant evidence that the omission to offer such intensive services in September 2013 was a failure to appropriately address the needs known at the beginning of sixth grade. On the record as a whole, I conclude that this omission was not a substantive or procedural failure.

Parents argue that the program did not offer related services. However, the evidence is not preponderant that such services were required. Student's fine and gross motor skills were within the average range. Speech and language skills were not a suspected disability. I conclude that the program addressed all known needs through special education interventions.

#### SIXTH GRADE – FAILURE TO PROVIDE A FAPE

The preponderance of the evidence is that the District's interventions – though reasonably calculated - did not in fact provide Student with the opportunity for meaningful, appropriate progress in view of Student's circumstances. The record shows that Student did not progress meaningfully in Student's academic areas of weakness in sixth grade, except for reading, in which Student's benchmark score advanced to Proficient in 2014. Student's benchmark scores for reading were below basic and basic in the first and second marking periods. Student struggled with newly emerging difficulties in reading comprehension, inferential reasoning and a less developed vocabulary. Student's struggles continued with written expression and mathematics, requiring significant interventions to enable Student to attain passing grades. Student's attention, organization, classroom behaviors and social behaviors continued to interfere with learning. I conclude that, from the beginning of Student's sixth grade year, the District's interventions failed to enable Student to obtain meaningful and appropriate progress in view of Student's circumstances. These circumstances include Student's essentially average range cognitive ability, well-known history and the well-understood disabilities that impeded Student's opportunity to utilize that intelligence to an average range level of academic achievement, Student's supportive family, and Student's documented positive personality and motivation to succeed.

As noted above, I accord the District a reasonable period in which to recognize that its program of interventions was not delivering a FAPE. Ordinarily, interventions must be given at least six weeks to evaluate their effectiveness. The IDEA and Chapter 14 allow a district sixty days in which to assess educational needs, and another thirty days to implement new interventions to address such needs. In this matter, the District was well aware of Student's vulnerability and needs, so its assessment of current interventions and the need to revise them should not have taken until March 2014, which is the next time the District convened an IEP team meeting. I conclude from this and the above guidelines that it is appropriate to accord the District seventy-five days to have addressed the inadequacies of its sixth grade program, and another fifteen days to have implemented changes. Therefore, I conclude that ninety days is a reasonable period for rectification in view of Student's lack of meaningful and appropriate progress from the beginning of sixth grade. In sum, I conclude that the District failed to provide student with a FAPE during sixth grade, beginning on December 1, 2013.

#### SEVENTH GRADE IEP AND FAILURE TO PROVIDE A FAPE

In March 2014, the District, through the IEP team, offered an IEP that was to govern the special education services that it would provide Student for the bulk of seventh grade, until March of the seventh grade year. It is important to note a new circumstance facing Student that factors into the determination of whether or not this IEP was "reasonably calculated." Student was anticipated to change from an elementary school-like single classroom for all regular education instruction, to a more high-school-like roster of different classes and teachers for each regular education subject. For a child with serious attention and focus difficulties, organizational deficits, serious and ongoing behaviors that impeded learning and a history of very problematic social skills

deficits, the record shows that such a change was likely to be challenging and problematic for Student. Thus, one would expect substantial support in Student's areas of disability to help Student cope with the anticipated dramatic change in circumstances.

However, the District did not offer supports commensurate with the magnitude of the challenges that Student would face, nor with the chronic and substantial nature of Student's academic, behavioral and social struggles in school. The March 2014 IEP made no change to Student's placement, nor did it increase the amount of time that Student would spend in the learning support classroom. Its interventions for reading, written expression and mathematics were not changed appreciably from the approach that had not succeeded in sixth grade. Similarly, it offered essentially unchanged interventions for attention, organization, behavior and social interactions. The IEP did not offer related services, although the record shows preponderantly that Student needed counseling services at this point in time.

Although the District did respond to Student's new reading challenges with appropriate interventions, the remainder of its interventions were not appropriate to Student's needs. The written expression goal was not measurable, although there was a goal for spelling that was measurable; specially designed instruction to address written expression was essentially unchanged. The District offered the same approach to the mathematics goal as it had adopted ineffectively for sixth grade: the goal was to obtain good marks in regular education class. The goal did not address mathematics fluency, basic facts or problem solving explicitly. The IEP provided the same modifications and accommodations as the April 2013 IEP. As in the sixth grade IEP, there was no provision for formal Direct Instruction, despite the failure of the more informal special instruction approaches in sixth grade.

