

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: D.K.

Date of Birth: [redacted]

ODR No. 17036-15-16-KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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

Bristol Township School District
6401 Mill Creek Road
Levittown, PA 19057-4014

Melissa K. Fiala, Esquire
Benjamin W.R. Hauser, Esquire
Rudolph Clarke, LLC
Seven Neshaminy Interplex, Suite 200
Trevose, PA 19053

Dates of Hearing:

February 8, 2016; February 9, 2016;
February 26, 2016; March 1, 2016; March 7,
2016

Record Closed:

April 4, 2016

Date of Decision:

April 19, 2016

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is a resident of the District named in this matter (District), and is enrolled in a private grade school (School) for the 2015-2016 school year. (NT 9-10.) Prior to enrolling in the School, Student was enrolled in a District grade school. The District has classified Student under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disability of Other Health Impairment due to Attention Deficit Hyperactivity Disorder (ADHD). (NT 10.)

Student's mother and father (Parents) removed Student from the District unilaterally, during the summer before Student was to advance into a District middle school. Parents assert that the District failed to evaluate Student appropriately and failed to offer and provide Student with a free appropriate public education (FAPE) when Student was in its schools during most of the two school years prior to Student's enrollment in the private School.²

Parents filed this due process request, pursuant to the IDEA; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504); and the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (ADA).³ Parents request compensatory education, reimbursement

¹ Student, Parent and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality. "Parent" in the singular refers to Student's Mother.

² The parties in effect stipulated to the relevant period regarding which the hearing officer would be asked to determine the appropriateness of District services to Student: November 16, 2013 (two years prior to the date of filing) to the date of the first hearing in this matter. (NT 41-42.) As a practical matter, however, I cannot charge the District with a failure to comply with IDEA or section 504 during any time after Student was disenrolled from the District; at that point, the District had no further jurisdiction or responsibility to provide Student with educational services. Thus, the actual period of time for which I will decide the propriety of the District's services begins on November 16, 2013 and ends on the date of disenrollment from the District, which was the first day of school in the 2015-2016 school year. (NT 1072; J 96.) I reference this here as the "relevant period" of time.

³ I exercise jurisdiction over section 504 claims pursuant to the Special Education Dispute Resolution Manual and Chapter 15 of the Pennsylvania Code, 22 Pa. Code §15.2 et seq. I assert jurisdiction over the ADA claims and decide them here only insofar as they are "derivative" claims that assert issues and request relief that is identical with the issues and relief requests advanced pursuant to the IDEA. 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S.

for one year's tuition at the School, including transportation expenses, and reimbursement of the cost of a private evaluation that they obtained unilaterally.

The District asserts that its services were appropriate during the relevant period.

The hearing was completed in five sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District failed to provide a FAPE to Student, and I enter the appropriate equitable relief.

ISSUES

1. During the relevant period of time, from November 16, 2013 to the first day of school in the 2015-2016 school year, did the District provide Student with an appropriate re-evaluation in compliance with all requirements of the IDEA and section 504?
2. During the relevant period of time, did the District identify Student appropriately under the IDEA?
3. During the relevant period of time, did the District offer and provide a FAPE to Student in compliance with the IDEA and section 504?
4. Is the School an appropriate placement for Student?
5. Considering the equities, should the hearing officer order the District to reimburse Parents for the cost of tuition for Student's 2015-2016 school year and transportation expenses?
6. Should the hearing officer order the District to provide Student with compensatory education for or on account of all or any part of the relevant period?
7. Should the hearing officer order the District to reimburse Parents for the cost of a private evaluation, reported on February 23, 2015?

FINDINGS OF FACT

1. Student's cognitive ability is in the high average to superior range. (J 4, 45.)

Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011). Therefore, the analysis in this decision will refer only to the IDEA and section 504.

2. Student is diagnosed with attention deficit hyperactivity disorder (ADHD), for which Student has received medication, and specific learning disability (SLD) with impairment in written expression. (J 45.)
3. Student's diagnosed disabilities substantially affect Student's written expression skills in conventions, clarity, organization and handwriting. (J 45.)
4. Student's ADHD causes symptoms of poor attention, distractibility, impulsivity and hyperactivity in all settings. (J 45.)
5. Student has a history of behavioral and social problems in school, from kindergarten until sixth grade, including inattentive, disruptive and aggressive behavior, as well as difficulties with social interactions, participation and following directions. (J 4, 45.)
6. Student enrolled in the District for first grade. (J 45.)
7. The District provided an educational evaluation of Student dated February 22, 2011, when Student was in second grade. The District administered a variety of tests and reviewed a variety of other information in order to determine Student's functional, developmental and academic strengths and needs. (J 4.)
8. The District evaluation classified Student with Emotional Disturbance, based upon Student's average performance in achievement testing, and negative classroom behaviors that interfered with learning. Some discrepancies were noted in cognitive and achievement scores, but the evaluation did not classify Student with specific learning disorder. Attention difficulties were noted. The report recommended mental health treatment, a behavior intervention plan and social skills training. It also recommended referral for [redacted]. (J 4.)
9. In third grade, Student met or exceeded most grade level benchmarks; however, Student's classroom performance was inconsistent in reading and mathematics. Student's writing of correct word sequences was well below average. (J 33.)
10. In third grade and fourth grades, Student exhibited significant behavioral difficulties, including difficulty following directions and non-compliance; talking out in class; hyperactive behaviors; lack of focus; and problems with work completion. (J 33, 82, 83.)
11. In fourth grade, Student's Pennsylvania System of Standardized Assessment (PSSA) scores indicated proficient performance in reading, mathematics and science. (J 31.)
12. In May 2013, at the end of Student's fourth grade year, the District provided an Individualized Educational Program (IEP). (J 33.)
13. The May 2013 IEP identified needs related to Student's disability including daily behavior chart; consistent expectations and rules; instruction on appropriate behavior toward adults; visual cues and prompting to address focus and staying on task; periodic check-ins for longer assignments; and specially designed instruction to increase time on task. It noted behaviors interfering with learning. While these described modifications rather than educational needs, they were placed under "needs" in the IEP; moreover, several of these

needed modifications were not listed in the “modifications” section of the IEP, including consistent expectations and rules; visual cues and prompting; and periodic check-ins for longer assignments. (J 33.)

