

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

ODR No. 00011-0910LS

Child's Name: JW

Date of Birth: XX-XX-XXXX

Dates of Hearing: 8/26/09; 9/29/09, 10/9/09, 10/12/09,
10/13/09, 10/14/09, 10/15/09, 1/4/10, 1/8/10, 1/15/10

OPEN HEARING

Parties to the Hearing:

Representative:

Parent

Parent Attorneys

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School District

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Date Record Closed:

February 24, 2010

Date of Decision:

March 11, 2010

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

“Student” is presently a 12th grade student at Lower Merion High School (School).

“Student” has been IDEA eligible by reason of learning disabilities since first grade.

“Student’s” Parent filed a due process complaint early in July 2009, seeking an IEE, intensive reading and math instruction, two years of compensatory education for lack of educational progress, including inadequate transition services, a private school placement for the 2009/2010 school year and an additional year of school in the private placement, contending that “Student” is unprepared for graduation and the completion of his secondary education program.

For the reasons that follow, the District will be required to provide “student” with intensive, individualized reading and math instruction for the remainder of the current school year. The District will also be ordered to offer the intensive reading and math instruction, along with other educational and related services in a setting other than School for a minimum period of an additional school year. “Student” will also awarded limited compensatory education for the 2008/2009 and 2009/2010 school years. In all other respects, Parent’s claims will be denied.

ISSUES

1. Did the School fail to provide “student” with an appropriate program and placement at any time during the 2007/2008, 2008/2009 or 2009/2010 school years?
2. Is “student” entitled to compensatory education and if so, for what amount of time and in what form?
3. Is the School required to provide “student” with an independent educational evaluation (IEE)?
4. Is the School required to provide “student” with intensive reading and math instruction during the remainder of the 2009/2010 school year?
5. Is the School required to provide “student” with an additional year of secondary education, and if so, is the District required to identify and fund a private placement for the 2010/2011 school year?

FINDINGS OF FACT

Background Facts Relevant to the Issues in Dispute

1. “Student” is an 18 year old child, born XX-XX-XXXX. “Student” is a resident of the School and is eligible for special education services. (N.T. pp. 866)
2. Student has a current diagnosis of specific learning disability (SLD) and emotional disturbance (ED) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(4)(i), (10); 22 Pa. Code §14.102 (2)(ii) (N.T. p. 435; S-2, p. 13, S-18, p. 9)
3. Presently in 12th grade, Student has been educated in the School since kindergarten and was identified as IDEA eligible in 1st grade. (N.T. p. 398; S-2)
4. In December 2006, the middle of 9th grade (2006/2007 school year), Student was involved in an incident on the school bus that resulted in injury to another student. The District suspended Student for 4 days and notified the police, who arrested him. Student admitted to the charge of simple assault and was detained in the [Redacted facility], near Norristown, until January 2007, when he was placed on probation. (N.T. pp. 1683, 1684; P-15, p. 2, P-46, p. 3)
5. In April 2007, Student was arrested in Delaware County and charged with [redacted charges]. Student pled guilty to [redacted charges] was adjudicated delinquent by the Delaware County Court and detained there from May 31 until June 13, 2007. Student then returned to Montgomery County Court, where he had been had recently been placed on probation for theft. . (N.T. pp. 1691, 1692; P-15, P-19)
6. Based upon the Delaware County adjudication, several prior juvenile court adjudications, including the school bus incident, and a positive test for marijuana, Student was convicted of violating probation and adjudicated delinquent by the Montgomery County Court. Student was remanded to the Montgomery County Youth Center, pending a final disposition hearing. (N.T. pp.831, 1693; P-15, pp. 1, 19)
7. In July 2007, Student was committed to [Redacted Program] Schools Residential Program, a community-based juvenile facility located in [redacted city], PA, where he remained until April 18, 2008. (N.T. p. 1693; P-15, P-20, S-7)
8. In March 2009, in response to a peer complaint, verified by camera surveillance, that Student had removed a bicycle from school property, a District administrator called the local police, who charged him with theft. The District also suspended Student for three days. (N.T. pp. 1045, 1046, 1108, 1134, 1693—1695; P-15, p.23, P-20, P-46, p. 1)
9. On April 3, 2009 Student was adjudicated delinquent, detained at the Montgomery County Youth Center and ultimately committed to the [redacted program] located within

the [redacted] District, where he remained and received educational services until August 2009. (N.T. pp. 325, 1695, 1696; P-15, P-20, P-26)

Evaluations Relevant to the Issues in Dispute

10. In May 2007, near the end of 9th grade the District conducted a psycho-educational evaluation of Student and arranged for a psychiatric evaluation. (N.T. pp. 397, ; S-1, S-2)
11. A District School Psychologist administered the WISC-IV (Wechsler Intelligence Scale for Children-Fourth Edition), which yielded a full scale IQ score of 73, in the borderline range of intellectual functioning. Student demonstrated relative weaknesses in verbal comprehension and perceptual reasoning and relative strengths in working memory and processing speed. (N.T. pp. 414—416; S-2, p. 7)
12. On the initial evaluation in 1st grade, Student's cognitive potential had been measured in the average range. The District's psychologist believed that at the time of the 2007 evaluation, Student's intellectual capacity was likely to be in the low average (80—89) to average (90-100) range. The school psychologist's observation of Student during the testing session led him to believe that Student was not putting forth his best effort on the WISC-IV, possibly because of frustration with his learning experiences and a resulting unwillingness to take risks and otherwise engage in the testing process. (N.T. pp. 416, 419—421, 426, 427, 440, 441; S-2)
13. A language assessment completed as part of the same evaluation yielded scores on a number of subtests that were in the average range, with an overall low average score. The results of the speech/language assessment were inconsistent with the WISC-IV results, lending additional support to the school psychologist's conclusion that the May 2007 FSIQ score was not an accurate assessment of Student's intelligence. (N.T. pp. 418, 419, 526, 527, 529; S-2)
14. The WIAT-II (Wechsler Individual Achievement Test-Second Edition) was also administered to assess Student's academic skills. All subtest scores, measuring reading, math and written language, were significantly or well below average and significantly below expectations based upon Student's cognitive potential. Two additional reading subtests, from the Woodcock Johnson Psycho-Educational Battery III, were also administered, yielding a significantly below average score for Passage comprehension and a well below average score for Reading Vocabulary. (N.T. pp. 427, 430; S-2, pp. 7, 8)
15. The District members of Student's IEP team believed that a psychiatric examination was warranted as part of the District's May 2007 reevaluation. Due to Student's disruptive school behaviors, inability to follow rules and lack of academic success, the District wanted to determine whether emotional issues were interfering with Student's educational progress and needed to be addressed in the school setting. (N.T. p. 486; S-1, S-2)

