

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
DUE PROCESS HEARING

Name of Child: I.K.
ODR #2158/11-12 KE

Date of Birth:
[redacted]

Dates of Hearing:
October 4, 2011
October 7, 2011
November 4, 2011
November 7, 2011
January 6, 2012
January 20, 2012
January 27, 2012

CLOSED HEARING

Parties to the Hearing:

Parents

Representative:

Sonja Kerr, Esquire
PILCOP
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103

Haverford Township School District
50 E. Eagle Road
Havertown, PA 19083

Natalie Habert, Esquire
BeattyLincke
2000 Old Forge Road Suite 202
Kennett Square, PA 19348

Date Record Closed:
Decision Due Date:
Date of Decision:

March 20, 2012
April 19, 2012
April 18, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a late teen-aged resident of the District who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA]² under the classification of Intellectual Disability, and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504],³ as well as the federal and state regulations implementing those statutes.

The Parents assert that Student was denied a free appropriate public education [FAPE] under the IDEA and suffered discrimination under Section 504 and is therefore entitled to appropriate remedies. The Parents also assert that the District has denied them meaningful participation in Student's program and has engaged in retaliation.

The District maintains that at all times Student was provided with FAPE, that Student was not discriminated against, that the Parents were offered meaningful participation and that it did not engage in retaliation.

Student began attending District schools in 4th grade but has been educated at home at the Parents' choice since March 13, 2009. Because of events explained in the Procedural History the relevant period addressed in this decision is from June 15, 2007 to the present.

Procedural History

The extensive procedural history of this case is briefly summarized as follows: The Parents⁴, represented by counsel⁵, initially filed a Due Process Hearing Request on June 15, 2009. On July 27, 2009 the parties and their respective counsel met and arrived at what the attorneys and the District believed was an agreement. Counsel jointly informed the hearing officer⁶ that the parties had reached an agreement but needed 30 days to reduce the agreement to writing. On July 28, 2009 the hearing officer canceled the hearing sessions and notified the attorneys that he would retain jurisdiction for 30 days. Hearing nothing for 38 days, on September 4, 2009 the hearing officer dismissed the case.

From August to October 2009 counsel collaboratively worked on various drafts of the agreement, producing what appeared to be a final version on or about October 15, 2009 and then communicated into November over having the final version approved and

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² 20 U.S.C. §§ 1400 *et seq.*

³ 29 U.S.C. § 794.

⁴ Student's father and mother attended all hearing sessions. However, as Student's mother conducted all interactions with the District, for the sake of clarity, the singular "Parent" is used in the Findings of Fact, and in the Discussion section as applicable.

⁵ A different attorney but formerly of the same firm as Parents' current counsel.

⁶ A different hearing officer than the undersigned.

signed by their clients. However, during this time neither the Parents nor the District signed the agreement. After a new Parents' attorney was assigned⁷ and further resolution attempts were not productive, the Parents filed a new Due Process Hearing Request on March 9, 2010 seeking to reopen the previous case on the grounds that the prior agreement had not been finalized, that in fact there was no agreement, and that the matter had been improperly dismissed. Believing that I lacked authority to reopen a matter that had been previously dismissed by another hearing officer, which dismissal was not timely appealed, and also determining that I lacked subject matter jurisdiction over the question of whether a contract [agreement] existed between the parties, I dismissed the Parents' March 9, 2010 Due Process Hearing Request on June 5, 2010. The Parents then successfully appealed my dismissal to the U.S. District Court for the Eastern District of Pennsylvania⁸, and the matter was remanded to me to determine whether or not a contract existed between the parties. After receiving testimonial and documentary evidence, including testimony from the original attorneys⁹, and considering briefs submitted, I concluded that a contract between the parties did not exist and so ruled on July 8, 2011.

In light of my finding that an agreement had not in fact been reached pursuant to the Parents' June 15, 2009 Due Process Hearing Request, and acknowledging that those claims had never been adjudicated, I reconsidered my previous decision not to reopen the case dismissed by the first hearing officer. Over objection from the District I allowed the Parents to move forward with the claims in their original Due Process Hearing Request of June 15, 2009, and for the sake of judicial economy, to include the claims set out in their second Due Process Hearing Request of March 9, 2010.

As the instant matter therefore begins by addressing the original Due Process Hearing Request of June 15, 2009, applying the IDEA's 2-year filing limitation with no exceptions to the limitation existing, the relevant period under consideration is from June 15, 2007 forward.

Issues¹⁰

1. Did the District deny Student a free, appropriate public education under the IDEA during the relevant period in the following and/or other areas by
 - a. Failing to provide an appropriate evaluation including non-verbal instruments and an FBA; and/or
 - b. Failing to follow appropriate procedure when the Parents requested an IEE; and/or

⁷ The original attorney left the firm.

⁸ *IK v. Haverford Township School District*, No. 2:10-cv-04397 (E.D. Pa.).

⁹ For the "contract" hearing the District was represented by another member of the firm in which the District's attorney in the current hearing practices.

¹⁰ The order of presentation of issues is slightly altered from that stated on the record to create a more logical flow.

- c. Failing to provide appropriate and measurable IEP goals, a behavior management plan, transition services, assistive technology, speech/language services including alternative means of communication, and/or an appropriate aide;
 - d. Denying the Parents meaningful participation in deciding educational environment; and/or
 - e. Refusing to provide homebound services; and/or
 - f. Retaliating against the Parents as a result of their complaint to the BSE?
2. Did the District discriminate against Student in consideration of the requirements under Section 504 by denying equal opportunity to access the regular education curriculum?
 3. As a result of any or all of the above alleged failures of the District, did Student fail to make meaningful educational progress and/or regress in some areas?
 4. If the District violated the IDEA and/or Section 504 in any or all these areas, must the District fund appropriate educational services in reading, mathematics, writing and/or other academic subjects; and/or fund an appropriate transition evaluation; and/or fund an appropriate assistive technology evaluation; and/or fund appropriate speech/language services; and/or reimburse the Parents for costs of private tutoring; and/or be responsible for providing other remedies as the hearing officer finds appropriate?

Chronology

Although the relevant period in this matter begins in 8th grade, the following chronology is provided for reference:

Student was home-schooled in 1st grade. [2000-2001]

Student was enrolled in another school district in 2nd grade [2001-2002].

Student was home-schooled in 3rd grade [2002-2003].

Student entered elementary school in the District in 4th grade [2003-2004].

Student remained in elementary school in the District in 5th grade [2004-2005].

Student entered middle school in the District in 6th grade [2005-2006].

Student remained in middle school in the District in 7th grade [2006-2007].

Student remained in middle school in the District in 8th grade [2007-2008].

Student entered high school in the District in 9th grade [2008-2009].

Student stopped attending school in the District in 9th grade on March 13, 2009.

Findings of Fact

Issue 1a: Evaluation

District's Evaluation

1. Student is a late teen-aged District resident with a genetic disorder and a disorder of the digestive system.¹¹ Student was identified as eligible for special education in the previous school district under the IDEA disability classification of Intellectual Disability.¹² [NT 1615-1618; S-47]
2. Student is adept at many activities of daily living, including preparing food, doing laundry, running errands, completing chores, and assisting in household repairs. Student is virtually independent in maintaining hygiene, including appropriate toileting, but requires some minimal assistance on occasions of sudden diarrhea. [S-67]
3. In middle school Student participated on a community sports team, participated in a summer community theater group, and attended a community college course for young people in an area of special interest.
4. Student got along well with teachers and peers in the school and community settings and was pleasant and cooperative.
5. The District re-evaluated Student in April 2008. Cognitive ability was assessed with the Wechsler Intelligence Scale for Children – Fourth Edition [WISC-IV] which compares the test-taker's results with those of same-age peers. The WISC-IV provides some tasks that are primarily verbal [e.g. those comprising the Verbal Comprehension Index] and some tasks that are primarily non-verbal [e.g. those comprising the Perceptual Reasoning Index and the Processing Speed Index]. Student's abilities on verbal and on non-verbal indexes were comparable. [S-76]

¹¹ Persons with this disorder experience frequent diarrhea and may not always timely experience the sensation of needing to eliminate.

¹² All references to mental retardation in the record will use the term intellectual disability consistent with Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010); see 20 U.S.C. § 1401(3)(A)(i).

6. Student's WISC-IV standard scores¹³ and percentile ranks were as follows: Verbal Comprehension Index SS 50/PR<0.1; Perceptual Reasoning Index SS 45/PR <0.1; Working Memory Index SS 50/PR<0.1; Processing Speed Index SS 50/PR<0.1; Full Scale IQ 40/PR<0.1. These scores place Student in the range of intellectual disability and are consistent with scores obtained at the previous school district. [S-47, S-76]
7. Student's academic achievement was assessed in the April 2008 re-evaluation using the Wechsler Individual Achievement Test – Second Edition [WIAT-II]. Student's standard scores, interpretable on the same normal distribution curve as cognitive scores, were as follows: Word Reading SS 58; Pseudoword Decoding SS 64; Reading Comprehension SS 40; Reading Composite SS 46; Numerical Operations SS 43; Math Reasoning SS 41; Math Composite SS 40; Spelling SS 63; Written Expression SS 56; Written Language Composite SS 51. [S-76]
8. As of April 2008 some areas of Student's academic achievement as assessed by the WIAT II were better than would be expected based on cognitive scores and while still considerably below average indicated relative personal strengths in the areas of Word Reading [sight words], Pseudoword Decoding [sound-symbol association], Spelling, and Written Expression. Student's academic achievement scores were congruent with expectations based on cognitive scores in the areas of Reading Comprehension and mathematics, with these areas representing relative personal weaknesses. [S-76]
9. Adaptive behavior [activities of daily living] was assessed in April 2008 using the Adaptive Behavior Assessment System – Revised [ABES-R]. Student received an Adaptive Quotient of 59, well above the Full Scale IQ score but still below the first percentile, supporting a classification of intellectual disability. [S-76]
10. In spring 2008 Student received a speech/language evaluation using a structured instrument, the Comprehensive Assessment of Spoken Language [CASL]. Student's subtest scores, reported through standard scores that are interpretable on the same curve as cognitive testing, were all well below average, ranging from 40 to 68, with the composite score being 51. Observations of Student in fall 2008 were congruent with standardized testing. [NT 1720-1726; S-76, S-91]

Independent Evaluation

11. For the February 2009 Independent Educational Evaluation [IEE] cognitive ability assessment the independent evaluator utilized the Woodcock Johnson III Test of Cognitive Abilities scored using the Normative Update. On the Visual-Spatial Thinking Cluster [non-verbal functioning] Student scored a standard score of 61 at the 0.4 percentile, age equivalent 5 years 8 months. On the Auditory

¹³ Based on a "normal distribution" of scores across the population, an average Standard Score is 100 with the Average Range being 90-109. The range of 80-89 is Low Average; 70-79 is Borderline; scores of 69 and below place test-takers in the range of intellectual disability; scores of 110 to 119 are High Average, 120-129 are Superior and 130 and above are Very Superior.

Processing Cluster Student scored a standard score of 66 at the 1st percentile, age equivalent 6 years 9 months. On the Comprehension-Knowledge Cluster [verbal functioning] Student scored a standard score of 59 at the 0.3 percentile, age equivalent 8 years 3 months. On the Long-Term Retrieval Cluster [verbal] Student scored a standard score of 20, with Student's Retrieval Fluency [recalling and verbally providing as many things as possible in a certain category such as animals in one minute] being a standard score of 58 at the 0.3 percentile, age equivalent 7 years 1 month, and Student's Visual-Auditory Learning [learning symbol-word associations and reading sentences composed of the symbols] being a standard score of 8 at the <0.1 percentile, age equivalent 3 years 5 months. On the Processing Speed Cluster [non-verbal] Student's standard score was 12 with Decision Speed being a standard score of 38 at <0.1 percentile, age equivalent 6 years 2 months and Visual Matching being a standard score of 12 at the <0.1 percentile, age equivalent 5 years 10 months. On the Fluid Reasoning Cluster [reasoning, concept formation, problem solving] Student's standard score was 39 at the <0.1 percentile age equivalent 5 years 4 months. On the Short-Term Memory Cluster Student's standard score was 49 at the <0.1 percentile age equivalent 5 years 5 months. [S-126]

12. The independent evaluator concluded that “[Student’s] cognitive abilities are delayed and inconsistent. [Student] can be expected to learn more slowly than the average student, and there will be a limit to the complexity of material [Student] is able to comprehend. However, these results should not be used to limit what [Student] is taught. An accurate measure of [Student’s learning can be obtained by teaching [Student] using research-based strategies and monitoring [Student’s] progress.” [S-126]
13. The independent evaluator used the Woodcock-Johnson III Tests of Achievement to assess Student’s academic achievement. Results were as follows: Letter-Word Identification standard score 61 at the 0.4 percentile, age equivalent 8 years 9 months; Passage Comprehension standard score 39 at the <0.1 percentile, age equivalent 7 years; Reading Fluency standard score 58 at the 0.3 percentile, age equivalent 7 years 4 months; Spelling standard score 45 at the <0.1 percentile, age equivalent 7 years 2 months; Writing Samples standard score 50 at the <0.1 percentile, age equivalent 7 years 3 months; Writing Fluency was discontinued consistent with standard administration directions; Math Calculation standard score 36 at the <0.1 percentile, age equivalent 7 years 3 months; Applied Problems standard score 33 at the <0.1 percentile, age equivalent 5 years 9 months; Math Fluency standard score 55 at the 0.1 percentile, age equivalent 7 years 8 months; Story Recall standard score 66 at the 1st percentile, age equivalent 6 years 1 month; Understanding Directions standard score 46 at the <0.1 percentile, age equivalent 5 years 5 months. [S-126]
14. While discussing the limitations and the purposes of a diagnosis, the independent evaluator concluded that the most appropriate diagnosis for Student is intellectual disability. Although the evaluator did not assess adaptive behavior using a

standardized instrument he reviewed previous adaptive testing and directly observed delays in Student's communication, functional academics and social skills. Background information was not integrated into the IEE because the Parent did not return the parent questionnaire. [S-126]