14. The May 2013 IEP provided for itinerant learning support with a behavior plan. It provided for goals addressing performance on assessments; daily behavior; and correct word sequence in written expression. It provided for specially designed instruction and modifications addressing emotional regulation, classroom behavior and appropriate interaction with adults. It provided for direct instruction in writing skill deficit areas. It provided for related services in the form of group sessions with a social worker. (J 33.)
15. Also in May 2013, the District provided a behavior assessment and intervention plan, based upon the hypothesis that the function of Student's behavior was escape. The District's behavior assessment did not consider the role of attention deficit in this behavior. The behavior plan did not add any goals or modifications to those provided in the May 2013 IEP. (J 34.)
16. Student demonstrated many of the same behaviors noted in previous school years during the first marking period of fifth grade. These included difficulties with focus, time management, homework completion, organization and self-control. Student received lower marks in this marking period with regard to listening, and most areas of writing, including organization, conventions and variety of vocabulary. Teachers reported that these behavioral difficulties interfered with Student's acquisition of the curriculum and progress academically. (NT 925-926; J 87.)
17. In November 2013, when Student was in fifth grade, the District convened an IEP team meeting; the team modified its behavior chart to take data on attention to task and provided for visual reminders for Student. (J 36.)
18. Student continued to display problematic behavior in fifth grade. Student did not meet Student's behavioral and work completion goals in fifth grade. (J 84, 85, 86, 87.)
19. Interventions attempted in fifth grade for Student's behaviors were unsuccessful. There was no systematic coordination with a behavior consultant and data collection lacked integrity. (NT 719-722, 725-727, 961; J 33.)
20. Student did not meet the fifth grade written expression goal or the behavior goal. (NT 1324-1335; J 55, 84.)
21. While Student passed academic courses in fifth grade, Student worked below grade in a number of subjects including written expression, which was considered average in Student's class. However, this performance was not consistent with Student's above average cognitive ability. (NT 743-747; J 45, 87.)
22. Student was due for an IDEA-required three-year re-evaluation in fifth grade. On March 31, 2014, District personnel recommended that a re-evaluation was unnecessary. In reliance upon this recommendation, Parent knowingly and intentionally signed a written waiver of re-evaluation form presented to Parent by the District, which indicated that both Parent and District agreed that re-evaluation was not necessary at the time. The form further

indicated that Student would be re-evaluated after the first marking period in the following school year. (NT 1348-1349; J 39, 61, 69.)

23. At the same meeting in March 2014, Parent re-iterated concerns about Student's inconsistent behavior, organizational difficulties and struggles with writing. (J 65.)
24. The document that the Parent signed, waiving re-evaluation, was not a Notice of Recommended Educational Program/Prior Written Notice (NOREP) form approved by the Pennsylvania Department of Education. (NT 1349-1351; J 39, 46, 90.)
25. In May 2014, the District provided an IEP that acknowledged Student's behaviors impeding learning and listed educational needs related to disability, including task completion; remaining on task; and following teacher directions. It noted that written assignments were "a particular challenge" for Student; that Student's organizational skills were weak; and that Student often avoided work by moving about the class and annoying others. (J 55.)
26. The May 2014 IEP provided for one goal, directed to task completion. It revised specially designed instruction and modifications by removing a time out provision for frustration and direct instruction in writing; adding a requirement to complete unfinished classwork during privilege time; and adding daily check-in with an adult for work completion and classroom behavior. It did not provide for consistent expectations and rules or visual cues and prompting; while it added daily check-ins for work completion in general, this modification did not specify periodic check-ins for longer assignments. (NT 65-70; J 33, 55.)
27. The May 2014 IEP provided for 12 sessions with the social worker for the next IEP year, each session to last 30 minutes. (J 55.)
28. In May 2014, the District modified Student's behavior intervention plan to require completion of classwork during privilege time if not completed in class. (J 41.)
29. From the beginning of sixth grade, in September 2014, Student continued to exhibit the same problems with attention, work completion, classroom behavior, organization and written expression that had been a concern throughout the previous school year. During sixth grade, Student's inappropriate behaviors included several incidents of aggressive or threatening behavior toward peers, resulting in disciplinary action including suspensions. Most of these incidents occurred during recess and lunch periods. (NT 682-685; J 43, 45, 49, 51, 53, 64, 91, 98.)
30. During sixth grade, Student performed below benchmark in reading correct words per minute. Student did not meet Student's goal for work completion. Student continued to display difficulties with certain writing conventions, organization and text dependent analysis. (J 58, 69, 91.)
31. Student's teacher communicated with Parents about assignments and Student's organizational problems during the school year. (J 98.)

32. In September 2014, the beginning of Student's sixth grade year, the District invited the Parents to an IEP team meeting to discuss Student's IEP. It convened an IEP team meeting in October 2014 and the team reviewed Student's re-evaluation, behavior and needs with regard to transition into sixth grade. Parents requested a re-evaluation, but District personnel recommended to delay re-evaluation until Spring 2015, and instituted or reiterated interventions for Student's organizational and work completion struggles, including visual reminders, checklists for homework and assignments and adult monitoring at the end of the school day. (NT 1349-1356; J 42, 43, 61, 69.)
33. The District offered an IEP team meeting in January 2015 but this was postponed at Parent's request due to a pending medical appointment for Student. (J 44.)
34. The Parents obtained, at their own expense, a private psychoeducational report, and the evaluation was conducted in January 2015. The report was issued in February 2015 and was conveyed to the District before March 23, 2015, when it was discussed at a meeting with District personnel. (NT 103-104; J 45, 55, 95.)
35. The private evaluator ruled out IDEA classification of Emotional Disturbance, due to a finding that Student's behavioral struggles were caused by the combination of a specific learning disability in writing and difficulties stemming from Student's ADHD, as manifested in impulsive and hyperactive behavior. The evaluator recommended classification under Specific Learning Disability and Other Health Impairment. (J 45.)
36. Student's written expression continued to be an area of significant weakness in fifth and sixth grades. (NT 822-823, 863, 907-908; J 45, 58.)
37. The private evaluator recommended a series of modifications as well as counseling to be provided in school. (J 45.)
38. On March 23, 2015, the District proffered and received from Parent a written permission to re-evaluate Student. On the same day, the District commenced an occupational therapy evaluation (J 48, 49.)
39. Also on March 23, 2015, the District revised the existing IEP without a meeting, but with Parents' consent, to provide for data collection, chunking and prompting for written assignments. The revision also added six 30-minute sessions with the social worker. (NT 65-70; J 55.)
40. Social worker services were not provided at a level that permitted systematic direct teaching of skills that the Student needed to cope with Student's distractibility, organizational challenges and impulsivity. Social worker services were not coordinated systematically with teachers. The provider delivered twenty-minute sessions, while the IEP called for thirty minute sessions. (NT 640-641, 645-646, 651-653, 659-660, 666-667, 686-688, 694-697, 705-708, 728-729; J 33, 55, 56, 60, 70.)
41. In April 2015, the occupational therapy screening report recommended some accommodations, but did not recommend a need for school-based or any occupational therapy. (J 51.)