16. The District agreed with the recommendation in the psychiatric report that Student needed an out of District program that would provide more structure and more individualized attention than available in a large public high school. The District did not pursue an alternative placement at that time because Student was in a court ordered detention in June 2007 and no one on the IEP team was certain when he would return to the District. (N.T. pp. 488, 489, 492, 493; S-1, S-2,)
17. Pursuant to a juvenile court order, the psychologist for the Montgomery County Juvenile Court conducted an evaluation of Student in June 2007, including re-administration of the WISC-IV, which yielded a full scale IQ of 93, a score suggesting that Student falls into in the lower end of the average range of intellectual functioning and would struggle in most academic settings. (N.T. pp. 809—813, 819, 826—828; P-15, P-19)
18. The court psychologist was unaware that the District’s school psychologist had administered the WISC-IV just a few months before and had he known, would not have repeated it due to the “practice effect”, *i.e.*, the possibility that familiarity with the test might affect the score. In response to the court psychologist’s Student denied that he had been a special education student in the District and that he had ever been previously evaluated. (N.T. pp. 437, 439, 808, 809; P-19)
19. Neither the court psychologist nor the District school psychologist believes that familiarity with the WISC-IV could account for the 20 point discrepancy between the District’s and the court’s FSIQ scores. Factors that might also have affected Student’s greatly improved performance the second time include Student’s increased comfort level with taking the test and the desire to do well in the hope that cooperation with the court-ordered evaluation would result in a more favorable disposition of the criminal charges. (N.T. pp. 439, 442, 522, 523, 807, 820)
20. When Student returned to the District in April 2008, a new evaluation was proposed to obtain updated information after Student’s lengthy absence from the high school. Although the evaluation was conducted in September 2008, after Parent signed the permission to reevaluate at the beginning of Student’s 11th grade year, Student declined to participate in additional testing despite the efforts of teachers, administrators and Parent to encourage his cooperation. (N.T. pp. 239--445—453, 497, 498, 510, 518—521; S-18)
21. The reevaluation in the fall of 2008 consisted primarily of a review of records, information from Parent, from Student’s 11th grade teachers concerning his academic progress and behavioral functioning and a classroom observation. (N.T. pp. 508—512, 516, 517; S-18)
22. In November 2009, after the due process hearing was underway, Parent procured an independent psycho-educational evaluation of Student by a nationally certified school psychologist in private practice. (N.T. pp. 1999, 2000, 2062; P-53)

23. The independent evaluator administered the WAIS-IV (Wechsler Adult Intelligence Scale, Fourth Edition), from which he determined that Student's general ability level is in the low average to average range of intellectual functioning, with a full scale IQ score of 82. Student demonstrated a relative weakness in verbal comprehension, which was in the deficient to low average range, and a relative strength in perceptual reasoning, which was solidly in the average range. (N.T. pp. 2009, 2010, 2013, 2014; P-53, pp. 6, 13)
24. Academically, Student was functioning on approximately the 5th grade level based upon the WIAT-III (Wechsler Individual Achievement Test-Third Edition). Student's highest score was a grade equivalent of 8.4 in the essay composition subtest, which does not include grammar and writing mechanics. Student's total achievement in reading, math and writing was classified as below average. (N.T. pp. 2009, 2021--; P-53, pp. 7, 13)
25. The independent evaluator also asked Student and Parent to complete rating scales to measure Student's adaptive functioning in school, home and community settings. The results were consistent with information in Students' records. (N.T. pp. 2031; P-53, pp. 14, 15)
26. The measures of emotional functioning confirmed that Student is at risk for conduct disorder, consistent with the diagnosis made by the court psychologist. Response bias on the self concept rating scale and the depression inventory led the independent evaluator to conclude Student was masking negative feelings and shows signs of depression, despite scores on the depression inventory that fall short of the "at risk" category. (N.T. pp. 2039—2042; P-19, P-20, P-53, pp. 8, 9, 12)
27. The evaluator did not observe Student in school because he did not attend on the day the observation was scheduled. The teachers did not receive the questionnaires sent to them through Parent's counsel in enough time to complete them for inclusion in the report completed on December 15, 2009. (N.T. pp. 2044, 2076, 2078; S-62)
28. The independent evaluator identified personal issues that could affect Student's educational performance but are not the responsibility of the District and recommended that family issues such as Student's feelings about the absence of his father be addressed in private psychotherapy. (N.T. p. 2160; P-53, p. 9)

10th Grade-2007/2008 School Year

29. During most of the 2007/2008 school year, Student was educated in the court ordered placement at [Redacted Program]. Student was enrolled in 6 academic classes covering math, reading, writing, oral communication, science and geography, in which he earned Bs and Cs. Student also took PE/Health and participated in a vocational program. (N.T. pp. 899, 921; S-8, p. 5)