FBA

15. In fall 2007 the Parents retained counsel, and during Student's 8th grade year a lay advocate from the firm attended IEP meetings with the Parent. The lay advocate has no recollection of the school raising concerns about Student's behavior. [NT 1413-1415]
16. The middle school principal did not recall Student displaying any behavior problems during the years there. Student's middle school one-to-one aide who was always with Student except for lunch time never observed Student having any behavioral problems and did not believe that staff was concerned about behaviors as Student entered high school. When Student engaged in a behavior that might be interpreted as somewhat out-of-place for school Student was easily redirected. [NT 495, 815, 822, 839, 844-845]
17. Because a new one-to-one aide was being assigned for high school, the middle school aide met with the 9th grade principal and the new high school aide and shared Student's needs. The middle school aide did not anticipate Student having any behavioral needs in 9th grade. [NT 845, 982-987]
18. At an IEP meeting on November 25, 2008 there were no concerns about Student's behaviors discussed. [NT 1426; S-94]
19. On February 18, 2009 Student received a behavior incident write-up. The incident, written on a Disciplinary Report form, was for calling a teacher an inappropriate name and stating that she was not doing her job and [Student] was going to take her to court¹⁴. Both the Parent and the 9th grade principal were surprised as this was Student's first ever behavioral write-up; the Parent spoke with Student about this at home. [NT 1462, 1466; S-105]
20. On February 20, 2009 Student received another write-up on a Disciplinary Report form. The Parent and the 9th grade principal spoke on the phone and the Parent said she was worried about what was happening in school and that she was going to be filing for due process. [NT 1467-1468; S-105]
21. Student received a third write-up on a Disciplinary Report form for referencing using a "G-U-N" [Student spelled, rather than said, the word since talk about guns was discouraged in school]. Student's fourth write-up on a Disciplinary Report form was on February 27, 2009. The Parent did not get a copy of either of these

¹⁴ The Parent had used this term to explain Due Process when speaking with Student about doing all she could to help Student. [NT 1463-1465]

- reports and did not discuss them with the 9th grade principal. [NT 1461, 1469; S-105]
22. On April 17, 2009, an IEP meeting was held but the Parent had a family medical emergency and could not attend; she indicated the team should meet without her. The school members of the IEP team discussed Student's behaviors and decided that an FBA should be done. [NT 1492, 1835-1836, 2217-2218; S-111]
 23. Because Student had already stopped attending school in mid-March, the FBA was completed on April 24, 2009 by an individual who had never met Student but crafted the FBA based on descriptions of behaviors. [S-112]
 24. The Parent disagrees with the FBA, maintaining that the listed behaviors were not inappropriate. For example, the IEP provided that the aide could write things down for Student or help with materials as needed and this kind of help had been provided by the aide in middle school. The Parent did not view Student's sitting passively or becoming distracted as "huge behaviors". In middle school when Student was affectionate towards the aide it was not seen as a behavior problem. [NT 1494-1498]
 25. The Parent noted that Student was fascinated by CSI and had gone to a community college course on the weekends when in middle school and the middle school staff knew this. The Parent had not received reports of comments about guns in the school or the community. [NT 1499-1501]
 26. After reviewing behaviors of concern to school personnel the independent evaluator concluded that Student did not have any significant behavioral problems, attributing the described incidents to frustration or anger in response to academic tasks and normal adolescent physical development in the absence of appropriate ability to manage or appropriately express thoughts/feelings. [S-126]

Issue 1b: IEE

27. On April 9, 2008 the Multi-Disciplinary Team [MDT] met to review the District's re-evaluation; the Parent was accompanied by a lay advocate from the law firm representing the family. The Parent disagreed with the results of the District's evaluation and made a verbal request for an independent educational evaluation and further indicated that she did not want the District to use its re-evaluation to develop a new IEP for Student. The District asked the Parent to put those requests in writing. [NT 363-364, 1420; S-76, S-77]
28. As of April 24, 2008 no written request had been received. As the time line for preparing an IEP following completion of an evaluation was close to expiring, the District wrote to Parent to confirm what had transpired and to advise her that an IEP Meeting would have to be held on May 9, 2008, if the Parent did not waive the time line for the IEP meeting in writing. [S-77]

29. On April 29, 2008 the Parent supplied the written request for an IEE and the required IEP timeline waiver, indicating that she did not feel the District's re-evaluation was "a true reflection of [Student's] abilities". [NT 358-359; S-78, P-9 p592]
30. The District agreed to provide the IEE and on May 14, 2008 issued a Request for Permission to Re-evaluate, suggesting a local group psychology practice to perform the evaluation. The Parent did not respond. The materials were resent to Parent on June 10, 2008 and again on June 25, 2008. [NT 359-361, 408-410; S-76, S-79]
31. The Parent responded on July 11, 2008 indicating that she wanted an evaluation by a psychologist of her own choice. The District contacted the Parent, agreeing that she could choose the evaluator. [NT 361; S-79]
32. On December 3, 2008 the Parent let the District know that she had selected a psychology practice affiliated with a local university to perform the IEE; the District issued a new Permission to Re-evaluate naming the Parent's chosen evaluation group and enclosed a copy of the Procedural Safeguards Notice. As the Parent did not return the Permission, it was resent on December 17, 2008. [NT 361; S-97])
33. During the week following winter break in early January 2009 the Parent left a voicemail message for the District psychology department saying that she no longer wanted the university-affiliated practice to perform the IEE, but was going to request a different evaluator. By letter dated January 12, 2009 the District confirmed receipt of the message, asked that Parent forward the resume for the person she selected, and offered to provide a list of independent evaluators. [NT 362-363; S-99]
34. The independent evaluator chosen by the Parent conducted the IEE in February 2009 and listed the date of a June 12, 2009 meeting with the Parent, other members of the IEP team, and an administrator as being part of the evaluation. At that meeting the Parent expressed disagreement with the results of the IEE. The final IEE report was dated June 29, 2009 and the District did not receive a copy of the IEE report until July 2009, after Student had stopped attending school. [NT 363, 2228-2230; S-120, S-124, S-126]

Issue 1c: IEP
Summer 2007¹⁵

35. The District offered Student extended school year [ESY] programming for Summer 2007, but the Parent declined ESY because Student was going to stay with Student's father and she wanted to work with Student on her own outside of the school's math and reading programs. [NT 336-337; S-58]

¹⁵ As noted above, the relevant period for this hearing begins on June 15, 2007.

2007-2008 8th grade September 2007 through November 2007

36. An IEP meeting was held on May 10, 2007 at the end of Student's 7th grade year. The IEP created at that meeting was in effect during the first three months of Student's 8th grade year. [NT 632-633; S-60]
37. Needs listed in the May 10, 2007 IEP were attention/on-task behavior, auditory memory/following directions, fine motor skills/handwriting, listening comprehension [also listed as a relative strength], math computation, math reasoning/problem solving, reading comprehension, spelling, written expression, verbal expression and articulation. [S-60]
38. Goals listed on the May 10, 2007 IEP addressed "growth in reading comprehension", "growth in mathematics", "respond[ing] verbally and in writing with support to prompts", "improve[ment] in visual/fine motor and visual/perceptual skills", "improv[ing] articulation skills", "increas[ing]...understanding and use of vocabulary". [S-60]
39. The IEP carries a reading comprehension goal using a baseline [grade equivalent 2.7] that is different than the Woodcock score for Passage Comprehension [grade equivalent 1.7]. [S-60]
40. Although "Evaluation Criteria" for attaining reading comprehension objectives are pegged at 85% accuracy, the objectives do not carry baselines. [S-60]
41. Although "Evaluation Criteria" for attaining mathematics objectives are pegged at 90% accuracy, the objectives do not carry baselines. [S-60]
42. Although "Evaluation Criteria" for attaining verbal and written response objectives are pegged at 90%/85% accuracy, the objectives do not carry baselines. [S-60]
43. The May 10, 2007 IEP does not carry goals to address reading decoding or math reasoning/problem solving. [S-60]
44. In the Specially Designed Instruction [SDI] section Student's needs for attention/on-task behavior and following directions are addressed. [S-60]
45. The IEP provides that Student would receive supports, modifications and adaptations in the general education curriculum and environment, would receive instruction for language arts and math in the Learning Support classroom and would receive instruction for Science, Social Studies, and all Unified Arts classes in the General Education classroom. [S-60]
46. The IEP also provides that Student would receive extra support in the Resource Room, two days per cycle, to help with science and social studies classes. [S-60]

47. The IEP provides that Student would receive speech/language therapy once per week for 30 minutes and occupational therapy twice per month for 30 minutes per session. [S-60]
48. The IEP continues Student's one-on-one aide. [S-60]
49. The IEP did not contain a transition plan as Student was below the age when such a plan was required. [S-60]
50. The IEP contains detailed program modifications and specially designed instruction. [S-60]
51. The IEP does not provide for assistive technology. [S-61]
52. The District issued a NOREP proposing a continuation of "Resource Learning Support [Language Arts and Math] and Speech and Language Support". The Parent indicated that she did not approve the recommendation because "[Student] should be in Regular Education..." and returned the NOREP on June 12, 2007. [S-61]
53. Student did not exhibit any behaviors of concern in the middle school warranting a Behavior Support Plan in 8th grade [NT 815, 839, 844-845]

2007 -2008 8th grade November 30, 2007 through August 31, 2008¹⁶
2008-2009 9th grade September 1, 2008 through November 25, 2008

54. An IEP meeting was held on November 29, 2007. The IEP created at that meeting was in effect during Student's 8th grade year beginning November 30, 2007 until October 10, 2008 in Student's 9th grade year. [NT 632; S-64]
55. Needs listed in the November 29, 2007 IEP were attention/on-task behavior, auditory memory/following directions, fine motor skills/handwriting, listening comprehension [also listed as a relative strength], math computation, math reasoning/problem solving, reading comprehension, spelling, written expression, verbal expression and articulation. [S-64]
56. The IEP carries a reading comprehension goal using a baseline [grade equivalent 2.7] that is different than the Woodcock score for Passage Comprehension [grade equivalent 2.4]. [S-64]
57. Although "Evaluation Criteria" for attaining reading comprehension objectives are pegged at 85% accuracy, the objectives do not carry baselines. [S-64]

¹⁶ Exact date of beginning of school year was not immediately identifiable in record so September 1st was chosen.

58. The IEP carries a mathematics goal using a baseline [grade equivalent 1.8] that is different than the Woodcock score for Total Math [grade equivalent 1.2]. [S-64]
59. Although “Evaluation Criteria” for attaining mathematics objectives are pegged at 90% accuracy, the objectives do not carry baselines. [S-64]
60. Although “Evaluation Criteria” for attaining verbal and written response objectives are pegged at 90%/85% accuracy, the objectives do not carry baselines. [S-64]
61. The IEP does not carry goals to address reading decoding or math reasoning/problem solving. [S-64]
62. In the Specially Designed Instruction [SDI] section Student’s needs for attention/on-task behavior and following directions are addressed. [S-64] Wait for page 12
63. The OT update under “present levels” notes handwriting being difficult to read, difficulty signing name in cursive and inability to form the capital letter of Student’s first name. The OT opines “It is thought that [Student’s] handwriting will not improve and would benefit from continued assistance when needed for classroom notes” and recommends continuation of OT for life skills tasks.¹⁷ [S-64]
64. It was recommended that Student “would benefit from continued OT services for a forty five minute group session once a week to work on life skill tasks such as cooking, grooming, washing and drying of clothes. This would replace the twice a month sessions where [Student] was working on [Student’s] handwriting and typing skills.” [S-76]
65. Accordingly, the occupational therapy [OT] goal addresses “functional life skills” such as meal clean-up and prep, hygiene, and clothing care. Although the objectives are precisely written and measurable, there are no objectives addressing fine motor skills as were listed in the previous IEP. [S-64]
66. The speech/language pathologist who worked with Student since the beginning of middle school worked on speech goals such as articulation and rate, and later addressed language goals such as synonyms, antonyms, multiple word meaning nouns, descriptive language and idiomatic expressions [S-76]
67. Although Student made progress in all areas of speech/language, and was able to learn to articulate more clearly and slow down rate of speech, Student could not maintain the clearer speech for more than a few minutes. [S-76]

¹⁷ The special education teacher responsible for this IEP testified that he did not know the Parent did not want Student working on life skills goals in school. [NT 665-666]