42. On April 29, 2015, Student was suspended for physically attacking a peer. As a result of this incident, at Student's father's request, District personnel excluded Student from recess and lunch in the regular education setting. (J 53.)
43. On May 12, 2015, the District provided an IEP. The IEP recognized behaviors that impede learning. It recognized needs including calling out frequently in class, difficulty remaining in Student's seat and other disruptive behaviors in class. It recognized needs in the areas of work completion and note taking. It did not recognize needs in the area of written expression. (J 56.)
44. The May 2015 IEP provided for continuing the itinerant learning support placement. (J 56.)
45. The May 2015 IEP provided for goals in the areas of improving work completion in class and reducing disruptive behaviors in class. It did not provide for a goal with regard to written expression or goals regarding learning skills needed to cope with attention, organization and impulsivity challenges. (J 56.)
46. The District's IEP goals produced little systematic progress monitoring of Student's written expression achievement, attention to task, organization and impulsivity. (NT 1321-1345; J 33, 55, 58, 65, 84.)
47. The May 2015 IEP retained some of the previously provided specially designed instruction and modifications, and added some. These included data collection and check in twice per week for writing assignments; two opportunities per day to take a walk when feeling upset or frustrated; daily behavior chart for work completion and behavior; one-to-one instruction in coping strategies, 30 minutes per week; daily check-in with an adult to discuss classroom behavior; assisting in kindergarten classroom during recess; eating lunch in the office. It did not provide for consistent expectations and rules or visual cues and prompting; while it continued daily check-ins for work completion in general, this modification did not specify periodic check-ins for longer assignments. (J 56, 92.)
48. Student was required to take lunch and recess away from the regular education environments for those periods in order to avoid the risk of disciplinary action due to inappropriate behavior. (J 98 p. 17.)
49. The May 2015 IEP provided for related service in the form of social work services, 30 minutes per week from May 12, 2015 to the end of the year, and 600 minutes per year, starting September 2, 2015 until May 10, 2016. (J 56.)
50. The May 2015 IEP also attached a behavior intervention plan. The plan contained an analysis of function of the behavior, but it did not add any additional services, goals or specially designed instruction to that provided by the IEP. (J 56, 57.)
51. On May 19, 2015, the District provided to Parents an evaluation report dated May 18, 2015. The report reviewed the private psychological evaluation that parents had conveyed to the District, and reported additional testing results. The report concluded that Student should be classified with Other Health Impairment due to ADHD. (J 58.)

52. For the May 2015 re-evaluation, the District administered two standardized tests of written expression, a behavior rating inventory addressing executive functions, and a broad based behavior rating inventory. (J 58.)
53. The District re-evaluation was conducted by a qualified and experienced school psychologist. It was based upon a variety of assessment tools and strategies, and addressed relevant functional, developmental, and academic information about Student. It assessed Student in all areas related to Student's various suspected disabilities. (J 58, 72.)
54. The May 2015 re-evaluation also was based upon a functional behavioral assessment (FBA). This was conducted without systematic data-gathering, and was not based upon observations conducted over an extended period of time. Therefore, the data-gathering provided a less reliable basis for the conclusions of the FBA. (NT 968-970; J 56.)
55. On June 1, 2015, Parents asked for gradual re-integration into regular education environment for lunch and recess, but the District personnel advised against it at that time and noted the risk of further disciplinary action if re-integrated. (J 98 p. 17.)
56. On June 8, the District proposed to increase Student's placement to supplemental learning support, with English Language Arts co-taught by regular and special education teachers. It offered an IEP with three goals, addressing work completion, disruptive classroom behavior and requesting appropriate assistance in class. New modifications addressed attention and organization needs, as well as written expression. These included clear expectations and directions; a silent signal to remind Student to focus on task; editing aids including graphic organizers and checklists; use of an agenda book; guided notes; direct instruction in organizational skills, to be delivered in the regular education setting; and chunking of long assignments. (NT 1304-1307; J 60.)
57. The offered program contained many of the same elements that had proven ineffectual in the past. Only three goals were offered, and only one was aimed at explicit instruction of Student in skills needed to learn to control Student's own behavior to facilitate educational success; this was unclear and not apparently measurable. The offer of social work services in this IEP was inappropriate for Student's needs. (NT 848-871; J 45; 60.)
58. Parents were unable to discern how the District's offered program was reasonably calculated to address Student's attention deficit and related behavioral difficulties in school. (NT 1245.)
59. On August 13, 2015 Parents, through counsel, notified the District of their intention to place Student unilaterally in a private school for Student's seventh grade year. (J 93.)
60. On August 28, 2015, Parents enrolled Student at the School, and placed a cash deposit with the School to hold a place for Student for the 2015-2016 school year. (J 96.)
61. The School teaches a curriculum that is consistent with the Pennsylvania core standards, it is appropriately licensed, and its staff meet Pennsylvania standards for private schools. (NT 1066-1068, 1093-1094; J 97.)