30. When Student returned to the District near the end of his 10th grade year, an IEP team meeting was held on April 24, 2008 to plan for Student's transition back to the District for the remainder of the school year and determine Student's program going forward. There was a discussion at the meeting concerning the recommendation in the 2007 reevaluation report for an out of District placement, and the District's request to conduct a reevaluation prior to planning for the following school year. A permission to reevaluate was sent to Parent several days later. (N.T. pp. 214, 500, 501, 734, 965, 1169—1172; S-8, S-9)
31. Parent refused an out of District placement at that time. Parent thought that the District was proposing an alternative school similar to [Redacted Program]. (N.T. pp. 501, 963, 1323;)
32. At the IEP meeting, which was attended by Student and Parent, it was agreed that Student would enter the regular 10th grade classes for the remainder of the school year. The IEP included a transition plan and goals in the areas of organization, self-advocacy, developing coping strategies, reading, writing and math. Itinerant emotional support at the rate of one 45 minute session/week and social work services for transition planning at the rate of one 45 minute session every three weeks were provided as related services. (N.T. p. 1509; S-8)
33. The emotional support teacher began meeting with Student in mid-May 2008 and met with him during the remainder of the school year, working particularly on trying to build a good relationship as well as developing coping strategies, including anger management. Student was cooperative, discussed anxieties about returning to school and identified additional issues to discuss. (N.T. pp. 1510—1520; P-58, S-8)

11th Grade—2008/2009 School Year

34. The April 24, 2008 IEP remained in place during the following school year until Student's IEP team met in September 2008. No significant revisions were made at that time, pending completion the District's requested reevaluation, for which Parent signed the PTRE form at the IEP meeting. (N.T. pp. 85—87, 504; S-8)
35. Student was enrolled primarily in regular education 11th grade classes, two of which were co-taught by a regular and education teacher. Student was also assigned to two instructional support labs (ISL) daily for additional academic support by the special education teacher who served as his case manager. (N.T. pp. 62, 90, 91, 96, 217; S-25,)
36. Specially designed instruction as specified in Student's IEP was provided by the special education teacher/case manager in the course of her co-teaching in Student's English III class. (N.T. pp.62—65, 70, 224)
37. Student's special education teacher/case manager and another special education teacher provided additional support in the ISL classroom for chemistry and math, to fulfill the skill building and goal remediation functions of the ISL. The math goals in Student's IEP

- were implemented by the regular education teacher in Student's Algebra I class. Because Student was struggling, he was offered the opportunity to work with one on one with a District math specialist, but after one or two sessions declined to do so. (N.T. pp. 79—83, 228—231, 915, 916, 1607—1617)
38. Study skills were taught in the ISL classroom, and Student also received instruction to meet his organization and self-advocacy goals. (N.T. p. 232, 233; S-8)
 39. Several weeks into the school year, Student began to find reasons not to meet with the itinerant emotional support teacher. The emotional support teacher discussed Student's reasons for not wanting to keep his appointments. Although Student confirmed in his hearing testimony that the emotional support teacher worked on strategies for helping him manage frustration and that he liked her, he did not feel that he needed the sessions. Student also reported to the teacher that he felt there were too many people trying to help him. (N.T. pp. 269, 916, 917, 1520—1522, 1527)
 40. Since Student was not meeting with the emotional support teacher because he appeared to be feeling overwhelmed by the number of people working with him, the emotional support teacher met with Student and his case manager to consider alternative means of meeting Student's emotional support needs. They agreed that if Student identified issues for which he needed support, he would first discuss them with his case manager, who would then initiate meetings with the emotional support teacher if she felt that would be helpful to Student. The emotional support teacher continued to offer Student the opportunity to meet with her and maintained regular contact with his special education teacher/case manager. (N.T. pp. 1522, 1523, 1528, 1529, 1532)
 41. During the fall of 2008, Student began requesting a change of placement to a part-time work experience program. After discussion at IEP team meetings on December 22, 2008 and January 29, 2009, Parent signed a NOREP permitting the change. (N.T. pp. 244—246, 900, 901, 1184—1187, 1196, 1524, 1525; S-25, S-26, S-60, S-61)
 42. Through the District's transition coordinator, Student was placed in a volunteer program at [Redacted Hospital], where he serves as a messenger. (N.T. pp. 279, 868, 869, 1771—1773, 1778; S-25, S-26)
 43. From January 2009 until April, when Student again left the District for a juvenile court ordered placement, Student attended academic classes in the morning and worked hours at [Redacted Hospital], every school day. Student did very well in the hospital volunteer position. (N.T. pp. 1785—1787, 1808)
 44. At the December 22, 2008 IEP meeting, the District members of the IEP team proposed changing Student's emotional support from direct to collaborative services for one 30 minute session/month due to Student's reluctance to meet with the emotional support teacher and to accommodate the half-day school attendance and half day work experience program. (N.T. pp. 283, 1529—1533; S-25, S-26)

45. The direct reading instruction Student had not been receiving in an academic literacy class in the spring of 2008 and during the first half of the 2008/2009 school year was eliminated when his schedule was changed to accommodate an afternoon work experience program. (N.T. pp.227, 278; S-25)
46. Student's special education teacher noted progress in reading and writing during the 2008/2009 school year, but progress toward organizational and study skills development and coping skills was minimal. Student's greatest progress occurred in the area of developing self-advocacy skills. (N.T. pp. 288—290, 1526, 1527)

12th Grade—2009/2010 School Year

47. When Student returned to the District in September 2009, he was again enrolled in the regular education classes in the morning and [Redacted Hospital] work experience program in the afternoon pursuant to the January 29 IEP. (N.T. pp. 291, 292; P-, S-25,)
48. Although Student believes he is currently enrolled in the same math class, he completed in the ACT placement's educational program, his counselor confirmed with the teacher from that program that Student's course there was the equivalent of the District's Introduction to Algebra class, not the District's Algebra I class in which Student is currently enrolled. Student may have also taken an Introduction to Algebra course at [Redacted Program]. Algebra I is a two year course in the District. Student was enrolled in the second year of the sequence during the 2008/2009 school year, but at the time Student was detained by the juvenile court in April 2009, he was not passing Algebra I and is repeating it in the current school year. (N.T. pp. 293, 294, 871, 1150—1152, 1155, 1232—1234; P-, S-,)
49. Student resumed the half-day work experience program at [Redacted Hospital] Hospital at the beginning of October 2009. After missing a day each week for two weeks, Student asked to reduce the work experience hours, initially to four and then to three days/week. (N.T. pp. 1808, 1813, 1814)