68. At the IEP Meeting, Parent reiterated her previously stated wish that occupational therapy services stop. [S-67]
69. In January 2008 the Parent stated in writing “I wanted Occupational Therapy to stop” stating that she had made this request at the IEP meeting in November 2007 and at the IEP meeting in May 2007. [S-67]
70. On March 9, 2008 the Parent wrote to the then director of special education reiterating her demand “for speech and O.T. to stop.” [NT-356; S-75]
71. As in the past the IEP provides for a one-on-one aide. Student did not exhibit any behaviors of concern warranting a Behavior Support Plan in 8th or 9th grade IEPs. [NT 815, 839, 844-845]
72. The IEP Team considered whether Student needed an assistive technology assessment, but concluded that Student did not. A need for Assistive Technology is not endorsed under Special Considerations. [NT 651; S-64]
73. The IEP did not contain a transition plan as Student was below the age when such a plan was required. [S-64]
74. The IEP reflects team discussion about Student’s educational program, both in the concerns expressed by teachers in the Present Levels section and in the discussion of how Student’s disability affected involvement and progress in the general education curriculum. The IEP also reflects the disagreement between the Parent and teachers regarding whether Student should be receiving a full-time academic program in the general education curriculum at the secondary level [Parent’s position], or whether Student should spend some time receiving a program for functional academics and prevocational training, a Life Skills program [position of many of Student’s teachers]. [S-64]
75. In 8th grade data was taken to ascertain regression/recoupment over school breaks and it was determined that Student was eligible for ESY services. Student was found to require practice to maintain a specific academic skill. [NT 1133; S-74]
76. The District offered ESY programming for Summer 2008 which was highly individualized and provided for one-to-one instruction by a special education teacher at dates and times mutually agreeable to the Parent and the teacher. The Parent did not respond to the offer. [NT 364; S-80]

2008-2009 9th grade November 26, 2008 through March 13, 2009

77. An IEP meeting was held on November 25, 2008. The IEP created at that meeting was in effect during Student’s 9th grade year until Student stopped attending school on March 13, 2009. [S-94]

78. Needs listed in the November 26, 2008 IEP were attention/on-task behavior, auditory memory/following directions, fine motor skills/handwriting/keyboarding, math computation, functional math [time, money, and measurement], reading comprehension, written expression, verbal expression, articulation and exploration of careers of interest. [S-94]
79. The IEP carries a written expression goal using a baseline of 0% with a success criterion of 50% with support. The objectives are specific and measurable. The objectives are related to Student's identified needs. [S-94]
80. The IEP carries two mathematics goals with specific baselines and clear criteria for achievement. The goals address mastering money and addition/subtraction facts and the goals/objectives are related to Student's identified needs. [S-94]
81. The IEP carries a reading comprehension goal with a baseline of 0% and specific criteria for mastery. The goal and objectives relate to Student's needs. [S-94]
82. The IEP does not carry a goal for reading decoding. [S-94]
83. Speech/language therapy in the form of twice weekly 30-minute sessions outside the general education setting are provided for in the IEP. The IEP carries three speech/language goals and accompanying objectives. Each goal is related to Student's specific needs for learning grammar, improving pragmatics [conversation skills], and improving articulation. Although there are no stated baselines the criteria for success are clear and measurable.¹⁸ [S-94]
84. Therapy to meet the speech/language goals and objectives was recommended to be delivered in the therapy room as opposed to in a classroom setting to allow for direct instruction. It was the speech/language pathologist's professional opinion that a classroom setting in the presence of other pupils was not the right place to offer speech/language therapy at the time. [1729-1730, 1775-1777]
85. The Parent disagreed with the speech/language therapy being provided in the therapy room. The Parent's lay advocate did not voice agreement or disagreement but asked pertinent questions. [NT 1730-1731, 1735, 1767]
86. In the Specially Designed Instruction [SDI] section Student's needs for attention/on-task behavior and following directions are addressed. [S-64]

¹⁸ Unfortunately the Parent did not give permission for Student to resume speech/language services in 9th grade and since she had demanded that they stop Student did not receive speech/language under the November 26, 2008 IEP.

87. At the IEP Meeting Parent requested that Student not be removed from academic classes to receive direct OT. Instead, Parent requested that Student work on keyboarding in English class. It was noted that Student was receiving an assistive technology consult from the intermediate unit to determine what tools will assist Student with fine motor needs in the academic setting. Instead of receiving direct OT services, the team provided for consultation services. [NT 1785; S-94]
88. Occupational therapy consults in the general education settings in the amount of once weekly 30-minute sessions are provided for in the IEP. [S-94]
89. At the IEP meeting on November 25, 2008 there were no discussed concerns about Student's behaviors that would warrant a Behavior Support Plan. The four behavior incidents of any concern occurred in late February 2009. Student stopped attending school two weeks later. There was no anticipated need for a Behavior Support Plan in this IEP. [NT 1462-1469; S-105]
90. The IEP does not carry a goal or objectives for occupational therapy. [S-94]
91. This IEP was the first annual IEP developed after the age for transition planning was reduced from 16 to 14, so the IEP Team discussed transition planning. [NT 372-373; SD-94]
92. The Parent at the meeting indicated that Student was planning on attending college to study architecture and that this was the post-secondary path she wanted the District to pursue for Student. The Parent indicated that she did not want Student to participate in job training activity, or practice independent living skills, but to have a full-time academic schedule utilizing the general education curriculum. The Parent's requests regarding transition planning were incorporated into the IEP. [NT 371-372; S-94]
93. At the beginning of Student's 9th grade year, the District requested that the Delaware County Intermediate Unit [DCIU] evaluate Student's assistive technology needs, which it did using the SETT process. [NT 311-312, 1858; S-134]
94. Assistive technology consults in the general education settings in the amount of six 60-minute sessions per semester are provided for in the IEP. [S-94]
95. The DCIU provided Student's teachers with a number of suggestions and assistive technology materials, including typing software, and a LOTTIE Kit¹⁹. [NT 1785; S-134]
96. Student successfully used the adaptations of a large key calculator, highlighters, and a checklist for packing and unpacking materials for each class to promote independence. Student was less successful utilizing the typing software, since

¹⁹ A kit that contains various materials to use to assist a student in accessing the curriculum.

- Student preferred to type for a purpose and did better utilizing the keyboard to write something for class. Student was distracted by highlighting tape and stickers, but did better with markers and pencil checks in place of tape and stickers. Student's teachers found that using visual prompts in the form of pictures had a very positive effect on Student's retention of information. [NT 686, 1229, 1785; S-134]
97. The District retained an educational facilitator from the Elwyn Davidson School who had experience in integrating students with disabilities in regular public education and who provides initial transition program development in public school districts that are including students with disabilities in their general education settings. [NT 373-375; S-94, S-96]
98. The educational facilitator's recommendations were included in the IEP. [NT 374; S-94]
99. The District had a very experienced teacher adapting material for social studies and science classes and helping develop curriculum materials that Student would be able to understand. This teacher was concerned that the courses required skills which Student did not currently possess, including "the ability to infer concepts, demand high order thinking skills, draw conclusions from background knowledge and generalize information in order to connect concepts to real life situations." She was further concerned that the courses "do not provide instruction in those basic skills" that Student needed to transition from school-aged programming to the adult world. [NT 374-375; S-94]
100. Career exploration and academic preparation for post-secondary education were provided for in the IEP. Career exploration would be the Bridges program, and general and special education classes would provide academic preparation. [S-94]
101. The 9th grade science teacher and the case manager were in almost daily contact about adapting the science course for Student. The science teacher collected materials from other teachers to use in presenting the curriculum to Student in a meaningful way. The science teacher worked with the DCIU consultant to find ways of using assistive technology materials with Student and modified equipment using larger items that required less dexterity so Student could succeed. The teacher worked one-to-one with Student virtually every day and related topics to Student's background knowledge to make concepts meaningful. [NT 560-561, 570-571, 576-577, 590-592]
102. The 9th grade western civilization teacher found it difficult to present the material in a way that was meaningful for Student given the curriculum topics of European history including the Enlightenment, the Scientific Revolution, the French Revolution, the Industrial Revolution, Imperialism, Nationalism, first and

second World Wars and the Cold War. She met several times a week with the case manager to devise ways of presenting the curriculum to Student. She made adapted tests and materials, and Student took practice tests that were very similar to the actual tests. She was interested in Student's getting the "big picture" of cause and effect. She worked daily one-on-one with Student. Student participated with other pupils on learning games such as answering questions to acquire parts to assemble a guillotine, and used visuals and graphic organizers to learn material. [NT 705-714, 755-756, 763-768; S-133]

9th Grade Supportive Service: Physical Disorder/Same Gender Aide

103. A 2003 physical therapy evaluation report noted that Student had a medical condition affecting elimination. [P- 9 p155-156]
104. The middle school nurse was not aware that Student had this disorder and had required early surgery, and a plan of care was not developed. Until the date of her testimony she was not aware that there was written documentation of Student's disorder. Had she been aware of Student's condition she would have been part of the IEP team and participated in developing any necessary accommodations. [NT 1663-1664, 1671, 1675-1680, 1679-1680, 1687-1688; S-47, S-76, S-137]
105. The May 2007 and the November IEPs make provision for Student to visit the nurse's office for assistance with toileting and changing if needed. Student was permitted to leave class to use the bathroom as needed, provided with additional wipes and toilet tissue by the aide if needed, and allowed to use the bathroom in the nurses' office as needed. The school maintained a change of clothes provided by Parent in the nurses' office in case student needed to change. [NT 811, 882, 1648; S-60, S-64]
106. In 8th grade Student was physically independent with toileting, only requiring verbal prompts to request help and being handed wipes to use for self cleaning. [NT 811-882, 1651-1650]
107. The Parent testified that Student was generally independent with toileting but that she or Student's father, or in some cases other persons in public rest rooms, would assist Student by handing Student extra toilet tissue. [NT 1608-1651]
108. In a phone call with the 9th grade principal on September 4, 2008 the Parent asked for a new aide for Student, reasoning that as Student was getting older an aide of the same gender would be appropriate. She expressed this request in person the next day to the 9th grade principal and the guidance counselor. The principal said this would need to be discussed by the IEP team. The Parent started keeping Student home on days when the diarrhea was severe. [NT 1223; P-8 p51]

109. At an IEP meeting on October 10, 2008 the topic of a same-gender aide for Student was discussed. The Parent noted that although a same-gender aide was not needed at all times it would be better to have a same-gender aide to check on Student in the bathroom to ask if Student needed help or a change of clothing. It was discussed that generally Student was independent in using the bathroom. [NT 1923]
110. When the Parent requested a same-gender aide for the fourth time in an IEP meeting in November of 9th grade, the District requested a doctor's note. The then-director of special programs discussed the request with the human resources director, the high school principal and the nurse and in February by letter informed the Parent that a same-gender aide would not be provided because there had been only one documented bathroom accident. However, the Parent was keeping Student home from school on days when the problem was severe. [NT 279-280; S-102]
111. The high school aide provided for Student believed it was not within the role of an aide to offer Student coaching or replacement language when Student made an inappropriate comment. [NT 924-925, 958-962]
112. The high school aide was uncomfortable with some of Student's verbalizations and casual gestures. Rather than consulting with special education supervisors, on numerous occasions the high school aide went to the principal to ask for advice about Student. [NT 909, 913, 924, 939]

Issue 1d: Parental Participation/LRE

113. On April 25, 2007, the Parent wrote a letter to the middle school assistant principal formally requesting that Student be put into regular education beginning in eighth grade with support and a modified curriculum.²⁰ She asked for overviews and books to be sent home for language arts, science and social studies to help prepare Student over the summer before 8th grade. Although the director of special education did not see the Parent's letter, she was aware that the Parent specifically indicated that she wanted Student in all regular education classes, not just social studies and science. [NT 230, 270; P-8 p12-13]
114. At a May 10, 2007 IEP meeting the team addressed Student's placement. The middle school assistant principal suggested that Student be placed in special education learning support for all subjects, and opined that Student would not be able to handle regular education classes, as they would entail taking a foreign language, reading five major novels and writing a 20-page research paper. The Parent asked for two periods of language arts or two math periods in lieu of a foreign language, but was told this was not possible. The Parent requested that materials be sent home so that she could prepare Student over the summer. The

²⁰ Parent had also made this request in previous years outside the relevant period.