62. Student's needs with regard to written expression are being addressed, and Student has made progress with written expression skills while attending the School. (NT 1101-1102, 1139-1140; J 97.)
63. Student's attention-related behavioral difficulties are being addressed, and Student is making progress with these challenges. (NT 1079-1084, 1117-1118; J 97.)
64. Student's grades are improved with the supports provided. (NT 1095-1098; J 97.)
65. At the School Student attained grades of B or above in most major subjects. Student continued to demonstrate work completion and other difficulties in written expression, and continued to have achievement deficits in that skill area. (J 97.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.⁴ In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁵ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

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

⁴ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

⁵ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

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

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

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following credibility determinations.

I found the Parent’s expert psychoeducational evaluator to be highly credible and I found this witness’ expert opinions to be highly reliable. This expert is very qualified to evaluate Student and recommend educational programming for Student. The expert conducted a thorough evaluation. Her opinions were solidly grounded in data, and she resisted any temptation to offer opinions not grounded in her data. Her demeanor was relaxed and not in the least contentious or defensive.

I found the District’s evaluator to be likewise credible and reliable.

I accorded weight to the Student's Father's testimony. I found this witness' demeanor and answers to be indicative of truthfulness and reasonableness in the difficult circumstances of a due process hearing.

I accorded reduced weight to the special education supervisor's testimony. Cross examination revealed several contradictions between this witness' testimony in the first round of questioning by the District, as contrasted with the witness' own answers on the first Parent round, and documentation in the record. Similarly, I found some defensiveness and contradiction in the testimony of Student's teachers.

APPROPRIATENESS OF MAY 18, 2015 RE-EVALUATION

Parents assert that the District's re-evaluation report of May 18, 2015 was inappropriate. Parents base this assertion on three arguments. First, they argue that the re-evaluation report was provided more than one year after Parents first requested it. Second, they argue that the re-evaluation report inappropriately failed to identify Student with a specific learning disability in writing, contrary to the classification provided by their privately retained expert witness. Third, they argue that the re-evaluation report failed to appropriately address Student's educational needs.

The obligation to evaluate⁶ a child under the IDEA requires a determination of whether or not the child needs services in order to access the general curriculum and meet the agency's educational standards. Special education is defined as "specially designed instruction ...", 34 C.F.R. §300.39(a). "[S]pecially designed instruction" is defined as "adapting ... instruction", to address the unique needs of the child, 34 C.F.R. §300.39(b)(3)(i), and "[t]o ensure access of the

⁶ The IDEA requires both initial evaluations (to determine eligibility and identify educational needs) and re-evaluations (to determine continued eligibility and identify educational needs). Re-evaluations are required every three years, unless the agency and parents agree that the re-evaluation is unnecessary. 34 C.F.R. §300.303. Re-evaluations are subject to the same substantive and procedural requirements that the IDEA applies to evaluations. Ibid.

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)(ii). Substantively, then, an evaluation or re-evaluation must be sufficiently comprehensive to identify all of the Student’s special education and related services needs. 34 C.F.R. §300.301(c)(2)(ii); 34 C.F.R. §300.304(c)(6). Evaluation strategies and instruments must be selected for this purpose. 34 C.F.R. §300.304(c)(7).

The IDEA sets forth a list of procedures that local educational agencies must perform. These include the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information” 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency may not use “any single measure or assessment” as a basis for determining the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2).

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

The agency must review classroom-based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(ii), (iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

MAY 18, 2015 RE-EVALUATION: PROCEDURAL DEFICIENCIES

Parents assert only one procedural deficiency in the May 18, 2015 re-evaluation report.⁷ They argue that they requested a re-evaluation at a meeting in the spring of 2014, yet the District did not provide the requested re-evaluation until the spring of 2015. The District counters that the Parents waived their right to a re-evaluation in writing in March 2014. Parents reply that their waiver was not legally appropriate, and that, in any case they did not intend to delay re-evaluation past the fall of the 2015 – 2016 school year.

Under the IDEA, the District was obligated to re-evaluate Student at least every three years. 34 C.F.R. §300.303(b)(2). However, under this subsection, the District can waive the three-year re-evaluation requirement if both parties agree that such re-evaluation would be unnecessary. Ibid. The parties did so on March 31, 2014, when the District presented a form to Parent, indicating that re-evaluation was not necessary at that time, and Parent signed it.

The form indicated the Student would be re-evaluated after the first marking period of the next school year. Thus, Parent's agreement and waiver under subsection 300.303(b)(2) was time-

⁷ In their opening statement, Parents placed in issue the full range of IDEA procedural requirements for re-evaluations. However, they did not introduce preponderant evidence of other procedural failures of the District's re-evaluation, in addition to the lateness of the District's 2015 re-evaluation report, discussed herein. The re-evaluation was conducted by a qualified and experienced school psychologist, and relied upon a variety of valid instruments. On this record, I find no basis to declare any other procedural violation.

limited. Parent's consent expired after the first marking period of the next school year. At that point, Parents reasonably expected the District to commence a re-evaluation report. As the District failed to commence a re-evaluation report by the end of that first marking period, I conclude that, to that extent, the District committed a procedural violation of the IDEA.⁸

The remaining question with regard to this procedural violation is whether or not the procedural violation amounted to a substantive deprivation of a FAPE. I find that the re-evaluation called for by the IDEA was not provided to Parents until May 19, 2015. If the Re-evaluation had been provided to Parents within 60 days of the end of the first marking period, as I find the District was obligated to do, it would have been provided in January 2015, four months earlier. The question is: did this delay satisfy the requirements of the IDEA regulation, 34 C. F. R. § 300.513 (a)(2)? Under this regulation, a procedural violation constitutes a deprivation of a FAPE if the violation is found to have impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in decision-making, or caused the deprivation of educational benefit.

I conclude that the delay in providing a re-evaluation report satisfied the first and third of these requirements. Without a valid, up-to-date and comprehensive re-evaluation, during the period between January 2015 and May 2015, the Student's IEP team was deprived of important and basic information that it needed to make appropriate determinations as to the educational interventions that Student needed during that period of time. On its face, this impeded Student's right to receive a free appropriate public education. 34 C. F. R. § 300.513 (a)(2)(i). In addition, as

⁸ Although the record is incomplete, there was some testimony suggesting that the Bureau of Special Education found that the District's waiver form was inconsistent with Pennsylvania law and policy. I make no finding with regard to this, and nothing herein should be construed to contradict the Bureau's findings, if any, on this issue.

more fully discussed below⁹, this also contributed substantially to the District's failure to provide Student with a FAPE during that period of time. 34 C.F.R. § 300.513 (a)(2)(iii).