Behavior/Discipline

50. The 2007 and 2008 reevaluation reports both included a section that the District school psychologist captioned "Functional Behavioral Assessment" (FBA), consisting of a description of behaviors of concern, such as cutting classes, not completing work and aggression/defiance and the perceived function of those behaviors. The FBA identified frustration with the learning process as the underlying reason for Student's lack of engagement in his academic classes and acting out behaviors. The school psychologist concluded that Student's desire to preserve positive feelings about himself interfered with his willingness to take the risks necessary to acquire new information and demonstrate mastery. The IEP team has been unable to identify positive reinforcements that can be consistently implemented throughout the school year and are sufficiently motivating to Student to encourage him to overcome the behaviors that interfere with his learning. (N.T. pp. 530, 610, 611, 625, 1072; S-2, p. 12, S-18, p. 10)

51. The District has been able to achieve limited success in motivating Student to maintain appropriate school behaviors by using eligibility for sports, particularly football, as an incentive for attending class and completing school work. (N.T. pp. 220, 221, 1062—1064, 1200)
52. Although Student's aggressive and defiant behaviors generally decreased after Student returned from the [Redacted Program] placement, other behaviors related to academic issues, such as cutting class and refusing to complete school work/homework persisted in the absence of incentives that are meaningful to Student over the long term. (N.T. pp. 264, 1206, 1219; P-, S-18, p. 10)
53. After the 2008 football season ended, Student's negative behaviors, including refusing to complete school work and homework, cutting classes and acting out increased. There were 20 disciplinary referrals between mid-November 2008 and the end of January 2009, but only one incident of cutting class reported from the beginning of the school year until November 17, 2008 (N.T. p. 1187; P-46, pp. 1, 2)
54. Concluding that consequences such as suspensions are ineffective in motivating Student, a District vice principal has worked with Student to develop the structure Student needs to successfully maintain appropriate school behaviors, attend class and complete school work, as well as to understand the long-term consequences of uncontrolled negative behaviors. (N.T. pp. 1062—1069, 1202, 1203)
55. During the winter and early spring of 2009, Student was also motivated by the work experience program that allowed him to spend half days in school and half days working as a hospital volunteer. (N.T. pp. 280, 1201, 1202)
56. After a difficult start to the current school year, including an early out of school suspension, Student's school behaviors and performance improved. (N.T. pp. 295, 296, 298, 308, 1137—1151, 1220; P-46, p. 1)

Transition Planning/Services

57. The District's transition coordinator first became involved in providing services to Student at a September 2008 IEP meeting, the beginning of Student's 11th grade year. Transition planning was the primary focus of that meeting. (N.T. pp. 216, 1745, 1752; S-58)
58. The transition coordinator contributed information to include in the IEP discussed at the December 22, 2008 IEP team meeting. (N.T. p. 1754; S-25)
59. Student's half day work experience program at [Redacted Hospital] is part of his transition program. The work experience permits Student to learn and practice basic employability skills such as punctuality, attendance, taking direction, asking for clarification, advocating for workplace needs. (N.T. pp. 1773, 1774, 1779, 1780)

60. Student was provided with a job coach who started working on employment skills with him before he began at [Redacted Hospital] and accompanied him to [Redacted Hospital] each day until it was determined that Student could independently perform the required duties. The job coach interpreted directions, suggested work strategies, such as requesting additional tasks when one was completed and collected data on Student's ability to independently demonstrate job skills. (N.T. pp. 1779—1782, 1786)
61. The transition coordinator and job coach also helped Student prepare a resume, research job openings and apply for jobs, including a paid position at [Redacted Hospital]. (N.T. pp. 1782—1784, 1788)
62. During the 2009/2010 school year, Student again worked with a job coach, focusing on maturity skills. (N.T. pp.1810)
63. Student completed interest inventories and participated in the SAGE¹ assessment conducted by the Montgomery County Intermediate Unit (MCIU). (N.T. pp. 1434—1440, 1800, 1801; S-25)
64. The transition coordinator took Student to a community college symposium for students with disabilities planning to attend college. The District also sponsors college fairs that Student attended. (N.T. pp. 1794—1796, 1798)
65. During the current school year, Student expressed a stronger interest in attending college. (N.T. p. 1812)

DISCUSSION AND CONCLUSIONS OF LAW

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009)

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parent

¹ System for Assessment and Group Evaluation

has challenged the appropriateness of the District' program/placement Parent must establish that the District's program/placement is not reasonably calculated to assure that Student will receive a meaningful educational benefit from the proffered services.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

I. Preliminary Issues

Prior to considering the program and placement issues that comprise the primary matters for decision, there are several underlying issues raised by each party that must be addressed.