- Parent renewed this request for materials in a May 20, 2007 letter. [NT 479-480; P-8 p12-14, P-9 p332, 571]
115. The Parent returned the NOREP disapproving the recommendation for learning support classes and asking for all regular education classes with adequate support from teachers and an aide. She requested mediation instead of a hearing because she believed that due process started with mediation. [NT 1541-1542; P-9 p348-349]
116. On August 20, 2007 the Parent spoke about Student's roster with the middle school principal who said that Student did not have to take a foreign language or fulfill the other requirements the middle school assistant principal had listed. [NT 1548-1549; P-9, p18-19].
117. On August 20, 2007, the parties participated in mediation, but the parties did not reach a mediation agreement. [NT 352-355; P-9 p348-349]
118. In 8th grade [2007-2008] Student was placed in regular education classes for homeroom, science, social studies, geography, art, health, and physical education. Student was in special education classes for language arts and math, and was also in a special education "support class" to help Student with the regular education classes. [NT 267-270, 816-817, 820-821; S-86, P-9 p465]
119. In 8th grade student had a double period of English/language arts as well as a regular education English class. Student was instructed using the Read 180 program at Parent's request. [NT 344-345, 535-536, 1071-1073; S-66, S- 86]
120. The November 29, 2007 IEP read: "The school team continues to recommend that [Student] take part in a life skills program²¹ for functional academics and prevocational training and that when [Student] transitions to high school, the school team would reconsider the life skills program." On January 9, 2008 the Parent wrote to the then-director of special education that she did not agree to a life skills program, that the IEP portion quoted was added after she left the meeting, and that she had not received a NOREP with that IEP. [S-67, P-8 p27, P-9 p411]
121. In her January 9, 2008 letter the Parent listed the many life skills Student could already perform. [S-67]
122. After the April 2008 evaluation toward the end of 8th grade, the District proposed that for high school the IEP team should consider the life skills program,

²¹At the middle school the life skills curriculum included functional academics. For example, language arts would be reading and spelling, math would address such things as number sense and money, science could address expiration dates on food labels, history would involve community resources, and functional activities such as cooking would be offered. [NT 625-626]

- characterized as an “intensive learning support” program. [NT 267-269, 278-279; S-101]
123. On March 4, 2008, the Parent completed the registration forms for high school [2008-2009] noting, “I have asked for all regular education with the proper support not removal from all regular education as this form is recommending.” [NT 1208, 1863; S-73]
124. The Parent requested freshman reading and writing, regular education math, and the electives of Introduction to Practical Woodworking, Introduction to Manufacturing Technology, and Introduction to Maintenance and Repair. She requested all regular education with appropriate support. [NT 1208, 2257-2258]
125. Student was not placed in any of the three electives. The high school principal thought that it might be because Student was a freshman but the Parent thought other freshmen had received electives of their choice. [NT 1209-1210]
126. Students are assigned to electives by seniority, with 9th graders being the last to be placed in electives. 9th graders also have a more structured schedule than upper classmen, so the number of spaces in their schedules for electives is limited. [NT 2039-2040]
127. Student was assigned to one of the general education electives requested by Parent. [NT 2030]
128. For 9th grade Student was placed in a special education resource room for supplemental math and in a regular education math lab class. Student was in a learning support class for English and in a regular education reading lab class. Student was assigned to regular education science, western civilization, and sculpture. [NT 1785, 1864-1865; S-73, S-117, S-124]
129. The math resource room syllabus used a replacement curriculum²² and math lab was individualized for each pupil. [NT 1231, 1233, 2043]
130. The independent evaluator who had been chosen by the Parent and performed the IEE looked at Student’s assessment results on each test and subtest, and spoke with the Parent, teachers and the tutor. He applied numerical findings to practical interpretation of what Student can and cannot do and why. Of particular practical implication are the evaluator’s comments as follows: Student needs to be taught using concrete material, Student needs direct systematic instruction, Student learns when material is meaningful and a visual

²² A *replacement* curriculum is a different curriculum than the regular education curriculum, whereas a *modified* curriculum takes the general education material and modifies it to a level that a student can access. [NT 1231]

- representation is essential, physical involvement in learning is beneficial, teachers can only be sure Student is capable of completing a specific task when Student can do the task on demand, independently, over time and in multiple settings. [S-126]
131. The independent evaluator opined that the IEP team may want to focus on teaching Student functional skills rather than academic skills. [S-126]
132. The Elwyn educational facilitator observed Student in 9th grade physics class working with the aide, one-on-one with the teacher, and with the assistance of another student. She observed Student with modified activities when the class was involved in “calculating the kinetic energy, potential energy, along with their total and velocity of a rollercoaster at certain points along the curve.” She observed Student called on in class, and provided with a choice of two answers, but unable to show understanding of the subject matter. She also witnessed Student using a calculator. [SD-96]
133. The educational facilitator found that [Student] does not have some of the functional skills that are required both in the school and community settings. It would be difficult to make accommodations to this material that would be meaningful and relevant for [Student]. I would recommend an adapted curriculum emphasizing functional academics and community-based instruction. [S-96]
134. Although the Parent had stopped speech/language therapy, with her lay advocate present at a preliminary IEP meeting in 9th grade the Parent agreed to allow the high school speech/language pathologist, to observe Student and provide updated assessment data at the next IEP meeting. [NT 366-369, 596-597, 730, 1235, 1720-1728; S-90, S-91)
135. Based on testing from the previous year and observations of Student in 9th grade, the speech/language pathologist found that Student qualified for Speech and Language services. When the IEP Team reconvened she presented her report to the IEP team, including Parent and Parent’s legal representative. The speech/language pathologist recommended specific speech/language goals and objectives that were included in the IEP, and recommended that therapy be provided in the therapy room. [NT 1727-1728; S-91, S-94]
136. Parent received regular reminders that her permission was required to provide speech/language services to Student, but the Parent never wrote to reinstate the services. [NT 1730; S-125]
137. The speech/language pathologist recommended “therapy in the structured setting, because [she] felt that these were goals that [she] needed to give direct instruction to [Student] on, and that if [she] had pushed into a classroom where [Student] already is expected to learn that curriculum, say, it was math, it would

be very difficult for [her] to be giving [Student] direct instruction on a speech and language goal in math setting. [NT 1729-1733, 1771; S-94]

Issue 1e: Homebound

138. On March 9, 2009 the Parent spoke with the guidance counselor about the procedure and timeline for homebound instruction and was informed that a physician needed to fill out a form that would be processed and sent to the superintendent for signature. On March 10, 2009 the Parent returned the form signed by the physician; the form was stamped as received by the District on March 12, 2009 and referred to the current director of special education. [NT 2212-2213; S-108, P- 8 p55]
139. Student stopped attending school as of March 13, 2009. [NT 1271-1272]
140. When Student stopped attending the case manager did not follow up with the physician, believing it was not her responsibility. She was not asked to provide tutoring for Student at home. The case manager was not clear about the difference between homebound instruction and instruction in the home. She did not follow up with the Parent. [NT 2093-2097]
141. On March 18, 2009 the Parent reiterated her request for homebound instruction in writing. [P- 8 p55]
142. The current director of special education called the Parent and asked about meeting. The Parent responded in writing on March 25, 2009. The Parent and the special education director communicated, but no decision about homebound instruction was made by the end of the school year despite IEP meetings being held on April 17th and May 29th. Homebound instruction was not provided to Student although Student had not attended school since March 13th. [NT 2215-2221; S-109, 110; P-8 p56]

Issue 1f: Retaliation

143. On August 17, 2007 the Parent filed a Complaint with the Pennsylvania Department of Education/Bureau of Special Education [BSE]. One element of the Complaint was a delay in the scheduling of mediation. Another related to implementation of Specially Designed Instruction [SDI] components. [P- 3, P-8 p15-17, 356-359]
144. On October 1, 2007 BSE issued its decision regarding the Complaint the Parent had filed. BSE found in favor of the Parent but did not award compensatory education or other relief. [P-3, P-8 p15]
145. Following receipt of the BSE finding in response to “District is to develop a recordkeeping system” the staff was asked to complete checklists on implementation of the SDI on all pupils with IEPs. The Parent thought the

- checkmarks were about Student's classroom behaviors and were a response to her Complaint to BSE. [P-3 p4, P-8 p32-33, P-9 p377-382, 390-393, 399-402, 404, 422, 437, 450-461, 578]
146. The District's former director of special programs had no personal vendetta or regret that the Parent had filed the complaint with the state. [NT 249]
147. On January 22, 2008, the Parent wrote to BSE asking among other things about the checklist issue. [S-67, p-8 p27]
148. On February 26, 2008, the Parent wrote to Governor Rendell and others about her difficulties with the District. [P- 8 p38-39]
149. In August 2008 the lay advocate working with the Parent filed a complaint with BSE on behalf of a number of families regarding how the District handed IEEs. [NT 1421-1422]
150. The Parent's perception was that when she filed her complaint in 7th grade going into 8th grade certain things happened and then things got worse in 9th grade and that "the more [she] complained, the worse it got." [NT 1506]
151. Student was complaining about the checkmarks, interpreting them as recording bad behavior. The Parent feared that the checkmarks were designed to establish that Student should not be in regular education. [P-8, p34-35]
152. When the 9th grade supplemental math teacher observed Student question why Student's aide was making checkmarks the aide changed the way the data was recorded. [NT1862-1863]
153. In February 2009 the Parent's concern was that given Student's statement about taking a teacher "to court" the District was writing up discipline reports. [NT 1470-1471]

Issue 2: Discrimination

154. In November of 7th grade the Parent made a written request that Student be removed from language arts class and be placed in the Reading 180 Program, a research-based program for pupils with reading difficulties. [NT 329, 505-506, 1023; S-51]
155. During the 2006-2007 school year, when Student was in 7th grade, the District was piloting the program at the middle school for 8th graders in an 8th grade Language Arts class. [NT 329, 504-510, 1023-1024]
156. Even though the Read 180 pilot was for 8th graders only at that time, the day after receiving the Parent's letter the District's former director of special education told the Parent that she was asking a learning support language arts

- teacher to assess Student to see if Student was an appropriate candidate for the program. Student was assessed on December 5, 2006. [NT 330, 1019, 1034; S-52, S-53]
157. When the teacher telephoned the Parent to go over the results the Parent was upset that Student had been assessed because Student was too tired to do well, said the teacher and the grade level principal had determined in advance that Student would not take Read180, and hung up before the conversation was finished. [NT 1017, 1068-1069; S-53]
158. The teacher believed that the Read 180 materials would be too difficult for Student at the time and did not recommend the class for Student. She believed reconsideration in 8th grade would be appropriate. [NT 1017; S-54]
159. The Parent followed up with a letter to the director of special education in early January 2007 criticizing the test results and asserting low expectations for Student. The Parent acknowledged that she knew the Read 180 program was only offered to 8th graders that year. [NT 333; S-54]
160. In 8th grade, Student participated in Read 180. The assessment used by the program classified Student as a Beginning Reader with reading skills in the 1st percentile. Because the leveled readers used by the program were above Student's independent reading level, Student was accommodated by having the teacher and/or paraprofessional read with [Student]. Student's teacher observed Student's progress in navigating the computer program and learning from mistakes, and that multiple attempts at reading the book and answering questions were helpful. [NT 1047-1060; S-66]
161. Based upon concerns about Student's lack of independence, Student was observed by a Behavior Specialist, and Student's aide was instructed in how to collect data on Student's independence in the classroom. Data sheets were shared with Parent daily. Although the Parent did not object to the data collection, she believed that the comments on the data collection sheets became more negative, as she had seen another student's sheet which did not have negative comments written on it. Parent perceived comments indicating that Student was unable to complete a task without assistance as negative. (NT 1217, 1554; s-70, S-89)
162. On March 4, 2008, completing the roster registration forms for high school the Parent requested freshman reading and writing, regular education math, and the electives of Introduction to Practical Woodworking, Introduction to Manufacturing Technology, and Introduction to Maintenance and Repair. [NT 1208, 2257-2258; S-73]
163. Student was not placed in any of the three hands-on electives. The high school principal thought that it might be because Student was a freshman but the

Parent thought other freshmen had received electives of their choice. Student was assigned to one of the general education electives requested by Parent. [NT 1209-1210, 2030]

164. Students are assigned to electives by seniority, with 9th graders being the last to select and be assigned to electives. 9th graders also have a more structured schedule than upper classman, so the number of spaces in their schedules for electives is limited. [NT 2039-2040]
165. Although Student was never enrolled in or attended the Life Skills class, for one half-day when other pupils were having PSSA testing [Student took the PASA] Student was with a learning support teacher and other pupils with intellectual disabilities who also took the PASA. During that half day Student cooked and ate an egg and delivered mail in the building. [NT 1115 et seq.; S-86]

Issue 3: Progress

166. In November 2005 [6th grade²³] Student was administered the KeyMath test. KeyMath scores expressed as grade equivalents²⁴ were as follows: Basic Concepts K.4, Operations K.8, Applications 1.4, Total Math 1.0. [P-9 p230]
167. In October 2006 [7th grade²⁵] Student was administered the KeyMath test. KeyMath scores expressed as grade equivalents were as follows: Basic Concepts 1.5, Operations 2.0, Applications 1.6, Total Math 1.8. [S-60]
168. In November 2007²⁶ [8th grade] Student was administered the KeyMath test. KeyMath scores expressed as grade equivalents were as follows: Basic Concepts K.3, Operations 1.1, Applications 1.7, Total Math 1.2. [S-64]
169. On February 14, 2008 [8th grade] Student was administered the KeyMath test. KeyMath scores expressed as grade equivalents were as follows: Basic Concepts 1.7, Operations 1.6, Applications 1.4, Total Math 1.5. [S-76]
170. In October 2008 [9th grade] Student was administered the KeyMath test. KeyMath scores expressed as grade equivalents were as follows: Basic Concepts K-6, Operations K-6, Applications K-1, Total Math K-3. [S-94]

²³ Although outside the relevant period these scores are used for comparison with later scores.

²⁴ Grade equivalent scores are less robust measures of achievement than standard scores, however they are useful here for purposes of comparison from testing to testing.