I conclude that Parents have failed to present preponderant evidence that the District's failure to re-evaluate Student by January 2015 substantially interfered with Parents' opportunity to participate in decision-making. 34 C.F.R. § 300.513 (a)(2)(ii). The record is replete with examples of repeated correspondence between District personnel and Parents. In fact, the record shows that the District offered to convene an IEP meet team meeting in January 2015, albeit without a completed re-evaluation report in place, thus providing Parents with further opportunity for input into educational decision-making during the period of time in question. Parents asked that the offered meeting be postponed at that time. While Parents' resort to self-help at this time was understandable, the record as a whole does not support a conclusion that the delay in the re-evaluation of 2015, which I find to be a procedural violation, rose to the level of a deprivation of parental participation in educational planning, 34 C.F.R. § 300.513 (a)(2)(ii), sufficient to render it a substantive deprivation of FAPE. Nevertheless, I conclude above that it was a substantive violation due to impeding Student's receipt of a FAPE and causing deprivation of educational benefit.

MAY 18, 2015 RE-EVALUATION: SUBSTANTIVE DEFICIENCIES

Parents argue that the May 18, 2015 re-evaluation report is substantively deficient because it is not sufficiently comprehensive, and because it failed to identify a specific learning disability

⁹ As discussed below, I will order compensatory education for the deprivation of FAPE during the relevant period. I consider that remedy to be appropriate and sufficient in view of my conclusions regarding the denial of a FAPE due to the District's late delivery of the May 18, 2015 re-evaluation report.

that the private evaluation had previously identified. I conclude that the re-evaluation was substantively appropriate under the IDEA.

Re-evaluation included review and consideration of the private re-evaluation of February 23, 2015. The private re-evaluation had contained a thorough medical and developmental history, noting physical screenings for hearing, visual and fine motor impairments, and finding no such impairments. The private report had recounted Student's early test scores for cognitive ability as well as academic achievement, all of which indicated a high level of intellectual ability with grade level and typical academic achievement. The private report had also contained two different behavior inventories addressing Student's behavioral, emotional and social functioning. The private report had included parental and teacher input as of February 2015.

The District's re-evaluation report supplemented the findings of the prior report through administration of number of instruments. The District evaluator explored Student's difficulties in written expression by administering the test specifically directed to that cluster of skills. In addition, the evaluator administered, to two teachers, a behavior inventory specifically directed at Student's struggles with attention and executive functions. It also re-administered a broad-based behavior inventory exploring emotional, behavioral and social difficulties. The District report considered Student's recent scores on the Pennsylvania System of Standardized Assessment (PSSA), and various curriculum-based assessments, as well as additional teacher input in the full report of a recent functional behavioral assessment, which included reports of two recent classroom observations.

I conclude that, on its face, this re-evaluation report was sufficiently comprehensive. It reflected consideration of Student's developmental, functional, cognitive and academic functioning. It contained multiple sources of information, and reflected the use of multiple testing

instruments. It relied upon instruments designed to explore in depth areas of functioning where there was particular concern expressed by Parents and their private evaluator. These areas included Student's ability to perform written expression, in which the private evaluator had classified Student with a Specific Learning Disability. These areas also included Student's distractibility, difficulty with time on task, and organizational struggles, all of which were prominently reported by Parents and teachers, both anecdotally and also through their responses to behavior inventories. In sum, the District's re-evaluation was designed to address the most important referral questions, and to elicit information on all of Student's suspected disabilities, consistent with the law.

FALURE TO PROVIDE A FAPE

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

“Meaningful benefit” means that an eligible child’s program affords him or her the

opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide a FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the program and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-

65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District failed to provide Student with a FAPE during the relevant period between November 16, 2013 and Student's last day of school in the District in June 2015. Regardless of the appropriateness of the District's conclusion that Student should be classified with Other Health Impairment, rather than with Specific Learning Disability, the record is preponderant that Student was struggling with attention to task, distractibility, impulsive behavior reaching seriously problematic proportions, and organizational difficulties. Yet the District's interventions for the relevant period are characterized by a paucity of goals and modifications, none of which address attention related issues directly. Moreover, the goals and modifications repeatedly changed, without any clear rationale, even when Student had failed to meet or even come close to meeting the goals. This had the inappropriate effect of often abandoning progress monitoring in areas of Student's ongoing struggle, such as written expression. Regardless of the parties' dispute regarding the origin of Student's struggles, I conclude that the District failed to appropriately intervene and address all of these difficulties, which were indisputably the result of a disability as defined by the IDEA, and which severely impacted Student's educational achievement.

Student entered the fifth grade with an IEP that had been drafted at the end of fourth grade, in May 2013. At this point, Student continued to be classified with Emotional Disturbance.¹⁰ The May 2013 IEP recognized considerable behavioral difficulties during the previous school year,

¹⁰ Because the parties stipulated to the relevant period as explained above, I do not reach any conclusion as to the appropriateness of this classification as it existed prior to the relevant period. However, starting at the beginning of the relevant period, the immediate issue is whether or not the District provided special education and related services that were reasonably calculated to provide Student with meaningful benefit. Regardless of the appropriateness of the classification with which Student entered the relevant period, I conclude that the District failed to provide Student with a FAPE, as discussed below.

including difficulties with focus, attention to task, impulsivity, organization, and work completion. While the relevant period does not start until November 16, 2013, the provisions in the May 2013 IEP are relevant to the extent that they were in place on that date.

The May 2013 IEP addressed Student's attention, organization and impulsivity issues minimally and only indirectly. Its placement provided learning support intervention, and its goals addressed academic performance, but the IEP modifications were directed primarily to Student's feelings of frustration during class and behavior management. One modification provided for direct instruction in writing skill deficit areas. Local assessments were to be administered without supports. The IEP provided related services in the form of a social work intervention with unclear frequency.