In sum, I conclude that the offered IEP for the bulk of seventh grade was not reasonably calculated to provide Student with the opportunity for meaningful, appropriate educational benefit, in view of Student's circumstances. These circumstances included Student's cognitive potential for average and grade level achievement academically, except for mathematics, in which Student's disability and lost opportunity were such that grade level achievement would not have been a reasonable expectation. Nevertheless, as to mathematics Student at least had the potential to make meaningful progress toward grade-level achievement. Student's circumstances also included the anticipated challenges of beginning with a high-school-like regular education roster of multiple classes and teachers.

The evidence is mixed as to whether or not Student made appropriate, meaningful progress in seventh grade. Considering the record as a whole, I conclude that the evidence is preponderant that Student did not make meaningful and appropriate progress.

Academically, Student continued to score below basic on all benchmarks for reading and mathematics, except for one score of basic in reading at the third administration. Student continued to function below grade level in mathematics basic skills. Teachers reported weaknesses in legible writing, basic reading, mathematics calculation, mathematics problem solving and written expression. Student functioned below the proficient range in most core academic skills on report cards for seventh grade. Academic achievement scores elicited in the later IEE in 2016 create an inference that Student's academic growth in mathematics was not meaningful for several years prior to testing, thus supporting more contemporary evidence of a failure to make meaningful progress in seventh grade.. Student's deficiencies in attentiveness and task-avoidant behaviors impacted Student's performance in other core subjects.

Behaviorally, teachers also reported that Student lacked “age appropriate social skills”. Student’s inappropriate behavior escalated, and Student displayed increasing and sometimes defiant work avoidance behaviors. Student also experienced increasing conflict with peers. Student was suspended three times, and the last infraction involved threatening a peer, an infraction that put Student at risk of lengthy suspension and expulsion if repeated. By March, Parents felt the need to intervene to protect Student from Student’s own social and behavior issues, by partially hospitalizing Student in a District program.

In sum, the evidence is preponderant that the District’s offered program for seventh grade was not reasonably calculated to provide a FAPE, and that as a result, Student did not make progress that was appropriate in view of Student’s intellectual abilities or challenging circumstances. I therefore conclude that the District failed to provide Student with a FAPE for the entirety of seventh grade.

#### EIGHTH GRADE- FAILURE TO PROVIDE A FAPE

Despite Student’s ongoing struggles with cognitive deficits, academics, behavior and social relationships, the District failed to convene an IEP team meeting to review its seventh grade services until March 2015. Anticipating Student’s impending transfer to the District’s partial hospitalization program, the IEP team changed Student’s placement to full-time emotional support, despite the facts that its own 2012 re-evaluations had ruled out emotional disturbance; that it conducted no additional assessment of Student’s emotional needs in its pro-forma 2015 re-evaluation; and that it had neglected to perform an FBA despite behaviors impeding learning in sixth and seventh grades.

The offered IEP contained the same kinds of goals that had proven ineffective in sixth and seventh grade, based upon achieving better grades in reading and written expression, although the mathematics goals were more specific. The IEP offered reduced numbers of modifications and specially designed instructional interventions, although it provided for some new interventions, including modified tests. The IEP also reduced the areas of behavior targeted in the behavior intervention plan, despite the lack of FBA data and analysis. In line with the placement in a partial hospitalization program, the IEP provided for counseling to be delivered by that program. On this record, these changes were not reasonably calculated to address Student's academic issues with any likelihood of conferring appropriate, meaningful educational benefit.

The District revised the March 2015 IEP in late September 2015, to reflect the fact that Student had been discharged from the partial hospitalization program. The revision returned Student to the placement of itinerant learning support that had so far failed to deliver the opportunity for meaningful and appropriate educational benefit, with a return to one hour per day in learning support for interventions focused on re-teaching and review of material from general education, as well as other, non-specified interventions. The IEP retracted the related service of counseling.

I conclude that, based upon the preponderant evidence, this revision was not reasonably calculated to provide a FAPE. The evidence is preponderant that the amount of time provided in the learning support classroom was inadequate to address all of Student's needs for instruction and support in the small classroom setting. Moreover, the retraction of supports was inappropriate in view of Student's continuing educational struggles.

Student's academic performance and behaviors plummeted during eighth grade. Consequently, Parent demanded an IEE by letter of counsel dated February 9, 2016. Immediately, the District scheduled an IEP meeting to revise the IEP.