²⁵ See above.

²⁶ The special education teacher testified that Student was not well on the day of testing by means of explaining the drop in some subtest scores. However some scores increased as well. If Student was not well Student should have been tested on another day. [NT 661-663]

171. Over a three-calendar-year period the following scores were recorded for mathematics:

KeyMath	Nov. 2005	Oct. 2006	Nov. 2007	Feb. 2008	Oct. 2008 ²⁷
Bas. Con.	K.4	1.5	K.3	1.7	K.6
Operations	K.8	2.0	1.1	1.6	K.6
Applications	1.4	1.6	1.7	1.4	K.1
Total Math	1.0	1.8	1.2	1.5	K.3

172. In November 2005 Student was administered the Woodcock Diagnostic Reading Battery. Scores on the Woodcock expressed in grade equivalents were: Letter-Word Identification 2.0, Word Attack 1.1, Reading Vocabulary 3.4, Passage Comprehension 1.7, Oral Vocabulary 1.0, Broad Reading 1.8-2.7. [P-9 p230]
173. In October 2006 Student was administered the Woodcock Diagnostic Reading Battery. Scores on the Woodcock expressed in grade equivalents were: Letter-Word Identification 2.6, Word Attack 1.8, Reading Vocabulary 4.1, Passage Comprehension 1.7, Total Reading 2.1-3.3, Listening Comprehension K.8. [S-60]
174. In November 2007 Student was administered the Woodcock Diagnostic Reading Battery. Scores on the Woodcock expressed in grade equivalents were: Letter-Word Identification 2.9, Word Attack 1.9, Reading Vocabulary 3.6, Passage Comprehension 2.4, Total Reading 2.1-3.3, Listening Comprehension 1.3. [S-60]
175. On February 13, 2008 Student was administered the Woodcock Diagnostic Reading Battery. Scores on the Woodcock expressed in grade equivalents were: Letter-Word Identification 3.1, Word Attack 2.4, Reading Vocabulary 3.3, Passage Comprehension 1.7, Overall 2.5, Listening Comprehension 1.6. [S-76]
176. In October 2008 Student was administered the Woodcock Reading Mastery test.²⁸ Scores on the Woodcock expressed in grade equivalents were: Letter-Word Identification 2.8, Word Attack 1.7, Word Comprehension 1.4 [2.6²⁹], Reading Vocabulary 3.3, Passage Comprehension 1.9 [1.9], Overall 1.8 [2.1]. [S-94]

²⁷ These scores are out-of pattern and thought to be inaccurate but included as they are in the record.

²⁸ The Woodcock Reading Mastery test is similar to the previously administered Woodcock Diagnostic Reading Battery in the areas of Word Attack, Word identification and Passage Comprehension. The tests differ in that Listening Comprehension is not included in the Woodcock Reading Mastery test. [S-94]

²⁹ Because the tester felt that a room change had affected Student a retest was done. The bracketed scores are the scores on the second administration. [S-94]

177. Over a three-calendar-year period the following scores were recorded for reading:

Woodcock	Nov. 2005	Oct. 2006	Nov. 2007	Feb. 2008	Oct. 2008
Letter-Word	2.0	2.6	2.9	3.1	2.8
Word Attack	1.1	1.8	1.9	2.4	1.7
Reading Voc	3.4	4.1	3.6	3.3	3.3
Pass Comp	1.7	1.7	2.4	1.7	1.9
Oral Vocab	1.0	N/A	N/A	N/A	N/A
Broad Read	1.8	2.2-3.3	2.1-3.3	2.5	1.8
Listng Com	N/A	K.8	1.3	1.6	N/A
Word Comp	N/A	N/A	N/A	N/A	1.4/2.6

178. The Pennsylvania Alternate System of Assessment [PASA] is an alternate statewide assessment for students who have very significant disabilities and for whom the regular assessment is inappropriate even with accommodations and modifications. This description is provided to parents with individual results; results are sent directly to parents' homes. Although administered in students' school districts or other placements, the PASA is prepared, issued, and scored through the Pennsylvania Department of Education [PDE] which also selects the specific version of the PASA to be administered to each student. The District has no role in this process. [NT 328, 365, 1115; S-50, p1; S-82, p1, P-9 p305]

179. PASA results are reported as a performance level in one of four categories: Emerging, Novice, Proficient, or Advanced, with Advanced representing the highest level of achievement. [S-50, p1; S-83, p1, P-9, p305³⁰].

180. Student took the PASA in Spring 2006 near the end of the 6th grade year and achieved a score of Proficient in Reading and Proficient in Mathematics. [P-9, p305-306]

181. Student took the PASA in Spring 2007 near the end of the 7th grade year and achieved a score of Novice in Reading and Emerging in Mathematics. [S-50]

182. Student also took the PASA in Spring 2008 near the end of the 8th grade year and achieved a score of Proficient in both Reading and Mathematics. [S-82]

183. The PASA is filmed for scoring by the Department of Education. The video of the special education teacher providing the PASA was from middle school. (SD-83; NT 1196-1197)

³⁰ Pages 305 and 306 of P-9 were not used during the hearing because the data was outside the relevant scope of the issues and the record indicates that these pages were to be removed. However, on later reflection, the hearing officer determined that the information was valuable and therefore has included them in the record.

184. Student has received one-to-one tutoring two hours a week from a former special education teacher since fall 2008. The tutor testified that Student has made progress in reading, writing, math, learning skills and computer. A CD video of a tutoring session was provided as an exhibit. [P-7]
185. With the tutor Student focuses for the whole lesson, and transitions easily between skills. Student behaves well and has not said anything inappropriate. [NT 77-78, 141-142]
186. The tutor is able to understand about 90% of Student's verbalizations³¹. [NT 80]
187. The tutor testified that Student can use a computer to access websites, but still has a lot more to learn. [NT 135-136]
188. The tutor administered an oral reading test to Student on three occasions: September 2009, June 2010, and June 2011. The tutor testified as to Student's independent vs. instructional reading levels on the three test administrations: 3rd grade/4th grade, 4th grade/5th grade, 5th grade/7th grade.³² It is not clear whether Student was required to read the passages/comprehension questions and the vocabulary items/choices or whether the passages were read to Student by the tutor.³³ [NT 114-115; P- 5 p15-36]
189. The reading tests carry the caveats: "These two Silent Reading Comprehension Tests are designed to give you a general idea of student's comprehension ability in a short period of time. They are shorter than most regular comprehension tests, and therefore not quite as precise. However they are a good supplement to classroom observation and will help you find out if further assessment is needed in this area" and "This [Word Meaning] test is not normed in the formal sense of most standardized tests; however the test was anchored to the standardized tests. The grade level scores in the table that follows are approximated. The scores are intended to give you some idea of a student's vocabulary development. For a more accurate designation you may give a standardized vocabulary test". [P-5 p18, 33]

³¹ As was the case for the hearing officer viewing the videos of tutoring and PASA, the verbalizations were in a "known context" which enhances understanding. In an "unknown context" Student's speech would likely be less intelligible. "Unknown context" is an important consideration for communication such as an emergency telephone call, starting a conversation in a social setting, etc.

³² The standardization sample for this test "Oral Reading Test" from Teacher Created Materials Inc. © is unknown. Additionally, Student's scores on these tests could not be verified by examining the exhibit. For example the exhibit provides one but not both completed answer sheets for a Word Meaning Test on which Student was credited with answering 12 out of 20 items correctly. The completed answer sheet was the second page, and Student missed all eight words on this page [items 13 through 20] leading to the assumption that Student must have correctly answered all the words on the first page correctly [items 1 through 12] which is not verified. [P-5, p33-36]

³³ Based on observation of the tutoring session, this hearing officer hypothesizes the latter.

190. The tutor testified that Student I.K. can tell time 50% of the time and identify coins. She testified that Student knows what numbers represent and understands different kinds of graphs. [NT 83-84]
191. She testified that addition is at the third-fourth grade level, that Student can do subtraction with borrowing, but has difficulty with multiplication and division. She testified that Student's multiplication skills are probably at a second grade level, and that Student cannot do division independently. [NT 85-86, 89-92, 94]
192. Student has worked on math crossword puzzles using a calculator. Neither of the examples provided in the documents were correct. Student has been given 4-square Sudoku puzzles [using the numbers 1,2,3,4 with four rows across and four columns down] and was able to complete these correctly³⁴. [NT 90-93; P-6, p12-13, 15-18]
193. The tutor has read Student high-school level articles on government, social studies and political science and discussed these with Student.³⁵ [NT 119-121; P-5, p37- 64]
194. The tutor does not believe Student has reached the highest level Student can in reading or math and she recommends speech/language services. [NT 151]
195. In a "typical" session with the tutor taped on September 22, 2011³⁶ Student used an iPhone to do mental math. Addition, subtraction and multiplication problems appeared on the screen in horizontal format and there were three possible answers. Student performed best on addition with the use of some finger-counting, was less successful on subtraction, and had a very difficult time with multiplication. It was not clear why the tutor was emphasizing speed with demonstrative finger snapping; it seems that Student needed time to think about the problems.³⁷ [NT 95-98; CD Tutoring P-7]
196. Following the math lesson Student worked for several minutes on identifying road signs with partial success. [CD Tutoring P-7]

³⁴ The exhibit pages with the Sudoku puzzles is very difficult to read due to the quality of copying but the two puzzles are correct.

³⁵ Given the tutor's teaching style of errorless teaching/learning this testimony is credible. The tutor makes material interesting to Student, digests and modifies the concepts, and corrects/clarifies/praises continuously. [See CD Tutoring P-7]

³⁶ The hearing officer watched the entire session. Although she is not a teacher, a speech/language pathologist or an occupational therapist, in her capacity as a licensed psychologist and a Pennsylvania certified school psychologist for thirty-plus years the hearing officer has conducted behavioral observations of hundreds of children and has collaborated with colleagues in these related professions. This professional experience underlies comments about what she viewed on the video. The hearing officer believes that since the parties entered videos into evidence they intended that the hearing officer make observations and draw conclusions about them.

³⁷ Student scored at around 80% correct when doing fairly simple addition but scored under 50% on most if not all the subtraction and multiplication suggesting that work on math facts using manipulatives and flash cards might be beneficial.

197. Following the road signs lesson Student worked on reading “My Brother’s Debt”. The lesson started with a vocabulary review, followed by a section for expressing agreement or disagreement with various statements related to the story, followed by reading the text. Student read the passage sentence by sentence and the tutor asked questions, clarified the material and corrected mis-read words as Student read. Student read quickly, missing several words in each sentence, but the running corrections from the tutor helped student understand the material. Student could answer some factual questions and some inferential questions. Student remembered the definition of “prompt” [which Student first misheard] a good length of time after the initial presentation of the word. [CD Tutoring P-7]
198. Student seems to rely on sight reading as opposed to decoding which enhanced fluency but not accuracy, suggesting that Student requires more instruction in sound-symbol association and that it may be helpful if Student were told to slow down and read more carefully³⁸. [CD Tutoring P-7]
199. Particularly on the traffic signs and the reading activities the tutor provided a great deal of structure and feedback, engaging in a form of errorless teaching/learning where mistakes were quickly corrected in running commentary and correct responses were always praised. Student was engaged throughout the lessons, and was focused and cooperative. Student did not appear to be frustrated when math items were too difficult or when the tutor pointed out mistakes. [CD Tutoring P-7]
200. Student’s lesson included accessing and logging onto a website for reading. Student required continuous prompting and correction from the tutor to type in the web address and click on the correct places. Student also required correction on scrolling down the page. Student’s fine motor issues seemed to compromise use of the keyboard.³⁹ [CD Tutoring P-7]
201. Student’s speech was intelligible to the hearing officer about 40%-50% of the time; articulation emerged as a significant need. [CD Tutoring P-7]
202. Student was engaged, focused and cooperative during the entire tutoring session and did not evidence frustration when corrected or promoted, which the tutor did on a continual basis throughout the session. [CD Tutoring P-7]

³⁸ This “jumping to conclusions” about a word was mitigated by the tutor’s providing a running word correction [without stopping and having Student look at and sound out the word]. However, if Student were to read something important independently such as a traffic alert or the directions on a medication label this deficit could have significant consequences. As this was only one lesson observed and the lesson was clearly geared toward reading comprehension, the hearing officer acknowledges that the tutor may also be providing other reading lessons using a scientifically-based systematic method of reading instruction such as one of the Orton-Gillingham based programs [e.g. Wilson, Scottish Rite Orton-Gillingham].

³⁹ Perhaps such technology as use of an adapted keyboard with larger keys and a screen with enlarged font and icons would be useful. This along with the observations during the math portion of the PASA testing video suggested that occupational therapy is required.