I conclude that this IEP did not address Student's attention issues appropriately, and as of November 16, 2013, the District was on notice of the need for further intervention. The evidence is preponderant that Student's struggles with attention, time on task, impulsive behavior and organization continued. On November 4, 2013, the IEP team, including Student's father, met to discuss Student's behavior chart. The team agreed to make adjustments in the implementation of this behavior chart. It also added the use of a visual reminder on Student's desk to redirect Student to the lesson at hand. The team discussed implementation of rewards on a week-to-week basis. There is no evidence that the team made any other amendments to the May 2013 IEP. Thus, at the beginning of the relevant period, the District was intervening with regard to Student's attention – related behaviors, but only indirectly and inadequately addressing Student's manifest difficulties with attention, time on task, impulsivity and organization. I conclude by a preponderance of the evidence that the District's interventions were not designed or implemented so as to provide a reasonable opportunity for meaningful educational benefit to this child with serious behavioral

issues, based on what the District knew at the start of the relevant period and during the remainder of the school year.

The District introduced evidence suggesting that Student was subjected to repeated psychological disturbances from home. It asserts that these influences interfered with its efforts to bring Student's inappropriate behaviors under control, and that they served as distractions from learning for Student. I accord little weight to these assertions. Most of this evidence was introduced through general and vague teacher testimony about what Parent told teachers, and as such is hearsay. Such hearsay was uncorroborated. The few observations or admissions by Student as to family concerns simply carry too little weight to negate the preponderant evidence that the District's ineffectiveness stemmed from the deficiencies of its own programming for this child.

The District also argues that Student was functioning within the average range for children in Student's classes, and thus, was not in need of specially designed instruction and related services. The documentary evidence contradicts these subjective assertions, and there is little or no data to support them. Moreover, the District's IEPs, interventions and eventual change of identification all contradict the suggestion that Student's education was not impacted by Student's disabilities. On the contrary, the record preponderantly shows a child with relatively high cognitive ability who was performing well below expectations¹¹, and was declining in both behavior and academic achievement.

The evidence is preponderant that District interventions were not successful during Student's fifth grade year. Student's inappropriate behaviors continued with little improvement, and Student's academic achievement declined. Thus, it is inexplicable that, in March 2014, when Student's three-year re-evaluation was due, the District met with Parent and recommended that re-

¹¹ I note that the Student's IEPs provided for no accommodations for local assessments. Therefore, I give weight to Student's report card grades, as they are facially valid measures of Student's educational performance in all grades.

evaluation would be unnecessary at that time. In the same meeting, Parent re-iterated concerns about Student's inconsistent behavior, organizational difficulties and struggles with writing.

Two months later, in May 2014, the District provided an IEP for the upcoming IEP year. Although this IEP, in present levels of functional and academic performance, acknowledged that Student was exhibiting behaviors indicating problems with attention, organization and impulsiveness, it did not directly address these issues. The IEP surprisingly reduced the small number of existing IEP goals to only one goal, directed generally to task completion, omitting the May 2013 goals for maintaining grades, classroom behavior and correct writing sequence. It removed the previous modification providing for direct instruction in writing. Instead of providing accommodations and environmental modifications directed toward Student's struggles with attention, the May 2014 IEP added a requirement that Student would be required to complete unfinished classwork during what it called privilege time, and provided for a daily check in with an adult to check homework completion and classroom behavior. It provided for social worker services to instruct Student on making appropriate choices and responding appropriately to adults -- not on methods to keep oneself focused on the tasks at hand, not on organizational skills, and not on impulse control. The attendant behavior intervention plan merely echoed these changes. In short, this IEP continued to be directed towards controlling Student's inappropriate behavior, without providing any supports for Student's manifest difficulties with attention, organization and impulsivity.

Student's negative behaviors continued unabated in the beginning of sixth grade, and escalated into aggressive and threatening behavior, resulting in multiple suspensions and disciplinary actions. In the face of these difficulties, the District convened an IEP team meeting to discuss the IEP. Again, incongruously, the IEP team decided to delay any re-evaluation until the

spring of 2015.¹² Meanwhile Student's struggles continued, with regard to Student's behavior and academic achievement, especially in writing. In March 2015, the District obtained Parents' written permission to re-evaluate, and commenced a re-evaluation, including an Occupational Therapy screening.

On March 23, 2015, the District revised the existing IEP without a meeting, but with Parents' consent. It added modifications, including data collection on current writing assignment and provision of clear beginnings and endings for all writing assignments in the regular education classroom. It also added six weekly 30 minute sessions with the social worker, to be delivered between March 2015 and May 11, 2015. The single work completion goal remained; no additional goals were added. These modifications, which focused appropriately upon the Student's struggles with writing, added nothing regarding attention, organization or impulsivity. Even the social work sessions, as described in the IEP, were provided at such a low level that the provider was not able to provide a systematic, sequential curriculum to address Student's behavioral challenges, nor were these services coordinated with teachers. I conclude that this revision was not an appropriate intervention in view of Student's attention-related struggles.¹³

Student's aggressive behaviors continued, and in April 2015, Student was suspended for physically attacking a peer. At Student's father's request, Student was no longer allowed to attend recess and lunch in the regular education setting. For recess, the District substituted an activity in which Student would participate as a helper in the kindergarten class located in Student's school.

¹² The District argues that it delayed re-evaluating Student in order to obtain fresh scores and reports on Student, in view of Student's impending graduation to middle school. While I cannot contradict this rationale in the abstract, I find that the rationale essentially ignored the evidence that the District's current interventions were a failure, and revision was needed. I conclude that the need for intervention outweighed the administrative consideration that drove the timing in this matter, because it constituted a denial of a FAPE; consequently I find that the delay was inappropriate, as discussed above.

¹³ The record also cast doubt on whether or not related services were delivered at the level stated in the IEP.

Although Parents criticized this intervention, I conclude that they failed to produce a preponderance of the evidence to prove that this was inappropriate.