At this meeting, the IEP team made significant changes to the IEP, including revised goals and modifications. However, it made no changes to the Student's placement. It continued the one-period-per day provision of instruction in the learning support classroom<sup>8</sup>, adding a promise to provide – in addition to the review-oriented services previously listed - supplemental instruction in mathematics and guided assistance in completing assignments. It did not specify what areas of the mathematics curriculum would be addressed, and it added vaguely the possibility of “additional pull-out periods.” The revised written expression goal was not measurable. “Self-advocacy” goals, measured through a periodic checklist, were added. A behavior intervention plan was offered, but it did not address all of Student's behaviors impeding learning. The IEP added new modifications.

In eighth grade, Student continued to display behavioral dysfunction and social immaturity. Student continued to display social difficulties and significant anxiety. Student's school-related behaviors and skills, as well as more general adaptive skills, were below expectations for Student's age. Student continued to struggle with attention and focus, organization impulsiveness, defiance and untruthfulness.

Academically, Student continued to function at a below grade level in basic mathematics skills and at a below average level in most academic subjects. Standardized testing revealed achievement below reasonable expectations in mathematics calculation, fluency and problem solving, with significant academic weaknesses in reading and written expression.

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<sup>8</sup> Student's IEPs during this period of time also provided for push-in special education services in the regular classroom.

The District argues that I should consider Student's passing grades from year to year as establishing that Student's overall educational attainment has been progressive. Cf. Andrew F., 137 S. Ct. above at 999 (society regards education as passing and advancing from grade to grade). I reject that argument in the context and circumstances of this matter. Here, Student's passing grades stood in stark contrast with the yearly benchmark testing and the standardized testing provided in the IEE, as well as in many teacher reports. The record also establishes that the District accommodated Student's testing, even to the point of altering the test questions themselves. While this accommodation serves an important pedagogic purpose of providing a truer measure of Student's mastery of material at any given point in the curriculum, it also renders grades less reliable as a measure of overall progress, as courts have recognized. See, e.g., D.S. v. Bayonne Bd. Of Ed., 602 F.3d 553, 567 (3d Cir. 2010)(grades in special education accorded less weight). Therefore, while I consider Student's passing grades (as well as their deterioration over time), I give less weight to the fact that Student was able to pass Student's courses in the years in question and advance from grade to grade than I accord to the preponderant evidence that Student made no meaningful or appropriate progress during that time.

In sum, the District provided a program and placement to Student for eighth grade that was not reasonably calculated to provide a FAPE. Student did not make meaningful or appropriate progress in eighth grade, despite some evidence of improved grades in the latter half of the year. I conclude that the District failed to provide Student with a FAPE for Student's eighth grade year.

#### NINTH GRADE – PROVISION OF A FAPE

In August 2016, after receiving the IEE consisting of the psychologist's evaluation and the speech therapists' report, the District convened an IEP team meeting to revise the IEP. Following

the psychologist's independent recommendations, the District increased Student's placement to supplemental learning support with about 60% of Student's time spent in the learning support classroom. The IEP team revised the goals to target the cognitive and achievement areas highlighted by the psychologist as needing specific intervention. It provided for formal Direct Instruction in mathematics calculation, fluency and problem solving, as well as written expression. It also provided for direct, explicit instruction in reading, language arts (English) and functional skills in the learning support classroom, and a supported study hall for homework.

The revised IEP provided for weekly counseling and consultative speech and language services pending a full District speech and Language evaluation in response to the IEE speech and language evaluation. The revision revamped the IEP goals to provide measureable goals targeted at basic mathematics skills, and measureable goals addressing reading, written expression, functional skills including organization, following directions and social relationships. It revamped the modifications to address attention; executive functions; organization; functional skills; copying difficulties; anxiety; and deficits in long and short term memory, perceptual and processing speed, analyzing complex materials and directions, impulsiveness, anxiety and social skills.

I conclude that the August 2016 revised IEP was reasonably calculated to provide Student with appropriate, meaningful educational benefit. It followed many of the recommendations of the independent psychologist-evaluator, and it addressed Student's array of educational needs with new, better conceived and better-designed interventions.

Student entered high school for ninth grade. Student continued to struggle in the beginning of ninth grade with planning, homework completion, self-regulation and social skills, but showed improvement in attentiveness, focus and initiative, as well as following directions. Student achieved some "A's in the first marking period. I conclude that Student made significant progress

in the first marking period of ninth grade. It remains to be seen how Student's performance and progress will play out over the course of the full year, and, given this record, I cannot reach any findings or conclusions about the rest of this year. Suffice it to say that I do not find preponderant evidence to warrant a conclusion that the District denied FAPE for ninth grade first marking period.