203. Student's PASA testing dated September 28, 2011⁴⁰ was presented on a CD. [PASA CD- S-83]⁴¹
204. Student performed well on most of the language arts questions, showing some difficulty with prepositions and tending to respond with the last word in the passage read. On the day of the language arts testing Student appeared tired, yawning frequently, and seemed somewhat apprehensive as evidenced by some hand-wringing and a solemn attitude. However, Student was focused on the tasks and attentive. [PASA CDS-83]
205. On the math section completed on a different day as evidenced by Student wearing different clothing Student did not appear tired, seemed much more relaxed, related warmly with the teacher administering the test [telling the teacher the teacher was "cool"], and again was focused. Student experienced little success with the math, both numerical problems using concrete materials and with concepts [e.g. weight] using concrete materials. [PASA CD S-83]
206. During the math section poor fine motor skills were discernible, as Student had considerable difficulty picking up flat materials from the table.⁴² [PASA CD S-83]

Discussion and Conclusions of Law

Burden of Proof

The burden of proof consists of two elements: the burden of production⁴³ and the burden of persuasion. The burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. The party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *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. In this matter the Parents met their burden of proof and prevailed on some, but not all, issues.

⁴⁰ The testing was divided into language arts skills and math skills. Although the CD carries one date I am inferring that the testing was done on two separate days since Student's clothing was different.

⁴¹ I watched the entire language arts section but only about half the math section because it was difficult to see the materials. See the above footnote regarding my observations and conclusions.

⁴² See above regarding difficulties with fine motor skills during computer use in tutoring session.

⁴³ 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.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). Each witness testified at considerable length and each person’s testimony was actively considered during the hearing, clarified as necessary by myself on many occasions, and reconsidered upon review of the transcripts and the documents. I will make specific credibility findings regarding witnesses whose testimony contributed substantially to the findings in this decision, as follows:

Mother: Student’s mother is clearly a most ardent advocate and there is no question that she has at all times acted in what she believes to be Student’s best interests. I was repeatedly struck by her level of commitment to her child and appreciated how difficult going through the hearing process was for her. As related to factual matters, her testimony was generally credible, but less so related to areas that hinged on perception and interpretation of others’ actions and motives.

Tutor: The tutor was a middle school and high school special education teacher in another school district for many years. She conveyed a great deal of investment in Student both in her testimony and on the video of a tutoring session. She seems to have forged a strong working relationship with the Parent. However, her testimony about Student’s current abilities compared with Student’s abilities at the beginning of tutoring could not be credited with a great deal of weight for several reasons. First, she has not tested Student’s math or reading using standardized nationally normed achievement tests and her estimates of Student’s functioning when she started the tutoring contradicted evidence from these types of standardized tests that is in the record; second, what she testified Student could do [e.g. math crossword puzzles, navigating a computer keyboard and screen] was contradicted by the pertinent document and on the video; third, she did not carefully delineate what Student can do independently versus what Student can do when engaged in errorless teaching/learning [what can best be described as the tutor’s providing running “auto-correct” without having Student go back and decode the word missed]; and fourth, her belief that helping Student acquire basic math skills was “ludicrous” [NT 82] was puzzling in light of Student’s apparently scant concepts of number. Additionally it is noted with concern that when asked what type of math curriculum she used with Student her initial response was, “What do you mean?” [NT 85] The video of her tutoring session provided incontrovertible evidence in support of the high degree of Student’s needs in the areas of math calculation, reading decoding and reading comprehension given that Student’s functioning represented nearly three years of one-to-one work, albeit for only two hours per week, but reinforced on a daily basis by the Parent. The video [along with the PASA video] also highlighted Student’s need for speech [articulation] therapy and occupational [fine-motor] therapy.

Former Director of Special Programs: This witness provided credible factual information about the Read 180 program and the reasons for Student’s taking it in 8th grade rather than 7th grade. [NT 329-332] Her trying to balance Student’s need for direct specially designed instruction given Student’s basic academic needs with the Parent’s desire for Student not to be in any special education classes is acknowledged as being a very difficult situation. I found her testimony regarding lack of animus toward the Parent around the complaint filed with the state to be credible [NT 245-252]. On the other hand, her not knowing if Student was ever assigned to a reading specialist or what a parent had to do to get a child a reading specialist [NT 223-225] was troubling. Additionally troubling, even though she was not responsible for the decision not to approve homebound instruction for Student, was her apparent confusion about “homebound”⁴⁴ instruction and “instruction in the home”⁴⁵ [NT 321-323].

Current Director of Special Education: This witness conducted herself graciously, professionally and without defensiveness or rancor. Her testimony was credible and given significant weight. Although I did find that homebound services should have been provided, this was the issue on which the evidence almost, but not quite, reached equipoise.

Middle School Instructional Assistant [Aide]: This individual testified very credibly on all points raised during examination and cross examination and established that other aides were taking data on other pupils, that Student did not verbalize or evidence distress at the data collection in middle school, that Student was relatively independent in the bathroom and that Student presented no behavior problems in middle school.

High School Instructional Assistant [Aide]: This individual seemed tense and rigidly wary during testimony. For example after testifying three times to never having met the Parent at all, it took clarification from me to elicit the admission that the two had met but had never been “formally introduced”. I also found this aide’s circumscribed view of the aide role peculiar, for example when the person opined that it was not within the role of aide to offer Student coaching or replacement language when Student made an inappropriate comment. On the other hand given the person’s fixed idea of hierarchy of responsibility I found it odd that the aide went on “numerous” occasions to the principal to ask for help rather than going to the case manager or the special education director. Finally I found this witness’s discomfort with some of Student’s verbalizations and casual gestures to be surprising given that the person was the parent of four children, three of whom are the same gender as Student.

9th Grade Science Teacher: The science teacher’s testimony fairly shone with enthusiasm for teaching Student. He was eminently credible, giving detailed and rich examples of how he with the help of others adapted and modified the curriculum so that Student could have meaningful access.

⁴⁴ When a regular education student or a special education student has a medical condition prohibiting attendance in school for a period of time the student may receive “homebound” instruction.

⁴⁵ “Instruction in the home” is the most restrictive placement on the spectrum of special education placements.

9th Grade Western Civilization Teacher: This teacher was clearly doing a great deal to help Student succeed in a very difficult course. Her graphic organizers were creative, and designed to appeal to Student's ability to learn visually, and served to level the playing field for Student. I found her testimony credibly supported the fact that although it was difficult, the District made strenuous efforts to accommodate Student's learning needs so as to access the general curriculum.

Speech/Language Pathologist: This witness testified in a straightforward manner and was particularly persuasive on the point that in order for Student to receive appropriate speech/language services they needed to be delivered in a therapy room setting.

Issue 1: Did the District deny Student a free, appropriate public education under the IDEA during the relevant period?

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act. 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a "free appropriate public education" [FAPE]. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received FAPE. 20 U.S.C. §1415(f)(3)(E).

Issue 1 a: Failing to provide an appropriate evaluation including non-verbal instruments and an FBA? [See Findings of Fact #1 to 26]

In conducting an evaluation to determine whether a child has a disability and requires specially designed instruction, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

(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

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

(c) *Other evaluation procedures.* Each public agency must ensure that—

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed 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;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated

with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is 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.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. 34 C.F.R. § 300.304(b).

Upon completion of all appropriate assessments, "[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability[.]" 34 C.F.R. § 300.306(a)(1).

Under the IDEA the requirement for a Functional Behavioral Assessment [FBA] as part of an evaluation or as a stand-alone evaluation is only triggered when there is a removal from the current placement for disciplinary reasons:

A child with a disability who is removed from the child's current placement pursuant to paragraphs (c) [violation of school code not a manifestation of disability] or (g) [drugs, weapons, serious bodily injury] of this section must...Receive, as appropriate, a functional behavioral assessment.... 34 C.F.R. §300.530(d)(1)(ii)

Nevertheless, where a student's behavior impedes his or her learning, the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.124(a)(2)(i); 22 Pa. Code § 14.133.

Both the evaluation conducted by the District and the IEE were appropriate and fulfilled the purposes that evaluations serve – determining eligibility/classification and providing guidance to the IEP team in designing an educational program and placement. Both evaluations met all criteria put forth in the IDEA. Both evaluations considered not only test scores but also functional performance.

Both evaluations utilized testing instruments [WISC-IV and Woodcock-Johnson III] that balanced verbal and non-verbal subtests and presented verbal and non-verbal scores separately. Student's results on both verbal and non-verbal portions of the tests were not significantly different. In fact, scores on verbal portions were slightly higher. The belief that a non-verbal test would yield significantly higher results is not supported by the extensive data collected through well-regarded and extensively normed instruments. The evaluations were not inappropriate because they did not utilize a separate non-verbal cognitive assessment instrument.

The Parent's issues with the findings of the independent evaluator, who had no connection to the District, was selected by herself, and over the decades has been a strong advocate for inclusion are illustrative of the chronic conflict between the Parent and schools throughout Student's educational career. The independent evaluator's solid and extensive test data, and his integration of the data into Student's real-life presentation at school and in tutoring, provided an invaluable understanding of Student's strengths and weaknesses. However, as the independent evaluator drew the conclusion from standardized cognitive and achievement testing data that Student's proper classification was intellectually disabled, and that Student should receive educational programming in functional areas, the Parent disagreed just as she had done with the District's evaluation.

FBA: An FBA is IDEA-mandated when a special education student is being considered for disciplinary dismissal. Districts however have the option of performing an FBA when a student's behavior is interfering with learning. Up until the four incidents in late February 2009 Student presented no behavior problems whatsoever, and Student's needs in the areas of attention/on-task behavior and auditory memory/following directions were addressed in the IEP's in SDIs and in the provision of a full time one-to-one aide. Accordingly there was no need for an FBA and the evaluations in question were not deficient because they did not include an FBA.

Eventually the IEP team did decide that an FBA was needed. The FBA was unnecessary under the IDEA, unwarranted by any of the four incidents of concern, and conducted after Student stopped attending school. The FBA and its timing neither caused Student to lose educational benefit nor provided educational benefit to Student and therefore has no further relevance to this decision.

Issue 1b: Failing to follow appropriate procedure when the Parents requested an IEE?
[See Findings of Fact 27 to 34]

The implementing regulations of the IDEA put forth a district's responsibility when a parent requests and is granted an IEE at public expense:

Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations. 34 C.F.R. §300.502(a)(2).

On May 14, 2008 when the District issued the Permission to Evaluate in response to the Parent's request for, and the District's agreement to, an IEE at public expense the District unilaterally named a specific group practice thus committing a procedural violation. However, despite having re-sent the material to the Parent on June 10th and June 25th, the District did not hear back from the Parent until July 11th. At that point the District rectified its procedural error and told the Parent she was free to choose her own evaluator. Given Parent's delays in responding to the District [1 month between Parent's verbal and written requests, 2 months between the District's naming an evaluation provider and Parent's response], selecting her own evaluator [an additional 5 months], deciding on a different evaluator [1 month], and that evaluator's completion of the IEE [6 months later], I find that the District's procedural violation was harmless, causing only a small

portion of the delay in obtaining the IEE, and had no adverse effect on Student's educational program.

Issue 1c: Failing to provide appropriate and measurable IEP goals, a behavior management plan, transition services, assistive technology, speech/language services including alternative means of communication, and/or an appropriate aide? [See Findings of Fact 35 to 112]

The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of a number of specific classifications and who, "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. "Special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a). Further, "specially designed instruction" means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3).

An "appropriate" education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1).

School districts provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefit", a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011).

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). Most critically, the IEP must be appropriately responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, it has long been recognized that "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).

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*,

The Third Circuit explains that while an “appropriate” education must “provide ‘significant learning’ and confer ‘meaningful benefit,’” it “need not maximize the potential of a disabled student.” *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a “basic floor of opportunity”. There is no requirement to provide the “optimal level of services.” *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania’s federal court in the Eastern District noted, “Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit at the time it was created.

Transition: A transition plan is a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student’s needs, taking into account the student’s preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. 20 U.S.C. § 1401(a)(19).

Although I find that the District was correct in assigning Student to special education classes for literacy and for mathematics [see below], and to regular education for all other classes, the problem is that in those special education classes Student was not taught appropriately, using research-based, systematic, multisensory methods and Student thus was denied FAPE. Both the method of instruction and the individualized plan for instruction were deficient in Student’s case. While the *Rowley* court reasoned that “to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child’s potential is, we think, further than Congress intended to go”, in the instant matter the District failed to provide the minimum required to meet Student’s needs appropriately in several important areas as will be discussed below.

Student's May 10, 2007 IEP did not list reading decoding as a need and did not provide a goal or specially designed instruction in reading despite the results of the Woodcock administered in October 2006. Although an IEP does not have to address every identified need, given that reading decoding is a basic fundamental need of every pupil and of this Student in particular the lack of provision for a research-based, multisensory, sequential reading program is inexcusable. Additionally, the reading comprehension objectives, the math objectives and the verbal and written responding objectives do not contain baselines from which to measure Student's progress. Further, the IEP does not provide for an assistive technology consult or use of assistive technology which would be very important to assist Student in these three areas. Student was denied FAPE in these three areas as well as because of failure to consider/provide assistive technology from the first day of the 2007-2008 school year through November 29, 2007 [the date of the next IEP].