A. Parent Participation in IEP Meetings

Parent's counsel contended throughout the hearing that Parent was prevented from meaningful participation in Student's IEP meetings because "parent" frequently did not understand the discussions and was unable to read and understand the documents "parent" was asked to sign. Parent notes, e.g., that when the District suggested a private school placement for Student in early 2009, "parent" believed the District was referring an alternative educational facility similar or identical to a juvenile detention facility, and was, therefore unwilling to agree to the suggestion. F.F. 31

Parent argues that because "parent" is a former special education student who attended school in the same School District, the District should have known that "parent" would be unable to read the IEPs and other documents, or understand the discussion of various issues at the IEP

meetings. Parent further argues that the District denied “parent’s” right to fully participate in IEP meetings because it failed to comply with 34 C.F.R. §300.322(e), the federal IDEA regulation which provides that,

The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

Although Parent is entitled to understand the IEP proceedings, it is unreasonable and unrealistic to expect the District to know that Parent had difficulty reading the IEPs and evaluation/reevaluation reports and otherwise understanding the content of the IEP meetings unless “parent” either informed the District or there is evidence to establish that the District knew or reasonably should have known, based upon its dealings with Parent in the context of “parent’s” participation in IEP meetings, that Parent did not understand the proceedings. Parent admitted, however, that “parent” hadn’t told the friend who helped “parent”, “parent” advocates or counsel, that “parent” has difficulty reading until the fall of 2009. (N.T. p. 1313) In addition, although both Parent and “parent’s” friend who sometimes accompanied “parent” to IEP meetings testified that District members of the IEP team sometimes resisted when Parent asked to have things repeated and re-explained, Parent’s friend also testified that other IEP team members from the District were willing to continue explaining matters that Parent did not understand. (N.T. pp. 1316, 1390, 1401)

Since Parent did not explicitly inform the District of “parent’s” inability to read the IEPs and other documents, or that “parent” generally did not understand the proceedings even after further explanation, Parent argues that the District should have known that “parent” would have difficulty understanding oral and written communications because had been a special education student when “parent” attended District schools. Accepting that premise and concluding that the

District violated Parent's right to participate in the IEP process because it failed to act on its purported "knowledge" that Parent did not fully understand the proceedings is unwarranted and would place an unreasonable burden on the District. First, accepting Parent's argument would mean that the District must always assume that a parent who was provided with special education services in public school will be unable to read or fully understand oral communications. That assumption would require the District to further assume that it is never successful in preparing its special education students to overcome or remediate their disabilities sufficiently to participate independently in activities such as IEP meetings for their own children.

In addition, Parent did not suggest anything more that the District could or should have done in this case to meet its obligation to ensure Parents' understanding of the IEP process, or how the District can ever be certain that it has met its obligation when a parent is a former special education student. Here, Parent signed several NOREPs indicating "parent" agreement with the program/placement recommendations discussed at IEP team meetings in which "parent" participated, but later testified that "parent" did not fully understand the program "parent" was accepting for Student. Parent made no attempt to explain how the District should have known that "parent" still did not actually understand IEPs or evaluation reports after "parent" stopped asking for explanations and indicated her agreement with the reports or proposed IEPs. In the absence of objective criteria for ascertaining when a parent understands the IEP proceedings, no school district could ever reasonably conclude that a former special education student fully understands the program he or she accepts on behalf of his/her child. It is manifestly unreasonable to impose an obligation that a district can never meet with a reasonable degree of certainty and that is not based upon any objective criteria. Parent contends, in essence, that a district interferes with a parent's full participation in the IEP process any time a parent later

asserts a lack of understanding of some aspect of past IEP proceedings. A district's compliance or noncompliance with IDEA requirements cannot be based upon such a subjective and obviously self-serving standard.

Moreover, during the period in dispute in this case, Parent never attended an IEP team meeting unaccompanied by counsel and/or an advocate or friend. *See* S-8, p. 3; S-25, p. 3; S-53, p. 3; S-56; S-58, p. 2; S-60 p. 2. Parent's friend testified that she will ask questions at meetings when she believes Parent may not understand something and speak with her about the meeting later. (N.T. pp. 1387—1389, 1391) There was uncontradicted testimony that one of Parent's attorneys told the District that no one from the District should speak to Parent about Student's program or ask "parent" to consent to anything except in the presence of one of "parent's" attorneys or advocates. (N.T. p. 162) IEP meetings were sometimes delayed because an attorney or advocate was unavailable to attend with Parent. (N.T. p. 248) Under such circumstances, the District was certainly entitled to conclude that if Parent needed help in understanding any aspect of the IEP process, "parent" had readily available resources for obtaining whatever assistance "parent" needed.

Parent cited no statute, regulation or decision that supports "parent" sweeping conclusion that the District was not only obligated to ensure Parent's understanding of proposals and decisions, but was also required to assure that Parent's understanding came directly from District communications without expecting Parents' attorneys and advocates to assist "parent" in understanding the IEP discussions and documents.

The reasons Parent asserted in support of her contention that "parent" was denied full participation in the IEP process due to the District's failure to ensure her understanding of

documents and oral communications presented at IEP meetings are unsupported by the law, and in light of the evidence in this case, devoid of reason and logic.

B. District's Responsibility for Student's Juvenile Court Involvement and for Student's Education During Out of District Juvenile Detention Placements

Parent constantly alluded to the District's role in Student's juvenile court commitments to [Redacted Program] for most of 2007/2008 school year and to the ACT program beginning in April 2009, presumably to suggest that the District's decision to notify police of Student's involvement in events that resulted in criminal charges and subsequent adjudications of delinquency violated IDEA and can support an award of compensatory education for the periods Student was in court-ordered residential placements. Parent's position, however, is contrary to the IDEA statute and regulations, which explicitly provide that,

Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

20 U.S.C. §1415(K)(6); 34 C.F.R. §300.535(a). There is no legal basis for concluding that the District was responsible for Student's absence from school for most of "student's" sophomore year and a the last two months of "student's" junior year, and, therefore, that the District is obligated to provide "student" with compensatory education for the periods "parent" was absent due to juvenile court commitments.

Moreover, the first incident reported to the police led to a brief period of detention that occurred prior to the period for which compensatory education could be awarded in this case. The adjudication and probation resulting from that incident had only an indirect effect on Student's subsequent court placement at [Redacted Program], in that it was one of several

offenses for which Student was on probation that “student” violated by “student’s” involvement in two subsequent crimes that actually precipitated the [Redacted Program] placement. F.F. 5, 6 Those offenses had nothing to do with the District.