Pursuant to the IDEA requirement for annual IEP meetings, the District presented Parents with an IEP in May 2015. The IEP made no change in Student's ongoing placement of itinerant learning support. While it changed goals, none of the goals addressed Student's attention or organizational problems directly, nor did any address Student's ongoing struggles with written expression. Instead, goals were directed toward work completion and reducing disruptive behaviors in class. Modifications continued those previously offered, with additional modifications reflecting the current interventions established in the March 2015 revisions. There were no accommodations or modifications directly addressing attention or organizational difficulties. The IEP offered related services in the form of social work services, at a frequency of 600 minutes per year, which would amount to slightly more than 15 minutes per week, and, as phrased, would not require provision of services on a regular weekly basis. A new functional behavioral assessment posited escape and attention seeking as the functions of Student's inappropriate behavior. I conclude that this IEP continued virtually to ignore Student's attention-based educational needs.

After offering the May 2015 IEP, the District completed its re-evaluation report in 2015 and provided it to Parents. Relying substantially but not exclusively upon the findings and test results provided by Parents' private evaluator, the District finally acknowledged that Student should be classified, not with Emotional Disturbance but with Other Health Impairment due to ADHD.¹⁴

¹⁴ I find this significant, because the District clearly and admittedly relied upon the private report in reaching this re-classification. This furnishes part of the equitable underpinning of my decision ordering the District to reimburse Parents for the cost of the private evaluation, below. I do not reach the issue of the appropriateness of Student's classification, as Parents urge, because that classification was reported before the relevant period.

Apparently recognizing that its supports were inadequate and inappropriate, the District in June 2015 provided a NOREP proposing to increase supports to the level of supplemental learning support. It offered an IEP that provided for placement in a co-taught classroom for English Language Arts. It substantially increased the number of modifications explicitly required of educational staff.

Nevertheless, two of the three new IEP goals in this offered IEP were similar to the previous goals directed toward behavior control, rather than toward systematic and explicit teaching of skills that Student could use to succeed in spite of Student's attention related difficulties. One goal seems to address these issues, namely the goal concerning self-monitoring to appropriately seek help; however, the goal is unclear and does not appear to be measurable on its face.

The IEP offered social work services again, and the 600 minutes-per-year formulation of frequency in this IEP is inherently confusing. It amounts to slightly more than 15 minutes per week, but also allows the provider to provide such minutes irregularly in time, a service offer that, according to the reliable testimony of Parents' private evaluator, would be inappropriate for this Student, who needs a greater amount of consistent and regular explicit instruction in skills needed to overcome Student's disabilities. I conclude that this offer, especially in light of the evidence known to Parents concerning the District's history of misdirected and inconsistent services during the relevant period, did not constitute an offer that was reasonably calculated to provide Student with meaningful educational benefit in the seventh grade year.

In sum, the District's interventions were too little and too late. I conclude that many of its revisions to Student's IEP were directed toward behavior control only. They did not include accommodations and modifications that should have been provided to intervene with regard to Student's severe struggles with attention, time on task, organization and impulsivity. All of the

struggles constituted a glaring red flag that indicated a continuous need for intervention directed towards Student's ADHD, regardless of educational classification.

The District provided meager and shifting goals, with minimal progress monitoring. It did not require its teaching staff to provide consistent modifications such as preferential seating, cueing and prompting, chunking assignments with multiple step instructions. It did not provide adequate and consistent levels of emotional support to address the sequelae of Student's attention disorder. Its final offer, though calling for additional services, remained inappropriate in several fundamental respects. I conclude that these glaring omissions constituted a failure to provide Student with a FAPE during the relevant period.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a “make whole” approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

Here, the Parents have established that compensatory education is due, but have not provided evidence regarding the amount or form of compensatory education that would make the child whole. Therefore, I will order provision of this remedy on an hour for hour basis.

In this matter, I conclude that the District’s failure to provide needed special education services affected Student in all aspects of Student’s education. Nevertheless, Student did pass Student’s subjects and did manage to learn from the curriculum, although this was not “meaningful benefit” in view of Student’s underperformance in relation to Student’s high cognitive ability, as

described above. Student's grades declined in major subjects in fifth and sixth grade, and Student was deprived of the benefits of typical social skill development due to the behavioral manifestations of Student's disability. Therefore, I will order compensatory education in the amount of four hours per day, assuming an ordinary school day of six and one-half hours. (J 60.) The four hours represent Student's major subjects, all of which were impacted by Student's behaviors, and additional time for social interaction which Student was unable to enjoy as typical peers were able to enjoy.

TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement¹⁵. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007).

¹⁵ The weight of judicial authority in this Circuit holds that tuition reimbursement is available under section 504, and that the Burlington-Carter tests are equally applicable to section 504 claims for tuition reimbursement. See, 34 C.F.R. §103.33(c)(4); Lauren G. v. West Chester Area Sch. Dist., 906 F.Supp.2d 375, 390-391(E.D. Pa. 2012). Therefore, I so conclude. It follows that the ADA provides the same remedy. 42 U.S.C. §12133 (providing same "remedies, procedures and rights" for ADA claims as are available under section 504). See, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996), overruled on other grounds, A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (2007)(allowing ADA claim for same remedies as available under section 504).

FIRST PART OF THE BURLINGTON-CARTER TEST: FAILURE TO OFFER OR PROVIDE A FAPE

As noted above, I conclude that the District failed to provide Student with a FAPE during the relevant period of time. Its final offer was a minimal attempt to amend a program that had failed to address Student's needs for months. Based upon the glaring failures of the District's program during the relevant period, and the remaining deficiencies in the June 2015 offered IEP, discussed above, I conclude that the District's final offer was not reasonably calculated to provide Student with meaningful educational benefit.

THE PRIVATE SCHOOL IS AN APPROPRIATE PLACEMENT

I conclude that the private placement chosen by the Parents for Student was appropriate. A unilateral placement does not have to be the equivalent of that provided by a competent local education agency under the IDEA. A private placement's failure to meet state education standards is not a bar to tuition reimbursement. 34 C.F.R. §300.148(c); Lauren W. v. DeFlaminis, 480 F.3d 259, 276-277 (3d Cir. 2007). The private placement only needs to provide significant learning, confer meaningful benefit, and provide the least restrictive environment appropriate to address the Student's needs. Munir v. Pottsville Area Sch. Dist., 2013 U.S. App. Lexis 15129 (3d Cir. 2013); Lauren W., above at 276-277. I conclude that the School meets these requirements.