The same deficiencies as discussed above are noted for the November 29, 2007 IEP which governed Student's program in 8th grade from November 30, 2007 through the end of the school year in June 2008, and in 9th grade from September 1, 2008 through November 25, 2008. In addition to being devoid of a goal for reading decoding, the goal for reading comprehension may be based on an incorrect present level and the objectives for reading comprehension, mathematics and verbal/written responding do not have baselines from which to measure progress. An additional problem with this IEP is the OT section which abandons addressing Student's fine-motor needs in favor of life skills tasks. Although I acknowledge the District's likely argument that in January 2008 the Parent in writing stated that she had wanted OT to stop, the reason I infer for her position was that the OT tasks inappropriately involved life skills and did not focus on handwriting or keyboarding or use of a computer mouse or touchpad. Also notable given the OT update is the absence of an endorsement for assistive technology and a lack of provision of an assistive technology evaluation or assistive technology in the SDI (except for calculator use). Student was denied FAPE in these areas from November 30, 2007 through the end of the school year in June 2008, and from September 1, 2008 through November 25, 2008 [the date of the next IEP].

Student's November 25, 2008 IEP which covers Student's program from November 26, 2008 to March 13, 2009 represents a considerable improvement over the previous IEPs discussed above. This IEP provides goals and objectives that are measurable and relate to Student's needs and for the most part is reasonably calculated to produce meaningful educational benefit. The transition plan is appropriate for a 9th grade student who would reasonably be expected to remain in public education until the end of the school year in which Student turned 21. However, the crucial element again missing from the IEP is direct instruction in reading decoding. As discussed above, improving Student's reading skills required focused programming. The speech/language goals and objectives were carefully tied to Student's demonstrated needs and it is truly unfortunate that the Parent did not give consent for speech/language therapy in the therapy room. Given the direct instruction in speech/language Student required, conducting therapy in a classroom while other pupils were being instructed was not an option that would have conferred any benefit. Although there was provision in the IEP for weekly occupational therapy consultation there was no goal and no objectives for this important supportive service.

The unfortunate fact that the Parent decided that OT must be discontinued is acknowledged and understood given the nature of the OT recommended previously, however the consults still needed to be pegged to certain skills Student was being helped to acquire. Therefore, Student was denied FAPE in the areas of reading and OT from November 26, 2008 through March 13, 2009 [the date Student stopped attending school].

Aide: A parent of an adolescent child who has a one-to-one aide throughout the day is certainly justified in requesting and even demanding that the aide be of the same gender as the child. This is of special importance when the child has intellectual disabilities and part of the aide's role is to assist as needed with toileting, regardless of how occasional. This having been said, in the instant matter the Parent's problem with the assigned high school aide seems to have gone far beyond the aide's gender. From listening to the high school aide testify on two separate dates, it is clear to me that this particular aide was not a good match for this particular child. In contrast, regardless of gender, the middle school aide was a much better match for Student and for the Parent and it is possible that the request for an aide change would not have come up if the middle school aide had simply moved up to high school with Student. The IDEA requires that a child receive an appropriate education, including appropriate supportive services. Appropriate does not mean optimal. However, I have reached the conclusion that not only should have the District listened to the Parent's request for a same-gender aide, but also should have itself recognized that the particular aide assigned was not appropriate for this particular child regardless of gender. It is a challenge to compensate Student for having been provided an aide that was a poor match. I find the most egregious deficit in the aide was the unwillingness or the inability to appropriately deal with Student's unexpected and occasionally inappropriate behaviors, not merely by redirecting, but by helping Student find acceptable ways to express age-appropriate affection and attraction. If the aide, a parent of four, could not come up with replacement behaviors then Student should have been given access to school staff who could have appropriately dealt with the issues. Therefore, what makes sense to me is to find that Student was denied the equivalent of two hours per week of guidance or counseling services that could have been delivered by a guidance counselor, a school psychologist, a health teacher, a nurse, or an empathic same-gender special education teacher. I will allow the District a two month period to have replaced the aide. Therefore the compensatory education award of two hours per week will begin on November 1, 2008 and run until the end of the week when Student stopped attending school, a period of four and a half months.

Issue 1d: Denying the Parents meaningful participation in deciding educational environment? [See Findings of Fact 113 to 137]

The IDEA requires that eligible students be educated in the "least restrictive environment" [LRE] *which permits them to derive meaningful educational benefit*. [emphasis added] 20 U.S.C. § 1412(a)(5)(A); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). IDEA's least restrictive environment requirement provides that states must ensure that

To the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling, or other

removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (emphasis added). 20 U.S.C. § 1412(a)(5)(A).

The IDEA's implementing regulations emphasize that the "public agency" [District] must "ensure that . . . [t]he placement decision . . . [i]s made in conformity with the LRE provisions of this subpart," that "[i]n selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs," and that the student "is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116. Adding further emphasis to the strength of the LRE as the default position, 22 Pa Code §14.145(3) specifically states that a student may not be determined to require separate education because the student cannot achieve at the same level as classmates who do not have disabilities if the student can, with the full range of supplementary aids and services, make meaningful progress in the goals included in the student's IEP.

Our Third Circuit unequivocally enforced the statutory requirement for the least restrictive appropriate placement nearly twenty years ago in *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d 1204, 1215 (3d Cir. 1993), a landmark case that also addressed the education of a child with Down Syndrome. Under *Oberti*, in deciding whether a school district has included an eligible child in regular education to the maximum extent appropriate, consideration must be given to: 1) the efforts of the school district to include the student in a regular education classroom with supplementary aids and services; 2) the educational benefits available to the child in the regular classroom, and 3) any possible negative impact on the education of the other students.

Parents are entitled to meaningful participation in planning their children's educational programming. This does not mean that every request a parent makes, no matter how potentially educationally adverse, must be honored. In the instant matter the Parent had a significant voice in her child's educational program, and at times the District acquiesced to her wishes in ways that did not benefit Student, as for example when she did not agree to speech therapy services in the therapy room for 9th grade. In significant ways the Parent did prevail in designing Student's program, most visibly in Student's being in all regular education classes except for literacy and mathematics. I find that she was not denied the level of meaningful participation the IDEA provides.

I find that the subjects which Student took in the special education setting and the subjects Student took in special education classes were determined in a reasonable manner that was designed to provide meaningful educational benefit. Student's levels in essential literacy and math skills were such that Student required specially designed instruction in a smaller educational setting that allowed for a more measured pace, repeated reinforcement and considerable practice. Even with the one-to-one instruction provided by the private tutor, with skills reinforced on a daily basis initially at school and home and then just at home, as of the date of the tutoring video Student evidenced

significant deficits. Other than for literacy and math Student was placed in regular education classes. It is in reference to the regular education classes in which Student participated that the court's holding in *Girty v. School District of Valley Grove*, 163 F.Supp.2d 257 (W.D. Pa. 2001) is instructive. In *Girty*, the district court held that the IDEA does not require disabled children to receive the same educational experience as nondisabled children, and recognized that disabled children may benefit from regular education differently than nondisabled children. This was the case with Student. The regular education teachers with support from special education staff were diligent and creative in conveying difficult concepts in science and social studies in a manner than Student could understand them. Student participated in whole-class and in smaller groupings with nondisabled peers and derived benefit.

Although the Parent clearly wanted Student in all regular education classes with supports, this was not in Student's best interests and the District's decision to place Student in some special education and some regular education classes was reasonable. In *D.F. v. Western School Corp.*, 921 F. Supp. 559, 572 (S.D. Ind.1996), the district court recognized that "there is no requirement that school districts first place students with serious disabilities in general education settings and then wait for them to fail before removing them. Instead, the potentially harmful effects of a general education placement must be considered on an individual basis before any placement decision is made." Similarly, "OSEP does not interpret [IDEA] Part B's LRE provision to require that a disabled student actually be placed in the regular classroom and fail before a more restrictive placement is considered. [Instead, the IEP team] must give first *consideration* to placement of a disabled student in the regular classroom with appropriate aids and services before a more restrictive placement can be considered." *Letter to Cohen*, 25 IDELR 516 (OSEP 1996). This reasoning is persuasive and applicable to the facts of this case.

Although the Parent had reasons that she believed were valid when she removed Student from school, it is unfortunate that this has resulted in Student's then being educated in the most restrictive environment possible, in a one-to-one setting outside a school building/program. Student, who was described as friendly and interactive with adults and peers, currently has a very small circle of adults, and virtually no peers, with whom to associate on a daily basis. For the past three years Student has missed the typical academic and non-academic high school experiences that disabled and nondisabled children enjoy. The Parent's hopes and intentions that Student attend college [and hardly a week goes by that this hearing officer does not receive special education list serve articles about colleges more and more being willing and able to admit students with intellectual disabilities] would be better served by having Student engaged in a high school environment in preparation for college. Although Student is beyond the age of compulsory school attendance, the Student has a few years left of eligibility for FAPE and the Parents are encouraged to consider allowing Student to take advantage of this opportunity.

Issue 1e: Refusing to provide homebound services? [See Findings of Fact 138-142]

Homebound services are not governed by special education regulations, but rather are an accommodation for any student who for medical reasons cannot attend school for a period of time. A student who is excused from attending school for mental, physical, or other urgent reasons may be provided with homebound instruction. 24 P.S. § 13-1329; 22 Pa. Code § 11.25. School districts that provide homebound instruction in such circumstances are required to adopt policies that describe the instructional services that are available to students who have been excused. 22 Pa. Code § 11.25(c). School districts that do provide homebound instruction may be reimbursed financially for the expenditure by the Commonwealth of Pennsylvania. 24 P.S. § 25-2510.1. However, the Pennsylvania Department of Education must grant approval for homebound instruction that exceeds five hours per week, and states an upper limit of ten hours per week. See PDE-4676 (available at http://www.portal.state.pa.us/portal/server.pt/community/school_districts/7366/sd_forms_for_filing_with_pde/509289).

It is my experience that five hours per week of homebound instruction is the common amount of homebound instruction and an appropriate basis for calculating compensatory education services/tutoring reimbursement.

When the Parent requested homebound instruction on March 9, 2009, produced a physician's note on March 10, 2009 as directed, and reiterated her request in writing on March 18, 2009 the District's response was inadequate. There is no evidence that anyone from the District attempted to contact the physician to discuss Student's needs. It appears that Student's day to day educational need slipped through the cracks once Student stopped attending school. Although the director of special education engaged in earnest communication with the Parent over this issue I conclude that this process took much too long and that not providing any District staff to educate Student in the home from mid-March to the end of the 2008-2009 school year constituted a denial of FAPE.

The Parents continued tutoring services for Student for two hours per week, and the Order below will cover reimbursement for that portion of the tutoring. However, given that homebound instruction is generally provided for five hours per week, the District will be required to provide compensatory education services for three hours per week from the time Student stopped attending school until the end of the school year in June 2009, the end of the period for which homebound instruction should have been offered.

Issue 1f: Retaliating against the Parents as a result of their complaint to the BSE? [See Findings of Fact 143-153]

The Americans with Disabilities Act and Section 504 prohibit retaliation against an individual who is engaged in a protected activity. 42 U.S.C. § 12203(a)-(b) ; 34 C.F.R. § 100.7(e) Advocacy on behalf of a special education student such as "advocacy at [an] IEP meeting" or "participation or assistance in a proceeding involving the minor child's IEP" is protected against retaliation under both the ADA and Section 504. *Knaub v. Tulli*, 788

F. Supp. 2d 349, 358-59 (M.D. Pa. 2011). Protected advocacy activities include filing a charge or complaint under those statutes. *See, e.g., Shellenberger v. Summit Bancorp*, 318 F.3d 183, 188 (3d Cir. 2003).

The test for a successful retaliation claim under Section 504 in this circuit is contained in *Lauren W. ex rel. Jean W. v. Deflaminis*, 480 F. 3d 259 (3d Cir. 2007). First, plaintiffs “must show (1) that they engaged in a protected activity, (2) that defendants’ retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or Student’s rights, and (3) that there was a causal connection between the protected activity and the retaliatory action.” *Id.* at 267. The third element, the causal connection, is satisfied if plaintiff can show either an unusually suggestive temporal proximity between the protected and retaliatory activity *or* a pattern of antagonism coupled with timing to establish a causal link. *Id.*

Here, the protected activity is the Parent’s advocacy for Student’s special education rights. On the issue of causation, usually the most difficult element, the Parents have not provided persuasive evidence of any retaliation against the Parent or the Student. The District’s implementation of checklists to track the implementation of Student’s SDI’s was an appropriate response to the BSE directive. The fact that the Parent could not get the books ahead of time reflected no more or less than very poor coordination of response on the part of the District. Student’s having received four write-ups towards the end of February 2009 reflected legitimate concerns at the time about behaviors emerging for a brief period in school and it would have been remiss for the District not to address these concerns, albeit using a different format than disciplinary incident reports.

Issue 2: Did the District discriminate against Student in consideration of the requirements under Section 504 by denying equal opportunity to access the regular education curriculum? [See Findings of Fact 154-165]

The Parents’ complaint raised a claim under Section 504. The statute prohibiting disability-based discrimination commonly referred to as “§504 of the Rehabilitation Act of 1973” or simply “§504” is found at 29 U.S.C. §794(a), and provides as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 504 of the Rehabilitation Act of 1973 protects all qualified persons with a disability who have a physical or mental impairment which substantially limits one or more major life activities. A student is considered “qualified” when the student is of an age at which the student can attend school. The Section 504 regulations define a “physical or mental impairment” as any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or

endocrine: or any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

To fall within the protection of Section 504, though, this physical or mental impairment must have a substantial limitation (permanent or temporary) on one or more major life activities - functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working. Students who qualify for services under IDEA also are protected under Section 504, although not all students protected under Section 504 are eligible for special education services. Specifically, the non-categorical criteria for determining eligibility under Section 504 are generally broader, or more inclusive, than their categorical IDEA counterparts. As a result, there are students eligible for educational program adaptations and services under Section 504 who are ineligible under the IDEA.