Finally, an eligible student’s school district of residence is not responsible for providing either a special or regular education program when the student is an inmate in an out of district residential facility, such as [Redacted Program], Montgomery County Juvenile Detention Center or the ACT program. Pennsylvania statutory law places the responsibility for educating all students detained in juvenile residential facilities on the “host” school district, *i.e.*, the district in which the facility is located. 24 P.S. §13-1306(a). The host district’s responsibility explicitly includes providing special education services to eligible students. 24 P.S. §13-1306(c). Neither [Redacted Program], the Montgomery County Juvenile Detention Center nor the ACT facility are located within the District. Since the District was not responsible for Student’s educational program during those periods of commitment, no compensatory education may be awarded in this case before the date in April 2008 when Student returned to the District or between April 3, 2009 and the end of the school year in June 2009.

C. Issues Not Raised in Parent’s Complaint

The District argues that Parent cannot raise claims based upon inappropriate transition services, inappropriate discipline/number of disciplinary referrals Student received or upon denial of ESY services. Although it is accurate that no claim for denial of ESY services was asserted in the complaint, Parent did not argue in either the opening statement or Post-Hearing Submission that Student was eligible for ESY services during the summer of 2008. Similarly, Parent asserted no claim or argument based upon disciplinary referrals, such as District suspensions that amounted to a change of placement without conducting a manifestation determination review.

Parent's complaint asserted, generally, that Student failed to make meaningful academic progress during the 2007/2008 and 2008/2009 school years and that the District should provide compensatory education for those school years. Since both a lack of appropriate behavior support and inadequate transition services can be part of the basis for an alleged denial of an appropriate program and placement and can support a claim for compensatory education, the alleged deficiencies in the District's program in those areas are fairly within the claims asserted in the complaint. In addition, the complaint asserts that the only transition activities provided to Student throughout the period in dispute were the SAGE assessment and the [Redacted Hospital] Hospital volunteer placement for part of the school day during the 2008/2009 school year. There is, therefore, no basis for precluding substantive consideration of the adequacy of the transition services provided to Student, as well as the adequacy of the District's efforts to address Student's behaviors that allegedly interfered with his academic progress.

D. Compensatory Education for the 2009/2010 School Year

When the complaint in this case was filed on July 1, 2009 Parent requested a private school placement for the current school year due to an allegedly inappropriate program resulting in denial of FAPE for the current school year. That is no longer a feasible remedy because most of the current school year has passed and a new placement could not be arranged before the current school year ends. If FAPE was indeed, denied, it would be an unreasonable exaltation of form over substance to deny Student a real remedy in the form of compensatory education. Because the hearing required numerous sessions and was not concluded until mid-January 2010, Parent's request for a private school placement for the current school year must, at this point, be transformed to a claim for compensatory education as an appropriate remedy for denial of FAPE during the current school year.

II. Independent Evaluation

Parent first requested an IEE at public expense by letter dated June 17, 2006, and included that request in “parent’s” July 1, 2009 due process complaint. (S-46, P-21). The District refused the IEE request by letter dated July 8, 2009 and offered to conduct a reevaluation. (S-47, S-48). The District did not initiate its own due process complaint to support the appropriateness of its own evaluation in accordance with 34 C.F.R. §502, but defended its most recent reevaluations of Student throughout the due process hearing on Parent’s complaint. Accordingly, Parent was permitted to present the report and testimony of an independent psychologist who evaluated Student in November 2009 in response to the District’s denial of the IEE. (HO-1) Since Parent has already obtained the IEE, “parent’s” request now is for reimbursement for the costs of that evaluation.

Parent argues that the District did not properly evaluate Student and identify all needs, particularly after “student” returned from two juvenile court placements. The record, however, does not support that conclusion. Although the District’s May 2007 reevaluation, the most recent in which standardized testing was completed, yielded an IQ score in the borderline range, much below the previous assessment of average intellectual functioning, the District’s school psychologist recognized that the score was anomalous and concluded that Student’s true FSIQ was more likely in the low average to average range. F.F. 11, 12, 13 Two and a half years later, Parent’s independent evaluator came to the same conclusion, based upon the standardized test scores he obtained. F.F. 23 In making his determination, the evaluator noted Student’s low average FSIQ score of 82 on the WAIS-IV, as well as the discrepancy between Student’s verbal comprehension score of 74 and his perceptual reasoning score of 100. F.F. 23 The independent evaluator’s test results and conclusion with respect to Student’s intellectual functioning provided

no new information to either Parent or District. Moreover, because the Parent's independent evaluation was not only obtained well after the District's 2007 evaluation, but more than a month after the District's school psychologist testified at the due process hearing, there can be no suggestion that the District's psychologist conformed his conclusions to the outcome of the independent evaluation. There is, therefore, no question that the District psychologist's assessment of Student's true cognitive potential provided a sound basis for planning Student's program at all times since the 2007 evaluation was completed.

The results of standardized achievement tests conducted by the District in 2007 and by the independent evaluator in 2009 were also similar. F.F. 14, 24 The District recognized and attempted to address Student's significant deficiencies in academic functioning at all times that Student was attending high school in the District. The independent evaluator's conclusion, based on the recent standardized achievement tests, that Student is functioning well below grade level confirms the results of the District's standardized achievement tests. Surprisingly, however, given the well-documented difficulties motivating Student and engaging "student" in the learning process during the 2008/2009 and 2009/2010 school years, Student's standard scores and percentile rankings actually increased in reading, math and writing, the academic areas assessed by the WIAT-II, given by the District in 2007, and the WIAT-III, given in November 2009 by the independent evaluator. Since Student remains far below the academic levels expected based upon age and intellectual capacity, because different versions of the test were administered, and because neither party elicited testimony comparing the evaluation results and explaining the significance, if any, of the increases in the standard scores and percentiles, it is impossible to draw the conclusion that the more recent test results establish that Student made significant academic progress. It does appear, however, that Student made at least minimal

gains, based upon a comparison of the standardized measures of academic achievement given in 2007 and 2009, and certainly did not regress.