A preponderance of the evidence in this record proves that the School is providing significant learning and is meeting the Student's educational needs. The School is appropriately licensed and staffed. It teaches a curriculum that is consistent with the Pennsylvania core standards. Student has made progress during Student's year there. Student's attention-related behavioral

difficulties are being addressed, and Student is making progress with these challenges. Student's grades are improved with the supports provided.

THE EQUITIES

Parents were unable to discern how the District's offered program was reasonably calculated to address Student's attention deficit and related behavioral difficulties in school. I find that their decision to enroll Student in a private school was not inappropriate and that they complied with the IDEA's requirement to provide the District with an opportunity to cure the deficiencies in its program before they enrolled Student in the private school.

On August 13, 2015, Parents provided 10 day notice according to law, and indicated their intention to unilaterally remove Student from the District and enroll Students in a private school at District expense. Parents waited more than 10 days before placing deposit with the School at their own expense, so the Student could be enrolled there for the coming school year. Considering all of the evidence, I find nothing inequitable in Parents' behavior in making this decision. The IDEA posits a 10 day notice as presumptively fair, and Parents provided it. I find no evidence that Parents interfered with or blocked District efforts to remedy the failures of its interventions.

SECTION 504 VIOLATION

I conclude that the District, which violated the IDEA by failing to offer a FAPE, also violated its obligations not to discriminate on account of handicap under section 504¹⁶ and the ADA. Based upon the record in the present case, the District failed to make an offer that was reasonably calculated to provide meaningful educational benefit. I conclude that this failure was

¹⁶ There is no dispute that the District is federally funded, that Student has a handicap within the meaning of section 504, and that the Student is "otherwise qualified" for section 504 purposes.

also a failure to design Student's education in order to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1).

Parent argues that the District's removal of Student from recess and lunch with typical peers, and its resistance to Student's Father's request to begin gradual re-integration of Student into those typical environments, constituted segregation and therefore discrimination under section 504. I disagree. Father requested this removal in the first place, and the District did not refuse to re-integrate – rather, it pointed out that such re-integration would carry risks of a resurgence of inappropriate behavior with disciplinary consequences. Moreover, it found an activity for Student during recess that had educational value. Parent has failed to prove that the District's actions in this regard constituted discrimination under section 504. Nevertheless, the deprivation of FAPE under the IDEA discussed above does constitute a violation of section 504 as well.

REIMBURSEMENT FOR EXPERT EVALUATIONS

I will order the District to reimburse Parents for the educational evaluation that Parent obtained privately, based upon my equitable authority to remedy the Student and make the Student and Parent whole for the District's failure to re-evaluate Student appropriately during the relevant period of time. Not until it received the private evaluation report did the District even consider that its longstanding classification of Student as emotionally disturbed might be incorrect. Upon receipt of the report, the District eliminated the Emotional Disturbance classification and adopted the private evaluator's classification of Other Health Impairment. That this was a secondary classification in the private evaluator's judgment does not diminish the significance of the District's adoption of this classification while abandoning its previous classification. The record

is preponderant that the District was guided by the private evaluator's reasoning, and adopted this aspect of her assessment.

I place little weight upon the fact that the District, reasonably in my view, did not adopt the private evaluator's conclusion that the primary classification should be Specific Learning Disability. The private evaluator's persuasive analysis and opinion as to the presence of an attention deficit disorder led the District to completely reverse its previous view of the etiology of Student's difficulties. This, in turn, led Parents to see that Student needed more intensive programming directed, not just to behavior control, but primarily to supporting Student's educational need to attend to task and organize Student's academic efforts to access the curriculum. In sum, the record supports an equitable order that the District compensate Parents for the private evaluation which substantially informed its re-evaluation of May 2015.

The District argues that the Parent did not follow the procedural requirement of the IDEA for obtaining an Independent Educational Evaluation (IEE) at public expense, 20 U.S.C. §1415(b); 34 C.F.R. §300.502, by disagreeing with its re-evaluations and thus giving the District an opportunity to amend any errors therein. Regardless of whether or not Parent followed the preconditions in the IDEA regulation for obtaining an IEE, I conclude that the hearing officer's remedial authority supports an order for reimbursement of Parent in the unusual circumstances of this matter. Given the District's inexplicable delays in the legally required evaluation, and its longstanding failure to address Student's overt attention-related needs in its IEPs appropriately, it would be inequitable to deny reimbursement for the private evaluation that led it to begin to change its view. Moreover, the private evaluation showed Parents that the District's final offers of services were inadequate, leading them to provide appropriate programming.

I conclude that the preconditions set forth in the regulations are not meant to be the exclusive conditions under which reimbursement can be ordered; rather, I conclude that, in the circumstances of this matter, the hearing officer has equitable remedial authority to order reimbursement. See generally, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015)(requiring complete remedial orders). Based upon the above findings of fact and conclusions of law, I will exercise that equitable authority.

CONCLUSION

I conclude that the District failed to provide Student with a FAPE during the entire relevant period, thus violating both the IDEA and section 504. The Parents' unilateral placement is appropriate, and the equities favor tuition reimbursement. Therefore, I will order the District to provide Student with compensatory education on account of the relevant period, and to reimburse Parents for Student's tuition and transportation costs for Student's attendance at the School for the 2015-2016 school year. In addition I will order reimbursement of the Parents' costs for the private evaluation.

ORDER

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

1. The District shall provide compensatory education to Student in the amount of four hours for every school day on which Student's District school was open for students from November 16, 2013 until the first day of school in the 2015-2016 school year, not including summer school or ESY services.
2. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parents, and may be provided after school hours, on weekends, or during summer months when convenient for Student or Parent.
3. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parents.
4. The cost of any compensatory educational service may be limited to the current average market rate in Pennsylvania for privately retained professionals qualified to provide such service.
5. The District shall reimburse Parents for the cost of tuition for full school-day educational services at the School, and for the cost of mileage incurred by Parents for transportation of Student to the School, at the Internal Revenue Service's current rate per mile, for 44 miles for every school day on which the School was open to students and Student attended the School, during the 2015-2016 school year.
6. The District shall reimburse Parents for the cost of the private evaluation dated February 23, 2015 and marked as Exhibit J 102 in this matter.

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

William F. Culleton, Jr. Esq.

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

DATED: April 19, 2016