Notwithstanding language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with FAPE. *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009). The substantive right to FAPE, as well as the procedural safeguards to which a qualified disabled student is entitled under §504 may be satisfied by complying with IDEA substantive and procedural requirements. 34 C.F.R. §§104.33(b)(2), 104.36; *Centennial School District v. Phil L. and Lori L.*, 559 F.Supp.2d 634 (E.D. Pa. 2008); *Lyons v. Smith*, 829 F.Supp.2d 414 (D.D.C. 1993).

Conversely, proof of an IDEA violation does not automatically establish a §504 violation. *D.G. v. Somerset Hills*. Rather, to assert a successful §504 claim a parent must prove four elements: 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

Student was included in special education classes as needed, and in regular education classes as appropriate with modifications and supports, thus fulfilling the IDEA's mandate of the least restrictive environment *appropriate* for the child. The obligation of a local education agency 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). Other than the significant denial of FAPE in various areas discussed above, there is no discernible discrimination against Student on the basis of handicap. Parents' §504 claim was based entirely upon the same facts that they asserted in support of their IDEA claims. They produced no persuasive evidence of discrimination, much less intentional discrimination against Student, and Student is entitled to no more relief than will be order

pursuant to the IDEA claims that will be allowed. I find that all of the Parents' claims have been addressed pursuant to the IDEA.

Issue 3: As a result of any or all of the above alleged failures of the District, did Student fail to make meaningful educational progress and/or regress in some areas? [See Findings of Fact 166 to 206]

The comparisons of Student's reading and mathematics scores across multiple testing occasions as presented above in narrative and chart format tell the tale starkly and clearly. Over the relevant period, despite being properly placed in special education settings for literacy and for mathematics, Student did not make any educational progress, much less meaningful educational progress, in the essential skills of reading and mathematics. The District reasonably held firm against the Parent's demands that Student not be in any special education classrooms, but then squandered the opportunity to educate Student appropriately in those small settings with credentialed personnel. The failure of the District to provide Student with research-based, systematic, sequential, multidisciplinary instruction in reading and in mathematics is truly incomprehensible, and Student is entitled to compensatory education to make up for the District's failure. Student is likewise entitled to compensatory services for the District's failure to provide adequate supports such as assistive technology, appropriate OT, and an appropriate aide, all of which could have helped Student progress in Student's significant areas of need.

Issue 4: If the District violated the IDEA and/or Section 504 in any or all these areas, must the District fund appropriate educational services in reading, mathematics, writing and/or other academic subjects; and/or fund an appropriate transition evaluation; and/or fund an appropriate assistive technology evaluation; and/or fund appropriate speech/language services; and/or reimburse the Parents for costs of private tutoring; and/or be responsible for providing other remedies as the hearing officer finds appropriate?

The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy when a school district has failed to provide a student with FAPE Lester H. v. Gilhool, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district's failure. [*Id.*] It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a student's educational program is not appropriate or that the student 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 student 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 method that awards the "amount of compensatory education reasonably calculated to bring a student to the

position that the student 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. *See Lester H.*

I was provided no 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, and such evidence would only be speculative. Thus, I conclude that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Student in this case.

May 27, 2007 IEP: Having found that Student's May 10, 2007 IEP was inappropriate in the areas of reading, mathematics and verbal/written expression as well as assistive technology, I find that Student was denied FAPE from the first day of the 2007-2008 school year⁴⁶ until November 29, 2007 [the implementation date of the next IEP]. These areas comprise approximately half of an instructional day with an additional amount of time for assistive technology exploration and implementation. 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. This equates to a 5.5 hour school day. Accordingly Student is entitled to 2.75 [2.5 + .25] hours per day of compensatory services for every day Student was in attendance in school from the first day of the 2007-2008 school year until November 29, 2007, a period of about three months. In the event that precise attendance records by date are not available, one third of Student's total absences for the 2007-2008 school year will be deducted from the total number of days school was in session between the aforementioned dates.

November 29, 2007 IEP: Having found that Student's November 29, 2007 IEP, like the previous IEP, was inappropriate in the areas of reading, mathematics and verbal/written expression and concomitant assistive technology, but also deficient in the area of occupational therapy I find that Student was denied FAPE from November 30, 2007 through the end of the school year in June 2008⁴⁷. Accordingly Student is entitled to 3.25 [2.75 + .5] hours per day of compensatory services for every day Student was in attendance in school from November 30, 2007 through the end of the school year in June 2008 and in 9th grade from September 1, 2008 through November 25, 2008. In the event that precise attendance records by date are not available, two-thirds of Student's total absences for the 2007-2008 school year and one-third of Student's absences for the 2008-2009 school year up until the time Student left school in March 2009 will be deducted from the total number of days school was in session during the aforementioned dates.

⁴⁶ The Parent declined ESY services for summer 2007.

⁴⁷ The Parent did not respond to an offer of ESY services for Summer 2008.

November 26, 2008 IEP: Having found that Student's November 26, 2008 IEP was inappropriate in that it did not provide for instruction in reading decoding or a goal and objectives in consultative occupational therapy I find that Student was denied FAPE from November 27, 2008 until March 13, 2009, the day Student stopped attending school. Accordingly Student is entitled to 1.25 [1 + .25] hours per day for every day Student was in attendance from November 27, 2008 through March 13, 2009. In the event that precise attendance records by date are not available, one-third of Student's total absences for the 2008-2009 school year up until the time Student left school in March 2009 will be deducted from the total number of days school was in session during the aforementioned dates.

Homebound Instruction: In addition to denial of FAPE while Student was attending school during the relevant period, I hold the District responsible for educating Student at home for 5 hours per week during the period from March 14, 2009 to the last day of the school year in June 2009, a period that should have been covered by homebound instruction at the usual amount of hours. The reimbursement for 2 hours per week tutoring the Parent procured for Student following Student's removal from school will serve as partial compensation for the District's not providing homebound [see below]. In addition, I will award Student three hours of compensatory education for each week school was in session from March 14, 2009 to the end of the school year in mid-June.

Aide: Because the high school aide assigned to Student was not appropriate by virtue of gender and disposition, and failed to provide appropriate replacement strategies in addition to redirection, and because the necessary strategies were not provided by any qualified professional, I will award Student two hours per week of compensatory education services from November 1, 2008 until the end of the week when Student stopped attending school, a period of four and a half months.

The hours of compensatory education are subject to the following conditions and limitations. I find reasonable the Parents' request that the value of each hour of compensatory education be set at \$75.00 and will so order. 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 addresses Student's areas of need. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that would appropriately be provided by the District through any future IEP should the Parents decide to have Student return to school. The hours of compensatory education may be used at any time from the present until the date of Student's 26th birthday. Given Student's demonstrated needs, it is strongly suggested that the Parents consider enrolling Student with qualified providers in research-based, structured, systematic, multisensory programs of reading instruction [e.g. Wilson, Scottish Rite Orton-Gillingham] and math instruction [e.g. Saxon Math] and also consider procuring speech/language therapy and occupational therapy. They may want to consider asking the psychologist who performed the IEE to assist them in selecting appropriate programs and technology, or to engage an educational consultant suggested by another knowledgeable and trusted source to oversee Student's use of the compensatory education hours.

Tutoring and Transportation: I will order the District to reimburse the Parents for tutoring procured for Student beginning from the time Student left the District, but not for the period of time when Student was still attending the District as that period [fall 2008 to March 13, 2009] is covered by the compensatory education awarded above for the relevant IEP's. With the exclusion of the tutoring provided when Student was still in school, the Parents' submission in their closing brief provides a reasonable figure for reimbursement for tutoring services.

The exact basis on which the transportation costs submitted by the Parents was calculated was not clear to me. Therefore, rather than order reimbursement for transportation according to the Parents' analysis presented along with the tutoring services cost analysis, I will direct the District to pay for Student's transportation to and from the library for 119 weeks of tutoring at 55.5 cents per mile, the mileage to be established by determining the exact distance between Student's home and the library using a trip calculator such as MapQuest or AAA.

This modified portion of their submission will be adopted as follows: Reimbursement for Tutoring: \$11,900.00 [3-15-09 to 7-31-09⁴⁸: 2 hours x 18 weeks x \$50.00 = \$1800.00; 2009-2010 school year⁴⁹: 2 hours x 48 weeks x \$50.00 = \$4800.00; 2010-2011 school year⁵⁰: 2 hours x 48 weeks x \$50.00 = \$4800.00; 2011-2012: 2 hours x 5 weeks x \$50 = \$500.00]

Student is eligible to attend public school until the end of the school year in which Student turns 21 [the 2013-2014 school year]. However, Student has passed the age of compulsory education in Pennsylvania [age 17]. Unless the Parent wishes to return Student to school, as of the date of this decision the District is no longer required to offer an IEP. Hence the District's obligation to provide FAPE ends with the date of this decision, notwithstanding of course the obligation to provide compensatory education as ordered below.

⁴⁸ Includes weeks in the school year and weeks for ESY programming.

⁴⁹ See above

⁵⁰ See above

Order

It is hereby **ORDERED** that:

1. The District denied Student FAPE in some areas but not in others as follows:
 - a. The District did not deny Student a free, appropriate public education under the IDEA during the relevant period by failing to provide an appropriate evaluation including non-verbal instruments and an FBA. The District evaluation and the IEE were appropriate and no FBA was needed as Student was not presenting with significant behavior problems.
 - b. The District did not deny Student FAPE by failing to follow appropriate procedure when the Parents requested an IEE. The District promptly corrected its procedural error and the error did not result in a lack of educational benefit to Student or prevent parental participation.
 - c. The District did deny Student FAPE during part of the relevant period as described above by failing to provide appropriate and measurable IEP goals, assistive technology, an appropriate aide, and appropriate occupational therapy. Student did not require a behavior management plan, transition services were appropriate for grade and age, and speech/language services were appropriate.
 - d. The District did not deny the Parents meaningful participation in deciding educational environment. The Parent had considerable input in deciding the environment and the District acted appropriately in balancing the Student's needs with the Parents' desires.
 - e. The District did deny student FAPE by refusing to provide homebound services.
 - f. The district did not retaliate against the Parents as a result of their complaint to the BSE.
2. The District did not discriminate against Student in consideration of the requirements under Section 504 by denying equal opportunity to access the regular education curriculum. Student was provided the maximum amount of instruction in general education classes as was appropriate for Student to receive FAPE under Section 504.

3. As a result of inappropriate IEPs, including lack of appropriate instruction in reading and mathematics through research-based, systematic multisensory sequential programs and lack of appropriate assistive technology and occupational therapy services, student did fail to make meaningful educational progress and/or did regress in some areas.
4. As the District violated the IDEA and Section 504 in the above areas the District must provide Student with compensatory education services in the amount of hours specified below at the hourly value of \$75.00 and must reimburse the Parents for costs of private tutoring at the hourly rate of \$50.00 and Student's transportation to and from tutoring sessions at 55.5 cents per mile as follows:
 - a. IEP: Student is entitled to 2.75 hours per day of compensatory services for every day Student was in attendance in school from the first day of the 2007-2008 school year until November 29, 2007, a period of three months. In the event that precise attendance records by date are not available, one third of Student's total absences for the 2007-2008 school year will be deducted from the total number of days school was in session between the aforementioned dates. The uses and the limits of this entitlement are presented above.
 - b. IEP: Student is entitled to 3.25 hours per day of compensatory services for every day Student was in attendance in school from November 30, 2007 through the end of the school year in June 2008 and in 9th grade from September 1, 2008 through November 25, 2008. In the event that precise attendance records by date are not available, two-thirds of Student's total absences for the 2007-2008 school year and one-third of Student's absences for the 2008-2009 school year up until the time Student left school in March 2009 will be deducted from the total number of days school was in session during the aforementioned dates. The uses and the limits of this entitlement are presented above.
 - c. IEP: Student is entitled to 1.25 hours per day of compensatory services for every day Student was in attendance from November 26, 2008 through March 13, 2009. In the event that precise attendance records by date are not available, one-third of Student's total absences for the 2008-2009 school year up until the time Student left school in March 2009 will be deducted from the total number of days school was in session during the aforementioned dates. The uses and the limits of this entitlement are presented above.
 - d. Aide: Student is entitled to 2 hours per week of compensatory services from November 1, 2008 to the March 13, 2009.
 - e. Homebound: Student is entitled to 3 hours per week of compensatory services from March 14, 2009 to the end of the school year in June 2009.

- f. The District must reimburse the Parents in the amount of eleven thousand nine hundred dollars [\$11,900.00] for tutoring services they obtained privately. The District must also reimburse the Parents' mileage for transporting Student to and from the library for tutoring sessions at the rate of 55.5 cents per mile, the distance to be verified through a computerized mapping program.
5. As of the date of this decision, the District is no longer responsible for providing FAPE to Student unless the Parents choose to return Student to school in accord with the discussion above.

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

April 18, 2012

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official