Finally, the conclusions in both the District's 2007 and 2008 evaluations and the independent evaluation concerning the role of emotional factors in Student's academic and behavioral difficulties are similar. Both evaluators clearly understand that whatever personality or emotional factors contribute to Student's lack of motivation, disengagement from the educational process, and especially Student's unwillingness to admit that "student" needs the special education supports offered to "student", substantially interfere with Student's ability to make better academic progress. Although the school psychologist's assessment of those emotional factors is not a "Functional Behavioral Assessment" as that term is commonly used, the conclusions in those portions of the District's 2007 and 2008 evaluation reports accurately describe the nature of the emotional problems that interfere with Student's performance in school, and the District's conclusions are similar to those of the independent evaluator—Student lacks confidence in "student's" ability to read and perform other academic tasks, becomes frustrated by "student's" lack of success and tries to protect his self-esteem by avoiding situations where "student" believes "student" will be unsuccessful, primarily academic tasks. *Compare*, S-2, p. 12; S-18, p. 10; P-53, pp. 8, 9; N.T. pp. 2041, 2042.

In light of the similarities in results and conclusions between the District's evaluations in 2007 and 2008, and the independent evaluation, there was no need for the District to provide an independent evaluation at public expense. The District's evaluations provide sufficient and appropriate information for Student's IEP team to identify Student's disabilities and the needs arising from those disabilities, as well as guide the development of a program reasonably calculated to meet "student's" needs.

In addition, the primary purpose of the evaluation, report and testimony of Parent's expert was to argue that the District's program and placement proposals, not its evaluations, were flawed, and to offer opinions in support of the remedies Parent seeks. At this point, parents are not entitled to reimbursement for expert testimony designed to support claims for private school tuition, compensatory education or other programs/placements they believe would be appropriate. *Arlington Central School District v. Murphy*, 548 U.S. 291, 126 S. Ct. 2455, 165 L.Ed. 2d 526 (2006). Support for Parent's denial of FAPE claims was clearly the thrust of the independent evaluator's testimony and of the evaluation report, which included four pages of program/placement recommendations. Parent's claim for reimbursement for the independent evaluation is, therefore, denied.

III. Appropriateness of the District's Programs

A. Academic Instruction/Emotional Support

In this case, Parent is essentially asserting a kind of "strict liability" claim. Parent argues that because Student remains far below grade level in basic academic skills, "student" did not make meaningful educational progress, which in turn, establishes that the District failed to provide an appropriate program and placement.

It is true that an eligible student is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*. "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). In this case,

the key language in the applicable legal standard are the phrase “reasonably calculated” and “opportunity.” Contrary to Parent’s argument, the District is not held to the impossible standard guaranteeing meaningful progress. Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, the District not required to provide an eligible Student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

In most respects, the District met the legal standards for offering FAPE in this case by providing detailed IEPs with annual goals designed to meet Student’s needs arising from both “student’s” learning disabilities and emotional disturbance. Unfortunately, the District’s efforts were not entirely successful, due, primarily, to the nature and severity of Student’s emotional disturbance disability, which prevents Student from recognizing the severity of “student’s” academic needs, leading “student” to reject most of the supports and services the District offered “student” during the 2008/2009 and 2009/2010 school years.²

In three respects, however, the District fell short of properly implementing the IEPs it offered. Beginning in February 2009, the District eliminated additional reading instruction. F.F. 45. Student, however, remains far below grade level in reading, and it is likely that “student’s”

² Although the 2007/2008 school year is encompassed within Parent’s claim, there is no issue concerning an appropriate program for most of that school year, since Student was in a court-ordered out of District residential placement until April 2008. As discussed above, the District had no responsibility for providing a program for Student during that period.

The temporary program developed for the few remaining weeks of that school year was primarily designed for and directed toward facilitating Student’s transition back to the District, and Parent produced no evidence that the services and supports the District provided did not meet that goal. .

Finally, because the applicable legal standards require the District to offer a program/placement reasonably calculated to result in meaningful progress and permits a school district a reasonable period to correct any deficiencies that may come to light as the program is implemented, and because as written the IEP addressed all needs and provided sufficient means for meeting them, the District’s period for revising the IEP would have extended beyond the end of the school year. For all of the foregoing reasons, there is no basis for an award of compensatory education for any period during the 2007/2008 school year.

reading difficulties significantly contribute to “student’s” disengagement from the learning process.

Although Student’s work experience program has been very positive for “student”, and it is difficult to assure that “student” receives all necessary academic instruction in only half a school day, and there is little doubt that Student would have, and will resist, additional reading instruction, “student” clearly needs it and it must be offered, and Student assigned to work with a teacher daily at a specific time.

The District, therefore, will be ordered to provide Student with daily intensive reading instruction equal to the length of an academic literacy class for the remainder of the current school year, and provide compensatory education for insufficient reading instruction from January 29, 2009 to the date the Student left the District for the ACT program in April 2009, and from the first day of school in the current school year through the date intensive reading instruction begins.

Student has also struggled in math to the extent that “student” is only now on track to pass Algebra I this year. The District offered additional math instruction by a math specialist, but Student declined the services. As with reading, the District must set aside a period each day for Student to work with the math specialist and leave the time to Student’s choice. The District will also be ordered to provide Student with compensatory education in the form of math instruction equal to the length of a regular class period from the beginning of the 2008/2009 school year through the date Student left the District in April 2009 until the date the additional period of math instruction begins.

Finally, Student needs the emotional support services he rejected, and the District will be ordered to reinstate those services and provide Student with a 30 minute period of emotional

support services each week, and compensatory education in the form of 30 minutes of emotional support or counseling services each week from November 1, 2009, the approximate time Student began refusing services through the date Student left the District in April 2009 and from the beginning of the current school year until services begin.