Parents argue that the ninth grade IEPs do not contain goals related to behavior, study skills, homework completion or social skills. Cf. 34 C.F.R. §300.320(a)(2)(i)(A). While I so find, I do not conclude that this is a substantive violation requiring relief. Overall, the revised IEPs for ninth grade were reasonably calculated to deliver a FAPE.

Parents argue that the District's failure to provide speech and language services during the relevant period was a deprivation of FAPE. I disagree. At the start of the relevant period, there was no reason for the District to suspect a speech or language impairment. As to the subsequent period of time, the evidence is not preponderant that Student had such a need. The two IEEs are in conflict about this, and I give more weight to the psychologist's findings that contradict those of the independent speech therapist. Moreover, I give weight to the District's own testing and evaluation, which concurred with the psychologist's findings.

#### SECTION 504 VIOLATION

I conclude that the District failed to provide Student with a FAPE for the Student's sixth grade year beginning on December 1, 2013, all of Student's seventh grade year and all of Student's eighth grade year. Accordingly, for these periods of time, I conclude that the District failed to provide Student with appropriate services and accommodations 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). Conversely, I find no violation of section 504 for the relevant time periods in which

I find no IDEA violation. In this case, compliance with the IDEA is preponderant evidence that the District also complied with section 504. 34 C.F.R. §104.33(b)(2).

## COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the local educational agency to make up such services on an hour-by-hour basis; however, there is support also for a “make whole” approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010). Recently, the Third Circuit embraced the “make whole” approach in G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015)(child deprived of FAPE entitled to be made whole).

In this matter, the evidence is preponderant that the District failed to provide Student with a FAPE during the regular school years from December 1, 2013 through the last day of school in the 2015-2016 school year. It remains to be resolved how many hours of compensatory education – or what other remedy - should be ordered on account of this deprivation. In this matter, the record amply supports a “make whole” approach to remedy, because it establishes that Student failed to progress meaningfully with itinerant level placement, and began to show progress when accorded a supplemental level placement, with approximately 4 hours of special education in the learning support classroom, and reasonably devised interventions. I conclude that this fact provides a reasonable and equitable criterion by which Student can be restored to the educational path from which the District’s denial of a FAPE diverted Student in December 2013, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 625 (3d Cir. 2015)(courts should restore child to educational path

that child was on prior to deprivation). Therefore, I will order compensatory education in the amount of four hours per school day for every school day during the regular school year in part of Student's sixth grade, part of Student's seventh grade (with one hour per day for the time spent in the partial hospitalization program) and all of Student's eighth grade years.

The District argues that it was not able to provide the educational program and placement available at Student's middle school during Student's seventh grade year when Student was placed in the partial hospitalization program. However, it made the placement, albeit at Parent's request. Thus, it remained responsible for Student's educational program, and the District has made no showing that the program at the partial hospitalization program would have precluded effective learning support interventions. Nevertheless, as the placement was at Parent's request, and the placement was full-time emotional support, it is reasonable to expect that there would not have been time for four hours per day of learning support, nor would Student have been available for such intense learning support. Therefore, considering the equities, I will reduce the ordered compensatory education to one hour per day for the time in seventh grade during which Student was in the partial hospital placement.

### **CONCLUSION**

I conclude that the District failed to provide Student with a FAPE during part of the relevant period of time, from December 1, 2013 to the last day of school in the 2015-2016 school year. Accordingly I will order the District to provide Student with compensatory education pursuant to equitable principles. As the District has provided FAPE for the current school year, I see no equitable reason to order prospective relief.

## ORDER

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

1. The District shall provide compensatory education to Student in the amount of four hours for every school day during the regular school year, excluding summer break, on which Student's school was open to receive students during the 2013-2014 school year, beginning on December 1, 2013 to the last day of school in that school year.
2. The District shall provide compensatory education to Student in the amount of four hours for every school day during the regular school year, excluding summer break, on which Student's school was open to receive students during the 2014-2015 school year, from the first day of school until the last day on which Student attended school in that school year.
3. The District shall provide compensatory education to Student in the amount of one hour for every school day during the regular school year, excluding summer break, on which Student attended Student's partial hospital placement during the 2014-2015 school year.
4. The District shall provide compensatory education to Student in the amount of four hours for every school day during the regular school year, excluding summer break, on which Student's school was open to receive students during the 2015-2016 school year.
5. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parents, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parents. Such services may be provided to Student until Student reaches twenty-one years of age.
6. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parents.
7. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service, within a fifty mile radius of the District's headquarters.

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

*William F. Culleton, Jr. Esq.*

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

DATED: May 31, 2017