B. Transition Services

It is questionable whether the lack of an adequate transition plan can support a denial of FAPE under the interpretation of the applicable legal standards adopted by the Court of Appeals for the Third Circuit. *See High v, Exeter Twp. School District* 2010 WL 363832 (E.D.Pa. Feb. 1, 2010). Regardless, the District in this case provided Student with appropriate transition services, including the work experience program at [Redacted Hospital]. Since Student has recently requested to reduce “student’s” hours and has recently begun expressing more interest in college, it is possible that the employment experience had the effect of helping “student” develop a better idea of the future “student” wants to pursue. F.F. 49, 65 If that is the case, the transition services the District is providing are serving their intended purpose. Transition services are designed to be a process through which a student begins to plan effectively for life as an adult, including exploring interests likely to lead to realistic future educational and/or employment goals. The District’s transition plan is reasonably calculated to fulfill that purpose. Student has been provided with interest assessments and experiences designed to explore “student’s” interests and develop employment skills, which “student” will ultimately need even if “student” pursues a college education first. F.F. 59-64

IV. Continued IDEA Eligibility/Future Program

Testimony during October 2009 due process hearing sessions indicated that Student was lacking sufficient credits to graduate in June 2010, and that there was no IEP in place to support

Student's graduation from high school at the end of this school year. *See*, N.T. pp. 1234—1238, 1241—1244, 1259, 1261, 1265. There was no evidence later in the hearing from either party to contradict the testimony of the District's witness in that regard. Nevertheless, although Parent concluded "parent's" argument by requesting two additional years of education at a private school of "parent's" choice, and the District opposes a private school placement, the District's closing argument was silent with respect to whether Student should/will have continued eligibility after this school year. *See* Parent's Post-Hearing Submission at p. 77; Closing Argument of the Lower Merion School District, pp. 1—41.

The matter of an appropriate program for Student going forward, however, must be carefully considered. As all witnesses for both parties recognized in their testimony, Student is clearly still lacking in basic reading, writing and math skills, as well as sufficient credits to meet District graduation requirements. In addition, Student remains eligible for special education services until "student" meets "student's" current IEP goals or reaches age 21. On the other hand, Student's testimony clearly indicated that "student" expects to graduate on time at the end of the current school year. According to the conclusions of both the District's school psychologist and Parent's private evaluator, there are emotional psychological factors that prevented Student from accepting and taking full advantage of the educational opportunities offered to "student" as an IDEA eligible student. F.F. 28. As discussed above, the District's IEPs have been largely appropriate. There is no basis, therefore, for ordering a private school as a remedy for past denial of FAPE.

The question of an appropriate program and placement going forward, however, is more problematical. There is nothing in the record to indicate that Student is presently any more receptive to the District's efforts to provide the academic and emotional support services

“student” needs than “student” has been during the past two school years, much less that “student” will be willing to return to the high school setting from which “student” intends to graduate in June for an additional year or more of secondary education. Unless Student becomes reconciled to the need to remain in an IDEA placement until “student’s” basic academic skills are better developed and “student” meets graduation requirements, no program is likely to be successful for “student”. Student’s inability to fully benefit from the educational services provided to “student” appears to be part of his ED disability. Parent has provided no evidence to support a conclusion that ordering two additional school years of education at an unspecified private school selected by Parent is any more likely to assure that Student will overcome “student’s” disability and develop the academic, behavioral and coping skills. Student needs to be successful in adulthood than the programs that the District has provided in the past or could provide in the future. Consequently, although it is possible to order that IDEA services continue for at least one additional school year, it is impossible to discern the kind of program, services and setting that would be reasonably calculated to yield meaningful educational benefit, since Student’s disability is likely to make “student” even more resistant to continuing his IDEA services in the future than “student” was in the past.

Given the District’s experience with Student and its knowledge of “student’s” needs and how “student’s” disability adversely affects “student’s” ability to successfully access the services offered to “student”, the District, as well as Parent, needs to be involved in developing a future program for Student through the IEP process. The record provides much valuable information about Student that the parties need to keep in mind in developing an appropriate program going forward. Student needs highly structured, small group or individualized instruction in math and reading, where “student” remains far below grade level. Student also needs to develop

sufficient trust that can improve “student’s” basic academic skills and be successful despite “student’s” frustration and denial that “student” still needs extensive help. Student needs effective emotional support services.

Both parties need to be receptive to finding or developing a program and placement that can address Student’s needs. Although it may be possible for the District to provide such services, having Student return to “student’s” current high school for another year or more of academic instruction is not reasonably likely to be successful. Consequently, the IEP team will be ordered to consider alternative settings and methods, such as another public high school, tutoring services or a private placement. The additional services must also include a transition plan, which may be the same or similar to the transition services the District has been providing.

Finally, in order to defuse the tension that was evident between counsel during the due process hearing, the IEP team will be required to meet with the assistance of an IEP facilitator provided either through ODR or privately. It must be noted that contrary to the suggestion that the teachers and District administrators were either uncaring or actively biased against Student and Parent, which Parent’s lead counsel attempted to establish by tone of voice, comments, and innuendoes throughout the hearing, there was not a shred of evidence or other indication in the patient and professional demeanor exhibited by all District witnesses during their extensive testimony that the District bears either Parent or Student any ill will or put forth less than a full and thoughtful effort to provide Student with an appropriate educational program.

Nevertheless, given the poisonous atmosphere that the clear animosity between counsel created during the hearing, it may not be possible for the parties to work together productively without the assistance of a neutral third party. An advocate for Parent may certainly be involved in any and all IEP meetings, as well as counsel, if the parties so desire. Consideration, however,

should be given to whether it would be more productive for other attorneys within the firms representing the parties to be involved in the IEP process since cooperation and some degree of cordiality going forward is highly desirable if not actually necessary.

CONCLUSION

An appropriate order will be issued to give effect to the foregoing decisions.

Anne L. Carroll

Anne L. Carroll, Esq.

HEARING OFFICER

March 11, 2010